[Cite as *State v. Mulvey,* 2009-Ohio-6756.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 BE 31
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
JOHN ANDREW MULVEY,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Belmont County Court, Northern Division, Case No. 08CR0362-02.
JUDGMENT:	Affirmed.
APPEARANCES: For Plaintiff-Appellee:	Attorney Chris Berhalter Prosecuting Attorney Attorney Daniel P. Fry Asst. Prosecuting Attorney 147 W. Main Street St. Clairsville, OH 43950
For Defendant-Appellant:	Attorney Brett E. Fullem 3755 Liberty Road, Suite 4 Pittsburgh, PA 15234
JUDGES: Hon. Mary DeGenaro Hon. Gene Donofrio Hon. Cheryl L. Waite	
	Dated: December 11, 2009

[Cite as *State v. Mulvey*, 2009-Ohio-6756.]
DeGenaro, J.

{¶1} Appellant John Mulvey appeals the October 1, 2008 decision of the Belmont County Court, Northern Division, Belmont County, Ohio, that imposed a ninety-day jail sentence, seventy days of which were suspended, subsequent to a jury finding of guilty on one count of Resisting Arrest, and a finding of not guilty on counts of Assault and Disorderly Conduct.

{¶2} Mulvey argues that the trial court committed reversible error by overruling Mulvey's challenge of a juror for cause, denying Mulvey's motion for a mistrial; providing incomplete jury instructions; disallowing the admission of a particular prior inconsistent statement; and, preventing Mulvey from referring to a non-witness in closing arguments. Mulvey also argues that the State committed prosecutorial misconduct during its closing statements.

{¶3} Upon review of the record below, the challenged juror expressed his ability to be unbiased, and the trial court did not abuse its discretion in denying Mulvey's challenge for cause. The actions of an EMT witness did not bias the jury, and the testimony focused on the assault charge for which Mulvey was acquitted, thus the trial court did not err in denying Mulvey's motion for a mistrial. The trial court's failure to define "lawful arrest" in the jury instructions did not rise to the level of plain error. The written statement of a witness was not admissible as extrinsic evidence for impeachment when the witness admitted all differences between the writing and his testimony. The trial court abused its discretion in disallowing Mulvey from referring to non-testifying witnesses. However, the trial court's error did not affect Mulvey's substantial rights, and was thus harmless beyond a reasonable doubt. Finally, although it was improper for the prosecution to refer to non-testifying witnesses to imply that the State's evidence could be further corroborated, it did not deny Mulvey the right to a fair trial. Accordingly, the trial court's decision is affirmed.

FACTS AND PROCEDURAL HISTORY

{¶4} On May 23, 2008, Mulvey was charged with one count of Assault in violation of R.C. 2903.13(A), a first degree misdemeanor; one count of Resisting Arrest in violation of R.C. 2921.33(A), a second degree misdemeanor; and, one count of Disorderly Conduct in the presence of a law enforcement officer in violation of R.C.

2917.11(A)(1)(E)(3)(c), a fourth degree misdemeanor. Mulvey entered a plea of not guilty. At a pre-trial hearing on August 13, 2008, the trial court instructed attorneys to appear early on the day of trial to review jury instructions.

{¶5} Mulvey's trial took place on September 16, 2008. During voir dire of the jury venire, Mulvey challenged a juror for cause, due to the juror's previous experience as an expert witness in unrelated cases. Subsequent to a colloquy with the challenged juror, the trial court denied Mulvey's challenge. Mulvey exercised all three of his permitted peremptory challenges.

{¶6} During the voir dire process, an excused juror fell ill as he was leaving, requiring the aid of emergency medical technicians, one of whom was a witness who would be called by the State to testify. Mulvey moved for a mistrial. The trial court denied Mulvey's motion, but gave a curative instruction to the jury to not let the incident during voir dire affect their judgment of the case.

{¶7} During opening statements, Mulvey attempted to discuss statistics and a news article regarding the corrupt behavior of public officials, in order to emphasize that police version of events with Mulvey would be untruthful. The State's objections to Mulvey's two statements were sustained by the trial court.

{¶8} For its case in chief, the State called Officer John McFarland to testify. McFarland stated that he had been dispatched to the house of Cathy Tingler (Mulvey's sister) at 12:20 a.m. on December 18, 2007, on a report of a fight in progress. At the scene, Tingler appeared intoxicated, was bleeding from lacerations on her face, and yelled for the police to arrest a nearby female who had been involved in the fight. McFarland testified that Officer Dojack attended to Tingler in her house, accompanied by Officer Duncan and two paramedics (Michael Lollini and Bryan Hall). Mulvey objected to McFarland's reference to Duncan's written police report as hearsay.

{¶9} MacFarland testified that, after interviewing the other woman, he and two additional officers, Officer Heslop and Officer Hendershot, waited on Tingler's porch with him. When Mulvey appeared on the scene, the officers stood in the doorway and asked him to wait, but Mulvey disregarded them and entered the house. McFarland testified that he has known Mulvey for a long time and wanted to explain to him what had happened.

