[Cite as *State v. Gordon*, 2017-Ohio-9357.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Earle E. Wise, J.
	:	
-vs-	:	
	:	Case No. 2017CA00073
TROY ANTHONY GORDON	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 2016CR2188(B)
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 29, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Gwin, P.J.

{¶1} Appellant Troy Anthony Gordon ["Gordon"] appeals his conviction and sentence after a jury trial in the Stark County Court of Common Pleas.

Facts and Procedural History

{¶2} On November 14, 2016, shortly after seven o'clock in the evening, Canton Police Detective Darrell Pierson was working an off-duty job at the Canton Walmart. For such jobs, Pierson would be in uniform, and was assigned for this particular job to stand by the general merchandise doors to handle any problems with customers walking out without paying for merchandise. Walmart had many problems with this kind of theft, and thus Pierson positioned himself by the cash register that was closest to the exit doors.

{¶3} While working this job, Pierson saw a female identified as Erin Jean Buckley[1] walk down the action alley aisle, which is past the registers, and heading towards the exit doors, avoiding the sensors. Buckley had a large duffel bag on her shoulder, and Pierson could see merchandise inside it. In addition, Buckley was walking briskly. Suspecting a possible shoplifting, Pierson approached Buckley and asked her to come with him. As Buckley made it through the exit doors, however, she turned back, looked at Pierson, and took off running.

{¶4} Pierson responded by running after Buckley, who headed straight for a green four-door car parked nearby. He could still see the unpaid merchandise inside Buckley's duffel bag as he caught up to her, so he grabbed her arm in order to effect an arrest. Buckley managed to slip out of her coat in trying to get away. Gordon, who was sitting in the front passenger seat of this car, got out, grabbed Pierson's wrist, and

[1] Buckley's conviction is the subject of a separate appeal in *State v. Buckley*, 5th Dist. Stark No. 2017CA00084.

attempted to pull the detective's hand off Buckley. In response to this action, Pierson pulled his baton out and ordered Gordon not to interfere and to get back into the car. Due to the distraction, Buckley was able to get into the rear passenger seat of the car. Gordon got into the front passenger seat.

{¶5} Pierson thought that the car might try to drive away, so he went to the rear of the car to get its license plate number. Going to the front of the vehicle would have put Pierson between the car and another parked ear. As he was reading off the license plate number, Pierson saw the reverse lights of the car go on. Pierson immediately ordered the driver to stop or he would shoot, having drawn his handgun. Pierson heard the driver of the car say that he — Pierson — would not get out of the way. Getting out of the way, Pierson holstered his gun and went to the driver's window with his baton. His repeated orders to stop the car and for all of the occupants to put their hands up were being ignored, so Pierson broke out the driver's window with is baton. During this melee, Pierson also called for backup.

{¶6} Unbeknownst to Pierson, several bystanders observed this confrontation. George Jordan, a retired Perry Township police officer, went to assist Pierson when he saw the commotion upon leaving the store with his wife. As he approached the car, ready to draw his handgun, Jordan watched as Buckley opened the rear passenger door in an effort to pick up the duffel bag she had dropped when Pierson first grabbed her. Pierson was on the driver's side of the vehicle, trying to get the car to stop. Jordan saw that Pierson's repeated orders were being ignored.

{¶7} John Bowman was in his electric cart when he saw the commotion involving Pierson and Buckley. He was also leaving the store and was going to get in his van,

which was parked nearby in the handicap section. Bowman heard Pierson yell at the people in the car to stop, and saw the detective take out his baton, smashing the driver's window. Bowman estimated that Pierson gave some 30 commands, all of which were ignored. He also saw the car back up and almost hit Pierson, which scared Bowman quite a bit.

{¶8} Bonnie Davis, the mother of a Canton police officer, was waiting in her parked car in the parking lot for her granddaughter to get off work at Walmart. As she was waiting, she heard the commotion at a car that was three to four feet away from her. She saw Pierson trying to stop the escape of the people in the car, which led to Pierson standing behind the car, gun drawn, ordering them to stop. Fearing for the Pierson's safety, Davis called 9-1-1 on her cell phone. The car, she testified, could have hit Pierson, as it was initially backing up. While on the phone, she heard Pierson order the driver to put his hands on the wheel, heard glass being broken, and saw the car driving away after a cruiser pulled up and another officer joined the chase.

