[Cite as *State v. Vaughn*, 2004-Ohio-5122.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 03-MA-49
VS.	)	
	)	OPINION
WILLIAM VAUGHN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 02 CR 319
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Paul J. Gains Mahoning County Prosecutor Attorney Jason M. Katz Assistant County Prosecutor 21 W. Boardman St., 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney J. Dean Carro University of Akron School of Law Appellate Review Office 150 University Avenue Akron, Ohio 44325-2901

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Hon. Cheryl L. Waite

Dated: September 23, 2004

DONOFRIO, J.

{¶1} Defendant-appellant, William Vaughn, appeals from a Mahoning County Common Pleas Court judgment convicting him of aggravated murder and aggravated robbery, with firearm specifications, following a jury trial.

{¶2} During the afternoon of February 21, 2002, 21-year-old Youngstown State University student Justin Treasic was hanging out with his friends Michael George, Duane Delahunt, and Edward Whitaker at Whitaker's apartment on the north side of Youngstown. At some point Treasic and George left to go to the store to buy ice cream. Treasic received a phone call from a person wanting to buy some marijuana from him. So on the way to the store he stopped at home to pick up some marijuana to sell. Treasic and George arrived back at Whitaker's apartment around 3:00 p.m., and almost immediately, Treasic received another call. After taking the call, Treasic told his friends he would be right back and went outside.

{¶3} The phone calls Treasic received were from Fred Lewis, a.k.a. "Freddie the Drooler." In the days before February 21, Treasic had met Lewis at a gas station and sold him marijuana.

{¶4} When Treasic went outside to wait, his friends watched him from the window of Whitaker's third-floor apartment. Treasic's friends observed a dark-colored, big-bodied, Mercury Grand Marquis-type car pull into the neighbor's driveway. They saw Treasic approach the car and talk with someone on the driver's side. They then saw Treasic get into the front passenger seat. Whitaker and Delahunt noticed there was at least one other individual in the back seat and Delahunt observed that this person was wearing a coat with a red sleeve. After Treasic got in the car, it drove away.

{¶5} At approximately 3:43 p.m., Youngstown Police Officer Robert Martini received a call that there was a man down in an open field at the intersection of Ada

and Poplar Streets on the north side of Youngstown. The man, later identified as Treasic, had been shot in the head. When the police arrived, he was still breathing. He was transported to St. Elizabeth's Hospital where he died the next morning.

{¶6} Sometime between 3:00 and 3:30 p.m., Gracie Tubbs, appellant's then-girlfriend, was waiting for her children to come home from school. Appellant came home with Lewis and asked Ms. Tubbs if he had any clean clothes there. While appellant was at Ms. Tubbs' house, she overheard Lewis say, "you didn't have to shoot him" and appellant reply, "he knew who we were." (Tr. 761).

{¶7} Several days later, Lewis was at home with his girlfriend, Megan Weidner. The phone rang and Ms. Weidner answered. She recognized the caller as appellant. He asked to speak with Lewis. After his conversation with appellant, Lewis turned on the news and watched a story about a Youngstown State University student who had been shot in the days before.

{¶8} Upon investigation, the police learned that Michael Virgalitte, who lived near the field where Treasic was shot, was outside working on his car on February 21. He heard what he thought was a firecracker and shortly thereafter saw a big, black Mercury drive by. Upon obtaining Lewis's address, the police drove by and saw a black Mercury Grand Marquis in Lewis's driveway. The police arrested Lewis but could not find appellant.

{¶9} Eventually, Ms. Tubbs turned appellant in as a result of his listing as the "Fugitive of the Week" in the Youngstown Vindicator. When the police arrived at the house where appellant was staying, it took 30 to 45 minutes before appellant turned himself in.

{¶10} A Mahoning County grand jury indicted appellant on one count of aggravated murder, a first degree felony in violation of R.C. 2903.01(B)(F); one count of aggravated robbery, a first degree felony in violation of R.C. 2911.01(A)(3)(C); and one count of having weapons while under disability, a fifth degree felony in violation of R.C. 2923.13(A)(2)(C). The aggravated murder and aggravated robbery charges contained firearm specifications in violation of R.C. 2941.145(A) and R.C.

2941.146(A). For purposes of trial, the court sustained appellant's motion to have the having weapons while under a disability charge separated from the other charges.

{¶11} The case proceeded to a jury trial on the remaining charges on February 3, 2003. The jury found appellant guilty on all charges. The trial court consolidated this case with Lewis's case for sentencing. In a separate trial, Lewis was convicted of complicity to commit aggravated murder and complicity to commit aggravated robbery, both with firearm specifications. On the aggravated murder conviction, the court sentenced appellant to life imprisonment with parole eligibility after 20 years. On the aggravated robbery conviction, the court sentenced appellant to ten years imprisonment to be served consecutively to the aggravated murder sentence. Additionally, the court found the two firearm specifications merged and sentenced appellant to three years on the specification, to be served consecutively to his other sentences.

{¶12} Appellant filed his timely notice of appeal on March 26, 2003.

{¶13} Appellant raises five assignments of error, the first of which states:

{¶14} "THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO SUPPORT THE JURY'S GUILTY VERDICT IN VIOLATION OF APPELLANT VAUGHN'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES. SPECIFICALLY, THE STATE OF OHIO DID NOT PROVE THAT MR. VAUGHN WAS PRESENT DURING THE COMMISSION OF THE ALLEGED CRIME NOR THAT HE PARTICIPATED IN ANY WAY."

