[Cite as *State v. Rutledge*, 2009-Ohio-2478.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0022
LATOYA RUTLEDGE	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 2007CR-1903(C)
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 26, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney By: Renee M. Watson 110Central Plaza South, Ste. 510 Canton, OH 44702	MATTHEW PETIT 111 Second Street N.W., Ste. 302 Canton, OH 44702

Gwin, J.,

{¶1} Defendant-appellant Latoya Rutledge appeals her convictions and sentences entered by the Stark County Court of Common Pleas, on one count of complicity to aggravated robbery, one count of complicity to aggravated burglary, and one count of complicity to aggravated kidnapping following a jury trial. Each count also included a firearm specification. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On March 13, 2008, the Stark County Grand Jury indicted appellant on one count of complicity to aggravated murder, in violation of R.C. 2923.03(A)(1) and (A)(2) and R.C. 2903.01(B); one count of complicity to aggravated robbery, in violation of R.C. 2923.03(A)(1) and (A)(2) and R.C. 2911.01(A)(1); one count of complicity to aggravated burglary, in violation of R.C. 2923.03(A)(1) and (A)(2) and R.C. 2911.11(A)(2); and one count of complicity to aggravated kidnapping, in violation of R.C. 2923.03(A)(1) and (A)(2) and R.C. 2905.01(A)(2).

{¶3} The matter proceeded to jury trial, commencing on June 24, 2008. The following evidence was presented at trial.

{¶4} In June 2007, Steven Hight, Jr. lived in Canton at 2311 20th Street N.E. He lived with his brother Antwon and his father Steven Sr. Steve Jr. and his brother smoked marijuana and sold marijuana to friends and acquaintances. During May and June of 2007, Steve Jr. and Antwon sold marijuana to a man known to them only as "Kwan." Appellant would frequently drive Kwan to the Hight home in her silver Pontiac Grand Am.

{¶5} In May and June, Steve Jr. sold marijuana to Kwan once or twice a week. Antwon sold to Kwan 6-7 times within a two-week period. On one occasion, after Kwan and appellant left, appellant returned to the Hight home irate and claiming Antwon had shorted her purchase of marijuana.

{¶6} On the evening of June 20, 2007, Antwon and Steve Jr. decided to go night fishing. They left their house between 8:30 and 9:00 p.m. The boys asked Steve Sr. if he wanted to go, but he declined.

{¶7} That same evening, Raymond Byrd received a phone call from Zabe Jenkins. Jenkins told Byrd to come and meet him at Kwan's girlfriend's apartment at the Chips Townhouses. He took his shotgun with him tucked inside his pants and walked the five minutes to the meeting place.

{¶8} When Byrd arrived, he went into the apartment with Jenkins, Michael Hall and Kwan. The men planned a robbery at the Hight home. All of them dressed in dark clothing. Byrd noticed Jenkins had a .9-millimeter chrome handgun. When they left the apartment, appellant was outside waiting for them in her silver Grand Am. Byrd, Kwan, Jenkins and Hall all got into the car. Appellant drove them to the Hight neighborhood and past the Hight home. The others pointed to the house and told Byrd, "that's the house right there." Appellant then parked the car around the corner from the house. The men got out of the car and tied black bandanas over their faces. Byrd gave appellant his cell phone and wallet before walking to the Hight home because he did not want to risk dropping them at the crime scene.

{¶9} Byrd, Jenkins, and Hall knocked on the door at the Hight home. When Steve Sr. opened the door, they rushed inside. The men used duct tape to bind Steve Sr.'s

hands and feet together. They then ransacked the house for marijuana, money and other items. The men were getting ready to leave when they heard a knock at the door. Byrd and Jenkins decided to rob whoever it was and told Hall to go back to the car.

{¶10} A few minutes earlier, Ryan Rider was at Bob Hight's house. Bob Hight is Steven Sr.'s brother. Around midnight, Rider was outside smoking a cigarette when Bob came out and said Steve Sr. was being jumped by some men and somebody needed to go help him. Rider and Bob got into Bob's car and drove to Steve Sr.'s house five minutes away.

{¶11} When Ryan pulled in the driveway at Steve Sr.'s house, he saw three people run through the backyard. Bob stayed in the car and Ryan Rider went to the door and knocked. He saw the kitchen light go out and heard the door lock. Ryan started yelling for Steve Sr. As he did, Byrd came up behind him, pointed the shotgun at Ryan's head and ordered him to go to the back of the house. Ryan turned when he heard Byrd's voice and saw a second black male, dressed in black, pointing a gun at Bob's head through the car window.

{¶12} As Ryan walked to the rear of the house at gunpoint, Steve Sr. came charging out the side door and grabbed the barrel of the shotgun. He and Byrd momentarily battled for possession of the weapon, causing it to discharge into the roof of the carport. Ryan Rider ran. Steve Sr. managed to gain possession of the weapon. As Steve Sr. attempted to pump the weapon, Byrd threw a pair of shoes he had stolen from the home at Steve Sr. and fled.

{¶13} As Byrd ran back to appellant's car, he heard shots. A few minutes later, Jenkins showed up at the car. Appellant drove all the men back to Chips. Once back at

Chips, the men split up the marijuana they had stolen from the Hight home. Appellant was given a portion for her participation. She then gave Byrd a ride back home.

{¶14} Canton Police Department crime scene detective Robert Smith was dispatched to the Hight home in response to a "shots fired" call. Upon arrival, Smith observed a man later identified as Steven Hight Sr. lying dead in a pool of blood in the driveway. Smith and other Canton officers collected numerous pieces of evidence from the driveway, home and surrounding area.

