[Cite as *State v. Miller*, 2013-Ohio-1242.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-899 (C.P.C. No. 10CR-02-1075)
Kelly Miller,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 29, 2013

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Siewert & Gjostein Co., LPA, and *Thomas A. Gjostein*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Kelly Miller ("defendant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a jury verdict, of one count of murder, in violation of R.C. 2903.02 and two counts of aggravated arson, in violation of R.C. 2909.02. Because: (1) sufficient evidence and the manifest weight of the evidence support defendant's convictions; (2) defendant failed to establish actual prejudice resulting from the pre-indictment delay; and (3) the trial court did not abuse its discretion in denying defendant's motion to sever the joint trial, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On February 18, 2010, plaintiff-appellee, State of Ohio ("State"), filed a joint indictment against defendant and Craig Jewett, charging both men with one count of felonious assault, a felony of the second degree, three counts of murder, unclassified felonies, three counts of involuntary manslaughter, felonies of the first degree, one count of aggravated arson, a felony of the first degree, and one count of aggravated arson, a felony of the second degree. The first count of the indictment charged defendant only with one count of obstructing official business, a felony of the fifth degree. The events giving rise to the indictment occurred on April 20, 2002.

{¶ 3} In 2002, Jewett was married to an African-American woman known as Carmen. Carmen was also dating defendant. Despite the somewhat unusual relationship, Jewett and defendant were also good friends. Carmen, Jewett and defendant would all periodically stay at a homeless shelter in Columbus, Ohio. In 2002, Carmen began residing at 255 South Gift Street with a white male named John "Jack" Miller ("the victim"). Carmen would take care of the victim, who was overweight, blind, and not particularly mobile.

{¶ 4} On the afternoon of April 20, 2002, the Columbus Fire Department responded to a call of an individual experiencing a seizure at 255 South Gift Street. When the paramedics arrived, they found the victim and an African-American female on the porch of the residence. Although the victim claimed to have experienced a seizure, the victim appeared alert and orientated, atypical characteristics for an individual who recently experienced a seizure. The paramedics observed that the victim was anxious, near hyperventilating, sweating profusely, and in general "very unhealthy." (Tr. 345-46.)

{¶ 5} While the paramedics were treating the victim, a white male wearing jeans and a blue and white stripped shirt began yelling toward the house from the sidewalk, just beyond the fence of the property. A witness walking by noted the man, later identified as defendant, was "cussing and screaming at the paramedics." (Tr. 101.) The paramedics asked defendant to leave, sensing "there was going to be a confrontation between [them] trying to help th[e] patient and this gentlemen" yelling. (Tr. 59.) Defendant continued "yelling at the individual on the porch," causing the victim to

become "all worked up." (Tr. 336.) When defendant continued yelling and refused to leave, the paramedics called the police for assistance. As defendant left, he yelled "I'll be back," or "I'm going to get you." (Tr. 57.)

{¶ 6} Later that day, defendant and Jewett met up with their friend David McGowan. The men walked to a store, purchased some beer, and proceeded toward Dodge Park. On the way to the park, the men stopped at 255 South Gift Street to see if Carmen was home. When no one responded to their knock on the front door, defendant and Jewett walked around to the back door and entered the house. Defendant and Jewett opened the front door for McGowan. McGowan walked in, saw the victim sitting on the couch, and asked if Carmen was home. When the victim told McGowan Carmen was not home, McGowan exited the house and sat on the front porch. While defendant and Jewett were inside the house, McGowan heard the victim "halfway crying" and saying "I didn't do it, * * * [o]r, I'm sorry, something like that." (Tr. 517.) Defendant came to the front door and told McGowan "I think you should leave." (Tr. 518.) McGowan left and walked to the park where he met his friend Jason Jones. Shortly thereafter, McGowan and Jones saw black smoke rising over 255 South Gift Street.

{¶ 7} At 8:35 p.m., on April 20, 2002, the Columbus Fire Department responded to the report of a fire at 255 South Gift Street. After the firefighters entered the house, they discovered the victim's badly burnt body in the front room on the first floor. The fire investigator determined the fire originated in the front room, close to where the firefighters found the victim's body. A canine trained to detect ignitable liquids alerted to the presence of ignitable liquid in the house. After ruling out other possible causes of the fire, the investigator concluded that the cause of the fire was an ignitable liquid poured in the front room and ignited by human hands.

