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

State of Ohio — Court of Appeals No. L-13-1193

Appellee — Trial Court No. CR0201202661

v.

Antwaine L. Jones — **DECISION AND JUDGMENT**

Appellant — Decided: February 20, 2015

* * * * *

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

Veronica M. Murphy, for appellant.

Antwaine L. Jones, pro se.

* * * * *

JENSEN, J.

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, sentencing appellant, Antwaine Jones, to life in prison and ordering him to pay the "costs of supervision, confinement, assigned counsel, and prosecution as authorized by

law." For the following reasons, we affirm, in part, and reverse, in part, the judgment of the trial court.

{¶ 2} This case arises from a shooting that occurred on August 9, 2012, at the Moody Manor apartments in Toledo, Ohio. On that night, Naomi Reed was inside her apartment with several others including her great-grandchildren, K.H. and L.H. In the moments before the shooting, K.H. and L.H. were asleep on the floor of the apartment in front of an air conditioner.

{¶ 3} Awoken by gunshots, one-year-old K.H. sat up and was shot in the head. Two-year-old L.H. was shot in the chest and abdomen. The children were rushed to St. Vincent's hospital. K.H. died as the result of her wounds. L.H. was treated and released several days later.

{¶ 4} Two Moody Manor residents, Cassandra Wells and Demetria Johnson, along with Wells' boyfriend, Brandon Lino, witnessed two men flee the scene and make their way into a moving minivan. One of the men was wearing a red and white hat, a white T-shirt, black jogging pants, and a black hoodie. The other man was wearing a red T-shirt underneath a black hoodie.

{¶ 5} Johnson phoned 911. Several Toledo police officers responded to the call. When Officer Paul Marchyok arrived, one of the children had already been rushed to the hospital. Moments later, the second child received medical attention from emergency medical services, on scene. When Marchyok began to secure the crime scene, he discovered shell casings outside Reed's apartment. He then notified his lieutenant of the

incident and requested access to the Moody Manor camera system in an effort to determine the number of suspects involved.

{¶ 6} Approximately fifteen minutes after the shooting, Toledo police Detective Jason Lenhardt arrived on the scene. By this time, the weather had taken a turn for the worse and Lenhardt was forced to conduct his investigation under heavy rainfall. While the rainfall did hamper Lenhardt's investigation, he was nonetheless able to recover a bullet from an adjacent apartment, as well as a 9 mm cartridge, fragments of copper jacketing, and multiple shell casings, both 9 mm and .40 caliber. Eventually, two additional 9 mm casings and one .40 caliber casing were retrieved from the scene.

{¶ 7} While Lenhardt was conducting his investigation outdoors, Detective Scott Smith focused on the interior of Reed's apartment. As Smith made his way through the apartment, he discovered several more bullets and shell casings.

{¶ 8} Later, officers investigated the van that was allegedly used as a getaway vehicle. Inside the van, they located a red and black Chicago Bulls hat, a dark blue hoodie, a black hoodie, and traffic citations previously issued to Keshawn Jennings. Upon execution of a search warrant at Jennings' house, officers recovered a black hooded sweatshirt and a pair of black sweatpants. A red T-shirt was seized from Jennings after he was interviewed by detectives.

{¶ 9} In time, Toledo police determined that appellant was one of the men involved in the shooting. On October 10, 2012, an 11-count indictment was handed down charging appellant with one count of aggravated murder in violation of R.C.

2903.01(C) and (F), one count of murder in violation of R.C. 2903.02(B), two counts of attempt to commit aggravated murder in violation of R.C. 2923.02 and 2929.23.01(C) and (F), four counts of felonious assault in violation of R.C. 2903.11(A)(2), two counts of attempt to commit murder in violation of R.C. 2923.02 and 2903.02, and one count of improper discharging of a gun into a habitation in violation of R.C. 2923.161(A)(1). Each count contained a firearm specification. The indictment also charged the above offenses against codefendants, James Moore and Keshawn Jennings.

{¶ 10} Appellant entered a plea of not guilty, and a trial was scheduled for December 10, 2012. The trial date was continued several times at the defendants' requests. Eventually, Moore entered a plea of guilty to involuntary manslaughter in exchange for his testimony at appellant's trial and an agreed sentence of three years.

{¶ 11} A jury trial began on June 24, 2013. Multiple witnesses testified at trial. Most relevant to this appeal is the testimony of codefendant Moore.

{¶ 12} Moore testified that he, appellant, and Jennings were members of the Bloods street gang. He acknowledged that he was the driver of the van. Moore also testified that appellant was one of the men responsible for the shooting, which was intended for a man affiliated with a rival gang, the Crips.

{¶ 13} Upon conclusion of the trial on July 5, 2013, the jury returned a guilty verdict on all counts, and the matter was continued for sentencing.

{¶ 14} Jones was sentenced to 30 years to life for the aggravated murder conviction and one year for the attached firearm specification; 11 years for the attempted

murder conviction and one year for the attached firearm specification; and 8 years for the felonious assault convictions and one year for the attached firearm specification.[1] The aggravated murder and one of the felonious assault charges were ordered to be served consecutively with each other, and the remaining sentences were ordered to be served concurrently with each other and the first and fourth counts, for a sentence of life with parole eligibility after 40 years. Further, appellant was ordered to pay "all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as well as authorized by law." This appeal followed.

