[Cite as *State v. Heard*, 2019-Ohio-1227.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JASON N. HEARD,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0064

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 15 CR 1174B

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed in part. Sentence Vacated in part. Remanded in part.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. John D. Falgiani, Jr., P.O. Box 8533, Warren, Ohio 44484, for Defendant-Appellant.

Dated: March 25, 2019

WAITE, P.J.

{¶1} Appellant Jason N. Heard appeals his April 3, 2017 convictions in the Mahoning County Common Pleas Court. Following jury trial, Appellant was convicted of complicity to commit aggravated murder, complicity to commit attempted murder, and complicity to commit felonious assault. Appellant argues that his aggravated murder and attempted murder convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Appellant also argues that a detective's testimony in regard to a surveillance video was improper. Appellant contends that he was denied a fair trial based on the cumulative nature of these errors. Appellant also appeals his sentence, arguing that the trial court erroneously imposed consecutive sentences without making the requisite R.C. 2929.14(C)(4) findings. For the reasons provided, Appellant's arguments as to his convictions are without merit and the judgment of the trial court is affirmed. However, we vacate the trial court's imposition of consecutive sentences and remand the matter for the limited purpose of addressing consecutive sentences.

Factual and Procedural History

{¶2} As necessary background to this matter, on December 28, 2004, Thomas Owens and his close friend, Richard Owens (no familial relation) were drinking alcohol in a basement. At some point, the two men were playing with a gun and it discharged, striking Richard in the head. Thomas rushed Richard to the hospital where he died the next day. Because of this incident, Thomas pleaded no contest to a negligent homicide charge. Richard was Appellant's uncle. Appellant and his family have harbored a grudge against Thomas since this incident occurred and have made threats against him over the years. (Trial Tr. Vol. II, pp. 377-380.)

{¶3} Regarding the instant appeal, on the night of November 13, 2015, Erik Brown picked up his cousin Lottre Haynes, his brother Tony Brown, and Thomas Owens. The men drove to the Southern Tavern in Youngstown for food. While inside the Southern Tavern, Erik Brown noticed Appellant. Appellant had previously arrived at the bar with Leonard Savage. At some point during the night, a Southern Tavern surveillance video captured Appellant holding a gun in his right hand. (Trial Tr. Vol. IV, p. 757.) Jawonn Hymes, Savage's brother, arrived at the Southern Tavern separately and joined Appellant and Savage. Jovon Fleetwood waited outside in a van that Appellant and Savage had driven to the tavern. According to Fleetwood, he did not enter the tavern because he was not of legal age to enter the bar.

{¶4} After receiving their food order, Erik, Lottre, Tony, and Thomas left. (Trial Tr. p., 339.) Tavern surveillance video shows Appellant, Savage, and Hymes follow the men outside. Appellant, Savage, and Hymes put on gloves on their way outside and then watched to see which way the victims' car turned before running across the street towards a dark car. (Trial Tr. Vol. IV, pp. 747, 768.) Fleetwood saw the men run past their van and leave in a black Nissan. (Trial Tr. Vol. III, pp. 491.)

{¶5} Erik Brown drove the car carrying the victims to his aunt's house and parked along the curb in front of her house. Lottre sat in the front seat, Thomas was in the back driver's side, and Tony sat in the rear passenger seat. Erik saw a sedan pull next to him, when someone inside the sedan fired shots into Erik's car. Erik attempted to put the car in reverse to flee but ended up in his aunt's front lawn. Thomas died instantly, the remaining victims were uninjured.

{¶6} Fleetwood heard gunshots shortly after his companions left and saw the black Nissan return a few minutes later. According to Fleetwood, Appellant and Savage exited the Nissan and entered the van. Fleetwood noticed that Appellant and Savage wore gloves on their return to the van. The three men left the Southern Tavern and Fleetwood went home.

{¶7} Shay Colpetro, the daughter of Erik Brown's girlfriend, called Erik and told him that she had seen a "Snapchat" image of a gun with the word "headshot" posted on Appellant's account. Apparently, Shay and a friend, Kayla Williams, had been with Appellant for some period of time at the Southern Tavern. Shay recognized a black hooded sweatshirt shown in the image that appeared to be the one worn by Appellant at the Southern Tavern.

{¶8} On November 25, 2015, Appellant and his three codefendants were indicted on several charges: one count of aggravated murder, an unclassified felony in violation of R.C. 2903.01(A), (F); three counts of attempted murder, a felony of the first degree in violation of R.C. 2903.02(A), (D) and R.C. 2923.02(A); three counts of felonious assault, a felony of the second degree in violation of R.C. 2903.11(A)(2), (D) with an attendant firearm specification in violation of R.C. 2941.145(A); and one count of having weapons while under disability, a felony of the third degree in violation of R.C. 2923.12(A)(3), (B). On November 23, 2016, the trial court granted Appellant's motion to sever his trial from the trials of his codefendants.

{¶9} On February 13, 2017, Appellant's case proceeded to a jury trial. After the three day trial concluded, the jury found Appellant guilty on all counts under a complicity theory. Appellant had previously elected to sever the charge of having weapons under a

disability and have this charge heard separately to the bench. However, the state dismissed the charge at the sentencing hearing.

{¶10} On April 3, 2017, the trial court sentenced Appellant to a period of incarceration of twenty years to life for aggravated murder, five years for each count of attempted murder, and three years of incarceration for each of the firearm specifications. The attempted murder and felonious assault convictions merged for purposes of sentencing. The state elected to proceed on the attempted murder convictions. The court ordered the firearm specifications to run concurrent to one another, but consecutive to the sentences for aggravated murder and attempted murder. The attempted murder convictions were ordered to run concurrent to one another but consecutive to the aggravated murder sentence. Ultimately, the trial court imposed an aggregate sentence of twenty-eight years to life imprisonment. Appellant timely appeals his convictions and sentence.

ASSIGNMENT OF ERROR NO. 1

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

{¶11} Appellant contends the state failed to present sufficient evidence to support his aggravated murder and attempted murder convictions. As to the aggravated murder conviction, Appellant argues that there was no evidence that he was at the scene or that he aided and abetted in the shooting. While he concedes that several witnesses testified he was at the Southern Tavern, he argues that the evidence regarding his involvement is circumstantial. As to the attempted murder convictions, Appellant argues that there is no evidence he had a motive to harm Erik Brown, Tony Brown, or Lottre Haynes.

{¶12} The state responds that witness testimony and the surveillance video establish that Appellant was at the Southern Tavern on the night of the incident and followed the victims as they left the bar. The state highlights the fact that Appellant is seen carrying a gun on the surveillance video. The testimony and surveillance video also show Appellant leave in a dark car and return shortly thereafter. Additionally, the state points to a jail inmate who shared a cell with Appellant and testified that Appellant confessed his involvement. A sheriff's deputy overheard Appellant attempting to convince Fleetwood not to testify against him.

{¶13} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.3d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. No. 09-JE-26, 2011-Ohio-1468, ¶ 34.

{¶14} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed

on the grounds of sufficiency unless the reviewing court determines no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id*.

{¶15} As previously noted, Appellant was convicted of all offenses under a complicity theory. Appellant focuses his arguments on whether the evidence established his involvement in the shooting, however, he also questions the state's evidence about whether he acted with the requisite culpability.

{¶16} Under a complicity theory, a defendant can be prosecuted and punished as if he were a principal offender, even if the charge is stated in terms of the principal offense. R.C. 2923.03(F). "A person is complicit if, acting with the kind of culpability required for the commission of an offense, he aids or abets another in committing the offense." *Henderson* at ¶ 48, citing R.C. 2923.03(A)(2).

{¶17} Aiding and abetting exists where the defendant "supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime * * *." *Id.*, citing *State v. Johnson*, 93 Ohio St.3d 240, 245, 754 N.E.2d 796 (2001). "Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed." *Id.* at 245.

{¶18} Aggravated murder is defined within R.C. 2903.01(A): "No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy." When aggravated murder is charged under a complicity theory, the requisite culpability needed to be proven is that the defendant acted "purposely, and with prior calculation and design." *State v. Henderson*, 2018-Ohio-5124, -- N.E.3d --, ¶ 48 (7th Dist.), citing R.C. 2903.01(A).

{¶19} Attempted murder involves conduct that, if successful, would result in purposely causing the death of another. R.C. 2903.02(A); R.C. 2923.02(A). When attempted murder is charged under a complicity theory, the defendant must have acted "purposely."

{¶20} Although Appellant does not directly address his felonious assault convictions, he does claim that he had no involvement whatsoever in this matter. As such, his felonious assault convictions will also be addressed. Felonious assault is defined within R.C. 2903.11(A): "[n]o person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another's unborn; (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶21} The state's case consisted of the Southern Tavern surveillance video and testimony from Jovon Fleetwood, Shay Colpetro, Kayla Williams, Kenneth Price, Deputy Gary Shane, and Det. Michael Lambert. Fleetwood admittedly lied during his first interview with police. During the interview, Fleetwood denied that he was acquainted with Appellant, Savage, and Hymes. (Trial Tr. Vol. III, p. 516.) As the interview progressed, Fleetwood admitted that he knew Appellant and claimed that he bought marijuana from Appellant on the night of the shooting. At trial, he explained that he lied during this interview because he had received threatening calls and was afraid to testify. (Trial Tr. Vol. III, pp. 499, 548.) The record indicates that a second interview was conducted on October 3, 2016. During this interview, Fleetwood was shown at least part of the Southern Tavern surveillance video. However, Fleetwood specifically testified at trial that his recollection of the events was from his own memory, not from what he saw on the video.

{¶22} A third interview took place the next day, October 4, 2016. During this interview, Fleetwood admitted that he saw Appellant and Savage at a bar called "Twisted." According to Fleetwood, Appellant asked him if he wanted to join them as they were about to "bust a move," which is slang for picking up money from someone. (Trial Tr. Vol. III, p. 484.) Fleetwood agreed and entered a light colored van driven by Savage. After picking up the money, Fleetwood accompanied Appellant and Savage to the Southern Tavern, however, Fleetwood remained inside the van because he was not of legal age to enter the bar. As Appellant and Savage entered the tavern, Fleetwood saw Hymes join them.

{¶23} Sometime thereafter, Fleetwood saw Appellant, Savage, and Hymes run past the van and get into a black Nissan. Fleetwood watched the Nissan pull out onto the street and then turn right, off of Glenwood Avenue. Shortly thereafter, he heard gunshots. Soon after, he saw the black Nissan return and Appellant and Savage exited the car and entered the van. Fleetwood noticed that the men were now wearing gloves. The men left in the van and drove Fleetwood home.

{¶24} Fleetwood also testified that he was in a holding cell near Appellant the day before he testified and Appellant told him "little brother, you still my nigga; don't do this." (Trial Tr. Vol. III, p. 501.) Fleetwood was in jail because he tried to flee the area to avoid testifying due to threats he had received.

{¶25} Deputy Gary Shane of the Mahoning County Sheriff's Office corroborated Fleetwood's claim. Dep. Shane testified that he was transporting prisoners to and from the jail and the courthouse the day before Fleetwood testified. Dep. Shane explained that he took Fleetwood out of his holding cell and began cuffing him when he heard Appellant

talk to Fleetwood from his holding cell. Dep. Shane heard Appellant tell Fleetwood, "why you doing this -- you know, why you doing this to me? You know, we're all, we're all niggers. You know, you shouldn't be doing this, to be ratting on anybody." (Trial Tr. Vol. III, p. 580.) He specifically heard Appellant tell Fleetwood, "you still my nigger. Don't do this." (Trial Tr. Vol. III, p. 589.)

{¶26} Kayla Williams testified that she and Appellant were close friends. On the night of the incident, she arranged to meet Appellant at the Southern Tavern. (Trial Tr. Vol. III, p. 593.) Williams conceded that she was drunk that night. She testified that Appellant, Savage, and Hymes were together at the Southern Tavern. At some point, she saw the three leave together. She testified that she did not leave with Appellant and was upset that he tried to use her as an alibi.

{¶27} Shay Colpetro is the daughter of Erik Brown's girlfriend. Colpetro is also Kayla Williams' friend, and was at the Southern Tavern with Williams, Appellant, Savage, and Hymes. At one point during the night, Colpetro saw that Appellant had a gun. (Trial Tr. Vol. III, p. 615.) Colpetro heard the men discussing something and one of the men stated "niggers think stuff sweet." (Trial Tr. Vol. III, p. 615.) According to Colpetro, on the streets, "sweet" means that a person is weak, or not tough. (Trial Tr. Vol. III, p. 626.) Colpetro testified Williams told her that Appellant, Savage, and Hymes "went to go shoot up some niggers." (Trial Tr. Vol. III, p. 617.) Colpetro also testified that, sometime after the shooting, she saw an image posted from Appellant's "Snapchat" account showing a gun with the phrase "head shot" underneath the image. (Trial Tr. Vol. III, p. 623.) Although it is unclear if Appellant was holding the gun, he was apparently visible in the image wearing the same black hooded sweatshirt he wore while at the Southern Tavern.

(Trial Tr. Vol. III, p. 623.) A copy of the image was not introduced into evidence, as a Snapchat image is designed to be visible only for a short period of time before it disappears.

{¶28} Kenneth Price was incarcerated with Savage, Appellant's codefendant. Price testified that inmates often discuss their cases with another. Price testified that he took notes of his jailhouse conversations with Savage. According to Price, Savage said that:

> [H]im [sic], [Appellant] and Jawonn [Hymes] was at the bar and ran into Thomas Owens, the person that supposedly killed Lenny's uncle back in the early 2000s, I think 2004 maybe. And once Thomas left they followed him out the bar to West Myrtle and pulled up on the car, shot the car up. He said his brother, Jawonn, was the driver. He said [Appellant] was in the back seat shooting and he was in the front – [Savage] was in the front seat shooting.

(Trial Tr. Vol. IV, p. 689.)

{¶29} According to Price, when Savage found out that a witness was cooperating with the police, he "was real nervous like -- cuz at first he said she wasn't coming to court and he had somebody beat her up out there on some streets and she was scared to come testify and then she popped back up out of the blue. She was corroborating -- he was worried about them finding somebody's DNA on the shell." (Trial Tr. Vol. IV, p. 691.) Regarding another witness, Price testified that Savage told him, "[j]ust gotta kill that bitch. He told detectives there was a dude in the van with them and they wanted him killed because he was supposed to be telling on them." (Trial Tr. Vol. IV, p. 693.) Savage also

expressed concern over the Southern Tavern surveillance video as he feared it would link the evidence to him. Savage also told Price that his family put money into Appellant's prison account to keep him quiet.

{¶30} Det. Lambert testified about the Southern Tavern surveillance video, which was shown to the jury and admitted into evidence. The video shows Appellant, Savage, and Hymes walk into the Southern Tavern together, contradicting Appellant's statement to police that he did not know Hymes and was not with Savage the night of the incident. According to Det. Lambert, Appellant did not amend his story even after seeing the video. (Trial Tr. Vol. IV, pp. 725, 740.) The video then showed the four victims entering the bar. At some point during the video, Appellant can be seen holding a gun in his right hand and gesturing as if he had two guns. (Trial Tr. Vol. III, p. 626.) Despite viewing this video, Appellant continued to deny that he had a gun that night.

{¶31} The video shows the four victims leave the bar and Appellant, Savage, and Hymes follow them out moments later. Appellant, Savage, and Hymes are shown putting on gloves, described as gloves worn by football players, as they exit the building. The car carrying the victims can be seen driving down the street as Appellant, Savage, and Hymes exit the bar. Appellant, Savage, and Hymes wait to see where the car turned before running across the street towards a dark sedan. Shortly thereafter, the sedan can be seen pulling onto the road and turning onto the same street as the victims. According to Det. Lambert, the car carrying Appellant turned on the street one minute and twenty-five seconds after the car carrying the victims. A few moments later, the dark sedan returned and pulled next to the van where Fleetwood was waiting. The van left shortly thereafter. Williams and Colpetro are shown on the video at the bar after Appellant left.

Appellant did not reenter the bar at any time during the night. Despite this, Appellant claimed that Williams drove him home from the Southern Tavern that evening.

{¶32} As to culpability, the requisite intent for attempted murder is "purposely." "A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." R.C. 2901.22(A). This record reveals that the shooters fired two guns at least fifteen times into the car. Thirteen of the shots came from a .40 caliber gun and the other two came from a .45 caliber gun. (Trial Tr. Vol. IV, p. 675.) We have previously held that four gunshots fired at a victim is sufficient to demonstrate the "purposeful" element of murder even where the shooter claimed that he intended only to stop the victim, not kill him. *State v. Johnson,* 7th Dist. No. 2001 WL 1667878, *4-5 (Dec. 18, 2001.) In this matter, fifteen shots were fired into the car carrying the four victims. It is sufficient from the number of shots fired into this single car to find that Appellant intended to cause the death of everyone inside the car. See also *State v. Smith,* 89 Ohio App.3d 497, 624 N.E.2d 1114 (10th Dist.) (when the defendant fired a nine millimeter handgun one time into a crowd of people this was sufficient to find that the defendant shot the gun with the intention to kill due to the close range and caliber of the weapon.)

{¶33} The requisite intent for aggravated murder is "purposely, and with prior calculation and design." As discussed above, the purposeful element is satisfied in this case. Regarding prior calculation and design, the legislature intended that proof of this element requires more than mere instantaneous or momentary deliberation. *State v.*

Kerr, 7th Dist. No. 15 MA 0083, 2016-Ohio-8479, ¶ 20. Prior calculation requires "evidence of 'a scheme designed to implement the calculated design to kill' and 'more than the few moments of deliberation permitted in common law interpretations of the former murder statute.' " *Id*.

{¶34} When evidence presented at trial "reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." *Id*., citing *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 61.

{¶35} Prior calculation and design is evaluated by looking at the totality of the circumstances on a case-by-case basis. *Kerr* at ¶ 21. Prior calculation and design exists where a defendant "quickly conceived and executed the plan to kill within a few minutes." *State v. Coley*, 93 Ohio St.3d 253, 264, 754 N.E.2d 1129 (2001), citing *State v. Palmer*, 80 Ohio St.3d 543, 567–568, 687 N.E.2d 685 (1997).

{¶36} When reviewing whether prior calculation and design has been proven, Ohio courts analyze several factors. *State v. Carosiello*, 7th Dist. No. 15 CO 0017, 2017-Ohio-8160, ¶ 33. These factors include whether the defendant and victim knew each other, if the relationship was strained, whether the defendant gave thought in choosing the murder weapon or site, and whether the act was drawn out or sprung from an instantaneous eruption of events. *Id*., citing *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 56-60.

{¶37} It is apparent from this record that Appellant knew Thomas Owens and held a grudge against him for the death of his uncle, Richard Owens. The record also shows that Appellant had a gun in his possession on the night of the incident and made a reference to his opinion that Owens and his friends thought "stuff [was] sweet." (Trial Tr. Vol. III, p. 615.) Again, on the street, "sweet" means weak. The video shows Appellant and his codefendants follow the victims out of the bar. As they exit the bar, surveillance video shows them putting on gloves and stop to watch which street the victims turned onto before running to their car. Based on this evidence, there is sufficient evidence to find that Appellant acted with prior calculation and design.

{¶38} This record is replete with evidence demonstrating Appellant's involvement with the shooting. Appellant is shown on the surveillance video with a gun. He and his codefendants are shown following the victims out of the bar. Appellant and his codefendants can be seen putting on gloves and watching the direction of travel of the victims' car before pursuing them. Appellant returned shortly thereafter by car and the men exited the car and left in the van. For these reasons, there is sufficient evidence to support Appellant's aggravated murder, attempted murder, and felonious assault convictions.

{¶39} Appellant argues that the state did not prove he had motive to harm Erik Brown, Tony Brown, and Lottre Haynes. We have previously acknowledged that:

> Motive is not an element of the crime of murder and need not be established to warrant a conviction; proof of motive does not establish guilt nor does want of proof thereof establish innocence; and, where the guilt of the

> accused is shown beyond a reasonable doubt, it is immaterial what the motive may have been for the crime, or whether any motive is shown.

State v. Williams, 7th Dist. No. 11 MA 185, 2014-Ohio-1015, ¶ 41, citing *State v. Lancaster*, 167 Ohio St. 391, 149 N.E.2d 157, paragraph two of the syllabus.

{¶40} As to Appellant's argument regarding the circumstantial nature of the evidence, "[c]ircumstantial evidence and direct evidence inherently possess the same probative value." *State v. Prieto*, 7th Dist. No. 15 MA 0200, 2016-Ohio-8480, ¶ 34, citing *In re Washington*, 81 Ohio St.3d 337, 340, 691 N.E.2d 285 (1998); *State v. Jenks,* 61 Ohio St.3d 259, 272-273, 574 N.E.2d 492 (1991), paragraph one of the syllabus. In fact, "[e]vidence supporting the verdict may be found solely through circumstantial evidence." *State v. Smith*, 7th Dist. No. 06 BE 22, 2008-Ohio-1670, ¶ 49.

{¶41} As such, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE JURY'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶42} Appellant contends that several witnesses, especially Jovon Fleetwood and Kayla Williams, lacked credibility which misled and confused the jury. Regarding Fleetwood's testimony, Appellant argues that police coerced his testimony by threatening and frightening him into providing favorable testimony. Appellant points out that Fleetwood gave several inconsistent statements to police before testifying at trial. Appellant also argues that Fleetwood was under the influence of marijuana at the time of the incident and was a minor. As to Williams' testimony, Appellant argues that she was

intoxicated the night of the incident. Appellant also questions testimony regarding the surveillance video, however, he does not specify in what manner the jurors were confused.

{¶43} In response, the state argues that the jury was in the best position to judge and weigh Fleetwood's testimony.

{¶44} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.3d 541 (1997). It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id*. Weight of the evidence involves the state's burden of persuasion. *Id*. at 390 (Cook, J. concurring). The appellate court reviews 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, at 387. This discretionary power of the appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶45} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice

inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. No. 09 JE 15, 2010-Ohio-3282, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 20 N.E.2d 650 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶46} Pursuant to Evid.R. 601:

> Every person is competent to be a witness except:
>
> (A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

{¶47} *State v. Clark*, 71 Ohio St.3d 466, 469, 644 N.E.2d 331 (1994) holds that:

> A plain reading of Evid.R. 601(A) leads to the conclusion that the competency of individuals ten years or older is presumed, while the competency of those under ten must be established. * * * As a result, absent some articulable concern otherwise, an individual who is at least ten years of age is per se competent to testify. (Internal citations omitted.)

{¶48} Fleetwood was sixteen years old when the incident occurred and eighteen years old at the time of trial. In accordance with Evid.R. 601(A), he is presumed competent to testify. While Fleetwood's first statement to police was untruthful, it is clear from his testimony and Det. Lambert's testimony that he was afraid of Appellant, Savage,

and Hymes. He testified that he received threats prior to trial. He also testified that at the time he testified he was being held for attempting to flee to avoid testifying due to these threats. There is also evidence from Price's testimony that Appellant's codefendant, Savage, made a specific threat to kill Fleetwood.

{¶49} Fleetwood's testimony was corroborated by the Southern Tavern surveillance video. To the extent that Appellant argues Fleetwood's testimony was a result of what he later viewed on the surveillance tape as opposed to what he actually witnessed, Fleetwood was questioned about this at trial and specifically stated that his testimony was the result of the events as he saw them on the night of the incident, not from what he saw on the video. (Trial Tr. Vol. III, p. 575.)

{¶50} As to Williams, she admitted that she was drunk the night of the incident. However, her testimony was also corroborated by the surveillance video. She testified that she did not go home with Appellant as he claimed in his interview with investigators. The video shows that Appellant left and did not reenter the bar, while Williams continued to be visible on the video. Williams did not provide any other significant testimony.

{¶51} Appellant claims that Det. Lambert's testimony about the surveillance video was confusing to jurors. Det. Lambert explained to the jury that the video was made up of small video clips that were placed on the same disk but did not represent a continuous timeframe of the events. Det. Lambert discussed what was shown on the surveillance video as it was played. According to Det. Lambert, at the beginning of the video Appellant, Savage, and Hymes entered the bar. The victims entered a short time later. The video shows Appellant holding a gun in his right hand at some point. The victims can be seen leaving the bar and, shortly thereafter, are followed out the door by Appellant, Savage,

and Hymes. Appellant and his codefendants can be seen putting on gloves and watching where the victims' car turned before they ran across the street towards a dark sedan. The dark sedan left moments later. The car returned a short while later and parked next to Appellant's van and the van left. Det. Lambert's testimony regarding the video is neither confused nor confusing in any way.

{¶52} Accordingly, Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

> THE TRIAL COURT COMMITTED PLAIN ERROR IN ALLOWING THE ADMISSION OF TESTIMONY REGARDING VIDEO SURVEILLANCE FOOTAGE.

{¶53} At trial, the state and the defense stipulated the surveillance video displayed a time-stamp that is not synchronized with the actual time of day. Appellant argues that Det. Lambert's testimony gave the illusion that the video represented a seamless, contemporaneous timeline of the events. Also, Appellant contends that it is unclear whether Det. Lambert's testimony referred to the time-stamps or actual time of day. Appellant claims that Det. Lambert's testimony affected the outcome of trial because it allowed the state to establish the timing of the events before and after the shooting.

{¶54} The state responds by arguing that Det. Lambert's testimony was within the bounds of the stipulation agreement.

{¶55} At trial, the parties' stipulation was read to the jury:

> The Southern Tavern is equipped with several cameras and video surveillance equipment. The cameras are motion operated and recordings

> are made with this equipment. The information/events are recorded as it is occurring and it's kept by the Southern Tavern or others with knowledge of the operation and is kept in the regular course of business. The recordings cannot be altered. Each camera has its own time-stamp and each camera's times are synchronized closely to one another but time still may different [sic] by several seconds to minutes from camera to camera. The times are not synchronized to the actual time of day and do not reflect the actual time of day.
>
> The Southern Tavern provided the recordings from the night of November 13th, 2015 into the early hours of November 14, 2015 to the Youngstown Police Department. The information contained on the recorded videos is a fair and accurate depicting of the events from that night.

(Trial Tr. Vol. IV, pp. 733-734.)

{¶56} Det. Lambert's testimony was consistent with the parties' stipulation. He testified that "[t]his video is -- consists of several tracks of videos that last about a minute, minute and a half apiece. The video quality is so high that it's only able to lay it in tracks like a CD player so as soon as it gets to the end it starts over at the next track and it gives you the illusion of a continuous video but what actually it is is a bunch of small videos linked together." (Trial Tr. Vol. IV, p. 738.) His testimony clearly informed the jury that the video did not show a seamless timeline of events.

{¶57} Det. Lambert also clearly stated that his references to time corresponded with the time-stamp on the video. (Trial Tr. Vol. IV, p. 739.) Det. Lambert referred to the camera number each video originated from, where the camera was located, and what the

angle each camera captured. There is nothing confusing or misleading in Det. Lambert's testimony and it clearly followed the parties' stipulation.

{¶58} Accordingly, Appellant's third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

MULTIPLE INSTANCES OF ERROR, IF NOT REVERSIBLE ON THEIR OWN, RENDER THIS CASE REVERSIBLE ON A THEORY OF CUMULATIVE ERROR.

{¶59} Appellant argues that he was denied a fair trial based on the cumulative nature of the errors. In addition to the issues specifically addressed as error by Appellant, he claims it was cumulative error that another witness, Colpetro, was improperly permitted to testify about an image she saw on Appellant's "Snapchat" account. Again, Appellant did not raise his concerns with this testimony or address it as error in any other section of his brief.

{¶60} The state argues that Appellant has not demonstrated any error, thus cannot argue the cumulative effect of errors. In so doing, the state does not directly respond to Appellant's claims regarding the Snapchat testimony.

{¶61} For ease of understanding, Appellant's Confrontation Clause argument will be addressed separately from the rest of his cumulative error argument.

Confrontation Clause

{¶62} As "cumulative error," Appellant argues that Colpetro was permitted to testify about an image that purportedly appeared on Appellant's Snapchat account

without any evidence that Appellant posted the photograph. Appellant argues that the testimony is hearsay and may violate the Confrontation Clause.

{¶63} While defense counsel did object to admission of this testimony before it was given and at the time the testimony was given, Appellant did not file a motion to suppress or motion in limine.

{¶64} The Confrontation Clause affords a criminal defendant the right "to be confronted with the witnesses against him." U.S. Constitution, Sixth Amendment. Pursuant to the United States Supreme Court, the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

{¶65} Hence, we must decide "what constitutes a testimonial statement: 'It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.' " *State v. Shaw*, 2013-Ohio-5292, 4 N.E.3d 406 (7th Dist.) ¶ 39, citing *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006).

{¶66} Pursuant to Evid.R. 801(D)(2), an admission by a party opponent is a:

> [S]tatement [that] is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant

> concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

{¶67} A Snapchat photograph or video is designed to disappear within one to ten seconds after the image is viewed. Ganzenmuller, *Snap and Destroy: Preservation Issues for Ephemeral Communications,* 62 Buff.L.Rev. 1239, 1248 (2014). Snapchat also offers a story feature which allows users to see an image or video for a twenty-four hour period. *Id.* at 1249. According to Snapchat, once the time period for an image has expired, it is deleted from users' phones and the Snapchat server. *Id.* There apparently has been significant debate about whether a Snapchat image truly disappears forever. *Id.* at 1250. These claims have involved security breaches where users' images have been accessed by a third party. *Id.*

{¶68} While the law regarding this technology is clearly evolving, we need not delve into this law to resolve this matter. Assuming, arguendo, that error resulted from the admission of testimony about the Snapchat image, any such error would be harmless. This record is replete with evidence supporting Appellant's conviction, absent this testimony. "Where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless 'beyond a reasonable doubt' if the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt." *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983). Further, this "error" was raised only within a cumulative error argument. It appears, then, that Appellant concedes this testimony did not rise to the level of harmful error. As no other error has

occurred in this case, it is axiomatic that the issue involving admission of the Snapchat image cannot result in cumulative error.

Cumulative Error

{¶69} "Cumulative error exists only where the harmless errors during trial actually 'deprive[d] a defendant of the constitutional right to a fair trial.' " *State v. Dawson,* 2017-Ohio-2957, 91 N.E.3d 140, ¶ 54 (7th Dist.), citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. In Ohio, it is generally recognized that "given the myriad [of] safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." *State v. Rupp*, 7th Dist. No. 05 MA 166, 2007-Ohio-1561, ¶ 83, quoting *State v. Jones*, 90 Ohio St.3d 403, 422, 739 N.E.2d 300 (2000). Again, even if the issue regarding the Snapchat testimony rose to the level of error, any such error was harmless. Hence, no cumulative error exists in this matter.

{¶70} Appellant's fourth assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT ERRED AND ACTED CONTRARY TO LAW IN IMPOSING CONSECUTIVE SENTENCES.

{¶71} Appellant argues that the trial court failed to make the requisite R.C. 2929.14(C)(4) findings when it imposed consecutive sentences. In addition to the absence of any findings pursuant to R.C. 2929.14(C)(4), Appellant argues that the trial court omitted any reference to R.C. 2929.14(C)(4).

{¶72} The state concedes the trial court's error.

{¶73} Pursuant to R.C. 2929.14(C)(4), before a trial court can impose consecutive sentences on a defendant, the court must find:

> [T]hat the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶74} A trial court must make the consecutive sentence findings at the sentencing hearing and must additionally incorporate the findings into the sentencing entry. *State v. Williams*, 2015-Ohio-4100, 43 N.E.3d 797, 806, ¶ 33-34 (7th Dist.), citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. The court is not required to

state reasons in support nor is it required to use any "magic" or "talismanic" words, so long as it is apparent that the court conducted the proper analysis. *Williams* at ¶ 34, citing *State v. Jones*, 7th Dist. No. 13 MA 101, 2014-Ohio-2248, ¶ 6; *State v. Verity*, 7th Dist. No. 12 MA 139, 2013-Ohio-1158, ¶ 28-29.

{¶75} The trial court ordered Appellant's aggravated murder sentence to run consecutively to his attempted murder sentence. However, both the sentencing hearing transcripts and sentencing entry are completely devoid of any reference to R.C. 2929.14(C)(4) or the requisite findings. As such, Appellant's fifth assignment of error has merit and is sustained.

Conclusion

{¶76} Appellant argues that his aggravated murder and attempted murder convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Appellant argues that Det. Lambert's testimony regarding the surveillance video violated the parties' stipulation. Appellant contends that he was denied a fair trial based on the cumulative nature of these errors. Appellant also argues that the trial court erroneously imposed consecutive sentences without making the requisite R.C. 2929.14(C)(4) findings. For the reasons provided, Appellant's arguments as to his convictions are without merit and the judgment of the trial court is affirmed. However, the trial court erred in sentencing and the matter is remanded for the limited purpose of addressing consecutive sentences.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first, second, third and fourth assignments of error are overruled and his fifth assignment is sustained. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. However, because the record reveals the trial court failed to consider the R.C. 2929.14(C) factors when it sentenced Appellant to consecutive prison terms, his sentence is vacated in part and this matter is hereby remanded to the trial court for the limited purpose of imposing consecutive sentences according to law and consistent with this Court's Opinion. Costs waived

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

NOTICE TO COUNSEL

This document constitutes a final judgment entry.