[Cite as *State v. Oliver,* 2012-Ohio-122.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0017**
- vs -	:	
CORTEZ M. OLIVER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2009 CR 0488.

Judgment: Affirmed in part; reversed in part and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

James W. Armstrong, Leipply & Armstrong, 101 Riverfront Centre, 2101 Front Street, Cuyahoga Falls, OH 44221 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Cortez M. Oliver, appeals from the February 18, 2010 judgment of the Portage County Court of Common Pleas, sentencing him for murder, aggravated burglary, and aggravated robbery.

{¶2} Appellant was indicted on three counts: murder, an unclassified felony, in violation of R.C. 2903.02(B); aggravated burglary, a felony of the first degree, in violation of R.C. 2911.11(A)(1) and (B); and aggravated robbery, a felony of the first

degree, in violation of R.C. 2911.01(A)(3). Appellant pleaded not guilty and the matter proceeded to a jury trial.

{¶3} Appellee, the state of Ohio, called the following witnesses who collectively established that appellant devised a deceptive plan in order to gain entry into Richard Lowther's residence for the purpose of stealing from him which resulted in his death.

{¶4} Bobby Nolan testified that on the afternoon of July 1, 2009, appellant asked him and Jon Dukes if they wanted to "hit a lick," a slang term for a robbery. Nolan and Jon Dukes agreed to participate that night in robbing Lowther of $50,000 and a valuable coin collection. Nolan and Jon Dukes were assured by appellant that the robbery would be easy because Lowther was an elderly man and would be asleep. Later that night, Nolan backed out of the robbery because he learned that the group would not be using guns and that a "white chick," Jodi Fetty, would be involved.

{¶5} James Oaks testified that he rented a house on Lowther's property and the two were neighbors for over five years. During the night of the incident, Oaks recalled waking to the barking and snarling sound of his dog. Oaks looked out his bathroom window in the direction of Lowther's residence. He observed a man and a woman leaving the side of Lowther's house, carrying what appeared to be plastic coin cases. Oaks heard voices coming from the back of Lowther's home. Oaks stuck his head out of his back door and heard Lowther say, "what are you doing to me?" Oaks grabbed a stick and proceeded to Lowther's house. Oaks swung at and tried to stop the man; however, he ran away. Oaks only had a split second glance of the male, but described the female as short, white, medium to heavy build, with blondish, shoulder length hair. Oaks checked on Lowther and called 9-1-1.

{¶6} Lieutenant Paramedic Michael Lee with the Rootstown Fire Department testified he was the first dispatched to the scene at approximately 2:34 a.m. He discovered Lowther lying on his porch. Lowther desperately wanted to get up but was unable to feel or use his legs. Paramedic Lee testified that Lowther told him he had fallen asleep while watching television and woke up to the sound of his doorbell. Lowther informed Paramedic Lee that a small, petite, brunette girl was at his door, stated she had car trouble, and wanted to use his phone. After Lowther let her inside his home, he was attacked from behind by a very tall, big, black man. His attacker grabbed Lowther by his mouth, twisted and threw him to the ground. On the way to the hospital, Paramedic Lee reported that Lowther had no feeling from the waist down and had the actual indentation of half a boot print on his left flank.

{¶7} Officer Kevin Nicolino with the Portage County Sheriff's Office testified that when he arrived at the scene, he observed quarters in the street. He briefly spoke with Lowther and Oaks. Officer Nicolino put out a report to "be on the lookout" ("BOLO"), advising dispatch that suspects included a white female with blond hair and a black male who were seen running from the scene with a large amount of coins.

{¶8} Detective Scott Kriegar with the Ravenna City Police Department testified that he was working an off-duty security detail at the Ravenna Giant Eagle when Officer Nicolino's BOLO came across the radio. Shortly after receiving that information, Detective Kriegar saw Fetty, the white female involved in the incident, exit a vehicle carrying what appeared to be a very heavy Crown Royal whiskey bag. Fetty asked Detective Kriegar if customer service could cash in some change. He directed Fetty to the Coin Star machine. Believing Fetty was a possible match to the BOLO, Detective

Kriegar contacted Officer Nicolino. He reported Fetty's presence at Giant Eagle and asked what types of coins were stolen. Officer Nicolino indicated that the coins were all late model statehood quarters. Detective Kriegar learned from the cashier that Fetty had deposited 740 quarters into the Coin Star machine. He then ordered the cashier to request identification from Fetty before providing cash on the Coin Star receipt. Detective Kriegar confirmed that Fetty fit the BOLO. He also observed that the driver of the vehicle that Fetty previously exited was a black male, and that another black male was seated in the back seat. At that time, Detective Kriegar called for backup assistance.

{¶9} Patrolman Jason Burrell with the Ravenna City Police Department testified that after he arrived at Giant Eagle, he stopped the vehicle in the parking lot. He stated that the driver of the car was identified as Darrell Dukes and the front seat passenger was identified as Fetty. Appellant was ultimately identified as the back seat passenger.

{¶10} Lieutenant Gregory Johnson, Chief of the Detective Bureau of the Portage County Sheriff's Office, testified that after he arrived at Giant Eagle, he interviewed both Fetty and Darrell Dukes. He ultimately released Darrell Dukes and arrested Fetty.

{¶11} Lieutenant Johnson's initial involvement with the case actually began earlier that morning when he went to Robinson Memorial Hospital. He photographed Lowther and recorded Lowther's interaction with the emergency medical team who attended to his injuries. The recording, which was played for the jury, included a conversation between Lowther and Dr. John Gusz, the trauma center physician. Lowther stated in the recording that he could not wiggle his toes, was injured by a guy who grabbed him and threw him on concrete, and had no feeling in the area of his

abdomen. Dr. Gusz testified at trial that Lowther had suffered a significant spinal cord injury and was life-flighted to Akron City Hospital.

{¶12} Lieutenant Johnson also testified that appellant's keys were found in Darrell Dukes' vehicle. Lieutenant Johnson indicated that while he was interviewing Fetty at the station, appellant arrived to retrieve his keys. Lieutenant Johnson believed that appellant was somehow involved in the incident, so he instructed Detective Acklin to speak with him. Lieutenant Johnson ultimately placed appellant under arrest.

{¶13} On cross-examination, Lieutenant Johnson testified he did not notice any trauma to appellant's hands. He said that the boot tread pattern on Lowther did not match the tread pattern on the boots appellant later wore to the station, approximately four to five hours after the initial 9-1-1 called was placed. Lieutenant Johnson did not find any of appellant's blood on Lowther's clothing or in Lowther's house.

{¶14} Co-defendant Fetty testified that Darrell Dukes let Jon Dukes, appellant, and herself out of the car on Lowther's street. Appellant led the way to Lowther's house and told Fetty to knock on the door. She complied. Fetty pretended she had car trouble and needed to use the phone in order for appellant to be able to gain access into Lowther's residence so that he could steal from him. Lowther let her into his home. As Fetty dialed a random phone number, she heard a thud from the porch. She ran out of the side door toward the street. Fetty stated that appellant followed her, dropping coins as he ran into the street where Darrell Dukes was waiting in the car. In the car, Fetty questioned whether appellant had hurt Lowther. She testified that appellant responded that he had "de-bowed" him, a slang term for some sort of an assault. Fetty also stated that appellant argued with Jon Dukes in the car because Jon Dukes did not assist him in

taking any “loot” from Lowther’s house. According to Fetty, Jon Dukes said he had blood on his hands, but she did not see it. She testified that Darrell Dukes later drove her and appellant to Giant Eagle. She went inside the store to cash in the coins. After she returned to the car, Darrell Dukes was still in the vehicle but appellant, who was originally seated in the back seat, was gone.

{¶15} On cross-examination, Fetty alleged heavy drug and alcohol use on the night of the incident. Fetty admitted that she had lied in her previous statements to police because she was scared, intoxicated, and afraid of going to jail.

{¶16} Co-defendant Darrell Dukes testified that he agreed to drive appellant to the “lick” in return for $2,000. He testified that appellant told him that the “lick” was on an elderly guy who lived alone, had guns, and a safe with $50,000, but had a nearby neighbor so a lookout was necessary. According to Darrell Dukes, appellant and Jon Dukes were dressed in black and initially tried to get into Lowther’s house but left because Lowther was awake and the lights were on in his home. Sometime later, Darrell Dukes testified that Fetty said she could get them into Lowther’s house. Their plan was for Darrell Dukes to remain in the car, Jon Dukes to be the lookout, and appellant to “de-bow” Lowther and take his money. Darrell Dukes dropped off appellant, Fetty, and Jon Dukes. He waited about 10 minutes, then returned to the area to find appellant and Fetty running toward his car. The first thing Fetty said was that appellant “f***ed the dude up pretty bad.” Appellant later argued with Jon Dukes in the car claiming that he did not assist him in the “lick.” According to Darrell Dukes, Jon Dukes showed blood on his hands. Darrell Dukes testified that he later drove Fetty and appellant to Giant Eagle to cash in the coins. After Fetty went inside the store, Darrell

Dukes said that appellant exited the car with a bag of crack and ran away after seeing the police. He testified that while in jail, he received a letter from appellant asking him to lie for him.

{¶17} On cross-examination, Darrell Dukes testified that he spent 26 days in the general population with his cousin, Jon Dukes, but said they did not discuss the case because he was mad at Jon for getting him arrested. He indicated that his main source of income before being arrested was from dealing drugs. Darrell Dukes stated he smoked a little marijuana on the day of the incident.

{¶18} A few weeks after the incident, Lowther passed away. Dr. Dorothy Dean, a Forensic Pathologist and Deputy Medical Examiner with the Summit County Medical Examiner's Office, performed Lowther's autopsy. She testified that the cause of Lowther's death was complications of spinal cord injury due to the blunt force trauma to his neck. Dr. Dean stated that Lowther had a separation between two of his backbones, fractures, and a corresponding spinal cord injury to the C-6 and C-7 area of his neck. She explained that Lowther's injury, between C-6 and C-7 of his cerebral vertebras, damaged his ability to control anything below his shoulder area. In addition to the loss of movement of his body, Lowther was unable to control his breathing and required a breathing tube before he died. Lowther was also unable to eat, required a hose into his body to receive nutrition, and could not control his kidneys.

{¶19} After the close of the state's case-in-chief, appellant filed a Crim.R. 29 motion for acquittal, which was overruled by the trial court. The defense then presented its case.

{¶20} Bruce Miller testified that he owns the Well Doctor, a business which drills wells, installs pumps, and replaces well systems. He was also in the flea market business. Miller stated that appellant grew up with his kids and did some work for him a couple of times. Miller also knew Lowther from the flea market, who talked to Miller about his commemorative coin collection. On one occasion, Miller went with Robert Greyhouse to Lowther's residence to fix a plumbing problem. Lowther did not show Miller his coin collection. Miller stated he never spoke with appellant about Lowther's coin collection, the layout of Lowther's house, or Lowther's neighbor. Miller also testified that he was not part of any plan to receive 20 percent of the take from the robbery of Lowther's house. Miller admitted he was a recovering drug addict, had a criminal past, and was released from prison in 1999.

{¶21} Greyhouse testified that he worked for Miller at the Well Doctor and in his flea market business. Prior to the incident, he went with Miller to Lowther's residence. Greyhouse said that Lowther showed him and Miller his coin collection. Greyhouse stated that while he worked on fixing Lowther's water filter, Miller was alone with Lowther for about 40 minutes. Greyhouse believed that Miller was "up to robbing" Lowther. Greyhouse did not believe that appellant was involved in the incident at issue on his own, but was put up to it by Miller.

{¶22} Appellant invoked his Fifth Amendment right to not testify and the defense rested. Appellant did not renew his Crim.R. 29 motion for acquittal at the conclusion of all the evidence.

{¶23} The jury returned a verdict of guilty on all charges.

{¶24} The trial court sentenced appellant to life in prison with parole eligibility after 15 years for murder, and 10 years each for aggravated burglary and aggravated robbery, consecutively. Appellant filed a timely appeal, raising the following eight assignments of error:

{¶25} "[1.] The trial court committed prejudicial error by making comments implying Appellant's guilt during individual voir dire, thus denying Appellant his rights to due process.

{¶26} "[2.] The trial court committed prejudicial error, denying Appellant due process, when the court refused to remove a potential juror for cause as requested by Appellant, thus forcing Appellant to use a preemptory challenge.

{¶27} "[3.] The trial court committed prejudicial error and denied Appellant due process by removing a potential juror for cause over the objection of defense counsel.

{¶28} "[4.] There was insufficient evidence to convict Appellant of Felony Murder, Aggravated Burglary, and Aggravated Robbery.

{¶29} "[5.] The guilty verdicts of murder, aggravated burglary, and aggravated robbery were against the manifest weight of the evidence.

{¶30} "[6.] The trial court committed prejudicial error by ruling aggravated robbery and aggravated burglary were not allied offenses of similar import.

{¶31} "[7.] The trial court abused its discretion by sentencing Appellant to maximum consecutive sentences for aggravated burglary, aggravated robbery, and murder.

{¶32} "[8.] Appellant received ineffective assistance from his trial counsel."

{¶33} **First Assignment of Error**

{¶34} In his first assignment of error, appellant argues the trial court erred by making comments implying his guilt during individual voir dire, thus denying him his right to due process. He stresses that on 49 separate occasions, the trial court improperly stated to seven of the 12 jurors selected that an elderly gentleman was "killed" during a "home invasion."

{¶35} Preliminarily, we note that appellant failed to object to the comments of the trial court during the lower court proceedings. Under Crim.R. 52(B), however, this court has the power to recognize plain error or defects involving substantial rights even if they are not brought to the attention of the trial court. *State v. Haines*, 11th Dist. No. 2003-L-035, 2005-Ohio-1692, at ¶30.

{¶36} In the context of a criminal case, a court of review should invoke the plain error doctrine with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. Thus, plain error does not exist unless, but for the error, the outcome of the proceeding would have been different. Id., paragraph two of the syllabus. See, also, *State v. Huckabee* (Mar. 9, 2001), 11th Dist. No. 99-G-2252, 2001 Ohio App. LEXIS 1122, at *17.

{¶37} The Sixth Amendment to the United States Constitution guarantees a defendant the right to a trial by fair and impartial jurors. *Irvin v. Dowd* (1961), 366 U.S. 717. In order to protect this fundamental right, the court conducts voir dire with the purpose of empaneling a fair and impartial jury, free from prejudice or bias. *State v. Twyford* (2002), 94 Ohio St.3d 340, 346; *State v. Crago* (1994), 93 Ohio App.3d 621, 641.

{¶38} This court stated in *State v. Smith*, 11th Dist. Nos. 2006-P-0101 and 2006-P-0102, 2008-Ohio-3251, at ¶40-41:

{¶39} "Pursuant to R.C. 2945.03, '(t)he judges of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding matters in issue.' See, also, *State v. Miller,* 11th Dist. No. 2004-T-0092, 2005-Ohio-5283, at ¶20. Further, in presiding over a trial, a judge must be cognizant of the effect of his or her remarks upon the jury. *State v. Wade* (1978), 53 Ohio St.2d 182, 187 ***. However, this does not imply a judge is precluded from making remarks during the course of a trial. *State v. Hardy* (Oct. 10, 1997), 11th Dist. No. 96-P-0129, 1997 Ohio App. LEXIS 4588, *20. An appellate court reviewing the propriety of a judge's remarks before a jury must determine whether the comments were prejudicial to a defendant's right to a fair trial. *Wade,* supra, at 188; see, also, *Miller,* supra, at ¶21.

{¶40} "To aid in this determination, the Supreme Court of Ohio has stated that courts shall adhere to the following rules: '(1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel.' *Wade,* supra." (Parallel citations omitted.)

{¶41} The trial court's challenged comment was made on each separate occasion to determine each prospective juror's knowledge of the case from pretrial media coverage. The trial judge was not giving her own views or opinion with respect to whether an elderly gentleman was "killed" during a "home invasion." Rather, the trial judge was merely portraying the pretrial media coverage surrounding this case to determine whether the jurors were exposed to the coverage. Only after determining which prospective jurors had in fact been exposed to pretrial media coverage could individual voir dire take place on the effect of the media exposure. The parties and the trial court conducted individual voir dire regarding the pretrial publicity of the case with 83 prospective jurors over two days.

{¶42} There is nothing in the record demonstrating the media portrayed or characterized the events at issue. However, it is reasonable to conclude that, based on the individual voir dire to address whether the coverage tainted the jurors and the facts of this case, the court properly characterized in general terms what the media reported.

{¶43} Appellant fails to establish either error or prejudice from the trial court's challenged comment, specifically with respect to the 12 empanelled jurors. Jurors 1, 6, and 8 had no knowledge of the case and indicated they could be fair and impartial; Jurors 2, 3, and 9 were familiar with the case but did not form opinions about appellant's guilt or innocence from the media coverage and indicated they could be fair and impartial jurors; Juror 5 was familiar with the case by name only and stated he could be fair and impartial; Jurors 7 and 10 vaguely recalled some media coverage of the case but stated they had not formed opinions and could be fair and impartial jurors; Juror 4 was familiar with the case name and recalled reading about it in the newspaper but

stated she had not formed an opinion and could be fair and impartial; Juror 11 thought that her co-workers may have discussed the case but indicated she could be fair and impartial; and Juror 12 initially was not familiar with the case, then later stated he remembered portions of the story but said he could set aside the media coverage and be a fair and impartial juror. Moreover, the court instructed the jury that they were to decide this case only upon the evidence presented at trial.

{¶44} Under *Wade*, the record establishes that there was nothing improper about the trial court's challenged comment during voir dire and there was no negative effect as a result of that challenged comment upon the 12 empanelled jurors. Appellant fails to show error or that he was prejudiced. It follows that he has not demonstrated that trial counsel's performance was deficient.

{¶45} Appellant's first assignment of error is without merit.

{¶46} **Second Assignment of Error**

{¶47} In his second assignment of error, appellant alleges the trial court erred and denied him due process by refusing to remove Prospective Juror 46A for cause as requested, thus forcing him to use a peremptory challenge. Appellant stresses Prospective Juror 46A stated appellant was guilty and that he believed in lynching. Appellant contends he had fewer peremptory challenges than the state due to the trial court's refusal to remove Prospective Juror 46A who showed bias against him.

{¶48} The Supreme Court of Ohio in *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, at ¶140, stated the following:

{¶49} "On a challenge for cause, '(t)he ultimate question is whether the "juror sw(ore) that he could set aside any opinion he might hold and decide the case on the

evidence, and (whether) the juror's protestation of impartiality (should be) believed."' *White v. Mitchell* (C.A.6, 2005), 431 F.3d 517, 538, quoting *Patton v. Yount* (1984), 467 U.S. 1025, 1036, ***. A trial court's resolution of a challenge for cause will be upheld on appeal unless it is unsupported by substantial testimony, so as to constitute an abuse of discretion. *State v. Tyler* (1990), 50 Ohio St.3d 24, 31, ***." (Parallel citations omitted).

{¶50} An abuse of discretion is the trial court's ""failure to exercise sound, reasonable, and legal decision-making."" *State v. Sawyer*, 11th Dist. No. 2011-P-0003, 2011-Ohio-6098, at ¶72, quoting *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶51} Crim.R. 24(C) lists the reasons that a prospective juror may be removed for cause and states in part:

{¶52} "(C) Challenge for cause.

{¶53} "A person called as a juror may be challenged for the following causes:

{¶54} "***

{¶55} "(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

{¶56} "***

{¶57} "(14) That the juror is otherwise unsuitable for any other cause to serve as a juror."

{¶58} Similarly, R.C. 2945.25 states in part:

{¶59} "A person called as a juror in a criminal case may be challenged for the following causes:

{¶60} "***

{¶61} "(B) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;

{¶62} "***

{¶63} "(O) That he otherwise is unsuitable for any other cause to serve as a juror."

{¶64} Prospective Juror 46A indicated on his questionnaire that he had some pretrial exposure to the case, including the fact that a robbery and beating led to the death of a man. During individual voir dire, the trial court asked Prospective Juror 46A if he would be able to set aside that information and only listen to the evidence presented from the witness stand. Initially, he stated that he could not due to the murder aspect of the case. Prospective Juror 46A understood appellant was presumed innocent but believed there was no excuse for beating someone so badly. He was uncomfortable with the act of beating in general. Prospective Juror 46A stated he understood that not everything he had previously heard and read about the case was true. He spoke in generalizations that "they are all guilty right now in my head," and "they should come

back with lynching." However, Prospective Juror 46A responded to the trial court's inquiry that he could have a fair and objective mind in the courtroom, listen only to the facts as presented in the courtroom, and be a fair and impartial juror.

{¶65} Appellant's trial counsel made a motion for cause. The trial court denied that motion indicating that defense counsel could do further questioning in the courtroom. However, the record reflects that appellant's representative did not further question Prospective Juror 46A while he was in the Juror 9 position during general voir dire. Rather, defense counsel exercised its fourth peremptory challenge to remove Prospective Juror 46A from the Juror 9 position.

{¶66} The record before us does not establish that the trial court abused its discretion by denying defense counsel's motion to remove Prospective Juror 46A for cause. Prospective Juror 46A initially presented some conflicting answers regarding his possible bias during the individual voir dire on pretrial publicity. "Where, as here, a juror gives conflicting answers, it is for the trial court to determine which answer reflects the juror's true state of mind." *State v. Jones* (2001), 91 Ohio St.3d 335, 339, citing *State v. Webb* (1994), 70 Ohio St.3d 325, 339. After conducting further questioning, the trial court determined Prospective Juror 46A could be fair and impartial. Thus, the trial court was not required to remove Prospective Juror 46A for cause. See *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169; *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, at ¶100 (holding that as long as a trial court is satisfied that a juror can be fair and impartial and follow the law as instructed, the court need not remove that juror for cause.) In addition, although given the opportunity by the trial court, defense counsel

did not further question Prospective Juror 46A while he was in the Juror 9 position during general voir dire.

{¶67} Thus, pursuant to Crim.R. 24(C)(9) and R.C. 2945.25(B), the trial court did not abuse its discretion by not removing Prospective Juror 46A for cause.

{¶68} Appellant's second assignment of error is without merit.

{¶69} **Third Assignment of Error**

{¶70} In his third assignment of error, appellant contends the trial court erred and denied him due process by removing Prospective Juror 28A for cause, due to her inability to communicate in English, over the objection of defense counsel.

{¶71} Crim.R. 24(C)(13) provides that a prospective juror may be removed for cause if "*** English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case."

{¶72} Similarly, R.C. 2945.25(N) states that a prospective juror may be removed for cause if "*** English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and law in the case[.]"

{¶73} In our case, Prospective Juror 28A was born in Gandhi and her native language was Tregan. She had lived in the United States for the past 10 years. Prospective Juror 28A was employed as a housekeeper and was required to communicate in English. On her written questionnaire, Prospective Juror 28A indicated she did not speak English very well. The trial court asked her if she could listen to the evidence and be fair. She replied, "No." Prospective Juror 28A also indicated she would have "gaps" of what was being said because she does not know some words in English very well. She said she had some difficulty understanding the questions she

was asked by the prosecutor. She stated she understood some parts but did not understand others. Prospective Juror 28A indicated she did not know what to say or how to respond to questions that she did not understand.

{¶74} The state moved to remove Prospective Juror 28A for cause due to her lack of sufficient understanding and confidence in the English language. Defense counsel objected. The trial court overruled the objection and removed Prospective Juror 28A for cause.

{¶75} The record establishes that English was not the native language of Prospective Juror 28A. She admitted she lacked a sufficient understanding of the English language. Prospective Juror 28A also indicated she could not adequately listen to the evidence and be fair.

{¶76} Thus, pursuant to Crim.R. 24(C)(13) and R.C. 2945.25(N), the trial court did not abuse its discretion by removing Prospective Juror 28A for cause.

{¶77} Appellant's third assignment of error is without merit.

{¶78} **Fourth Assignment of Error**

{¶79} In his fourth assignment of error, appellant argues there was insufficient evidence to convict him of murder, aggravated burglary, and aggravated robbery.

{¶80} As previously stated, appellant did not renew his Crim.R. 29 motion at the conclusion of all the evidence. In *State v. Miller*, this court recognized that "[a] split of authority exists on whether [an appellant] is permitted to argue insufficiency of the evidence where he has not renewed his Crim.R. 29 motion." *State v. Miller*, 11th Dist. No. 2004-P-0049, 2005-Ohio-6708, at ¶67, citing *State v. Murray*, 11th Dist. No. 2003-L-045, 2005-Ohio-1693, at ¶42; *State v. Shadoan*, 4th Dist. No. 03CA764, 2004-Ohio-

1756, at ¶16; and *State v. Jones* (2001), 91 Ohio St.3d 335, 346. See, also, *State v. Perry*, 11th Dist. No. 2004-L-077, 2005-Ohio-6894, at ¶31 (holding that a defendant's not guilty plea preserves an argument relating to the sufficiency of the evidence for appeal.) This court has held that an appellant is permitted to argue insufficiency of the evidence even though he has not renewed his Crim.R. 29 motion at the conclusion of all the evidence. *State v. Cartulla*, 11th Dist. No. 2008-L-133, 2009-Ohio-2794, at ¶10. Therefore, we will address appellant's fourth assignment of error on its merits.

{¶81} With regard to a Crim.R. 29 motion, in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, the Supreme Court of Ohio established the test for determining whether a Crim.R. 29 motion for acquittal is properly denied. The Supreme Court stated that "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." Id. at syllabus. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, at ¶18.

{¶82} As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *13-14:

{¶83} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶84} ""(***) The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable

to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*. ***"'

{¶85} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***" (Emphasis sic.) (Citations omitted.)

{¶86} "*** [A] reviewing court must look to the evidence presented *** to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS 3333, at *8. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶87} In the present case, appellant is challenging his convictions for murder, in violation of R.C. 2903.02(B); aggravated burglary, in violation of R.C. 2911.11(A)(1); and aggravated robbery, in violation of R.C. 2911.01(A)(3).

{¶88} Murder, pursuant to R.C. 2903.02(B), provides: "[n]o 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."

{¶89} In our case, the offenses of violence that are felonies of the first degree are aggravated burglary and aggravated robbery. R.C. 2901.01(A)(9)(a).

{¶90} With regard to aggravated burglary, R.C. 2911.11(A)(1) states:

{¶91} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶92} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another[.]"

{¶93} Trespass is established when an offender without privilege to do so, knowingly entered on the land or premises of another. R.C. 2911.21(A)(1).

{¶94} Force means "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1).

{¶95} Stealth means any secret or sly act to gain entrance and deception is defined as "knowingly deceiving another or causing another to be deceived by any false or misleading representation[.]" R.C. 2913.01(A).

{¶96} Physical harm to persons means "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

{¶97} In finding appellant guilty of aggravated burglary, the jury was required to find that the state had proven beyond a reasonable doubt that he acted recklessly. "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. ***" R.C. 2901.22(C).

{¶98} With respect to aggravated robbery, R.C. 2911.01(A)(3) provides: "[n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall *** [i]nflict, or attempt to inflict, serious physical harm on another."

{¶99} The elements of theft provide that no person, with purpose to deprive the owner of property shall knowingly obtain or exert control over the property without the consent of the owner, by deception, or by threat. R.C. 2913.02(A)(1), (3), and (4).

{¶100} R.C. 2901.01(A)(5) defines "serious physical harm to persons" as any of the following:

{¶101} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶102} "(b) Any physical harm that carries a substantial risk of death;

{¶103} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶104} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶105} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶106} In finding appellant guilty of aggravated robbery, the jury was required to find the state had proven beyond a reasonable doubt that he acted knowingly. "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶107} Appellant alleges that Jon Dukes acted alone and not in concert with the plan to steal Lowther's coin collection. Appellant contends that he should not have been convicted of murder, aggravated burglary, and aggravated robbery because the physical harm to Lowther was not the proximate cause of the trespass or the taking of the coins.

{¶108} We disagree. The state presented sufficient evidence to sustain appellant's convictions for murder, aggravated burglary, and aggravated robbery. Based on all of the testimony, previously discussed in detail, the jury could reasonably conclude that the elements of murder, aggravated burglary, and aggravated robbery were proven.

{¶109} The testimony supports a conclusion that appellant planned and participated in the robbery, burglary, and murder of Lowther with Darrell and Jon Dukes and Fetty. Appellant, through Fetty, used deception to gain entry into Lowther's residence for the purpose of stealing from him. Moreover, both appellant and Fetty took

coins from Lowther's house after appellant personally "de-bowed" Lowther and inflicted injury which ultimately resulted in his death in order to gain access to Lowther's house.

{¶110} Pursuant to *Schlee*, supra, there is sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements of murder, aggravated burglary, and aggravated robbery have been proven.

{¶111} Appellant's fourth assignment of error is without merit.

{¶112} **Fifth Assignment of Error**

{¶113} In his fifth assignment of error, appellant contends the guilty verdicts of murder, aggravated burglary, and aggravated robbery were against the manifest weight of the evidence.

{¶114} In *Schlee*, supra, at *14-15, this court stated:

{¶115} "'[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶116} "'In determining whether the verdict was against the manifest weight of the evidence, "(***) 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. (***)"' (Citations omitted.) ***" (Emphasis sic.)

{¶117} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "'only in the exceptional case in which the evidence

weighs heavily against the conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Quoting *State v. Martin* (1983), 20 Ohio App. 3d 172, 175.

{¶118} With regard to the manifest weight of the evidence, we note that the jury is in the best position to assess the credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶119} In the instant case, the jury apparently placed greater weight on the state's witnesses, as discussed in appellant's fourth assignment of error, over appellant's witnesses.

{¶120} The testimony of appellant's two witnesses does not in any manner relieve appellant of his criminal liability in the murder, aggravated burglary, and aggravated robbery of Lowther. At most, a link between Miller and appellant would, if believed by the jury, have meant that Miller was an additional individual involved.

{¶121} For the reasons stated in our discussion regarding the motion for acquittal, we cannot say that the jury clearly lost its way in finding appellant guilty of murder, aggravated burglary, and aggravated robbery. *Schlee*, supra, at *14-15; *Thompkins*, supra, at 387.

{¶122} Appellant's fifth assignment of error is without merit.

{¶123} **Sixth Assignment of Error**

{¶124} In his sixth assignment of error, appellant contends the trial court erred by ruling that aggravated burglary and aggravated robbery were not allied offenses of similar import.

{¶125} R.C. 2941.25 states:

{¶126} "(A) 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.

{¶127} "(B) 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."

{¶128} In *State v. Rance* (1999), 85 Ohio St.3d 632, the Ohio Supreme Court held that "[u]nder an R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract.*" Id., paragraph one of the syllabus. (Emphasis sic.) Since its release, the *Rance* decision has gone through various modifications and revisions. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569; *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059.

{¶129} In 2010, the Ohio Supreme Court revisited the allied offenses analysis again and overruled *Rance* in the plurality opinion of *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. Under the new analysis, which this court later relied upon and embraced in *State v. May*, 11th Dist. No. 2010-L-131, 2011-Ohio-5233, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson*, at the syllabus. The *Johnson* court provided the new analysis as follows:

{¶130} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. *** If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

{¶131} "If the multiple offenses can be committed by the same conduct, then 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.' ***.

{¶132} "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶133} "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has [a] separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." Id. at ¶48-51. (Citations omitted.) (Emphasis sic.)

{¶134} Appellant was sentenced prior to the release of *Johnson*. The trial court held that aggravated burglary and aggravated robbery were not allied offenses of similar import subject to merger. Because the trial court determined the merger issue without applying the *Johnson* analysis, we remand this matter for a new sentencing hearing. *May*, supra, at ¶59. On remand, should the trial court determine that the offenses merge, appellant shall be resentenced.

{¶135} Appellant's sixth assignment of error is with merit.

{¶136} **Seventh Assignment of Error**

{¶137} In his seventh assignment of error, appellant alleges the trial court abused its discretion by sentencing him to maximum and consecutive sentences. Appellant contends the trial court acted unreasonably by sentencing him to 10 more years than Jon Dukes.

{¶138} After the *State v. Foster* decision, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus.

{¶139} The Supreme Court of Ohio, in a plurality opinion, has held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The court held:

{¶140} "First, [appellate courts] must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶141} The first prong of the analysis instructs that "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. at ¶14.

{¶142} If the first prong is satisfied, a review of the trial court's decision in imposing the term of imprisonment is made under the abuse of discretion standard. *Kalish* at ¶26.

{¶143} The *Kalish* Court affirmed the sentence of the trial court as not being contrary to law, since the trial court expressly stated that it had considered the R.C. 2929.11 and R.C. 2929.12 factors, postrelease control was applied properly, and the sentence was within the statutory range. *Kalish* at ¶18.

{¶144} "It is important to note that there is no mandate for judicial factfinding in the general guidance statutes. The court is merely to 'consider' the statutory factors." *Foster*, supra, at ¶42. Thus, the trial court was not required to make any findings with respect to imposing maximum and consecutive sentences. Id. at ¶100.

{¶145} In our case, the record reflects the trial court considered the statutory factors. At the sentencing hearing, the trial court stated the following:

{¶146} "The harm that you inflicted to Mr. Lowther and his family, as well as the psychological harm to the community of Rootstown, the [residents] of Portage County, especially the elderly and those living in rural areas is so great that a single term does not adequately reflect the seriousness of the Defendant's conduct.

{¶147} "I have seen no remorse, no pity, no sign of accountability. Therefore, consecutive sentences are warranted.

{¶148} "Mr. Oliver and his co-Defendants not only stole the life of Mr. Lowther, but they also have stolen the innocence of the Rootstown community, as well [as] the rest of Portage County."

{¶149} In addition, the trial court stated in its February 18, 2010 judgment entry that it "considered evidence presented by counsel, oral statements, any victim impact statement, the pre sentence report and Defendant's statement."

{¶150} Applying the first prong of the *Kalish* analysis to our case, the trial court's sentence was not clearly and convincingly contrary to law. Although not required, the trial court stated its consideration of the R.C. 2929.11 and 2929.12 statutory factors. Appellant failed to rebut the presumption that the trial court considered R.C. 2929.11 and 2929.12. Also, appellant's sentence, which included a life sentence with parole eligibility after 15 years for murder, an unclassified felony, and for 10 years for aggravated burglary and 10 years for aggravated robbery, both felonies of the first degree, was within the statutory range.

{¶151} R.C. 2929.14 provides in part:

{¶152} "(A) Except *** in relation to an offense for which a sentence of *** life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

{¶153} "(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years."

{¶154} Applying the second prong of the *Kalish* analysis to our case, the trial court did not abuse its discretion in sentencing appellant within the statutory range for the crimes he committed.

{¶155} In addition, with respect to appellant's argument that he received a longer sentence than Jon Dukes, we note that "'there is no requirement that co-defendants

receive equal sentences.' *State v. Rupert*, [11th Dist. No. 2003-L-154,] 2005-Ohio-1098, at ¶11, citing [*State v.*] *Lloyd*, [11th Dist. No. 2002-L-069, 2003-Ohio-6417,] at ¶21. '(***) (W)hen there is a multiple co-defendant situation and those co-defendants are essentially charged with the same crimes, what may seem to be a disparity in certain situations may not be a disparate sentence. This may occur when the records submitted in such cases provide a different table of review which may appropriately result in a varied sentence in a given case when evaluated according to the pertinent statutory criteria.' *Rupert* at ¶13. ***." *State v. Martin*, 11th Dist. No. 2006-T-0111, 2007-Ohio-6722, at ¶40.

{¶156} Nothing in the record before this court suggests that the difference in appellant's sentence from that of his co-defendant is a result of anything other than the individualized factors the court applied to appellant. See *Martin*, supra, at ¶40. The trial court properly applied the statutory factors and considerations, thus, ensuring consistency and proportionality.

{¶157} Appellant's seventh assignment of error is without merit.

{¶158} **Eighth Assignment of Error**

{¶159} In his eighth assignment of error, appellant maintains he received ineffective assistance from his trial counsel.

{¶160} In evaluating ineffective assistance of counsel claims, we apply the following two-part test enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 687:

{¶161} "[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction *** has two components. First, the

defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction *** resulted from a breakdown in the adversary process that renders the result unreliable."

{¶162} "*** When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland*, supra, at 694, states: "[t]o warrant reversal, '(t)he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

{¶163} Appellant asserts he was deprived of a fair trial due to his counsel's failure to file a motion to suppress statements. He stresses that he was not given his Miranda rights prior to at least some of his statements.

{¶164} "'When claiming ineffective assistance due to failure to file or pursue a motion to suppress, an appellant must point to evidence in the record showing there was a reasonable probability the result of trial would have differed if the motion had been filed or pursued.' *State v. Gaines,* 11th Dist. Nos. 2006-L-059 and 2006-L-060,

2007-Ohio-1375, at ¶17, citing *State v. Clark,* 11th Dist. No. 2002-A-0056, 2003-Ohio-6689, at ¶28. 'If case law indicates the motion would not have been granted, then counsel cannot be considered ineffective for failing to prosecute it.' *Gaines,* supra, at ¶17, citing *State v. Edwards* (Sept. 5, 2000), 10th Dist. No. 99AP-958, 2000 Ohio App. LEXIS 3971, at *8." *State v. Kitcey*, 11th Dist. No. 2007-A-0014, 2007-Ohio-7124, at ¶56.

{¶165} At issue here is a portion of appellant's interview after he arrived at the station to pick up his car keys which he left in Darrell Dukes' vehicle. Appellant was initially taken by Detective Acklin into an interview room. After Lieutenant Johnson entered the discussion, appellant became confrontational and did not want to provide any information. Lieutenant Johnson stated that appellant was under arrest and appellant immediately responded that he was upset and had been set up.

{¶166} Between the time that Lieutenant Johnson stated appellant was under arrest and when he provided the Miranda warnings, the following recorded conversation took place which was played for the jury. State's Exhibit 120 provides in part:

{¶167} "[JOHNSON]: You are under arrest. You have the right to remain – stand up and turn around.

{¶168} "[APPELLANT]: I have a question. I am a little upset here. Number one, I was just set up.

{¶169} "[MALE VOICE]: Everyone is talking over each other.

{¶170} "[ACKLIN]: You want to talk now?

{¶171} "[JOHNSON]: The problem Cortez is that I was with a 68 year old man over at Akron City Hospital that had the living s**t beat out of him. You are my primary suspect for that.

{¶172} "[APPELLANT]: How am I your primary suspect?

{¶173} "[JOHNSON]: Because I got a female that is putting you out at the house he got beat up.

{¶174} "[APPELLANT]: A female?

{¶175} "[JOHNSON]: Jodi Fetty is …

{¶176} "[APPELLANT]: Let's bring her in.

{¶177} "[JOHNSON]: Do you want to talk or do you want to sit here and argue? I am telling you what I have. I have you in the car at Giant Eagle running from the car while they are cashing out the money that was taken from the house. I have boots that match up to a boot print that is on the old man.

{¶178} "[APPELLANT]: What are you talking about that boot? Honestly, you guys can put me in the truck right now and I can show you …

{¶179} "[ACKLIN]: Go ahead and tell us.

{¶180} "[JOHNSON]: Do you want to go ahead and argue? I am telling you what I got. I have you fleeing from the scene at Giant Eagle, I have witnesses to that.

{¶181} "[APPELLANT]: Whose witnesses?

{¶182} "[ACKLIN]: Listen, just talk what you gotta say.

{¶183} "[APPELLANT]: What do you want to know?

{¶184} "[MALE VOICE]: Everyone is talking.

{¶185} "[ACKLIN]: You, just tell us what you want to say. Where were you at tonight?

{¶186} "[APPELLANT]: Where was I at tonight? Okay. I had to meet the dude at Giant Eagle. I didn't have any drugs on me or anything like that, alright. What he did with you guys in the camera, I was in the car. I knew that you guys were gonna pull his a*s over. I kid you not. I did know that. So I just left and you guys seen me in the camera. I did not take anything with me. I just got out and left. Because I knew that things were up to no good. Point blank, point blank. I just don't want to be arrested on no stupid s**t because I did not have no drugs.

{¶187} "[ACKLIN]: Shut up for a minute.

{¶188} "[JOHNSON]: This is not stupid s**t.

{¶189} "[APPELLANT]: It is because – look, I am getting harassed.

{¶190} "[ACKLIN]: We are talking felony ones and felony twos and if the old man dies, we are talking murder. He got the living s**t beat out of him.

{¶191} "[APPELLANT]: The living s**t – then I am not telling you I didn't …

{¶192} "[JOHNSON]: No, I know who beat him up.

{¶193} "[APPELLANT]: Then who beat him up?

{¶194} "[JOHNSON]: Jonathan Dukes.

{¶195} "[APPELLANT]: Who?

{¶196} "[JOHNSON]: Maybe you guys should have been more careful with the old man's house. He is a coin collector and he has a video system. We haven't downloaded it yet. I'm not going to lie to you, but he has one. I am giving you guys the opportunity to clean your souls. You want to go to prison, that is fine by me, but you are

under arrest. I need you to stand up and I need you to put your hands behind your back.

{¶197} "[APPELLANT]: So what do I got to do to get out of this mess?

{¶198} "[ACKLIN]: Are you going to tell us the exact truth of every little thing that happened? Or are you going to lie to us? Or are you going to play games with us still? Your choice.

{¶199} "[APPELLANT]: Then I go home?

{¶200} "[JOHNSON]: I can't tell you, you can go home. What I can tell you is that I don't think that you beat him up.

{¶201} "[APPELLANT]: I know it.

{¶202} "[JOHNSON]: Look at me because I am not lying to you.

{¶203} "[APPELLANT]: I am, man.

{¶204} "[JOHNSON]: They life-flighted him. The old man is beat all to hell. Jonathan beat the living s**t out of him.

{¶205} "[APPELLANT]: That is crazy. I told him …

{¶206} "[ACKLIN]: Now, tell us everything that happened so we can get your a*s out of this. If it goes down to s**t.

{¶207} "[APPELLANT]: So, what you guys know about me? Because this guy knows a lot about me.

{¶208} "[ACKLIN]: We just want to know the beginning tonight, when you guys got together until you ended up here. Step by step, in detail, without any bulls**t.

{¶209} "[APPELLANT]: My keys were in the car and I had to get them out. I knew that – man, he beat him bad.

{¶210} "[JOHNSON]: I am not lying to you. They life-flighted him. All I can tell you is he could talk a little bit. Then I do have some questions about that because Jodi is telling me a little bit of truth but she is lying about a lot of stuff.

{¶211} "[APPELLANT]: How is she lying, Jodi?

{¶212} "[ACKLIN]: Just start going there.

{¶213} "[JOHNSON]: They had to get him going to life flight because he could not feel anything from here down. I do not know why but I do know that he has a big a*s boot print here and his face is beat all to hell.

{¶214} "[APPELLANT]: Boot print? My boot print?

{¶215} "[JOHNSON]: No, the thing is that I am telling you is the boot print, I cannot tell you is matching up.

{¶216} "[APPELLANT]: I was about to say you got me completely …

{¶217} "[ACKLIN]: Start at the beginning and tell us everything here.

{¶218} "[APPELLANT]: Can I get water. I got cotton mouth like a mug. I am a little upset.

{¶219} "[MALE VOICE]: Did we give him Miranda yet?

{¶220} "[JOHNSON]: Not yet because he was going home.

{¶221} "[APPELLANT]: Honestly, to tell the truth, I don't think that Jon Dukes did it."

{¶222} Appellant was then given his Miranda rights.

{¶223} The Supreme Court of the United States in *Miranda v. Arizona* (1966), 384 U.S. 436, 444, defined custodial interrogation as "questioning initiated by law

enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

{¶224} In our case, the record establishes that appellant initiated contact with the police by driving himself to the station to look for his car keys that he left in Darrell Dukes' vehicle. He voluntarily engaged in conversation with Detective Acklin. During the initial portion of that conversation, appellant was not in custody or under interrogation. Thus, he was free to leave at any time. Appellant does not take exception with his counsel's failure to file a motion to suppress up to this point. Rather, appellant only takes exception with the statements he made after he was arrested which were played to the jury.

{¶225} When Lieutenant Johnson stated that appellant was under arrest, Miranda warnings were required at that time, as appellant was in custody. *Miranda*, supra, at 444. Also, the dialogue between the officers and appellant establishes that the officers' conduct qualifies as "'reasonably likely to elicit an incriminating response.'" *State v. McCauley*, 11th Dist. No. 2010-T-0015, 2010-Ohio-6446, at ¶21, quoting *Columbus v. Stepp* (Oct. 6, 1992), 10th Dist. Nos. 92AP-486 and 92AP-487, 1992 Ohio App. LEXIS 5209, at *11-12. Nevertheless, defense counsel's failure to file a motion to suppress the limited portion of the foregoing quoted interview does not automatically render his performance ineffective.

{¶226} In the limited portion of the interview that occurred at the station, appellant admitted after he was placed under arrest that he was in the back seat of Darrell Dukes' car at Giant Eagle, he left his keys in the car, and he fled after seeing police. Appellant's incriminating statement was made in response to the officers' questioning of

where he was that night. However, appellant's pre-Miranda admission was corroborated by witness testimony at the jury trial. Again, Detective Kriegar testified that he saw a second black male in the back seat of the vehicle driven by Darrell Dukes when he dropped off Fetty at Giant Eagle and that only Darrell Dukes and Fetty were in the car when it was stopped by police. Detective Acklin inventoried the vehicle and found appellant's keys in the back seat. Both Darrell Dukes and Fetty testified that the second black male in the vehicle was in fact appellant.

{¶227} Additionally, in response to the officers' further questioning, appellant asked, "So what do I got to do to get out of this mess?" Although not specifically incriminating on its face, appellant's statement can be construed that he was involved in "this mess," i.e., the crime. Also, in reference to the officers' statement that Jon Dukes beat up the victim, appellant's reply that he 'told him …" was incriminating, yet truncated. Lastly, right before he was given his Miranda rights, appellant gave a possible incriminating statement that he did not think that Jon Dukes committed the crime.

{¶228} Under *Miranda*, the foregoing incriminating statements were subject to suppression and therefore, counsel's performance was deficient. However, appellant fails to establish that he was prejudiced from the admission of the limited portion of the interview because the evidence against him was substantial even without his suppressable statements. Stated otherwise, he fails to establish that but for the deficiency, the result of the trial would have been different. *State v. Clark*, 11th Dist. No. 2002-A-0056, 2003-Ohio-6689, at ¶28.

{¶229} Appellant also alleges that he was deprived of an impartial jury and a fair trial due to his counsel's failure to object to the trial court's statements during individual voir dire that a gentleman was "killed" during a "home invasion."

{¶230} "'The Supreme Court of Ohio has held that trial strategy decisions should not be second-guessed and that "'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'"' *State v. Ogletree,* 11th Dist. No. 2005-P-0040, 2006-Ohio-6107, at ¶64, quoting *State v. Mason* (1998), 82 Ohio St.3d 144, 157-158, ***, quoting *Strickland,* 466 U.S. at 689." *Kitcey*, supra, at ¶59. (Parallel citation omitted.)

{¶231} "'"(E)xperienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. (***) In light of this, any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial (***) that failure to object essentially defaults the case to the state. Otherwise, defense counsel must so consistently fail to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice."' *State v. Johnson,* 112 Ohio St.3d 210, 2006-Ohio-6404, at ¶140, ***. (Citations omitted.)" (Parallel citation omitted.) *Kitcey*, supra, at ¶62.

{¶232} As previously addressed in appellant's first assignment of error, the trial court's challenged comment was made in order to identify which of the Portage County murder cases at the time was at issue for purposes of determining each prospective juror's knowledge of appellant's case from pretrial media coverage. Again, the trial judge was not giving her own views or opinion with respect to whether an elderly

gentleman was "killed" during a "home invasion." Rather, the trial judge was merely portraying the pretrial media coverage surrounding this case. Only after determining which prospective jurors had in fact been exposed to pretrial media coverage of appellant's case could individual voir dire take place on the effect of the media exposure. The trial court's comment with respect to identification provided defense counsel with a better examination into any prospective juror's potential bias from the media exposure. The alleged failure of defense counsel to object did not prejudice appellant or deny him a fair trial.

{¶233} Thus, based on *Strickland*, appellant has failed to demonstrate that his counsel was deficient, or that such deficiency resulted in prejudice to him.

{¶234} Appellant's eighth assignment of error is without merit.

{¶235} For the foregoing reasons, appellant's first, second, third, fourth, fifth, seventh, and eighth assignments of error are not well-taken. Appellant's sixth assignment of error is well-taken. The judgment of the Portage County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. On remand, should the trial court determine that the offenses merge, appellant shall be resentenced.

TIMOTHY P. CANNON, P.J., and

DIANE V. GRENDELL, J., concur.