{¶ 15} Appellant's appointed counsel has requested leave to withdraw in accordance with the procedure set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶ 16} In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the appeal, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id.* at 744. The request shall include a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel shall also furnish his client with a copy of the request to withdraw and its accompanying brief, and allow the client sufficient time to raise any matters that he chooses. *Id.* The appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court

[1] After the jury's verdicts were returned, the verdict forms were discovered to have contained the statutory language for a one-year firearm specification pursuant to R.C. 2941.141, rather than the language for the three-year specification in R.C. 2941.145.

determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id*.

{¶ 17} Here, appointed counsel has met the requirements set forth in *Anders*. Counsel informed appellant of his right to file his own, additional assignments of error, and appellate brief. Appellant has filed his own brief and assigned additional assignments of error. Accordingly, this court has examined the potential assignments of error set forth by counsel, the assignments of error set forth by appellant, and the entire record below.

{¶ 18} In her brief, appellate counsel states, "[p]ossible issues to be addressed on appeal are whether Mr. Jones was prejudiced by the trial court's refusal to grant severance or a change of venue or by ineffective assistance of counsel." In his brief, appellant, pro se, raises twelve assignments of error for our review. Counsel's arguments are similar to some of the arguments set forth in appellant's pro se brief. We will address those issues jointly.

First Assignment of Error

{¶ 19} In his first assignment of error, appellant states:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. JONES BY FAILING TO EXCUSE A SLEEPING JUROR IN VIOLATION OF HIS RIGHT TO A JURY AND HIS RIGHT TO DUE PROCESS OF LAW AS GUARANTEED UNDER THE FIFTH, SIXTH,

AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶ 20} During the trial, the court became aware that juror No. 5 was having a hard time staying awake. At one point, defense counsel asked for a sidebar conference and informed the trial judge of the situation. The court decided to monitor the juror, and the trial continued. Additionally, the state alerted the court that it was concerned that an alternate juror had fallen asleep during its direct examination of Lenhardt. Once again, the court informed the parties that it would monitor the jury. The court also indicated that it would provide an instruction if the situation continued.

{¶ 21} On the next day, defense counsel requested another sidebar conference, suspecting juror No. 5 of sleeping during the trial. At the beginning of the conference, the court stated: "I know that you guys think that juror no. 5 is sleeping because his head's down. * * * He's taking notes. I can see him from up higher. * * * I've been watching him and he's been – his head is down, his eyes are down, but I can see from the bench here he's writing."

{¶ 22} On the second to last day of trial, the court individually voir dired juror No. 5. The court was prompted to voir dire juror No. 5 when it became apparent that juror No. 5 had fallen asleep during the showing of a lengthy video exhibit. In questioning juror No. 5, the following dialogue took place:

THE COURT: Just have a seat there, sir. Okay. The record should reflect that we're outside the presence of the jury. We're here with juror no. 5. You having a little trouble staying awake?

JUROR NO. 5: Not really.

THE COURT: I've been watching and it seems like you were dozing off earlier when the – when the video was being played here. Is there some – do you feel like – have you caught yourself nodding off here?

JUROR NO. 5: I have done that.

* * *

THE COURT: You can – you want to finish sitting on this trial?

JUROR NO. 5: Oh, yes.

THE COURT: Well, we all want you to [too] but if we notice that you're sleeping, we can't have you continue. Obviously if – it's not fair to the defendants, it's not fair to the State here if you do. So I'm going to caution you that if you continue to have this problem – if there's anything we can do, will you let us know?

JUROR NO. 5: I can do that.

THE COURT: And if you continue to have the problem and you don't let us know, then I may have to remove you and seat one of the alternate jurors.

JUROR NO. 5: Okay.

* * *

THE COURT: We're in recess. Before counsel goes, anybody have any objections to the voir dire of that juror?

[DEFENSE COUNSEL]: On behalf of [appellant], no.

{¶ 23} On appeal, appellant argues that the trial court erred in failing to excuse juror No. 5 when it realized that the juror was sleeping during trial. Notably, appellant's counsel did not object to the trial court's instructions to juror No. 5, nor did counsel move for a mistrial. "If a party fails to express dissatisfaction with the trial court's handling of an issue, the issue is waived in the absence of plain error." *State v. Bunce*, 6th Dist. Lucas No. L-08-1237, 2010-Ohio-3629, ¶ 32, citing *State v. McKnight*, 107 Ohio St.3d 101, 837 N.E.2d 315, 2005-Ohio-6046, ¶ 185. Therefore, plain error is the appropriate standard of review.

{¶ 24} In order to establish plain error, appellant must demonstrate an obvious error that affected substantial rights "under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); Crim.R. 52(B). An alleged error cannot rise to the level of plain error unless the outcome clearly would have been different if not for the error. *State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996).