{¶15} Dr. P.S. Murthy performed an autopsy on Hight's body. He determined the manner of death was homicide and the cause of death was multiple gunshot wounds.

{¶16} Canton Police Detective Sergeant Victor George also responded to the crime scene on the night of the murder. He canvassed the neighborhood to determine whether anyone had seen anything useful to his investigation. Detective George spoke with Jason Ramey who lived near the Hight home on 22nd Street N.E. Ramey said he heard shots at approximately 12:25 a.m. The noise caused him to look out the window. When he did, he saw two people running through the yard toward the road where a Pontiac Grand Am was parked. He watched as they jumped into the car and the driver sped away.

{¶17} Detective George went to the spot where Ramey said the Grand Am was parked. He noted that the car was parked 450 feet from the rear of the Hight home. From that vantage point, one would be able to see clearly, what was taking place in the carport area of the Hight home. There was a light on in the carport area the night of Hight's murder. Further, from that distance, one would be able to hear gunshots and

see muzzle-flash from the gun. Through continued investigation, Detective George determined that appellant was the driver of the Grand Am and that "Kwan" was Elvis Wooten.

{¶18} Approximately seven months later, the appellant, age twenty (20), was home in her pajamas when police arrived at her home with a tow truck threatening to tow her vehicle and seeking a statement about her involvement with the events of June 21, 2007. The detectives advised appellant they had information that she knew something about the Hight murder. After approximately thirty minutes of conversation at her residence, the appellant was driven to headquarters by the officers in a police cruiser. She was not handcuffed, threatened or restrained in any way either in the cruiser or at the police department.

{¶19} Once at the police department, appellant was provided with her Miranda warnings. Detective George went over the warnings with her verbally and in writing. Appellant signed a form indicating she understood and was waiving her rights and agreed to speak with the detectives, and gave the officers a taped statement.

{¶20} Appellant denied that she had any knowledge of what was to take place at the Hight home before driving the men to the residence. Appellant indicated that Wooten told her what was going on after she parked the car around the corner from the Hight residence. Appellant told the officers there had been no phone calls between herself and Wooten the evening of Hight's murder. She claimed that for approximately thirty minutes, the men nagged her for a ride "around the corner" and she finally relented. She denied seeing any weapons, even though Byrd's shotgun, which was recovered at the scene, was 37 inches long. She claimed none of the men covered their

faces. Appellant told the officers that she thought the trip was suspicious, but claimed Hall told her not to worry about it and just go park the car. She claimed that she and Wooten stayed with her car and that she and Wooten argued about the reason they were there. Appellant said when the other men came back to the car, the only thing they told her was "Drive. Get out of here." The detectives released appellant and provided her a ride home at the conclusion of the interview.

{¶21} After speaking with appellant, Detective George obtained cell phone records for both Wooten and appellant's phones. Between 10:00 p.m. and 12:40 a.m. on the night of Hight's murder, there were six phone calls between appellant and Wooten. During the approximate time appellant claimed Wooten was standing outside her car arguing with her, Wooten called appellant three times – at 11:59, 12:09 and 12:28. She called him once at 12:33. There were two additional calls, both from appellant to Wooten at 10:00 p.m. and 12:39 a.m.

{¶22} Appellant filed a motion to suppress statements she made to law enforcement. She alleged that her waiver of Miranda rights was invalid and her statement coerced. After a hearing on the matter, the court overruled the motion.

{¶23} After hearing all the evidence and deliberations, the jury acquitted appellant of complicity to aggravated murder. She was found guilty, however of complicity to aggravated robbery with the firearm specification, complicity to aggravated burglary with the firearm specification and complicity to kidnapping without the firearm specification.

{¶24} Appellant was subsequently sentenced to serve nine years on each count to be served concurrently. She was ordered to serve this term consecutive to a three-year term for the firearm specifications.

{¶25} Appellant originally filed her notice of appeal in Stark App. No. 2008 CA 00158 on July 21, 2008. However, on January 30, 2009 this Court *sua sponte* dismissed that case for lack of a final appealable order pursuant to the Ohio Supreme Court's mandate in *State v. Baker*, 119 Ohio St.3d 197, 893 N.E.2d 163, 2008-Ohio-3330.

{¶26} Appellant filed a notice of appeal and motion for delayed appeal in Stark App. No. 2009 CA 00022 on February 10, 2009. This Court overruled appellant's motion for a delayed appeal finding appellant's appeal to be timely filed under *State v. Baker*, supra.

{¶27} On February 27, 2009 appellant filed a motion requesting that all "transcripts, documents and briefs" that had previously been filed in Case No. 2008 CA 00158 be transferred to Case No. 2009 CA 00022. This Court granted said motion by Judgment Entry filed March 6, 2009, which stated, "the Clerk needs only to physically transfer any briefs, exhibits and transcripts from 2008 CA 00158 to this case file."[1]

{¶28} It is from this conviction and sentence Appellant appeals, raising the following assignments of error:

{¶29} "I. THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

[1] There were no new or additional briefs filed by any of the parties in Case No. 2009CA 00022. We further note that each party's briefs bear the original 2008 CA 00158 case number.

{¶30} "II. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO EXERCISE A PEREMPTORY CHALLENGE IN VIOLATION OF *BATSON V. KENTUCKY.*

{¶31} "III. THE APPELLANT WAS DEPRIVED OF DUE PROCESS OF BY THE MISCONDUCT OF THE PROSECUTOR.

{¶32} "IV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE ILLEGALLY OBTAINED STATEMENTS."

I.

{¶33} In her first assignment of error, appellant challenges her convictions as against the sufficiency and manifest weight of the evidence. We disagree.