McFarland and the other two officers shortly entered the house, and witnessed Duncan and Dojack struggling with Mulvey upstairs. Mulvey was struggling and kicking, and three officers worked to place him in handcuffs. McFarland testified that he did not see the first ten to fifteen seconds of the exchange between Mulvey and Duncan and Dojack leading up to their decision to handcuff Mulvey. Mulvey continued to struggle, and the officers had to carry him down the stairs out of the house. Subsequently, Mulvey yelled profanities at the officers, refused to calm down but ceased physically struggling, and continued to yell as he was taken out of the house and into a police cruiser.

{¶10} Bryan Hall testified that he is a paramedic who was called to the scene on a report of an assault. Tingler was upset that he and the others were there, refused to provide basic information, refused to go to the hospital, and yelled profanities at them. Hall testified that he heard Mulvey enter the house and yell, and turned around as Mulvey ascended the stairs and struck Hall in the chest with his forearm, causing Hall to stumble into a bathroom. Hall then heard Mulvey yell at the officers, and heard a physical struggle.

{¶11} Officer Rob Duncan testified that he had been called in for assistance regarding a fight in progress on December 18, 2007, and that Officers McFarland and Dojack were already at the scene. Duncan went upstairs to assist Dojack, and observed Tingler bleeding, intoxicated, and yelling obscenities at Dojack and the EMT's. As Duncan was squatted down to talk to Tingler as she was sitting on her bed, Mulvey entered the room yelling "what the fuck are you doing here?" and pushed Duncan. Duncan did not know who Mulvey was. As Duncan tried to direct Mulvey to the door, Mulvey reached for Duncan with his hands raised in an aggressive manner. Duncan then took Mulvey by the arm, pushed him to the bed, and said he was under arrest. Mulvey kicked and struggled to keep from putting his hands behind his back. Duncan and two other officers subdued Mulvey, who then continued to struggle and refused to descend the stairs. During cross examination, Mulvey offered Duncan's written statement of the incident as an exhibit, and questioned Duncan about missing details in the report.

{¶12} For the defense case in chief, Mulvey called his niece, Tiffany Tingler, to testify. Tiffany testified that she is Cathy Tingler's daughter, and that she was in Tingler's

house during the December 18, 2007 incident. Tiffany stated that she had driven Tingler home after Mulvey and Tingler had been out playing darts for five hours. Tiffany did not know if either party had been drinking. Tiffany witnessed the fight that occurred between Tingler and others in the street, and witnessed Tingler's injuries afterwards. Tiffany telephoned Mulvey, told him that Tingler had gotten attacked, and told him to come over. Tiffany witnessed Tingler's interactions with the police, and did not hear her yelling obscenities. When Mulvey arrived, the officers outside were still talking to the other parties in the fight, and were not on the porch. Tiffany followed Mulvey up the stairs, did not see an EMT in the hallway, and did not see Mulvey push anyone. Mulvey asked the officers what was happening, and the officers attacked Mulvey. Tiffany then ran outside and did not witness the rest of the exchange in the bedroom. Tiffany saw the officers hit Mulvey's face into the front screen door when taking him out to the police cruiser. Tiffany testified that Mulvey was not struggling as the police took him downstairs and outside, and Mulvey was not handcuffed. Mulvey was not yelling or swearing, but was calmly protesting being arrested.

{¶13} Mulvey testified that he had been at a bar from approximately 5:30 p.m. to 11:00 p.m. on December 18, 2007, had consumed approximately six beers, but was not intoxicated. Mulvey assumed that his sister, Tingler, had consumed approximately the same amount of alcohol. An hour after Mulvey had returned home, Tiffany called and said that someone was beating up her mother. When Mulvey arrived at Tingler's house, there were police cars and an ambulance in front. There were no officers on the front porch. Mulvey saw blood in the front and inside the house, then hurried up the stairs and saw Tingler, bleeding. EMT Hall was standing at the top of the steps in the house, but Mulvey had no physical contact with him. Mulvey did not yell obscenities or question the police and EMTs' presence, because he knew why they were there. When Mulvey walked into the bedroom towards his sister, Duncan grabbed him and threw him on the bed. Mulvey did not attempt to make physical contact with anyone, and the officers did not state anything before throwing him on the bed. As Mulvey's face was down on the bed, he was repeatedly struck in the lower back, which caused him to urinate. Mulvey testified that he squirmed due to being hit in the kidneys, but was not fighting back.

Mulvey did not become combative with the officers, and did not resist being taken down the stairs or use vulgar language. The officers hit Mulvey's face on the front screen door to open it. Mulvey testified that he has known McFarland his whole life, and that McFarland has picked on him since childhood. Mulvey denied the officers' version of events, and believed that they were adding fabrications to the incident in order to cover up their misconduct.

{¶14} Mulvey moved to admit the police report written by Duncan. The State objected on the grounds that Duncan testified as to any inconsistencies from his prior statement on cross-examination, and that the written statement itself should not be admitted. The trial court ruled to not admit the police report, and Mulvey lodged an objection.

