

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 10AP-593  
 : (C.P.C. No. 09CR-10-6203)  
 Raymond Lee Thompson, :  
 : (REGULAR CALENDAR)  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on December 27, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Sarah W. Creedon*,  
for appellee.

*Joy L. Marshall*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Raymond Lee Thompson ("appellant"), appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas pursuant to a jury verdict finding him guilty of one count of aggravated robbery under R.C. 2911.01.

{¶2} The prosecution's theory was that appellant, while he did not physically perpetrate the robbery as the principal actor, was liable as an accomplice because appellant had both aided and abetted the principal actor, Donald Hamilton, in commission of the crime, solicited Hamilton to commit the crime, designated the intended victim, and

drove the getaway car. The principal witnesses for the State of Ohio at trial were the intended victim of the robbery, Ryan Von Jasinski, Hamilton, who accepted a plea bargain in exchange for his cooperation, and the arresting officer, Sergeant Robert Forsythe of the Columbus Division of Police. The trial court overruled a Crim.R. 29 motion for acquittal at the close of the State's case, and chose not to instruct the jury on the lesser included offense of robbery in addition to the charged offense of aggravated robbery. Over the defense's objection, the court instructed the jury on complicity as a basis for guilt. After the jury returned its guilty verdict, the court sentenced appellant to a four-year term of imprisonment.

{¶3} Appellant brings the following six assignments of error upon appeal:

FIRST ASSIGNMENT OF ERROR

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION OF COMPLICITY TO AGGRAVATED ROBBERY.

SECOND ASSIGNMENT OF ERROR

THE COURT ERRONEOUSLY FAILED TO GIVE THE JURY INSTRUCTIONS FOR THE LESSER INCLUDED OFFENSES OF AGGRAVATED ROBBERY

THIRD ASSIGNMENT OF ERROR

APPELLANT'S COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN HIS DEFENSE WHEN THEY 1) FAILED TO OBJECT TO INADMISSIBLE TESTIMONY; 2) FAILED TO PREPARE A DEFENSE FOR A CHARGE OF COMPLICITY TO AGGRAVATED ROBBERY; 3) FAILED TO PRODUCE EVIDENCE CHALLENGING THE CREDIBILITY OF THE CO-DEFENDANT'S TESTIMONY; 4) FAILED TO OBJECT TO IMPROPER CLOSING REMARKS; AND [5) FAILED TO REQUEST JURY INSTRUCTIONS FOR LESSER INCLUDED OFFENSES THAT WERE REASONABLE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

## FOURTH ASSIGNMENT OF ERROR

THE COURT ERRED IN PERMITT[ING] PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS

## FIFTH ASSIGNMENT OF ERROR

APPELLANT'S REQUEST FOR A BILL OF PARTICULARS DID NOT APPRISE THE APPELLANT OF THE FACTS AND CIRCUMSTANCES TO SUBSTANTIATE THE INDICTMENT.

## SIXTH ASSIGNMENT OF ERROR

THOMPSON WAS CONVICTED OF AGGRAVATED ROBBERY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶4} Appellant's first assignment of error asserts that there was insufficient evidence to support his conviction for aggravated robbery. Appellant's sixth assignment of error asserts that his conviction was against the manifest weight of the evidence. These assignments will be addressed together.

{¶5} The legal concepts of sufficiency of the evidence and weight of the evidence involve different determinations. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. As to sufficiency of the evidence, " 'sufficiency' is a term of art meaning 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 the jury verdict as a matter of law." *Id.*, quoting Black's Law Dictionary (6th ed.1990) 1433. A determination as to whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386. The relevant inquiry on review of the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. (Emphasis sic.) When we

review the sufficiency of the evidence upon appeal, we construe the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. As a result, when we review the sufficiency of the evidence, we do not, on appeal, reweigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶179.

{¶6} A reversal based on insufficient evidence has the same effect as a not guilty verdict because such a determination "means that no rational factfinder could have voted to convict the defendant." *Tibbs v. Florida* (1982), 457 U.S. 31, 41, 102 S.Ct. 2211, 2218.