{¶34} Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry 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 proven beyond a reasonable doubt, *State v. Jenks* (1991), 61 Ohio St. 3d 259.

{¶35} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶36} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St. 3d 387, citations deleted. On review for manifest weight, a reviewing court is "to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶37} In *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id. at paragraph

four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶38} Appellant was convicted of complicity to aggravated robbery with the firearm specification, complicity to aggravated burglary with the firearm specification and complicity to kidnapping without the firearm specification.

{¶39} R.C. 2923.03 sets forth the essential elements for a complicity offense. The complicity statute provides, in relevant part:

{¶40} "No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶41} "(1) Solicit or procure another to commit the offense;

{¶42} "(2) Aid or abet another in committing the offense;

{¶43} "(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

{¶44} "(4) Cause an innocent or irresponsible person to commit the offense.

{¶45} "(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

{¶46} "(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

{¶47} "* * *"

{¶48} R.C. 2911.01 defines aggravated robbery as: "(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."

{¶49} R.C. 2911.11(A)(1) defines the offense of aggravated burglary as: “(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.”

{¶50} R.C. 2905.01 defines the offense of kidnapping as “(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: (2) To facilitate the commission of any felony or flight thereafter.”

{¶51} The firearm specification defined by R.C. 2941.145 provides that when 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 offenses of aggravated burglary and aggravated robbery.

{¶52} It is undisputed that actions of at least some of the co-defendants in the instant case satisfied the requirements of the aggravated robbery, aggravated burglary

and kidnapping offenses. It is also undisputed that a firearm was brandished and utilized to facilitate the commission of those offenses by the co-defendants. Appellant does not argue the State failed to prove any element of any of the crimes; rather appellant argues that the State failed to prove beyond a reasonable doubt that appellant aided or abetted in commission of the crimes.

{¶53} In order to convict appellant, the State needed to prove that she knowingly supported, assisted, encouraged, cooperated with, advised or incited Wooten, Hall, Byrd, and Jenkins in trespassing into the occupied Hight residence by force, stealth or deception in order to commit a theft offense while one or more of the men had a deadly weapon under their control, and that the men displayed, brandished or used the weapon. The State further needed to prove that she aided and abetted the men in restraining the liberty of Hight by force, threat or deception with purpose to facilitate the commission of a felony or flight thereafter, and that Hight was not released in a safe place unharmed.

{¶54} It is true that a person's mere association with a principal offender is not enough to sustain a conviction based on aiding and abetting. *State v. Sims* (1983), 10 Ohio App.3d 56, 58, 460 N.E.2d 672, 674-675. Generally, a criminal defendant has aided or abetted an offense if he has supported, assisted, encouraged, cooperated with, advised, or incited another person to commit the offense. See *State v. Johnson* (2001), 93 Ohio St.3d 240, 754 N.E.2d 796, syllabus. "'Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" *State v. Mendoza* (2000), 137 Ohio App.3d 336, 342, 738 N.E.2d 822, quoting *State v. Stepp* (1997), 117 Ohio App.3d 561, 568-569, 690 N.E.2d 1342.

{¶55} In the case at bar, appellant was familiar with the Hight home and the fact that there was marijuana in the house. Antwon and Steven Hight Jr. testified that appellant had been at their home on numerous occasions with Wooten to purchase marijuana. After one such occasion, appellant returned to the residence by herself, irate and claiming she had been shorted.

{¶56} On the evening of Hight's murder, appellant claimed she was present inside Wooten's girlfriend's apartment and that the men badgered her for a half hour to give them a ride "around the corner." Byrd, however, testified that appellant was not in the apartment, but rather after the men finished their planning inside the apartment, they went outside to find appellant ready and waiting for them in her car. Appellant told officers that there was nothing special about the way the men were dressed that night; however, Byrd testified that he, Wooten, Jenkins and Hall were all dressed in black. Contrary to appellant's claim that she argued with the men during the drive to the Hight home, Byrd testified no one spoke on the way, other than when appellant drove by the Hight home and the others pointed to the house and advised Byrd "there's the house right there." After appellant parked the car, Byrd said the men all stepped outside the car and put black bandanas over their faces. Appellant claimed no one covered their faces with anything. Further, Byrd testified that he gave his wallet and cell phone to appellant because he did not want to risk dropping them at the crime scene. Appellant claimed she did not see any weapons in her car; however, the shotgun Byrd carried was recovered at the scene and measured 37 inches long.

{¶57} Appellant claimed there were no phone calls between herself and Wooten on the night of Hight's murder; however, Detective George determined via cellular

telephone records that there were six phone calls between the pair. Appellant and Wooten had phone contact four times during the approximate time that the crimes were taking place – at 11:59, 12:09, 12:28 and 12:33. There were two additional calls between them at 10:00 p.m. and 12:39 a.m.

{¶58} Ryan Rider testified that it was past midnight when Bob Hight received the phone call alerting him that Steve Sr. needed help. When they arrived at Steve Sr.'s house five minutes later, Rider saw three people run through the backyard. Moments later, after seeing the lights go out in the house and hearing the door lock, two men came up behind him. Jason Ramey heard shots, looked out his window and saw people running for appellant's Grand Am at approximately 12:25 a.m. He watched as they jumped into the car and the driver sped away.

{¶59} Viewing this evidence in a light most favorable to the prosecution, any rational trier of fact could have found that appellant knew the men intended to commit one or more crimes at the Hight home and that she was aware that at least one weapon was involved.

{¶60} Based upon the foregoing and the entire record in this matter, we find appellant's convictions were neither against the manifest weight nor the sufficiency of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before it given they acquitted appellant of the most serious crimes against her.