{¶15} During closing statements, the State noted that "I could have brought the other four [witnesses] in here including Chief Dojack. I simply didn't want to duplicate the testimony from everybody. * * * The other officers could have come in and testified as to what I believe they would have said." Mulvey objected to the argument regarding evidence that was not presented, which the trial court overruled. The trial court also overruled Mulvey's objection to the State's statement that there could technically be three assault charges for Mulvey's striking of Hall, pushing of Duncan, and subsequent lunging at Duncan. The State specified that any one of those three incidents would be sufficient for the assault charge being tried. Mulvey further objected to the State's statement that Mulvey had assaulted Hall and Duncan, which the trial court overruled.

{¶16} During Mulvey's closing statements, the State unsuccessfully objected to Mulvey stating "There's a reason those other charges weren't filed. If the prosecutor felt those charges were viable, they would have filed them." The State unsuccessfully objected to Mulvey's statement that McFarland failed to file his own report or statement about the incident. The trial court sustained the State's objection to Mulvey alleging a statement made by an officer during a pre-trial meeting, as it was not in evidence. The trial court sustained the State's objection to Mulvey pointing out that EMT Lollini was not called to testify, though Mulvey protested that he was only pointing out that Lollini was present during the altercation. The trial court overruled the State's objection to Mulvey

making reference to Hall's EMT report to point out discrepancies, as Hall had testified as to the content of his report during cross examination. Mulvey protested the State's repeated objections during Mulvey's closing. The trial court overruled the State's objection to Mulvey's discussion of the booking sheet exhibit.

{¶17} Subsequent to closing arguments, final instructions by the trial court, and deliberations, the jury found Mulvey not guilty of assault and disorderly conduct, and found him guilty of resisting arrest. On October 1, 2008, the trial court held a sentencing hearing, and sentenced Mulvey to 90 days in jail, with 70 days of the sentence suspended. The trial court also imposed two years of probation, costs and jury fees. The trial court initially denied Mulvey's motion to stay sentence, but later granted the stay pending appeal.

Challenge of Juror for Cause

{¶18} In his first of six assignments of error, Mulvey asserts:

{¶19} "The trial court deprived appellant of a fair trial by overruling a challenge for cause regarding Juror John Heilmeier."

{¶20} Mulvey contends that his challenge was valid as the juror had requested to be disqualified due to being a psychotherapist who has previously provided expert testimony at trials, and stated during voir dire that he had provided expert testimony for prosecutions in the past. Mulvey asserts that such a relationship with the State creates a clear bias.

{¶21} A prospective juror may be challenged for cause if there is a demonstration of bias toward the defendant. R.C. 2945.25(B); Crim.R. 24(C)(9). A trial court has the broad discretion to determine whether a juror has the ability to be impartial. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶73. The trial court may rely on the juror's testimony in order to determine that juror's impartiality. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, at ¶191. If a prospective juror is challenged for bias, a reviewing court must pay deference to the trial court, who was able to see and hear the prospective juror and the exchanges during voir dire. *Trimble* at ¶73.

{¶22} A trial court's ruling on a challenge for cause will not be disturbed by a

reviewing court "unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion." *State v. Williams*, 79 Ohio St.3d 1, 8, 1997-Ohio-407, 679 N.E.2d 646. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶23} John Heilmeier stated that he had testified as an expert witness several times for the State. Heilmeier stated that he requested to be excused because of the likelihood that he had testified in the past for one of the attorneys in the case. However, Heilmeier had not testified for either attorney in this particular case, and stated that he would be an impartial juror. At the end of jury questioning, Mulvey challenged Heilmeier for cause, which the State opposed. The trial court addressed Heilmeier:

{¶24} "The Court: John Heilmeier, because of your involvement with the prosecutor's office, would you feel uncomfortable at all today ruling in favor of the defendant?

{¶25} "The Prospective Juror: No, Your Honor.

{¶26} "The Court: You could listen today to the evidence that's presented to you from the stand and from anything we give you as agreed upon in documentary evidence, apply the law as I give it to you, and make your decision?

{¶27} "The Prospective Juror: Yes, sir.

{¶28} "The Court: And you have no concern as to your involvement with the state in the past?

{¶29} "The Prospective Juror: No, sir.

{¶30} "The Court: The challenge for cause is denied."

{¶31} The record supports the trial court's decision. The juror's request for excusal merely complained of the potential for a conflict of interest, and did not indicate that the juror would be biased. The juror did not end up knowing the attorneys involved in the case, and had not testified as an expert witness for either of them before. Further, the juror explicitly stated that he would be impartial. Nothing in the record indicated that the juror was being untruthful to the trial court. The trial court could have reasonably concluded that the juror understood his obligation to disregard his previous interactions

with other attorneys for the State and render a verdict free of any prejudgment. The trial court therefore did not abuse its discretion in denying Mulvey's challenge for cause. Accordingly, Mulvey's first assignment of error is meritless.

Prosecutorial Misconduct in Closing Arguments

{¶32} In his second assignment of error, Mulvey asserts:

{¶33} "The prosecutor's statements during closing arguments amounted to prosecutorial misconduct and prejudicially affected the appellant's right to a fair trial."

{¶34} Mulvey argues that the State committed prosecutorial misconduct by stating during closing arguments that it could have brought additional corroborating witnesses and could have brought additional charges against Mulvey, and by inappropriately characterizing Mulvey's version of events as "ludicrous" and less reasonable. Although not exactly within the scope of his stated assignment of error, Mulvey additionally argues that the State committed misconduct by repeatedly objecting during Mulvey's opening and closing arguments.