{¶ 25} Here, appellant contends that juror No. 5 was observed falling asleep during testimony related to exhibit No. 37, an aerial photograph of the Moody Manor apartment complex overlaid with a diagram depicting the coverage area of the

surveillance system. Appellant asserts that the testimony surrounding exhibit No. 37 formed "a centerpiece of the State's case in chief."

{¶ 26} Upon review, we find no plain error in this case. Contrary to appellant's assertion, we find that the evidence presented during the period that juror No. 5 was allegedly sleeping was not critical to the state's case. Indeed, the trial, which produced almost 1,600 pages of transcript, did not hinge merely on the witnesses' discussion of the surveillance system that was installed at the Moody Manor apartments. Moreover, as noted by the state in its appellate brief, multiple witnesses testified regarding the surveillance system prior to any contention that juror No. 5 was sleeping. Thus, we find that appellant has failed to demonstrate any prejudice in the trial court's failure to replace juror No. 5.

{¶ 27} Accordingly, appellant's first assignment of error is not well-taken.

Second Assignment of Error

{¶ 28} In his second assignment of error, appellant states:

> TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL TO MR. JONES BY FAILING TO OBJECT TO THE SLEEPING JUROR'S PRESENCE ON THE JURY IN VIOLATION OF HIS RIGHT TO COUNSEL AND HIS DUE PROCESS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE APPLICABLE PORTIONS OF THE OHIO CONSTITUTION.

{¶ 29} In his second assignment of error, appellant alleges that he received ineffective assistance of counsel as a result of defense counsel's failure to seek replacement of the sleeping juror.

{¶ 30} To support a claim for ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 694.

{¶ 31} We have already concluded that appellant failed to demonstrate prejudice by showing that the outcome of his trial would have been different without juror No. 5's continued presence on the jury. Consequently, we also find that appellant has failed to meet his burden under the second prong of the *Strickland* test.

{¶ 32} Accordingly, appellant's second assignment of error is not well-taken.

Third Assignment of Error

{¶ 33} In his third assignment of error, appellant states:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. JONES WHEN IT ORDERED HIM TO PAY UNSPECIFIED COSTS, INCLUDING COURT APPOINTED FEES, WITHOUT FIRST DETERMINING THE ABILITY TO PAY THOSE COSTS.

{¶ 34} For his third assignment of error, appellant argues that the trial court erred in ordering him to pay costs of supervision, confinement, assigned counsel, and prosecution without first ascertaining his ability to pay such costs. Appellant contends that the record contains no evidence to support a finding that he is able to pay the costs.

{¶ 35} Regarding costs of prosecution, R.C. 2947.23(A)(1)(a) provides: "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs." This section "requires a sentencing court to impose the costs of prosecution against all convicted defendants." *State v. Wright*, 6th Dist. Wood No. WD-11-079, 2013-Ohio-1273, ¶ 5, citing *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8; *see also State v. Dupuis*, 6th Dist. Lucas No. L-12-1035, 2013-Ohio-2128, ¶ 13 ("Pursuant to R.C. 2947.23, the trial court is required to impose 'the costs of prosecution' on all convicted defendants, including those who are determined to be indigent for purposes of obtaining appointed defense counsel at trial."). Given the trial court's *obligation* to impose costs of prosecution under R.C. 2947.23, this court has held that "[t]he trial court is not required to hold a hearing or otherwise determine an offender's ability to pay before ordering him to pay costs." *State v. Reigsecker*, 6th Dist. Fulton No. F-03-022, 2004-Ohio-3808, ¶ 10, citing *State v. Fisher*, 12th Dist. Butler No. CA98-09-190, 2002-Ohio-2069, *State v. Scott*, 6th Dist. Lucas No. L-01-1337, 2003-Ohio-1868.

{¶ 36} Regarding costs of supervision, R.C. 2951.021 permits a sentencing court that places a felony offender under a community control sanction to require the offender to pay a maximum of $50 monthly supervision fee as a condition of parole. "No means test is stated. Imposition is in the discretion of the court." *State v. Jobe*, 6th Dist. Lucas No. L-07-1413, 2009-Ohio-4066, ¶ 78. Appellant advances no argument to explain how the trial court abused its discretion when it imposed costs of supervision in this case. In light of the foregoing, we find that the trial court did not err by ordering appellant to pay the costs of prosecution and supervision.

{¶ 37} In addition to his arguments concerning costs of prosecution and supervision, appellant also contends that the trial court erred when it ordered him to pay the costs of confinement and court-appointed counsel. R.C. 2929.28 governs the imposition of costs of confinement. Pursuant to R.C. 2929.28(B), the trial court "may hold a hearing to determine whether the offender is able to pay the financial sanction imposed pursuant to this section or court costs or is likely in the future to be able to pay the sanction or costs." Ohio courts have interpreted R.C. 2929.28(B) to mean that a hearing to determine ability to pay is not required; however, there must, at minimum, "be some evidence in the record that the court considered the defendant's present and future ability to pay the sanction imposed." *Reigsecker* at ¶ 11; *State v. Cole*, 6th Dist. Lucas Nos. L-03-1163, L-03-1162, 2005-Ohio-408, ¶ 26. In addition, the payment of court-appointed counsel fees is governed by R.C. 2941.51(D), which states in relevant part:

> The fees and expenses approved by the court under this section shall not be taxed as part of the costs and shall be paid by the county. However, if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the person shall pay the county in an amount that the person reasonably can be expected to pay.