{¶15} Appellant argues that plaintiff-appellee, the State of Ohio, failed to present sufficient evidence to convict him. He alleges appellee could not prove that he was the one who shot Treasic, nor could it prove he was present at the crime scene. He points out that the only witnesses to Treasic's last actions were his friends, who could not identify appellant as being present when Treasic left the apartment. Furthermore, he notes that Treasic's friends could not even identify the race or gender of the person they saw in the backseat of the car. Appellant also

attacks the witnesses' testimony about the color red. Delahunt testified that the arm he saw in the backseat of the car was of a red coat. (Tr. 499). Megan Weidner, Lewis' girlfriend, testified appellant's favorite color was red and he wore this color frequently. (Tr. 735-37).

{¶16} Next, appellant argues that Ms. Tubbs' testimony regarding statements he allegedly made was self-serving and unreliable. He points out that she received an award for providing information that led to his arrest. Furthermore, appellant argues that the statements Ms. Tubbs stated he made were not confessions because they were ambiguous. He notes that they did not identify a victim, nor do they specifically reference killing anyone. Additionally, appellant points out that appellee failed to produce any forensic evidence that connected him to Treasic's murder and robbery.

{¶17} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Smith*, 80 Ohio St.3d at 113.

{¶18} Appellant was convicted of aggravated murder, in violation of R.C. 2903.01(B), and aggravated robbery, in violation of R.C. 2911.01(A)(3)(C), both with firearm specifications.

{¶19} R.C. 2903.01(B) provides:

{¶20} "(B) No person shall purposely cause the death of another * * * while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, * * * aggravated robbery, * * *."

{¶21} R.C. 2911.01(A)(3) provides:

{¶22} "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶23} "* * *

{¶24} "(3) Inflict, or attempt to inflict, serious physical harm on another."

{¶25} Examining the evidence at trial reveals the following.

{¶26} Treasic's friends testified that Treasic, Whitaker, George, and Delahunt were hanging out at Whitaker's apartment on Pennsylvania Avenue during the afternoon of February 21, 2002. (Tr. 437, 471, 495). They stated that Treasic and George left the apartment to go to the grocery store. (Tr. 442, 471, 496). Whitaker stated that the two returned around 3:00 p.m. (Tr. 443).

{¶27} Whitaker and Delahunt testified that during that afternoon Treasic received a call on his cell phone. (Tr. 438, 504). Whitaker testified that the call was from a person Treasic referred to as "Freddie the Drooler." (Tr. 438, 442). Whitaker testified that Treasic had mentioned Freddie the Drooler about a week prior. (Tr. 440). He stated that Treasic had told him he had met Freddie the Drooler at a gas station and had sold marijuana to him. (Tr. 440-41).

{¶28} Lee Hanze, a manager at Cellular One, testified as to Treasic's cell phone records. He stated that the records for Treasic's cell phone showed that on February 18, 19, and 21, 2002, seven calls were placed to Treasic's cell phone from a certain phone number. (Tr. 591-84). The last call from that number on February 21 was at 3:02 p.m. (Tr. 584-85). Detective Sergeant John Kelty testified that the phone number belonged to Lewis. (Tr. 664-65).

{¶29} George testified that in addition to stopping at the grocery store, he and Treasic stopped at Treasic's grandmother's house, where Treasic was living, so Treasic could pick up some marijuana. (Tr. 472).

{¶30} Treasic's friends testified that soon after Treasic and George returned to the apartment, Treasic received another phone call. (Tr. 443, 473). Treasic told his friends he had to go downstairs and he would be back in a few minutes. (Tr. 443,

497). When Treasic left the apartment, he had the marijuana with him but he did not take his cell phone, wallet, or keys. (Tr. 443, 447, 473). Whitaker and Delahunt watched Treasic from the third floor bedroom window. (Tr. 444, 497-98). They saw an older, dark-colored, bigger-bodied, Grand Marquis or Lincoln style car pull into the neighbor's driveway and Treasic approached the car. (Tr. 444-45, 498-99). They saw Treasic speak with the driver for a minute or two and then get in the passenger side. (Tr. 446, 500-501). The car then drove away.

{¶31} Whitaker was able to notice that the driver of the car was a black person and that there was at least one person in the backseat. (Tr. 446). And Delahunt noticed an arm in the backseat window that was wearing a red coat. (Tr. 499).

{¶32} Michael Virgalitte, who resides on Victoria Street near the area of Ada and Poplar Streets, also testified. He stated that on the afternoon of February 21, he was out in his garage working on his car. (Tr. 536). While he was working on his car he heard what he thought was a firecracker. (Tr. 537). He then heard a car come by his house and noticed that it was a big, black Mercury. (Tr. 537-38).

{¶33} Officer Robert Martini was dispatched to the intersection of Poplar and Ada Streets on the north side of Youngstown at 3:43 p.m. (Tr. 517). Dispatch informed him that there was a man down in an open field. (Tr. 517). Officer Martini testified that area is fairly deserted and is a high crime area. (Tr. 518-19). There, Officer Martini found a man, still alive, with a pool of blood around his head, and an entrance wound on the left side of his head near his ear. (Tr. 519). The victim was taken to St. Elizabeth's Hospital where he later died and was identified as Treasic.

{¶34} Officer Martini testified that when he and Officer Jankowski first approached the victim, they noticed his pants pockets were turned inside out. (Tr. 522). Additionally, he stated that they searched him and did not find any money or drugs on his person nor did they find any money or drugs nearby. (Tr. 522).

