[Cite as *State v. White*, 2015-Ohio-2387.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101576

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERMEAL WHITE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-581732-A

BEFORE: Celebrezze, A.J., Kilbane, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 18, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Appellant, Jermeal White, seeks to overturn his convictions for aggravated murder, murder, aggravated burglary, felonious assault, and kidnapping. He argues that his convictions are against the manifest weight of the evidence, are unsupported by sufficient evidence, and that certain evidence and testimony should have been excluded. He also argues his sentence is contrary to law. After a thorough review of the record and law, we affirm appellant's convictions but remand for a nunc pro tunc journal entry of sentence conforming with what took place at the sentencing hearing.

I. Factual and Procedural History

{¶2} On December 22, 2012, between 6:00 p.m. and 7:00 p.m., two men entered a house on East 99th Street in Cleveland, Ohio, occupied by Don'Tel Sheeley, Serenity Sheeley, Kimmetta Sheeley, Mack Miller, Special Thurman, Delrico Sheeley, Taranda Emery, Marrisa Sheeley, and a few others. Testimony from several witnesses established that these two men, armed with handguns, entered the house to rob Don'Tel of marijuana he allegedly sold. In the course of this robbery Don'Tel was shot three times and died. After the shooting, the two men fled without taking anything from the house.

{¶3} Three bullets recovered from Don'Tel's body revealed that they all came from a single weapon, later identified as a .40 caliber handgun. After Richard Harris was arrested in possession of a stolen vehicle, he provided police with information that led to the discovery of this handgun in possession of Darrell Davis. At first, Harris acted as an

informant, but quickly became a suspect. Police learned it was Harris who had sold the gun to Davis. Davis testified that he arranged to purchase the gun from Harris and another individual later identified as appellant. Eventually, Harris agreed to testify against appellant in exchange for a plea deal that resulted in his imprisonment for life, with parole eligibility after 18 years.

{¶4} According to Harris, he, appellant, and Lateef Taylor planned to rob Don'Tel of marijuana. The three got a ride from Ashaka Johnson from the west side of Cleveland to the east side, near Don'Tel's house. Taylor, a friend of the Sheeley family, then went inside the house to purchase some marijuana from Don'Tel. He informed appellant and Harris of the situation in the house, including that Don'Tel had a firearm on or near his person. Harris and appellant then went to the house, knocked on the side door, and forced their way through once it began to open.

{¶5} Harris testified that he entered into a kitchen where he attempted to hold several occupants there at gunpoint while appellant ran to the front of the house where Taylor had told them Don'Tel was located. Seated in that room were Don'Tel and Taranda Emery. She testified she was in the house at Don'Tel's invitation because she was supposed to meet a friend of hers who lived in the apartment above Don'Tel's, but no one was home. She was seated on the couch, and Don'Tel was in a chair next to it. She was watching him play a video game. She observed a handgun in Don'Tel's lap. Emery heard a knock on the door and turned to see a man wearing a partial mask heading from the kitchen through the dining room toward the living room, where she was seated.

This man had a gun. She testified that she jumped up and ran behind the television and curled up into a ball and prayed. She heard a number of shots fired, but nothing else.

{¶6} Kimmetta, Don'Tel's mother, testified she was about to take out the trash when she heard a knock on the side door of the home off the kitchen. As she opened the door, two men rushed in with guns. In the kitchen were Special, Kimmetta, and Mack. Serenity was in the bathroom off the kitchen. The first male entered and put a gun to Kimmetta's chest and then chased Special and Mack to the bathroom when they ran. The second male that entered went to the front room. She described the first person who entered as a shorter African-American male with a lighter skin tone; the second one was a taller, thinner African-American male with a dark complexion.

{¶7} Mack testified he was in the kitchen of the home talking to his cousins when two men with guns entered. Mack's descriptions of the men were largely consistent with Kimmetta's except the taller individual entered first. Mack stated the shorter individual stayed in the kitchen and held them at gunpoint. He and his cousin Special ran to the bathroom where Serenity was already located. He attempted to shut the door, but he struggled to close it because the gunman was trying to get in. Mack held the door shut while the girls jumped out the window. Mack followed after they escaped.

{¶8} Kimmetta said she followed the taller assailant into the front room and observed him shoot Don'Tel while he was standing with his hands up. She also testified the other intruder followed them into the front room and shot Don'Tel as well. After the shooting, she was chased into a bedroom by the taller intruder who then pointed his gun at

her. When she asked him why he wanted to shoot her, he exited the bedroom and left the home.

{¶9} Harris testified that he was in the kitchen when shots were fired. He ran out of the house followed by appellant. They then met up with Taylor. Harris asked appellant what happened, and Harris testified that appellant said that Don'Tel reached for a gun so appellant shot him. According to Harris, the three got a ride from Johnson[1] back to the apartment where appellant was staying.

{¶10} Police interviewed the occupants of the house on the night of the shooting. No one identified appellant as one of the intruders. Within a few days, Kimmetta and Mack told police that they recognized appellant as the taller individual.

{¶11} Appellant, Lateef Taylor, and Richard Harris were indicted on January 16, 2014. Charges included violations of R.C. 2903.01(A), aggravated murder; R.C. 2903.01(B), aggravated murder; R.C. 2903.02(B), murder; R.C. 2911.11(A)(1), aggravated burglary; R.C. 2911.11(A)(2), aggravated burglary; R.C. 2903.11(A)(1), felonious assault of Don'Tel; R.C. 2903.11(A)(1), felonious assault of Kimmetta; R.C. 2903.11(A)(2), felonious assault of Don'Tel; R.C. 2903.11(A)(2), felonious assault of Kimmetta; R.C. 2905.01(A)(2), kidnapping of Don'Tel; R.C. 2905.01(A)(2), kidnapping of Kimmetta; R.C. 2905.01(A)(3), kidnapping of Don'Tel; and R.C. 2905.01(A)(3),

[1] Johnson testified he gave appellant and Harris a ride to the east side, but denied giving them a ride home, and text messages sent from Johnson to Harris indicated Johnson refused to wait for Harris and appellant because he thought something was going on and did not want any part in it.

kidnapping of Kimmetta. Most counts carried one- and three-year firearm and forfeiture specifications.

{¶12} On April 30, 2014, appellant filed a motion to determine the competency of Lateef Taylor to testify. The court granted the motion. On May 7, 2014, appellant waived his right to a jury trial after colloquy and signed a written waiver that was filed with the court that same day. Trial commenced on May 8, 2014. A hearing was conducted on May 9, 2014 to determine Taylor's competency. The court determined Taylor was competent to testify.

{¶13} Trial concluded on May 20, 2014. The court found appellant guilty of all charges. After appellant waived a presentence investigation report, the court immediately proceeded to sentence appellant. The court merged the counts of murder and aggravated murder with each other. The court also merged the two counts of aggravated burglary with each other, the two counts of felonious assault with each other, and the four counts of kidnapping merged as to each victim, and further merged into other counts.[2] The court imposed an aggregate prison sentence of 28 years to life: Life in prison with the possibility of parole after 25 years with three additional years for the firearm specification, 11 years in prison for aggravated burglary with three additional years for the firearm specification, and eight years for the felonious assault of Kimmetta with three additional years for the firearm specification. However, the journal entry of sentence indicates sentences were imposed

[2] At sentencing, the court indicated a sentence imposed on many counts while also stating that the count would merge, making the court's analysis on the issue quite confusing.

for aggravated murder, aggravated burglary, felonious assault, and two counts of kidnapping. The court issued a nunc pro tunc entry on June 23, 2014 removing the sentence imposed for felonious assault and retaining the sentences imposed for kidnapping that were not imposed at the sentencing hearing.

{¶14} Appellant then filed the instant appeal assigning six errors for review, which will be addressed out of order for ease of discussion:

> I. The trial court erred by finding Lateef Taylor competent to testify in violation of appellant's Due Process Right to a fair trial and his constitutional right to confrontation.
>
> II. Appellant's convictions were not supported by sufficient evidence and the trial court erred by denying his motions for acquittal.
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> III. The convictions were against the manifest weight of the evidence.
>
> IV. The state's use of cell phone records throughout trial deprived appellant of his constitutional rights to due process and a fair trial.
>
> V. The sentence the trial court imposed was contrary to law because it was disproportionate and imposed sentences for allied offenses of similar import.
>
> VI. Whether appellant's Fourth, Fifth, Sixth and Fourteenth Amendment rights were violated by the admission of evidence without testimony concerning prison mail that was seized without a warrant.

II. Law and Analysis

A. Sufficiency

{¶15} When analyzing whether a conviction is supported by sufficient evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence 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. Where a conviction is supported by legally sufficient evidence, the state has adduced evidence of the offender's guilt as to every necessary element of the crime. *Id*. This court views the evidence so adduced in a light favorable to the state without taking into consideration matters of credibility.

i. Aggravated Murder and Murder

{¶16} Appellant was found guilty of two counts of aggravated murder. The first required the state to show that appellant purposely caused the death of another with prior calculation and design under R.C. 2903.01(A). The second required the state to show appellant purposely caused the death of another "while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, * * * aggravated burglary * * *." R.C. 2903.01(B).

{¶17} Appellant was also found guilty of murder as defined in R.C. 2903.02(B): "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

{¶18} Prior calculation and design has a specific legal meaning defined by years of judicial interpretation. Case law distinguishes those acts which erupt abruptly without studied consideration from those that are the result of planning and deliberation.

However, in certain situations, a moment's consideration is sufficient to satisfy this element where a plan is conceived with a purposeful desire to kill.

> The state can prove "prior calculation and design" from the circumstances surrounding a murder in several ways: (1) evidence of a preconceived plan leading up to the murder, (2) evidence of the perpetrator's encounter with the victim, including evidence necessary to infer the defendant had a preconceived notion to kill regardless of how the robbery unfolded, or (3) evidence that the murder was executed in such a manner that circumstantially proved the defendant had a preconceived plan to kill. *See, e.g., State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81; * * * *State v. Campbell*, (2000) 90 Ohio St.3d 320, 2000-Ohio-183, 738 N.E.2d 1178.

State v. Trewartha, 165 Ohio App.3d 91, 2005-Ohio-5697, 844 N.E.2d 1218, ¶ 19 (10th Dist.). The third method allows the state the means to establish a perpetrator acted with prior calculation and design where the victim is killed in a cold-blooded execution-style manner. *State v. Hough*, 8th Dist. Cuyahoga No. 91691, 2010-Ohio-2770, ¶19.

{¶19} The closest statement from the Ohio Supreme Court interpreting the requirements for prior calculation and design with facts similar to the present case occurred in *State v. Goodwin*, 84 Ohio St.3d 331, 703 N.E.2d 1251 (1999). There, an individual entered a store desiring to steal money. The perpetrator put a gun to a store clerk's head. *Id.* at 344. The clerk was cooperating and had his hands in the air and was

then shot to death by the robber. *Id.* This execution, said the court, was a planned killing in order to further the plan to obtain money from the store. *Id*. The court held that the element of prior calculation and design was demonstrated. *Id*. The killing would have occurred regardless of how the robbery progressed. The killer did not flee immediately from the store, but demanded money from the remaining clerk. *Id*.

{¶20} This holding should be distinguished from other cases of the "robbery-gone-wrong" sort. Simply having a firearm during the commission of a robbery and being prepared to use it does not evidence prior calculation and design. *State v. Noggle*, 140 Ohio App.3d 733, 748, 749 N.E.2d 309

(3d Dist.2000). *See also State v. Reed*, 65 Ohio St.2d 117, 418 N.E.2d 1359 (1981).

{¶21} In the present case, the trial court found that appellant and Harris had a planned contingency to kill Don'Tel if he resisted. This was sufficient, in the trial court's mind, to meet the elements of prior calculation and design. This conclusion does not appear in line with the Ohio Supreme Court's decision in *Goodwin*. The fact that appellant and Harris entered the home with guns and discussed the possibility that Don'Tel may be armed does not evidence, in itself, a preconceived plan to kill.

{¶22} However, Kimmetta testified that she observed the men shoot her son while his hands were up. This is similar to the events that occurred in *Goodwin* and evidences a preconceived plan to shoot Don'Tel regardless of how the robbery progressed. While Harris's testimony indicates appellant shot Don'Tel because Don'Tel reached for a gun, conflicting evidence does not lead to the conclusion that appellant's conviction is not

supported by sufficient evidence. Kimmetta's testimony indicates appellant and Harris had a preconceived plan to kill Don'Tel and this satisfied the prior calculation and design element of aggravated murder under R.C. 2903.01(A).

{¶23} There is overwhelming evidence that appellant and Harris entered the apartment without permission with operable firearms to rob Don'Tel of marijuana, and that one of these two men purposefully shot Don'Tel during the commission of this burglary. Trial testimony exists identifying appellant as the individual that shot Don'Tel. This evidence presented at trial, viewed in a light favorable to the state, establishes each element of aggravated murder under R.C. 2903.01(B). This evidence also established there is sufficient evidence to support appellant's conviction for murder.

ii. Aggravated Burglary

{¶24} Appellant was convicted of aggravated burglary under two subsections of R.C. 2911.11(A). This statute criminalizes the trespass in an occupied structure by force, stealth, or deception, with purpose to commit in the structure any criminal offense, if "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another; (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."

{¶25} The evidence adduced at trial establishes that appellant and Harris concocted a plan to rob Don'Tel of marijuana. The testimony of Harris, Taylor, and Johnson all indicate such. Harris and appellant forced their way into an occupied structure while in possession of operable firearms with the intent to commit multiple felonies while inside.

Once inside, they also inflicted and threatened to inflict physical harm to Don'Tel, Kimmetta, and Special. Therefore, the convictions for aggravated burglary are supported by sufficient evidence.

iii. Felonious Assault

{¶26} Appellant was found guilty of three counts of felonious assault against two victims. R.C. 2903.11 defines felonious assault. As it relates to the present case, it specified that no person shall knowingly "[c]ause serious physical harm to another * * *" or "[c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." R.C. 2903.11(A)(1) and (2).

{¶27} Appellant was found guilty of violations of R.C. 2903.11(A)(1) and (A)(2) related to Don'Tel and R.C. 2903.11(A)(2) related to Kimmetta. As earlier discussed in the analysis of the aggravated murder and murder charges, evidence exists in the record demonstrating that appellant shot and killed Don'Tel. This necessarily includes a finding that appellant caused serious physical harm or caused physical harm with a deadly weapon.

{¶28} Kimmetta testified that upon entering the apartment, one of the perpetrators put a gun to her chest and said "[y]ou know what the f**k time it is." She also testified that after appellant shot her son, he chased her into a bedroom and she pled for her life with him standing there with the gun. "The act of pointing a deadly weapon * * * at another, coupled with a threat that indicates an intention to use the weapon to cause harm, is sufficient evidence to sustain a conviction for felonious assault under R.C.

2903.11(A)(2)." *State v. Velez*, 3d Dist. Putnam No. 12-13-10, 2014-Ohio-1788, ¶ 68, citing *State v. Henderson*, 10th Dist. Franklin No. 10AP-1029, 2011-Ohio-4761, ¶ 14, citing *State v. Mincy*, 1st Dist. Hamilton No. C-060041, 2007-Ohio-1316, ¶ 67, and *State v. Green*, 58 Ohio St.3d 239, 569 N.E.2d 1038 (1991), syllabus.

iv. Kidnapping

{¶29} R.C. 2905.01 defines the criminal offense of kidnapping. Appellant was found guilty of violating R.C. 2905.01(A)(2) and (A)(3):

> No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:
>
> * * *
>
> (2) To facilitate the commission of any felony or flight thereafter;
>
> (3) To terrorize, or to inflict serious physical harm on the victim or another[.]

{¶30} Appellant and Harris restrained the liberty of Kimmetta using threats of violence during the commission of an aggravated burglary. Harris testified he stayed behind in the kitchen and held Kimmetta and others at gunpoint while appellant went into the front room to rob Don'Tel. During these events, appellant inflicted serious physical harm, i.e. death, on Don'Tel. This testimony establishes that sufficient evidence exists in the record to support appellant's convictions for the kidnapping of Kimmetta under both subsections above.

{¶31} Inherent in the shooting of Don'Tel is also a kidnapping under R.C. 2905.01(A)(3). Also, because this occurred during the commission of an aggravated burglary and attempted theft of marijuana, the elements of R.C. 2905.01(A)(2) are also satisfied.

B. Manifest Weight

{¶32} Appellant claims his convictions are also against the manifest weight of the evidence. He points to the conflicting nature of the testimony of family members, as well as the fact that the testimony of codefendants is highly suspect.

{¶33} When reviewing a manifest weight claim,

> "[t]he 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

State v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). A factfinder is free to believe all, some, or

none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

{¶34} Here, there was sufficient evidence of prior calculation and design given Kimmetta's testimony to support an aggravated murder conviction under R.C. 2903.01(A), but her testimony is suspect in several respects. The trial court noted some aspects of her testimony lacked credibility. It also noted that the testimony of family members seemed to be informed by information learned from rumors "from the streets." Kimmetta testified that both men that broke into the apartment shot her son. She said that she ran after the intruders as they went to the living room and observed them shoot Don'Tel while he had his hands up. If Don'Tel was not resisting at the time he was shot, then this makes the case more like *Goodwin* where, regardless of how the robbery progressed, the victim was going to be killed. This indicates a deliberate plan to kill Don'Tel. However, the forensic scientist that tested the bullets recovered from Don'Tel's body found that the three bullets came from the same gun. No other bullets were recovered from the crime scene. But Kimmetta's testimony that at least one of the men shot her son while his hands were up is uncontradicted. While some aspects of her testimony about appellant's identity may have been based on information learned from others after the fact, this aspect of her testimony is hers alone as she was the only person who testified to seeing the shooting. Therefore, this is not the rare case where the court lost its way in finding the elements of prior calculation and design were met.

{¶35} Appellant also claims that certain testimony seems to cast doubt on the eyewitness identifications. Taranda Emery testified that the person who entered the living room and presumably shot Don'Tel was wearing some type of partial mask and that she could not see his face. Kimmetta testified that she recognized appellant's face from facial tattoos and other facial characteristics. She was the only one that testified seeing any facial tattoos, and police reports documenting witness statements made no mention of such tattoos. Mack also testified that he recognized appellant as one of the intruders from his smile. However, he also did not inform police that he thought appellant was one of the intruders when interviewed shortly after the murder.

{¶36} Given these contradictions, the court found that some of the testimony of the family members were likely informed by rumors from the streets and not from personal knowledge, but the remaining testimony sufficiently establishes that appellant was one of the individuals that entered Don'Tel's house on December 22, 2012. Harris named appellant as the other individual. Taylor testified that he saw appellant and Harris together just before the murder. Johnson gave appellant and Harris a ride to the east side of Cleveland and dropped them off a short distance from Don'Tel's house. Appellant and Harris sold the murder weapon to another individual shortly after the murder.

{¶37} Appellant also argues that it is more likely that Harris was the person that killed Don'Tel if appellant and Harris were indeed the individuals that entered the Sheeley house that day. However, R.C. 2923.03 allows appellant to be convicted of each offense that Harris may have committed in this case. It provides for the prosecution of those who

aid and abet others in committing an offense or those who conspire to commit an offense as if they were the principal offender. R.C. 2923.03(A)(2), (A)(3), and (F).

> A person aids and abets another when he supports, assists, encourages, cooperates with, advises, or incites the principal in the commission of the crime, and shares the criminal intent of the principal. *State v. Johnson* (2001), 93 Ohio St.3d 240, 245-246, 2001-Ohio-1336, 754 N.E.2d 796. Such intent may be inferred from the circumstances surrounding the crime. Id. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. *State v. Pruett* (1971), 28 Ohio App.2d 29, 34, 273 N.E.2d 884. Specifically, when a person sets in motion a "sequence of events, the foreseeable consequences of which were known or should have been known to him at the time, he is criminally liable for the direct, proximate and inevitable consequences of death resulting from his original act." *State v. Williams* (1990), 67 Ohio App.3d 677, 683, 588 N.E.2d 180. It is not necessary that the accused be in a position to foresee the precise consequence of his conduct, only that the consequence be foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by his conduct. *State v. Losey* (1985), 23 Ohio App.3d 93, 95-96, 491 N.E.2d 379.

State v. Burnett, 8th Dist. Cuyahoga No. 87506, 2007-Ohio-284, ¶ 27. Therefore, the state does not have to show that appellant was the principal offender. *State v. Smith*, 8th Dist. Cuyahoga No. 98280, 2013-Ohio-576, ¶ 65.

{¶38} The trial court recognized that Harris's testimony should be viewed with grave suspicion as it came from a co-defendant trying to minimize his culpability and the testimony came as the result of a plea agreement with the state. The court also found that some of Kimmetta's testimony was in conflict with the forensic evidence. She testified that both intruders shot her son. However, the bullets recovered all came from a single gun.

{¶39} While the trial court could not find beyond a reasonable doubt that appellant was the individual who went into the front room and shot Don'Tel, it did find beyond a

reasonable doubt that appellant and Harris were the individuals that entered the home and were responsible for Don'Tel's death. Evidence established that Harris and appellant discussed the use of deadly force prior to the burglary and had a plan for its use. This demonstrates the court did not lose its way when it found appellant guilty of aggravated murder,[3] murder, aggravated robbery, felonious assault, and kidnapping.

C. Evidentiary Issues

{¶40} "A decision to admit or exclude evidence will be upheld absent an abuse of discretion." *O'Brien v. Angley*, 63 Ohio St.2d 159, 163, 407 N.E.2d 490 (1980). Such an abuse is denoted by a decision that is arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

i. Competency to Testify

{¶41} Appellant complains that Taylor should not have been allowed to testify due to a lack of mental capacity.

{¶42} The Ohio Supreme Court has stated that the determination of witness competency "is within the sound discretion of the trial judge." *State v. Frazier*, 61 Ohio St.3d 247, 251, 574 N.E.2d 483 (1991). "'The trial judge, who saw the [witnesses] and heard their testimony and passed on their competency, was in a far better position to judge their competency than is this court, which only reads their testimony from the record * * *.'" *State v. Bradley*, 42 Ohio St.3d 136, 141, 538 N.E.2d 373 (1989), quoting *Barnett v.*

[3] This case must be distinguished from capital cases where in certain circumstances one must be the principal offender in order to be subject to the death penalty.

State, 104 Ohio St. 298, 301, 135 N.E. 647 (1922). Therefore, this court reviews the court's decision for an abuse of discretion. *State v. Smiley*, 8th Dist. Cuyahoga No. 97047, 2012-Ohio-1742, ¶ 13.

{¶43} Evid.R. 601(A) specifies that every person is competent to testify except "[t]hose of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." "'[A] person, who is able to correctly state matters which have come within his perception with respect to the issues involved and appreciates and understands the nature and obligation of an oath, is a competent witness notwithstanding some unsoundness of mind.'" *State v. Bradley*, 42 Ohio St.3d 136, 140-141, 538 N.E.2d 373 (1989), quoting *State v. Wildman*, 145 Ohio St. 379, 61 N.E.2d 790 (1945), paragraph three of the syllabus. A lack of ability to cross-examine a witness not competent to testify implicates the Confrontation Clause of the Sixth Amendment to the Constitution.

{¶44} Here, that right was not impinged. The court held a competency hearing where it was established that Taylor understood the nature of the proceedings and knew the importance of telling the truth. The state also supplied the court with Taylor's videotaped police interviews that demonstrated his ability to comprehend and answer questions. The preliminary results of a competency evaluation that found Taylor was competent to stand trial was relayed to the court as well.

{¶45} Taylor's testimony also does not indicate it should have been excluded. He testified he ran into Harris and appellant standing outside a white truck around East 99th Street. He said he did not participate in the robbery, although Harris asked if he knew anyone who had weed that they could rob. Taylor said he walked to Don'Tel's house, bought weed, smoked some with Don'Tel, and got a ride to his sister's house.

{¶46} His testimony was contradictory at times, but he understood the questions being asked of him. A more likely explanation for the contradictory nature of his testimony was that he was attempting to minimize any involvement he and appellant had with the burglary and murder. The trial court did not err in allowing Taylor to testify.

ii. Cell Phone Records

{¶47} Appellant also suggests that cell phone records were improperly used by the state throughout trial and admitted as evidence. He claims this violated his constitutional right to confront the witnesses against him. The Sixth Amendment to the Constitution preserves the right of a criminal defendant "to be confronted with the witnesses against him." The United States Supreme Court stated that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." The Sixth Amendment to the United States Constitution, in its Confrontation Clause, preserves the right of a criminal defendant "to be confronted with the witnesses against him." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

> The key issue is what constitutes a testimonial statement: "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006).

State v. Hood, 135 Ohio St.3d 137, 2012-Ohio-2260, 984 N.E.2d 1057, ¶ 33. However, business records are, by their nature, nontestimonial. *Id.* at ¶ 34, citing *Crawford* at 56. This removes them from purview of the Confrontation Clause. *Id*.

{¶48} The state asked witnesses questions using various cell phone records. The state asked witnesses if they recognized phone numbers contained within these records prior to authentication of the records. Those questions generally, but not always, came after the witnesses could not remember their own phone numbers or those of close acquaintances. The trial court sustained many objections made when the state attempted to use the records without laying a proper foundation. The court also excluded records from admission during trial.

{¶49} Appellant argues the state did not ask questions of witnesses who possessed cell phones to testify about the calls or texts that appeared in the records. This, appellant asserts, prevented him from cross-examining these witnesses about the content of calls and text messages.

{¶50} On reconsideration, the Ohio Supreme Court found where a police officer testified to cell phone records without proper authentication as a business record under

Evid.R. 803(6), the statements contained in the records were testimonial in nature and subject to heightened harmless-error analysis. *Hood*, 135 Ohio St.3d 137, 2012-Ohio-2260, 984 N.E.2d 1057. Here, the records were properly authenticated as business records through the testimony of a Revol Wireless employee, Lauren Maysey.

> "To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the 'custodian' of the record or by some 'other qualified witness.'"

State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 170, quoting Weissenberger, *Ohio Evidence Treatise 600*, Section 803.73 (2007).

{¶51} Maysey testified that she was an employee of Revol Wireless familiar with the records introduced by the state. She was the individual who compiled the records in response to a state subpoena. She testified the records were kept in the ordinary course of business. The data contained in the records were generated by an individual's cell phone activity at the time it occurred. Maysey's testimony satisfied the requirements of Evid.R. 803(6). Therefore, the trial court did not abuse its discretion in admitting these as business records.

{¶52} Further, the court did not admit records of text messages that were not the subject of testimony by the witnesses who sent or received the texts. The court excluded

records of these texts, but allowed the business records of call logs with accompanying cell phone tower data to be admitted as evidence.

{¶53} Appellant complains Maysey admitted she did not have any technical expertise about cell phone towers or could not testify about the reliability of cell tower locations. However, this goes to the credibility of the evidence, not its admissibility as a business record. Therefore, the trial court did not err in allowing questions regarding the records or their admission as evidence in this case.

iii. Prison Letters

{¶54} The Fourth Amendment protects against invasions of one's privacy by the federal government and is applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). But this protection exists where a person's expectation of privacy is objectively reasonable. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). While inmates in prison do not lose all constitutional protections, certain restrictions on rights are countenanced where legitimate penological goals so dictate. *Sandin v. Conner,* 515 U.S. 472, 485, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Monitoring a prisoner's non-attorney communications has been repeatedly upheld as a legitimate practice to advance legitimate penological interests. *United States v. Sababu*, 891 F.2d 1308, 1329 (7th Cir.1989) ("in prison, official surveillance has traditionally been the order of the day").

{¶55} When addressing the recording and monitoring of prison inmates' telephone conversations, at least one Ohio court has found that penological concerns outweighed any

expectations of privacy. *State v. Wolfe*, 12th Dist. Madison No. CA99-11-029, 2000 Ohio App. LEXIS 5782 (Dec. 11, 2000). That court relied on a Second Circuit court case holding the following:

> [N]oninmate mail to prisoners may be subject to inspection; and noninmate visitors may have their conversations with inmates monitored, or be subject, based upon reasonable suspicion, to strip searches. With respect to telephone communications, the public is on notice pursuant to regulations * * * that prison officials are required to establish procedures for monitoring inmates' calls to noninmates. Given the institution's strong interest in preserving security, we conclude that the interception of calls from inmates to noninmates does not violate the privacy right of noninmates.

(Citations omitted.) *United States v. Willoughby*, 860 F.2d 15, 21-22 (2d Cir.1988).

{¶56} "This lessened privacy right is especially appropriate where the non-inmate is aware of institutional policies herself or is aware that her conversations with an inmate may be monitored." *Wolfe* at *38, citing *United States v. Sababu*, 891 F.2d 1308, 1329 (7th Cir.1989).

{¶57} The letters appellant complains were improperly admitted were the written communications of an individual in county jail. While incarcerated, appellant wrote a letter to Maurice Gibson, also incarcerated, to convince Gibson to write a letter to Taylor. Gibson did send a letter to Taylor at a juvenile facility asking him to tell the truth.

Gibson also sent appellant a letter explaining that he had sent Taylor a letter as appellant requested.

{¶58} These letters were sent to and from individuals in jail. Both the sender and receiver knew or should have known of the policy of the facilities to inspect and review correspondence. Neither party had a legitimate expectation of privacy. Further, appellant did not file a suppression motion to exclude these letters or the testimony of Maurice Gibson, the individual whose mail was admitted as evidence.

{¶59} Neither appellant or Gibson had a reasonable expectation of privacy in the jailhouse correspondence seeking to have Gibson send a letter to Taylor. The trial court did not err in admitting those letters. This assigned error is overruled.

D. Sentences Contrary to Law

{¶60} Appellant claims that the sentences imposed are contrary to law. This court reviews such claims related to felony sentences according to the dictates of R.C. 2953.08(G)(2)(b). This statute provides,

> [t]he court hearing an appeal [claiming a sentence is contrary to law] * * * shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this

division if it clearly and convincingly finds [that the sentence is contrary to law.]

i. Allied Offenses of Similar Import

{¶61} Appellant claims that the court failed to merge several offenses. "R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. When the same conduct by the defendant "can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). "R.C. 2941.25(B) provides an exception where the offenses were committed "separately or with a separate animus as to each."

{¶62} The Ohio Supreme Court established a two-pronged test to determine whether multiple offenses are allied offenses of similar import under R.C. 2941.25(A). *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 48. The court must first examine "whether it is possible to commit one offense and commit the other with the same conduct." If this is true, 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). The court recently attempted to clarify this analysis in *State v. Ruff*, Slip Opinion No. 2015-Ohio-995. There, the court stated,

> [a] trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

Id. at ¶ 25.

{¶63} At the sentencing hearing, the court seemed to impose sentence on almost all counts, but then indicated certain counts would merge. A close reading of the sentencing transcript indicates that the court merged all counts except Count 1 (aggravated murder), Count 4 (aggravated burglary), and Count 8 (felonious assault of Kimmetta). However, the original journal entry of sentence indicates the court imposed sentences on Count 1, Count 4, Count 8, Count 9 (kidnapping of Don'Tel), and Count 10 (kidnapping of Kimmetta).

{¶64} The kidnapping charges related to Kimmetta should merge with the felonious assault charge involving her where the state used the same conduct, i.e. pointing a gun at Kimmetta, for both counts. *State v. Adkins*, 8th Dist. Cuyahoga No. 95279, 2011-Ohio-5149, ¶ 36. No separate, distinct harm or separate animus was shown. The kidnapping, felonious assault, and murder charges related to Don'Tel should also merge with the aggravated murder charges because, again, the same conduct was used by the

state to prove each crime, they were committed with the same animus, and did not result in distinguishable harm. *See State v. Hubbard*, 8th Dist. Cuyahoga No. 83384, 2004-Ohio-4627, ¶ 43. Indeed, the court merged the above counts and imposed sentence on the felonious assault count and aggravated murder count. The two aggravated burglary charges would merge with each other but not with any other charge. This is because the aggravated burglaries were based on the same conduct, but were complete when Harris and appellant entered the home with firearms with the intent to murder and rob Don'Tel. *State v. Taylor*, 8th Dist. Cuyahoga No. 95339, 2012-Ohio-99, ¶ 7; *State v. Phillips*, 3d Dist. Lucas No. L-14-1061, 2015-Ohio-632, ¶ 26; *State v. Knight*, 6th Dist. Lucas No. L-13-1066, 2014-Ohio-2222, ¶ 12; *State v. Jackson*, 2nd Dist. Montgomery No. 24430, 2012-Ohio-2335, ¶ 138; *State v. Christian*, 11th Dist. Trumbull No. 2013-T-0055, 2014-Ohio-4882, ¶ 15.

{¶65} Therefore, the court may have stated it was merging counts with other counts that were technically incorrect, the court arrived at the right outcome at sentencing. Appellant was not prejudiced by any improper merger or statements that sentences were imposed on merged offenses where the court ultimately merged them. The charges on which sentences were imposed and that did not merge were aggravated murder, aggravated burglary, and felonious assault related to Kimmetta. These are the appropriate counts that survive merger.

{¶66} However, as earlier stated, the journal entry does not reflect this. The nunc pro tunc entry previously issued by the trial court also does not reflect this even if the court

had jurisdiction to issue it during the pendency of this appeal. Therefore, the case must be remanded to the trial court for a nunc pro tunc entry reflecting what actually occurred during sentencing.

ii. Disproportionate Sentence

{¶67} Appellant also claims the sentences imposed are contrary to law because the court did not engage in a proportionality analysis.

{¶68} Appellant takes issue with a sentence that is not subject to review by this court. R.C. 2953.08(D)(3) excludes sentences imposed for aggravated murder and murder from appellate review. *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 19.[4] It states, "[a] sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section." Excluding his sentences for murder and aggravated murder from this assigned error, appellant makes no separate argument that his sentences for aggravated burglary and felonious assault, for which he received concurrent 11-year sentences, were disproportionate to his conduct or inconsistent with another similarly situated criminal defendant. Claims that he is a similarly situated offender to Harris, who received a sentence of life imprisonment with parole eligibility after 18 years, are unavailing as they attempt to compare sentences for murder and aggravated murder that are not subject to review.

[4] This case holds, however, that consecutive sentences are subject to appellate review even when the sentences involved are for murder or aggravated murder.

III. Conclusion

{¶69} Appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. The court did not err in admitting certain evidence including phone records and jailhouse mail. Finally, appellant's sentence is not contrary to law. However, a nunc pro tunc entry is required to clear up inaccuracies in the journal entry of sentence.

{¶70} Judgment affirmed; remanded for issuance of nunc pro tunc sentencing entry.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE.

MARY EILEEN KILBANE, J., and
ANITA LASTER MAYS, J., CONCUR