{¶ 38} Before court-appointed attorney fees are imposed on a defendant pursuant to R.C. 2941.51(D), "there must be a finding on the record that the offender has the ability to pay." *State v. Phillips*, 6th Dist. Fulton No. F-05-032, 2006-Ohio-4135, ¶ 20; *see also State v. Knight*, 6th Dist. Sandusky No. S-05-007, 2006-Ohio-4807.

{¶ 39} Here, the trial court stated, in its sentencing entry, that appellant has, or reasonably may be expected to have, the means to pay all or part of the costs of confinement and appointed counsel. However, appellant argues that the record does not support the trial court's determination of his ability to pay. We agree.

{¶ 40} At the time of sentencing, appellant was 19 years old. He was ordered to serve a life sentence in prison. At a minimum, appellant will not be eligible for release for 40 years. On these facts, we fail to find any evidence that appellant has the ability to pay the costs of confinement and appointed counsel. *See State v. Maloy*, 6th Dist. Lucas No. L-10-1350, 2011-Ohio-6919 (vacating imposition of costs of confinement and appointed counsel where the defendant did not graduate from high school, had no meaningful employment history, and was serving a prison sentence that would not be

complete until he reached 94 years of age); *see also Jobe*, 6th Dist. Lucas No. L-07-1413, 2009-Ohio-4066 at ¶ 82 (appellant unable to pay where he only "completed the eighth grade, did not obtain a GED and has never held a job").

{¶ 41} Accordingly, that portion of appellant's third assignment of error pertaining to the imposition of the costs of confinement and appointed counsel is found well-taken.

Fourth Assignment of Error

{¶ 42} In his fourth assignment of error, appellant states:

APPELLANT'S CONVICTIONS WERE BASED UPON INSUFFICIENT EVIDENCE PRESENTED AT TRIAL.

{¶ 43} In reviewing a sufficiency of the evidence claim, we are required to "examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, *superseded by state constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102, fn. 4, 684 N.E.2d 668 (1997).

{¶ 44} "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781. 61 L.Ed.2d 560 (1979).

{¶ 45} In his brief, appellant asserts that Moore's identification of appellant as the shooter is flawed and does not constitute sufficient evidence to support the convictions. Appellant contends that Moore's testimony is unreliable because Moore admitted he would do "whatever it takes" not to go back to prison for the rest of his life. Appellant further asserts that no other witness called by the state was able to positively identify appellant as the gunman and that no DNA evidence or gunshot residue tied appellant to the crime.

{¶ 46} Codefendant Moore testified that he, appellant, and codefendant Jennings were at the Moody Manor the night of the shooting. Moore identified himself and his codefendants on surveillance video. While Moore did not see the shooting at the Moody Manor, he indicated that he knew a shooting occurred and who was responsible for the shooting:

> Q. * * * Did you know there was a shooting in the Moody Manor on the night of August the 9th?
>
> A. Yeah.
>
> Q. Did you know who did the shooting?
>
> A. Yeah.
>
> Q. And who did the shooting?
>
> A. Keshawn [Jennings] and Antwaine [Jones].

{¶ 47} Moore further testified that moments before the shooting he walked to a van he and Jennings were riding in earlier that day. Appellant and Jennings walked the

opposite direction, toward the area of the shooting. Appellant and Jennings both had guns in their possession. Moore drove the van around the corner to wait for appellant and Jennings.

{¶ 48} At the time, Moore thought his codefendants were going to apartment 2217 because "there was a Crip in it." While in the van, Moore heard gunfire. Moments after the shooting, Moore picked appellant and codefendant Jennings up in the van. Moore asked Jennings one question when he got into the van:

> A. I asked him what house did they shoot.
>
> Q. Okay. Now, why did you ask him what house did they shoot?
>
> A. Because I seen them coming from the back of the house.
>
> Q. You saw them coming from the back of which house, if you know?
>
> A. 2225.
>
> Q. All right. Did you believe at that time that they shot the wrong house?
>
> A. Yeah. I knew it.

{¶ 49} Moore's testimony, if believed, clearly implicates appellant in the shooting. It is the duty of the jury as trier of fact to resolve conflicts in testimony and determine the credibility of witnesses who testified. *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). In assessing Moore's credibility, the jury was made aware of his

possible motive for testifying: that in exchange for his testimony against his codefendants, Moore would receive no more than three years imprisonment.

{¶ 50} Viewing the evidence in a light most favorable to the state, we conclude there was sufficient evidence to support appellant's identification and conviction. Appellant's fourth assignment of error is not well-taken.

Fifth Assignment of Error

{¶ 51} In his fifth assignment of error, appellant states:

> APPELLANT JONES WERE [sic] ENTITLED TO A RULE 29 MOTION THAT WAS IMPROPERLY OVERRULED BECAUSE THE STATE HAS NOT SHOWN THE TRANSFERRED INTENT THAT IS REQUIRED, AND BECAUSE APPELLANT WAS ARRESTED WITHOUT PROBABLE CAUSE OR WARRANT FOR INDICTMENT.