{¶ 8} While the firefighters addressed the fire, police officers attempted to control the crowd of spectators surrounding the house. A white female walked up to one of the officers and told the officer she knew who started the fire. The female pointed across the street to defendant and Jewett and said, "[t]hose are the two men that are walking." (Tr. 692.) The officers arrested defendant and Jewett and placed them in separate police vehicles. A firefighter who had responded to the seizure report earlier in

the day affirmed that defendant, still wearing the same blue and white stripped shirt, was the individual who had been yelling at the paramedics earlier in the day.

{¶ 9} The joint trial of defendant and Jewett began on April 11, 2011. Prior to the presentation of evidence, the State agreed to dismiss Count 1 of the indictment, obstructing official business, and Count 2 of the indictment, felonious assault. The State also dismissed the three counts for involuntary manslaughter during trial.

{¶ 10} On April 21, 2011, the jury returned verdicts finding defendant and Jewett each guilty of one count of murder and two counts of aggravated arson. The trial court sentenced defendant to a prison term of 15 years to life on the murder charge, 10 years on the first degree felony aggravated arson, and 8 years on the second degree felony aggravated arson. The judge ordered defendant to serve the prison terms concurrently.

II. ASSIGNMENTS OF ERROR

{¶ 11} Defendant appeals, assigning the following errors:

> [I.] APPELLANT'S CONVICTION WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION AND THE CONVICTION WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [II.] THE TRIAL COURT ERRED IN NOT RULING OR DENYING THE MOTION TO DISMISS BY THE DEFENDANT-APPELLANT MILLER ON THE CONSTITUTIONAL DUE PROCESS ISSUE FOR DELAY IN PROSECUTION OF THE CASE BETWEEN THE INCIDENT AND ARREST.
>
> [III.] THE TRIAL COURT ERRED IN OVERRULING AND DENYING THE DEFENDANT-APPELLANT'S MOTION FOR SEVERANCE OF TRIAL BETWEEN THE CODEFENDANTS IN THIS CASE.

III. FIRST ASSIGNMENT OF ERROR—SUFFICIENCY AND MANIFEST WEIGHT

{¶ 12} Defendant's first assignment of error asserts that neither sufficient evidence nor the manifest weight of the evidence support his convictions. While

defendant sets forth the appropriate legal standard for reviewing a criminal conviction on sufficiency and manifest weight grounds, defendant's arguments in support of his claims do not contain citations to the appropriate authorities, statutes, or parts of the record on which appellant relies, as required by App.R. 16(A)(7). Pursuant to App.R. 12(A)(2), an appellate court may disregard an assignment of error if the party raising the assignment of error fails to identify in the record the error on which the assignment of error is based. *See also State v. Williams*, 10th Dist. No. 02AP-507, 2003-Ohio-2694, ¶ 54. However, in the interests of justice, we have thoroughly reviewed the record before us and conclude that the evidence was sufficient to support defendant's convictions and that his convictions were not against the manifest weight of the evidence.

{¶ 13} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Conley*, 10th Dist. No. 93AP387 (Dec. 16, 1993). When reviewing the sufficiency of the evidence the court does not weigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79.

{¶ 14} The jury found defendant guilty of felony murder as defined in R.C. 2903.02(B), finding defendant caused the victim's death while committing or attempting to commit felonious assault. Felonious assault under R.C. 2903.11 prohibits any person from knowingly causing serious physical harm to another. The mens rea for felony murder is the intent that is required to commit the underlying predicate offense. *State v. Maynard*, 10th Dist. No. 11AP-697, 2012-Ohio-2946, ¶ 17, citing *State v. Walters*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶ 61. *See* R.C. 2901.22(B).

{¶ 15} The trial court instructed the jury that an indictment charging a defendant as a principal offender also charges the defendant with aiding and abetting that crime. Ohio's complicity statute provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: (2) Aid or abet another in committing the offense." R.C. 2923.03(A)(2). If one is guilty of complicity to

commit an offense, the state may prosecute and punish the individual as if they were a principal offender and may state the charge in terms of the principal offense. R.C. 2923.03(F).

{¶ 16} Defendant asserts the State's case was "one solely of circumstantial evidence," as there was no evidence linking him to the crime beyond his "mere presence" at 255 South Gift Street when McGowan left to walk to Dodge Park. Appellant's brief, at 5-6. "Under Ohio law, however, circumstantial evidence can have the same probative value as direct evidence, and '[a] conviction can be sustained based on circumstantial evidence alone.' " *State v. Fausnaugh*, 10th Dist. No. 11AP-842, 2012-Ohio-4414, ¶ 26, quoting *State v. Franklin*, 62 Ohio St.3d 118, 124 (1991), citing *State v. Nicely*, 39 Ohio St.3d 147, 154-55 (1988).

{¶ 17} The State's evidence indicated that defendant was acting "exceptionally aggressive" on the afternoon of April 20, 2002, yelling at the victim and threatening that he would "be back." (Tr. 354, 57.) Defendant, Jewett and McGowan went to the victim's house later that day. While McGowan sat on the porch, he heard the victim "halfway crying," saying "I didn't do it, I was[n't] the one who didn't accept the call." (Tr. 517-18.) McGowan also heard Jewett ask the victim in a "[k]ind of mean" tone why the victim did not accept Jewett's calls. (Tr. 524.) Defendant came to the door and told McGowan to leave "because he [didn't] think [McGowan] should be [t]here." (Tr. 519.) Shortly thereafter, the house was on fire. That night, the police apprehended defendant and Jewett walking together in the vicinity of 255 South Gift Street.

{¶ 18} The canine trained to detect ignitable liquid performed a "sniff lineup" on defendant and Jewett. The canine alerted to the presence of ignitable liquid on both men and the investigator collected defendant's and Jewett's clothing in order to test the clothing for ignitable liquids. The investigator noticed apparent blood stains on both men's jeans, and removed the stained portion of the jeans for DNA testing. Two of the three blood stains on defendant's jeans matched the victim's DNA, while one stain matched defendant's own DNA. All three blood stains from Jewett's jeans matched the victim's DNA.

{¶ 19} Approximately two weeks after the fire, Jones and McGowan saw defendant and Jewett walking together by the Scioto River in downtown Columbus.

When McGowan told defendant and Jewett that he "didn't have nothing to do with" the fire at 255 South Gift Street, defendant reassured McGowan that he knew McGowan was not involved with the crime. (Tr. 533.) Defendant told McGowan that, if McGowan were ever accused, defendant and Jewett "would take the blame." (Tr. 533.) Defendant told McGowan that Jewett had strangled the victim and set the house on fire. Jewett, who was present when defendant told McGowan these things, did not take exception or otherwise indicate that defendant was lying.

{¶ 20} Jones also testified about the riverfront meeting, explaining that Jewett confessed to strangling the victim and setting the house on fire. Jewett told Jones "[h]e didn't really mean to kill him," but "they set the fire to cover up the crime." (Tr. 903.) Jones stated that when Jewett was talking, defendant never disagreed with anything Jewett said.

{¶ 21} The State also presented the testimony of Michael Ostrander, Jewett's former co-worker, who testified that Jewett had told him about the case. Ostrander testified that Jewett said he went to 255 South Gift Street to get money from the victim, as Jewett used to take money from the victim to support Jewett's crack cocaine addiction. When the victim stood up and said he would not give Jewett the money, "Jewett hit the dude; and when he fell to the ground, he started kicking him." (Tr. 872.) When the victim was no longer moving, and Jewett had determined the victim did not have any money, "he set the house on fire and left the scene." (Tr. 872.)

{¶ 22} The coroner, Dr. Patrick Fardal, determined the victim did not die from the smoke caused by the fire, as the autopsy did not reveal soot in the victim's airway. Dr. Fardal discovered that the victim had a markedly enlarged heart, weighing 580 grams, and concluded the victim died of a cardiac arrest brought on by an arrhythmia, "an abnormal heartbeat, [or] an electrical conductivity that causes the heart to beat irregularly." (Tr. 425.) Due to the extent of the thermal injuries on the victim's body, Dr. Fardal was unable to identify any superficial injuries such as "a bruise or something from a strike, et cetera." (Tr. 411.) Dr. Fardal was able to detect "a minor injury" on the scalp where "there was a little bit of hemorrhaging," which occurred on or about the time of death. (Tr. 416.)

{¶ 23} Dr. Jacob Kolibash testified as an expert in cardiovascular medicine. He explained that there is "[a]lmost always" a predisposing event, such as physical or emotional stress, which causes an arrhythmia. (Tr. 667.) Dr. Kolibash opined that "[t]he stress imposed by the event that happened" at the time of the victim's death triggered the fatal arrhythmia. (Tr. 677.)

{¶ 24} The evidence thus circumstantially indicated that defendant and Jewett assaulted the victim: defendant, acting aggressively, threatened to return to 255 South Gift Street; defendant and Jewett were at the victim's residence later that day; McGowan heard the victim halfway crying and apologizing as Jewett spoke to him in a mean tone; defendant came out and told McGowan to leave; the coroner detected a minor injury on the victim's scalp; defendant and Jewett both had the victim's DNA on their clothing; and, defendant and Jewett were present together in the vicinity of 255 South Gift Street after the fire. Defendant told McGowan that Jewett had strangled the victim, and Jewett confessed to Jones and Ostrander that he had strangled and/or hit and kicked the victim.

{¶ 25} Accordingly, sufficient evidence supported the jury's conclusion that defendant caused the victim's death as a result of committing or attempting to commit felonious assault. A defendant's conduct is the proximate cause of a victim's injuries when the consequence was "foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by his conduct." *State v. Losey*, 23 Ohio App.3d 93, 96 (10th Dist.1985). A cardiac arrest falls within the scope of the risk created by defendant's and Jewett's conduct of assaulting an overweight, unhealthy, blind man. *See State v. Emch*, 6th Dist. No. L-99-1292 (Sept. 22, 2000) (finding the defendant proximately caused the victim's death where the victim, who suffered from severe heart disease, had a heart attack after the defendant crashed his vehicle into the victim's bedroom at 3:00 a.m.).

{¶ 26} Even if the evidence were construed as insufficient to convict defendant as the principal offender, defendant's presence with Jewett before and after the incident, and Jewett's confession to committing the crimes, permitted the jury to convict defendant as an aider or abettor. *See State v. Johnson*, 93 Ohio St.3d 240 (2001), paragraph one of the syllabus (holding that an aider or abettor must "share[] the

criminal intent of the principal"); *State v. Pruett*, 28 Ohio App.2d 29, 34 (4th Dist.1971) (noting that "[p]articipation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed").

{¶ 27} Defendant contends that the presence of the victim's blood on his jeans was not indicative of criminal conduct "given the testimony that Appellant was known to assist the victim with redressing his bandages for his cellulitis which often would seep blood from open lesions." Appellant's brief, at 5-6. Defendant does not provide a citation to the record to support this statement.

{¶ 28} The evidence indicated that the victim did suffer from cellulitis, a condition which may create open wounds where serum or blood may leak out, and that a doctor prescribed antibiotics to treat the cellulitis on March 22, 2002. One of the paramedics at the house during the afternoon noted that the victim's legs appeared "overly wet * * * like, either sweat or something beyond that," but confirmed it was not blood on the victim's legs. (Tr. 348.) Dr. Fardal explained that, while blood may contain DNA, serum which is a protein, will not contain DNA unless it comes into contact with other cells. McGowan testified that defendant would occasionally stay at 255 South Gift Street and that defendant probably "was helping [the victim] with things" when he stayed there. (Tr. 589.) McGowan also testified that the victim would wear bandages on his legs and that sometimes the victim's legs would bleed or leak. Viewing all of the evidence in a light most favorable to the State, the evidence of defendant's cellulitis does not alter the adequacy of the evidence noted above which supports defendant's murder conviction.

{¶ 29} Defendant's convictions for aggravated arson required the State to prove that defendant, by means of fire or explosion, knowingly "create[d] a substantial risk of serious physical harm to any person other than the offender," and that defendant "[c]ause[d] physical harm to any occupied structure." R.C. 2909.02. "Based upon the very nature of the crime, proof of arson must, of necessity, often rely heavily on circumstantial evidence." *State v. Weber*, 124 Ohio App.3d 451, 462 (10th Dist.1997), citing *State v. Pruiett*, 9th Dist. No. 12858 (Apr. 15, 1987).

{¶ 30} During the afternoon of April 20, 2002, while defendant was yelling at the victim, a witness walking down Gift Street heard defendant threaten to "come back and

burn this bitch down." (Tr. 102.) When the firefighters arrived later in the evening on April 20, 2002, there was heavy fire showing on the first floor of 255 South Gift Street, the flames were blowing 15 to 20 feet out the windows. A witness identified defendant as the individual who set the fire, explaining she saw "him come from the side of the house; and as soon as he came from the side of the house, the house went up in flames." (Tr. 693.) Defendant told McGowan that Jewett strangled the victim and set the fire, and Jones testified Jewett stated "they set the fire to cover up the crime." (Tr. 903.)

{¶ 31} When Officer Maselli placed defendant in his cruiser, there was the "immediate" and "overwhelming smell of gas[oline]." (Tr. 710.) The canine alerted to the presence of ignitable liquid on both defendant and Jewett, and alerted to the presence of ignitable liquid in the house. Forensic testing revealed gasoline in the debris from the house and on the shirts, jeans, socks, and shoes of both defendant and Jewett. Based on the foregoing, there was sufficient evidence to support the finding that defendant, by means of a fire ignited by gasoline, knowingly caused physical harm to the occupied structure at 255 South Gift Street. *See State v. Woogerd*, 10th Dist. No. 05AP-45, 2007-Ohio-1518, ¶ 26 (finding sufficient evidence to support aggravated arson conviction because "an ignitable fluid was used in setting the fire; [and] the presence of an ignitable fluid was found on defendant's clothing and shoes").

{¶ 32} Sufficient evidence also supported the jury's conclusion that defendant, by means of the fire, knowingly created a substantial risk of serious physical harm to another. Although the evidence indicated the victim died before the fire began, "[t]he statutory definition of 'substantial risk of serious physical harm' to any person [in R.C. 2909.02] includes the creation of such a risk to firefighters. *See* R.C. 2909.01(A) and (B)(1)(a)." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, ¶ 138.

{¶ 33} Lieutenant Clyde Williamson testified regarding the dangers firefighters face when entering a structure engulfed in flames. He noted that firefighters could breathe in poisonous smoke, or a "backdraft situation" could occur, where firefighters entering an enclosed room expose the fire therein to oxygen, creating "basically an explosion." (Tr. 117.) Lieutenant Williamson explained that the use of an accelerant such as gasoline creates additional risks, as the gasoline will cause the fire to burn hotter and faster. Gasoline may also seep into the flooring, causing the building "to be weak,

and at any time you could have a collapse." (Tr. 118.) Based on such testimony, there was sufficient evidence for the jury to conclude defendant would have been aware that, as a result of using gasoline to set a house on fire, emergency personnel would respond to the scene and enter the house to extinguish the fire, placing their own lives in great danger.

{¶ 34} Defendant asserts that the presence of gasoline on his clothing was insufficient to support the jury's verdicts because he "may have contributed to the lawn care at the residence of 255 Gift Street * * * thereby, causing him to be around lawn mowers with gas combustion engines." Appellant's brief, at 5. Defendant does not provide a citation to the record to support his contention, and the record does not support defendant's statement. Jewett's counsel asked Ostrander if Jewett ever stated that he mowed the lawn on the morning of April 20, 2002, Ostrander responded "No." (Tr. 888.) Prior to closing arguments, the State noted there had been no testimony indicating that either defendant mowed the lawn. The court noted it "remember[ed] several people being asked if they were told that somebody mowed the yard, and I think they all said, No." (Tr. 979.) Because there was no evidence that defendant contributed to the lawn care at the victim's house, that fact cannot support defendant's claim that his convictions were supported by insufficient evidence.

{¶ 35} Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *Thompkins* at 386. When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*, supra. *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). In the manifest weight analysis the appellate court considers the credibility of the witnesses and determines whether the jury "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). Determinations of credibility and weight of the testimony remain within the province of

the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 36} Regarding his manifest weight of the evidence claim, defendant simply "incorporates all of [his] arguments, supra, and finds that reasonable doubt existed on the guilty verdicts by the court." Appellant's brief, at 6-7. Defendant's arguments in support of his sufficiency claim fair no better under a manifest weight of the evidence analysis. As noted above, circumstantial evidence is sufficient to support a guilty verdict, and here the State presented compelling circumstantial evidence of defendant's guilt. The trial evidence does not support defendant's contention that he contributed to the lawn care at 255 South Gift Street.

{¶ 37} Although there was some evidence indicating that defendant may have helped care for the victim, there was no evidence indicating that defendant had recently changed the victim's bandages or that the victim's legs were seeping blood on the day of the incident. Moreover, the jury was free to weigh the evidence indicating that defendant may have changed the victim's bandages against the other evidence in the case indicating that defendant assaulted the victim, including defendant's aggressive conduct toward the victim during the afternoon and defendant's presence with Jewett at the victim's house before and after the incident.

{¶ 38} The jury was in the best position to judge the credibility of the witnesses and to resolve conflicts in their testimony. Engaging in the limited weighing of the evidence which we are permitted, we cannot say the jury clearly lost its way when it found defendant guilty of one count of murder and two counts of aggravated arson beyond a reasonable doubt. There was competent, credible evidence in the record to support the jury's verdicts. Defendant's first assignment of error is overruled.

IV. SECOND ASSIGNMENT OF ERROR—PRE-INDICTMENT DELAY

{¶ 39} Defendant's second assignment of error asserts the trial court erred by denying defendant's motion to dismiss for pre-indictment delay. While the events of this case occurred on April 20, 2002, the State did not file the indictment against defendant until February 18, 2010. Defendant filed a motion to dismiss the indictment

on October 12, 2010, alleging the delay between the offense and arrest was unnecessarily excessive and prejudicial. Prior to trial, defendant "acknowledged that he had gotten all the addresses he needed and the information that he needed and was withdrawing the motion to dismiss based upon the circumstances." (Tr. 11.)

{¶ 40} Accordingly, as defendant withdrew his motion to dismiss, defendant has forfeited all but plain error review. *See State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶ 22. Plain error is not present unless, but for the error complained of, the outcome would have been different. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 78, citing *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph two of the syllabus.

{¶ 41} "The constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution, as well as to unjustifiable delays after indictment." *State v. Meeker*, 26 Ohio St.2d 9 (1971), paragraph three of the syllabus. An unjustifiable delay between the commission of an offense and a defendant's indictment resulting in actual prejudice to the defendant, is a violation of the right to due process of law. *State v. Luck*, 15 Ohio St.3d 150 (1984), paragraph two of the syllabus. In *Luck*, the Supreme Court of Ohio adopted a two-part test to determine whether pre-indictment delay constitutes a due process violation. A defendant initially must produce evidence demonstrating the delay caused actual prejudice to his or her defense. *State v. Dennis*, 10th Dist. No. 05AP-1290, 2006-Ohio-5777, ¶ 19, citing *Luck* at 157-58. After a defendant establishes actual prejudice, the burden will shift to the state to produce evidence justifying the delay. *Id.*, citing *Luck* at 158. *See also State v. Whiting*, 84 Ohio St.3d 215, 217 (1998).

{¶ 42} "The determination of 'actual prejudice' involves 'a delicate judgment based on the circumstances of each case.' " *State v. Walls*, 96 Ohio St.3d 437 (2002), ¶ 52, quoting *United States v. Marion*, 404 U.S. 307, 325 (1971). Any claim of prejudice, "such as the death of witnesses, lost evidence, or faded memories, must be viewed in light of the state's reason for the delay to determine whether a defendant will suffer actual prejudice at trial." *Dennis* at ¶ 19, citing *State v. Weiser*, 10th Dist. No. 03AP-95, 2003-Ohio-7034, ¶ 38; *State v. Peoples*, 10th Dist. No. 02AP-945, 2003-Ohio-4680, ¶ 30. "Proof of actual prejudice must be specific, particularized, and non-speculative; a court will not speculate as to whether the delay somehow prejudiced a defendant." *Id.*,

citing *Peoples; Weiser*. "It is the defendant's burden to demonstrate the exculpatory value of the alleged missing evidence." *Peoples* at ¶ 30, citing *United States v. Doerr*, 886 F.2d 944 (7th Cir.1989).

{¶ 43} Defendant asserts the delay in bringing the indictment impaired his ability to mount a defense "since any other potential witnesses in his favor may have dried up and become unavailable over this inordinate and lengthy delay in the prosecution of this case." Appellant's brief, at 8-9. Defendant's contention that other "potential" witnesses "may have dried up" does not amount to the specific, particularized proof necessary to establish actual prejudice. Defendant does not attempt to explain who these potential witnesses were, what their testimony would have been, or how such alleged testimony would have been exculpatory. *See Dennis* at ¶ 20 (noting the defendant failed to establish actual prejudice where he did "not clarify how the testimony of his missing alibi witnesses would have been exculpatory in nature"); *State v. Bass*, 10th Dist. No. 02AP-547, 2003-Ohio-1642, ¶ 71, citing *State v. Woods*, 10th Dist. No. 87AP-736 (June 16, 1988), citing *United States v. Jenkins*, 701 F.2d 850 (10th Cir.1983) (noting "that the absence of witnesses is insufficient to constitute a showing of actual prejudice, rather, the defendant must be able to show in what specific manner missing witnesses would have aided his defense to establish actual prejudice").

{¶ 44} Moreover, the evidence supports the State's justification for the delay. The State asserts the delay was justified because "transient witnesses had to be located and interviewed before the State could seek an indictment." Appellee's brief, at 10. "[I]nvestigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused,' * * * precisely because investigative delay is not so one-sided." *United States v. Lovasco*, 431 U.S. 783, 795 (1977), quoting *Marion* at 324. A prosecutor abides by standards of fair play and decency if they refuse to seek an indictment until they are "completely satisfied that [they] should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *Id*.

{¶ 45} The fire investigator stated that any delay in bringing the charges was because a number of the witnesses were homeless and difficult to locate for questioning. McGowan and Jones, who were both homeless at the time of the events, were important

witnesses for the State to locate, as both testified that the Miller and Jewett confessed to the crimes.

{¶ 46} Based on the foregoing, defendant's second assignment of error is overruled.

V. THIRD ASSIGNMENT OF ERROR—SEVERANCE

{¶ 47} Defendant's third assignment of error asserts the trial court erred in overruling his motion for severance. Prior to trial, defendant moved to sever the joint trial and the court denied the motion. Defendant renewed the motion to sever prior to Ostrander's testimony, noting that Ostrander's testimony regarding Jewett's confession would potentially confuse the jurors "if they were to assume that these two were acting in concert or anything like that." (Tr. 829.) The State noted it had counseled Ostrander to testify only regarding what Jewett said Jewett had done, and not to mention any other individual. The trial court noted the defenses were not mutually antagonistic, and concluded that Ostrander could testify regarding what Jewett had said.

{¶ 48} Defendant asserts that, "[g]iven the circumstantial nature of this case," Ostrander's testimony served to inculpate and prejudice defendant. Appellant's brief, at 9. Relying on *Bruton v. United States*, 391 U.S. 123 (1968) and *Walters*, defendant asserts that his and Jewett's defenses were mutually antagonistic.

{¶ 49} Crim.R. 8(B) provides that two defendants may be jointly indicted and tried for a non-capital offense as long as " 'they are alleged to have participated in the same act or transaction * * * or in the same course of criminal conduct.' " *Walters* at ¶ 21, quoting *State v. Cotton*, 2d Dist. No. 15115 (Dec. 6, 1996). Pursuant to Crim.R. 14, however, "[i]f it appears that a defendant or the state is prejudiced by a joinder of * * * defendants * * * for trial * * *, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

{¶ 50} The law generally favors joinder of defendants and the avoidance of multiple trials. *Walters* at ¶ 21. Joinder of trials conserves judicial and prosecutorial time, lessens the expenses multiple trials entail, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries. *Id.*, quoting *State v. Daniels*, 92 Ohio App.3d 473 (1st Dist.1993), quoting *State v. Thomas*, 61 Ohio St.2d 223, 225 (1980). While judicial economy generally weighs in

favor of a trial court's decision to try defendants together, judicial economy does not outweigh a defendant's right to a fair trial. *Walters* at ¶ 30, citing *State v. Brown*, 2d Dist. No. CA 8560 (Oct. 11, 1985).

{¶ 51} A trial court errs in denying a defendant's motion for severance where a defendant establishes the following: (1) that the defendant's rights were prejudiced; (2) that at the time of the motion to sever defendant had provided the trial court with sufficient information so that the court could weigh the considerations favoring joinder against the defendant's right to a fair trial; and (3) that given the information provided to it, the court abused its discretion in refusing to separate the charges for trial. *Walters* at ¶ 22, quoting *State v. Schaim*, 65 Ohio St.3d 51, 59 (1992), citing *State v. Torres*, 66 Ohio St.2d 340 (1981), syllabus. A defendant may establish prejudice sufficient to warrant severance " 'when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant.' " *Walters* at ¶ 25, quoting *Zafiro v. United* States, 506 U.S. 534, 539 (1993). *See also State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶ 1, quoting *United States v. Castro*, 887 F.2d 988, 996 (9th Cir.1989) (noting a trial court abuses its discretion in deciding not to sever a joint trial when a defendant presents clear, manifest and undue prejudice and a violation of a substantive right resulting from the failure to sever). Defendants, however, " 'are not entitled to severance merely because they have a better chance of acquittal in separate trials.' " *Walters* at ¶ 38, quoting *Zafiro* at 540.

{¶ 52} Defendant asserts that his and Jewett's defenses were mutually antagonistic. "Defenses are mutually antagonistic where each defendant attempts to exculpate himself and inculpate his co-defendant." *Walters* at ¶ 23, citing *Daniels* at 486. Mutually antagonistic defenses must be antagonistic to "the point of being irreconcilable and mutually exclusive," thus the "essence or core of the defenses must be in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." *Walters* at ¶ 23, citing *United States v. Berkowitz*, 662 F.2d 1127, 1133-34 (5th Cir.1981). While antagonistic defenses may prejudice co-defendants to such a degree that they are denied a fair trial, " '[m]utually antagonistic defenses are not prejudicial *per se*.' " *Walters* at ¶ 24, quoting *Daniels*;

Zafiro at 538. Even if defendants present mutually antagonistic defenses, a trial court should grant severance under Crim.R. 14 only " 'if there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' " *Walters* at ¶ 24, quoting *Zafiro* at 539.

{¶ 53} The record does not support defendant's claim that his and Jewett's defenses were mutually antagonistic. Neither co-defendant attempted to exculpate themselves while inculpating the other. Both defendant and Jewett defended the case by alleging that the State's evidence was insufficient to support guilty verdicts on the charged offenses. *See Daniels*, supra at 486 (noting the record in that case did not indicate that the defendants intended to raise antagonistic defenses, as "defendants maintained that they had nothing to do with the killing of Foster"). While each defendant may have attempted to shift blame off of themselves and onto their co-defendant, such attempts are not grounds for severance based on mutually antagonistic defenses. *See Walters* at ¶ 39, quoting *State v. Bunch*, 7th Dist. No. 02 CA 196, 2005-Ohio-3309, ¶ 43, citing *United States v. Pena-Lora*, 225 F.3d 17, 33 (1st Cir.2000) (noting that mere " 'finger pointing between co-defendants, i.e., the familiar "he did, not I" defense, normally is not a sufficient ground for severance based upon mutually antagonistic defenses' "). Moreover, defendant did not seek severance on the basis of mutually antagonistic defenses; accordingly, defendant did not provide the trial court with sufficient information for it to determine whether the defenses were so antagonistic as to deny defendant a fair trial. *See Walters* at ¶ 22.

{¶ 54} Defendant's reliance on *Bruton* is similarly misplaced. In *Bruton*, the United States Supreme Court held that the admission of a non-testifying co-defendant's confession, expressly implicating the defendant, violated the defendant's Sixth Amendment right to confront the witnesses against him. *Id.* at 126. The court concluded that a limiting instruction, instructing the jury to admit the confession as against the co-defendant but disregard the statement as against the defendant, was not "an adequate substitute for petitioner's constitutional right of cross-examination." *Id.* at 137.

{¶ 55} Defendant contends that Ostrander's testimony prejudiced him because Jewett's confession "in effect, incriminated Appellant by the unfair inference that Appellant was likely a participant in the crime charged by his mere presence with the Co-Defendant before and after the incident." Appellant's brief, at 9. Ostrander testified that Jewett confessed to hitting and kicking the victim and setting the house on fire; Ostrander did not mention defendant in his testimony. Ostrander's testimony thus did not facially implicate defendant, and implicated defendant in the crimes only when linked with other evidence.

{¶ 56} In *Richardson v. Marsh*, 481 U.S. 200 (1987), the Supreme Court clarified *Bruton*'s holding by rejecting the "contextual implication" doctrine, which would have allowed a court to bar the use of a co-defendant's confession in a joint trial if the confession, though not facially incriminating, had inculpatory value when linked with other evidence from the trial. The Supreme Court concluded that "evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce." *Id.* at 208. When a co-defendant's confession is redacted to omit any reference to defendant, such that the confession becomes incriminating only when linked with other evidence, the jury is more likely to "obey the instruction to disregard the evidence." *Id.*

{¶ 57} Thus, "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211. *See also In re Watson*, 47 Ohio St.3d 86 (1989), paragraph two of the syllabus (approving and following *Richardson*). Ostrander's testimony was limited to repeating only what Jewett said that Jewett had done; Ostrander did not mention defendant's name or indicate that defendant played any role in the incident. Although at one point in his testimony Ostrander used the plural "they" instead of the singular "he," the trial court instructed the jury that while "there was some talk about he and they," the jury was to "note that Mr. Ostrander was testifying about what Mr. Jewett allegedly did and not what anyone else allegedly did." (Tr. 892.)

{¶ 58} The court also instructed the jury to "consider and determine each of the defendants' verdicts separately," and that "[e]ither, both or neither of the defendants

c[ould] be found guilty, or not guilty, of each count of the indictment." (Tr. 1078.) The court provided the jurors with separate verdict forms for each defendant. Accordingly, because Ostrander's testimony was limited to stating only what Jewett had done, and did not refer to defendant, Ostrander's testimony became prejudicial, if at all, only when linked with other evidence. Ostrander was accordingly not a "witness against" defendant under the Confrontation Clause. There is no reason to believe the jury was incapable of following the court's limiting instruction.

{¶ 59} Based on the foregoing, the trial court did not abuse its discretion in denying defendant's motions to sever the joint trial. Defendant's third assignment of error is overruled.

{¶ 60} Having overruled defendant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, P.J, and TYACK, J., concur.

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