[Cite as *State v. Patton*, 2015-Ohio-1866.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-12-1356

Appellee — Trial Court No. CR0201102973

v.

Daurin Patton — **DECISION AND JUDGMENT**

Appellant — Decided: May 15, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Daurin Patton, appeals a December 10, 2012 judgment of conviction and sentence of the Lucas County Court of Common Pleas on two counts of aggravated murder with two accompanying firearms specifications and one count of aggravated robbery. The aggravated murder convictions were for violations of R.C. 2903.01(A) and

(F), unspecified felonies. The accompanying firearm specifications were pursuant to R.C. 2941.145. The aggravated robbery conviction was for a violation of R.C. 2911.01(A)(1), a felony of the first degree. The convictions were pursuant to guilty verdicts returned by a jury at trial in November 2012.

{¶ 2} In the judgment, the trial court sentenced appellant to serve a 10 year prison term on the aggravated robbery conviction and imposed life terms without parole on both aggravated murder convictions. The court ordered that the sentences for the aggravated murders and aggravated robbery be served consecutively to each other. The court merged the two firearm specifications pursuant to R.C. 2929.14(B)(1) and imposed a mandatory and consecutive three-year term of imprisonment on one firearm specification.

{¶ 3} Appellant filed a timely notice of appeal of the trial court judgment to this court.

{¶ 4} The evidence at trial was that Timothy Blair, age 14, and his mother, Veronica Serrano, were shot and killed on November 25, 2011. The shooting occurred outside their residence located at 1357 Page Street, in Toledo. At the time of the shooting, Gary Blair, age 17, was in the house. Timothy was Gary's brother and Veronica, his mother. Gary resided with them at 1357 Page.

{¶ 5} Gary Blair and Lawrence Elliott testified at trial that earlier, on the night of the killings, a black man, dressed all in black, struck Gary in the head with a sawed-off shotgun as Gary and Elliott walked down the 1300 block of Page Street. At the time

neither Gary nor Elliott knew the man. Elliott also testified that the man pointed the shotgun at him and took an almost empty bottle of Jim Beam liquor from him.

{¶ 6} After Veronica Serrano learned of the injury to her son, she confronted the man who struck Gary. An argument followed. At one point Veronica threatened to call police. Multiple witnesses testified at trial that the man in black told her that he would kill her if she called the police. Veronica's other son, Timothy, was with Veronica during the confrontation with the man.

{¶ 7} Veronica did not call police, but others did. There was eye-witness testimony at trial that as a paddy wagon approached Veronica's house, (1) the man in black walked away; (2) that Veronica thereafter spoke to police and stated all was fine; (3) that the man in black returned after police left; and (4) that within minutes the man shot Veronica and Timothy. Both died from their injuries.

{¶ 8} Lawrence Elliott identified appellant at trial as the shooter. Troy Minor, a neighbor living across the street from the victims, testified that he saw the same man, dressed all in black, who had argued with Veronica Serrano before police arrived, return after they left and shoot both victims.

{¶ 9} Gary Blair testified as to what he heard from inside the house:

> I heard, I'm looking to that mother-fucker in the white and gray shirt, and I'm going to kill him. Where's he at? Then my brother said, No, no, no, no, 38. It's my brother. It's all cool.
>
> * * *

Q. Did you see who he was talking to?

A. No.

Q. What did you do in the basement?

A. I hid.

* * *

Q. Did you hear gunshots?

A. Yes.

Q. When?

A. When – when I went ran in the basement.

{¶ 10} Officers Tyson Phalen and Michael Johnson of the Toledo Police Department were the first to respond to the scene. Phalen testified that as they pulled up there was a woman sitting on the stairs to the front porch. A young man was lying face down on the porch. The woman was on the top concrete step to the porch. Officer Phalen testified that she appeared pale and frightened. She had labored, heavy breathing. She stated that she had been shot in the chest and leg. Phalen testified:

> She was terrified. You could tell in her eyes. She was pale, kept saying to us, you know, she was going to die. We were telling her the medical's on the way, trying to keep her calmed down * * * [she] * * * was asking about her son.

{¶ 11} The officers asked the woman who shot her:

We asked the female if she knew who shot her. She said 38. At that point we asked her who 38 was. She said she didn't know his real name but that her son knew who he was. At that point of course we looked at each other like your son's laying on the floor here and it's not looking good.

And she said Gary knows who he is * * * and she said Gary's in the house.

{¶ 12} Multiple witnesses testified at trial that appellant went by a street name—38.

{¶ 13} Appellant asserted an alibi defense at trial through three witnesses. The testimony conflicted with eyewitness trial testimony identifying appellant as the man in black, who committed the theft of the bottle of Jim Beam at gunpoint from Lawrence Elliott and who shot Timothy Blair and Veronica Serrano, causing their deaths.

{¶ 14} Appellant asserts nine assignments of error on appeal:

Assignments of Error

Assignment of Error No. 1. The trial court erred by permitting the state to play the video of two alleged gang members standing with a semi-automatic "assault style" rifle. Patton's constitutional right to confront witnesses was violated and it was improper hearsay.

Assignment of Error No. 2. The trial court erred and abused its discretion through admission of the video, the Russian SKS 45 rifle, gang

evidence and statements made by Serrano and her son were more prejudicial that probative. The video, rifle, and other gang evidence was not relevant.

Assignment of Error No. 3. The state failed to properly authenticate the You Tube video in violation of Evid.R. 901(A). As such, Patton was denied his right to a fair trial.

Assignment of Error No. 4. The trial court erred by allowing the prosecutor to engage in improper impeachment of Patton's alibi witness including an unprosecuted event while she was in junior high school and an allegation in a police report, neither of which resulted in a conviction.

Assignment of Error No. 5. The verdicts were against the manifest weight of the evidence.

Assignment of Error No. 6. The trial court erred by not granting Patton's motion to suppress the out-of-court identification made of Patton from photo arrays. The identifications were made contrary to Ohio statutory law and in violation of his right to due process of law.

Assignment of Error No. 7. Patton did not receive effective assistance of counsel to which he has a Constitutional right.

Assignment of Error No. 8. If this Court agrees with certain assignments of error and holds in favor of Patton, then the state's case must fall due to insufficient evidence.

Assignment of Error No. 9. The prosecutor engaged in a pattern of misconduct that was intentionally designed to prejudice the jury in order to obtain a conviction at all costs.

{¶ 15} We consider appellant's assignments of error out of turn and consider assignment of error No. 6 first. In the assignment of error, appellant contends that the trial court erred in denying his motion to suppress out of court identifications made of him by photo arrays. Appellant contends that the ruling constituted error on two grounds: first that the photo identification procedure used did not comply with Ohio statutory requirements under R.C. 2933.83 and second, use of the out of court identifications denied appellant due process of law.

{¶ 16} Appellate review of a trial court's ruling on a motion to suppress evidence presents mixed questions of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. The Ohio Supreme Court has identified our standard of review:

> [A]n appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539. *Id.*

Photo Identification Issues

{¶ 17} The hearing on the motion to suppress proceeded on November 16, 2012. At the hearing, the state advised the trial court that it would not use evidence of the photo identification of the appellant by Susanne Degler at trial. Accordingly, the motion to suppress was limited to consideration of the admissibility photo identifications of appellant by Gary Blair, Lawrence Elliott and Anthony Blair prior to trial.

{¶ 18} The state used a six-pack array to present photographs for identification rather than using a folder system identification procedure.[1] Appellant argues that the folder system is the preferred system under R.C. 2933.83 and that the trial court erred in failing to suppress identifications by Gary Blair, Lawrence Elliott and Anthony Blair from six-pack arrays.

{¶ 19} The state argues that R.C. 2933.83 does not require use of a folder system rather than six pack array. We agree. This court has held that R.C. 2933.83 does not require use of the folder system. *State v. Winters*, 6th Dist. Lucas No. L-12-1041, 2013-Ohio-2370, ¶ 42; *accord State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2013-Ohio-3722, ¶ 77. Additionally, noncompliance with R.C. 2933.83 alone does not provide an independent ground to suppress. *State v. Johnson*, 6th Dist. Lucas No. L-13-1032, 2014-Ohio-4339, ¶ 11, 13; *State v. Henry*, 6th Dist. Lucas No. L-11-1157, 2012-Ohio-5552, ¶ 46.

[1] A six-pack array presents six photographs on one sheet of paper. The folder system uses individual photographs placed in separate folders in a procedure set forth in R.C. 2933.83(A)(6).

{¶ 20} R.C. 2922.83(C)(3) directs that where evidence of a failure to comply with R.C. 2933.83 "is presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup." The trial court referred to the folder system as the sequential presentation method of photo arrays in its jury instructions and instructed the jury:

> The sequential presentation method uses single photos to be viewed by the witness one at a time.
>
> The six-pack array method displays six photographs at the same time. The law prefers the utilization of the sequential method. Utilization of the six-pack method in and of itself is not impermissible.
>
> The fact that the sequential method was not utilized is a matter which you may properly consider when weighing the reliability and the weights to be given the testimony of any identification which was used in whole or in part from a photo array.