{¶ 52} Appellant asserts that the trial court erred in overruling his Civ.R. 29 motion for judgment of acquittal because "the State has failed in its attempt to show that the offenses committed in the indictment were a product of transferred intent as relates to the shooting of a Crip, specifically the aggravated murder."

{¶ 53} Civ.R. 29(A) provides:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such

offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶ 54} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The proper analysis under a sufficiency of the evidence standard is "'whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996), quoting *Jenks*, 61 Ohio St.3d 259, at paragraph two of the syllabus, 574 N.E.2d 492. In order to affirm the denial of a Crim.R. 29 motion, we need only find that there was legally sufficient evidence to sustain the guilty verdict. *Thompkins* at 386.

{¶ 55} The jury in this case received a complicity instruction. Complicity may be proven through evidence that an individual "acting with the kind of culpability required for the commission of an offense," aids or abets another in committing the offense. R.C. 2923.03(A)(2). Complicity requires a showing "that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. *State v. Johnson*, 93 Ohio St.3d 240, 754 N.E.2d 796 (2001), syllabus. Evidence of aiding and abetting may be demonstrated by both direct and circumstantial evidence. *State v. Cartellone*, 3 Ohio App.3d 145, 150, 444 N.E.2d 68 (8th Dist.1981). Criminal intent may be inferred

from an individual's presence, companionship, and conduct before and after an offense. *Id. See also State v. Jackson*, 10th Dist. Franklin No. 03AP-273, 2003-Ohio-5946, ¶ 32-34. For the reasons set forth under appellant's fourth assignment of error, we find appellant's fifth assignment of error not well-taken.

Sixth Assignment of Error

{¶ 56} In his sixth assignment of error, appellant states:

> APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 57} The Ohio Supreme Court has summarized the standard for reversal for manifest weight of the evidence as follows:

> The Court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 485 N.E.2d 717 (1st Dist.1983).

{¶ 58} "In determining whether a conviction is against the manifest weight of the evidence, we do not view the evidence in a light most favorable to the state. Instead, we sit as a 'thirteenth juror' and scrutinize 'the factfinder's resolution of the conflicting testimony.'" *State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 15,

citing *Thompkins*, 78 Ohio St.3d at 388, 678 N.E.2d 541. Reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *Martin* at 175.

{¶ 59} Here, appellant argues that the state failed to prove, beyond a reasonable doubt, that appellant was the shooter. He further argues that the state failed to present any physical evidence linking appellant to the crimes. However, appellant admitted that he was at Moody Manor on the night of the shootings. He was also identified by Moore and police officers in Moody Manor surveillance video.

{¶ 60} As discussed under appellant's fourth assignment of error, Moore testified that he, appellant, and Jennings were at Moody Manor and learned that a Crip was in the complex. Appellant and Jennings were armed and split off from Moore, who was waiting for them in a van. After shots were fired, appellant and Jennings climbed into the van.

{¶ 61} During cross-examination, Moore was subjected to rigorous cross-examination exploring his potential bias. While a reviewing court considers the credibility of the witnesses in a weight of the evidence review, "that review must nevertheless be tempered by the principle that weight and credibility are primarily for the trier of fact." *State v. Kash*, 1st Dist. Butler No. CA2002-10-247, 2004-Ohio-415, ¶ 25, citing *DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212. The trier of fact is in the best position to "view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered

testimony." *Kash* at ¶ 25, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). "The jury may believe all that a witness has said, or part or none of it." *Barker v. Century Ins. Group*, 10th Dist. Franklin No. 06AP-377, 2007-Ohio-2729, ¶ 14, quoting *In re D.F.*, 10th Dist. Franklin No. 06AP-1052, 2007-Ohio-617, ¶ 26.

{¶ 62} After reviewing the record, we cannot say that the jury clearly lost its way or that the verdict was a manifest miscarriage of justice. Because witness credibility was primarily for the trial court to determine, we find that the verdict was not against the manifest weight of the evidence.

Seventh Assignment of Error

{¶ 63} In his seventh assignment of error, appellant states:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. JONES BY ORDERING CONSECUTIVE SENTENCES AND BY FAILING TO MERGE ALL COUNTS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION AND THE APPLICABLE PORTIONS OF THE OHIO CONSTITUTION.

{¶ 64} Appellant argues that the court erred at sentencing by imposing consecutive sentences without first making the requisite findings. He also contends that the court erred in failing to merge allied offenses of similar import.

{¶ 65} Concerning the imposition of consecutive sentences, R.C. 2929.14(C) provides, in relevant part:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> * * *
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 66} Notably, the trial court "is not required to recite any 'magic' or 'talismanic' words when imposing consecutive sentences provided it is 'clear from the record that the trial court engaged in the appropriate analysis.'" *State v. Wright*, 6th Dist. Lucas Nos.

