[Cite as *State v. McCoy*, 2010-Ohio-5810.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-090599 TRIAL NO. B-0806325-D
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
SCOTT MCCOY,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 1, 2010

Joseph T. Deters, Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela M. Stagnaro, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

CUNNINGHAM, Presiding Judge.

{¶1} Defendant-appellant Scott McCoy appeals his convictions for the aggravated murder and aggravated robbery of Kevin Johnson and the aggravated robbery of Kevin Redding. McCoy contends that the trial court erred by overruling his motion to exclude the testimony of "cooperating witnesses" and by denying his request for a reliability hearing related to this testimony. He also challenges the sufficiency and weight of the evidence adduced to support his convictions, the trial court's handling of the jury's questions during deliberations, and the sentences imposed by the court. We affirm.

I. Background

{¶2} In the early morning hours of August 28, 2002, Johnson was shot while running from a group of armed men seeking to rob him on McMicken Avenue in the Mohawk area of Cincinnati. He died from his wounds.

{¶3} Andre Thomas ("Andre"), one of Johnson's assailants, discovered Redding asleep inside Johnson's truck. Andre took Redding's money and cellular phone and forced him into the back of the truck. Andre drove Redding to Eugene Jackson's house to meet the other assailants. There, Redding was beaten in a successful effort to obtain the location of Johnson's apartment, which was later ransacked. Andre later fatally shot Redding in a wooded area.

{¶4} The state's theory of the case was that McCoy, Andre, Andre's cousin Harold Thomas ("Harold"), Eugene Jackson, and Angelo Howard were responsible for the crimes against Johnson and Redding, and that they had targeted Johnson for the robbery because they believed he was a drug dealer.

{¶5} In 2008, over six years after Johnson's and Redding's deaths, the Hamilton County Grand Jury returned an 11-count indictment against McCoy, Andre, Harold, Howard, and Jackson. McCoy was named as a defendant in six of the counts, including counts for the aggravated murder and aggravated robbery of Johnson, counts for the aggravated murder, aggravated robbery, and kidnapping of Redding, and one count of having weapons under a disability. The aggravated-murder counts were charged under R.C. 2903.01(B)—aggravated felony murder with the predicate offense of aggravated robbery. These counts did not contain a death-penalty specification.

{¶6} Jackson, Andre, and Howard cooperated with the state and entered into plea agreements. Before his trial, McCoy anticipated that the state would call these codefendants as witnesses against him. Thus, he moved to exclude their expected testimony, which he characterized as "biased and inherently unreliable" because the state had "compensated" them for the testimony.

{¶7} McCoy also sought a pretrial hearing to address the reliability of the testimony, in part because the particulars of the plea agreements had been sealed by the trial court and could not be explored on cross-examination. McCoy cited the passage of time in the case, the lack of physical evidence linking McCoy to the crimes, and the ability of the cooperating witnesses to collaborate as additional reasons for the hearing.

{¶8} The trial court received argument on the motion, and as a result, it ordered that the plea agreements of the codefendants be made available to McCoy. The court then overruled the motion to exclude the cooperating witnesses' testimony and the request for a reliability hearing.

{¶9} McCoy's trial was held in July 2009, almost seven years after the offenses. Harold and Andre testified against McCoy. Their testimony conflicted in many respects, but both testified that McCoy had acted with them in the commission of the crimes on McMicken Avenue and, specifically, that McCoy had shot at Johnson multiple times.

{¶10} Further, Andre disclosed that he was serving prison terms for the deaths of Kevin Redding and Kevin Johnson as part of a plea agreement. The plea agreement had allowed him to plead guilty to the reduced charges of manslaughter for Johnson's death and murder for Redding's death and to receive reduced sentences in exchange for his cooperation, including giving truthful and accurate testimony against McCoy. His conviction for the murder of Redding contained a life-tail, meaning that he would be in prison for the rest of his life unless he was released earlier by the parole board.

{¶11} Andre further admitted that he also had prior felony convictions for murder, assault, drug trafficking, and weapons offenses. And Andre admitted that he had lied to the police on several occasions during the investigation. This issue, as well as the potential for bias in Andre's testimony, was thoroughly explored on cross-examination.

{¶12} When Harold first testified, he claimed that he could not remember McCoy's face and could not say that McCoy was with him and the others on McMicken Avenue. At that point, the prosecutor excused him as a witness. When the state recalled him the next day, Harold admitted that he had pleaded guilty to an offense concerning the murder of Redding, that he was serving eight years in prison,

and that his plea agreement required him to testify at McCoy's trial. He further admitted to having prior felony convictions for robbery and drug trafficking.

{¶13} Eugene Jackson did not testify at all, but his younger brother, Carlos Jackson ("Carlos"), who hoped to receive leniency in a federal case, did testify in a videotaped deposition. Carlos testified that he had not witnessed the crimes but that he had learned what had happened from McCoy and others who said they had been present. McCoy told him that Johnson's robbery had been planned and that Andre had shot Johnson and, later, Redding. The jury was made aware of Carlos's lengthy criminal record and the motives for his testimony, including the promise of leniency.

{¶14} McCoy presented an alibi defense from his former girlfriend. She claimed that McCoy had been with her at the time of the offenses. After closing arguments, the court instructed the jury on the applicable law, including a special instruction on how to evaluate the testimony of an accomplice.

{¶15} The jury found McCoy guilty of the aggravated murder and aggravated robbery of Johnson and the aggravated robbery of Redding, all with firearms specifications, but not guilty of the aggravated murder and kidnapping of Redding and having weapons under a disability. McCoy moved for an acquittal under Crim. R. 29(C). The trial court accepted the jury's guilty verdicts and imposed sentences for each offense, for an aggregate term of 33 years to life in prison. This appeal followed.

II. Pretrial Motions

{¶16} In his first assignment of error, McCoy contends that the trial court erred as a matter of law by overruling his combined pretrial motions for a reliability hearing and for the exclusion of the cooperating witnesses' testimony.

{¶17} McCoy acknowledges that Ohio law contains no specific provision for a reliability hearing. But he contends that the hearing is permitted under the Ohio Rules of Evidence, which require the court, not the jury, to determine preliminary questions of admissibility and to conduct a hearing on such preliminary matters out of the hearing of the jury when required by the "interests of justice."[1] He also contends that the court has an obligation to determine whether the state is sponsoring or encouraging perjury when a witness who is provided with leniency testifies against a defendant, and that, in this case, the expected testimony was such that the court should have deemed it inadmissible.

{¶18} The United States Court of Appeals for the First Circuit addressed an issue similar to ours in *United States v. Dailey*.[2] In *Dailey*, the United States appealed the district court's pretrial order excluding the testimony of three cooperating witnesses who were alleged accomplices. The district court's decision had been based on its conclusion that the plea agreements entered into by the accomplices were so likely to induce perjurious testimony that to allow them to testify would have violated the defendant's due-process rights. In reversing, the appellate court stated the following: "Long ago the courts rejected the notion that the testimony of co-defendants and other interested witnesses was so likely to be unreliable that it should be excluded. Recognizing that such individuals were frequently the most knowledgeable witnesses available, the courts have chosen to allow them to testify and to rely upon cross-examination to ferret out any false testimony they might give. As the Supreme Court put the matter in *Hoffa v. United States*, 'the established safeguards of the Anglo-American legal system leave the

[1] See Evid.R. 104(C). See, also, Evid.R. 103, 104(A), and 403(A).
[2] (C.A.1, 1985), 759 F.2d 192.

veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.' In the particular case of an accomplice who has struck a plea agreement, the 'established safeguards' are that the jury be informed of the exact nature of the agreement, that defense counsel be permitted to cross-examine the accomplice about the agreement, and that the jury be specifically instructed to weigh the accomplice's testimony with care."[3]

{¶19} The *Dailey* court continued its analysis by noting that courts have followed this rule even when confronted with an agreement that leaves an accomplice's sentence open until after he has testified.[4]

{¶20} After reviewing the case law in this area, we reject McCoy's suggestion that the testimony of a "cooperating witness" is unreliable as a matter of law. We also reject his argument that the trial court was required to have a pretrial reliability hearing in this case.

{¶21} In support of his request for a hearing in the trial court, McCoy complained that he did not have access to Andre's and Howard's plea agreements. But the trial court ordered those records unsealed before trial. Further, each "cooperating witness" testified about the complete extent of his plea agreement, including the leniency promised. The defense cross-examined Andre, Thomas, and Carlos on this issue and on their ability to collaborate with each other before cooperating with the state. And the jury was properly instructed about the heightened scrutiny that it should give to the testimony of an accomplice. The facts of this case do not demonstrate that the "established safeguards" mentioned in

[3] Id. at 196 (internal citations omitted).
[4] *Dailey* at 198, citing *United States v. Vida* (C.A.6, 1966), 370 F.2d 759, 767; *United States v. Kimble* (C.A.5, 1983), 719 F.2d 1253.

Dailey were insufficient. Further, we note that when the cooperating witnesses testified at trial, McCoy did not raise objections to the testimony under the rules of evidence or move for a mistrial, either of which would have been an additional safeguard of McCoy's right to a fair trial.

{¶22} We conclude that the credibility of these "cooperating witnesses" was for the jury to decide, and that the trial court did not err in declining McCoy's invitation to prejudge the admissibility of the testimony in a pretrial reliability hearing outside the presence of the jury. Accordingly, we overrule the first assignment of error.

III. Sufficiency and Weight

{¶23} In his second assignment of error, McCoy argues that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. To address this assignment of error, we provide a more detailed rendition of the facts as elicited at trial.

{¶24} Cincinnati Police Officer Scott Owen testified that on August 28, 2002, at about 3:00 a.m., he was on patrol in his vehicle. As he travelled on McMicken Avenue towards Mohawk Avenue, he heard gunshots coming from the area in front of him. In the distance, he saw a sport-utility vehicle parked across both lanes of McMicken Avenue.

{¶25} After taking cover behind his cruiser, Officer Owen saw Johnson running down McMicken Avenue towards him. Blood was spurting from the area of Johnson's legs. Eventually, Johnson collapsed to the ground. When Owen approached him, Johnson cried out, "[J]ust take my wallet, please don't shoot me anymore." Johnson died shortly thereafter.

{¶26} According to the coroner, Johnson died from two gunshot wounds caused by bullets that had entered the back of his right thigh, one of which had completely transected his femoral artery. The coroner also observed abrasions on Johnson's hands. The police found six shell casings and a bullet fragment at the crime scene on McMicken Avenue, as well as a trail of blood leading to the area where Johnson had collapsed.

{¶27} Andre and Harold both testified that they and others, including McCoy, had approached Johnson, who was urinating on the side of a building near his truck on McMicken Avenue. Thomas testified that McCoy had then asked Johnson, "[W]here's the money?" Johnson ran towards his truck, which was parked in the middle of the street.

{¶28} According to Harold, McCoy and others shot at Johnson, but McCoy in particular shot at him multiple times. Andre testified that only McCoy had shot Johnson, but that he and others had displayed guns. Andre further testified that, during the robbery, he had discovered Redding inside Johnson's truck. When he jumped in the truck, Redding offered him all of his belongings, and Andre took them.

{¶29} Andre drove Johnson's truck to Eugene's house, where he met with the others. Andre took money, crack cocaine, and a gun from Johnson's truck, and he then took clothing, jewelry, electronics, and a "little dope" from Johnson's apartment, which he had located with information gained from Redding. Andre admitted that he had taken Redding to the woods and shot him because Redding had seen the faces of his assailants. Andre further testified that McCoy had not accompanied him when he had raided Johnson's apartment or when he had killed Redding.

{¶30} Carlos testified that he was not present when Johnson or Redding were robbed and shot, but that McCoy had told him what had happened a few hours later when he saw him in front of the English Woods Store. According to Carlos, McCoy said that he and the others, including Andre, Eugene, and Howard, had seen Johnson's truck parked near a nightclub on Central Parkway. They waited for Johnson to leave the nightclub so they could rob him. When Johnson drove away, they followed him to a location across from the Spot Bar on McMicken Avenue, and eventually Andre shot him. Andre discovered Redding when he entered the truck, and Andre took Redding in Johnson's truck to Eugene's house, where he was tied up and beaten until he told the group the location of Johnson's apartment. "They" entered Johnson's apartment and took some items.

{¶31} Finally, Carlos testified that McCoy told him that he had "walked away" from making a decision about Redding and that Andre had eventually shot Redding.

{¶32} McCoy's alibi witness, Destiny Cue, testified that almost seven years earlier, in August 2002, she and McCoy had been living together in English Woods, and she had been seven months' pregnant with McCoy's child. Because hers was a high-risk pregnancy, McCoy was always with her, including on the evening of August 27, 2002, and into the next day.

{¶33} Based on this evidence, McCoy was convicted of the aggravated murder of Kevin Johnson in violation of R.C. 2903.01(B) and the aggravated robbery of Johnson and Redding in violation of R.C. 2911.01(A)(1), all with three-year firearm specifications.

{¶34} The state proceeded against McCoy as a principal offender or a complicitor. R.C. 2923.03 prohibits complicity with others to commit crimes. The statute provides in relevant part that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense[.] * * * Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender."[5]

{¶35} The law on aiding and abetting is well settled. " 'To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal.' Such criminal intent can be inferred from the presence, companionship, and conduct of the defendant before and after the offense is committed."[6] The state does not need to prove the identity of the principal to establish the offense of complicity by aiding and abetting.[7]

{¶36} Under R.C. 2902.01(B), the state was required in this case to prove that McCoy or an accomplice had "purposely caused the death of another * * * while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, ** * aggravated robbery." A person acts purposely when he specifically intends to cause a certain result.[8] Intent to kill may be proved by

[5] R.C. 2923.03(A)(2) and 2923.03(F).
[6] *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, 849 N.E.2d 286, ¶13, quoting *State v. Johnson* (2001), 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, syllabus.
[7] Id.
[8] R.C. 2901.22(A).

inference and "may be inferred in a[n] [aggravated] felony-murder when the offense and the manner of its commission would be likely to produce death."[9]

{¶37} The aggravated-robbery charges in this case were governed by R.C. 2911.01(A)(1). Under this statute, the state was required to prove that McCoy or his accomplice, in attempting or committing a theft offense, had a deadly weapon on or about his person or under his control and either displayed the weapon, brandished it, indicated that the he possessed it, or used it.

{¶38} To establish the three-year firearm specifications, the state was required to prove that McCoy or his accomplice had a firearm on or about his person or under his control while committing the offenses and displayed it, brandished it, indicated that he possessed it, or used it to facilitate the offenses.[10]

{¶39} McCoy argues primarily that the state failed to prove his involvement in the offenses. He contends that the credibility of the cooperating witnesses was severely undermined due to the plea bargains, the witnesses' criminal histories, and the conflicts among their testimony. He argues also that no physical evidence directly linked him to the crimes and that he had a strong alibi in his former girlfriend's testimony. Further, according to McCoy, the jury's acquittal on some of the counts indicated that the jurors were not convinced of his guilt.

{¶40} The test for sufficiency is circumscribed: the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.[11] In this case, the testimony of the cooperating witnesses

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[9] *State v. Gardner*, 74 Ohio St.3d 49, 60, 1995-Ohio-168, 656 N.E.2d 623.
[10] R.C. 2941.145. See, also, *State v. Mincy*, 1st Dist. No. C-060041, 2007-Ohio-1316, ¶49.
[11] *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781.

was neither inherently unreliable nor unbelievable. Thus, the defects in the testimony of the cooperating witnesses did not render the evidence insufficient to support McCoy's convictions.[12] Rather, "the weight to be given the evidence and the credibility of the witnesses were primarily for the trier of facts."[13]

{¶41} After reviewing the evidence under the sufficiency test, we conclude that the jury could have drawn the inference that McCoy had participated in the offenses as a principal or an accomplice, and that he had the culpable mental state for the commission of each offense. Further, consistency between verdicts on several counts of an indictment is not required and does not show that the jury was not convinced of the defendant's guilt.[14] The jury's decision as to one count is independent of, and unaffected by, the jury's finding on another count. Thus, we conclude that McCoy's convictions were supported by sufficient evidence.

{¶42} Because there was sufficient evidence to support the convictions, we next consider McCoy's claim that the convictions were against the manifest weight of the evidence. Our inquiry in this respect is broader than the inquiry for sufficiency. We review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding McCoy guilty.[15]

{¶43} In his brief, McCoy has carefully detailed the conflicts in the testimony of the cooperating witnesses. Although these conflicts were not immaterial, they were less material than the consistent testimony of the cooperating

[12] See *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶201-202.
[13] *State v. DeHass*, (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of syllabus.
[14] *United States v. Powell* (1984), 469 U.S. 57, 105 S.Ct. 471. See, also, *State v. Garner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶81-82.
[15] See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

witnesses naming McCoy as a participant in the events on McMicken Avenue. This major detail was likely to be remembered accurately, even after the passage of time.

{¶44} The cooperating witnesses' motives for testifying against McCoy were fully explored at trial. While all three had been provided with or were expecting leniency in exchange for their testimony, we note that, even with that leniency, Andre was sentenced to life in prison for Redding's murder.

{¶45} Further, Officer Owen's testimony and the physical evidence in the case offered some corroboration for the testimony of the cooperating witnesses. And, importantly, we do not find the testimony of McCoy's alibi witness, Destiny Cue, compelling. Cue, McCoy's former girlfriend and the mother of his child, recalled that seven years earlier McCoy had been with her from the evening of August 27, 2002, through August 28, 2002. She claimed that she had a high-risk pregnancy and that she would have remembered if McCoy had not been home with her. But Cue could not remember any specific events on those dates except that she and McCoy had gone to his grandmother's retirement home on the evening of August 28 to celebrate the grandmother's birthday. Also, Cue acknowledged that she had been convicted of theft, a crime of dishonesty.

{¶46} The jury was presented with all the relevant facts and instructions. On this record, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in rejecting McCoy's alibi defense and finding him guilty of the offenses.

{¶47} Accordingly, we overrule the second assignment of error.

IV. Jury Deliberations

{¶48} In his third assignment of error, McCoy contends that the trial court improperly handled the jury's questions during deliberations and erroneously overruled his mistrial motions.

{¶49} The record demonstrates that on a Friday afternoon, less than one hour after the commencement of deliberations, the jury requested transcripts of Andre's, Harold's, and Carlos's testimony. The court, noting that transcripts were not yet available for all three witnesses, denied the jury's request at that time and instructed the jurors to continue to deliberate while relying upon their collective memories. The court left open the possibility that it would provide the testimony later if the jury found it necessary for its deliberations. Defense counsel objected to the court's resumption of deliberations without providing the requested transcripts.

{¶50} The jurors deliberated until 4:00 p.m., when they were dismissed for the weekend. On Monday morning, the jury requested Carlos's transcript. Defense counsel told the court that he did not "want a transcript going back there, period," because it would emphasize one witness's testimony over the others. The trial court declined to provide a transcript to the jury, but it did allow the court reporter to read from the transcript of Carlos's testimony. McCoy moved for a mistrial. The trial court overruled the motion.

{¶51} Approximately two and one-half hours later, the trial court received a note from the jury stating, "We are at an impasse. How should we proceed?" The court gave an instruction that complied with the mandates of *State v. Howard*[16] and then a *Martens* charge.[17] McCoy objected and urged the court to declare a mistrial.

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[16] *State v. Howard* (1989), 42 Ohio St.3d 18, 537 N.E.2d 188, paragraph two of the syllabus; Ohio Jury Instructions (2010), CR 429.09(1) and (2).
[17] See *State v. Martens* (1993), 90 Ohio App.3d 338, 343, 629 N.E.2d 462; Ohio Jury Instructions (2010), CR 429.09(3).

Because it was the end of the day, the court chose instead to dismiss the jurors after instructing them to resume their deliberations the next morning.

{¶52} The jury resumed deliberations on Tuesday morning. Later, the jury requested a reading of Andre's testimony and asked, "Does complicity carry from beginning to end, or do we separate the counts?" The trial court clarified which counts the complicity instruction applied to and reiterated that each count had to be considered separately. The trial court then permitted the reading of Andre's testimony over McCoy's objection. The court further denied another motion by McCoy for a mistrial. On the following day the jury returned its verdict.

Reading of Testimony

{¶53} We first address McCoy's argument concerning the reading of witnesses' testimony. McCoy claims that the trial court erred by allowing the reading of the testimony of only two of the state's witnesses and that this error required a mistrial because the court emphasized one witness's testimony over another.

{¶54} A trial court is vested with considerable discretion in responding to jury requests during deliberations.[18] In this case, the court denied the jury's first request involving the testimony of Andre, Harold, and Jackson primarily for a logistical reason—by the time the transcripts would have been available for a reading the jury would have been ready to retire for the weekend. The court instructed the jurors to rely upon their collective memories at that point and to renew a request for

[18] See *State v. Weind* (1977), 50 Ohio St.2d 224, 364 N.E.2d 224, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3137; *State v. Berry* (1971), 25 Ohio St.2d 255, 267 N.E.2d 775, paragraph four of the syllabus; *Itskin v. State* (1935), 51 Ohio App. 211, 214, 200 N.E. 202. See, also, *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229; *State v. Terry*, 1st Dist. No. C-040261, 2005-Ohio-4140, ¶39, reversed in part on other grounds, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174.

the testimony later, if necessary. The trial court's ruling applied to the testimony of each witness that the jury had requested.

{¶55} Subsequently, the jury requested a transcript of Andre's and Carlo's testimony. Consistent with its prior ruling, the court allowed the court reporter to read this testimony to the jurors. The jury did not request a reading of Harold's testimony. We note further that Harold's testimony, which in McCoy's view, was deemphasized by the trial court's rulings, also implicated McCoy in the crimes.

{¶56} Based on these facts, we conclude the court's treatment of the jury's requests for a reading of testimony displayed a sound reasoning process and, therefore, was not an abuse of discretion or a basis for a mistrial.

Howard Charge

{¶57} We next review McCoy's claim that the trial court erred by giving the jury a *Howard* charge. The *Howard* charge is a supplemental instruction for the court to give a deadlocked jury to encourage the jurors to reach a verdict.[19] "To avoid the pitfall of coercing a guilty verdict from an otherwise deadlocked jury, the supplemental jury instruction must advance two goals: it 'must encourage a verdict where one can conscientiously be reached,' and it 'must be balanced, asking all jurors to reconsider their opinions in light of the fact that others do not agree.' "[20]

{¶58} McCoy argues the jury was obviously in conflict throughout its deliberations, and that forcing the jury to continue to deliberate pursuant to the *Howard* charge was coercive.

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[19] *Howard*, supra, 42 Ohio St.3d 18. See, also, Ohio Jury Instructions (2010), CR 429.09(1) and (2).
[20] *State v. Carson*, 1st Dist. No. C-040042, 2005-Ohio-902, ¶48, reversed in part on other grounds, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174, quoting *Howard* at 25.

{¶59} The trial court is vested with sound discretion in determining whether a jury is truly deadlocked—necessitating a mistrial—or whether further deliberation will produce a fair verdict.[21] Here, the jury had been deliberating for only five hours when it communicated its impasse. The case involved multiple counts. And the jury asked to review more evidence after the communication, indicating that it was not satisfied with its recollection of the testimony. These circumstances indicate that the jury was not truly deadlocked.[22] Additionally, after giving the *Howard* charge, the court instructed the jury that they could ask to be returned to the courtroom if they could not agree and if they concluded that further deliberations would serve no useful purpose.

{¶60} In sum, we can perceive no potential for coercion created by the trial court's action. Thus, we find no abuse of discretion by the court on the basis of the *Howard* charge.[23] And we find no ground for a mistrial. Accordingly, we overrule the fourth assignment of error.

V. Sentencing Issues

{¶61} In his final assignment of error, McCoy challenges the sentence imposed by the trial court. First, he argues, as he did at the sentencing hearing, that aggravated felony murder with the predicate offense of aggravated robbery and aggravated robbery are allied offenses of similar import, and, in this case, the offenses were not committed separately or with a separate animus. Therefore, McCoy contends, the trial court was required to merge the offenses for sentencing under R.C. 2941.25. Second, he argues that the trial court's imposition of

[21] *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶127.
[22] See *State v. Mason*, 82 Ohio St.3d 144, 167, 1998-Ohio-370, 694 N.E.2d 932.
[23] See *State v. Beasley* (Mar. 26, 1999), 1st Dist. No. C-980535.

consecutive sentences was improper based on the United States Supreme Court's decision of *Oregon v. Ice*.[24]

Allied Offenses of Similar Import

{¶62} As noted by the state, the Ohio Supreme Court has repeatedly held that aggravated felony murder, as defined in R.C. 2903.01(B), is not an allied offense of similar import to the underlying charged felony, including aggravated robbery.[25] The Supreme Court has not overruled this binding precedent, and we are constrained to follow it.[26] That being the case, R.C. 2941.25(A) authorized punishment for both crimes.

Oregon v. Ice

{¶63} McCoy additionally argues that the United States Supreme Court's decision in *Oregon v. Ice*[27] has effectively overruled the Ohio Supreme Court's decision in *State v. Foster*[28] and, therefore, that the trial court must once again make specific factual findings before imposing consecutive sentences. But McCoy concedes that the Ohio Supreme Court has yet to determine the effect of *Ice* on

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[24] *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711.
[25] *State v. Coley*, 93 Ohio St.3d 253, 264-265, 2001-Ohio-1340, 754 N.E.2d 1129; *State v. Frazier*, 73 Ohio St.3d 323, 342-343, 1995-Ohio-235, 652 N.E.2d 1000; see, also, *State v. Keene*, 81 Ohio St.3d 646, 668, 1998-Ohio-342, 693 N.E.2d 246, citing *State v. Moss* (1982), 69 Ohio St.2d 515, 520, 433 N.E.2d 181; *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 66, 461 N.E.2d 892; and *State v. Henderson* (1988), 39 Ohio St.3d 24, 28, 528 N.E.2d 1237.
[26] But cf., *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937 (serious-harm felonious assault and attempted felony murder are allied offenses of similar import); *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181 (clarifying the *Rance* test for allied offenses of similar import); *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595 (holding that in determining whether an offense is a lesser-included offense of another when a statute sets forth mutually exclusive ways of committing the greater offense, a court is required to apply the second part of the *Deem* test to each alternative method of committing the greater offense); *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889 (suggesting that a lesser-included offense will always be an allied offense of similar import); *State v. Wyant*, 64 Ohio St.3d 566, 1992-Ohio-103, 597 N.E.2d 420 (in the context of the ethnic-intimidation statute, a specifically mentioned predicate offense is a lesser-included offense), vacated on other grounds (1993), 508 U.S. 969, 113 S.Ct. 2954.
[27] (2009), 555 U.S. 160, 129 S.Ct. 711.
[28] 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

Foster, although review of the issue is currently pending before the court.[29] Until the Ohio Supreme Court decides the issue, we remain bound by *Foster*,[30] and we accordingly reject McCoy's challenge to the imposition of consecutive sentences in this case.

{¶64} Accordingly, we overrule the fourth assignment of error.

VI. Conclusion

{¶65} Based on our review, we conclude that McCoy's assignments of error are meritless. Accordingly, we affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT and **MALLORY, JJ.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

[29] *State v. Hodge* (Sept. 16, 2009), 1st Dist. No. C-080968, discretionary appeal allowed, (Feb. 10, 2010), 124 Ohio St.3d 1472, 2010-Ohio-354, 921 N.E.2d 245.
[30] See *State v. McCrary*, 1st Dist. No. C-080860, 2009-Ohio-4390, at ¶35.