{¶ 21} After the enactment of R.C. 2933.83, the overriding analysis on motions to suppress photo identifications remains whether the identification procedure was "impermissibly suggestive." *Johnson* at ¶ 13; *Henry* at ¶ 46; *see Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). "[W]hen a witness has been confronted with a suspect before trial, due process requires a court to suppress * * * identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and

the identification was unreliable under all the circumstances." *State v. Waddy*, 63 Ohio St.3d 424, 438, 588 N.E.2d 819 (1992), *superseded by constitutional amendment on other grounds*, citing *Neil v. Biggers* and *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

{¶ 22} In *Waddy*, the Ohio Supreme Court identified the two-step analysis. "Under Neil's two-pronged test, the first question is whether the identification procedure was unnecessarily suggestive." *Waddy* at 438. The second "is whether, under all the circumstances, the identification was reliable, i.e., whether suggestive procedures created 'a very substantial likelihood of irreparable misidentification." *Id.* at 439, citing *Simmons v. United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). The court also detailed the five *Neil v. Biggers* factors to consider in determining whether the identification was reliable:

> Key factors are the witness's opportunity to view (in the case of a voice identification, to hear) the defendant during the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the witness's certainty, and the time elapsed between the crime and the identification. *Neil,* 409 U.S. at 199–200, 93 S.Ct. at 382, 34 L.Ed.2d at 411. *Waddy* at 439.

{¶ 23} Toledo police used three separate arrays in conducting out of court photo identifications in this case, lineups 22602A, 22603B, and 22625. Lineups 22602A and

22603B both used a July 3, 2011 photo of appellant, but with appellant's photo placed in different locations on the sheet. Lineup 22625 used a November 28, 2011 photo of appellant.

{¶ 24} Gary Blair and Lawrence Elliott were both presented lineup 22602A on November 26, 2011. Neither identified a suspect. Blair said it could be the individual in photos 4, 5, or 6. Elliott said it was between 5 and 6. Appellant was depicted in photo 5. On that date, Anthony Blair identified appellant from a different array, using lineup 22603B.

{¶ 25} Subsequently both Gary Blair and Elliott were presented with an array different from the original array. On November 28, 2011, Lawrence Elliott identified appellant as the suspect in array 22603B. On December 2, 2011, Gary Blair identified appellant as the suspect in array 22625.

{¶ 26} Appellant objects to use of the 22625 array in Gary Blair's identification of him. He argues that persons appellant identified as potential suspects in the first array (22602A) were not included in the 22625 array. The state responds that the 22625 array depicts a different photograph of appellant than used in the 22602A array and appears with longer hair and more facial hair in his photograph. The state argues that use of the array was appropriate as photographs of other individuals where chosen to depict similarity to appellant's changed appearance.

{¶ 27} Detective Robert Schroeder prepared all three arrays. Detective Schroeder testified that that appellant's appearance changed markedly between July and November,

2011. The second photo array used a more current photo of appellant with longer hair and more facial hair.

{¶ 28} Schroeder testified that he used a computer program to search a database of photographs to secure a block of photographs of men who looked similar to the photographs of appellant for the arrays. The computer program provided a block of 50 similar photographs from which Schroeder chose photographs for use with appellant's photograph for the arrays.

{¶ 29} At the hearing on the motion to suppress, the trial court conducted a detailed review of the photographs used in the photo arrays. It concluded that the arrays included photographs of African-American men of similar age. The backgrounds and shading of the photographs were similar. The men had the same range of complexion, were of similar build, and had generally similar hairstyles and facial hair. None of the photographs depicted distinguishing features. All had fuller lips. The court concluded: "the Court makes the factual finding that here is nothing about the photos selected and the photos that comprise the other individuals that were with Mr. Patton in those photo arrays to be unduly suggestive." We find competent, credible evidence in the record supports that conclusion.

{¶ 30} Appellant also argues that it was possible that Gary Blair and his brother may have interacted concerning the arrays either at the residence or at the police department prior to the photo identifications conducted on December 2, 2011. However there is no evidence to support that contention. Furthermore, Anthony Blair had

previously identified appellant in a photo identification conducted on November 26, 2011. The record reflects that on December 2, 2011, Gary Blair proceeded first and identified appellant's photograph from a different array than viewed by Anthony on November 26.

{¶ 31} Appellant argues that the trial court erred in overruling the motion to suppress because the photo identifications of him by Gary Blair and Elliott were unreliable. Appellant argues both were intoxicated at the time of the events on November 25, 2011, and both gave inconsistent statements and lied to police. Neither identified appellant from the first array. Appellant argues that it was dark out and the perpetrator wore a hoodie, obscuring his face.

{¶ 32} Although the crimes occurred at night, Page Street has street lights. Both Gary Blair and Lawrence Elliott were in close, direct contact with the offender. Both observed the offender in close proximity, threatening them with a shotgun. Blair testified that he was in reach of the gun and attempted to grab it. Witnesses testified that Elliott stood in the street as the gunman pointed the shotgun at his chest. Elliott testified he saw the gunman shoot the victims. These circumstances are of the type that would focus a high degree of attention of the witnesses on the gunman.

{¶ 33} While neither identified appellant when first presented a photo array for identification, they both did at the second. The crime occurred on November 25, 2011 and the identifications occurred within a few days. Elliott identified appellant on

November 28, 2011, with "no doubt." Gary Blair identified appellant on December 2, 2011. Both also made in court identifications of appellant.

{¶ 34} Considering all the circumstances including the *Neil v. Biggers* reliability factors, we conclude that the photo identifications were not impermissibly suggestive and that the identifications were sufficiently reliable to permit admission of evidence of the identifications at trial consistent with due process of law.

{¶ 35} We find assignment of error No. 6 not well-taken.

YouTube Video

{¶ 36} Under assignment of error No 1, appellant argues that the trial court erred by permitting the state to play a video of two alleged gang members with a semi-automatic rifle at trial. Appellant contends that admission of the video violated his Sixth Amendment right to confront witnesses and that the video also constituted inadmissible hearsay.

{¶ 37} The video is less than three minutes in length and was uploaded to YouTube in December 2007. It depicts two young men with an SKS style assault rifle with two ammunition magazine clips. The state used the video at trial as evidence that appellant, as a member of the gang Bagdad Boyz, had access to weapons of the type used to kill Timothy Blair and Veronica Serrano.

{¶ 38} Appellant raises objections to the video on confrontation and hearsay grounds for the first time on appeal. Prior to trial, appellant objected to evidence of gang related activity in a motion in limine on the grounds that the evidence was irrelevant and

more prejudicial than probative. At trial counsel renewed the objection on the same grounds: "Objection, Judge, based on prior objection." Accordingly, appellant waived all but plain error on claimed error challenging the admissibility of the evidence on confrontation and hearsay grounds. *See State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 174.

{¶ 39} The Ohio Supreme Court has identified the standard for noticing plain error:

> First, there must be an error, *i.e.*, a deviation from the legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial. *State v. Eafford*, 132 Ohio St.3d 159, 2012–Ohio–2224, 970 N.E.2d 891, ¶ 11, quoting *State v. Payne*, 114 Ohio St.3d 502, 2007–Ohio–4642, 873 N.E.2d 306, ¶ 16 and *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

{¶ 40} Even where these three prongs are met, notice of plain error is taken "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Eafford* at ¶ 12, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

Confrontation Clause

{¶ 41} The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." In "*Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Confrontation Clause bars "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."

{¶ 42} The state contends that the YouTube video was admitted without sound and, therefore, the court's ruling did not admit any testimonial statement at trial. The record discloses, however, that statements from the video were recited at trial.

{¶ 43} At the hearing on appellant's motion to suppress the video, the trial court originally ordered that the video could be played at trial but excluded all audio, except for references to Bagdad and Bagdad Boyz memberships, and references to the weapon involved in the video.

{¶ 44} At trial, the court approved a different procedure to achieve the same result. The state played the video portion of the recording, without any audio. The state was permitted to question Office Doug Allen of the Toledo Police Department's Gang Task Force concerning statements made in the video within the limited areas of content previously set by the court. The court permitted this procedure for reasons of

"expediency" as a means to enforce the court's limitations on use of audio from the without requiring technical editing of the recording.

{¶ 45} Officer Doug Allen testified that prior to trial he had heard the audio portion of the recording. The officer testified that the two men in the video were doing a rap. The officer testified to the names of the two men in the video and identified them as gang members of the Bagdad Boyz gang. Officer Allen testified further that the individuals in the video identified themselves as "Bagdad" and that they were from the "North." The state also questioned the officer as to statements made in the video about how many of the particular type weapon they had:

> Q. And with respect to that particular weapon, do they indicate how many of these type weapons that they have?
>
> A. They make reference at one point in here that they have a few of them.