L-13-1056, L-13-1057, L-13-1058, 2013-Ohio-5903, ¶ 33, quoting *State v. Murrin*, 8th Dist. Cuyahoga No. 83714, 2004-Ohio-3962, ¶ 12.

{¶ 67} Here, appellant argues that the trial court erred in failing to include "individualized findings to support the trial court's sentencing [appellant] to consecutive sentences." While we have already noted above that the trial court is not required to make such "individualized" findings, we disagree with appellant's contention.

{¶ 68} We begin by noting that the trial court stated its findings in support of consecutive sentences at the sentencing hearing. The court also memorialized its findings in its sentencing entry. During the sentencing hearing, the court specifically stated:

> So I find as to each defendant that consecutive sentences are necessary to protect the public from future crime or to * * * punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. I also find that at least two of the multiple offenses were committed as part of one or more courses of conduct and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as any of the part of the courses of conduct adequately reflect the seriousness of the offender's conduct. I also find the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the defendant.

{¶ 69} Prior to delivering its sentence, the court examined appellant's criminal history, noting that appellant, a 19 year old at the time of sentencing, was previously convicted of two misdemeanors as an adult, as well as two felonies and eight misdemeanors as a juvenile. With regard to the severity of the crimes committed, the court characterized this case as a "tragedy of the highest magnitude," noting that appellant's actions, along with those of his codefendants, resulted in the death of one baby and severe injury to another. The court further noted that appellant maintained his innocence when interviewed by the probation department in preparation for sentencing.

{¶ 70} In light of the foregoing, we conclude that the trial court did not err in imposing consecutive sentences in this case. Indeed, the court was careful to engage in the appropriate analysis, supporting its conclusions by noting, inter alia, appellant's criminal history and the severity of the crimes committed. Thus, we find no merit to appellant's assertion that the trial court did not make the requisite findings under R.C. 2929.14(C)(4).

{¶ 71} Next, we turn to appellant's contention that the trial court erred at sentencing by failing to merge all of the offenses as allied offenses of similar import.

{¶ 72} As set forth in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the test for whether offenses are allied offenses of similar import under R.C. 2941.25 is two-fold. First, the court must determine "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *Id.* at ¶ 48. Second, the court must determine "whether the offenses were committed by the

same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Id.* at ¶ 50.

{¶ 73} At sentencing, the court examined the merger issue and found that merger was appropriate as to the convictions for aggravated murder, murder, and improperly discharging a firearm at or into a habitation. However, the court refused to merge the remaining counts. In his appellate brief, appellant argues that all of the offenses committed in this case were carried out through a single act involving a single animus. As such, appellant argues that the trial court should have merged the offenses at sentencing. For its part, the state acknowledges that the non-merged offenses (felonious assault and attempted murder) are capable of being committed by a single act. Nonetheless, the state urges that the offenses were not committed with a single animus since they involved multiple victims. We agree.

{¶ 74} In *State v. Mitchell*, 6th Dist. Erie No. E-09-064, 2011-Ohio-973, we held that offenses committed against different victims during the same course of conduct are committed with a separate animus for each offense. In that case, Mitchell was found guilty of three counts of complicity to felonious assault, one count of complicity to improperly discharging a firearm at or into a habitation, one count of complicity to improperly handling firearms in a motor vehicle, one count of complicity to having a weapon while under disability, and one count of complicity to carrying a concealed

weapon. Mitchell's convictions stemmed from an incident involving his discharge of a firearm into a habitation in which children were sleeping at the time. On appeal, Mitchell argued that the offenses should merge as allied offenses of similar import. In evaluating Mitchell's merger arguments, we began by noting that the offenses placed more than one person at risk of serious harm. *Id.* at ¶ 42. Thus, concerning the convictions for complicity to felonious assault, we stated that "crimes against each victim are of dissimilar import with separate animus." *Id.*; *see also State v. Ruby*, 6th Dist. Sandusky No. S-10-028, 2011-Ohio-4864 (no merger of two counts of attempted murder where the offenses were committed against two victims); *State v. Swiergosz*, 6th Dist. Lucas No. L-12-1293, 2013-Ohio-4625 (refusing to merge multiple kidnapping convictions where each conviction was tied to a different victim); *State v. Majid*, 8th Dist. Cuyahoga No. 96855, 2012-Ohio-1192, ¶ 93 (concluding that attempted murder does not merge with murder where the defendant intended to shoot one person but accidentally shot another); *State v. Young*, 2d Dist. Montgomery No. 23642, 2011-Ohio-747, ¶ 39 (finding that "separate convictions and sentences are permitted when a defendant's conduct results in multiple victims").

{¶ 75} Similar to the facts in *Mitchell*, the case sub judice involves multiple offenses and multiple victims. In addition to the merged offenses, appellant was found guilty of four counts of felonious assault. The victims of these offenses were named at sentencing as follows: L.H., Nai'Reese Hamilton, Naomi Reed, and Tamatha Pride. Further, appellant was found guilty of attempted murder, relating to appellant's failed

attempt to murder a rival gang member. Because this case involves multiple victims who were placed into harm's way when appellant and his codefendants fired 16 shots into an occupied residence, we find no merit to appellant's contention that the offenses were committed as a single act with a single animus. Thus, we conclude that the trial court did not err in failing to merge the convictions for felonious assault and attempted murder.