{¶35} In reviewing a prosecutor's alleged misconduct, a court looks at whether the prosecutor's remarks were improper and, if so, whether the prosecutor's remarks affected substantial rights of the appellant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 470 N.E.2d 883. "The touchstone of the analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, at ¶140, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78. An appellate court should not find reversible error unless, in the context of the entire proceedings, it appears that the misconduct deprived the appellant of a fair trial. *State v. Fears*, 86 Ohio St.3d 329, 332, 1999-Ohio-111, 715 N.E.2d 136; *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293.

{¶36} As for the statements complained of during the State's closing arguments, "we must keep in mind the latitude counsel is given during closing arguments and that the closing must be viewed in its entirety in determining whether the complained of remarks were prejudicial." *State v. Morris*, 7th Dist. No. 08 CO 7, 2009-Ohio-3326, at ¶133, citing *State v. Byrd* (1987), 32 Ohio St.3d 79, 82, 512 N.E.2d 611, and *Smith*, supra. An appellate court must "view the state's closing argument in its entirety to determine

whether the allegedly improper remarks were prejudicial." *State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4, 739 N.E.2d 749. A conviction should be reversed due to improper statements in closing only if the jury would have found the defendant not guilty but for the improper statements. *State v. Benge*, 75 Ohio St.3d 136, 141-142, 1996-Ohio-227, 661 N.E.2d 1019.

{¶37} During rebuttal closing statements, after paraphrasing Mulvey's cross-examination of Duncan on his police report, the prosecutor stated that it was "ludicrous" to suggest that, just because a police officer did not define every term and describe every detail in a police report, that the officer is lying and incompetent. The prosecutor then stated "the testimony that the officers gave you I would submit is the more reasonable testimony," and proceeded to summarize the facts as presented by the State's witnesses. Mulvey did not object to these particular statements by the State, and has thus waived all but plain error. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, at ¶84.

{¶38} Mulvey contends that these comments were grossly improper, but includes no further argument. As noted, the parties have wide latitude in their closing statements, particularly "latitude as to what the evidence has shown and what inferences can be drawn from the evidence." *Diar*, supra, at ¶213. A prosecutor may state his opinion if it is based on the evidence presented at trial. Id. A prosecutor may even point out a lack of credibility of a witness, if the record supports such a claim. *State v. Powell*, 177 Ohio App.3d 825, 2008-Ohio-4171, 896 N.E.2d 212, at ¶45. In the above statements, the prosecutor appears to be giving his opinion on the overall believability of the evidence presented, and not necessarily the credibility of a particular witness. The State's opinion was general and was within the scope of making an inference from the whole record. Given the generality of the prosecutor's statements, the statements were not improper, and thus did not constitute misconduct as a matter of plain error.

{¶39} The State also noted during closing that there could technically have brought three assault charges for Mulvey's striking of Hall, pushing of Duncan, and subsequent lunging at Duncan. Mulvey's objection was overruled. The State specified that any one of those three incidents would be sufficient for the assault charge being

tried. During Mulvey's closing he noted "There's a reason those other charges weren't filed. If the prosecutor felt those charges were viable, they would have filed them."

{¶40} Mulvey asserts that the prosecutor went beyond the scope of facts relevant to the case. It is true that a prosecutor is not permitted to go beyond the admissible evidence in a trial. *Smith*, supra, at 14. However, witnesses for the State testified to three acts by Mulvey that could have been considered assaults. Thus the prosecutor's statements did not go outside the evidence, and the statement that charges could have been filed would be an acceptable inference from those facts. Moreover, as Mulvey was acquitted of the assault charge, even if these statements were improper, they would be harmless beyond a reasonable doubt.

{¶41} The main violation cited in Mulvey's claim of misconduct is the reference that the prosecutor made to witnesses who were present at the December 18, 2007 incident but did not testify at trial. Of the seven witnesses mentioned during the State's case in chief, the four who did not testify were Officers Heslop, Hendershop and Dojack, and EMT Lollini. During closing arguments, the State noted that "I could have brought the other four [witnesses] in here including Chief Dojack. I simply didn't want to duplicate the testimony from everybody. * * * The other officers could have come in and testified as to what I believe they would have said." Mulvey's objection was overruled.

{¶42} Mulvey argues that this statement refers to evidence not admitted at trial, and makes the insinuation that the evidence would have corroborated the State's case. A prosecutor's arguments to the jury may not allude to matters not supported by admissible evidence in his closing arguments. *Smith*, supra. Testimony during trial did indicate that there were additional eyewitnesses at the scene that could have testified on behalf of the prosecution, thus it would be acceptable for the prosecutor to infer that those eyewitnesses could have testified about the matter. However, to the extent that the prosecutor implied that witnesses not called to testify would have given the exact same testimony as the testifying witnesses, his remark was improper.

