[Cite as *State v. Moore,* 2015-Ohio-1327.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 25990
	:	
v.	:	T.C. NO. 13CR39
	:	
JERMAINE A. MOORE	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___3rd___ day of ____April____, 2015.

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ANDREW T. FRENCH, Atty. Reg. No. 0069384, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

MICHAEL C. THOMPSON, Atty. Reg. No. 0041420, 5 N. Williams Street, Wright-Dunbar Business Village, Dayton, Ohio 45402
Attorney for Defendant-Appellant

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FROELICH, P.J.

{¶ 1} Jermaine A. Moore was found guilty by a jury in the Montgomery County Court of Common Pleas of felonious assault, aggravated robbery, and two counts of murder, each with a firearm specification. After a bench trial, the trial court found him guilty of a repeat violent offender specification for each of the offenses, as well as having weapons while under disability. The trial court merged the offenses into one count of

murder, merged the firearm specifications, and merged the repeat violent offender specifications. The court sentenced Moore to an aggregate sentence of 28 years to life in prison.

{¶ 2} Moore appeals from his conviction, claiming that the trial court erred in admitting recorded jail conversations, that the court erred in fashioning a remedy for a *Batson* violation, that the court gave an improper jury instruction on complicity, and that the court did not properly impose consecutive sentences. For the following reasons, the trial court's judgment will be affirmed.

I. Factual and Procedural History

{¶ 3} At approximately 1:00 a.m. on November 18, 2012, Scott Mullins was shot in the right side of his abdomen as he sat in the driver's seat of his black Buick Regal in front of 4325 Fair Oaks Road. The bullet came to rest on the left side of his body, above his pelvis. Mullins drove away for a short distance, stopping around the corner on East Nottingham Road near the intersection with Daleview Avenue.

{¶ 4} Mullins was discovered slumped over his steering wheel by Melissa Bah, her boyfriend, and her friend, who were driving westbound on Nottingham. Bah opened the driver's door, noticed Mullins's injuries and that he was still alive, and contacted the police. An officer arrived within minutes, and medics were called to the scene. Mullins was taken to the hospital, where he remained for approximately three months. He endured chronic and recurrent wound infections, which necessitated multiple surgeries and procedures. Mullins was never able to verbalize what had happened to him. Mullins died from complications of the gunshot wound on February 19, 2013.

{¶ 5} During the police investigation at the site where Mullins was found, officers

observed that several shots had been fired at the vehicle; bullets went through the front and back passenger-side windows, and others struck the trunk lid, the roof, and the driver's-side B-pillar (the vertical support between the front and rear doors) of the Buick. The rear windshield was shattered. Officers located Mullins's eyeglasses and an orange knit Cincinnati Bengal's hat on the pavement near the driver's side of his car; a bullet was embedded in the hat. Officers also observed a semi-automatic handgun, which Mullins reportedly had purchased for his protection, in the rear floor area of his vehicle; the gun had not been fired recently. No bullet casings were located by the police. Mullins's wallet had his debit card and approximately $120 in cash.

{¶ 6} Around the same time as Bah's 911 call, another 911 call was made by Michael Thacker, who reported that two men had tried to rob Mullins and "shot his car up." Thacker stated that he saw two men run behind the first couple of buildings on Fair Oaks Road. Thacker provided descriptions of the two suspects to officers. One suspect was described as 6'4" to 6'6" tall with a thin build and wearing a dark hooded sweatshirt; the other suspect was described as between 5'10" and 6' tall and wearing light blue hooded sweatshirt. Thacker told Detective Steele that the taller suspect had been on the driver's side of the vehicle. (Moore is approximately six feet tall; his cousin, Daryl Moore (known as "Baby D"), is approximately 6'6" tall.)

{¶ 7} At the time of the shooting, Robert "Tracy" Green lived with his sister and another individual at one of the apartments at 4324 Fair Oaks Road, across the street from where Mullins's vehicle had been parked. Green testified that he heard three loud pops in the early morning hours of November 18, 2012, but he did not recognize them as gunshots. A few days later, Moore came to visit his aunt and cousin, Daryl Moore, who

lived next door to Green. Moore's family was not home, and Moore asked Green if he (Moore) could wait in Green's apartment.

{¶ 8} Green and Moore talked about the shooting. Moore told Green that Daryl was not involved in the shooting. When Green asked how Moore knew that, Moore stated, "I shot the motherf***er." Moore further told Green that, around 1:00 a.m., he (Moore), his uncle (Ronnie Moore), and two other men, known as "Lose" and "New York," had driven to the apartment parking lot in a white limousine, that Daryl had joined them, and that Moore had decided to rob Mullins, who Moore saw sitting in a vehicle across the street. Moore told Green that he (Moore) walked up to the passenger window, saw a gun in Mullins's vehicle, and fired several shots. Green reported Moore's statements to the police that day.

{¶ 9} Green's sister, Tamara Bartley, was also in the apartment when Moore spoke to Green about his involvement in Mullins's shooting. Bartley's testimony about Moore's statements to Green mirrored Green's testimony, including that Moore had stated that he arrived in a white limousine to pick up "Baby D" and that he had "shot the motherf***er." Bartley spoke with the police several weeks after the shooting.

{¶ 10} Moore was arrested on January 3, 2013, and held in the Montgomery County Jail. For a couple of weeks in September 2013, he shared a cell with Gary Burns, whose sister was friends with Moore's sister. Burns testified that, on several occasions, Moore talked about the shooting, saying it was a robbery "that went bad" and that he (Moore) was the shooter. Moore told Burns that he (Moore) came to the scene of the shooting in a white car, and after the shooting, he went to his girlfriend's house and told her what had happened. Moore expressed to Burns that he believed he would "beat

the case" because there were no witnesses and the police did not have the gun used in the shooting.

{¶ 11} Moore's friend, Carlos Broadus (known as "Lose"), lived with Moore's uncle, Ronnie Moore. Broadus testified that he owned a white limousine in November 2012, and that Moore had called him in the evening on November 17 to pick him up. They planned to "ride around and get drunk." Broadus stated that he and Ronnie Moore drove to 4324 Fair Oaks to pick up Moore at Moore's aunt's apartment, but Moore was not there. Broadus then drove west on Nottingham, where he saw Moore and Daryl Moore walking. Moore appeared to be sweaty, and he told Broadus that "he had gotten into some sh*t." Broadus drove Moore and Daryl to Moore's girlfriend's home.

{¶ 12} Three recorded jail telephone calls from Moore to his girlfriend, Krystina Sallee, were played to the jury. In one call, Moore expressed concern that Broadus and others were snitching. He also indicated to Sallee that he could not talk to his attorney because he might incriminate himself.

{¶ 13} Sallee testified on Moore's behalf. She stated on direct examination that Moore had gone out in the evening of November 17, but had returned between 10:30 p.m. and 11:00 p.m. Sallee testified that they went to bed shortly thereafter, and Moore was in bed, dressed the same way (in pajamas), when she awoke on November 18. Sallee was not aware of Moore's ever getting up during the night.

{¶ 14} The jury found Moore guilty on all of the counts and specifications before it, and the trial court did likewise. The court sentenced Moore to an aggregate prison term of 28 years to life.

{¶ 15} Moore appeals from his conviction, raising four assignments of error.

II. Authentication of Jail Telephone Calls

{¶ 16} Moore's first assignment of error states:

It was error to allow the State to admit Appellant's jail telephone calls to the jury without sufficient authentication under Rule 901(B)(5).

{¶ 17} In his first assignment of error, Moore argues that the testimony of Sgt. Whittaker was insufficient to authenticate recorded jail telephone calls under Civ.R. 901(B)(5). At trial, Moore had objected to the admissibility of the recorded telephone calls on authentication grounds.

{¶ 18} "Evid.R. 901(A) requires, as a condition precedent to the admissibility of evidence, a showing that the matter in question is what it purports to be." *State v. Simmons*, 2d Dist. Montgomery No. 24009, 2011-Ohio-2068, ¶ 12. The threshold standard for authenticating evidence is low, *State v. Wiley,* 2d Dist. Darke No. 2011 CA 8, 2012-Ohio-512, ¶ 11, and Evid.R. 901(B) provides examples of numerous ways that the authentication requirement may be satisfied. The most commonly used method is testimony that a matter is what it is claimed to be under Evid.R. 901(B)(1). *State v. Renner*, 2d Dist. Montgomery No. 25514, 2013-Ohio-5463, ¶ 30. Evid.R. 901(B)(5) involves voice identification and permits authentication by "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."

{¶ 19} At trial, the State played recordings of three telephone conversations between Sallee and Moore while Moore was in jail. Sgt. Jeannine Whittaker of the Montgomery County Sheriff's Office testified that she is the keeper of records at the

Montgomery County Jail; those records include recorded phone calls. She described how calls are made in the jail by inmates. She stated that the inmate is required to enter a PIN, which consists of the inmate's number and the last four digits of the inmate's Social Security number, which identifies that inmate as the caller. The inmate is also supposed to say his or her name when prompted. Whittaker testified that all inmate calls from the jail are recorded on a server, and they cannot be manipulated or deleted.

{¶ 20} Sgt. Whittaker testified that she was asked to pull phone calls by Moore. She stated that State's Exhibit 85, a compact disc, had her writing on it, that she created the CD, and that it contained three calls by Moore. Whittaker testified that it was a fair and accurate copy of Moore's phone calls off of the server. Upon cross-examination, Whittaker stated that she did not listen to the entirety of the calls. Rather, she listened to the header at the beginning of each call, which identified the jail and Moore as the caller. Whittaker stated that she listened to make sure that the call was downloaded and that the call matched the date and time requested by the prosecutor. (Moore had made approximately 20 calls.) Sgt. Whittaker did not detect any defects in the downloaded recordings based on the portion she heard.

{¶ 21} Prior to the tape's being played, Detective Walt Steele, the lead detective, identified State's Exhibit 85 as a CD of three jail telephone calls that were downloaded from the jail's system. Steele stated that he made the copies of the jail calls with Sgt. Whittaker, and that he personally listened to the three calls on the server and then on the CD. Steele testified that he noticed no alterations, deletions, or glitches of any kind. Steele further testified that he had previously spoken with Moore on two occasions and recognized his voice. He had also previously spoken with Sallee twice and knew what

her voice sounded like. He identified the voices on the recordings as those of Moore and Sallee.

{¶ 22} The testimony of Sgt. Whittaker and Detective Steele provided sufficient authentication that State's Exhibit 85 was a CD of three of Moore's telephone calls to Sallee from the Montgomery County Jail and that the CD contained true and accurate copies of those telephone conversations, as recorded on the jail's server.

{¶ 23} Moore's first assignment of error is overruled.

III. Use of Peremptory Challenge after Successful *Batson* Challenge

{¶ 24} Moore's second assignment of error states:

> **The trial court's allowance of an additional peremptory challenge or "do over" following Appellant's successful *Batson* challenge, was error.**

{¶ 25} At the conclusion of voir dire, the trial court, counsel, Moore, and the State's representative met in chambers to discuss the selection of jurors. One prospective juror was excused for cause, and another was excused due to financial hardship. The State dismissed prospective jurors with its first, second, and third peremptory challenges, without objection. Defense counsel used his first and second peremptory challenges, but passed on his third. Citing *Batson v. Kentucky*, 476 U.S. 83, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), defense counsel objected to the State's use of its final peremptory challenge. The trial court sustained the objection, and the prospective juror at issue was not removed from the jury.

{¶ 26} The court entertained discussion about whether the State could exercise a peremptory challenge on another prospective juror or whether the State had, instead,

forfeited its ability to select another individual with its fourth peremptory challenge. After hearing from both parties, the trial court determined that it would allow the State to exercise a peremptory challenge on another individual. The court reasoned that it was "invalidating the exercise of that fourth peremptory as to [Prospective Juror #7] not because the State has lost that peremptory challenge, but because I'm finding that the use of the peremptory challenge as to that particular individual juror on the basis of race based criteria is improper[.] I believe it would be appropriate for me to go ahead and allow the State to have a fourth peremptory provided that it obviously cannot be used as to [Prospective Juror #7]." (Tr. 199-200.)

{¶ 27} The trial court invited defense counsel to make a record regarding its ruling. Defense counsel objected to the trial court's ruling, arguing that since the State's fourth peremptory challenge was invalid, the State should not be given a "do over" with another peremptory challenge. The court noted the objection, and the State proceeded to dismiss another prospective juror. Defense counsel passed on his final peremptory challenge.

{¶ 28} Moore claims that the trial court violated Crim.R. 24(D) when it allowed the prosecutor to exercise a peremptory challenge after sustaining his *Batson* challenge. Under Crim.R. 24(D), in felony cases other than capital cases, each party may peremptorily challenge four prospective jurors. In general, a prospective juror who is peremptorily challenged is excused. Crim.R. 24(E).

{¶ 29} In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that the Equal Protection Clause forbids the State from exercising a peremptory challenge to excuse a juror solely because of that

juror's race. *See also State v. Murphy*, 91 Ohio St.3d 516, 747 N.E.2d 765 (2001) (applying *Batson*). "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors[.]" (Citations omitted.) *Batson*, 476 U.S. at 86. The Supreme Court has extended *Batson* to criminal defendants who are not of the same race as the excluded jurors. *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Neither the effectiveness of *Batson* nor the wisdom of allowing peremptory challenges is before us. *Compare*, *e.g., State v. Saintcalle*, 178 Wash.2d 34, 309 P.3d 326 (2013) (discussing racial discrimination in jury selection and the shortcomings of *Batson*).

{¶ 30} Moore relies on *State v. Holloway*, 129 Ohio App.3d 790, 719 N.E.2d 70 (10th Dist.1998), to support his contention that the State was improperly provided a fifth peremptory challenge after the court sustained his *Batson* objection. In *Holloway*, a capital murder case, the defense exercised all six[1] of its peremptory challenges to strike white males from the panel, and the prosecution used four of its peremptory challenges to strike three white females and one Hispanic female from the panel; the State waived its last two peremptory challenges. The court excused the jurors who had been challenged. During the selection of alternate jurors, each side was permitted two peremptory challenges. The State used its first on a black female; the defense struck another white male. At this juncture, the State raised the fact that the defense had used all of its peremptory challenges on white males. The trial court reviewed with counsel how the peremptory challenges had been exercised, but it did not make any ruling. The court

[1] For capital cases, Crim.R. 24(D) grants each party six peremptory challenges.

permitted the parties to use their final challenges; the State passed, and the defense used its last challenge on a white male.

{¶ 31} After the peremptory challenges had been used, but before the challenged alternates were excused, the trial court asked the parties to state on the record their reasons for striking the jurors. During this discussion, the State asked that one of the prospective alternate jurors, who had been peremptorily excused by the defense, be reinstated under *Batson*. The trial court never ruled on the *Batson* issue, apparently believing that it was an issue for an appellate court. However, it allowed the State to exercise a peremptory challenge against another prospective alternate juror. On review, the Tenth District concluded that the trial court violated Crim.R. 24(D) when it permitted the State to exercise a peremptory challenge after it had previously waived its final peremptory challenge.

{¶ 32} *Holloway* provides little guidance to the case before us. The trial court in *Holloway* allowed the State to exercise an additional peremptory challenge after the completion of the peremptory challenge process; all peremptory challenges had been used or waived. In fact, after the State waived its last challenge, the defense exercised its final peremptory challenge on a prospective alternate juror. Jury selection should have been complete at that time. Nevertheless, the court then granted the State another peremptory challenge to remedy a perceived error in the jury selection process.

{¶ 33} The critical issue here is whether the State actually used its last peremptory challenge when the trial court ruled, under *Batson*, that the peremptory challenge was invalid and the prospective juror at issue could not be dismissed. This court has not faced this question before, and *Holloway* does not answer it. If the answer

is yes, then Moore would be correct that the State was improperly granted a fifth peremptory challenge, as in *Holloway*. We conclude the answer is no. Although the State attempted to use a peremptory challenge to remove a prospective juror, the court prevented its use by ruling that the challenge was invalid. In our view, the State continued to have that peremptory challenge available to it.

{¶ 34} The United States Supreme Court did not mandate a particular procedure to follow upon a successful *Batson* challenge. *See Batson*, 476 U.S. at 99, fn.4. It stated, "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire[.]" (Citations omitted.) *Id*. In Moore's case, the exercise of peremptory challenges was conducted in chambers, and the prospective juror at issue was retained (i.e., "reinstated") on the jury.

{¶ 35} Some courts have held the trial court may order a peremptory challenge that was unlawfully used under *Batson* to be forfeited. *See People v. Luciano*, 10 N.Y.3d 499, 890 N.E.2d 214, 860 N.Y.S.2d 452 (2008). After finding that New York statutes governing peremptory challenges neither required nor barred forfeiture, the Court of Appeals of New York balanced "the tradition of exercising peremptory challenges without explanation, and a potential juror's right to be free from discrimination" to determine whether forfeiture was permissible. *Luciano*, 890 N.E.2d at 218. The court noted that

"disallowing forfeiture may be seen as indifference to discriminatory challenges; if caught, the litigant would be in the same position as if there had been no *Batson* violation." *Id.* The *Luciano* court further found that allowing forfeiture "promotes the spirit of *Batson*, signaling to litigants – and to the jury – that discrimination will not be tolerated." *Id*. at 219.

{¶ 36} However, the *Luciano* court further recognized that forfeiture was not always required. It stated:

> In holding that forfeiture is a permissible remedy, we note that the free exercise of peremptory challenges is a venerable trial tool that should be denied only in rare circumstances. In fashioning the proper remedy, a trial judge may consider, among other factors, whether the challenged juror is available to be reseated, whether the litigant appears to be engaging in a pattern of discrimination, and the number of peremptory challenges that remain to be exercised. While even a single instance of discriminatory conduct may warrant forfeiture, where the finding of discrimination is close, forfeiture may not be an appropriate remedy (*see e.g. United States v. Ramirez-Martinez*, 273 F.3d 903 [9th Cir.2001], overruled on other grounds by *United States v. Lopez*, 484 F.3d 1186 [9th Cir.2007]).

Luciano, 890 N.E.2d at 219. The Court of Appeals of New York thus concluded that the trial court must exercise its discretion in determining whether forfeiture, while permitted, was required.

{¶ 37} Other courts have also considered forfeiture of a peremptory challenge to be a permissible remedy available to trial courts, at their discretion. *See State v.*

Andrews, 216 N.J. 271, 78 A.3d 971 (2013) (discussing a variety of permitted remedies to address *Batson* violations). And many courts grant trial judges flexibility in fashioning remedies for *Batson* violations, based on factors related to the nature of the peremptory challenge process (such as whether challenges are exercised in the presence of the jury) and the egregiousness of the conduct. *Id*., citing cases.

{¶ 38} We find these cases persuasive and conclude that a bright line, while perhaps helpful to trial courts, is not appropriate under *Batson* and its progeny. In our view, it was within the trial court's discretion to determine, based on the circumstances before it, whether the peremptory challenge that was invalidated under *Batson* was forfeited or, alternatively, the State could re-exercise the challenge, provided that it does not exercise it in a discriminatory fashion. We therefore conclude that the trial court did not abuse its discretion in finding that the State did not exercise its peremptory challenge when the trial court ruled that the challenge was unlawful under *Batson* and reinstated the challenged prospective juror. Accordingly, the State was not improperly provided a fifth peremptory challenge, in violation of Crim.R. 24(D).

{¶ 39} Moore's second assignment of error is overruled.

IV. Jury Instruction on Aiding and Abetting

{¶ 40} Moore's third assignment of error states:

> **It was error to instruct the jury on aiding and abetting when the evidence was insufficient to establish complicity to felonious assault, aggravated robbery or murder.**

{¶ 41} In his third assignment of error, Moore asserts that there was insufficient evidence that he aided and abetting another person in committing the offenses, and

therefore the trial court erred in giving a jury instruction on complicity.

{¶ 42} "A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Williford*, 49 Ohio St.3d 247, 251, 551 N.E.2d 1279 (1990); *State v. Mullins*, 2d Dist. Montgomery No. 22301, 2008-Ohio-2892, ¶ 9. As a corollary, a court should not give an instruction unless it is specifically applicable to the facts in the case. *State v. Fritz*, 163 Ohio App.3d 276, 2005-Ohio-4736, 837 N.E.2d 823 ¶ 19 (2d Dist.). The decision to give a requested jury instruction is a matter left to the sound discretion of the trial court, and the court's decision will not be disturbed on appeal absent an abuse of discretion. *State v. Elliott*, 2d Dist. Montgomery No. 26104, 2014-Ohio-4958, ¶ 22.

{¶ 43} When reviewing a trial court's jury instructions, an appellate court must consider the instructions as a whole, rather than viewing an instruction in isolation, and then determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights. *State v. Crawford*, 2d Dist. Montgomery No. 22314, 2008-Ohio-4008, ¶ 36, citing *Becker v. Lake Cty. Mem. Hosp. West*, 53 Ohio St.3d 202, 560 N.E.2d 165 (1990). An appellate court will not reverse a conviction due to an erroneous jury instruction unless the error was so prejudicial that it might have induced an erroneous verdict. *Id.*; *Hayward v. Summa Health Sys./Akron City Hosp.*, 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243.

{¶ 44} The State requested and the trial court gave, over Moore's objections, an instruction on aiding and abetting. R.C. 2923.03(A)(2), which defines complicity, states 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." "A charge of

complicity 'may be stated in the terms of this section, or in terms of the principal offense.' R.C. 2923.03(F). As a result, a defendant who is indicted as a principal offender is on notice that evidence could be presented that he was either the principal offender or an aider and abettor." (Citation omitted.) *State v. Boyce*, 2d Dist. Clark No. 11 CA 95, 2012-Ohio-3713, ¶ 19.

{¶ 45} The State's primary theory in Moore's case was that Moore was the principal offender, who approached Mullins's vehicle with the intent to rob him, and then shot Mullins through the passenger-side window after he (Moore) noticed Mullins's gun in the vehicle. Several witnesses testified that Moore confessed to being the shooter and stated that the incident was a "robbery gone bad." Although no eyewitnesses identified him as the shooter and no weapon was found, Broadus's testimony placed him near the scene of the shooting, and Moore's statements during jail telephone calls implied culpability as the principal.

{¶ 46} But the State also presented evidence from which the jury could have concluded that he acted in concert with another individual, even if he (Moore) were not the shooter. Thacker stated in his 911 call that two individuals tried to rob Mullins and "shot up" Mullins's car. The physical descriptions of the two men were consistent with descriptions of Moore and his cousin, Daryl Moore. Moore repeatedly admitted to approaching Mullins's vehicle with the intent to rob Mullins. Detective Steele testified that Thacker reported the tall one as being on the driver's side of the vehicle "with several flashes." Multiple gunshots were fired at Mullins's vehicle, causing damage to both sides of the car. There was damage on the B-pillar on the driver's side of the car, as well as the roof and trunk closer to the driver's side. Both the front and rear passenger-side

windows were shot out, and the location of Mullins's wound indicated that the fatal shot traveled through a passenger-side window. There were no bullet holes inside the vehicle, only two bullets were located (the one that killed Mullins and one in the hat), and no weapon was found.

{¶ 47} Even if the jury concluded that the taller man was the shooter, based on Thacker's statement to Detective Steele that he saw "flashes" by the taller man on the driver's side, Thacker placed two men at the vehicle, and Moore repeatedly stated that he intended to commit a robbery when he approached the vehicle. And, considering the location of the bullet strikes on the Buick, the evidence supports a conclusion that both men acted together, with both possibly firing upon the vehicle. Moreover, Thacker saw both men flee together, and Broadus testified that he encountered Moore and his cousin, Darryl, together on Nottingham near the time of the shooting. Accordingly, while the State presented substantial evidence that Moore was the principal offender in the offenses, there was evidence from which the jury could have convicted Moore of the offenses as an aider and abetter.

{¶ 48} Moore's third assignment of error is overruled.

V. Consecutive Sentences

{¶ 49} Moore's fourth assignment of error states:

The trial court's imposition of consecutive sentences was error; therefore, the sentences should be reversed.

{¶ 50} In his fourth assignment of error, Moore claims that the record does not support the imposition of consecutive sentences under R.C. 2929.14(C)(4) and that the trial court "failed to link either the seriousness of the offense or the threat to society with its

decision to impose consecutive sentences."

{¶ 51} Moore relies upon R.C. 2929.14(C)(4), which permits a trial court to impose consecutive sentences for multiple offenses. In this case, however, the five offenses of which Moore was found guilty (felonious assault, aggravated robbery, two counts of murder, and having weapons under disability) were merged into a single count of murder. The court did not impose consecutive sentences for multiple offenses. Accordingly, R.C. 2929.14(C)(4) is inapplicable. In imposing sentence, the trial court did appear to make findings under R.C. 2929.14(C)(4). Nevertheless, because multiple offenses had been merged into a single offense, the trial court's statements regarding consecutive sentences were superfluous.

{¶ 52} In addition to the five underlying offenses, Moore was found guilty of five firearm specifications and four repeat violent offender specifications. The trial court merged the firearm specifications into a single firearm specification and the repeat violent offender specifications into a single repeat violent offender specification. The trial court imposed three years of actual incarceration on the firearm specification and ten years on the repeat violent offender specification. Both specifications were ordered to be served consecutively to and prior to the prison term for the murder and consecutively to the other specification.

{¶ 53} The trial court's order that the firearm specification and the repeat violent offender specification be served consecutively to the prison term on the underlying offense was required by R.C. 2929.14(C)(1)(a) (firearm specification) and R.C. 2929.14(B)(2)(d) (repeat violent offender specification). The trial court did not err in ordering each of those specifications to be served consecutively to the fifteen year to life

sentence for the murder.

{¶ 54} Moore's assignment of error is overruled.

VI. Conclusion

{¶ 55} The trial court's judgment will be affirmed.

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WELBAUM, J., concurs.

DONOVAN, J., dissenting:

{¶ 56} The State asks us to adopt a rule that a party may engage in racial discrimination and suffer no consequences. Adopting such a rule rewards discriminatory conduct and does not deter future misconduct. The State exercised its final peremptory challenge in a discriminatory manner. Its final strike was exercised under Crim.R. 24(D). "When a man is spoken of as 'exercising a right,' it is commonly understood that he is doing something." *U.S. v. Souders*, 27 F.Cas. 1267 (D.N.J. 1871). The State did something, it gambled and lost. The language of the rule does not require a "successful exercise" of the challenge.

{¶ 57} Thus, the trial court abused its discretion by granting a fifth peremptory challenge to the State.

{¶ 58} I would sustain Moore's second assignment of error and reverse.

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Copies mailed to:

Andrew T. French
Michael C. Thompson
Hon. Mary L. Wiseman