{¶ 76} In light of the foregoing, appellant's seventh assignment of error is not well-taken.

Eighth Assignment of Error

{¶ 77} In his eighth assignment of error, appellant states:

> THE APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT IN VIOLATION OF ARTICLE 1, SECTION 2, 10, AND 16 OF THE OHIO CONSTITUTION: 5th, 6th, AND 14th AMENDMENTS U.S. CONSTITUTION.

{¶ 78} Here, appellant argues that the prosecutor committed misconduct by playing approximately five minutes of a recording of Jennings' statement to the police. The trial court had previously suppressed the portion of the recording because the recording included statements Jennings made before he was read his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Appellant asserts he was prejudiced when the state played the unredacted recording.

{¶ 79} The test for prosecutorial misconduct is whether the conduct was improper and, if so, whether the conduct prejudicially affected substantial rights of the accused. *State v. Eley*, 77 Ohio St.3d 174, 187, 672 N.E.2d 640 (1996). A new trial is warranted only upon findings that the prosecutor acted culpably and that those "acts detrimentally affected the fairness of the proceedings." *State v. Winters*, 6th Dist. Lucas No. L-12-1041, 2013-Ohio-2370, ¶ 68.

{¶ 80} The statements that were played concerned Jennings being shot at least four times prior to the events of August 9, 2012. The statements revealed that Omar, a friend of Jennings, had been shot and killed at the same time and that the Crips had something to do with that shooting. The recording also depicted Jennings lifting his shirt and showing his tattoos and scars to the detectives.

{¶ 81} Upon examination of the entire record we cannot find that appellant was denied a fair trial as a result of the unredacted statements. Throughout the trial, other evidence was admitted regarding previous shootings, gang violence, and gang affiliation. Furthermore, the jury was instructed to disregard the statements. Thus, any misconduct of the prosecutor was not prejudicial to the appellant. Appellant's eighth assignment of error is not well-taken.

Ninth Assignment of Error

{¶ 82} In his ninth assignment of error, appellant states:

> THE TRIAL COURT ERRORED [sic] TO THE PREJUDICE OF APPELLANT BY ADMITTING PERJURED TESTIMONY

GOVERNMENT WITNESS' [sic] AND STAR WITNESS J.T. MOORE IN VIOLATION OF ARTICLE 1, 2, 10, AND 16 OF THE OHIO CONSTITUTION: 6th, AND 14th AMENDMENTS, U.S. CONSTITUTION.

{¶ 83} Appellant argues that Moore offered perjured testimony and that the state was aware his testimony was false. "The knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *State v. Iacona*, 93 Ohio St.3d 83, 97, 752 N.E.2d 937 (2001), citing *U.S. v. Lochmondy*, 890 F.2d 817, 822 (6th Cir.1989). "The burden is on the [appellant] to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *State v. Widmer*, 12th Dist. Warren No. CA2012-02-008, 2013-Ohio-62, ¶ 38. The fact that a witness contradicts himself or changes his story does not establish perjury. *Id.* at ¶ 41.

{¶ 84} When Moore took the stand, he admitted that he lied to detectives early in the investigation. There is no evidence that Moore's testimony at trial was false. Rather, review of surveillance camera footage corroborates his trial testimony. Thus, even if Moore's trial testimony was perjured, there is no evidence that the state knowingly used false testimony to convict appellant. Appellant's ninth assignment of error is not well-taken.

Tenth Assignment of Error

{¶ 85} In his tenth assignment of error, appellant states:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. JONES WHEN IT DENIED A DEFENSE MOTION TO HAVE A COMPLETE COPY OF THE PROSECUTOR'S FILE TURNED OVER TO THE COURT AND SEALED FOR APPELLATE REVIEW IN VIOLATION OF HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE APPLICABLE PORTIONS OF THE OHIO CONSTITUTION.

{¶ 86} In his tenth assignment of error, appellant argues that the trial court erred in denying his pretrial "motion for an order directing that a complete copy of the prosecutor's file be made and turned over to the court for review and to be sealed for appellate review, if necessary." In his motion, appellant requested that a complete copy of the state's file be made, reviewed by the trial court prior to trial, and sealed for appellate review if necessary. The trial court denied this motion, reasoning that Crim.R. 16(B)(5) sufficiently safeguarded against withholding of exculpatory evidence by the state.

{¶ 87} Trial courts are not "required to examine the prosecutor's file to determine the prosecutor's truthfulness or seal the prosecutor's file for purposes of appellate review." *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 60,

citing *State v. Chinn*, 85 Ohio St.3d 548, 569, 709 N.E.2d 1166 (1999); *State v. Williams*, 73 Ohio St.3d 153, 172, 652 N.E.2d 721 (1995). Thus, we find that the trial court did not err when it denied appellant's "motion for an order directing that a complete copy of the prosecutor's file be made and turned over to the court for review and to be sealed for appellate review, if necessary." Furthermore, in this case, the state was fully aware of its continuing obligation to divulge exculpatory evidence, as evidenced by its memorandum in opposition to the motion wherein it stated that "counsel for the State is well aware of the legal responsibilities placed upon it by the Ohio Revised Code, the Ohio Rules of Criminal Procedure, and the Constitutions of the State of Ohio and the United States of America." Having fully reviewed the record, we find that the state complied with its disclosure obligations under Crim.R. 16. Moreover, we conclude that appellant's implication that the state may have withheld exculpatory evidence from defense counsel is purely speculative. Indeed, appellant pointed to no such evidence in his memorandum in support of the motion, and cites no such evidence before this court on appeal.