{¶43} However, the potential for prejudice against the defendant is less likely if a prosecutor's reference to matters outside the record is oblique and is a short isolated lapse. *Lott*, supra, at 166-167. See, also, *State v. Blasdell*, 155 Ohio App.3d 423, 2003-

Ohio-6392, 801 N.E.2d 853, at ¶50-51. In light of the record as a whole, although it was improper, the prosecutor's brief mention of the fact that the officers and EMT could have testified did not contribute to Mulvey's conviction. The State asked the jury to decide the case on the testimony that was presented. The prosecutor focused on the believability of the scenario presented by his side, and did not indicate that the consistency of his witnesses' testimony made them more believable, and thus that additional consistent testimony would make his scenario even more believable. Given that the jury found Mulvey not guilty on two of the charges, the finder of fact did not view the officers' consistent testimony as completely credible, even in the face of the possible implication that four more State witnesses could have testified to the same story. There is not any reason to think that the prosecutor's reference to the other four officers somehow made the resisting arrest claim more believable to the jury. Thus the prosecutor's statement was improper but did not deprive Mulvey of a fair trial.

{¶44} As a final additional argument, Mulvey asserts that the State committed prosecutorial misconduct by distracting the jury and interrupting the flow of Mulvey's opening and closing arguments with repeated objections. Although it is considered quite rude to repeatedly object during another party's opening or closing, there is no rule prohibiting counsel from interrupting another party's arguments with valid objections. *Powell*, supra, at ¶45; *State v. Reed*, 11th Dist. Nos. 18417, 18448, 2001-Ohio-1537, citing *State v. Stinson* (1984), 21 Ohio App.3d 14, 17, 21 OBR 15, 486 N.E.2d 831.

{¶45} The State lodged two objections during Mulvey's opening statements, both of which were sustained. The State lodged six objections during Mulvey's closing statements, two of which were sustained. The State objected during opening and closing because it believed that Mulvey was going outside the admissible evidence of the case or making improper inferences in various statements. The State articulated a valid basis for each of its objections, and the record does not indicate that the State was voicing such objections for the purpose of interfering with opposing counsel. The State's objections were not improper and thus did not constitute prosecutorial misconduct.

{¶46} Given the foregoing, most of the prosecutor's actions complained of did not constitute improper conduct. The prosecutor's improper inference to non-testifying

witnesses did not deprive Mulvey of a fair trial. Mulvey's second assignment of error is meritless.

Mistrial – State Witness Aid to Juror

{¶47} In his third assignment of error, Mulvey asserts:

{¶48} "The trial court committed reversible error and an abuse of discretion by denying the appellant's request for a mistrial after a State witness (an emergency medical technician) provided medical attention to an ill juror."

{¶49} The refusal to grant a mistrial is largely within the trial court's broad discretion. *State v. Glover* (1988), 35 Ohio St.3d 18, 19, 517 N.E.2d 900. A mistrial need only be declared when a fair trial for the defendant is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1. "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused are adversely affected * * *." *State v. Nichols* (1993), 85 Ohio App.3d 65, 69, 619 N.E.2d 80. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶50} During voir dire, as a member of the jury venire was leaving due to being challenged for cause, he fell ill. From the transcript, it appears that an unidentified police officer and an unspecified number of emergency medical technicians went to the aid of the venireman, though the trial court told the police officer to sit down. Mulvey moved for a mistrial because one of the EMT's, Bryan Hall, was going to be called as a witness in the trial. The trial court overruled Mulvey's motion for mistrial, but agreed to give a curative instruction to the jury. The trial court then told the jury, "You saw certain EMT's assisting Mr. Collette which is what EMT's do. One of those EMT's is believed to be a witness in this case. Your observation of that assistance is to have nothing to do with your decision in this case." Bryan Hall later testified as a witness to the incident on December 18, 2007.

{¶51} Mulvey relies solely on *State ex rel. Haukedahl v. Bates* (1995), 102 Ohio App.3d 460, 657 N.E.2d 513, to support his argument that the jury would be biased by the

EMT's actions. However, *Haukedahl* did not involve a witness helping a disqualified venireman during voir dire. It involved aid to an ailing juror during trial by a defendant to a medical malpractice claim which contended that the defendant had not properly responded to the plaintiff's medical condition. *Haukedahl v. St. Lukes Hosp.* (Dec. 3, 1993), 6th Dist. No. L-92-011. The Sixth District found that, given the subject matter of the suit, the events during trial risked predisposing the jury in the defendant's favor. Id.

{¶52} Given that the EMT's actions in this case were not closely related to the issue of whether Mulvey resisted arrest, the case at hand is distinguishable. Based on the reading of a cold record, it is difficult to ascertain if the jury was at all affected by the efforts of the EMT. Unlike *Haukedahl*, this is not a situation where juror bias for or against the defendant would automatically be assumed. Moreover, the EMT's testimony almost exclusively addressed the assault charge for which Mulvey was acquitted. The more pertinent evidence from different witnesses supporting Mulvey's conviction indicates that the actions of the EMT did not preclude the possibility of Mulvey receiving a fair trial.

{¶53} Finally, any potential prejudice to Mulvey was further assuaged by the trial court's prompt curative instruction. A jury is presumed to follow curative instructions given to it by a trial judge. *State v. Garner*, 74 Ohio St.3d 49, 59, 1995-Ohio-168, 656 N.E.2d 623. Mulvey does not indicate anything in the record that would overcome such a presumption. Mulvey's third assignment of error is therefore meritless.