{¶ 46} In our view, the fact that the state was permitted to use Officer Allen to voice statements made in the video, as a manner of convenience to avoid editing problems at trial, did not remove the testimonial nature of the court's ruling. The court's ruling permitted introduction into evidence of the out of court statements of the young men, voiced by Officer Allen, that the Bagdad Boyz gang possessed a few SKS automatic rifles at the time of the video. As neither of the young men testified at trial, admitting their out of court statements into evidence at trial denied appellant his Sixth Amendment to confront witnesses against him and constituted an obvious defect in trial proceedings.

Hearsay

{¶ 47} "To constitute hearsay, two elements are needed. First, there must be an out-of-court statement. Second, the statement must be offered to prove the truth of the matter asserted. If either element is not present, the statement is not 'hearsay.'" *State v. Maurer*, 15 Ohio St.3d 239, 262, 473 N.E.2d 768 (1984); see Evid.R. 801(C). The statements by the two young men were out of court statements and the statements were admitted to prove the truth of the matter asserted, namely that the Bagdad Boyz gang possessed a few automatic rifles of the type shown in the video. Accordingly, admitting the statements into evidence at trial was an obvious legal error, as the statements constitute hearsay. Evid.R. 802.

{¶ 48} We conclude, however, that these errors did not rise to the level of plain error, as the admission of the YouTube video did not affect the outcome of the trial. As more fully discussed in our consideration of whether the verdicts were against the manifest weight of the evidence, we conclude that the evidence of appellant's guilt at trial was overwhelming. We find assignment of error No. 1 not well-taken.

{¶ 49} Under assignment of error No. 3, appellant argues that the trial court erred in admitting the YouTube video because the state failed to authenticate the video. Appellant failed to object at trial to admission of the video on authentication grounds. Accordingly, our review of assignment of error No. 3 is limited to plain error.

{¶ 50} We deem the issue moot as a result of the court's determination under assignment of error No. 1, considering a plain error challenge to admission of the video

on the right to confront witnesses and hearsay grounds. Under assignment of error No. 1, we concluded that error in admitting the video into evidence did not rise to the level of plain error. On that basis we also hold any error on authentication grounds in admitting the video also did not constitute plain error.

{¶ 51} We find assignment of error No. 3 not well-taken.

{¶ 52} Under assignment of error No. 2, appellant argues that the trial court erred and abused its discretion in admitting into evidence at trial the YouTube video, the Russian SKS 45 rifle, gang evidence, and statements by the victims, Veronica Serrano and Timothy Blair, on Evid.R. 403(A) grounds that the evidence was more prejudicial than probative. Alternatively, appellant contends that the YouTube video, the SKS rifle, and gang evidence were not relevant.

{¶ 53} "[T]he admission of evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Conway,* 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶ 62, citing *State v. Issa*, 93 Ohio St.3d 49, 64, 752 N.E.2d 904 (2001). An abuse of discretion is demonstrated where the trial court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Admissibility of Victims' Statements

{¶ 54} We consider admissibility of the victims' statements first. Officers Tyson Phalen and Michael Johnson were the first to respond to the scene after the shootings.

Phalen testified that Veronica, when asked if she knew who shot her, stated 38, and that she did not know his real name. The trial court admitted Veronica's statements to Phalen as a dying declaration pursuant to Evid.R. 804(B)(2).

{¶ 55} Gary Blair testified concerning his brother Timothy's response to a threat to kill "that mother-fucker in the white and gray shirt." Timothy responded "No, no, no, no, 38. It's my brother. It's all cool." The state argues that the statement was properly admitted as an excited utterance under Evid.R. 803(2).

{¶ 56} On appeal, appellant argues that the victim statements were more prejudicial than probative and should have been excluded from evidence under Evid.R. 403(A). Evid.R. 403(A) provides: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Appellant argues that the witness statements were unreliable, contending that Veronica did not know appellant and merely repeated what her son said, that it was dark out, and that Timothy was drunk.

{¶ 57} The victims' statements were highly relevant as they identified the shooter. Substantial evidence in the record supports a conclusion that the victims had an extended opportunity to view the shooter that night under circumstances that would focus their attention. Although contact with the shooter was outside, the evidence was that Page Street had street lights and neighbors along the street were able to view events due to street lighting.

{¶ 58} The evidence at trial demonstrated that Veronica Serrano (accompanied by Timothy) confronted the man dressed all in black outside on Page Street after he injured her son Gary that night and argued with him. Tonia Atwell lived on Page Street, knew appellant through work and testified that he was dressed all in black in front of her house that night. She also testified that she heard appellant threaten to kill Veronica if she called police.

{¶ 59} The confrontation with the man dressed all in black was witnessed by multiple neighbors living along Page Street. Troy Minor and Jerry Hamblin lived across the street from the victims. Hamblin testified that the man dressed in black identified himself as "38" during the course of his argument with Veronica. Troy Minor testified that the same man, dressed all in black with a black hoodie, argued with Veronica before police came and returned after they left, shooting both victims. Eye-witness testimony by Lawrence Elliott identified appellant as the man dressed all in black who Veronica confronted on Page Street and as the shooter.

{¶ 60} We conclude that appellant's argument that the probative value of the victims' statements was substantially outweighed by the danger of unfair prejudice is without merit. Substantial credible evidence in the record supports the reliability of the statements.

{¶ 61} We find no abuse of discretion in the trial court's admitting into evidence the dying declaration of Veronica and excited utterance of Timothy.

Additional Objections to YouTube Video

{¶ 62} Appellant argued in the trial court that the YouTube video was inadmissible under Evid.R. 403(A) because the probative value of the video was substantially outweighed by danger of unfair prejudice. Appellant also argued that the video was irrelevant. Under assignment of error No. 2, appellant argues that the trial court abused its discretion on those grounds by admitting the video into evidence at trial. The state argues that the video was relevant to prove that appellant, as a member of the Bagdad Boyz gang, had access to SKS assault rifles at the time of the shooting.

{¶ 63} Appellant argues the evidence of the video was more prejudicial than probative because of the lack of any connection of appellant to the video and the length of time between the video and the shooting. The video was uploaded to YouTube in December 2007. At the hearing on the motion to suppress, the state indicted that it did not know when the video was made. Appellant does not appear in the video.

{¶ 64} Evid.R. 401 defines relevant evidence 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." In *State v. Dawson*, 10th Dist. Franklin No. 00AP-1052, 2001WL1568406, *3 (Dec. 11, 2001), the Tenth District Court of Appeals recognized that evidence that a shotgun had been in the possession of defendant or fellow gang members the day after a murder was relevant "to show that defendant had access to, and may have used the weapon the night before."

Citing *Dawson*, the state argues that the video in this case was relevant to demonstrate that appellant, as a gang member, had access to weapons of the type used to kill Veronica Sorrento and Timothy Blair.

{¶ 65} We find the decision in *Dawson* persuasive in recognizing that evidence that a gang is in possession of weapons is relevant to show that a defendant member of the gang had access to such weapons. We find no abuse of discretion of the trial court in its overruling of appellant's objection to the YouTube video on relevancy grounds.

{¶ 66} We distinguish *Dawson*, however, on the facts with respect to the issue of whether such evidence is more prejudicial than probative in this case under Evid.R. 403(A). Unlike in *Dawson*, the YouTube video in this case does not depict access of the gang to weapons at or near the time of the offense. The video was uploaded to YouTube in this case roughly four years prior to the shootings. In our view, evidence that the gang had access to a few assault rifles in December 2007, is of little probative value in showing gang access to the weapons roughly four years later when the shootings occurred.

{¶ 67} We recognize the discretion afforded trial courts in balancing the probative value of evidence against the danger of unfair prejudice to the defendant in considering objections to evidence on Evid.R. 403(A) grounds. *See State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 171. Appellate review of a trial court ruling on an objection to the admissibility of evidence on Evid.R. 403(A) grounds is under an abuse of discretion standard. *Id.*

{¶ 68} In our view, the evidence of possession of a few semi-automatic rifles by the Bagdad Boyz gang nearly four years prior to the shootings in this case is so remote in time that it carries little probative value in demonstrating the availability of such weapons to members of the gang at the time the shootings occurred. In our view, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant.

{¶ 69} We conclude that the trial court abused its discretion and erred in overruling appellant's objection to the YouTube video on Evid.R. 403(A) grounds.

{¶ 70} Appellant argues that the YouTube video, considered as other acts evidence, was also inadmissible under Evid.R. 404(B) due to the time differential between the video and shootings and the lack of evidence tying appellant to the video. In view of our ruling on Evid.R. 403(A) grounds, we find the issue moot.