{¶7} As opposed to the concept of sufficiency of the evidence, the court in *Thompkins* noted that "[w]eight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' " *Thompkins* at 387, quoting Black's Law Dictionary, *supra*, at 1594.

{¶8} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. *Id.* at 387. An appellate court should reverse a conviction as against the manifest weight of the evidence in only the most "exceptional case in which the evidence weighs heavily against the conviction[.]" *State v. Martin* (1983), 20 Ohio App.3d 172, 175. In instances

in which 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." *Id.*

{¶9} Pursuant to R.C. 2911.01, the State, to prove aggravated robbery, had the burden to establish beyond a reasonable doubt that the accused, when committing or attempting to commit a theft offense, had a deadly weapon on or about his person or under his control or either used the weapon or inflicted, or attempted to inflict, serious physical harm upon the victim. The "theft offense" element of aggravated robbery requires that the State prove beyond a reasonable doubt that the defendant acted with the purpose to deprive the owner of property. R.C. 2913.02.

{¶10} Under Ohio's complicity statute, R.C. 2923.03, the law will treat an accomplice as though the accomplice had committed every act of the underlying principal offense. The accomplice may therefore be charged under the statute defining the principal offense, and the law will impute the elements of the offense committed by the principal actor to the accomplice as an aider and abettor, as if the accomplice had committed those acts. "To support a conviction for complicity by aiding and abetting \* \* \* the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime." *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus. While the accomplice must share the criminal intent of the principal, such intent may be inferred from the circumstances surrounding the crime, including presence, companionship, and conduct before and after the offense is committed. *State v. Kendricks*, 10th Dist. No. 10AP-114, 2010-Ohio-6041, ¶15, citing *Johnson*, supra, and *State v. Pruett* (1971), 28 Ohio App.2d 29, 34.

{¶11} Aggravated robbery under R.C. 2911.01(A)(1), based upon the offender having a deadly weapon on or about his person while committing a theft offense, is a strict liability offense. *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225. Aggravated robbery incorporates the mens rea of "knowingly" only in relation to the theft aspect of the offense. *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, ¶49. A defendant acts "knowingly" when he is "aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶12} The victim here, Ryan Von Jasinski, testified regarding the circumstances of the crime. He described his acquaintance with appellant, stating that they met while attending DeVry University in Columbus, Ohio, and shared an interest in computers. Appellant discussed his plan for starting his own computer business and Von Jasinski's possible involvement in the business. Based upon appellant having printed business cards and a reasonably developed business plan, Von Jasinski found appellant's ambitions credible but was reluctant to become directly involved in the proposed business. Over the course of a few months, however, Von Jasinski loaned or gave appellant a series of small sums, including money for car repairs and possibly for promotion of the business. Eventually, upon the urging of his parents, Von Jasinski became more reluctant to advance appellant money. Appellant eventually dropped out of school, and thereafter the two only had intermittent contact by phone.

{¶13} Regarding the specific circumstances of the crime, Von Jasinski testified that he received a phone call from appellant on the day of the robbery, October 7, 2009, while Von Jasinski was riding a city bus and planning to go to the campus of Ohio State

University to buy a new video game from a campus-area merchant. Appellant claimed that he had \$100 to give Von Jasinski in partial repayment of the sums Von Jasinski had advanced him in the past, and wanted to meet at a Wendy's restaurant. Von Jasinski suggested that they meet instead at a nearby Seven Eleven convenience store on campus, somewhat closer to the store where Von Jasinski intended to buy his video game. During the course of the bus ride, appellant called Von Jasinski once or twice more to say that he would be late and asked Von Jasinski to wait.