{¶35} Officer Martini testified that the police looked for shell casings and a weapon but did not find either. (Tr. 521). And Detective Sergeant Joseph DeMatteo

testified that he searched for shell casings, bullets, slugs, and any other physical evidence but found none. (Tr. 548). Detective DeMatteo did receive a slug that was recovered from Treasic's left arm during the autopsy. (Tr. 553).

{¶36} Dr. Jesse Giles, the deputy coroner who performed Treasic's autopsy, testified that a gunshot wound to the head caused Treasic's death. (Tr. 615).

{¶37} Detective Kelty testified that based on the information provided by Treasic's friends, he began to investigate Lewis. (Tr. 662-65). He went to Lewis's home and found a black Mercury Grand Marquis in the driveway. (Tr. 665). Detective Kelty searched the Grand Marquis for evidence that Treasic was in the car, but could not find any evidence. (Tr. 668). Lewis was eventually arrested. (Tr. 666).

{¶38} After interviewing Lewis, Detective Kelty got an arrest warrant for appellant. (Tr. 670). Detective Kelty testified that they had difficulty finding appellant. (Tr. 671).

{¶39} Detective Sergeant Michael Lambert, a member of the Violent Crimes Task Force (task force), testified regarding appellant's apprehension. He stated that the task force works with the FBI to locate and recover fugitives who are wanted on violent crimes. (Tr. 634). He testified that the FBI runs a "Fugitive of the Week" program in connection with the Youngstown Vindicator whereby the Vindicator publishes a fugitive's picture and information along with a contact number for the police and usually offers a reward for information leading to the arrest of the fugitive. (Tr. 634-35). Detective Lambert testified that the task force received a tip that appellant was staying at a house on North Truesdale. (Tr. 637-38).

{¶40} Detective Lambert testified that upon knocking at the Truesdale home, a man answered the door and gave the officers permission to search the house. (Tr. 639). He stated that when they entered the house they announced their presence. (Tr. 639-40). They then began calling to appellant to come out because they were there to arrest him. (Tr. 640). Detective Lambert testified that the officers began searching, as appellant did not respond. (Tr. 641). He stated that after

approximately 30 to 45 minutes, appellant came down from upstairs and surrendered. (Tr. 641-42, 656).

{¶41} Once appellant was arrested, Detective Kelty stated that appellant gave an alibi that he was with Gracie Tubbs, his girlfriend, on the day in question. (Tr. 677). Detective Kelty stated that this alibi proved to be false when he spoke with Ms. Tubbs. (Tr. 677). He also testified that Ms. Tubbs told him that appellant had said that he "smoked some white boy." (Tr. 712).

{¶42} Megan Weidner testified that Lewis was her live-in boyfriend and father of her child. (Tr. 722). She stated that Lewis and appellant are cousins and that appellant was at their house "all the time." (Tr. 723-26). She stated that the two men were together ninety percent of the time hanging out and getting high. (Tr. 727). She also stated that appellant's favorite color was red and that he liked to wear red, particularly a red tee shirt. (Tr. 735, 737-38). She also stated that appellant owned a red and black coat. (Tr. 744). Additionally, she testified that she owned a black Grand Marquis and that Lewis drove the car around with appellant. (Tr. 728).

{¶43} Ms. Weidner also testified that she recalled one day when Lewis received a phone call from appellant. (Tr. 730). Lewis spoke with appellant and right after watched the 11 o'clock news about a YSU student who was found lying in a pool of blood. (Tr. 732).

{¶44} Ms. Tubbs, appellant's ex-live-in-girlfriend, testified last. She stated that appellant and Lewis "always hung together" and spent at least part of every day together. (Tr. 753-54). She testified that appellant carries a gun. (Tr. 756). She further stated that appellant's favorite colors to wear were red and black and he wore a red and black coat. (Tr. 754).

{¶45} She testified that on the day in question, she was waiting for her children to come home from school between 3:00 and 3:30 p.m. (Tr. 758). At that time, appellant came home and asked if he had any clean clothes. (Tr. 760). Appellant was with Lewis and another man named Mikal. (Tr. 760). Ms. Tubbs overheard Lewis say, "you didn't have to shoot him." (Tr. 761). She then heard

appellant respond, “he knew who we were.” (Tr. 761). Detective Kelty testified that no one besides Treasic was murdered in Youngstown that day. (Tr. 681).

{¶46} Ms. Tubbs also overheard them discuss marijuana. (Tr. 761). Ms. Tubbs stated that she thought that they shot somebody. (Tr. 762-63). She further testified that she and appellant planned to move to Lorain County to get him away from the situation because, “he said he smoked the white boy.” (Tr. 763, 794-95, 803).

{¶47} Additionally, Ms. Tubbs testified that approximately a week before the shooting, she overheard appellant and Lewis planning to rob a white boy for weed. (Tr. 776).

{¶48} Furthermore, Ms. Tubbs stated that appellant asked her, on more than one occasion, to lie for him and say that she was with him on the day in question. (Tr. 763-64, 803). And she testified that appellant carried a newspaper clipping of the shooting around in his wallet. (Tr. 765). Ms. Tubbs further testified that appellant went into hiding at two houses on the East side of town after the shooting. (Tr. 766-67).

{¶49} Ms. Tubbs testified that at some point she learned of the warrant for appellant’s arrest and the reward. (Tr. 769-70). She contacted an FBI agent involved with the Fugitive of the Week program, who told her that the information she gave would be confidential. (Tr. 770-71). She then gave him the address where appellant was hiding. (Tr. 771). For this information, Ms. Tubbs received $500. (Tr. 771). She then left town for Lorain County because she was afraid of appellant. (Tr. 772).