{¶9} Canton Police Officer Brian Dougherty responded to the Walmart parking lot in response to Pierson's call for backup. Arriving in his cruiser, the uniformed officer found Pierson, gun drawn, yelling commands at the trio of suspects. Dougherty also drew his gun and barked similar commands at the suspects. Instead of complying, the car backed up and left the scene. Dougherty jumped back in his cruiser and gave chase, lights and siren on, stopping the fleeing vehicle several blocks or miles away. The occupants again did not comply with his orders about putting their hands up and getting out of the vehicle. Once Gordon was pulled out of the vehicle and handcuffed, the other two became more compliant and exited the car without incident.

{¶10} Detective Pierson remained behind at the Walmart parking lot. Pierson retrieved the duffel bag and had Walmart personnel determine the value of the stolen merchandise. Buckley had attempted to shoplift items totaling a little over $300, mainly female apparel and clothing. Pierson also retrieved the security camera video of Buckley's activities both inside and outside the store.

{¶11} The three individuals were all charged with one count of aggravated robbery as principal offenders or alternatively as accomplices. The charge arose from the use of their get-away car as a deadly weapon against one of the police officers who was trying to stop these individuals' escape. The other charges included in the indictment were specific to the individual defendants' conduct.

{¶12} The driver of the car opted to plead guilty on the day of trial, and Buckley opted to plead guilty to the identity theft charge during the trial and her resisting arrest charge was dismissed.

{¶13} Gordon and Buckley were tried together and the jury found Gordon and Buckley guilty of these offenses. The trial court thereafter sentenced Gordon to an eight-year prison term for the aggravated robbery. The court also sentenced Buckley to an aggregate prison term of eight years.

Assignments of Error

{¶14} Gordon raises four assignments of error,

{¶15} “I. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF AND ARGUMENT ABOUT "OTHER ACTS" PROHIBITED BY EVIDENCE RULE 404.

{¶16} “II. THE TRIAL COURT ERRED IN ADMITTING THE OPINION TESTIMONY OF WITNESSES.

{¶17} "III. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

{¶18} "IV. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I.

{¶19} Gordon argues in his first assignment of error that the trial court committed error in failing to exclude evidence of his post-arrest uncooperative conduct. He claims that the admission of this evidence violated Evid. R. 404(B) and R.C. 2945.59. Gordon did object to the admission of this testimony. 1T. at 216-222; 245.

STANDARD OF APPELLATE REVIEW.

{¶20} The trial court has broad discretion in the admission and exclusion of evidence, including evidence of other acts under Evid.R. 404(B). *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 22. Unless the trial court has "clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere" with the exercise of such discretion. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). We have defined "abuse of discretion" as an "unreasonable, arbitrary, or unconscionable use of discretion, or as a view or action that no conscientious judge could honestly have taken." *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23.

ISSUE FOR APPEAL

A. Whether the trial court abused its discretion by admitting evidence of Gordon's post-arrest conduct.

{¶21} Evid.R. 404(A) provides that evidence of a person's character is not admissible to prove the person acted in conformity with that character. Evid.R. 404(B) sets forth an exception to the general rule against admitting evidence of a person's other bad acts. The Rule states as follows: "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."

{¶22} In *State v. Williams*, 134 Ohio St.3d 521, 983 N.E.2d 1278, 2012–Ohio–5695, the Ohio Supreme Court stated that trial courts should conduct a three-step analysis when considering the issue of "other acts" evidence:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. See Evid.R. 403.

Id. at ¶ 20.

{¶23} Furthermore, "other acts" evidence is admissible only if there is substantial proof that the alleged other acts were committed by the defendant and such evidence tends to show one of the matters enumerated in Evid.R. 404(B). *State v. Wagner*, 5th Dist. Licking 03 CA 82, 2004–Ohio–3941, ¶ 43, *citing State v. Echols*, 128 Ohio App.3d 677, 692, 716 N.E.2d 728 (1st Dist. 1998). This Court has recognized that the Ohio Revised Code does not define "substantial proof" in this context. *See State v. Burden*, 5th Dist. Stark No. 2012–CA–00074, 2013–Ohio–1628, ¶ 58. This Court also summarized as follows in *State v. King*, 5th Dist. Richland No. 08–CA–335, 2010–Ohio–4844: "We * * * do not believe that the substantial proof requirement necessitates that independent evidence corroborate other acts testimony. Instead, we believe that the substantial proof requirement is satisfied if at least one witness who has direct knowledge of the other act can testify to the other act. The jury may then fulfill its duty and evaluate the witness's testimony and credibility. * * *." Id. at ¶ 45.

{¶24} In the case at bar, the state did not submit evidence of Gordon's prior acts to show Gordon acted in conformity with his prior behavior. Rather, the evidence was submitted to counter the impression that Gordon was not aware of Buckley's intent to shoplift and the trio's intent to escape apprehension.

{¶25} In *State v. Dunivant*, 5th Dist. Stark App. No. 2003CA00175, 2005-Ohio-1497, the Ninth District Court of Appeals, sitting by assignment for this Court, provided a detailed analysis of the issue sub judice:

> "Under the rule of curative admissibility, or the 'opening the door' doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue

> to rebut any false impression that might have resulted from the earlier admission." *United States v. Whitworth* (C.A.9, 1988), 856 F.2d 1268, 1285. *See, also, United States v. Moody* (C.A.6, 1967), 371 F.2d 688, 693 ("With the door opened this widely in favor of [defendant], we cannot say that the District Judge's rulings in favor of appellee's proffered hearsay on the same subject was an abuse of judicial discretion or constituted reversible error."); *State v. Croom* (Jan. 18, 1996), 8th Dist. No. 67135, at *17 ("Invited error would preclude a defense counsel who induces hearsay evidence on cross-examination from precluding further hearsay testimony on re-direct examination.").

Dunivant, ¶12*. Accord, State v. Scott,* 4th Dist. Washington No. 15CA2, 2015-Ohio-4170, ¶42*; State v. Collins*, 7th Dist. Columbiana No. 10 CO 10, 2011-Ohio-6365, ¶93.

{¶26} In this case, Gordon's defense at trial was that he just happened to be in the car without any knowledge of the criminal intent of his friends. Thus, he put his conduct before, during, and after the shoplifting and escape into play. Gordon attempted to save Buckley from the clutches of a uniformed police officer by grabbing Pierson's wrist to get him to let go of Buckley. Once Buckley was able to slip her coat and get into the car, Gordon also got back into the car. The car then went into reverse, despite Pierson standing behind the car with his baton and gun drawn, yelling for them to stay put. The car continued backing up, compelling Pierson to get out of the way and to approach the driver's window. The trio continued to ignore Pierson's repeated commands to put the car in park and not to move, as well as to put their hands in the air. When police finally stopped the car, Gordon continued not to cooperate with police and comply with their

orders to raise his hands and get out. This evidence was relevant to show Gordon's state of mind and his allegiance to the cause of his comrades in committing the shoplifting and making their escape from the police. Thus, the evidence was relevant to show Gordon was not some innocent bystander to the shoplifting and the escape.

{¶27} We cannot conclude that the trial court abused its discretion by allowing the state to elicit evidence in order to rebut the impression that may have resulted from Gordon's arguments. If the state were not permitted to do so, the jury would have been left with the impression that Gordon cooperated with the police at his first available opportunity to do so. We do not find that the trial court's ruling was erroneous. Accordingly, Gordon was not denied of fundamental fairness. *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001); *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000).

{¶28} Gordon's first assignment of error is overruled.

II.

{¶29} Gordon's second assignment of error argues that the trial court once again committed plain error by allowing testimony from a bystander that Gordon should have stopped the driver of the getaway vehicle from attempting to run over a police officer in the trio's attempt to escape after the shoplifting. Gordon concedes that he did not object to the challenged testimony, and thus the standard of review is plain error.

STANDARD OF APPELLATE REVIEW

{¶30} Crim.R. 52(B) affords appellate courts discretion to correct "[p]lain errors or defects affecting substantial rights" notwithstanding an accused's failure to meet his obligation to bring those errors to the attention of the trial court. However, the accused

bears the burden to demonstrate plain error on the record, *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 16, and must show "an error, i.e., a deviation from a legal rule" that constitutes "an 'obvious' defect in the trial proceedings," *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

{¶31} Even if the error is obvious, it must have affected substantial rights, and "[w]e have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." Id. The Ohio Supreme Court recently clarified in *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, that the accused is "required to demonstrate a reasonable *probability* that the error resulted in prejudice—the same deferential standard for reviewing ineffective assistance of counsel claims." (Emphasis sic.) Id. at ¶ 22, *citing United States v. Dominguez Benitez*, 542 U.S. 74, 81–83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004). *Accord, State v. Thomas,* ___ Ohio St.3d ___, 2017-Ohio-8011, ___N.E.3d ____ (Oct. 4, 2017), ¶32-34.

{¶32} If the accused shows that the trial court committed plain error affecting the outcome of the proceeding, an appellate court is not required to correct it; the Supreme Court has "admonish[ed] courts to notice plain error 'with the utmost caution, under exceptional circumstances and *only* to prevent a manifest miscarriage of justice.'" (Emphasis added.) *Barnes* at 27, 759 N.E.2d 1240, *quoting State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. *Accord, State v. Thomas,* ___ Ohio St.3d ___, 2017-Ohio-8011, ___N.E.3d ____ (Oct. 4, 2017), ¶32-34.

{¶33} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d

1056 (1991). Evid.R. 402 states that all relevant evidence is admissible. "Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶34} In *State v. Crotts,* the Ohio Supreme Court explained,

> As a legal term, "prejudice" is simply "[d]amage or detriment to one's legal rights or claims." Black's Law Dictionary (8th Ed.1999) 1218. Thus, it is fair to say that all relevant evidence is prejudicial. That is, evidence that tends to disprove a party's rendition of the facts necessarily harms that party's case. Accordingly, the rules of evidence do not attempt to bar all prejudicial evidence—to do so would make reaching any result extremely difficult. Rather, only evidence that is unfairly prejudicial is excludable.
>
> "'Exclusion on the basis of unfair prejudice involves more than a balance of mere prejudice. If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under Rule 403. Emphasis must be placed on the word "unfair." Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. Consequently, if the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial. Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect.' " *Oberlin v. Akron Gen. Med. Ctr.* (2001), 91 Ohio St.3d 169, 172,

743 N.E.2d 890, *quoting Weissenberger's Ohio Evidence* (2000) 85–87, Section 403.3.

104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 23-24.

ISSUE FOR APPEAL

A. Whether "but for" the testimony from a bystander that Gordon should have stopped the driver of the getaway vehicle from attempting to run over a police officer in the trio's attempt to escape after the shoplifting the outcome of the trial clearly would have been otherwise.

{¶35} In the case at bar, the following exchange occurred,

> [The state]. Okay. Um, did you hear anything coming out of the car?
>
> [Witness]. Um, no, I did not. I couldn't hear anything. It was cold, so I had my windows up. Um, but I did not hear anyone in the car hollering at any point, no.
>
> [The state]. Okay. The people inside the car, were they cooperative with the two uniformed officers who were there at the scene?
>
> [Witness]. Um, to be honest, I really, I really don't feel that they were. I think had they been cooperative, they would have made the driver just stop at that point rather than backing up and taking off I mean, there were two other people besides the driver in the car, and I would think that they should have said something to the driver to just stop where they were and not to proceed any farther for fear that somebody could get hurt. I mean, the officer that was there originally, he could have been hit by the car. Anything could have happened.

1T.at 201-202.

{¶36} In the case at bar, the jury observed video evidence from security camera at Walmart, a police cruiser and a bystander that displayed the events in real time. The jury heard the testimony of five witnesses concerning the actions, verbal commands and actions of each of the parties. While Davis' testimony was prejudicial, it was not unfairly prejudicial but rather relevant to whether Gordon aided and abetted in the escape from the Walmart parking lot. The evidence was not admitted for an improper purpose. Gordon's claim of unfair prejudice must therefore fail. There is little if any probability that the admission of Davis' testimony affected the outcome of the trial.

{¶37} Gordon's second assignment of error is overruled.

III.

{¶38} In his third assignment of error, Gordon contends that he was denied the effective assistance of trial counsel. Specifically, Gordon cites to three incidents of alleged ineffectiveness: 1). trial counsel's failure to object to the other acts evidence; 2) trial counsel's failure to object to the lay opinion evidence related to Gordon's failure to attempt to stop the get-away driver; and, 3) trial counsel's failure to move for separate trials from the remaining co-defendant, Erin Jean Buckley.

STANDARD OF APPELLATE REVIEW

{¶39} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v, Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122

L.Ed.2d 180(1993); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373(1989).

{¶40} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley. Knowles v. Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251(2009).

{¶41} The United States Supreme Court discussed the prejudice prong of the *Strickland* test,

> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052.
>
> "Surmounting Strickland's high bar is never an easy task." *Padilla v. Kentucky,* 559 U.S. ——, ——, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689–690, 104 S.Ct. 2052. Even under de novo review, the standard for judging counsel's

> representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S.Ct. 2052; see also Bell v. Cone, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, 562 U.S. 86, 104-105, 131 S.Ct. 770, 777-778, 178 L.Ed.2d 624(2011).

{¶42} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley*, 42 Ohio St.3d at 143, 538 N.E.2d 373, *quoting Strickland,* 466 U.S. at 697, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984).

ISSUES FOR APPEAL

A. Whether Gordon was prejudiced by his attorney's failure to move for separate trials.

{¶43} Defendants may be charged in the same indictment, pursuant to Ohio Crim. R. 8(B) as follows:

> Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

{¶44} The law favors the joinder of defendants and the avoidance of multiple trials because joinder conserves judicial and prosecutorial time, lessens the expenses of multiple trials, diminishes the inconvenience to witnesses, and minimizes the possibility of incongruous results from successive trials before different juries. *State v. Thomas*, 61 Ohio St.2d 223, 400 N.E.2d 401(1980).

{¶45} In order to obtain a severance, a defendant needed to affirmatively demonstrate prejudice by the joinder. Crim.R. 14. Crim.R. 14 provides, in pertinent part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, information or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

{¶46} The United States Supreme Court has stated, "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States,* 506 U.S. 534, 539, 113 S.Ct. 933(1993). Even where the risk of prejudice is high, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." Id. Indeed, "[a] request for severance should be denied if a jury can properly compartmentalize the evidence as it relates to the appropriate defendants." *United States v. Causey*, 834 F.2d 1277, 1287(6th Cir. 1987). Thus, to prevail on his severance argument, an appellant must show "compelling, specific, and actual prejudice from [the] court's refusal to grant the motion to sever." *United States v. Saadey,* 393 F.3d 669, 678(6th Cir 2005)*, United States v. Driver,* 535 F.3d 424, 427(6th Cir. 2008).

{¶47} A defendant is not entitled to severance based upon mutually antagonistic defenses unless "there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 937(1993).

{¶48} "A defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant. In such a situation, the co-defendants do indeed become the government's best witnesses against each other. Where two defendants present defenses that are antagonistic at their core, a substantial possibility exists that the jury will unjustifiably infer that this conflict alone demonstrates that both are

guilty." *United States v. Berkowitz*, 662 F.2d 1127, 1133(5th Cir. 1981) (internal quotation marks omitted)(citations omitted). *Accord, State v. Walters,* 10th Dist. Franklin No. 06AP-693, 2007-Ohio-5554, ¶ 23; *State v. Evans,* 4th Dist. Scioto No. 08CA3268, 2010-Ohio-2554, ¶ 43.

{¶49} Gordon argues that Buckley's guilty plea during the middle of trial cast a shadow of guilt upon her, and thus upon him. Those charges, however, were unrelated to the Walmart incident. In the case at bar, the following exchange occurred,

> JUROR NO. 84: At the beginning of all this in like the opening arguments, they mentioned something about identity.
>
> THE COURT: Oh, that's a great question. We are not going forward on those charges; identity theft and resisting arrest. But, obviously, you're paying attention.
>
> * * *
>
> JUROR NO. 85: Well, is that the reason we have - - go from Count One to Count Three?
>
> THE COURT: Yes, sir. Absolutely.

1T. at 269-270. Thus, the jury was never told that the charges were removed from their consideration because Buckley had pled guilty. Buckley remained in the case on the same aggravated robbery charge as Gordon.

{¶50} Gordon has failed in his burden to demonstrate a reasonable probability that, but for counsel's failure to move for separate trials, the result of the proceeding would have been different.

B. Whether Gordon was prejudiced by his attorney's failure to object to Bonnie Davis's testimony.

{¶51} As we noted in our disposition of Gordon's second assignment of error, Ms. Davis testified that Gordon should have stopped the driver of the getaway vehicle from attempting to run over a police officer in the trio's attempt to escape after the shoplifting.

{¶52} As we have previously noted, there is little if any probability that the admission of Davis' testimony affected the outcome of the trial.

Gordon has failed in his burden to demonstrate a reasonable probability that, but for counsel's failure to object to Ms. Davis' testimony, the result of the proceeding would have been different.

C. Whether Gordon was prejudiced by his attorney's failure to object to the evidence of Gordon's post-arrest conduct.

{¶53} As we have previously noted in our disposition of Gordon's first assignment of error, Gordon did object to the admission of this testimony. 1T. at 216-222; 245.

{¶54} Accordingly, counsel could not be ineffective in failing to object to the testimony.

Conclusion.

{¶55} Accordingly, because Gordon was not able to demonstrate that he was prejudiced by trial counsel's representation, Gordon's third assignment of error is overruled.

IV.

{¶56} Gordon's fourth and final assignment of error challenges the sufficiency and manifest weight of the evidence that was presented at trial and which resulted in a jury's verdict of guilty. He argues that he was merely along for the ride, and that the evidence did not demonstrate his involvement in the shoplifting and escape scheme.

STANDARD OF APPELLATE REVIEW

{¶57} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses. *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668, 1997–Ohio–355. The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Murphy*, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶ 31. Because the trier of fact sees and hears the witnesses and is particularly competent to decide whether, and to what extent, to credit the testimony of particular witnesses, the appellate court must afford substantial deference to its determinations of credibility. *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶ 20.

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *

> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting 5 Ohio Jurisprudence 3d, Appellate Review*, Section 60, at 191–192 (1978). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer,* 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶ 24.

{¶58} Once the reviewing court finishes its examination, an appellate court may not merely substitute its view for that of the jury, but must find that " 'the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins, supra,* 78 Ohio St.3d at 387, quoting State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721(1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id.

ISSUE FOR APPEAL

A. Whether the trial court clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

1. Sufficiency of the Evidence.

{¶59} Gordon was convicted of aggravated robbery in violation of R.C. 2911.01(A)(1) that provides,

> (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:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
>
> * * *

{¶60} R.C. 2923.03(A)(2) sets forth the elements for complicity and provides that,

> No person, acting with the kind of culpability required for the commission of an offense, shall * * * [aid or abet another in committing the offense [.]

{¶61} With respect to the requirements for a conviction for complicity by aiding and abetting, the Supreme Court of Ohio has stated,

> To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime.

State v Johnson, 93 Ohio St.3d 240, 2001-Ohio-187, 749 N.E.2d 749, at syllabus. "'Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.' (Citations omitted)." *State v.*

Mendoza, 137 Ohio App.3d 336, 342, 738 N.E.2d 822(3rd Dist. 2000), *quoting State v. Stepp*, 117 Ohio App.3d 561, 568–569, 690 N.E.2d 1342(4th Dist. 1997).

{¶62} R.C. 2901.22(B) defines knowingly,

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

{¶63} In the case at bar, Buckley comes out of the Walmart with a large duffel bag filled with merchandise. A uniformed police officer who commanded her to stop was pursuing her. As she arrived at the car, Gordon got out and intervened on her behalf, allowing Buckley to slip out of her coat and the grasp of the police officer and re-enter the vehicle. Gordon got back into the car and the car backed up nearly striking the officer. As the officer broke the driver side window, Gordon did nothing. The car then sped away.

{¶64} In the case at bar, the jury observed video evidence from security camera at Walmart, a police cruiser and a bystander that displayed the events in real time. The jury heard the testimony of five witnesses concerning the actions, verbal commands and actions of each of the parties.

{¶65} Viewing this evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that, at the very least, Gordon had aided and abetted in committing the crime of aggravated robbery. We hold, therefore, that the state met its burden of production regarding aggravated robbery and, accordingly, there was sufficient evidence to support Gordon's conviction.

2. Manifest weight of the evidence.

{¶66} The Ohio Supreme Court has emphasized: " '[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.' " *Eastley v. Volkman*, 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012–Ohio–2179, *quoting Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting 5 Ohio Jurisprudence 3d, Appellate Review*, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of witnesses. *See, e.g., In re Brown*, 9th Dist. No. 21004, 2002–Ohio–3405, ¶ 9, *citing State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967).

{¶67} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.'" *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008–Ohio–6635, ¶ 31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004–Ohio–3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002–Ohio–1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶68} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the trier of

fact may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig,* 10th Dist. Franklin No. 99AP–739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). Indeed, the trier of fact need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP–604, 2003–Ohio–958, ¶ 21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP–1238, 2003–Ohio–2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102 at n.4, 684 N.E.2d 668 (1997).

{¶69} In the case at bar, the jury heard the witnesses, viewed the evidence and heard Gordon's arguments and explanations about his actions. A rational basis exists in the record for crediting the testimony of the state's witnesses because they were simply onlookers with no affiliation toward any of the parties. Further, video evidence was introduced from which the jury could determine for themselves the more credible version of the events.

{¶70} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury

neither lost his way nor created a miscarriage of justice in convicting Gordon of the charge.

{¶71} Based upon the foregoing and the entire record in this matter, we find Gordon's conviction is not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury heard the witnesses, evaluated the evidence, and was convinced of Gordon's guilt.

{¶72} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crime for which Gordon was convicted.

Conclusion

{¶73} Gordon's fourth assignment of error is overruled.

{¶74} The judgment of the Stark County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, Earle, J., concur