Incomplete Jury Instructions

{¶54} In his fourth assignment of error, Mulvey asserts:

{¶55} "The trial court committed plain error by failing to provide the jury a complete instruction on 'resisting arrest.'"

{¶56} A trial court is obligated to provide all jury instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as a fact-finder. *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, at paragraph two of the syllabus. "Jury instructions that effectively relieve the state of its burden of persuasion violate a defendant's due process rights." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶97.

{¶57} R.C. 2921.33(A) provides, in pertinent part: "No person, recklessly or by

force, shall resist or interfere with a lawful arrest of the person or another." The term "lawful arrest" is an essential element of the offense of resisting arrest. *State v. Thompson* (1996), 116 Ohio App.3d 740, 743, 689 N.E.2d 86; *State v. Campana* (1996), 112 Ohio App.3d 297, 678 N.E.2d 626.

{¶58} In this case, the trial court included the following instructions: "Before you can find the defendant guilty of resisting arrest, you must find beyond a reasonable doubt that * * * the defendant did recklessly or by force, resist or interfere with the lawful arrest of himself or another." The trial court then defined "reckless," "force," "resist or interfere," and "arrest." The trial court defined "arrest" as "an intent to arrest, under real or pretended authority, accompanied by actual or constructive seizure or detention of the person, and which is so understood by the person arrested." The trial court did not provide the definition of "lawful arrest." Thus the trial court included, but did not define, an essential element of the offense of resisting arrest.

{¶59} An arrest is "lawful" if the surrounding circumstances would give a reasonable police officer cause to believe that an offense has been or is being committed. *State v. Sansalone* (1991), 71 Ohio App.3d 284, 285-286, 593 N.E.2d 390. "In the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances." *State v. Mann* (1985), 19 Ohio St.3d 34, 39, 19 OBR 28, 482 N.E.2d 592, quoting *Columbus v. Fraley* (1975), 41 Ohio St.2d 173, 70 O.O.2d 335, 324 N.E.2d 735 paragraph three of the syllabus.

{¶60} As Mulvey notes, this court must apply the plain error standard of review regarding the trial court's omission, as Mulvey failed to object to the jury instructions. Crim.R. 30(A); Crim.R. 52(B). In the absence of plain error, the failure to object to errors or ambiguities in a jury instruction waives the issue on appeal. *State v. Bowman* (2001), 144 Ohio App.3d 179, 189-190, 759 N.E.2d 856; *State v. Underwood* (1983), 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus, following *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804. An error in the context of a jury instruction does not rise to the level of plain error unless, but for the error, the outcome of the trial clearly

would have been different. *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, at ¶31; *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 227, 4 OBR 580, 448 N.E.2d 452, quoting *Long*, supra. The doctrine of plain error "is to be applied with utmost caution and invoked only under exceptional circumstances, in order to prevent a manifest miscarriage of justice." *Cooperrider* at 227.

{¶61} Mulvey contends that it is highly probable that the jury would have acquitted him of resisting arrest had they been given a definition of "lawful arrest," because they acquitted him of the underlying offenses that led to his arrest. However, the fact that the jury acquitted Mulvey on the Assault and Disorderly Conduct charges does not mean that the arrest for those offenses was unlawful. Although an arrest must be lawful, "it is not necessary for the state to prove that the defendant was in fact guilty of the offense for which the arrest was made to uphold a conviction for resisting arrest." *State v. Collins* (Mar. 31, 1999), 7th Dist. No. 97-CO-38, at *3. See, also, *Sansalone*, supra, at 285; *Mann*, supra, at 40 ("the fact that a defendant was not found guilty of the underlying offense or that an indictment was not returned is not pertinent in a resisting-arrest trial.").

{¶62} The burden of proof for assault and disorderly conduct is proof beyond a reasonable doubt, which is a much higher standard than a "reasonable basis" standard required for an arrest to be lawful. See, e.g., *Thompson*, supra, at 743; *Collins*, supra. Thus, the fact that Mulvey was acquitted of assault and disorderly conduct does not affect whether the arrest was lawful.

{¶63} This is not one of those exceptional cases where the outcome of the trial would have been different but for the error. We find no plain error in the trial court's failure to provide a definition of the term "lawful arrest" in its instructions to the jury. Accord *State v. Broucker*, 5th Dist. No. 2007CA00315, 2008-Ohio-2946, at ¶33-38; *State v. Boyle*, 11th Dist. Nos. 2003-P-0027, 2003-P-0028, 2003-P-0029, 2004-Ohio-1531, at ¶32; *City of Hamilton v. Cherry* (Feb. 29, 1988), 12th Dist. No. 87-08-109; *State v. Morrow* (Oct. 10, 1984), 2d Dist. No. 8031. Accordingly, Mulvey's fourth assignment of error is meritless.

Admissibility of Prior Inconsistent Statement

{¶64} In his fifth assignment of error, Mulvey asserts:

{¶65} "The trial court committed reversible error by not admitting a prior inconsistent statement of a State witness."

{¶66} Mulvey contends that the trial court erroneously refused to admit into evidence the statement that Officer Duncan wrote on the date of the incident. Mulvey argues that the written statement constituted a prior inconsistent statement and should have been admitted. Beyond a quotation of Evid.R. 613(B), Mulvey offers no legal support for his argument.

{¶67} Evidence Rule 613(B) allows the admission of extrinsic evidence of a prior inconsistent statement if "the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;" and if the subject matter of the statement "is of consequence to the determination of the action other than the credibility of a witness," or otherwise meets the requirements of Evid.R. 613(B)(2). *State v. Reed*, 155 Ohio App.3d 435, 2003-Ohio-6536, 801 N.E.2d 862, at ¶29. A trial court's ruling on an Evid.R. 613(B) issue, like other evidentiary rulings, is reviewed for an abuse of discretion. *State v. Reiner*, 89 Ohio St.3d 342, 357-358, 2000-Ohio-190, 731 N.E.2d 662, reversed on other grounds; *State v. McKinnon*, 7th Dist. No. 02 CO 36, 2004-Ohio-3359, at ¶51. An abuse of discretion indicates that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, at ¶23.

{¶68} If a witness denies making a statement and the issue is not collateral, then extrinsic evidence is admissible to impeach the witness. *State v. Soke* (1995), 105 Ohio App.3d 226, 239, 663 N.E.2d 986. However, if a witness admits making the conflicting statement, then extrinsic evidence of the prior statement is not admissible. *Reed* at ¶30; *State v. Hill*, 2d Dist. No. 20028, 2004-Ohio-2048, at ¶40, citing *State v. Theuring* (1988), 46 Ohio App.3d 152, 155, 546 N.E.2d 436 and *Blackford v. Kaplan* (1939), 135 Ohio St. 268, 14 O.O. 118, 20 N.E.2d 522.

{¶69} Mulvey asserts that the inconsistencies between Duncan's written statement and his testimony dictate that the written statement should have been admitted into evidence. During cross examination of Duncan, Mulvey was permitted to present Duncan with his written statement of the incident. Mulvey thoroughly cross examined Duncan regarding missing facts and missing details from the statement. The cross-examination established that Duncan's statement was very brief and gave few details. When Mulvey confronted Duncan about the lack of details in the written statement, Duncan admitted that the details were missing from the report.

{¶70} The fact that details were lacking in Duncan's prior statement does not necessarily prove that the prior statement was inconsistent with his trial testimony. Moreover, insofar as the additional details were not in Duncan's written statement, Duncan admitted that the details were not there. Thus, if the statements can be interpreted as being inconsistent, Duncan admitted to the inconsistency. Because a witness's admission of inconsistency of a prior statement renders extrinsic evidence of the prior statement inadmissible, the trial court did not err in refusing to admit Duncan's written statement into evidence. The trial court did not err, let alone abuse its discretion, in disallowing the admission of extrinsic evidence. Mulvey's fifth assignment of error is meritless.

Reference to Non-Witness in Closing Arguments

{¶71} In his sixth and final assignment of error, Mulvey asserts:

{¶72} "During closing arguments the trial court committed reversible error by not allowing defense counsel to mention witnesses not called by the prosecution."

{¶73} Absent an abuse of discretion, a reviewing court should not reverse a trial court's determination that a party exceeded permissible bounds of closing argument. *State v. Glasure* (May 23, 2000), 7th Dist. No. 724, citing *Pang v. Minch* (1990), 53 Ohio St.3d 186, 194, 559 N.E.2d 1313. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Brady*, supra, at ¶23.

{¶74} Mulvey argues the trial court should have allowed him to comment on the absence of EMT Lollini's testimony in order to emphasize that one of the eyewitnesses to

the arrest and resistance had not been called by the State. Mulvey argues on appeal that such a comment was essential to argue that the State could be hiding conflicting evidence. The State counters that a party is prohibited from commenting on the fact that a witness who was listed on a witness list was not called to testify at trial, per Crim.R. 16(B)(4) and the interpretation of the similar section Crim.R. 16(C)(3) in *State v. Hannah* (1978), 54 Ohio St.2d 84, 8 O.O.3d 84, 374 N.E.2d 1359.

{¶75} Crim.R. 16(B)(4), as well as Crim.R. 16(C)(3), state the following: "Witness list; no comment. The fact that a witness' name is on a list furnished [by the opposing party], and that such witness is not called shall not be commented upon at the trial." The State claims that Lollini was listed on its witness list, and thus that Mulvey was barred by the Ohio Criminal Rules from mentioning his failure to testify. There is no indication in the record that the State furnished a witness list during discovery or at trial, thus there is no information before this court to confirm the State's contention that Lollini's name was included on the State's witness list. However, Mulvey's argument impliedly concedes that the State provided a witness list including Lollini's name.

{¶76} Further, there is a split among the districts as to how broadly the analysis of Crim.R. 16(C)(3) was construed in *Hannah*, thus the issue is not as straightforward as the State maintains. The small portion of *Hannah* that relates to Crim.R. 16 is very brief and broadly worded. *Hannah* at 90. Although the *Hannah* majority does not specify, apparently the witness's name did appear on the list provided to the State, and the State did not mention the absence of the witness in conjunction with a comment on that witness's name being present on Hannah's witness list. *Hannah* at 93-94 (Herbert, Celebrezze, McCormac, JJ., dissenting).

{¶77} Many districts have adhered to the dissent's reasoning in *Hannah* which interpreted Crim.R. 16(C)(3) to only mean that a party may not point out a witness's non-presence in conjunction with a mention of the witness's name appearing on the witness list, in accordance with *State v. Champion* (1924), 109 Ohio St.281, 289-290, 142 N.E. 141. See, e.g., *State v. Montgomery* (Mar. 29, 1996), 4th Dist. No. 94CA40; *State v. Lentz* (June 30, 1993), 6th Dist. No. E-91-58; *State v. Fannin*, 8th Dist. No. 79991, 2002-Ohio-6312, at ¶59-62; *State v. Knight* (Oct. 22, 1981), 10th Dist. No. 81AP-257. Some

districts have assumed that we are bound to follow the broad wording of *Hannah*, though they have questioned the wisdom of that portion of the *Hannah* decision. See, e.g., *State v. Simon* (May 26, 2000), 11th Dist. No. 98-L-134; *State v. Anthony* (Sept. 20, 1996), 2d Dist. No. 95 CA 0018 (1996 WL 531582). Other more recent cases have followed the majority of *Hannah*, though with minimal or conflicting analysis. See, e.g., *State v. Ryder* (Aug. 30, 2000), 9th Dist. No. 99CA007337; *State v. Crossty*, 12th Dist. No. CA2008-03-070, 2009-Ohio-2800, at ¶45.

{¶78} Irrespective of the split in the districts regarding the application of *Hannah*, the case at hand is factually distinguishable. During the State's closing arguments, the prosecutor stated that he could have brought four additional witnesses to testify, which would have been Heslop, Hendershot, Dojack, and Lollini. The State therefore opened the door to commentary on Lollini's failure to testify. See *State v. Wright*, 6th Dist. No. E-03-054, 2004-Ohio-5228, at ¶19; *State v. Messer*, 10th Dist. No. 01AP-396, 2001-Ohio-4048. Because the prosecutor mentioned those witnesses, over Mulvey's objection, the State cannot now argue that *Hannah* prevents Mulvey's mention of the same.

{¶79} Because the prosecutor opened the door to the issue of non-testifying witnesses, the trial court's decision to bar Mulvey from commenting on the State's failure to present Lollini's testimony was done in error. Given that the trial court overruled Mulvey's objection to the prosecutor's reference to the non-testifying witnesses during closing arguments, the trial court's decision to sustain the same objection against Mulvey was an abuse of discretion.

{¶80} Although we find that the trial court's decision was an abuse of discretion, our finding does not require an automatic reversal if we determine that the error was harmless beyond a reasonable doubt. Harmless error is defined as, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights[.]" Crim.R. 52(A). Any error that is harmless shall be disregarded. Id. "Whether [the] error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, at ¶62, quoting *State v. Conway*, 108

Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, at ¶78.

{¶81} When viewing the context of the error, the error was harmless beyond a reasonable doubt. Mulvey stated during closing:

{¶82} "Mr. Fullem: Now, were these officers, the witnesses today, were they being sloppy in their writing their reports or were they being vague on purpose? I would submit to you that they were being vague on purpose. First off, where is Mr. Lollini? This gentleman, the EMT, the other EMT inside the room.

{¶83} "Mr. Fry: Objection, Your Honor.

{¶84} "Mr. Fullem: Your Honor, there was testimony that he was in the room. That's all I'm saying.

{¶85} "(Bench Conference)

{¶86} "Mr. Fry: He's beginning to comment on witnesses who were not called.

{¶87} "Mr. Fullem: His witnesses testified that he was in the room. That's all I'm making a comment on.

{¶88} "Mr. Fry: [Indaudible].

{¶89} "Mr. Fullem: There was testimony that he was in the room. There is evidence to that effect. He was in the room and that's all I'm referring to.

{¶90} "Mr. Fry: But you're saying I didn't call him as a witness.

{¶91} "The Court: Objection sustained."

{¶92} Upon reviewing Mulvey's closing statements, Mulvey did get the opportunity to reference Lollini and indicate that he had not testified. Mulvey's statement was not stricken or given a curative instruction, thus the jury was able to consider Mulvey's statement. During the sidebar conversation, Mulvey argued that he only wanted to mention Lollini's presence in the room. Because Mulvey so limited his argument during trial, he is not able to later contend that he wanted to present more information or argument regarding Lollini. Moreover, Mulvey would be barred from making inferences beyond what he had already pointed out to the jury, because Mulvey would not be allowed to allude to predictions about Lollini's potential testimony. Because the trial court's error was harmless, Mulvey's sixth assignment of error is meritless.

CONCLUSION

{¶93} The trial court's denial of Mulvey's challenge of a juror for cause, denial of Mulvey's motion for mistrial, and disallowance of inadmissible extrinsic evidence did not constitute an abuse of discretion. The trial court's failure to define "lawful arrest" in the jury instructions did not amount to plain error. The prosecutor's inference regarding the potential testimony of non-testifying witnesses was improper, but did not deny Mulvey the right to a fair trial. Finally, the trial court's prevention of Mulvey's reference to non-testifying witnesses constituted an abuse of discretion, but was harmless beyond a reasonable doubt. Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.