{¶50} Appellee also played a videotape of appellant’s interview with police. In the video statement, appellant stated that on the day in question he was at Lewis’s house in the morning, but then spent the day at Ms. Tubbs’ house. (State’s Exh. 24). But Ms. Tubbs testified that appellant was not with her that day. Furthermore, she stated that appellant asked her to lie for him to provide him with an alibi. (Tr. 763-64). On the video statement, appellant also stated that after he saw his name in the paper

as a fugitive, he had been hiding because he was scared. (State's Exh. 24). Additionally, appellant stated that he did not hang out with Lewis. (State's Exh. 24). However, both Ms. Tubbs and Ms. Weidner testified that appellant and Lewis were together on practically a daily basis. (Tr. 724-25, 753-54).

{¶51} Viewing this evidence in the light most favorable to the prosecution, sufficient evidence existed to convict appellant of aggravated murder. Ms. Tubbs heard appellant admit to shooting someone on the day in question shortly after Treasic was shot. Only one person was murdered that day in Youngstown. She also testified that appellant told her he "smoked the white boy." Ms. Tubbs also testified that appellant was with Lewis that day. Virgalitte saw a car matching the description of Lewis's girlfriend's car, which was later found in their driveway, leaving the area of the shooting just after he heard what sounded like a firecracker. Appellant and Lewis had a plan to rob a white boy of marijuana. Just before his shooting, Treasic received several phone calls from Lewis. And then Treasic went out to meet someone in a dark-colored Grand Marquis to sell them marijuana and got into the car. After the shooting, appellant went into hiding. He planned to leave town. He asked his girlfriend to lie for him to provide him with an alibi. When the police showed up at the house where appellant was staying, he waited 45 minutes before surrendering. In his statement to police, he denied hanging out with Lewis regularly, which Ms. Tubbs and Ms. Weidner both contradicted. He also stated he was with Ms. Tubbs on the day in question, which Ms. Tubbs denied. Given this evidence, a rational trier of fact could have found the essential elements of aggravated murder proven beyond a reasonable doubt.

{¶52} Additionally, the evidence regarding aggravated robbery was as follows. Appellant and Lewis had planned to rob a white boy of marijuana. Treasic, a young male Caucasian, was planning to sell Lewis some marijuana. He left his friend's apartment with the marijuana. When the police found Treasic, his pants pockets were turned inside out and there was no money or marijuana on or near his person. This evidence, viewed in the light most favorable to the prosecution, along with the

evidence set out above, tends to prove that appellant and Lewis robbed Treasic and that appellant had a firearm in committing the offense.

{¶53} We must address one other issue. Appellant argues the court improperly allowed appellee to introduce Ms. Tubbs' testimony regarding the statements she heard appellant make because appellee had to first prove the corpus delicti of the crime. He cites to *State v. Knapp* (1904), 70 Ohio St. 380, and *State v. Maranda* (1916), 94 Ohio St.364, for support. In *Knapp*, the court held that a confession that established the manner of killing was admissible because the manner of the crime is not part of the corpus delicti. In *Maranda*, the court held that for a confession to be admissible, there must be some evidence outside of the confession to prove a material element of the crime charged. Appellant contends that appellee failed to offer any evidence that he was present before, during, or after Treasic's shooting. Therefore, he argues that Ms. Tubbs' testimony concerning the statements she allegedly heard him make can not be considered as evidence that he shot or robbed Treasic.

{¶54} Appellant failed to object to Ms. Tubbs' statements that he now alleges were inadmissible. (Tr. 761-63). Thus, he has waived all but plain error. "Plain error does not exist unless, but for the error, the outcome at trial would have been different." *State v. Joseph* (1995), 73 Ohio St.3d 450, 455. Since appellant's statements, as recounted by Ms. Tubbs, appear to be the most damaging evidence to appellant, it seems that but for their admission, it is possible the outcome of the trial may have been different.

{¶55} The Ohio Supreme Court set out a thorough discussion of corpus delicti in *State v. Van Hook* (1988), 39 Ohio St.3d 256, 261:

{¶56} "The corpus delicti of a crime consists of two elements: the act and the criminal agency of the act. Before an out-of-court confession will be admitted, the corpus delicti must be established by evidence outside the confession. However, '[i]t is sufficient if there is *some* evidence outside of the confession that tends to prove some material element of the crime charged.' For example, when the offense is

homicide, the corpus delicti 'involves two elements, i.e., (1) the fact of death and (2) the existence of the criminal agency of another as the cause of death.'

{¶57} "The purpose of requiring the evidence of the corpus delicti as a foundation for admitting a confession was explained by the *Maranda* court: 'The doctrine * * * was born out of great caution by the courts, in consideration of certain cases of homicide wherein it had turned out that by reason of the failure of the government to prove the death of the person charged as having been murdered it so happened that such person sometimes survived the person accused as his murderer.' In light of the myriad procedural protections granted defendants in modern criminal practice, however, 'the corpus delicti rule is supported by few practical or social policy considerations.' This court has refused to apply it 'with a dogmatic vengeance.'" (Internal citations omitted.)

{¶58} The corpus delicti rule acts as a safeguard against confessions to crimes that may not have actually occurred and against coerced confessions. In this case, however, it is debatable whether appellant's statements to Ms. Tubbs qualified as confessions. A "confession" is a, "criminal suspect's oral or written acknowledgment of guilt, often including details about the crime." Black's Law Dictionary (8 Ed. 2004) 317. In this case, appellant made a statement to Ms. Tubbs that, "he smoked the white boy." (Tr. 763, 794-95, 803). Ms. Tubbs also heard appellant respond, "he knew who we were," to Lewis's statement, "you didn't have to shoot him." (Tr. 761). The statements by appellant, while admissions against his interest, do not include details about the crime. They do not even identify the victim or indicate that appellant killed anyone, only that he shot or "smoked" someone. There is no indication that appellant's admissions were coerced or that a robbery and murder did not occur. Thus, the corpus delicti rule's purposes are not at issue.

{¶59} Moreover, even if we strictly apply the corpus delicti rule here, the admission of appellant's statements to Ms. Tubbs was proper.

{¶60} The *Van Hook* court noted the prosecution need only adduce *some* proof tending to prove the act and its agency, but not necessarily as much proof as

would rise to the level of a prima facie case. Id. at 261-62. And it continued to emphasize that the prosecution need not produce evidence on all elements of the crime, but only on some material element. Id. at 262.

{¶61} Thus, in meeting the corpus delicti rule, the prosecution has a very low burden. This court has noted, "the corpus delicti of a crime can be demonstrated through circumstantial evidence when such evidence supports the logical inference that the commission of a crime is the only probable explanation for the proven facts." *State v. Twyford* (Sept. 25, 1998), 7th Dist. No. 93-J-13. In analyzing whether the corpus delicti was proven for aggravated robbery in *Twyford*, we found that the absence of personal items, such as money, a wallet, or identification on the body constituted some evidence that personal items had been taken from the victim. And the wounds to the body indicated serious physical harm had been inflicted when the robbery occurred. Thus, the corpus delicti had been established. Similarly, in this case, the evidence demonstrated that when Treasic left the apartment he had marijuana with him. When he was found, his pants pockets were turned inside out and no marijuana or money was found on or near his person. Additionally, he had a bullet hole in his head and was in a pool of blood. These facts tend to establish that he was shot in the course of a robbery.

{¶62} The corpus delicti of homicide was also established. Dr. Giles testified that the cause of Treasic's death was a gunshot wound to the head caused by homicide, thereby meeting the two requirements to show the corpus delicti of homicide. *Van Hook*, 39 Ohio St.3d at 261.

{¶63} Other circumstantial evidence connected appellant to the crimes. For instance, Ms. Weidner and Ms. Tubbs testified that appellant's favorite color is red and that he frequently wears a red jacket. (Tr. 735-37, 744, 754). And Delahunt testified that he noticed a person with a red sleeve in the backseat of the car that Treasic left in. (Tr. 499). Also, Ms. Weidner and Ms. Tubbs testified that appellant and Lewis were always together and Ms. Weidner noted that the two frequently drove around in the black Marquis together. (Tr. 723-27, 753-54). Moreover, just after the

time of the shooting, appellant went to Ms. Tubbs' house and asked her for some clean clothes. (Tr. 760). Additionally, after the murder, appellant went into hiding. (Tr. 766-67). He also had a strong interest in the murder, making sure to watch reports about it on the news and carrying a newspaper clipping about it in his wallet. (Tr. 730-32, 765). Furthermore, appellant gave a false alibi to police about where he was when the crimes occurred. (Tr. 677). This evidence, albeit circumstantial, constitutes "some" additional evidence of appellant's involvement in the murder and robbery.

{¶64} The corpus delicti rule is grounded in "a desire to protect unfortunate persons who confess to crimes that they not only did not commit themselves, but which were never committed by anyone." *State v. Nobles* (1995), 106 Ohio App.3d 246, 261. In this matter, the evidence referenced above demonstrated that two crimes were committed against Treasic, aggravated robbery and aggravated murder. Since appellee presented some evidence of the corpus delicti of aggravated robbery and aggravated murder, Ms. Tubbs' statements regarding appellant's admissions were admissible. Hence, appellant's first assignment of error is without merit.

{¶65} Appellant's second assignment of error states:

{¶66} "THE TRIAL COURT ERRED WHEN IT ADMITTED THE STATE'S TESTIMONY REGARDING MR. VAUGHN'S OTHER ACTS IN VIOLATION OF OHIO RULE OF EVIDENCE 404(B). SPECIFICALLY, THE STATE FAILED TO CORRELATE WITH SUFFICIENT EVIDENCE, THE OTHER ACTS TESTIMONY TO THE CRIME IN QUESTION."

{¶67} Appellant argues that the trial court should not have admitted Ms. Tubbs' testimony that appellant carried a gun and had previously threatened to kill her. He contends Evid.R. 404(B) required its exclusion. Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Appellant

argues that appellee used Ms. Tubbs' testimony that appellant carried a gun and had threatened her in the past to identify appellant as the triggerman in Treasic's shooting.

{¶68} Furthermore, appellant contends that the court should have given the jury a limiting instruction directing them not to consider this testimony to prove appellant's character or to show his conformity therewith.

{¶69} The admission or exclusion of evidence is within the trial court's discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. Thus, we will not reverse the trial court's decision absent an abuse of discretion. Abuse of discretion requires more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Clark* (1994), 71 Ohio St.3d 466, 470

{¶70} On direct examination, appellee asked Ms. Tubbs if appellant carries a gun, to which she responded "yes." (Tr. 756). Appellant objected. Appellee then went on to question Ms. Tubbs as to what kind of gun it was. (Tr. 756-57). She did not know what type of gun it was and could only describe it as being not big like a rifle, but like something you hold in your hand. (Tr. 757). Appellee then changed the subject. (Tr. 757).

{¶71} "Evidence of other crimes, wrongs or bad acts independent or unrelated to the offense for which a defendant is on trial is generally inadmissible to show criminal propensity." *State v. Wickline* (1990), 50 Ohio St.3d 114, 120. But in this case, appellee did not attempt to use this evidence to show that appellant had a criminal propensity. Detective DeMatteo explained what type of guns would explain the lack of shell casings at the scene. (Tr. 563-64). And he testified that the type of bullet recovered from Treasic's body was fired from a pistol, as opposed to a rifle. (Tr. 571). Appellee attempted to show that appellant owned the same type of gun as was used to shoot Treasic. Appellee did not try to use the evidence that appellant carries a gun to show that he had a criminal propensity. Instead, appellee attempted

to use this evidence to link appellant's gun to the murder. Thus, the trial court did not abuse its discretion in admitting Ms. Tubbs' testimony about the gun.

{¶72} Additionally, appellee asked Ms. Tubbs if appellant ever threatened to kill her. (Tr. 772). Again, appellant objected. (Tr. 772). This question came in a line of questioning regarding why Ms. Tubbs did not immediately go to the police with her information about appellant. Before asking this question, appellee questioned Ms. Tubbs about going to the police to turn appellant in. (Tr. 769-72). She indicated that the officer she spoke to told her the information she provided would be kept confidential. (Tr. 771). Ms. Tubbs testified she only remained in town one week after turning appellant in before leaving for Lorain County. (Tr. 772). She stated she was afraid because appellant "just killed somebody. He could have did the same thing to me if he knew I did it." (Tr. 772). It was at this point that appellee asked her if appellant ever threatened to kill her before. (Tr. 772). She responded that he had threatened to kill her if she got an abortion, but that she did not think he was serious. (Tr. 772).

{¶73} At oral argument, appellee stated that it questioned Ms. Tubbs about appellant's prior threat in order to show why she did not go to the police sooner. Appellee further explained it was anticipating that appellant would question Ms. Tubbs on cross-examination about why she waited so long to report appellant's statements and conduct to the police. Appellee was not attempting to use the evidence of appellant's prior threat to demonstrate his criminal propensity. Appellant's counsel had tried to discredit Ms. Tubbs' testimony in opening statements. He told the jury that Ms. Tubbs was unbelievable as a witness because she did not go to the police right away. (Tr. 425-26). Thus, it was reasonable for appellee to solicit through Ms. Tubbs why she did not turn appellant in immediately and why she was afraid of him.

{¶74} But even if this was error, Ms. Tubbs testified that she did not take appellant's threat seriously. (Tr. 772). Thus, the "threat" that appellant made to Ms.

Tubbs did not demonstrate his criminal propensity or bad character as appellant alleges. Hence, any error in admitting the testimony would be harmless.

{¶75} Accordingly, appellant's second assignment of error is without merit.

{¶76} Appellant's third assignment of error states:

{¶77} "THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY ON THE CHARGE OF AIDING AND ABETTING BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUPPORT THE CHARGE TO THE JURY."

{¶78} The court instructed the jury on aiding and abetting in addition to the principal offenses. Appellant objected to the aiding and abetting instruction. (Tr. 815). He argues that appellee did not present sufficient evidence to support this instruction. He contends that appellee never before suggested that he was an aider and abettor, only that he was the triggerman. Additionally, appellant contends that appellee never amended the bill of particulars to put him on notice that he could be tried as an aider and abettor.

{¶79} The bill of particulars reads:

{¶80} "**Aggravated Murder with a firearm specification**: The State of Ohio says that * * * William Vaughn did purposely cause the death of Justin Treasic, and/or aided and abetted Freddie Lewis in purposely causing the death of Justin Treasic, while committing or attempting to commit * * * a felony, namely aggravated robbery * * *.

{¶81} "**Aggravated Robbery**: The State of Ohio says that * * * William Vaughn did, in attempting or committing a theft offense, * * * and/or in aiding and abetting Freddie Lewis in committing a theft offense, inflict serious physical harm on Justin Treasic."

{¶82} The bill of particulars put appellant on notice that he could be tried as an aider and abettor in the aggravated murder and aggravated robbery. Furthermore, the jury convicted appellant of the principal offenses, not complicity. The trial court specifically instructed the jury that it was only to consider aiding and

abetting if it found appellant not guilty of aggravated murder and aggravated robbery. (Tr. 911, 917-18). Since the jury found appellant guilty of the principal offenses, it would have never moved on to consider whether appellant was guilty of complicity. Hence, appellant's third assignment of error is without merit.

{¶83} Appellant's fourth assignment of error states:

{¶84} "THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT VAUGHN'S OBJECTION TO THE STATE'S PEREMPTORY CHALLENGES STRIKING THREE POTENTIAL JURORS WHO WERE AFRICAN-AMERICAN AND HISPANIC IN VIOLATION OF THE UNITED STATES SUPREME COURT'S DECISION IN *BATSON V. KENTUCKY* (1986), 476 U.S. 79 AND MR. VAUGHN'S RIGHT TO EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

{¶85} Appellee used three of its four peremptory challenges to strike minority jurors, two African Americans and a Hispanic American.

{¶86} Appellant argues that appellee failed to provide valid, race-neutral reasons as required by *Batson v. Kentucky* (1986), 476 U.S. 79, for excluding potential minority jurors. He contends that appellee provided implausible justifications, serving as a pretext for purposeful discrimination because it never alleged that the jurors could not have been impartial. Appellant asserts that appellee wanted to exclude minority jurors because he is African American and the victim was Caucasian. Additionally, appellant's counsel argued that appellee has shown a pattern of discrimination in other cases it had prosecuted in which he was involved.

{¶87} The Ohio Supreme Court has set out the steps for analyzing a *Batson* challenge as follows:

{¶88} "First, the opponent of the peremptory strike must make a prima facie case of racial discrimination. Second, if the trial court finds that the opponent has fulfilled this requirement, then the proponent of the strike must come forward with a racially neutral explanation for the strike. The 'explanation need not rise to the level justifying exercise of a challenge for cause.'

{¶89} "Third, if the proponent puts forward a racially neutral explanation, the trial court must decide, on the basis of all the circumstances, whether the opponent has proved purposeful racial discrimination. The burden of persuasion is on the opponent of the strike." (Internal citations omitted.) *State v. Herring*, 94 Ohio St.3d 246, 255-56, 2002-Ohio-796.

{¶90} An appellate court will not reverse the trial court's decision of no discrimination unless it is clearly erroneous. *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583.

{¶91} First, we should note that it does not appear appellant timely objected to appellee's use of peremptory challenges. When appellee exercised its first peremptory challenge to excuse Petra Garcia, a Hispanic American, appellant did not object. (Tr. 270). When appellee used its second challenge to excuse Elaine Jordan, an African American, appellant asked to approach the bench and an off-the-record discussion was held. (Tr. 310-11). When appellee used its fourth challenge to excuse Shawn Allen, another African American, appellant did not object. (Tr. 359).

{¶92} Halfway through the third witness is the first time there is any mention of a *Batson* challenge on the record. During a break in the proceedings, the court told appellant's counsel to make a record. (Tr. 476). Counsel stated that he raised a *Batson* challenge when appellee excused Ms. Jordan. (Tr. 476). Presumably, this occurred at the off-the-record side bar. Counsel then brought up the fact that appellee used three of its four peremptory challenges to excuse minority jurors and alleged that appellee did so on the basis of race. (Tr. 477). Counsel also stated that he brought up an allegation that appellee demonstrated a pattern of racial discrimination throughout several trials that he was involved with, including two trials before a different trial judge. (Tr. 477). Appellee then gave its race-neutral reasons for excusing the jurors it did in the present case. (Tr. 478-80).

{¶93} Defense counsel must object to an allegation of racially motivated use of peremptory challenges before the jury is sworn. *State v. Robertson* (1993), 90 Ohio App.3d 715, 718. "[W]aiting to object to the prosecutor's use of peremptory

challenges until after the jury is sworn prevents the trial court from noticing and correcting any error. * * * [T]he requirement of contemporaneous objection with the exercise of a peremptory challenge is based upon practical necessity and basic fairness in the operation of the judicial system." Id.

{¶94} In this matter, appellant failed to timely object to appellee's use of peremptory challenges in the cases of Ms. Garcia and Ms. Allen. The only indication of a timely objection was in the case of Ms. Jordan. Thus, appellant has waived a *Batson* challenge as to Ms. Garcia and Ms. Allen. However, as will be seen below, even if appellant had timely objected to those jurors, he would not prevail on this assignment of error.

{¶95} It should also be noted that the court made a point to note on the record that the jury consisted of three African American jurors and one African American alternate juror. (Tr. 480). We will examine each challenged juror in turn.

{¶96} First, appellee excused Ms. Garcia. Appellee stated that it was concerned with Ms. Garcia because she stated that her son was severely beaten by Youngstown Police Officers. (Tr. 97-100). Appellee stated this was important because the Youngstown Police Officers were involved in this case and would be testifying. (Tr. 478). Appellee pointed out that Ms. Garcia stated that after the alleged incident she was angry and did not trust police officers. (Tr. 173-74). Ms. Garcia did state that she would judge the police officers who testified fairly and listen to what they had to say. (Tr. 174-75). However, when the court asked her if she would hold the incident with her son against the officers in this case, she answered, "I don't know." (Tr. 98-99). Additionally, appellee referenced the fact that Ms. Garcia stated numerous times that she was nervous about the jury process. (Tr. 478).

{¶97} Second, appellee excused Ms. Jordan. Appellee stated that it did so because it had reservations about Ms. Jordan's honesty. It pointed to two circumstances to support these reservations, (1) she failed to disclose on her questionnaire that she had been convicted of domestic violence and had been on probation and (2) she was not forthcoming with appellee when it asked her why her

husband was no longer employed by General Motors. (Tr. 90-92, 122). For these reasons, appellee stated that Ms. Jordan was hiding things and was not trustworthy. (Tr. 479).

{¶98} Finally, appellee excused Ms. Allen. Appellee stated that Ms. Allen was having a difficult time comprehending an analogy regarding children and truth telling, which a prosecutor spent a lot of time on while questioning her. (Tr. 155-58, 160-63, 479). Appellee stated that Ms. Allen either did not understand the analogy or did not care. (Tr. 479). And appellee was concerned with opinions she expressed about the amount of credibility that the State's witnesses would need to possess for her to be able to rely upon them. (Tr. 156, 160-62, 479). In fact, appellee pointed out that it excused a white male juror for the same reason, he expected too much from appellee in order to convict. (Tr. 479-80).

{¶99} Based on all of the circumstances and the reasons set forth by appellee, appellee had valid, race-neutral reasons for excusing the jurors it did.

{¶100} Furthermore, appellant argued that appellee has shown a pattern of discrimination throughout other cases that continued into this case. First, appellee did not discriminate in this case. Second, there is no way to know what occurred during the jury selection of other cases. Any such information is beyond the scope of the record of this case. "A reviewing court cannot add matter to the record which is not part of the trial court proceedings and decide an appeal on the basis of such new matter." *State v. Green*, 7th Dist. No. 01CA 54, 2003-Ohio-5442, at ¶23.

{¶101} Thus, appellant's fourth assignment of error is without merit.

{¶102} Appellant's fifth assignment of error states:

{¶103} "THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY MAKING DENIGRATING STATEMENTS AGAINST THE DEFENDANT AND DEFENSE COUNSEL IN CLOSING ARGUMENT. AS A RESULT, THE STATE DEPRIVED MR. VAUGHN OF A FAIR TRIAL IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

{¶104} Appellant contends that the prosecutors committed misconduct in their closing arguments. He claims that they called into question his counsel's ability to effectively question witnesses and alluded to his not taking the stand.

{¶105} The standard of review for prosecutorial misconduct is whether the comments and questions by the prosecution were improper, and, if so, whether they prejudiced appellant's substantial rights. *State v. Treesh* (2001), 90 Ohio St.3d 460, 480. Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record. *State v. Lott* (1990), 51 Ohio St.3d 160, 166. Furthermore, we are to view the state's closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial. *Treesh*, 90 Ohio St.3d at 466.

{¶106} Specifically, appellant points to the following comments as being prejudicial:

{¶107} (1) "[W]hat questions were - - was Megan asked [by appellant's counsel]? '*Is there anything on the sleeve of Ray's jacket?*' '*What night did you actually see the news?'* Again, what is the purpose of those questions? To make it look like Duane from three floors up didn't see an emblem on a jacket. He told you what he saw; a red elbow, no hand, no cuff." (Tr. 829).

{¶108} Appellant argues that here the prosecutor questioned his counsel's ability to inquire into what Delahunt saw on the day in question.

{¶109} (2) "[I]n watching the tape [of appellant's statement to police], I think there are probably five things the defendant and I can agree upon * * * his comment that it's hard to say what length a crackhead would go to to get crack, only I prefer to state it a little differently: What length would someone who loves marijuana go to to get marijuana?" (Tr. 831).

{¶110} Appellant contends this statement was the prosecutor's way of telling the jury that if he really loved marijuana, he would go to any lengths to get it, including murder.

{¶111} (3) “Ladies and gentlemen, did you ever hear the phrase *you can’t see the forest for the trees*? That’s what the defendant wants. He questioned the witnesses looking for something to ask them about.” (Tr. 836-37).

{¶112} Appellant alleges this statement insinuates appellee’s case was so air tight that his counsel had to badger every witness to look for discrepancies in their testimony.

{¶113} (4) “[I]t’s a puzzle. If you take a puzzle - - I should have brought one - - and I hold up one piece, you don’t know what the picture is, but I put the pieces together, as Detective Kelty did, and guess what - - ? - - we can see the picture. That’s why defense lawyers attack it piece by piece - -” (Tr. 894).

{¶114} Appellant contends this comment told the jury that his counsel was manipulating every fact to confuse them.

{¶115} Considerable latitude is afforded to counsel during closing arguments. *State v. Mauer* (1984), 15 Ohio St.3d 239, 269. While in isolation these comments may seem improper, when examining the prosecutors’ closing argument in full, they were not prejudicial to appellant. The State’s closing arguments were over 57 pages long and discussed all elements of the case. The prosecutors talked about all of the evidence they believed pointed to appellant’s guilt and discussed all of the witnesses’ testimony.

{¶116} When the prosecutors’ comments are read in context of the entire closing argument, they are not improper. For instance, appellant argues the prosecutor’s comment “you can’t see the forest for the trees” insinuated that his counsel had to badger witnesses looking for discrepancies. However, when read in context, the prosecutor was using this analogy to urge the jury not to look at the evidence piece by piece (or tree by tree), but instead to look at the big picture (the forest). (Tr. 836-39). The same applies to the comment about the puzzle pieces. The prosecutor was attempting to illustrate that alone, each witnesses’ testimony may not have shown that appellant was guilty, just like you cannot tell from one puzzle piece what the big picture is supposed to look like. But taken as a whole, like

all the puzzle pieces together, the witnesses' testimony proved appellant's guilt. (Tr. 893-97). And as to appellant's objection to statements about the red jacket sleeve and what night someone watched the news, this comment did not attack counsel's ability to question witnesses but was an attempt to convince the jury not to lose sight of the big picture and to focus on the elements of the crime. (Tr. 829-30). And when the prosecutor made the comment about the lengths a marijuana lover would go to get marijuana, it seems the purpose of the comment was more to attack the credibility of appellant's video statement than anything else. (Tr. 831). In his video statement, appellant commented that it was hard to say what lengths a crackhead would go to get crack. The prosecutor's comment insinuated that this statement was one of only a few things that appellant was truthful about and that the rest of appellant's statement was not believable. Or this reference could have been a comment on the evidence because Ms. Tubbs testified that she told Detective Kelty that appellant would do anything to get marijuana. (Tr. 774).

{¶117} Additionally, appellant mentions that the prosecution alluded to his not taking the witness stand. From a search of the transcript the prosecution did not allude to appellant choosing not to take the witness stand..

{¶118} Accordingly, appellant's fifth assignment of error is without merit.

{¶119} For the reasons stated above, the trial court's decision is hereby affirmed.

Vukovich, J., concurs.
Waite, P. J., concurs.