[Cite as *State v. Turner*, 2020-Ohio-1361.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DONNELL TURNER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 JE 0009

Criminal Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 17-CR-54

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed, in part; Reversed and Vacated, in part.

Atty. Jane M. Hanlin, Prosecuting Attorney, Jefferson County Justice Center, 16001 State Route 7, Steubenville, Ohio 43952, for Plaintiff-Appellee and

Atty. Eric M. Reszke, Suite 810, Sinclair Building, Steubenville, Ohio 43952 for Defendant-Appellant.

Dated: March 9, 2020

Robb, J.

{¶1} Defendant-Appellant Donnell Turner appeals from his conviction entered in Jefferson County Common Pleas Court for aggravated murder, murder, two counts of felonious assault, and tampering with evidence. The issues raised in this appeal are whether the convictions are against the manifest weight of the evidence, whether the trial court committed reversible error in sentencing, and whether Appellant received ineffective assistance of counsel. For the reasons expressed below, the conviction for tampering with evidence is reversed and vacated. All other convictions are affirmed.

Statement of the Case

{¶2} Appellant was indicted for the aggravated murder of Tyshawn Jett in violation of R.C. 2903.01(A)(F), an unclassified felony; murder of Tyshawn Jett in violation of R.C. 2903.02(A)(D), an unclassified felony; felonious assault of Christian Frazier in violation of R.C. 2903.11(A)(2)(D)(1), a second-degree felony; felonious assault of Kylar Petteway in violation of R.C. 2903.11(A)(2)(D)(1), a second-degree felony; and tampering with evidence in violation of R.C. 2921.12(A)(1), a third degree felony. The aggravated murder, murder, and felonious assault charges had R.C. 2941.145 attendant firearm specifications. The tampering with evidence charge alleged Appellant altered, destroyed or concealed the firearm used in the April 9, 2017 shootings of Tyshawn Jett, Christian Frazier, and Kylar Petteway. 9/13/17 Indictment.

{¶3} On the evening of April 9, 2017, Tyshawn Jett, Christian Frazier, Kylar Petteway, Sequonia Pearson, MyKeya Pearson, Appollonia Agresta, and Ena Miller were together outside the Pearson home located on Maryland Avenue in Steubenville. Testimony at trial indicated Jett, Frazier, and Petteway were members of the Grape Street Gang. As this group was congregated outside the Pearson home, Appellant, known by his street name Rider or Rida, drove down Maryland Avenue past them. He was driving a red car and stopped at the stop sign at the end of Maryland Avenue for a long period of time. Testimony and evidence at trial indicated Appellant is a member of the Nike Gang or the So Nike Boys Gang.

{¶4} Evidence at trial indicated that the two gangs have been in conflict with each other for years. Each group threatens or "disses" the other in rap songs or posts on social media and YouTube.

{¶5} After Appellant drove by the Pearson home, some of the members who congregated outside the Pearson home became nervous that something might happen, so they decided to leave. Frazier, Jett, and Petteway, by foot, went down the alley between Maryland Avenue and Ridge Avenue and then turned onto Carnegie Alley. At that point, someone started shooting at them. Petteway saw someone in black. He was shot in the hip/buttock area. He ran to the closest house on Ridge Avenue and called 911. Frazier testified he heard the shots fired when he was in the middle of Carnegie Alley. He stated he was shot in the elbow. He ran to his cousin's house on Euclid Avenue and called 911.

{¶6} Jett sustained two gunshot wounds – one gunshot wound to the left buttock area and another gunshot wound to the lower right chest area. The gunshot wound to the left buttock caused damage to the lower abdominal cavity and to the colon and caused a significant amount of blood loss. The bullet that caused that damage entered the back of his body and exited the front of his body. The other gunshot wound caused damage to soft tissue between two ribs on the right side and injured the right lung, diaphragm, the liver, and the lower part of the left lung. This injury also caused a significant amount of blood loss. The coroner determined the cause of death was the result of the two gunshot wounds.

{¶7} No gun was recovered; however, twelve casings were recovered from the scene. It was determined that the casings could be divided into two groups. Five of the casings had matching breach face marks and firing pin impressions and the remaining seven had matching breach face marks. This indicated that five of the casings were fired from one firearm and the other seven were fired from a different firearm. Two bullets were also recovered; one was from Petteway's injury. It was determined that those two bullets were fired from the same 9mm handgun. It could not be determined whether the bullets came from either of the firearms of the recovered casings; to make that determination, the firearm was needed.

{¶8} Shortly after the shooting, Ena Miller messaged Appellant on social media indicating that people were saying he was the shooter. He denied doing anything, but his statement could have been taken to be a confirmation that he was the driver of the red car that drove by the group prior to the shooting.

{¶9} A few days later, Appellant went to the police station voluntarily; his girlfriend dropped him off and he did not have his phone with him. He indicated to the police he was not in the area when the shooting occurred. Evidence gathered during the investigation indicated this statement might not be true; the towers from which his cell phone "pinged" indicated he was nearby and the social media message indicated he was in the area.

{¶10} Appellant was tried before a jury for the indicted offenses and was found guilty of all counts. Thus, he was found guilty of the aggravated murder of Jett, the murder of Jett, the felonious assault of Frazier, the felonious assault of Petteway, and tampering with evidence. The trial court immediately proceeded to sentencing without objection from either the state or the defense.

{¶11} During sentencing, the state acknowledged that there was some amount of provocation by the victims and there were prior bad feelings between the victims and Appellant. However, the state indicated that Appellant had served two other prison sentences prior to these crimes and he was older than the victims. Between the aggravated murder conviction and murder conviction, the state elected to have Appellant sentenced on the aggravated murder conviction. The state asked for the court to impose life in prison without the possibility of parole for the aggravated murder conviction and to order the sentences for aggravated murder and felonious assaults to be served consecutive to each other. The state did not oppose the sentence for tampering with evidence to run concurrent with the other sentences.

{¶12} Defense counsel argued that life without the possibility of parole is an extremely excessive punishment considering the situation. He asserted that the two victims who testified did not sound like boys, but rather men and given the lifestyle in which these young men were engaged, age does not matter. He asserted the victims were part of the gang and the lifestyle that brought about this incident. Counsel argued that 20 years to life would be a more appropriate sentence. Counsel asked for merger of

the firearm specifications even though he admitted that there were three separate victims. Counsel asked for the sentences for aggravated murder and the felonious assaults to run concurrent to each other.

{¶13} In total Appellant received an aggregate sentence of life in prison with the possibility of parole after 49 years. The trial court sentenced Appellant to 30 years to life on the aggravated murder conviction and a mandatory 3 year firearm specification to be served first. The court indicated the murder count merged into the aggravated murder count. On the felonious assault of Frazier, Appellant was sentenced to 7 years with a mandatory 3 year firearm specification to be served first. As to the felonious assault of Petteway, the trial court sentenced Appellant to 3 years with a mandatory 3 year firearm specification. The trial court ordered those sentences to run consecutive to each other because there were three different victims. As to tampering, Appellant was sentenced to 3 years and that sentence was ordered to be served concurrent with the aggravated murder and felonious assaults sentences. The trial court advised Appellant that for the classified felonies he would be subject to a 3 year term of postrelease control.

{¶14} Appellant appealed his conviction.

First Assignment of Error

"The jury verdict of guilty to all counts of the indictment was against the manifest weight of the evidence."

{¶15} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" *Id.* In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.* at 390.

{¶16} Granting a new trial is only appropriate in extraordinary cases where the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d 172, 175,

485 N.E.2d 717 (1st Dist.1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the fact who sits in the best position to judge the weight of the evidence and the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *State v. Rouse*, 7th Dist. Belmont No. 04-BE-53, 2005-Ohio-6328, 2005 WL 3190810, ¶ 49, citing *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Thus, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99-CA-149, 2002 WL 407847.

{¶17} Appellant asserts there was no witness identifying him as the shooter, there was no DNA connecting him to the shooting, he denied involvement, the "33K" posting on his Snapchat account occurred before the shooting, the shooter was said to be wearing black, however, he was seen in white earlier in the day, and one witness testified at the grand jury that she had seen a person named "Juwan" jump the fence after the shooting. Thus, he contends the convictions are against the manifest weight of the evidence. He further argues there was no evidence that he hid or tampered with the firearm used in the shooting.

{¶18} The state counters asserting there was overwhelming evidence that he committed the crimes.

{¶19} Appellant was convicted of aggravated murder, murder, felonious assault, and tampering with evidence. The analysis will address aggravated murder, murder and felonious assault simultaneously and first.

{¶20} Aggravated murder is defined as purposely causing the death of another with prior calculation and design. R.C. 2903.021(A). Murder is defined as no person shall purposely cause the death of another. R.C. 2903.02(A). The elements of felonious assault are no person shall knowingly cause or attempt to cause physical harm to another by use of a deadly weapon or dangerous ordnance. R.C. 2903.11(A)(2).

{¶21} Appellant does not dispute that the killing of Jett and the shootings of Petteway and Frazier constitute these crimes. However, he contends that he was not the

perpetrator of these crimes and the evidence does not indicate he was the perpetrator of these crimes.

{¶22} We have previously explained:

> Identity may be proven by direct or circumstantial evidence. *State v. Taylor,* 9th Dist. No. 27273, 2015–Ohio–403, ¶ 9. "Circumstantial evidence and direct evidence inherently possess the same probative value." *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus. "Circumstantial evidence is not inherently less reliable or certain than direct evidence, and reasonable inferences may be drawn from both direct and circumstantial evidence." *State ex rel. Hardin v. Clermont Cty. Bd. of Elections,* 2012-Ohio-2569, 972 N.E.2d 115, ¶ 66 (12th Dist.).

State v. Lewis, 7th Dist. Mahoning No. 18 MA 0059, 2019-Ohio-4081, ¶ 20, quoting *State v. Toney*, 7th Dist. Mahoning No. 14 MA 0083, 2016-Ohio-3296, ¶ 28.

{¶23} At trial, the testimony and evidence established that Kylar Petteway, Sequonia Pearson, MyKeya Pearson, Tyshawn Jett, Christian Frazier, Ena Miller and Apollonia Agresta were congregated outside the Pearson's apartment located on Maryland Avenue in Steubenville, Jefferson County, Ohio on April 9, 2017 at around 10:00 p.m. Around 10:50 p.m. shots were fired in that area near Carnegie Alley. Petteway, Frazier and Jett were each shot. Petteway was shot in the hip/buttock area. He ran to a house in the 1400 block of Ridge Avenue and had the resident call 911. Frazier was shot in the elbow and ran to his cousin's house on Euclid Avenue and called 911. Jett was shot three times and his body was discovered on an embankment leading up to 1345 and 1347 Ridge Avenue. This was close to the corner of Ridge Avenue and Carnegie Alley.

{¶24} Petteway testified that when they left the Pearson house, he, Frazier and Jett were walking down Carnegie Alley when they were shot. He testified that he saw someone in black and saw sparks from the gun. Tr. 472. He admitted he, Frazier and Jett were members of the Grape Street Gang. Tr. 475-476.

{¶25} Conversely, Frazier denied that they were members of the Grape Street Gang. Tr. 542-543. He testified that when they were walking down Carnegie Alley he heard shots fired and he was shot in the elbow. Tr. 540.

{¶26} There was no testimony at trial from an eye witness that Appellant was the shooter. There was no DNA evidence recovered from the crime scene linking Appellant to the shootings.

{¶27} However, there was testimony from Sequonia Pearson, MyKeya Pearson, Kylar Petteway, Christian Frazier, and Ena Miller that Appellant drove a red car down Maryland Avenue at around 10:10 p.m. and stayed stationary at the stop sign for a longer than necessary time period. Tr. 321, 327, 391-393, 464, 537, 579. A Facebook message from Ena Miller to Appellant hours after the shooting confirmed it was Appellant driving the red car. Miller asked Appellant to call her because people were indicating he was the shooter. State's Exhibit 12. In the message, she specifically indicated he was on Maryland Avenue. Appellant's response was that he did not do anything and he thought Frazier, Jett, and Petteway were going to shoot him. State's Exhibit 12. Cell phone records indicated Appellant's phone "pinged" off of a tower located at the corner of Ohio Street and Euclid Avenue at 10:12 p.m. State's Exhibit 37. That tower is located one street over from Carnegie Alley where the murder and shootings occurred. State's Exhibit 37. Street camera video also showed a car driving down Maryland Avenue around 10:10 p.m. and stopping for a period of time at a stop sign. It is difficult to determine from the video if this is a red car.

{¶28} Testimony established that the length of time the car driven by Appellant stayed stationary was concerning for the group of teenagers outside the Pearson home. Sequonia Pearson testified that Jett counted the seconds Appellant stayed stationary at the stop sign and seemed to be concerned. Tr. 328. She testified that she knew Jett and Appellant had issues with each other and they were in two different gangs. Tr. 323. However, she indicated that there was no verbal communication or signs that occurred between Appellant and the group. Tr. 356. MyKeya Pearson testified that Appellant was driving slowly down the street and that usually means something is going to happen and she was scared. Tr. 419. Petteway testified that there was a bad relationship between Jett and Appellant and that there were previous altercations between the Grape Street

Gang and the Nike Gang. Tr. 478, 503. The testimony indicated Appellant is a member of the Nike Gang. Tr. 395, 478. However, Frazier would not state Appellant is a member of the Nike Gang. Tr. 552.

{¶29} Petteway testified that about 10 to 20 minutes after seeing Appellant drive the car slowly down the street they decided to leave the area. The shooting occurred around 10:50 p.m.

{¶30} Miya Worrell testified she and Appellant are like family. Tr. 668-669. Many of the Nike Gang members hung out at her house. Shortly after the shooting, someone called her house and told them that everyone needed to leave in case there was retaliation. Tr. 676-677. Sometime around when that call was received, Appellant arrived at Miya's place with his girlfriend's red car. Tr. 678. Appellant asked Miya to drive it back to his girlfriend's house in Wintersville, and he headed out with "his Wheeling girls." Tr. 677-678. She testified that Appellant was wearing a white T-shirt that night and there was not any dark clothing in the car. Tr. 704.

{¶31} Worrell testified that she knew Jett. Tr. 678. She tried to talk to Jett about the gang life and the threats he was making against the Nike Gang on social media. Tr. 679-681. She told him he was going to either end up dead or in jail. Tr. 681. She testified that there is ongoing tension between the two gangs. Tr. 684. She said that Jett told her he had shot at Appellant in March 2017 by Maryland Market, which was one month before the incident at hand. Tr. 684-685, 692. Jett told her Kylar Petteway was with him when he shot at Appellant. Tr. 692. She testified that when Appellant learned it was Jett and Petteway shooting at him, Appellant said "he would catch them on the flip side." Tr. 693.

{¶32} At trial, there was also discussion of the music videos and snapchat videos posted by Appellant and members of the Grape Street Gang. On the night of the shooting Appellant posted on Snapchat the phrase "33K." Tr. 708. Testimony indicated that the number 33 is associated with the Grape Street Gang and that "33K" means Grape Street Killer. Tr. 708. Appellant's music video was also played. In that video, Appellant raps about turning something into grape juice. State's Exhibit 2; Tr. 339. Witnesses testified the lyrics meant a member of the Grape Street Gang was going to die. Tr. 340.

{¶33} The testimony at trial indicated the two gangs hate each other and consider themselves to be "opps," meaning opposites. They use phrases like "FTO" and "Fuck the

Opps." They use rap videos posted on social media and YouTube to threaten or "diss" each other.

{¶34} The jury viewed the video recording of Appellant's police interview. During the interview, Appellant claimed that on the night of the shooting he was not in that area.

{¶35} One of the calls Appellant made from jail was played for the jury. In that call, Appellant stated, "It's my fault I'm in here for acting like a street Nigger and jumping off the porch." Tr. 965.

{¶36} Considering all the above evidence, there was evidence that the jury could use to infer Appellant was the shooter. While there may not have been an eyewitness to the shooting identifying Appellant as the shooter, the evidence does indicate Appellant drove past the victims and stopped for a lengthy period of time at the stop sign. This action made some of the teenagers he drove past nervous. The evidence indicates that Appellant was in a rival gang of the victims and there was tension between the two. In fact, it appears Petteway and Jett had shot at Appellant a month prior to this and Appellant made a statement that he would "catch them on the flip side." Following the shooting Appellant left town and although he denied the shooting, he did make a statement that was recorded on the jail phone stating he "jumped off the porch." Also his statement to police did not match what the evidence showed. He indicated he was not in the vicinity of the shooting that day; however, eye witnesses, phone logs, and his own Facebook message to Ena Miller indicated he was in the area within 20 minutes of the shooting.

{¶37} That said, there was also evidence that he was wearing a white T-shirt on the night of the shooting and was not seen in black. The testimony established the shooter was in black. Also, when Appellant was asked by Ena Miller if he shot the victims, he denied it. Apollonia Agresta also testified at trial. She was outside with Petteway, Cristian, MyKeya and Sequoia Pearson, Jett, and Miller. She testified that she did not see Appellant drive by, but she stated that her grand jury testimony was that after the shooting she saw "Juwan" jump the fence. Given the other testimony, possibly the shooter was Juwan Williams, not Appellant.

{¶38} It was the province of the jury to determine if Appellant was the shooter and/or accomplice to this crime. While there may be evidence he was not the shooter or in the area while the shooting occurred, there was also evidence that he was the shooter

and was present. We cannot find, given the evidence, that the jury clearly lost its way when it found Appellant guilty of the murder of Jett and the felonious assaults of Frazier and Petteway.

{¶39} Appellant was also convicted of tampering with evidence. The elements of tampering with evidence are: "No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]" R.C. 2921.12(A)(1).

{¶40} None of the witnesses testified that they saw Appellant with a gun prior to the shooting. None of the witnesses testified they saw Appellant with a gun after the shooting. None of the witnesses testified Appellant was wearing black on the night of the shooting or that they saw black clothing in the car he was driving. No gun was recovered during the investigation and the shooter's black clothing was not recovered. The tampering with evidence conviction appears to be based on the fact that these items were not found.

{¶41} The Eighth Appellate District has held that when no gun or shirt that the alleged shooter was wearing was recovered, the tampering with evidence verdict is not against the manifest weight of the evidence. *State v. Gordon*, 8th Dist. No. 106023, 2018-Ohio-2292, 114 N.E.3d 345, ¶ 58. In that case, Robert Holsey was going to purchase marijuana from Neeko Gordon. Ricardo Nieves, the victim, drove Holsey to the marijuana-purchase meeting place. As they were approaching the meeting place, they saw Gordon and got suspicious and drove away. In the side view mirror, Holsey saw Gordon raise his arm and shoot at them. The shot hit Neives and he died. Holsey said Gordon was wearing an orange shirt. Another eyewitness said the shooter was wearing a bright shirt.

{¶42} In determining the tampering conviction was not against the manifest weight of the evidence, the court explained:

> Additionally, the evidence shows that no gun was ever found. Furthermore, when police questioned Gordon at the house on W. 41st Street not long after the shooting, Gordon was not wearing the orange shirt that he had on

> when he was running from the scene. That shirt was never recovered. Accordingly, we cannot say that the jury lost its way in convicting Gordon of tampering with evidence.

State v. Gordon, 8th Dist. No. 106023, 2018-Ohio-2292, 114 N.E.3d 345, ¶ 58.

{¶43} The Second Appellate District case addressing sufficiency of the evidence, has explained that the sole fact that the gun was not found is not sufficient evidence for a tampering with evidence conviction. It explained:

> "The inability of law enforcement to find the gun used in a shooting, by itself, does not show that the defendant 'altered, destroyed, concealed, or removed' it." *State v. Beard,* 6th Dist. Wood No. WD–08–037, 2009–Ohio–4412, ¶ 18, quoting *State v. Wooden,* 86 Ohio App.3d 23, 27, 619 N.E.2d 1132 (8th Dist.1993). In *Beard,* the court of appeals noted that "The state relied on a faulty syllogism: Witnesses saw Beard fire a gun. The gun was never found. Therefore, Beard must have tampered with the gun in order to make it unavailable as evidence against him. This was the extent of the evidence used to prove tampering. It is clearly insufficient to meet the standard applied by *Wooden, Spears,* and *Like.* Since the evidence was insufficient to support a tampering conviction, the conviction must be vacated." *Id.* at ¶ 20, citing *Like at* ¶ 24, and *State v. Spears,* 178 Ohio App.3d 580, 2008–Ohio–5181, 899 N.E.2d 188 (2d Dist.).

State v. Mabra, 2nd Dist. Clark No. 2014-CA-147, 2015-Ohio-5493, ¶ 32.

{¶44} Here, the only evidence of tampering is the fact that a gun was not found. Given this record, we find that this case is more analogous to *Mabra* and distinguishable from *Gordon*. Witnesses in *Gordon* testified Gordon had a gun and was wearing a bright colored shirt during the shooting. Here, there is no testimony that Appellant had a gun or dark clothing.

{¶45} This assignment of error is meritless as it pertains to aggravated murder and felonious assault. As to tampering with evidence, this assignment of error has merit.

Second Assignment of Error

"The trial court committed reversible error in the sentencing of the Defendant."

{¶46} The standard of review in a felony sentencing appeal is dictated by R.C. 2953.08(G)(2), which states:

> The court hearing an appeal under division (A), (B), or (C) of this section 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 courts' 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 either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶47} The Ohio Supreme Court has stated the plain language of R.C. 2953.08(G)(2) prohibits the application of the abuse of discretion standard when reviewing a felony sentence. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 10, 16. "An appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1.

{¶48} As stated above, Appellant received an aggregate sentence of life in prison with the possibility of parole after 49 years. He received 30 years to life on the aggravated murder conviction, 7 years for the felonious assault of Frazier, and 3 years for the felonious assault of Petteway. Each of those convictions had mandatory 3 year firearm specifications, which were required to be served first. The trial court ordered those sentences to be served consecutive. As to tampering, Appellant was sentenced to 3

years and that sentence was ordered to be served concurrent with the aggravated murder and felonious assault sentences.

{¶49} Appellant does not argue the trial court failed to make the requisite consecutive sentence findings for imposition of consecutive sentences. Rather, he argues given the facts surrounding the crimes the sentences chosen were excessive. His arguments focus on the factors set forth in R.C. 2929.11, the purposes and principles of sentencing, and 2929.12, the seriousness and recidivism factors. He asserts the victims had criminal records and they had shot at him a month before the shooting. Furthermore, they were members of the rival gangs. Appellant's statement to Ena Miller through Facebook messenger indicated that he thought Petteway, Frazier and Jett were going to shoot at him. Therefore, according to him the victims in part facilitated the offense. Likewise, although he was older than the victims, he was still only 24 and even though he has served two previous prison terms, he was not as wild as he was in his youth. He was diverting his attention to his music career. As such, he asserts he should have only received 20 years to life for the aggravated murder offense and lesser sentences for the felonious assault convictions. Therefore, he asserts these factors make the crime less serious and recidivism less likely.

{¶50} The trial court considered everything stated when determining the appropriate sentence. The following reasoning was provided by the trial court at sentencing:

> All right. Have a seat. Thank you. All right. It does appear that Defendant has been – has served two prior prison terms, one in 11-CR-129, one in 14-CR-45, both involve firearms. This is the third trip to prison and that cannot be ignored.
>
> The offense is gang related. That cannot be ignored.
>
> This was not a spur of the moment shooting or murder. This was a deal where it's planned out, where you lie in wait in the dark and start shooting in the back. That cannot be ignored.

The victims were minors. That's a factor. Maybe it's not as big a factor in this case that it might be in some other case because as the Defense points out, they weren't acting like minors and, in fact, two of them tended to bring this on themselves, although Mr. Frazier seemed to just be in the wrong place at the wrong time.

I have to point out 13 shots were fired, three hit the victims, ten went off into space somewhere to do whatever damage they did whenever they got there. That's a problem and – and that cannot be ignored.

With respect to Count One, I'll tell you, the three prior prison terms would – would kind of indicate life without but the victim there did tend to bring this on himself. He chose that life. He was one of the combatants and so we're not going to go life without but we are going to do life without parole for 30 years on that one, with the three year firearm specification which is mandatory and has to be served first.

The murder count merges. So, it just goes away.

The felonious assault on Christian Frazier, this is one lie in wait, shoot them in the back from the dark. The maximum on that is 8. We are going – and with the three prior prisons, I can't do the – the least. So, I'm going to do 7 on that one, with the 3 year firearm specification which is mandatory and must be served first.

With respect to the felonious assault on Kylar Petteway, he tended to bring it on himself. He was a voluntary combatant in this event and the Defendant is I guess entitled to something for that. Still with the three prior prisons we can't do the minimum on that one. So we are going to do 3 on that one, plus the 3 year firearm spec which is mandatory and is to be served first.

By the way, I'm doing all of the specs because they're different victims with respect to all of them.

> The tampering, I agree with both sides, that should run concurrent. So, we will do 3 years on that one but that's going to run concurrent with Counts One through Four.

Tr. 1142-1144.

{¶51} The judgment entry, likewise, provides similar statements to the ones made at the sentencing hearing. 5/3/18 J.E. Considering the facts, the trial court's explanation is direct, logical, and justifies the sentence. We cannot find the sentence is contrary to law.

{¶52} Appellant also asserts that the firearm specifications should have merged since one firearm was allegedly used by Appellant to commit the offenses; he argues all these shootings are a part of the same conduct, occurred at the same time, and were not committed with a separate animus. He further asserts the felonious assault convictions should merge with the aggravated murder conviction because they were also part of the same transaction and occurrence and were not committed with a separate animus.

{¶53} "Where the same conduct by 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). "Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25(B).

{¶54} However, when an offender's conduct constitutes offenses involving separate victims, the offenses are of dissimilar import under R.C. 2941.25(B) and merger is not required. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 23*; State v. Blanton*, 8th Dist. Cuyahoga No. 107237, 2019-Ohio-1523, ¶ 12. Therefore, merger was not required for the felonious assaults and aggravated murder convictions because there were three victims – Frazier, Petteway, and Jett. Likewise, as to the firearm specifications for those crimes, pursuant to R.C. 2929.14(B)(1)(g), merger of the firearms specifications was not permitted.

{¶55} This assignment of error lacks merit.

Third Assignment of Error

"The Defendant received ineffective assistance of counsel."

{¶56} In order to demonstrate ineffective assistance of counsel, Appellant must show that trial counsel's performance fell below an objective standard of reasonable representation, and prejudice arose from the deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 141-143, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, (1984). Both prongs must be established: If counsel's performance was not deficient, then there is no need to review for prejudice. Likewise, without prejudice, counsel's performance need not be considered. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶57} In Ohio, a licensed attorney is presumed to be competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). In evaluating trial counsel's performance, appellate review is highly deferential as there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Bradley* at 142-143, citing *Strickland* at 689. Appellate courts are not permitted to second-guess the strategic decisions of trial counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). The United States Supreme Court has recognized that there are "countless ways to provide effective assistance in any given case." *Bradley* at 142, citing *Strickland* at 689.

{¶58} To show prejudice, a defendant must prove his lawyer's deficient performance was so serious that there is a reasonable probability the result of the proceeding would have been different. *Carter* at 558. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d 136 at fn. 1, 538 N.E.2d 373, quoting *Strickland* at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding was fundamentally unfair as a result of the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶59} Appellant argues trial counsel was ineffective based on the failure to file a motion to suppress, permitting the trial court to proceed straight to sentencing following the guilty verdicts, and counsel did not object to two jurors being unable to walk to the

area where the shooting occurred as part of the jury view. Each argument will be addressed separately.

{¶60} Appellant contends trial counsel should have moved to suppress his statement to police, social media posts, and the phone records. A defense counsel's failure to file a suppression motion is not per se ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). Rather, failure to file a motion to suppress is ineffective assistance of counsel only if there is a reasonable probability that, had the motion been filed, it would have been granted. *State v. Watts*, 8th Dist. Cuyahoga No. 104188, 2016-Ohio-8318, ¶ 17.

{¶61} Appellant's arguments concerning the failure to file a suppression motion for all the above items fails for two reasons. First, counsel fails to indicate why or how the motion to suppress would have been successful. The failure to explain how or why the motion would have been successful is a basis for finding no merit with the argument that counsel was ineffective because there is no showing of prejudice. *State v. Miller,* 3d Dist. Logan No. 8-19-02, 2019-Ohio-4121, ¶ 39 (When there is no argument as to whether the motion to suppress would have had a reasonable probability of success, the appellate court may "decline to root out any possible argument."). Second, the record indicates the statement made to police was voluntary; he went to the police station on his own volition. Furthermore, nothing demonstrates there was a basis to suppress the statement. Likewise, nothing in the record demonstrates that there was a basis for suppression of the phone records or the social media posts. Without more, we cannot conclude that trial counsel's failure to file a motion to suppress amounted to deficient performance or resulted in prejudice.

{¶62} Next, Appellant argues counsel was ineffective when it failed to object to proceeding immediately to sentencing without asking for sentencing to be delayed for purposes of "having a mitigation hearing prior to the imposition of sentencing." This argument is without merit. It does not appear Appellant was entitled to a typical mitigation hearing. He was not charged with a death specification or convicted of a death specification. Mitigation hearings occur after a jury finds an offender guilty of a death specification. Potentially, Appellant is trying to argue that counsel was deficient for not requesting sentencing to be delayed so that mitigation evidence could be discovered and

presented at sentencing. This argument also lacks merit considering the record. Trial counsel argued mitigation by arguing that the victims, although minors, were not acting like minors, they were a part of the gang lifestyle, and two of the victims had instigated this crime by shooting at Appellant a month prior. Counsel also argued that Appellant did have a record but he had matured and was concentrating on his music. As the previous assignment of error indicates, these arguments resonated with the trial court in determining its sentencing. The trial court did not give the maximum sentence, but rather considered these statements and altered the sentences based on the victims' actions. Consequently, it is difficult to conclude counsel was deficient or that Appellant was prejudiced by counsel's performance.

{¶63} The last argument concerns the inability of two jurors to walk to the area of the shooting during the jury view. Appellant asserts these jurors could not be expected to see, view, and weigh the evidence at trial in the same light as the other ten jurors.

{¶64} The transcript indicates that two of the jurors could not walk the two blocks for the jury view. Those two jurors stayed in the van, which followed closely behind the rest of the jurors. Tr. 195. It appears these jurors were able to hear the statements made by the bailiff pointing out things to see. Tr. 195.

{¶65} It is difficult to conclude that counsel was deficient for failing to object to these two jurors not walking to the jury view or that Appellant was prejudiced for their failure to walk. The record indicates they saw the jury view and heard the bailiff's statements. Furthermore, every juror is not given an eye test to determine if they each have 20/20 vision so that they are seeing the same exact thing nor are they given a hearing test to make sure they are hearing the same exact thing. While the jurors van experience may have been different from the jurors walking, this does not mean that they could not weigh the evidence. Jurors are human and they are each going to take away similar but possibly different observations from a jury view. Therefore, this argument is meritless.

{¶66} For all the above stated reasons, this assignment of error lacks merit.

Conclusion

{¶67} The first assignment of error has no merit as to the aggravated murder and felonious assault convictions. As to the tampering with evidence conviction, it does have

merit; the conviction is against the manifest weight of the evidence. The second assignment of error has no merit; the sentence is supported by the record. The third assignment of error has no merit; counsel's performance was not deficient and/or there was no prejudice from counsel's performance. The convictions for aggravated murder and felonious assault are affirmed. As to tampering with evidence, the conviction is reversed and the three year concurrent sentence for that conviction is vacated.

Waite, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that the convictions for aggravated murder and felonious assault are affirmed. The conviction is reversed and the three year concurrent sentence for tampering with evidence is vacated . Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.