{¶ 71} We next consider whether the error was harmless. In *State v. Morris*, 141 Ohio St.2d 399, 2014-Ohio-5052, 24 N.E.2d 1153, the Ohio Supreme Court considered "the harmless-error rule in the context of a defendant's claim that the erroneous admission of certain evidence require a new trial." *State v. Harris*, Slip Opinion No. 2015-Ohio-166, ¶ 37. In *Harris*, the Court summarized its analysis:

> Recently, in *Morris*, a four-to-three decision, we examined the harmless-error rule in the context of a defendant's claim that the erroneous admission of certain evidence required a new trial. In that decision, the majority dispensed with the distinction between constitutional and

nonconstitutional errors under Crim.R. 52(A). *Id.* at ¶ 22–24. In its place, the following analysis was established to guide appellate courts in determining whether an error has affected the substantial rights of a defendant, thereby requiring a new trial. First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. *Id.* at ¶ 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. *Id.* at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt. *Id.* at ¶ 29, 33.

{¶ 72} We have reviewed the record and conclude that the admission into evidence of the YouTube video did not prejudice appellant. It did not have an impact on the jury verdicts. Even without the video, appellant's gang membership was in evidence on other grounds.

{¶ 73} The Ohio Supreme Court has recognized that the erroneous admission of evidence at trial is "harmless 'beyond a reasonable doubt' if the remaining evidence alone comprises 'overwhelming' proof of the defendant's guilt. *Harrington v. California* (1969), 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284." *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983). In our view, there was overwhelming evidence of appellant's guilt from eye-witness testimony at trial and statements from the two victims themselves -- the dying declaration by Veronica Serrano and the excited

utterance by Timothy Blair made shortly before his death. Eye-witnesses included not only individuals directly confronted by appellant that night but also neighbors up and down the 1300 block of Page Street who testified as to what they saw or heard outside. Accordingly we conclude that the error in admitting the YouTube video in evidence was harmless beyond a reasonable doubt.

{¶ 74} We reach the same conclusion after excising the YouTube video from consideration and weighing the remaining evidence alone. The remaining evidence alone provides overwhelming evidence of appellant's guilt and considered alone establishes appellant's guilt beyond a reasonable doubt.

{¶ 75} Accordingly, we conclude the admission into evidence of the YouTube video at trial did not affect the substantial rights of appellant and was harmless error.

SKS 43 Rifle

{¶ 76} Appellant also asserts trial court erred in admitting an SKS 45 Rifle into evidence at trial. Appellant argues that the rifle is irrelevant under Evid.R. 401 because there is no link between it and the murder weapon. The objection was first made in a motion in limine and the objection was renewed at trial.

{¶ 77} Dr. Diane Scala-Barnett, the Lucas County Deputy Coroner, conducted autopsies of both victims and testified at trial that the gunshot wounds to the victims were not caused by either a handgun or shotgun. Police found spent 7.62 by 39 millimeter shell casings in front of Veronica Serrano's house and nearby in the front yard of the

house next door. Officer William Goetz of the Toledo Police Department testified that the shell casings were found within the ejection pattern of a clip fed semi-automatic rifle, measured from where the shooter stood.

{¶ 78} On April 25, 2012 (five months after the homicides), Toledo police officers recovered an SKS-47 rifle found by a maintenance man outside property located at Chestnut and Ontario Streets in Toledo. Todd Wharton of the Ohio Bureau of Criminal Identification and Investigation testified at trial concerning his examination of the recovered rifle and testing of it. Wharton testified that the rifle was a semi-automatic SKS-47 rifle and shoots a 7.62 by 39 millimeter (.30 caliber) bullet. Wharton testified that bullet fragments secured at the autopsy of one of the victims were also from a .30 caliber bullet.

{¶ 79} Wharton was unable to scientifically positively identify the weapon as the murder weapon through testing of the rifle and examination of shell casings found at the scene as well as bullet fragments recovered at the house and at autopsy. He also could not exclude it.

{¶ 80} The trial court acknowledged that the BCI expert testified that he could not testify that the particular SKS rifle offered in evidence was "the exact weapon that fired the projectiles at issue." The court noted that the testimony at trial was that it was an uncommon weapon and used the same type ammunition as used in these homicides. The court ruled nevertheless that the rifle has some probative value under Evid.R. 401 and

admitted it into evidence. In making its ruling, the trial court specifically found that admitting the rifle into evidence would not cause jury confusion or mislead the jury.

{¶ 81} The state argues that the trial court's ruling does not reflect an unreasonable, arbitrary, or unconscionable attitude required to find an abuse of discretion.

{¶ 82} At best, the evidence demonstrated that an SKS semi-automatic rifle of this type may have been the murder weapon, but that evidence was lacking to prove that this particular rifle was the murder weapon. We find no abuse of discretion in the trial court's determination that the rifle may have some limited probative value to support the state's case, if only as a sample of the uncommon weapon at issue. We find no abuse of discretion in the trial court's ruling admitting the rifle into evidence.

Gang Related Evidence

{¶ 83} Appellant includes a general objection to admission of gang evidence at trial under assignment of error No. 2. Although appellant was indicted for participating in a criminal gang in violation of R.C. 2923.41, the court severed the charges and proceeded to trial on the murder and robbery charges alone. Nevertheless, the trial court, over objection, admitted evidence at trial that appellant was a member of the Bagdad Boyz gang.

{¶ 84} Appellant argues that gang evidence was without probative value and not relevant under Evid.R. 401. Under Evid.R. 403(A) appellant argues that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice,

confusion of issues, or misleading of the jury. Appellant also argues gang membership evidence was inadmissible character evidence under Evid.R. 404.

{¶ 85} In *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, the Ohio Supreme Court considered objections to the admissibility of evidence of gang membership of the defendant in a criminal case. In the decision, the court recognized the broad discretion afforded trial court's in determining whether the danger of unfair prejudice outweighs the probative value of such evidence under Evid.R. 403(A) and also that the trial court's determination on the issue should not be reversed on appeal absent "a clear abuse of that discretion." *Id.* at ¶171.

{¶ 86} The state argues that evidence of appellant's membership in a gang was relevant to explain lack of cooperation of trial witnesses with police in the investigation of the crimes, particularly where the credibility of a prosecution witness is attacked on grounds of an initial failure to cooperate with police, citing *State v. Dawson*, 10th Dist. Franklin No. 00AP-1052, 2001 WL1568406, *3 (Dec. 11, 2001).

{¶ 87} In *Dawson*, the defendant maintained that evidence of his association with the X-Clan street gang was inadmissible at trial under Evid.R. 403(A), 404(B) and R.C. 2945.59 in a prosecution on multiple counts of aggravated murder, attempted aggravated murder, and felonious assault and one count of aggravated burglary. In its judgment, the Court of Appeals concluded that the evidence was relevant to explain the initial failure of prosecution witnesses to cooperate in the police investigation into the crimes:

> While evidence of defendant's reputation and affiliation with the "X Clan" would have been inadmissible if its only purpose was to establish that defendant committed these crimes, *State v. Kelly* (Aug. 22, 2000), Franklin App. No. 99AP-1302, unreported, in this case, the challenged testimony was relevant for a number of other reasons. First, most of the eyewitnesses testified that they did not initially cooperate with the investigation of the shooting, and did not identify defendant as the individual who murdered McKinney until many years later because they were afraid of defendant and of retaliation by him or other members of the "X Clan." Indeed, the trial court made it perfectly clear that such evidence would be highly relevant if defendant attacked a witness's credibility on this basis. When defendant did so, the trial court properly allowed the state to use the challenged testimony to explain why the witnesses had been afraid. *Id.* at *3.

{¶ 88} The Court of Appeals concluded that the trial court did not abuse its discretion in admitting the evidence of gang membership over objections on Evid.R. 403(A) grounds. *Id.* at *4.

{¶ 89} In this case, Lawrence Elliott was a key prosecution witness at trial. Elliott identified appellant as the individual he saw shoot both victims and as the individual who

took his bottle of liquor at gunpoint. Elliott also testified that earlier on the night of the shootings, appellant had also threatened to kill Veronica Serrano if she called police.

{¶ 90} Elliott did not, however, initially cooperate with police in the investigation of the murders. He testified at trial that he did not tell Detective Schroeder, when he first spoke to him, that he actually saw the shootings, because he was "scared."

{¶ 91} Elliott testified that the first time he was presented a photo array he identified the suspect as either #5 or #6 in the photo array, when he actually knew at the time the suspect was #5 in the array, appellant. Elliott testified that he did not identify appellant from the first photo array "[b]ecause I was scared."

{¶ 92} On cross-examination at trial, Elliott admitted that he initially repeatedly lied to police in their investigation. On the night of the murders, Elliott told police he was not there and did not know anything. On cross-examination, Elliott testified he lied to police when he stated he did not see the shootings. He testified he also lied to police as to how he learned appellant's street name.

{¶ 93} Witness Jerry Hamblin refused to honor a subpoena to appear to testify as a prosecution witness at trial and was compelled to testify by the court. Hamblin testified that she did not want to testify and was scared for her safety and the safety of her children. Hamblin also provided key testimony in support of the state's case against appellant.

{¶ 94} Both Hamblin and Elliott resided in the 1300 block of Page Street. The court permitted introduction of evidence at trial that appellant was a member of the Bagdad Boyz gang and that the gang was active in the neighborhood.

{¶ 95} We find the Tenth District Court of Appeals analysis in *Dawson* applicable and persuasive. We conclude that evidence of gang membership was relevant to explain the failure of Lawrence Elliott to originally cooperate with police in their investigation, including the failure of Elliott to identify appellant in the first photo array and to permit the state to rebut challenges to Elliott's credibility raised in cross-examination.

{¶ 96} We find no abuse of discretion in the trial court's overruling objections to admissibility of evidence of gang membership under Evid.R. 403(A). To the extent appellant treats the issue as one concerning the admissibility of other acts evidence under Evid.R.404 (B), we conclude that the evidence was properly admitted as relevant evidence under Evid.R. 401 and 404(B), admitted to rebut challenges to the credibility of Elliott as outlined above.

{¶ 97} We find appellant's challenges to the admissibility of evidence of gang membership under Evid.R. 403(A) and 404(B) to be without merit.

{¶ 98} We find assignment of error No. 2, not well-taken.

Cross-Examination of Alibi Witness

{¶ 99} In assignment of error No. 4, appellant argues that the trial court erred in permitting improper impeachment of appellant's alibi witness, Shala Agee. The assignment of error specifically objects to cross-examination concerning "an

unprosecuted event while she was in junior high school and an allegation in a police report, neither of which resulted in a conviction."

{¶ 100} "'The scope of cross-examination and the admissibility of evidence during cross-examination are matters which rest in the sound discretion of the trial judge.'" *State v. Lundgren*, 73 Ohio St.3d 474, 487, 653 N.E.2d 304 (1995), quoting *O'Brien v. Angley*, 63 Ohio St.2d 159, 163, 407 N.E.2d 490 (1980). Accordingly, the standard of review of trial court orders with respect to the scope of cross-examination and admissibility of evidence during cross-examination is the abuse of discretion standard. *O'Brien* at 163; *State v. Hollowell*, 6th Dist. Wood No. WD-12-072, 2014-Ohio-1142, ¶ 28. An abuse of discretion connotes that the trial court's attitude is arbitrary, unreasonable, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

{¶ 101} Appellant gave a statement to Detective Schroeder on November 28, 2011. An audio-visual recording of portions of the statement was admitted in evidence at trial. In the interview, appellant stated that he was with Dominique Gordon at her residence on Ottawa Drive on the night of the shootings. Appellant stated that he was emotional over the death of a friend, Dominique understood, and she was taking care of him that night. Gordon testified at trial, however, that appellant left her residence at 7:00 p.m. and did not return that night because she was sick.

{¶ 102} Shala Agee testified as an alibi witness for appellant at trial. Shala testified that on the night of the shootings appellant was with her at 2508 Lagrange Street in Toledo all night, beginning at 9:30 p.m. On cross-examination, Shala testified that she

had once resided at 2115 Mulberry, a block away from the corner store. Questioning as to her knowledge of gangs in the area followed:

Prosecutor: You know that that's – I mean, that's gang territory, isn't it?

A. I don't know. The –

Q. You don't know?

A. No. I mean I'm from Sandusky, Ohio. I don't know nothing about no gang areas. I just live over there.

Q. Oh, really?

A. Yeah.

Q. You went to Leverette High School or Junior High, didn't you?

A. Yes, I did.

Q. And you were pulled in when you were 15 years old for wearing gang memorabilia in Bloods, weren't you?

Mr. Dech: Objection, Judge.

The Court: Approach.

(The following discussion was held at the bench.)

The Court: Basis?

Mr. Dech: It happened when she was a juvenile. She was pulled in, and I believe it was disciplined. I don't think would be admissible as it related to that.

Mr. Bahner: It's impeachment evidence.

The Court: She just said she doesn't know anything about no gangs. So he can – this is cross-examination of your witness. He may inquire.

{¶ 103} Further questioning of Shala Agee followed in which she denied any recollection about an incident concerning her wearing gang colors as a youth at school and maintained she lacked any knowledge of gangs. Ultimately, however, she admitted that the area where she had lived, Mulberry and Page, was a known gang area. The witness denied knowing whether the appellant was a gang member.

{¶ 104} Appellant argues that the cross-examination of Shala Agee concerning her knowledge of gangs in the Mulberry and Page neighborhood and cross-examination as to an incident in junior high school was improper. Evid.R. 608 concerns admissibility of evidence of character and conduct of a witness. Evid.R. 608(B) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid. R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

{¶ 105} The Ohio Supreme Court has recognized that "Evid.R. 608(B) allows, in the trial court's discretion, cross-examination on specific instances of conduct "if clearly probative of truthfulness or untruthfulness." *State v. Boggs,* 63 Ohio St.3d 418, 588 N.E.2d 813 (1992), paragraph one of the syllabus.

{¶ 106} We find no abuse of discretion in the trial court's permitting cross-examination of Shala Agee concerning a prior incident when she was age 15 concerning her wearing Bloods gang memorabilia at school. The questioning was directly related to impeaching the witness' truthfulness and credibility concerning her testimony that she lacked any knowledge about gangs. Ultimately Agee testified that she knew the area was Bloods gang territory.

{¶ 107} Appellant also argues that the prosecutor improperly questioned Shala Agee as to whether she knew that the appellant had been convicted "for trafficking in drugs." Counsel for appellant objected to the question at trial and the court sustained the objection, and instructed the jury to disregard. The state argues that appellant cannot claim error on appeal to objections to questions that were sustained at trial and the jury instructed to disregard. The state also argues that appellant suffered no prejudice because Shala Agee testified on direct that appellant sold drugs -- marijuana.

{¶ 108} We find this claimed error to be without merit. Generally, a defendant "cannot predicate error on objections the trial court sustained." *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 177, quoting, *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 162. Furthermore Shala Agee

testified on direct that she met appellant three weeks before the killings and that appellant would come over almost every morning. She testified at trial that "he used to sell Lao. So he would come over and smoke with me every morning." [Agee testified that Lao is a high grade of marijuana.]

{¶ 109} We conclude that the general rule applies. Counsel objected to the question, the court sustained the objection, and the court directed the jury to disregard. As the fact that appellant sold illegal drugs was already in evidence on direct by defense counsel, we conclude the nature of the question alone does not require a different result.

{¶ 110} Appellant argues next that Shala Agee was improperly and repeatedly attacked by the state in cross-examination as a bad mother. Appellant raised no objection to questioning at trial on those grounds. Accordingly we limit our consideration on appeal to whether the questioning constitutes plain error.

{¶ 111} On direct, Shala testified that she did not have custody of her daughter and remembered Black Friday 2011 (the night of the killings) in part because her daughter (age five at the time of trial) was with her that weekend. Agee also testified on direct that she spent the night smoking marijuana with appellant and others.

{¶ 112} On cross-examination the state questioned Agee on whether she in fact "decided to spend time with a gang member and a bunch people (sic) that you don't know and smoke weed and do drugs in your house as opposed to spending time with the daughter that you don't have custody of; is that correct?"

{¶ 113} In our view, this line of questioning was directed to show that Agee did not spend the night with appellant and others doing drugs and that her testimony providing an alibi was false. We find appellant's objection to the questioning to be without merit.

{¶ 114} Later in cross-examination, the state questioned Agee on whether she smoked crack cocaine that night and Agee testified no. The state followed with questioning concerning an incident in April 2012:

> Q. On April of this year – you'll have it in a moment, sir – you called the police department and reported that you were assaulted when you were with a 47-year-old white male because you were smoking marijuana and crack cocaine and that you were about to have sexual intercourse with him when he said that you tried to rob him, correct?
>
> A. No that's not correct.

{¶ 115} We agree that the questioning concerning an April 2012 incident was improper on multiple grounds. The questioning was inflammatory and largely irrelevant. However, appellant raised no objection at trial. Further, Agee withstood the questioning and provided a detailed response. Agee testified in detail as to inaccuracies of facts assumed in the question and unreliability of the police report on the incident, including the failure of the investigating detective to take her statement.

{¶ 116} In our view, appellant suffered no significant prejudice from the questioning concerning the April 2012 incident. Accordingly, we conclude that the questioning did not rise to the level of plain error.

{¶ 117} We find assignment of error No. 4, not well-taken.

Manifest Weight of the Evidence

{¶ 118} Under assignment of error No. 5, appellant contends that the verdicts were against the manifest weight of the evidence. Where it is claimed that a verdict is against the manifest weight of the evidence, an appellate court acts as a "thirteenth juror," weighs the evidence, and may disagree with a factfinder's conclusions on conflicting testimony. *State v. Thompkins,* 78 Ohio St.3d. 380, 387, 678 N.E.2d 541 (1997); *State v. Lee,* 6th Dist. Lucas No. L–06–1384, 2008–Ohio–253, ¶ 12. In *Thompkins,* the Ohio Supreme Court instructs:

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and new trial ordered. *Thompkins* at 387, 678 N.E.2d 541, quoting with approval, *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st. Dist.1983).