{¶ 88} Accordingly, appellant's tenth assignment of error is not well-taken.

Eleventh Assignment of Error

{¶ 89} In his eleventh assignment of error, appellant states:

> CUMULATIVE ERRORS DEPRIVE A CRIMINAL DEFENDANT AND CRIMINAL APPELLANT OF A FAIR TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH

AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE OHIO CONSTITUTION.

{¶ 90} As his eleventh assignment of error, appellant urges that he was deprived of his constitutional rights as a result of the cumulative effect of errors that occurred at trial. The cumulative error doctrine provides that, "a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial court error does not individually constitute cause for reversal." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 132, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus.

{¶ 91} Here, we have not found multiple instances of error by the trial court. Therefore, the cumulative error doctrine does not apply. *State v. Wright*, 6th Dist. Lucas No. L-12-1327, 2013-Ohio-5910, ¶ 31, citing *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000) ("[I]n order even to consider whether 'cumulative' error is present, we would first have to find that multiple errors were committed in this case.").

{¶ 92} Accordingly, appellant's eleventh assignment of error is not well-taken.

Twelfth Assignment of Error

{¶ 93} In his twelfth assignment of error, appellant states:

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO SEVERANCE [sic], CHANGE OF VENUE AND INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 94} Here, appellant asserts three arguments in what he claims is an "addendum of law to the three potential errors briefed by appointed counsel."

{¶ 95} The first argument involves the trial court's failure to sever appellant's trial from that of his codefendant, Keshawn Jennings.

{¶ 96} In order to obtain a severance, a defendant must affirmatively demonstrate prejudice by the joinder. Crim.R. 14. To prevail on a severance argument on appeal, the appellant must show "compelling, specific, and actual prejudice from [the] court's refusal to grant the motion to sever." *State v. Allen*, 5th Dist. Delaware No. 2009-CA-13, 2010-Ohio-4644, ¶ 57. (Citations omitted.)

{¶ 97} Here, appellant asserts the denial of severance "resulted in a firestorm of perjured testimony, condemning evidence, objections, and denial of objections." However, he does not point to specific examples of actual prejudice caused by the trial court's failure to sever. Thus, the trial court did not err when it elected not to sever appellant's trial from that of his codefendant.

{¶ 98} The second argument involves the trial court's failure to grant appellant's May 6, 2013 motion for change of venue. In that motion, trial counsel argued appellant could not receive a fair trial in Lucas County because the jury pool would be tainted by the extensive media coverage of the shooting and local gang violence. The trial court denied the motion.

{¶ 99} The determination whether or not to order a change in venue lies within the sound discretion of the trial court. *State v. Gumm*, 73 Ohio St.3d 413, 430, 653 N.E.2d

253 (1995). Thus, absent an abuse of the trial court's discretion, an appellate court must not substitute its judgment for that of the trial court in ruling on a motion for change of venue. *Id.*

{¶ 100} Ohio courts have long held that the voir dire process provides the best evaluation as to whether prejudice exists among community members that precludes a defendant from receiving a fair trial. *State v. Swiger*, 5 Ohio St.2d 151, 214 N.E.2d 417 (1966), paragraph one of the syllabus. Further, an appellant claiming that "pretrial publicity" has denied him a fair trial must show that one or more of the jurors were actually biased. *State v. Treesh*, 90 Ohio St.3d 460, 464, 739 N.E.2d 749 (2001).

{¶ 101} We have reviewed the record of the voir dire and find no error in the trial court's ruling on the motion for change of venue. In selecting a jury for appellant's trial, 121 potential jurors were summoned; over 70 were interviewed in chambers. Appellant fails to point to any juror that was permitted to remain on the panel which held a bias because of the pretrial media coverage. Further, each empaneled juror swore that he or she could set aside all information previously heard and render a fair and impartial verdict. Thus, the trial court did not err in overruling appellant's motion for change of venue.

{¶ 102} The third argument involves the alleged ineffectiveness of trial counsel. This argument was addressed under appellant's second assignment of error.

{¶ 103} For the foregoing reasons, appellant's twelfth assignment of error is not well-taken.

{¶ 104} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. The portion of the court's sentencing order requiring appellant to pay the costs of his confinement and appointed counsel is vacated. The judgment of conviction is affirmed in all other respects. Appointed counsel's unopposed motion to withdraw is granted. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A). The clerk is ordered to serve all parties, including the defendant if he has filed a brief, with notice of this decision.

Judgment affirmed, in part,
and reversed, in part.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE