[Cite as *State v. McFarland*, 2018-Ohio-2067.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105570

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHEILA A. McFARLAND

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-604052-B

BEFORE: Jones, J., Stewart, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: May 24, 2018

ATTORNEYS FOR APPELLANT

Mark Stanton
Cuyahoga County Pubic Defender

BY: Jeffrey Gamso
Paul Kuzmins
Cuyahoga County Public Defenders
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

BY: Anna M. Faraglia
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, SR., J.:

{¶1} In this appeal, defendant-appellant Sheila McFarland ("McFarland") challenges her convictions, which were rendered after a jury trial, for several crimes that stemmed from the murder of Robert Williams. McFarland also challenges her sentence of life without the possibility of parole. For the reasons that follow, we affirm the convictions, but remand for merger of the kidnapping count with the aggravated murder count and resentencing after the state makes its election on which count to proceed.

I. Procedural and Factual History

General Background

{¶2} The victim, Robert Williams ("Williams"), lived in the Indian Hills Apartments in Euclid, Ohio, with his girlfriend Korri Henderson ("Henderson").

{¶3} During the relevant time period, the Euclid police department received numerous complaints about drug activity in and around the apartment complex. In September 2015, the police conducted a series of controlled buys from Williams in the complex's parking lots. Thereafter, the police obtained a search warrant for Williams's apartment unit. Upon execution of the warrant, the police discovered crack cocaine in Williams's apartment, and Williams and Henderson were arrested.

{¶4} After their arrest, Williams and Henderson informed the police that their supplier was codefendant Eddie Brownlee ("Brownlee"), a.k.a., "Man," and his girlfriend, appellant. Williams and Henderson agreed to become confidential informants to help the police arrest Brownlee and appellant. The police set up electronic surveillance in Williams's and Henderson's apartment, and used Williams to engage in controlled buys from Brownlee. On October 22, 2015, Brownlee and appellant were arrested during one of the controlled buys. Appellant was released from jail October 23, 2015; Brownlee remained in jail.

{¶5} While in jail, Brownlee made calls to appellant, that were recorded. During one of the calls, appellant was with Brownlee's friend, codefendant Ryan Motley ("Motley"), a.k.a., "Chop." It was undisputed that Motley was the person who fired the deadly shots at Williams. During the call, Brownlee told appellant and Motley that he suspected Williams had "snitched" on him to the police and set up the controlled buy that led to Brownlee's arrest.

{¶6} After the call, Motley and appellant went to a hotel room where appellant and Brownlee had been staying to clear out the drugs so that they would avoid further charges.

Motley also recovered Brownlee's pistol from under a mattress. Motley informed both appellant and Brownlee that he had the pistol; Brownlee told Motley to "get Rob. Get those motherf***ers," and told him "I need you to handle this." Appellant told Brownlee that she and Motley were "about to do that one thing now." According to Motley, who testified at appellant's trial, the reference to what they were about to do was to look into retaining a lawyer for Brownlee.

{¶7} Thereafter, appellant convinced Motley that they needed to sell drugs so that they could get money to post Brownlee's bail. They raised the funds, and on November 10, 2015, appellant posted Brownlee's bail and he was released from jail.

{¶8} After his release from jail, Brownlee continued to express his belief that Williams was a snitch. To that end, Brownlee instructed Motley to physically hurt Williams. Brownlee also called Williams and told him that he (Williams) and Henderson were going to "see their graves."

Another Drug Dealer at Indian Hills Complex

{¶9} In addition to Williams and Henderson, the Euclid police were also interested in the activities of Dwayne Jackson ("Jackson"), who was engaging in drug transactions in and around Indian Hills. Brownlee was also Jackson's supplier. According to Jackson, who testified at trial, when he needed drugs he would call Brownlee's number and either Brownlee or appellant would answer. On November 12, 2015, appellant and Brownlee dropped crack cocaine off to him at his house. Jackson testified that appellant told him that "Rob" was snitching and to watch out for him.

Henderson Calls Police

{¶10} On November 13, 2015, the evening following appellant and Brownlee's

interaction with Jackson, Henderson called the Euclid police to report that she and Williams had been receiving threatening phone calls stating that Brownlee "was coming for them." She testified that she also saw a truck drive onto the parking lot in front of their building and the occupants of the truck watched her and Williams's apartment unit.

{¶11} The responding officer testified that Henderson was nervous and told him that the threats came from "Man," which, as mentioned, was Brownlee's nickname. After telling the officer that she and Williams were informants for the Euclid police department, the officer recommended that she and Williams stay some place other than their apartment for the evening. The two left the apartment for a period of time, but eventually returned that evening or the following morning.

Tape Over Peephole

{¶12} The following morning, November 14, 2015, a neighbor of Williams's and Henderson's discovered from a visitor to her apartment that masking tape had been placed over the peephole on the front door of her apartment unit. The visitor took the tape off and left it in his friend's apartment. The police recovered the tape and a latent fingerprint was recovered from it. The DNA profile recovered from it was a match to codefendant Raymond Motley, codefendant Ryan Motley's brother.

The Murder: November 14, 2015

{¶13} Williams was murdered the same morning as the neighbor found out there was masking tape over her peephole, November 14, 2015. On that morning Motley, his brother Raymond Motley, and a friend, Rahkee Young, drove to Indian Hills. Motley wore a "hoodie" with a mask and gloves.

{¶14} Upon arriving at the complex, all three entered the building and waited in the

second-floor stairwell. When they heard Williams leave his apartment, Motley ran towards him; Williams turned around. Motley then pulled out a pistol and Williams began to approach him. Motley fired, hitting Williams in his chest. Motley, his brother and their friend fled the scene. Motley disposed of the gun.

{¶15} Henderson, who heard the gunshot, called the police. Euclid police responded to the scene. Henderson told the police "they killed him, they killed him." She explained to the police that she and Williams had been receiving threats from "Man and Sheila" and she knew appellant because Williams bought cocaine from Brownlee.

{¶16} The police obtained cell phone records for Motley's cell phone and learned that a call had been placed from the phone a few minutes before the murder and a few minutes after the murder. Law enforcement also analyzed records of Brownlee's cell phone. They discovered that a call had been made from Brownlee's number to Williams's number in the very early morning hours of the day of the murder, and that Brownlee's number was blocked so that Williams could not see the caller. The call was made in the general vicinity of the Indian Hills complex. Law enforcement also determined that the calls made from Motley's cell phone just before and after the murder were made in the general vicinity of the Indian Hills complex.

Indictment and State's Theory of the Case

{¶17} In March 2016, the state indicted Ryan Motley, Eddie Brownlee, Raymond Motley, Rahkee Young, and appellant Sheila McFarland. They were charged as follows: Counts 1 and 2, aggravated murder; Count 3, conspiracy; Counts 4 and 5, murder; Counts 6 and 7, felonious assault; Counts 8 and 9, aggravated burglary; and Count 10, kidnapping. All counts contained one- and three-year firearm specifications.

{¶18} It was undisputed that Ryan Motley fired the fatal shot at Williams. It was also

undisputed that appellant was not present when the shooting occurred. The state's theory of the case was that appellant was a member of a conspiracy, who was involved in Brownlee's drug dealings and conspired with Brownlee to cause physical harm to Williams.

{¶19} Ryan Motley, Raymond Motley, and Rahkee Young accepted plea agreements and testified against Brownlee at trial. Ryan Motley testified for the state at appellant's trial.

Verdict and Sentence

{¶20} After its deliberations, the jury found appellant guilty on all counts and specifications. The trial court merged Counts 1, 2, 4, 5, 6, and 7 (aggravated murder, murder, and felonious assault) for the purpose of sentencing. The state elected to proceed on Count 1, aggravated murder, and the trial court sentenced appellant to life without the possibility of parole, with three years for the firearm specification.

{¶21} The trial court sentenced appellant to 11 years on Count 3, conspiracy. The court merged Counts 8 and 9 (aggravated burglary), and sentenced appellant to 11 years. The trial court further sentenced appellant to 11 years on Count 10, kidnapping. The court ordered the sentences on the counts to be served concurrent.[1]

II. Assignments of Error

{¶22} Appellant now appeals, raising the following assignments of error for our review:[2]

> I. The trial court committed prejudicial error and denied Ms. McFarland her right to a fair trial, to present a defense, to confront witnesses against her, and to due process of law when it improperly refused to allow Dwayne Jackson to answer a question about whether his testimony was directed by the prosecution

[1]After a jury trial, Brownlee was found guilty of aggravated murder, murder, felonious assault and kidnapping. The trial court sentenced him to a 33-year sentence, to be served prior to a sentence of life without the possibility of parole.

[2]Appellant raised five assignments of error in her initial brief. She filed a supplemental brief, raising two more assignments of error, which we have renumbered as assignments of error six and seven.

and then, sua sponte, disparaged defense counsel and implicitly indicated to the jury not only that the question was improper but that unlike defense counsel the prosecutor's behavior was above reproach.

II. The evidence was insufficient to support the guilty verdicts.

III. The guilty verdicts were not supported by the manifest weight of the evidence.

IV. The trial court committed error when it convicted Ms. McFarland of aggravated murder, conspiracy, aggravated burglary, and kidnapping when they are all allied offenses of similar import.

V. The trial court imposed a sentence of life without the possibility of parole not because it was the appropriate sentence for Ms. McFarland's crimes but to punish her for her obstreperous behavior at the sentencing hearing.

VI. The trial court committed error when it did not instruct the jury that the testimony of Ryan Motley and Dwayne Jackson was "subject to grave suspicion" and should be "weighed with great caution." R.C. 2923.03(D).

VII. Ms. McFarland received constitutionally ineffective assistance of counsel when her attorneys neither asked the court to give the jury the accomplice testimony instruction required by R.C. 2923.03(D) nor objected to the court's failure to give that instruction.

III. Law and Analysis

Right to a Fair Trial; Right to Confront Witnesses; Trial Court Bias

{¶23} Dwayne Jackson, another person of interest to the Euclid police department relative to drug dealings at Indian Hills, testified for the state at trial. Jackson was arrested the day before Williams's murder. He testified that a couple of days before the murder, Brownlee and appellant were at his house because Brownlee, his supplier, was delivering drugs to him.

{¶24} According to Jackson, appellant told him that Williams was snitching, and that he (Jackson) should "watch out for him." Defense counsel attempted to get Jackson to admit that it was Brownlee, rather than appellant, who told Jackson about Williams. Jackson maintained that it was appellant, however. The following exchange then occurred:

> Defense counsel: All right. Well, the prosecutor told you to tell us that.
>
> Prosecutor: Objection, Your Honor.
>
> The court: Yeah, I'm going to sustain that big objection there * * *. If I was the referee of a football game, I would throw the flag for unnecessary roughness.

{¶25} In her first assignment of error, appellant contends that the trial court's "refusal to allow an answer" prohibited the defense from pursuing Jackson's credibility.[3] According to appellant, the trial court should have first determined whether defense counsel had a good-faith basis for asking the question before it "arbitrarily denied the defense the right to confront and cross-examine the state's witness on exactly the matter for which he was called to testify." Further, appellant contends that the trial court "attacked the question" and "disparaged" counsel for asking it, which "told the jury that the defense was out of line even to raise the question of whether the prosecutors might have committed a form of misconduct affecting the witness's testimony." Appellant relies in large part on *Wade v. Ohio*, 53 Ohio St.2d 182, 373 N.E.2d 1244 (1978), *vacated on other grounds*, *Wade v. Ohio*, 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157 (1978), in support of her contentions.

{¶26} In *Wade*, the Ohio Supreme Court stated that courts should adhere to the following rules in determining whether a trial court's remarks were prejudicial:

> (1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel.

Wade, 53 Ohio St.2d at 188, 373 N.E.2d 1244.

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[3]Appellant is not seeking removal of the trial judge, and acknowledges that if she were, her remedy under R.C. 2701.03(A) would be to file an affidavit of disqualification with the Ohio Supreme Court.

{¶27} Thus, *Wade* requires that a trial judge's remarks be taken in context to determine if any prejudice occurred. We note that here defense counsel was cross-examining Jackson. Rather than ask Jackson a question, defense counsel made a statement; appellant has not indicated that the statement was supported by anything in the record, and our review of the record does not show that it was. "The attempt to communicate by innuendo through the questioning of witnesses when the questioner has no evidence to support the innuendo is improper." *State v. Gillard*, 40 Ohio St.3d 226, 230, 533 N.E.2d 272 (1988).

{¶28} Further, we find that appellant has failed to sustain her burden to demonstrate that the court's statement had any effect on the jury or impaired defense counsel. On this record, the first assignment of error is without merit and overruled.

Sufficiency of the Evidence

{¶29} In her second assignment of error, appellant contends that the state failed to present sufficient evidence to sustain her convictions.

{¶30} A claim of sufficiency of the evidence raises a due process question concerning whether the evidence is legally sufficient to support the verdict as a matter of law. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 219, citing *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). "On review of the sufficiency of the evidence to support a criminal conviction, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 34, quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶31} As mentioned, the state's theory of its case against appellant was that she was a

member of a conspiracy. Appellant contends that "there is no evidence of any of the overt acts necessary to support the conspiracy charge."

{¶32} This court has followed the rule set forth by the United States Supreme Court in *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed 1489 (1946), in regard to determining whether an individual can be held responsible as a conspirator. *See State v. Ephraim*, 178 Ohio App.3d 439, 2008-Ohio-4576, 898 N.E.2d 974 (8th Dist.). In *Pinkerton*, the court held that when an individual enters into a conspiracy, a substantive act by one conspirator, in furtherance of the purpose of the conspiracy, is attributable to the others for the purpose of holding them responsible for the substantive offense. *Id.* at 646-647.

{¶33} In *Ephraim*, this court followed *Pinkerton*, holding that if an individual enters into a conspiracy, he or she is not only guilty of the conspiracy, but he or she is "also vicariously guilty of the object crimes committed in furtherance of the conspiracy by any of the other conspirators." *Ephraim* at ¶ 43.

{¶34} Upon review, the state presented sufficient evidence that, if believed, supported the convictions. Ryan Motley, Henderson, and Jackson all testified about appellant's involvement with Brownlee's drug dealings. The state presented testimony through a police officer that appellant was present and took part in calls Brownlee made from jail about causing physical harm to Williams. Appellant also was involved in selling drugs to raise the funds necessary to post Brownlee's bail. It is true that appellant was not there for the shooting, but based on *Pinkerton* and *Ephraim*, the state presented sufficient evidence that she conspired to cause physical harm to Williams.

{¶35} In light of the above, the second assignment of error is overruled.

Manifest Weight of the Evidence

{¶36} For her third assignment of error, appellant contends that her convictions are against the manifest weight of the evidence.

{¶37} A reviewing court considering a manifest-weight claim "review[s] the entire record, weighs the evidence and all reasonable inferences, [and] considers the credibility of witnesses." *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983). The question for the reviewing court is

> whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against conviction.

Id.; *see also Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541.

{¶38} Although the appellate court acts as a thirteenth juror, it still must give due deference to the findings made by the jury.

> The fact-finder, being the jury, occupies a superior position in determining credibility. The fact-finder can hear and see as well as observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and the examiner, and watch the witness' reaction to exhibits and the like. Determining credibility from a sterile transcript is a Herculean endeavor. A reviewing court must, therefore, accord due deference to the credibility determinations made by the fact-finder.

State v. Thompson, 127 Ohio App.3d 511, 529, 713 N.E.2d 456 (8th Dist.1998).

{¶39} Appellant reiterates her arguments made in her sufficiency assignment of error relative to the state failing to establish that she was a conspirator. For the reasons already discussed, we find that the jury did not clearly lose its way in this case. In sum, Brownlee was recorded in a phone calls discussing harming Williams, and appellant participated in the calls. She was also present during a meeting between Brownlee and Motley where violence against Williams was discussed. And Jackson testified that appellant told him that Williams was a

snitch and he needed to watch out for him. Appellant never withdrew herself from the activities of the other defendants, so as to abandon her part in the conspiracy. Rather, the evidence demonstrates that she took an active role throughout with the other conspirators.

{¶40} In light of the above, the third assignment of error is overruled.

Merger

{¶41} As mentioned, the trial court merged several counts for the purpose of sentencing. It did not merge the conspiracy and kidnapping into any of the other counts, however. Appellant now contends in her fourth assignment of error that those two counts should have merged into the other counts.

{¶42} R.C. 2941.25, the allied offenses statute, codifies the constitutional right against double jeopardy, thus prohibiting multiple punishments for the same offense. *State v. Robinson*, 8th Dist. Cuyahoga No. 99917, 2014-Ohio-2973, ¶ 53, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. The statute provides when multiple punishments can and cannot be imposed:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

R.C. 2941.25; *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 12.

{¶43} In *Ruff*, the Ohio Supreme Court explained that when a defendant's conduct constitutes a single offense, the defendant may only be convicted and sentenced for that offense. *Id.* at ¶ 24. However, when the conduct "supports more than one offense, the court must determine whether the offenses merge or whether the defendant may be convicted of separate offenses." *Id.*

{¶44} To make this determination, the trial court must necessarily consider the defendant's conduct, specifically considering "how were the offenses committed." *Id.* at ¶ 25. In making this determination, the court must evaluate the defendant's conduct, his or her animus, and the import of the offenses:

> As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation?

Id. at ¶ 31. If the answer is "yes" to any of the above, the defendant may be convicted of all of the offenses separately. *Id.*

{¶45} We initially note that the failure to merge the counts appellant complains of was not raised below, so we review for plain error. *See State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. As such, appellant has the "burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus[.]" *Id.*

{¶46} The state concedes that the kidnapping and aggravated murder should have merged for sentencing, and we accept the state's concession. *See State v. Brownlee*, 8th Dist. Cuyahoga

No. 105116, 2018-Ohio-739, ¶ 42. And as noted in *Brownlee*, the error was not harmless because "'[i]mposing separate sentences for allied offenses of similar import is contrary to law and such sentences are void.'" *Id.*, quoting *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 2. As we did in *Brownlee*, we remand the case so that the state can elect which count it wishes to proceed with for sentencing. *See Brownlee* at *id.*

{¶47} We are not persuaded, however, with appellant's contention that the conspiracy count should have merged with the aggravated murder, murder, and felonious assault counts. The actions and animus involved in the conspiracy were separate from the actual shooting of Williams. Further, the aggravated burglary counts (Counts 8 and 9) were properly merged with each other, but were not subject to merger with the aggravated murder, murder, and felonious assault counts. The aggravated burglary occurred when the defendants entered the apartment complex with the intent to harm Williams — it was a separate act from the shooting of Williams.

{¶48} In light of the above, appellant's fourth assignment of error is affirmed in part and overruled in part.

Vindictive Sentence

{¶49} In her fifth assignment of error, appellant challenges her sentence on the ground that it was a vindictive sentence, meant to punish her for her "obstreperous" behavior at sentencing.

{¶50} "The U.S. Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), 'created a presumption of judicial vindictiveness that applies when a judge imposes a more severe sentence upon a defendant.'" *State v. Rammel*, 2d Dist. Montgomery Nos. 25899 and 25900, 2015-Ohio-2715, ¶ 19, quoting *Plumley v. Austin*, ___U.S. ___ , 135 S.Ct. 828, 190 L.Ed.2d 923 (2015) (Thomas, J., dissenting). The presumption of

vindictiveness does not apply, however, every time a defendant receives a higher sentence. *Rammel* at ¶ 20, citing *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). The presumption applies only when circumstances are such that there exists a "reasonable likelihood" the increased sentence is the product of actual vindictiveness on the part of the sentencing judge. *Smith* at 799, citing *United States v. Goodwin*, 457 U.S. 368, 373, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982).

{¶51} At the sentencing hearing, appellant (1) interrupted a statement by representative of the victim to maintain her innocence; (2) interrupted the trial court judge to maintain her innocence; and (3) denied an opportunity for allocution. In her remarks to the trial court judge, appellant maintained that the cases (this case and the drug case) were "rigged," and that she was the victim of a "racist" judicial system.

{¶52} In response, the trial court judge stated the following:

> So twice you were given the opportunity to enter into a guilty plea, accept responsibility, demonstrate some remorse. In both instances you refused to do that. You wouldn't testify against Eddie Brownlee, and you took your case to trial. And when there was a plea bargain offer just before trial, you rejected it. When there was a plea bargain offer when the jury was deliberating you rejected it because, apparently, your attorneys told me that you, quote, made your peace with God, closed quote. Well, now you have to make your peace with the state of Ohio. Okay?

{¶53} The trial court judge further stated,

> So maybe you should have testified and told the jury that story because they could have told you exactly what I'm going to tell you [—] I don't believe you. Words have meaning. I heard what you said. I know what the intent was * * *.
>
> People who, once they do get indicted for obvious crimes that they know they are going to get busted for, and then they get arrested and * * * they're so self-destructive that they continue to exhibit [appellant's] attitude.
>
> * * *

> And, [appellant], you are the most obnoxious outspoken one of the defendants. You're even worse than Eddie Brownlee. And as such, I'm going to hand down the penalty that I want to ring out across the state of Ohio and across this country. And it goes something like this. When you try to flip the script, when you play the race card in a disgusting fashion, but, most importantly, when you manipulate the system of justice by murdering a witness in a criminal trial, you will pay for it with the harshest possible penalty.

{¶54} As this court found in the codefendant's case, *Brownlee*, 8th Dist. Cuyahoga No. 105116, 2018-Ohio-739, the court "pushed hard for a plea bargain and was annoyed that Brownlee refused to accept one." *Id.* at ¶ 51. This court stated that "[v]iewed in isolation, the consecutive, maximum sentences might be viewed as vindictive." *Id.* But this court held that the court's "comments cannot be read in isolation from other remarks it made at sentencing * * *." *Id.* at ¶ 51. "Had the court said nothing about the plea, the murder of a police informant for the purpose of avoiding a drug trafficking prosecution would, by itself, justify a maximum sentence in this case." *Id.* at ¶ 52. Thus, this court concluded that it could not "clearly and convincingly conclude that Brownlee's sentence was the product of actual vindictiveness for his refusing to accept the state's plea offer."

{¶55} After careful review of this record, we find that appellant has not carried her burden of demonstrating that her sentence was punishment for the exercise of her constitutional right to a trial, or for her behavior at sentencing. The record shows that the court mentioned the plea offers that the state had presented to appellant, wherein the state sought to have her testify against Brownlee, not because it was punishing her for not accepting the offers, but in response to appellant's arguing with the court about the facts of the case.

{¶56} And, while yes, the court was upset with appellant's charge of racism, the court also made it clear, as in *Brownlee*, that its sentence was imposed because appellant and the other defendants murdered a confidential informant in a drug case.

{¶57} Thus, in light of the above, the fifth assignment of error is overruled.

Accomplice Testimony Instruction and Ineffective Assistance of Counsel

{¶58} In her sixth and seventh assignments of error, appellant contends that the trial court committed plain error by not instructing the jury that the testimony of Ryan Motley and Dwayne Jackson was "subject to grave suspicion" and should be "weighed with great caution."

{¶59} We first note that appellant contends that the instruction should have been given under R.C. 2923.03(D), which governs complicity. But appellant was charged under R.C. 2923.01, which governs conspiracy. However, the conspiracy statute contains a jury instruction that mirrors the language of the complicity statute. Specifically, under R.C. 2923.01(H)(2), a trial court is charged to substantially instruct the jury when a coconspirator testifies as follows:

> The testimony of an accomplice that is supported by other evidence does not become inadmissible because of the accomplice's complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect the witness' credibility and make the witness' testimony subject to grave suspicion, and require that it be weighed with great caution. It is for you, as jurors, in light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.

{¶60} Defense counsel did not request the instruction or object to the lack of it and, therefore, we review for plain error. *See State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 131. Plain error exists only if the "outcome of the trial clearly would have been otherwise." *State v. Long*, 53 Ohio St.2d 91, 93, 372 N.E.2d 804 (1978), paragraph two of the syllabus; Crim.R. 52(B).

{¶61} In regard to appellant's contention that the instruction should have been given as to Dwayne Jackson's testimony, he was not an accomplice to the crimes at issue here. Therefore, the instruction was completely inapplicable to his testimony.

{¶62} In regard to appellant's contention as it relates to Ryan Motley's testimony,

appellant relies on *State v. Simpson*, 9th Dist. Summit No. 25363, 2011-Ohio-2771. Brownlee raised this same issue in his appeal, which this court rejected, and for the same reasons, we again reject the argument in this case.

> Brownlee cites *State v. Simpson*, 9th Dist. Summit No. 25363, 2011-Ohio-2771, as authority for the proposition that the court's failure to give the R.C. 2923.03(D) accomplice instruction is plain error. It is more accurate, however, to say under the facts of that case that the failure to give the instruction was plain error because the accomplice's testimony widely differed from statements he gave the police and there was a lack of corroborating evidence. *Id.* at ¶ 29. In this case, we cannot clearly say that giving the accomplice instruction would have altered the outcome of trial. The jury knew the terms of Motley's plea deal (he would receive 18 years to life in prison). He was subject to extensive cross-examination and defense counsel spent a considerable amount of time in closing argument challenging Motley's credibility. In addition, the court instructed the jury to "consider the interest or bias the witness has in the outcome of the verdict * * *." That instruction, while admittedly not as specific as an accomplice instruction, nonetheless provided an avenue for the jury to assess Motley's credibility. Given these circumstances, we think it unlikely that an instruction that the jury view Motley's credibility with grave suspicion could have changed how the jury viewed his testimony.

Brownlee, 8th Dist. Cuyahoga No. 105116, 2018-Ohio-739, ¶ 18.

{¶63} Likewise, here, the trial court instructed the jury about assessing the credibility of all of the witnesses, the jury knew the terms of Motley's plea deal, and defense counsel subjected Motley to extensive cross-examination. On this record, we do not find that the outcome of the trial clearly would have been different had the instruction been given.

{¶64} Thus, the sixth assignment of error is overruled.

{¶65} For the reasons set forth above in resolving the sixth assignment of error, we also find no merit to appellant's contention that counsel was ineffective for failing to request the instruction or object to the lack of it. Again, we fail to see how the outcome would have been

different, a requirement for an ineffective assistance of counsel claim.[4] *See also Brownlee* at ¶ 21, finding no merit to Brownlee's claim of ineffective assistance of counsel for failing to request instruction.

{¶66} The seventh assignment of error is overruled.

Conclusion

{¶67} The convictions against appellant are affirmed. The case is remanded for resentencing for the sole purpose of merging the kidnapping count with the aggravated murder count and allowing the state to determine on which count to proceed to sentencing.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for further proceedings consistent with this opinion.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the

[4] Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus.

Rules of Appellate Procedure.

LARRY A. JONES, SR., JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
MELODY J. STEWART, P.J., DISSENTS WITH
SEPARATE DISSENTING OPINION

MELODY J. STEWART, P.J., DISSENTING:

{¶68} Sheila McFarland was found guilty on two counts of aggravated murder, two counts of murder, two counts of felonious assault, two counts of aggravated burglary, conspiracy, and kidnapping — all with one- and three-year firearm specifications. After merger and running sentences concurrently, she was given an aggregate sentence of life without the possibility of parole. Her guilt, however, is based on presence and association — not on the evidence presented in this case. I therefore dissent and would find the evidence insufficient to sustain her convictions.

{¶69} R.C. 2923.01, the conspiracy statute, states in relevant part:

> (A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder, murder, kidnapping, * * * aggravated burglary, * * * shall do either of the following:
>
> (1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;
>
> (2) Agree with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses.

Contrary to the majority's conclusion that "the state presented sufficient evidence that she conspired to cause physical harm to [the victim]," there is nothing in the record showing that McFarland planned or aided in the planning of the crimes committed, and there is nothing in the

record showing that McFarland agreed with Brownlee, Motley, or anyone else to engage in the conduct that facilitated commission of the offenses. Tellingly, the majority points to no such evidence.

{¶70} The majority bases its decision to affirm McFarland's convictions solely on her "involvement" with Brownlee's drug dealing and her presence while Brownlee made threatening calls to the victim and conspired with Motley to retaliate against the victim. This was not enough to show her participation in a conspiracy to commit the crimes for which she was convicted. A conspiracy must consist of more than mere presence and association with other conspirators. It is true that "'participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" *State v. Johnson*, 93 Ohio St.3d 240, 245, 2001-Ohio-1336, 754 N.E.2d 796, quoting *State v. Pruett*, 28 Ohio App.2d 29, 34, 273 N.E.2d 884 (4th Dist.1971). But an inference of a participation in a conspiracy based on presence must be accompanied by evidence that the defendant "supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, syllabus. In other words, "[t]here must be substantial evidence that a particular defendant knew of the illegal objective of the conspiracy and agreed to participate in its achievement." (Citations omitted.) *United States v. Burrell*, 963 F.2d 976, 987 (7th Cir.1992).

{¶71} A person can know about the goals of a conspiracy without agreeing to participate in a common scheme to achieve its purpose. But that fact standing alone did not permit the inferential leap that McFarland participated in the conspiracy. "Conspirators do not enter into an agreement by happenstance, and because an agreement is the essential element of conspiracy,

an agreement to commit a crime cannot be lightly inferred." *United States v. Ganji*, 880 F.3d 760, 768 (5th Cir.2018), citing *United States v. Johnson*, 439 F.2d 885, 888 (5th Cir. 1971).

{¶72} The evidence that the majority finds sufficient to sustain findings of guilt for aggravated murder, murder, felonious assault, aggravated burglary, conspiracy, and kidnapping consists of the following: testimony that McFarland was involved in Brownlee's drug dealings; that McFarland was present and took part in jail calls from Brownlee about causing the victim harm; and that McFarland posted Brownlee's bail. These are not actions that rise to the level of culpability sufficient to hold McFarland responsible for these crimes.

{¶73} It is true that there was evidence of McFarland's participation in Brownlee's drug trafficking. The record also demonstrates that, like Brownlee, McFarland believed that the victim was a snitch and she was no doubt upset that Brownlee had been arrested. Her alleged comments to Motley about somebody needing to "f*** up" the victim and his girlfriend shows she may even have wanted to see something happen to them. But this statement, coupled with the recording of her telling the victim's girlfriend that they were snitches is wholly insufficient to sustain her convictions. The record is completely devoid of any evidence demonstrating that she said or did anything to further Brownlee's plan of retaliating against the victim or to further Motley's carrying out of the plan to retaliate against the victim.

{¶74} To be sure, McFarland was no timid bystander who was unaware of Brownlee's desire to retaliate. But this awareness, even with the evidence the majority references, is not enough to demonstrate that she planned, aided, or agreed to the facilitation of the offenses Brownlee and Motley conspired to commit. So in the end, McFarland was convicted because she knew that Brownlee and Motley were going to do "something" to the victim, or because she did nothing to prevent "something" from happening to the victim, or both.

{¶75} I would vacate McFarland's convictions.