{¶ 119} Reversals on this ground are granted "only in the exceptional case in which the evidence weighs heavily against conviction." *Id.* There is "a presumption that

the findings of the trier-of-fact were indeed correct." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Fundamental to the analysis is that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 120} Appellant argues that the evidence at trial was conflicting and muddled, that forensic evidence of appellant's guilt was lacking, and that witnesses made multiple misstatements to police. Appellant contends that an objective review of the evidence does not support the convictions.

{¶ 121} Lawrence Elliott testified at trial that he originally did not cooperate with police and lied to them in their investigation. He originally denied to police that he had knowledge of the shootings. He testified at trial that he intentionally failed to identify appellant when presented with the first photo array. Nevertheless, Elliott identified appellant at trial and testified extensively against appellant. Elliott testified at trial that his original failed identification by photo array and his false statements to police were made because he was afraid to cooperate with police.

{¶ 122} Appellant also argues that Elliott and Gary Blair were both drunk and unreliable witnesses. Gary Blair failed to identify appellant in the first photo array he was presented.

{¶ 123} We do not find that the jury lost its way in resolving credibility issues and conflicts in evidence in rendering its verdicts. With respect to Elliott and Gary Blair, their trial testimony is supported by evidence a group of neighbors on Page Street, a motorist, and statements by the victims themselves.

Identity of Shooter

{¶ 124} Our review of the record demonstrates that the testimony or statements from four individuals who saw the shootings were presented at trial. Veronica Serrano made a dying declaration that the shooter was "38." Timothy Blair made an excited utterance, after hearing a threat to kill his brother Gary. Timothy called out "No, no, no, no, 38. It's my brother. It's all cool." The shootings followed. Lawrence Elliott testified he saw the shootings and identified appellant as the shooter at trial and also identified appellant in a photo array before trial.

{¶ 125} Troy Minor lived with his wife, Jerry Hamblin, across the street from Veronica Serrano on Page Street. Minor testified that he saw a man dressed all in black shoot both Veronica and Timothy. Minor also testified that the shooter was the same man, dressed all in black, who argued with Veronica earlier before police arrived, and that Minor saw the man leave as police approached and return later and shoot the victims.

{¶ 126} Jerry Hamblin testified that the man arguing with Veronica outside identified himself. She testified that the man stated in his argument with Veronica Serrano: "I'm 38, mother-fucker, while he's out there with a shotgun." She described the man was wearing a black hoodie and black pants.

{¶ 127} Tonia Atwell was another neighbor on Page Street who testified at trial. Atwell testified that she resided at 1331 Page. Susanna Degler and Lawrence Elliott resided across the street at 1334 Page.

{¶ 128} Atwell testified that she knew appellant through her work as a cook at the Express Carryout, located at the corner of Mulberry and Page. According to Atwell, appellant always ordered the same breakfast sandwich and she named the sandwich after him. Atwell testified she knew appellant as "38," but did not know his "real" name. Multiple other witnesses also testified that appellant went by the name "38."

{¶ 129} Atwell testified that she also knew Veronica Serrano and Timothy Blair and that she heard Timothy Blair and appellant argue outside that night. Timothy was arguing "why you hitting my brother." Atwell asked appellant to go home. She saw Gary Blair outside holding his head. Atwell also heard appellant argue with Veronica Serrano. According to Atwell, appellant stated:

> To go back in the house and stay out of it. Or Veronica said, you know tell me what you said. Why you hit my son? I'm going to call the cops. And he said if you call the cops I'm going to kill your ass or something.

{¶ 130} Atwell first saw appellant at a candlelight vigil up the street and later outside on the street in front of her house that night. She testified that appellant was wearing a black jogging suit and black hoodie that night.

{¶ 131} Gary Blair identified appellant at trial and in a photo array before trial. He testified that appellant was dressed all in black on the night of the shootings when he struck him on the left side of his head with a shotgun while on Page Street, cutting his left ear. Gary Blair also testified concerning what he heard from inside his family's house before the shootings including Timothy's excited utterance.

Aggravated Robbery

{¶ 132} Lawrence Elliott testified to appellant's taking what little was left in a bottle of Jim Beam liquor at gunpoint from him that night on the street. Sara King and Susanna Degler both testified to seeing a man dressed all in black holding a shotgun to Elliott's chest as they drove up to 1334 Page Street.

{¶ 133} Degler testified that there were three men in the street as they pulled up—Elliott, Gary Blair, and the man dressed all in black. She also testified that the man dressed in black had a bottle of liquor, and that she saw later that Gary was bleeding. Atwell also testified that she saw appellant holding a bottle of liquor outside that night.

{¶ 134} In our view, the record includes competent, credible evidence supporting the jury's verdicts that appellant committed the aggravated murders of Veronica Serrano and Timothy Blair and the aggravated robbery of Lawrence Elliott. We conclude that the verdicts are not against the manifest weight of the evidence.

{¶ 135} We find assignment of error No. 5 not well-taken.

Sufficiency of the Evidence

{¶ 136} Under Assignment of Error No. 8, appellant contends that his convictions are not supported by sufficient evidence. Appellant was convicted of one count of aggravated robbery, a violation of R.C. 2911.01(A)(1), and two counts of aggravated murder, a violation of R.C. 2903.01(A) and (F). Both aggravated murder convictions included accompanying firearm specifications under R.C. 2941.145, which the court merged at sentencing.

{¶ 137} Sufficiency of the evidence is "'that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support a jury verdict as a matter of law.'" *State v. Thompkins,* 78 Ohio St.3d at 386, 678 N.E.2d 541, quoting Black's Law Dictionary 1433 (6 Ed.1990). In *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), the Ohio Supreme Court outlined the analysis required to apply this standard:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.) *Id.* at paragraph two of the syllabus.

{¶ 138} We consider the convictions for aggravated murder first. R.C. 2903.01 provides in pertinent part:

> (A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.
>
> * * *
>
> (F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

{¶ 139} The aggravated murder counts included R.C. 2941.145 firearm specifications. The firearm specification requires evidence "that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." R.C. 2941.145(A).

{¶ 140} Multiple witnesses testified at trial concerning the identity and conduct of a man dressed all in black outside on Page Street on the night of November 15, 2011. The evidence was that Veronica Serrano and her son, Timothy Blair, were shot by a firearm outside their residence at 1357 Page Street that night and died as a result of injuries from the shootings.

{¶ 141} Lawrence Elliott testified he saw the shootings and identified appellant as the shooter at trial. Troy Minor, a neighbor living across the street, testified that he saw the same man in black argue with Veronica Serrano outside 1357 Page Street that night, saw the man leave when police approached, and saw him return later and shoot both Serrano and her son, Timothy Blair there.

{¶ 142} Multiple witnesses testified that appellant went by a street name of "38." The evidence at trial was that Veronica Serrano made a dying declaration that the shooter was "38." The evidence at trial included a statement by Timothy Blair, an excited utterance made after hearing a threat to kill his brother Gary. Timothy called out "No, no, no, no, 38. It's my brother. It's all cool." The shootings followed. Jerry Hamblin, the wife of Troy Minor, testified that the man arguing with Veronica Serrano across the street that night identified himself. Hamblin testified that the man said: "I'm 38, mother-fucker, while he's out there with a shotgun."

{¶ 143} Tonia Atwell, who lived up the street at 1331 Page, testified that she knew appellant, that she spoke to him, and that he was dressed all in black that night. Atwell also testified that appellant threatened to kill Veronica Serrano if she called police. Other witnesses at trial also testified to a threat by appellant to kill Serrano if she called police.

{¶ 144} Viewing the evidence at trial in a light most favorable to the state, we conclude that it was reasonable for the trier of fact to conclude beyond a reasonable doubt that appellant purposely, and with prior calculation and design, caused the deaths of Veronica Serrano and Timothy Blair and used a firearm to commit the offenses. We

conclude that there was sufficient evidence at trial to convict appellant of two counts of aggravated murder, violations of R.C. 2903.01(A) and (F) and also find the accompanying firearm specifications under R.C. 2941.145.

{¶ 145} With respect to the conviction of aggravated robbery, a violation of R.C. 2911.01(A)(1), the statute provides:

> 2911.01 Aggravated Robbery
>
> (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;

{¶ 146} Lawrence Elliott testified that appellant took a mostly empty bottle of Jim Beam liquor from him at gunpoint on November 11, 2011. Elliott testified that appellant pointed a shotgun at his chest.

{¶ 147} Sara King and Susanna Degler testified that they stumbled on the incident as Sara King dropped Susanna Degler off at home after work. Degler testified at trial that three men were in the street as they pulled up – Elliott, Gary Blair, and a man dressed all in black with a shotgun pointed at Elliot's chest. Sara King saw one of the men give a bottle of alcohol to a man dressed all in black with a gun in his hand. King testified that the gun looked like a shotgun and that the gunman put the bottle in his coat.

{¶ 148} Viewing the evidence at trial in a light most favorable to the state, we conclude that it was reasonable for the trier of fact to conclude beyond a reasonable doubt that appellant in committing a theft offense had a deadly weapon on or about his person and displayed the weapon or brandished it in committing the offense. We conclude that there was sufficient evidence at trial to convict appellant of the offense of aggravated robbery, a violation of R.C. 2911.01(A)(1).

{¶ 149} We find assignment of error No. 8 not well-taken.

{¶ 150} In assignment of error No. 9, appellant claims prosecutorial misconduct in two areas: (1) a statement by the prosecutor that appellant had been convicted of drug trafficking in cross-examination of appellant's alibi witness and (2) the prosecutor's remarks in closing argument.

{¶ 151} "The test for prosecutorial misconduct is whether the remarks were improper, and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St.3d 13, 14–15, 14 OBR 317, 318, 470 N.E.2d 883, 885." *State v. Ely*, 77 Ohio St.3d 174, 186-187, 672 N.E.2d 640 (1966). "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 92, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

{¶ 152} Factors to be considered in determining prejudice include: "(1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the

defendant." *State v. Binder*, 6th Dist. Ottawa No. OT-99-031, 2000 WL 145116, *2 (Feb. 11, 2000), citing *State v. Braxton*, 102 Ohio App.3d 28, 41, 656 N.E.2d 970 (8th Dist.1995).

{¶ 153} Appellant's argument begins with the prosecutor's cross-examination of appellant's alibi witness concerning whether she knew appellant had been convicted of drug trafficking. We addressed the issue in our consideration of appellant's fourth assignment of error. Appellant's remaining claims of prosecutorial misconduct all concern remarks made by the prosecutor during closing argument.

{¶ 154} Appellant acknowledges that he waived all but plain error on these claims. Plain error does not exist unless, but for the error, the trial's outcome would have been different. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978); *State v. Hurst*, 6th Dist. Fulton No. F-11-010, 2012-Ohio-2549, ¶ 9. We consider closing argument in its entirety in determining whether prosecutorial remarks were prejudicial. *State v. Slagle*, 65 Ohio St.3d 597, 607, 605 N.E.2d 916 (1992); *State v. Moritz*, 63 Ohio St.2d 150, 157, 407 N.E.2d 1268 (1980).

{¶ 155} Both the prosecution and defense are afforded considerable latitude in closing argument in commenting on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990). "It is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused." *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984).

{¶ 156} Appellant argues that the prosecutor improperly vouched for Lawrence Elliott "telling jurors with no evidence to support it in the record that he lied to the police and offered multiple stories because he was afraid of Patton." The state argues that the comment was not an expression of opinion by the prosecutor but a reasonable summary of testimony at trial:

Prosecutor: You weren't completely truthful with Detective Schroeder the first time you talked to him, were you?

Elliott: No.

Q. Why is that?

A. Because the guy was still on the loose, and I was feared for my family's safety.

Q. Did you tell the Detective Schroeder that you actually saw the shooting?

A. No.

* * *

Q. Why not?

A. 'Cause I was scared.

{¶ 157} The questioning continued to where the prosecutor questioned Elliott concerning his response, when presented with the first photo array:

Q. And what did you tell him it was?

A. I told him it was between 5 and 6.

Q. But you knew who it was?

A. Correct.

Q. Why didn't you tell him?

A. Because I was scared.

{¶ 158} We find that the prosecutor's statements in closing argument attributing fear of appellant as the reason for lying and providing multiple stories to police were not improper because they constitute a fair description of Elliot's testimony at trial.

{¶ 159} Appellant next argues that the prosecutor improperly vouched that Lawrence Elliott ("Bubby") told the truth. Placing the remarks in context, Elliott testified at trial that in the past he had been convicted of multiple felonies including a conviction for gross sexual imposition. In closing argument the prosecutor commented:

> How do you know if Bubby told you the truth? First and foremost the laws of Ohio apply to everyone. Prostitutes can get raped. Drug dealers can be robbed. And you took an oath. And sex offenders can actually tell the truth. Corroboration. He took an oath.
>
> Corroboration. If a witness got on the witness stand and told you on this date I was shot in my right shoulder, and I went to the hospital, you would have to listen to that witness, use your common sense and determine whether or not that witness is telling you the truth.

{¶ 160} In our view, the statement argues that Elliott, a convicted sex offender, can actually tell the truth, not that he did. The statement further provides that Elliott took

an oath as a witness and the jury would need to use its common sense and determine for itself whether Elliott testified to the truth. We find the prosecutor's comment did not constitute an expression of opinion as to Elliott's credibility and was not improper.

{¶ 161} Appellant next objects to the prosecutor's statements related to the discovery of a shotgun by police through decoding words used by appellant in a phone call he made from jail. The comments described how Officer William White was able to decode words used by appellant in the phone call and use them to provide step by step instructions to recover a shotgun. In the objection appellant contends that the remarks were not supported by the evidence because Officer White did not testify at trial.

{¶ 162} However, Officer White did testify at trial, and testified as described. A recording of the phone call is in evidence. Officer White testified that he was familiar with nicknames used in the call, and that he and his partner decoded language in the call to discover step by step instructions to locate a shotgun. He testified that they followed the instructions and recovered the shotgun at 1306 Noble Street in Toledo.

{¶ 163} We find that the comments of the prosecutor constituted fair comment on facts in evidence. To the extent appellant also objects to the prosecutor's statement that appellant "Didn't realize we were listening," we also find that statement to be fair comment on the evidence.

{¶ 164} Appellant states that the prosecutor "took great liberties" in commenting on DNA evidence with respect to DNA testing of the Jim Beam bottle, without further

elaboration. The state argues that the statements by the prosecutor concerning DNA test results for the Jim Beam bottle were consistent with expert testimony on DNA test results at trial.

{¶ 165} Raymond Peoples, a forensic scientist for BCI testified at trial concerning DNA testing of the Jim Beam bottle. Peoples testified that the DNA profile from the swab from the Jim Beam bottle "is a mixture of at least three individuals, the major profile is consistent with Veronica Serrano, and the minor profile is consistent with contributions from Daurin Patton and Lawrence Elliott." Further, the testing concluded that "Daurin Patton cannot be excluded as a possible contributor to the DNA from the swab from the Jim Beam bottle," and that one in 100 unrelated individuals cannot be excluded as possible contributors.

{¶ 166} Peoples testified that DNA testing of the Jim Beam bottle considered samples from 15 locations where DNA from all three (Serrano, Patton, and Elliott) were present. The report on the DNA testing on the bottle is exhibit 77 and was admitted in evidence at trial. Peoples testified that appellant was a full match on 12 of the 15 locations tested. The test results show a partial match at the other three locations.

{¶ 167} The prosecutor's remarks to the jury concerning DNA results from a sample secured from the liquor bottle did refer to the "1 in 100 people" finding. Using a chart of DNA testing results at 15 locations included in Exhibit 77, the prosecutor stated that appellant's DNA was found at all 15 locations tested. The prosecutor's comments on DNA test results on the Jim Beam bottle were technically correct. Accordingly, we find

appellant's claim of prosecutorial misconduct with respect to statements concerning DNA test results not well-taken.

{¶ 168} Appellant objects next to comments at closing argument concerning Victoria Serrano's visit to Carryout Express. The prosecutor stated:

> And why in the world would 38 get into an argument with Veronica? There has been not testimony that they knew each other or their paths ever crossed.
>
> Was there an argument? Let's look at the testimony. Officer Tanja Farrell, the officer that was projecting at the Express Carryout said that Veronica came in with her son, and she was upset and crying and told her that her son had just been robbed.
>
> You can infer that she – why would she cry about that unless she was just in an argument with someone. Bubby said that Veronica and 38 argued.
>
> And remember, Veronica was going to call the police. Tell me why you did this to my son, or I'm going to call the police. If you call the police, I'm going to kill you.

{¶ 169} Appellant argues that the evidence at trial demonstrated that at least two people made 9-1-1 calls to police before Veronica Serrano went to the carryout and disputes there was a basis in the evidence to conclude that Serrano was "upset and crying" and still intended to call police. Appellant questions why Officer Farrell, who

was providing security at the carryout that night, did nothing. The state argues that appellant's objection is a critique of Officer Farrell's behavior and not a basis of claimed prosecutorial misconduct.

{¶ 170} The record demonstrates that Officer Farrell was working for Carryout Express on the night of the shootings, providing security. Photographs from surveillance cameras at the carryout are in evidence and depict Veronica Serrano and Timothy Blair arriving and leaving the store.