{¶61} Appellant's first assignment of error is overruled.

II.

{¶62} In her second assignment of error, the appellant maintains that the trial court failed to conduct a proper constitutional analysis as outlined in *Batson v. Kentucky*

(1986), 476 U.S. 79 in determining that the State was not racially motivated in excluding an African American from the jury through the use of a peremptory challenge. See, *Hicks v. Westinghouse Materials Co.* (1997), 78 Ohio St.3d 95, 98; *State v. Toland,* Stark App. No. 2006-CA-0162, 2007-Ohio-644. We disagree.

{¶63} A defendant is denied equal protection of the law guaranteed to him by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution when the state places the defendant on trial before a jury from which numbers of the defendant's race have been purposely excluded. *Strauder v. W. Virginia* (1880), 100 U.S. 303, 305; *State v. Hernandez* (1992), 63 Ohio St.3d 577; *State v. Bryant* (1995), 104 Ohio App.3d 512, 516. The "equal protection" clause forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that jurors of the same race as the defendant will be unable to impartially consider the state's case against the defendant." *State v. Bryant,* supra, 104 Ohio App.3d 516; *Batson v. Kentucky,* supra, 476 U.S. at 89.

{¶64} Whenever a party opposes a peremptory challenge by claiming racial discrimination "[a] judge should make clear, on the record, that he or she understands and has applied the precise *Batson* test when racial discrimination has been alleged in opposition to a peremptory challenge." *Hicks v. Westinghouse Materials Co.,* supra, 78 Ohio St.3d at 99.

{¶65} In *Hicks,* supra, the Ohio Supreme Court set forth the *Batson* test as follows:

{¶66} "The United States Supreme Court set forth in *Batson,* the test to be used in determining whether a peremptory strike is racially motivated. First, a party

opposing a peremptory challenge must demonstrate a prima-facie case of racial discrimination in the use of the strike. Id. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 87. To establish a prima-facie case, a litigant must show he or she is a member of a cognizable racial group and that the peremptory challenge will remove a member of the litigant's race from the venire. The peremptory-challenge opponent is entitled to rely on the fact that the strike is an inherently 'discriminating' device, permitting 'those to discriminate who are of a mind to discriminate'. *State v. Hernandez* (1992), 63 Ohio St.3d 577, 582, 589 N.E.2d 1310, 1313, certiorari denied (1992), 506 U.S. 898, 113 S.Ct. 279, 121 L.Ed.2d 206. The litigant must then show an inference of racial discrimination by the striking party. The trial court should consider all relevant circumstances in determining whether a prima-facie case exists, including all statements by counsel exercising the peremptory challenge, counsel's questions during voir dire, and whether a pattern of strikes against minority venire members is present. See, *Batson* at 96-97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. Assuming a prima-facie case exists, the striking party must then articulate a race-neutral explanation 'related to the particular case to be tried.' Id. at 95, 106 S.Ct. at 1724, 90 L.Ed.2d at 88. A simple affirmation of general good faith will not suffice. However, the explanation 'need not rise to the level justifying exercise of a challenge for cause.' Id. at 97,106 S.Ct. at 723, 90 L.Ed.2d at 88. The critical issue is whether a discriminatory intent is inherent in counsel's explanation for use of the strike; intent is present if the explanation is merely pretext for exclusion on the basis of race. *Hernandez v. New York* (1991), 500 U.S. 352, 363, 111 S.Ct. 1859, 1868, 114 L.Ed.2d 395, 409.78 Ohio St.3d. 98-9.

{¶67} Although the prosecutor must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive or even plausible"; so long as the reason is not inherently discriminatory, it suffices. *Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S.Ct. 1769. *(per curiam); Rice v. Collins* (2006), 546 U.S. 333, 126 S.Ct. 969, 973-74.

{¶68} Last, the trial court must determine whether the party opposing the peremptory strike has proved purposeful discrimination. *Purkett v. Elem* (1995), 514 U.S. 765, 766-767, 115 S.Ct. 1769, 1770. It is at this stage that the persuasiveness, and credibility, of the justification offered by the striking party becomes relevant. Id. at 768, 115 S.Ct. at 1771. The critical question, which the trial judge must resolve, is whether counsel's race-neutral explanation should be believed. *Hernandez v. New York,* 500 U.S. at 365, 111 S.Ct. at 1869; *State v. Nash* (August 14, 1995), Stark County Court of Appeals, Case No. 1995-CA-00024. This final step involves evaluating "the persuasiveness of the justification" proffered by the prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett,* supra, at 768, 115 S.Ct. 1769; *Rice v. Collins,* supra, at 126 S.Ct. 974.

{¶69} It is irrelevant how many minority jurors remain on the panel if even one is excluded based on race. *State v. Bryant,* supra, 104 Ohio App.3d 512; *State v. Tuck* 80 Ohio App 3d 721, 724*(Batson,* applicable even if there is only one African-American juror on the panel); *Jones v. Ryan* (C.A.3, 1993), 987 F.2d 960, 972; *United States v. David* (C.A.11, 1986), 803 F.2d 1567.

{¶70} On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. *Hernandez v. New York,* 500 U.S. 352, 364-366, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion) (holding that evaluation of a prosecutor's credibility "lies 'peculiarly within a trial judge's province' "). *Rice v. Collins,* supra at 126 S.Ct. 974.

{¶71} In the case at bar, a review of the record establishes that Juror No. 158's responses to the questions posed by the trial judge and counsel cast considerable doubt as to whether or not he could set aside his personal beliefs, follow the law and render a fair and impartial verdict.

{¶72} In the instant matter, counsel for the State advised the venire that all of the charges in this case involve complicity. He then went on to ask individual members of the panel whether they felt it was fair that one can be charged with complicity even if one did not commit the actual crime. The following exchange took place between counsel for the State and Juror 158:

{¶73} MR. VANCE: 158, what do you think?

{¶74} JUROR 158: I feel they shouldn't be charged with the same crime as the person that did it.

{¶75} MR. VANCE: I am sorry, say that again.

{¶76} JUROR 158: I feel they shouldn't be charged with the exact sane crime as the person who committed it.

{¶77} MR. VANCE: You feel they should not be?

{¶78} JUROR 158: No.

{¶79} MR. VANCE: Okay. Why do you feel that way?

{¶80} JUROR 158: I mean she was with the person who done it, but she wasn't the one with the firearm who fired the gun. So I feel she shouldn't be charged with the same crime as the person who did it.

{¶81} MR. VANCE: I appreciate it that's why we are asking the questions. That's why the judge said speak up, there are absolutely no wrong answers. If the judge were to say, hey, look, this is the law and you have got to follow it, would that change your views?

{¶82} JUROR 158: I know – yes.

{¶83} MR. VANCE: But it sounds like this is something that you have some kind of strong feelings on.

{¶84} JUROR 158: Yes, I do.

{¶85} Defense counsel then engaged Juror 158 as follows:

{¶86} MR. URBAN: Now, I would like to ask, after hearing the charges in the indictment that the Judge read to you when he began, do those charges in and of themselves make it difficult for anyone to sit and hear the evidence, see the evidence and render a verdict. The charges themselves? Juror No. 158.

{¶87} JUROR 158: Yeah, it is difficult for me because I wasn't there. I don't know anything about the case yet, and I just feel my views would be different. I mean I don't even know this person, you know, don't know the kind of things they did. It would be better for me if I was there and actually had seen it. It would be hard for me to, in my view anyway.

{¶88} ...

{¶89} MR. URBAN: Are you saying that she is not guilty because you weren't there, or are you saying that she is guilty because of the facts, circumstances and charges?

{¶90} JUROR 158: Not guilty.

{¶91} MR. URBAN: Because you weren't there.

{¶92} JUROR 158: I wasn't there.

{¶93} MR. URBAN: Okay. There is no manner of evidence that can be presented to you that sways you differently?

{¶94} JUROR 158: No.

{¶95} MR. URBAN: Does anyone else feel that jury service is not appropriate when they weren't there, when they didn't get all the evidence?

{¶96} JUROR 158: I do.

{¶97} 2T. at 85-87.

{¶98} When both sides were finished questioning the venire, the State moved to dismiss Juror 158 for cause. A sidebar conference followed:

{¶99} THE COURT: It is only for your benefit because 158 is an African-American, the only African-American left on the panel. He has indicated that he would not be able to follow the law that somebody charged with complicity can be held responsible as a complicitor and even if they did not commit the underlying offense.

{¶100} Secondly, he indicated that he would have difficulty serving on the jury and finding someone guilty if he was not actually there to witness the event himself, both of which are indications that he would not be in a position to follow the law as I have stated it to you.

{¶101} Mr. Urban do you have any response?

{¶102} MR. URBAN: Yes your Honor. As the court has indicated, everyone is well aware, that this is the only African-American juror left in the available pool. Additionally, when I summed up, I did close by asking or by indicating that you were going to be instructing them on the law –

{¶103} THE COURT: All right, let's bring him up.

{¶104} THE COURT: Juror 158, would you come up here please.

{¶105} THE COURT: Good morning.

{¶106} JUROR 158: Good morning sir.

{¶107} THE COURT: Two areas in particular I want to go over with you. All right? There is no right or wrong answer. I am just asking you so I understand for sure.

{¶108} JUROR 158: Okay.

{¶109} THE COURT: you have indicated that you would not; you would not be able to find somebody guilty if they assisted somebody in the offense if they did not actually commit the offense, that you felt it wasn't right that they would be charged with the same offense.

{¶110} JUROR 158: Correct.

{¶111} THE COURT: Now, if I instructed you as a juror on the law that in fact you can be held accountable as a complicitor, even though you were not the actual offender of the underlying offense, would you be able to follow the law?

{¶112} JUROR 158: I mean I understand that, but I just feel that she shouldn't get the same –

{¶113} THE COURT: Well, I understand your feelings. There is no right or wrong answer. What we need to know is whether or not, notwithstanding your feelings, if I told you the law was an individual in a particular case, assuming they were charged with a shooting, they had assisted the person but were not the actual shooter, would you be able to follow the law?

{¶114} JUROR 158: Yes, I could follow the law.

{¶115} THE COURT: Even though I gave you those, even though your feelings are contrary?

{¶116} JUROR 158: Yes.

{¶117} THE COURT: Okay. The second thing you indicated is that, Judge, you said I think in response to a question that you would not be able to find somebody guilty of an offense if you weren't at the location to see it.

{¶118} JUROR 158: Yes.

{¶119} THE COURT: Now, you understand that more than likely if you were there to witnesses it you would be a witness?

{¶120} JUROR 158: Yes.

{¶121} THE COURT: You wouldn't be a juror.

{¶122} JUROR 158: That's true.

{¶123} THE COURT: Can you follow the law as I state it to you based on the testimony of witnesses that may or may not have seen things, judge their credibility, and make your decision on that in fairness to both the State and the Defendant; or are you going to automatically say if I didn't see it with my own eyes, there is no way I could find somebody guilty? Do you understand my question?

{¶124} JUROR 158: Yes, I understand.

{¶125} THE COURT: the State has a right to a fair trial as the Defendant. Obviously, if you were listed as somebody being there, you would have been interviewed by the police and listed as a witness.

{¶126} JUROR 158: Uh-huh.

{¶127} THE COURT: Can you sit as a juror with that feeling that you have and follow my instructions?

{¶128} JUROR 158: I don't believe I can.

{¶129} ...

{¶130} THE COURT: ...I want to cut to the heart of this. The lawyers can ask can ask you questions and you can give then the answers you think they need to have. But the fact of the matter is, here's the question. Clearly you want to be fair. But I need to know whether or not you would follow the instruction that I give you that in essence you do not have to be at the location and actually see it.

{¶131} JUROR 158: Yes, I understand that.

{¶132} THE COURT: you have indicated that, Judge, I could not find somebody guilty if in fact I did not see it with my own eyes, if I wasn't there. Now, did I misunderstand what you said? JUROR 158: No, you didn't

{¶133} ...

{¶134} THE COURT: Can you base a decision fairly to both the State and the Defendant even though you weren't at the location to see it with your own eyes?

{¶135} JUROR 158: No, I don't think I can then

{¶136} ...

{¶137} THE COURT: All right, thank you. You have said enough. Take your seat.

{¶138} THE COURT: Counsel approach. I'm going to overrule the excuse for cause. I'm not going to go back and forth. You have four peremptories. He has shown a race neutral basis, but I'm not going to go back and forth with this juror. It is not a cause situation given that he is African-American.

{¶139} MR. VANCE: that is going to be my next issue. I am going to say the State is prepared to use a peremptory.

{¶140} THE COURT: you don't have to approach. There are plenty of race neutral reasons given; but as to cause, I am not just comfortable with it because he is all over the ball park...it has nothing to do with race. It is he is all over the ball park.

{¶141} 2T. at 97-109. The State then used its first peremptory challenge to excuse Juror 158.

{¶142} "The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson.*" *Rice v. Collins,* supra at 126 S.Ct. at 977. (Breyer, J., concurring).

{¶143} We do not find that the dismissal of Juror No. 158 was clearly erroneous. We find that the reason provided by the court and the prosecutor prior to exercising a peremptory challenge to excuse Juror No. 158 was racially neutral.

{¶144} Appellant further contends that the court committed error in permitting Juror 212 to be excused for cause.

{¶145} Initially, we note that appellant has failed to properly brief this issue on appeal. App.R. 16(A)(7) states that an appellant shall include in its brief "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contention, with citations to the authorities, statutes and parts of the record on which appellant relies." In this case, appellant has wholly failed to cite any specific place in the trial court's record where any of the errors are alleged to have occurred with respect to Juror 212.

{¶146} Because appellant fails to properly reference portions of the record supporting his claim that the trial court's excusal of Juror 212 constitutes error, the appellant cannot demonstrate the claimed instance of error. See *Daniels v. Santic,* Geauga App. No.2004-G-2570, 2005- Ohio-1101, at ¶ 13-15. See, also, App.R. 12(A) (2) and 16(A) (7); *Graham v. City of Findlay Police Dept.* (Mar. 19, 2002), Hancock App. No. 5-01-32 (stating that "[t]his court is not obliged to search the record for some evidence of claimed error. * * * Rather, an appellant must tell the appellate court specifically where the trial court's alleged errors may be located in the transcript"). Our own Supreme Court has noted:

{¶147} "The omission of page references to the relevant portions of the record that support the brief's factual assertions is most troubling. Appellate attorneys should

not expect the court 'to peruse the record without the help of pinpoint citations' to the record. *Day v. N. Indiana Pub. Serv. Corp.* (C.A.7, 1999), 164 F.3d 382, 384 (imposing a public reprimand and a $500 fine on an attorney for repeated noncompliance with court rules). In the absence of the page references that S.Ct.Prac.R. VI(2)(B)(3) requires, the court is forced to spend much more time hunting through the record to confirm even the most minor factual details to decide the case and prepare an opinion. That burden ought to fall on the parties rather than the court, for the parties are presumably familiar with the record and should be able to readily identify in their briefs where each relevant fact can be verified." *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 2006-Ohio-903, at ¶ 13; *See also,* State *v. Davis*, Licking App. No. 2007-CA-00104, 2008-Ohio-2418 at ¶ 91.

{¶148} In the alternative, we would note that appellant agreed to excuse Juror 212 for cause because the juror had an emergency involving the care of his infant son. (1T. at 49-51). Under the doctrine of "invited error," it is well settled that "a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663, citing *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359. See, also, *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. As the Ohio Supreme Court has stated, "[t]he law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted. It follows,

therefore, that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible." *Lester* at 92-93, quoting *State v. Kollar* (1915), 142 Ohio St. 89, 91.

{¶149} In any event, the rule requiring race-neutral explanation for peremptory challenge alleged to be discriminatory does not apply to discharge of prospective juror for cause. *State v. Lewis,* Mahoning App. No. 03 MA 36, 2005-Ohio-2699 at ¶60.

{¶150} Accordingly, appellant's complaints regarding Juror 212 are devoid of merit.

{¶151} Appellant's second assignment of error is overruled.

III.

{¶152} In her third assignment of error, appellant contends that prosecutorial misconduct resulted in reversible error. We disagree.

{¶153} The prosecutor's duty in a criminal trial is two-fold. The prosecutor is to present the case for the State as its advocate and the prosecutor is responsible to ensure that an accused receives a fair trial. *Berger v. U. S.* (1935), 295 U. S. 78; *State v. Staten* (1984), 14 Ohio App. 3d 197.

{¶154} Misconduct of a prosecutor at trial will not be considered grounds for reversal unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768. The touchstone of analysis is "the fairness of the trial, not the culpability of the prosecutor." *State v. Underwood* (1991), 73 Ohio App.3d 834, 840-841, 598 N.E.2d 822, 826, citing *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct.

940, 947, 71 L.Ed.2d 78, 87-88. An appellate court should also consider whether the misconduct was an isolated incident in an otherwise properly tried case. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203, 209-210; *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶155} Appellant did not object to the comments to which she now claims error. Therefore, for those instances, we must find plain error in order to reverse.

{¶156} The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to ‘prevent a manifest miscarriage of justice.' " *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. *Perry*, supra, at 118, 802 N.E.2d at 646.

{¶157} A prosecutor is entitled to a certain degree of latitude in closing arguments. *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589, 433 N.E.2d 561. Thus, it falls within the sound discretion of the trial court to determine the propriety of these arguments. *State v. Maurer* (1984), 15 Ohio St.3d 239, 269, 473 N.E.2d 768. A conviction will be reversed only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found the defendant guilty. *State v. Benge,* 75 Ohio St.3d 136, 141, 1996-Ohio-227. Furthermore, "[i]solated comments by a prosecutor are not to be taken out of context and given their most damaging

meaning." *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431.

{¶158} First, appellant takes issue with the prosecutor's statement in closing argument:

{¶159} "The law in the State of Ohio does not require that we prove to you that she knows that they are going there to commit a murder or a robbery or a burglary or a kidnapping. But if a murder or a burglary or a kidnapping happens while they are there, if she drives them to and from, the law in the State of Ohio says she's responsible for it." 3T. at 679.

{¶160} At first blush it may appear that the prosecutor is improperly defining the crime of conspiracy; however, when taken as a whole, the jury is informed of the elements necessary to convict appellant. The prosecutor further clarified for the jury that, "she doesn't have to know when she gets in the car and turns the key… if at any time during the commission of these crimes or during this course of conduct, this frame of mind, this state of mind was developed the law in the State of Ohio says she is guilty of these crimes…" (3T. at 680; 699). Further, the court properly instructed the jury as to what conduct and circumstances constituted aiding and abetting and also advised the jury that closing arguments of counsel are not evidence.

{¶161} A jury is presumed to follow instructions given it by the court. *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237. Appellant has failed to establish beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found the defendant guilty. *State v. Benge,* 75 Ohio St.3d 136, 141, 1996-Ohio-227. See *State v. Campbell* (1994), 69 Ohio St.3d 38, 51 (where the Court opined that it

was implausible for that defendant to argue that the jury determined a capital case based on a minor legal misstatement made by the state during voir dire).

{¶162} Next, appellant contends that the prosecutor committed misconduct in his rebuttal argument in the following passage to which she did not object:

{¶163} "This is a great, this is a fabulous country folks. Only here in the United States of America are we allowed to get away with saying it's not my fault, it's somebody else's fault. And when we have something like this up here, we can point emphatically and say it's their fault, they did this to me. I didn't do it. I didn't make any free choice. I don't have any free will. It's my fault, and you twelve folks set it right. Fix this for me. Because it wasn't my mistake to begin with. I didn't cause this problem. So feel sorry for me and in fact, ignore the rules, ignore the law, forget everything the judge is going to tell you, and set everything that I screwed up, not just on the twenty-first of June 2007, but for the seven months that followed, and set it right. Ignore the oath that you took on Tuesday and set it right. Fix everything that I screwed up for me. It's a fabulous country we have." (3T. at 696-697).

{¶164} This Court has noted, "[i]n his rebuttal argument, the prosecutor may argue that the evidence does not support the conclusion postulated by defense counsel. He may comment upon the circumstances of witnesses in their testimony, including their interest in the case, their demeanor, their peculiar opportunity to review the facts, their general intelligence, and their level of awareness as to what is going on. He may conclude by arguing that these circumstances make the witnesses more or less believable and deserving of more or less weight.

{¶165} "Generally the credibility of various witnesses will now have been put in issue by the argument of the defense. Considerable additional latitude is due the prosecutor at this juncture, either on fair play grounds or because the comments are invited by the defense. The prosecutor should be allowed to go as far as defense counsel. Thus, if the defense accuses witnesses of lying, the prosecutor should have the same right.

{¶166} "However, the prosecutor may not invite the jury to judge the case upon standards or grounds other than the evidence and law of the case. Thus, he cannot inflame the passion and prejudice of the jury by appealing to community abhorrence or expectations with respect to crime in general, or crime of the specific type involved in the case. *United States v. Solivan* (C.A.6, 1991), 937 F.2d 1146". Id. at 670-71, 602 N.E.2d at 793." *State v. Draughn* (1992), 76 Ohio App. 3d 666, 602 N.E. 2d 790.

{¶167} In the case at bar, the comments by the prosecutor were invited by the defense and the defense's characterization that appellant's friends put her "between a rock and a hard place," "put her in the middle," "[t]he person she had babysitted children with, who she trusted and said nothing's wrong, don't worry about it."

{¶168} We find no error plain or otherwise. No misconduct occurred because of the prosecutor's comments. Under these circumstances, there is nothing in the record to show that the jury would have found the appellant not guilty had the comments not been made on the part of the prosecution. *State v. Benge,* 75 Ohio St.3d 136, 141, 1996-Ohio-227.

{¶169} Appellant's third assignment of error is overruled.

IV.

{¶170} In her fourth assignment of error, appellant argues the trial court committed error when it failed to suppress statements she made to the police on or about January 8, 2008. Appellant contends that her *Miranda* waiver was invalid because it was obtained through promises of leniency and because his confession was the product of coercion. We disagree.

{¶171} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E .2d 583; *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141, overruled on other grounds. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App .3d 623, 620 N.E.2d 906; *Guysinger*, supra.

{¶172} Appellant challenges the trial court's decision regarding the ultimate issue raised in her motion to suppress; therefore, we must independently determine whether the facts meet the appropriate legal standard.

{¶173} The inquiry as to whether a waiver is made voluntarily, knowingly and intelligently is two-fold.

{¶174} "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *State v. Davie* (Dec. 27, 1995), 11th Dist. No. 92-T-4693, unreported (quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410). In evaluating the totality of the circumstances, the court should consider "'the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.' " *State v. Brinkley,* 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, at ¶ 58 (quoting *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus) and (citing *State v. Green,* 90 Ohio St.3d 352, 366, 2000-Ohio-182, 738 N.E.2d 1208; *State v. Eley,* 77 Ohio St.3d 174, 178, 1996-Ohio-323, 672 N.E.2d 640).

{¶175} "[T]he burden of showing admissibility rests, of course, on the prosecution." *Brown v. Illinois*, 422 U. S. 590, 604 (1975). The prosecution bears the burden of proving, at least by a preponderance of the evidence, the *Miranda* waiver, *Colorado v. Connelly*, 479 U. S. 157, 169 (1986), and the voluntariness of the confession, *Lego v. Twomey*, 404 U. S. 477, 489 (1972).

{¶176} Based on the totality of the circumstances, we agree with the trial court that appellant did knowingly intelligently and voluntarily waive her *Miranda* protections.

{¶177} In the case at bar appellant contends that a combination of factors renders her statement involuntary, to wit: appellant had limited contact with the police prior to this incident; after approximately thirty minutes of conversation at her residence the appellant was driven to headquarters by police in a cruiser; multiple officers were present; she was told at her residence that police believed that she had information concerning the murder and that her vehicle was involved in the crime; and the police promised to return her home after the interview to allow her to babysit her niece after school.

{¶178} In *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473, the court held that "police over-reaching" is a prerequisite to a finding of involuntariness. Evidence of use by the interrogators of an inherently coercive tactic (*e.g.,* physical abuse, threats, deprivation of food, medical treatment, or sleep) will trigger the totality of the circumstances analysis. *State v. Clark* (1988), 38 Ohio St.3d 252, 261, 527 N.E.2d 844, 854.

{¶179} In the cause *sub judice,* the appellant does not assert that she was physically deprived or mistreated while at the police department, nor does the record

reveal any type of physical deprivation or mistreatment. Moreover, there is no evidence that police subjected appellant to threats or physical abuse, or deprived her of food, sleep, or medical treatment. See *State v. Cooey* (1989), 46 Ohio St.3d 20, 28, 544 N.E.2d 895, 908. The activities surrounding appellant's statement took place over a period of one and one-half hours from the time the officers arrived at her home until the officers drove her back to her residence. The record contains no evidence that appellant was questioned by the officers while inside the police cruiser in route to the station. The trial court further noted in overruling the appellant's motion to suppress:

{¶180} "One thing comes through very clearly during the tape of that interview and that is that this was a young lady that was not intimidated, that she was intelligent, that she understood the questions."

{¶181} (ST. June 24, 2009 at 43).

{¶182} Appellant further argues that the officers used improper inducement when they told her she would be returned home after the interview. However, such a statement is not improper. Improper inducement occurs when "the defendant is given to understand that he might reasonably expect more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement." *United States v. Johnson* (6th Cir 2003), 351 F.3d 254, 262. Appellant was not told she would never be arrested or charged if she spoke with police. Rather, Detective George testified that he did not intend to arrest appellant that day: "...we were not prepared to act on any of the information that she had gave us at that particular moment. I advised her if she came down with us and gave a statement that she would most definitely go home that day. We would take the information that we had back to our prosecutors and see what they

wanted to do with it." (ST. June 24, 2009 at 28). Detective George did not renege on his promise and did in fact returned appellant to her home after the interview. Moreover, appellant has failed to identify how this statement caused her will to be overborne and her capacity of self-determination critically impaired.

{¶183} In *State v. Brown* (2003), 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, the Ohio Supreme Court noted "[I]t is well established that at a suppression hearing, 'the evaluation of evidence and the credibility of witnesses are issues for the Trier of fact.' *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 1 ORB 57, 437 N.E.2d 583. The trial court was free to find the officers' testimony more credible than appellant's. We therefore defer to the trial court's ruling regarding the weight and credibility of witnesses. *State v. Moore* (1998), 81 Ohio St.3d 22, 31, 689 N.E.2d 1." Id. at 55, 2003-Ohio-5059 at ¶15, 796 N.E.2d at 512.

{¶184} The record is insufficient to establish that appellant's "will was overborne" by the officers' activities in coming to her home to investigate this crime and in having appellant accompany the officers to the police station to make a statement.

{¶185} Appellant's fourth assignment of error is overruled.

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

By Gwin, J.,

Farmer, P.J., and

Hoffman, J., concur

_____
HON. W. SCOTT GWIN

_____
HON. SHEILA G. FARMER

_____
HON. WILLIAM B. HOFFMAN

WSG:clw 0511

[Cite as *State v. Rutledge*, 2009-Ohio-2478.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
LATOYA RUTLEDGE	:	
Defendant-Appellant	:	CASE NO. 2009-CA-0022

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. SHEILA G. FARMER

_____
HON. WILLIAM B. HOFFMAN