{¶14} As Von Jasinski waited outside the convenience store, he observed an individual loitering in the area, who soon approached him. Von Jasinski looked down and saw a short knife in the man's hand. This individual, later identified as Hamilton, told Von Jasinski "give it to me" while showing the knife. (Tr. 71, 86.) Von Jasinski inferred that the robber wanted either Von Jasinski's laptop computer, which he carried in a shoulder bag, or money. Von Jasinski immediately ran from the area, ducked behind a large crowd of people outside a business where he felt that the number of onlookers would provide some security, and called 911. He gave a detailed description of the robber's appearance, including a grey and red logo sweatshirt, sunglasses, and the knife, and suggested to the 911 operator that the attempted robbery might be related to the aborted meeting with appellant. After police responded to the scene, they escorted Von Jasinski to a nearby location where, alerted by the 911 call, a patrol car had stopped a vehicle with an occupant matching the 911 description. When asked to identify the individuals in the car, Von Jasinski immediately identified one occupant as the previously-unknown individual who had threatened him with a knife, and the other as appellant.

{¶15} Sergeant Forsythe testified that he was on patrol when the dispatcher alerted him of a robbery in his patrol area. Another officer had signaled that he had stopped a car containing a person matching the description of the robbery suspect approximately two blocks from the scene of the robbery. When Sergeant Forsythe arrived at the location of the stop, the initial officer on the scene had the robbery suspect outside of the car. Sergeant Forsythe examined the interior of the car and noticed a pair of sunglasses on the dash and a knife in plain view on the seat next to the center console. At this point he asked appellant, who had remained behind the wheel, to step out of the car as well. He then assisted in allowing Von Jasinski to view the two individuals taken from the vehicle and noted that Von Jasinski was able to identify Hamilton as the person in sunglasses and a grey sweatshirt who had threatened him with a knife in front of the Seven Eleven. Von Jasinski also identified appellant at this time as the individual whom he was planning to meet at the Seven Eleven.

{¶16} Von Jasinski was shown the knife and sunglasses during his testimony and identified them as those used or worn by his robber.

{¶17} Hamilton testified at trial pursuant his plea agreement with prosecutors. His trial testimony was that on the morning of the robbery he was walking on High Street in the campus area on his way to the blood bank because he needed money to buy drugs. He saw appellant, whom he knew as a casual acquaintance, and appellant offered him a ride. The two talked about ways to get money, and appellant proposed robbing an individual whom he would identify. Appellant described the proposed victim as a "tall white guy with glasses" (Tr. 116) and indicated that it would be easy to scare this victim. Based upon this conversation, Hamilton assumed that he would be able to obtain money,

a phone, or a computer from the crime. He witnessed appellant make at least one phone call to arrange the meeting with the proposed victim.

{¶18} Arriving at the Seven Eleven, Hamilton was easily able to identify Von Jasinski as the proposed victim. He testified that he approached Von Jasinski, but gave inconsistent versions of the crime, first stating that he did not have a knife on his person or show a knife, and later in his testimony stating that he had a knife on him but did not show it. He admitted to wearing the sunglasses recovered from appellant's car. Hamilton misidentified the proposed meeting place as a Taco Bell restaurant, rather than the Seven Eleven convenient store described by Von Jasinski, but later identified the location of the robbery as the Seven Eleven.

{¶19} Hamilton testified that when his intended victim ran away, he ran in the opposite direction to the location where he expected appellant to be waiting for him with the car. They were very shortly thereafter stopped by police.

{¶20} On cross-examination, Hamilton admitted that he was high on crack cocaine at the time of the robbery and his arrest, and that he initially denied any involvement in the robbery when questioned by police.

{¶21} In support of his assignments of error on appeal, appellant concedes that there was sufficient evidence for the jury to consider whether appellant aided and abetted Hamilton in the commission of simple robbery. Appellant's argument, rather, is that there is insufficient evidence that appellant was aware that Hamilton would use a deadly weapon to commit the offense. To substantiate appellant's belief that no weapon was necessary, appellant points out that Hamilton's testimony established that appellant had

indicated that the intended victim would scare easily, which suggests there was no plan for the use of a deadly weapon.

{¶22} Liability as an accomplice to aggravated robbery does not require that appellant have specific prior knowledge that the principal actor would employ a weapon, i.e., "[h]ave 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[.]" R.C. 2911.01(A)(1). As an accomplice, appellant is deemed to have committed every element of the offense committed by the principal, including possession of the weapon. *State v. Kimble*, 7th Dist. No. 06 MA 190, 2008-Ohio-1539, ¶42, citing *State v. Chapman* (1986), 21 Ohio St.3d 41. In *Chapman*, not only was the accomplice convicted of aggravated robbery despite protestation that there was no evidence that he was aware that a weapon would be used, but he was also convicted of the accompanying firearm specification. Advance knowledge that a weapon will be used is not required. *Chapman* at 42-43. Since the evidence in the present case amply supports appellant's participation in, and, more to the point, active promotion of, the crime, liability as an accomplice arises from the nature of the crime committed by the principal actor, not from appellant's expectations of exactly how the proposed crime would take place. The State was thus not required to demonstrate prior knowledge by presenting evidence that appellant was aware that Hamilton would employ a knife in the course of the robbery, and there is sufficient evidence to support the conviction.

{¶23} In the same vein, there is nothing in the record to indicate that the jury manifestly lost its way such that the conviction is against the manifest weight of the evidence. The jury heard ample credible evidence to support each element of the

offense, and the evidence simply does not "weigh heavily against conviction." *Martin*, supra. Appellant's first and sixth assignments of error accordingly are overruled.

{¶24} Appellant's second assignment of error asserts that the trial court erred when it failed to instruct the jury on the offense of robbery as a lesser included offense of aggravated robbery. Because appellant's trial counsel did not object to this lack of instruction, we review the issue under the plain error standard. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." We notice plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes* at 27, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial." *Barnes* sets forth three predicates to a finding of plain error:

First, there must be an error, *i.e.*, a deviation from a 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.

*Barnes* at 27. (Citations omitted.)

{¶25} Appellant correctly states that the Supreme Court of Ohio has held that robbery is a lesser included offense of aggravated robbery and may be charged as such. *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974. Appellant's argument on appeal, however, is solely based upon the probability that the jury could have reasonably found

against the State on the question of whether a deadly weapon was used in the commission of the offense and whether appellant knew that a knife would be employed.

{¶26} The second half of this proposition, based upon our discussion of the first and sixth assignments of error, has no bearing upon appellant's guilt or innocence because we have determined that it is immaterial to appellant's guilt as an accomplice whether he had specific knowledge that Hamilton would use a knife.

{¶27} As to the first part of the argument, it becomes a question of conflicting evidence resolved by the jury. While Hamilton did testify that he did not brandish a knife during the robbery, the jury manifestly concluded otherwise based upon Von Jasinski's testimony. Because plain error will only be noticed if, but for the error, outcome of the trial would clearly have been different, it is difficult to conclude here that the jury, presented with the option of convicting for robbery, would necessarily have disregarded the testimony of Von Jasinski on this point and concluded that no weapon was used, particularly since there was corroborating evidence in the form of a knife taken from the vehicle at the time of the arrest. The jury was free to accept all, part, or none of Hamilton's testimony as it saw fit. *State v. Glover*, 10th Dist. No. 07AP-832, 2008-Ohio-4255. It chose not to give credence to his testimony regarding the absence of a knife, while believing the balance regarding his commission of the robbery and appellant's participation therein. On these facts, the trial court's decision not to give the instruction on robbery as a lesser included offense does not constitute plain error, if it was error at all. Appellant's second assignment of error is accordingly overruled.

{¶28} Appellant's third assignment of error asserts that he was denied the effective assistance of trial counsel in violation of his rights under the Sixth and

Fourteenth Amendments to the United States Constitution. In order to establish a claim of ineffective assistance of counsel, a defendant must first demonstrate that his trial counsel's performance was so deficient that it was unreasonable under prevailing professional norms. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064. The defendant must then establish that "there is 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 466 U.S. at 694, 104 S.Ct. at 2068.

{¶29} "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances the challenged action 'might be considered sound trial strategy.' " *Id.* at 466 U.S. at 689, 104 S.Ct. at 2065, citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. A verdict adverse to a criminal defendant is not of itself indicative that he received ineffective assistance of trial counsel. *State v. Hester* (1976), 45 Ohio St.2d 71, 75.

{¶30} Appellant cites several specific instances in which trial counsel's performance allegedly falls below prevailing professional norms. First appellant asserts that trial counsel failed to object to inadmissible testimony, allowing impermissibly leading questions on direct examination on the prosecution's witnesses. The first specific

example of this occurred during testimony by Sergeant Forsythe, in which the prosecution asked him to identify whether the sunglasses and knife admitted as exhibits corresponded to the items that he had observed in the stopped vehicle driven by appellant. Sergeant Forsythe confirmed that these were the same items. Appellant now argues that no foundation was laid to establish that Sergeant Forsythe had in fact seen the items prior to identifying them, and that the question was impermissibly leading. Von Jasinski was similarly led through the preliminary phase of his questioning on these items.

{¶31} Given the whole of the witnesses' testimony, we find that any failure by defense counsel to object to the form of questioning was not prejudicial. Both Von Jasinski and Sergeant Forsythe identified the knife and sunglasses and linked them to Hamilton as the direct assailant in the robbery. We find no prejudicial effect in the case from trial counsel's failure to object to the form of testimony. Assuming that the questions for both witnesses were in fact impermissibly leading and there was a lack of foundation for Sergeant Forsythe's identification as the items taken from appellant's vehicle, a review of the testimony of these witnesses in its entirety demonstrates that the impact of the information in the testimony was simply not affected by the manner in which it was presented. There is no indication from the balance of the testimony that the witnesses disclosed information of a different nature than that would have been presented by a more methodical invitation to narrative testimony without leading questions.

{¶32} Nor does the record support any prejudice from any lack of foundation before Sergeant Forsyth's identification of the exhibits. Sergeant Forsythe testified that he had collected evidence and secured it at the scene prior to turning it into the police property room. That evidence was then presented in an envelope to Sergeant Forsythe

on the stand and he was asked to identify the contents as the sunglasses and knife found in the car. The contents of the envelope at that point were irrevocably established, and the fact that the prosecutor in phrasing the question identified the objects in the envelope, rather than allowing the witness to do so and describe them, had little bearing upon the jury's appreciation of the information ultimately conveyed by the witness. Counsel upon appeal does not articulate any theory under which objection by trial counsel would have altered the impact of the testimony and therefore the outcome of the trial.

{¶33} The record therefore does not support any finding that appellant's counsel was deficient in failing to object to the form of questions, or lack foundation for the officer's identification of the exhibits in question.

{¶34} Appellant also argues that trial counsel failed to prepare a defense to appellant's eventual guilt based upon complicity. The record does not support this assertion. In fact, commencing with opening argument, it was inevitable that the only theory upon guilt might be founded would be complicity, since the State never purported to place appellant at the scene of the attempted robbery as a principal actor. Defense counsel during opening statements anticipated the complicity theory and told the jury that it would be shown that appellant did not participate in the robbery as a principal nor as an accomplice. (Tr. 19.) Prior to the testimony of Hamilton, defense counsel and the prosecution discussed with the court the question of whether a complicity instruction was necessary, and defense counsel addressed the implications of such an instruction. (Tr. 99-105.) At this point, the trial court indicated that it would probably give such an instruction. (Tr. 99-105.) Most significantly, defense counsel cross-examined Hamilton regarding inconsistencies between his initial statements to police and his trial testimony

and addressed Hamilton's assertion that appellant and Hamilton had discussed the crime prior to Hamilton attempting the robbery.

{¶35} Since trial counsel undertook various approaches during trial attempting to distance appellant from any role in the preparation or execution of the robbery, appellant's current assertion on appeal that the complicity theory met with no defense is not substantiated and no deficient performance of trial counsel can be based thereon.

{¶36} Appellant next argues that trial counsel was deficient for failing to produce evidence to impeach Hamilton based on his prior criminal record. Appellant now suggest that trial counsel could have produced documentary evidence of Hamilton's prior convictions during cross-examination. Since Hamilton freely admitted during direct examination that he had an extensive prior criminal record, there is little to support speculation that the result of the trial would have been different if one or more of these admissions were supplemented by documentary evidence, nor even if additional instances of criminal convictions could have been documented—particularly convictions not varying in any material degree from those to which Hamilton freely confessed.

{¶37} Appellant also argues that trial counsel should have, beyond cross-examining Hamilton on his prior inconsistent statements to police, introduced Hamilton's prior written statement as evidence. Hamilton admitted to the inconsistent prior statements on cross-examination. Any introduction of a written copy of the statements, again not varying materially from the essentials disclosed during cross-examination, would not of itself present such an alteration in the nature of the evidence as to mandate a different outcome at trial.

{¶38} Appellant also argues that counsel was ineffective for failure to object during closing arguments to certain statements made by the prosecution. Both prosecution and defense counsel are entitled to a wide degree of latitude during closing statements. *State v. Lott* (1990), 51 Ohio St.3d 160, 165. The prosecution may suggest reasonable inferences from the evidence presented at trial and comment on such inferences. *State v. Smith*, 80 Ohio St.3d 89, 111, 1997-Ohio-355. As such, the first question is whether the allegedly objectionable statements by the prosecution during closing were in fact worthy of objection. Secondly, there are tactical reasons for which defense counsel may choose not to interrupt closing argument with technically correct but ultimately counterproductive objections. *State v. Meyers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶154. Counsel may choose not to disrupt the flow of trial, or influence the objectivity of the finder of fact through "technical and bothersome" objections. *State v. Campbell*, 69 Ohio St.3d 38, 53, 1994-Ohio-492. Counsel's decision not to interrupt with excessive frequency during closing arguments must therefore be assessed under the same objective standard of reasonable representation as other aspects of trial counsel's performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

{¶39} The first allegedly impermissible inference suggested by the prosecution during closing argument was the suggestion that appellant knew that Von Jasinski was going to buy a video game and would therefore have cash on him. There was, admittedly, no direct trial testimony to establish that Von Jasinski had explicitly told appellant on the day in question that the object of his trip to the campus area was to purchase a video game, much less that it would be a cash purchase.

{¶40} Assuming, arguendo, that the inference was improper, the impact of this is difficult to establish. There was evidence of the extensive history of cash financial dealings between Von Jasinski and appellant, which had always in the past inured to appellant's benefit. Von Jasinski testified that he had given appellant more than \$1,000 over the course of a brief period of their friendship when they both attended school together. When Von Jasinski eventually became reluctant to lend or give appellant money, the last time appellant approached him for cash, Von Jasinski only gave \$10 which displeased appellant at the time. With this background, appellant on the day of the robbery, called Von Jasinski and offered to pay some of the money back. All this supports the prosecution's emphasis upon the probability that the past financial dealings between the parties would allow appellant to expect the robbery to yield some return. The balance of the testimony established that Hamilton expected to find money, a laptop computer, or a phone, items that he could exchange for money. The specific expectation of cash intended to buy a video game was, in fact, perhaps a step beyond what the record testimony would support, but asserting that appellant was specifically aware of Von Jasinski's intent to purchase a video game did little to alter the underlying premise that appellant expected Von Jasinski to have either money or fenceable items on his person. Allowing the prosecution to draw this further inference without objection, did little to alter or affect the outcome of trial.

{¶41} Finally, appellant argues that trial counsel was ineffective for failure to request an instruction on the lesser included offense of robbery. Failure to request an instruction on a lesser included offense, because of the established array of defense strategies that may include such a choice, will not of itself establish ineffective assistance

of trial counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 47. Counsel typically might choose not to request the instruction on the lesser included offense to avoid a compromise verdict, especially if counsel reasonably believed that the higher offense based upon a complicity theory might be disproved entirely. Since there was solid corroborating evidence of the use of a knife in the course of the robbery, and our discussion with respect to appellant's first and sixth assignments of error establishes that the use of the knife would have been entirely imputable to an accomplice, conviction of complicity to robbery rather than aggravated robbery could well have been determined by trial counsel as less likely than rejection of the accomplice theory entirely. As such, forgoing the possibility of a compromise verdict by the jury could well be argued as sound trial strategy.

{¶42} As a final aspect of appellant's third assignment of error, he argues that all of the above constitute in the aggregate support for a cumulative finding of ineffective assistance of trial counsel. Since we have found no ineffective assistance on any of the enumerated instances, a cumulative argument is not supported. In summary, trial counsel's performance did not fall below prevailing professional norms, and appellant's third assignment of error is overruled.

{¶43} Appellant's fourth assignment of error asserts that the prosecution committed prosecutorial misconduct when arguing facts not in evidence during closing argument. The two factors considered in assessing a claim of prosecutorial misconduct are: (1) the occurrence of improper conduct by the prosecutor, and (2) whether that conduct prejudicially affected the substantial rights of the criminal defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. As such, the critical aspect of a due process claim

based upon prosecutorial misconduct is the actual fairness of the trial, not the culpability or reprehensible conduct of the prosecutor. *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶38, citing *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947. Upon appeal, we will therefore review the State's closing argument in its entirety to assess the impact of the alleged improper remarks. *State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4.

{¶44} The first allegedly improper statement by the prosecution again concerns the claim that appellant lured Von Jasinski to the crime scene based upon knowledge that Von Jasinski intended to buy a video game and accordingly would have cash on his person. Accepting, as we have above in connection with appellant's third assignment of error, that no evidence was heard upon which to found this assertion, it is nonetheless of no material impact upon the case because appellant had no need to specifically rely upon this information in order to organize the robbery.

{¶45} Appellant also argues that the prosecution improperly stated in closing argument that appellant was driving away from the scene when apprehended; he points out that there was no direct testimony or evidence as to the direction of travel of the vehicle at the time it was stopped. Appellant also argues that the prosecution improperly characterized appellant as the "getaway" driver for the robbery. Both inferences were amply permissible based upon the evidence. Hamilton testified that he fled from the area to appellant's car behind a nearby business after Von Jasinski failed to cooperate in the robbery. Appellant's car was stopped by police only two blocks from the scene of the crime, appellant was at the wheel, and the admitted principal robber, Hamilton, was a passenger in the vehicle. The collective evidence reasonably supports the prosecution's

inference that appellant was driving a vehicle that was leaving the scene of the robbery. It was not misconduct for the prosecution to point out the obvious.

{¶46} Based upon the context of the case and the nature of the statements complained of, we find that there is no evidence that defendant's substantial rights were prejudicially affected. Appellant's fourth assignment is overruled.

{¶47} Appellant's fifth assignment of error asserts that the indictment and bill of particulars provided insufficient notice that he would be prosecuted under a theory of accomplice liability. Ohio's complicity statute, R.C. 2923.03(F), however, specifically provides that "[a] charge of complicity may be stated in terms of this section, or in terms of the principal offense." A defendant may be convicted on an offense on a complicity theory, therefore, even where the indictment is stated in terms of the principal offense rather than an explicit allegation of complicity. *State v. Herring*, 94 Ohio St.3d 246, 251, 2002-Ohio-796. Where one is charged in terms of the principal offense, he is on notice, by operation of R.C. 2923.03(F), that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. *State v. Keenan*, 81 Ohio St.3d 133, 151, 1998-Ohio-459. Appellant's fifth assignment of error therefore presents no basis for error, and is overruled.

{¶48} In summary, appellant's first, second, third, fourth, fifth, and sixth assignments of error are overruled, and the judgment of conviction and sentence entered by the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

TYACK and DORRIAN, JJ., concur.

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