{¶ 171} A review of the trial transcript demonstrates that Officer Farrell testified that a woman and her young son arrived at the carryout that night. Farrell testified that the woman was "very distraught, crying –." Farrell asked the woman why she was crying, and testified that "she told me that a black male dressed all in black robbed her son." Farrell asked her whether she had called for police. According to Farrell, the woman "said she did but she couldn't talk to police because the suspect was standing nearby."

{¶ 172} We find that the comments of the prosecutor constitute fair comment on facts in evidence at trial. There is evidence in the record that Veronica Serrano was upset and crying at the carryout. It was fair argument that Veronica Serrano may have yet intended to speak to police, given her explanation that she had not talked to police earlier because the offender was standing nearby.

{¶ 173} Appellant next argues that the prosecutor improperly vouched for Dominque Gordon when he told the jury in closing argument that witness Dominique Gordon "told the truth."

{¶ 174} Officer Robert Schroeder testified at trial that he conducted an interview of appellant on November 28, 2011. A redacted recording of the interview was admitted in evidence at trial. Officer Schroeder testified that appellant stated in the interview that he had been with Dominique Gordon all night on November 25, 2011, the night of the homicides. Dominique Gordon testified at trial that appellant had been with her earlier in the day on November 25, 2011, but left at 7:00 p.m. because she was sick. Appellant called other alibi witnesses to support a different alibi defense at trial.

{¶ 175} In closing argument the prosecutor stated that Dominique Gordon told the truth and then stated: "She was with him for part of that day. And then what? 7:00 o'clock he's gone. On the night of the murders at 7:00 p.m. he's gone. Murders happened at 10:23."

{¶ 176} The state argues that no improper vouching occurred because (1) the prosecutor did not imply knowledge of facts outside the record and (2) the statement did not place the prosecutor's own personal credibility at issue. Placed in context, appellant did not contend at trial Dominique Gordon's testimony was false. Rather, appellant called other alibi witnesses at trial who testified that he was with someone other than Gordon at the time of the murders.

{¶ 177} "In order to vouch for the witness, the prosecutor must imply knowledge of facts outside the record or place the prosecutor's personal credibility in issue. See *State v. Keene* (1998), 81 Ohio St.3d 646, 666, 693 N.E.2d 246." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 117. At trial, appellant not only did not dispute Dominique Gordon's testimony that he was not with her at the time of the murders, but also presented three witnesses who testified he was elsewhere. Under these circumstances we conclude that no improper vouching occurred. The prosecutor's statement did not imply knowledge of facts outside the record and the prosecutor's personal credibility was not placed in issue by his remark.

{¶ 178} Appellant argues that the prosecutor improperly argued facts not in evidence at trial when stating in closing argument:

> When the culprit committed the aggravated robbery, came back and argued with Veronica, he was angry. His best friend just days before was shot and killed while trying to rob the carryout at gunpoint a few days earlier.

{¶ 179} The state argues that the statement is fair comment based upon evidence in the record. We agree. The prosecutor argued appellant was the "culprit" in this statement. In his recorded statement to police of November 28, 2011, appellant admitted that he was upset, emotional, and hurt because Lamar Allen died robbing a carryout. Appellant discussed that Allen was shot more than 10 times and that Dominque Gordon

took care of him on the night of the shootings because she knew appellant was hurt and emotional. He also stated that he and Allen went to school together and that Allen was his "home boy."

{¶ 180} We conclude that the prosecutor's statement that appellant was angry over the death of his best friend was fair comment based on facts in evidence.

{¶ 181} Appellant argues next that the prosecutor asserted facts not in evidence when he argued in closing argument that Timothy Blair and Veronica Serrano "identified their killer as 38" and "tattooed his responsibility" by loudly calling out his identity on Page Street that night as heard by neighbors.

{¶ 182} The state asserts that the statement was fair argument based upon the evidence at trial. We agree. The prosecutor's statement refers to the excited utterance by Timothy Blair and the dying declaration of Veronica Serrano discussed at length under assignment of error No. 5. Veronica Serrano identified her killer in her dying statement as "38." Timothy called out shortly before he was shot: "No, no, no, no, 38. It's my brother. It's all cool."

{¶ 183} The prosecutor also stated that appellant "tattooed his responsibility" for these crimes by calling out his identity on Page Street that night. As also discussed under assignment of error No. 5, Jerry Hamblin testified that she heard the man dressed all in black who argued with Veronica Serrano state "I am 38 mother-fucker, while he is out there with a shotgun."

{¶ 184} We find that the prosecutor's statements in closing argument concerning the identity of the perpetrator constitutes fair comment based on evidence in the record. We find appellant's contention that the statements constituted prosecutorial misconduct to be without merit.

{¶ 185} Next, appellant argues prosecutorial misconduct occurred because the prosecutor falsely claimed in closing argument that appellant stipulated that he was a member of the Bagdad Boyz gang. The prosecutor stated:

> What's also undisputed? 38's a gang member. That it's the Bagdad Boyz. He admitted that. He stipulated to that.

{¶ 186} The evidence at trial included an admission of gang membership set forth in Exhibit 119. The document is a heavily redacted form, signed by appellant and dated October 22, 2009. The document admits that appellant's nickname was "38" and that he was an active member of "Baghdad Boys (Toledo)."

{¶ 187} The state acknowledges that Exhibit 119 is an admission of gang membership, not a stipulation. The state contends, however, that appellant's trial counsel, not only stipulated to the authenticity of statement (Exhibit 119), but also stipulated to the "factual averments" in the document.

{¶ 188} Our review of the record demonstrates otherwise. At a hearing on the Friday before trial, the court asked defense counsel to discuss with appellant whether appellant would stipulate to his membership in the gang. Later in the hearing counsel

advised the court: "Thank you, Judge. My client would have no objection that the Bagdad Boys exist. He's contesting his membership or association with them."

{¶ 189} The state filed a notice of stipulations on November 26, 2012, the first day of trial. The notice included a listing of nine stipulations. Number 8 on the list reads: "the defendant acknowledges for the purposes of this trial that a gang called Bagdad Boyz exists." The list of stipulations did not include any stipulation that appellant was a member of Bagdad Boyz gang.

{¶ 190} The record discloses that the court reviewed stipulation No. 8 with defense counsel on the first day of trial. During the discussion, counsel stated on the record, "agreed and stipulated for the purposes of trial." By that statement, counsel agreed to the stipulation that the gang called Bagdad Boyz exists, stipulation No. 8 on the notice of stipulations.

{¶ 191} At trial, the state moved for the admission of Exhibit No. 119, and the following discussion occurred:

> Mr. Bahner: I would move State's Exhibit Number 119 into evidence. I believe there will be a stipulation that according to the form and from the defense that this is a document that was kept in the normal and ordinary course of business with Mr. Patton's signature on it admitting that he is a Bagdad Boy gang member from North Toledo.
>
> The Court: Mr. Dech?

{¶ 192} Mr. Dech: No. That's been stipulated to, Judge.

{¶ 193} We read the stipulation to state that it was agreed that the form marked exhibit 119 was a document kept in the ordinary course of business and that the document bore appellant's "signature on it admitting that he is a Bagdad Boy gang member from North Toledo." The stipulation is limited to the October 22, 2009 form, its execution, and its contents.

{¶ 194} Our review of the record does not disclose the existence of any stipulation of fact under which appellant stipulated for the purposes of trial that he was a member of the Bagdad Boyz gang. Accordingly, we conclude that the comment by the prosecutor in closing argument stating that appellant stipulated that he was a member of the Bagdad Boyz gang was improper. Because trial counsel did not object to the statement at trial, the plain error standard applies to this assignment of error. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 44.

{¶ 195} Although appellant did not stipulate at trial that he was a member of Bagdad Boyz, he did admit in writing in 2009 that he was an active member of the gang. Officer Doug Allen testified that appellant was a member of Bagdad Boyz at trial. Officer William White testified that he had daily contact with appellant in the neighborhood and appellant had admitted to him that he was a member of the gang. There was also overwhelming evidence of appellant's guilt at trial.

{¶ 196} Accordingly, we conclude that the error did not rise to the level of plain error.

{¶ 197} We find assignment of error No. 9 not well-taken.

{¶ 198} Under assignment of error No. 7, appellant asserts that he did not receive effective assistance of counsel. Appellant argues that he "could list a number of ways in which he believes his counsel was deficient" and then narrows the assignment of error to one issue. He states "this assignment of error boils down to one issue: If this Court truly believes trial counsel stipulated that Patton was a member of the Bagdad Boyz, Patton believes this Court must find ineffective assistance."

{¶ 199} We deem this assignment of error moot due to the court's determination under assignment of error No. 9 that appellant did not stipulate that he was a member of the Bagdad Boyz gang at trial.

{¶ 200} We find assignment of error No. 7 not well-taken.

{¶ 201} We conclude that appellant has not been denied a fair trial. We affirm the judgment of the Lucas County Court of Common Pleas and order appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE