[Cite as *State v. Bell*, 2015-Ohio-1711.]

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

STATE OF OHIO,	:	APPEAL NO. C-140345 TRIAL NO. B-1102809
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
DAVID BELL,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 6, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. McKenna, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Defendant-appellant, David Bell, appeals convictions for one count of aggravated murder under R.C. 2903.01(B), one count of attempted murder under R.C. 2903.02 and 2923.02(A), two counts of having weapons while under a disability under R.C. 2923.13(A)(2), and two counts of aggravated robbery under R.C. 2911.01(A)(1) and (A)(3). On several counts, he was also convicted of accompanying firearm specifications. Although the indictment contained death-penalty specifications, Bell did not receive the death penalty. He was sentenced to a total term of life imprisonment without parole, plus 45 years. He has filed a timely appeal from those convictions, in which he asserts 11 assignments of error.

I. Factual Background

{¶2} The record shows that Bell and his girlfriend, Annishia Smith, engaged in a scheme to rob individuals that they thought had drugs, money, or both. The first victim, Brandyn Ward, met Smith at a club. Ward and Smith exchanged phone numbers, and later arranged to go on a dinner date.

{¶3} Smith and Bell kept in contact by texting. The original plan had been to rob Ward in the parking lot of the restaurant. But Smith noticed that Ward, who had a concealed-carry permit, was carrying a gun on his hip, so she texted Bell. Bell instructed her to take him back to her apartment in Butler County and get him in the bathroom.

{¶4} Smith followed Bell's instructions and had sex with Ward in the shower of her apartment. Before Ward entered the shower, he removed his gun and holster and left them in Smith's bedroom. When Ward came out of the bathroom, he saw a tall black man, later identified as Bell, holding the gun. Bell demanded that

Ward empty his pockets. He then took Ward's phone and money, as well as the gun, and left the apartment.

{¶5} Smith pretended that she was also a victim of the robbery. She told Ward it was her "baby daddy" Josh that had robbed Ward. She later acknowledged that Josh was not her "baby daddy," and that she had lied about him being involved. A few months later, a Cincinnati police detective called Ward, and told him that his stolen gun had been used in a crime in Hamilton County.

{¶6} Subsequently, Smith met Fabian Mitchell, an admitted drug dealer, and became aware that he carried a substantial amount of cash. She arranged to meet him at his house for a date. Mitchell lived in Price Hill at 930 Enright Avenue with his two roommates, Charles Martin and Trenton Calloway.

{¶7} Bell drove Smith to Price Hill in a white Chevy Lumina and parked down the street from the house. Smith walked up to the house to meet Mitchell. When she arrived, Martin and Calloway were lying on the couch in the front room. She passed them as she and Mitchell went to Mitchell's room on the second floor. While she was with Mitchell, she continued to text Bell to tell him the layout of the house. As to the roommates, Bell texted her, "don't trip they gone die."

{¶8} Later, Calloway and Martin went upstairs to their rooms on the second and third floor, respectively. Smith saw them and spoke to them briefly on the stairs. After Smith and Mitchell had sex, Mitchell had to leave to conduct a drug deal. He asked Smith to go with him, but she refused and stayed at the house by herself. Smith texted Bell to tell him that Mitchell was going to leave and how he could get in the house. Bell texted, "You gone here two gun shots thats me killin his brothers."

{¶9} Calloway awoke from a deep sleep when he heard his bedroom door creak. He saw a man in a white hoodie standing in the doorway. The man shot Calloway in the shoulder. Calloway rolled off the bed to avoid gunfire, and he heard the man say, "Lay down and die!" Though he was bleeding profusely, Calloway stood up to confront the shooter, whom he later identified as Bell. As Bell left, Calloway then heard him say, "Come on, Annishia. Let's go!" Calloway then went up to Martin's third-floor bedroom to find that Martin was dead. He had been shot in the head as he slept in his bed.

{¶10} Smith fled from the scene and ran to the car. Bell ran out a short time later and joined her there. He asked her to come back into the house. When she refused, he insisted that she return to the house and show him where the valuables were located. When they returned to the house, Bell told her that they were running out of time and that she should grab items in the front room. They then fled from the house again, carrying a television and a video-game system.

{¶11} Neighbors, who had heard gunshots, called the police, who responded immediately. When Smith and Bell saw the police cruiser, they dropped the stolen items and "took off running." As the police officers turned onto Enright Avenue, they saw Bell, wearing the white hoodie, running. The officers chased him, and, after a short pursuit, he laid down and surrendered.

{¶12} Officer Yvonne Gutapfel placed Bell in the back of her police cruiser. Bell told her that he and his girlfriend had been running for their lives because they had just been robbed at gunpoint. When Officer Gutapfel learned of the shooting victims inside the house, she read Bell his rights and took him to the Criminal Investigation Section to be interviewed by homicide detectives.

{¶13} The police officers found Smith hiding on the floor of the Chevy Lumina parked down the street. They also found a gun, which they later determined to be owned by Ward, lying in the yard of a nearby house. A criminalist determined that both Smith and Bell had gunshot residue on their hands consistent with firing a gun or being in the vicinity of a fired weapon. Another criminalist determined that while Smith was excluded as a person who had left traces of DNA on the gun, Bell could not be excluded.

{¶14} Smith and Bell wrote numerous letters to each other while both were in jail awaiting trial. They discussed Bell's plan to blame the crimes on Rique Robinson, a former friend of Bell's whom Bell believed had robbed him. At first, both Smith and Bell told police that Robinson was present at the scene and had fired the gunshots at both Martin and Calloway. Subsequently, Smith decided to cooperate with the police. She turned Bell's letters over to the police and acknowledged that Robinson was not involved in the offenses. Robinson was also excluded as a person who had left traces of DNA on the gun. A subsequent search of Bell's residence recovered photographs of Bell with a gun similar to that used in the shootings and ammunition of the same brand as ammunition recovered at site of the offenses.

II. Severance

{¶15} In his first assignment of error, Bell contends that the trial court erred in overruling his motion to sever counts one and two, related to the robbery of Ward, from counts three to eight, which involved the shootings on Enright Avenue. He argues that the two incidents were unrelated and that the joinder of the counts related to the two separate incidents allowed the jury to convict him on cumulative evidence. This assignment of error is not well taken.

{¶16} Two or more offenses may be charged in the same indictment if the offenses are "of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Crim.R. 8(A). The law favors joinder of charges that are of the same or similar character to conserve judicial resources, reduce the likelihood of incongruous results in successive trials, and diminish inconvenience to witnesses. *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990); *State v. Washington*, 1st Dist. Hamilton No. C-090561, 2010-Ohio-3175, ¶ 39.

{¶17} In this case, the two incidents involved a common plan and scheme that involved Smith luring the victims to a private residence and then Bell robbing them. Further, the gun that Bell stole from Ward was used in the shootings that occurred during the second robbery at the house on Enright Avenue. The offenses were connected together and were part of a course of criminal conduct. Therefore, joinder was proper under Crim.R. 8.

{¶18} If the defendant would be prejudiced by an otherwise proper joinder, a trial court may grant a severance under Crim.R. 14. *State v. Coley*, 93 Ohio St.3d 253, 259, 754 N.E.2d 1129 (2001); *Washington* at ¶ 41. The defendant bears the burden to prove prejudice and must show that the trial court abused its discretion in denying severance. *Coley* at 259; *Washington* at ¶ 41.

{¶19} The state may negate the defendant's claim of prejudice in two ways. First, it may show that it could introduce evidence of one offense in the trial of the other offense as other-acts evidence under Evid.R. 404(B). Second, it can show that the evidence of each crime joined is simple and direct. *Lott*, 51 Ohio St.3d at 163, 555

N.E.2d 293; *State v. Kennedy*, 1st Dist. Hamilton No. C-120337, 2013-Ohio-4221, ¶ 32.

{¶20} The evidence in this case meets both of these tests. Evidence of the Ward robbery would have been relevant and admissible in the trial of the Enright shootings to show Bell's motive, opportunity, intent, preparation plan, and identity as the perpetrator. *See State v. Shedrick*, 61 Ohio St.3d 331, 337, 574 N.E.2d 1065 (1991); *State v. Lukacs*, 188 Ohio App.3d 597, 2010-Ohio-2364, 936 N.E.2d 506, ¶ 37 (1st Dist.).

{¶21} Further, the evidence as to both sets of offenses was also simple and direct. The two incidents involved separate testimony from different witnesses, and they occurred on different dates and at separate places. The facts of each were uncomplicated, and the jury could easily segregate the proof relevant to each. *See Kennedy* at ¶ 35. Further, the trial court instructed the jury to consider each count separately, and we presume that the jury followed the court's instructions. *See State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995); *State v. Brown*, 1st Dist. Hamilton No. C-120327, 2013-Ohio-2720, ¶ 35.

{¶22} Under the circumstances, we cannot hold that the trial court's decision to overrule Bell's motion to sever was so arbitrary, unreasonable or unconscionable as to connote an abuse of discretion. *See State v. Clark*, 71 Ohio St.3d 466, 470, 644 N.E.2d 331 (1994). Consequently, we overrule his first assignment of error.

III. Venue

{¶23} In his second assignment of error, Bell contends that venue was improper on counts one and two of the indictment. He argues that those counts,

which involved the robbery of Ward, occurred in Butler County and should have been tried there. This assignment of error is not well taken.

{¶24} Although venue is not an element of an offense, the state must prove venue beyond a reasonable doubt. *State v. Headley*, 6 Ohio St.3d 475, 477, 453 N.E.2d 716 (1983); *State v. Sullivan*, 1st Dist. Hamilton Nos. C-130628 and C-130629, 2014-Ohio-3112, ¶ 7. R.C. 2901.12(A) requires a defendant to be prosecuted in a court with subject-matter jurisdiction in the "territory of which the offense or any element thereof was committed." *Sullivan* at ¶ 7.

{¶25} R.C. 2901.12(H) states that "[w]hen an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred." Prima facie evidence of a course of criminal conduct may be established through proof that the offenses involved the same or similar modus operandi. R.C. 2901.12(H)(5); *State v. Beuke*, 38 Ohio St.3d 29, 41, 526 N.E.2d 274 (1988).

{¶26} In this case, both sets of offenses involved the same modus operandi. In each, Smith met and targeted the victim because she believed each would have large sums of money. Smith set up a date with the victim and lured him to a residence where they could be alone. She texted Bell the pertinent information she had discovered, and Bell entered the residence to rob the intended victim. Additionally, Bell used the gun he had stolen from the victim in Butler County to commit the offenses in Hamilton County.

{¶27} Thus, Bell engaged in a course of conduct that involved offenses committed in both Hamilton County and Butler County. *See Beuke* at 41-42; *State v. Castor*, 5th Dist. Delaware No. 14 CAA 01 0004, 2014-Ohio-5236, ¶ 21-26; *State v.*

Retana, 12th Dist. Butler No. CA2011-12-225, 2012-Ohio-5608, ¶ 32. Both sets of offenses were properly tried in Hamilton County, and we overrule Bell's second assignment of error.

IV. Statements to Police

{¶28} In his third assignment of error, Bell contends that the trial court erred in overruling his motion to suppress his statements to the police. He argues that those statements were obtained in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This assignment of error is not well taken.

{¶29} Appellate review of a motion to suppress presents a mixed question of law and fact. We must accept the trial court's findings of fact as true, if competent, credible evidence supports them. But we must independently determine whether the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Burton*, 1st Dist. Hamilton No. C-080173, 2009-Ohio-871, ¶ 8.

A. Statements Prior to Miranda Warnings

{¶30} Bell makes two separate arguments. First, he argues that the statements made in the police cruiser to Office Gutapfel should have been suppressed because he was subjected to custodial interrogation without the officers informing him of his *Miranda* rights.

{¶31} *Miranda* mandates that all individuals who are taken into police custody must be advised of certain constitutional rights. The duty to advise a suspect of his or her *Miranda* rights does not arise until there is a custodial interrogation. *State v. Tucker*, 81 Ohio St.3d 431, 435, 692 N.E.2d 171 (1998); *State v. Edwards*, 1st

Dist. Hamilton No. C-100200, 2011-Ohio-1752, ¶ 4. Whether a suspect is in custody is an objective inquiry. *J.D.B. v. North Carolina*, __ U.S. __, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011).

{¶32} This determination requires two "discrete inquiries": (1) what were the circumstances surrounding the interrogation, and (2) given those circumstances, would a reasonable person have felt that he was at liberty to terminate the interrogation and leave. *Id.* "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.*, quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d. 383 (1995).

{¶33} We do not believe that a reasonable person in Bell's situation would have felt free to leave. Bell was placed in handcuffs in the back of a police cruiser at the scene of a suspected shooting, and the police officers were asking Bell why he was running. Though the inquiry is objective, we do note that Officer Guptafel testified that Bell was not free to leave. This court has stated that "an interrogation conducted inside a police vehicle is usually a custodial interrogation." *State v. Stafford*, 158 Ohio App.3d 509, 2004-Ohio-3893, 817 N.E.2d 411, ¶ 41 (1st Dist.). This case did not involve the sort of routine questioning associated with a traffic stop, for example. It was a police-dominated atmosphere at the scene of a shooting from which Bell was seen running away.

{¶34} Because a reasonable person in Bell's situation would not have felt free to leave and terminate the interview, we hold that Bell was in custody for purposes of the *Miranda* analysis. Consequently, he should have been advised of his *Miranda* rights prior to any questioning.

{¶35} Nevertheless, the statements he made in the police cruiser were not significantly different from the story he initially told the homicide detectives after he had been advised of his *Miranda* rights. Further, given the overwhelming amount of evidence against Bell, no reasonable possibility existed that the admission into evidence of his statements in the police cruiser contributed to his convictions. Therefore, any error was harmless beyond a reasonable doubt. *See State v. Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), paragraph seven of the syllabus, *vacated as to death penalty*, 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155 (1978); *State v. Brundage*, 1st Dist. Hamilton No. C-030632, 2004-Ohio-6436, ¶ 33.

B. Waiver of Miranda Rights

{¶36} Second, Bell argues that he did not knowingly, intelligently and voluntarily waive his *Miranda* rights during the interview with the homicide detectives. Generally, the state bears the burden to prove by a preponderance of the evidence that the accused knowingly, voluntarily, and intelligently waived his *Miranda* rights. *State v. Edwards*, 49 Ohio St.2d 31, 38, 358 N.E.2d 1051 (1976); *State v. Jones*, 1st Dist. Hamilton No. C-080518, 2009-Ohio-4190, ¶ 19. But, under R.C. 2933.81(B), because Bell was suspected of committing a homicide and the interview was both audibly and visually recorded, Bell's statements are presumed to be voluntary. The burden then shifted to him to prove that his statements were not voluntary. *State v. Washington*, 1st Dist. Hamilton No. C-130213, 2014-Ohio-4178, ¶ 29.

{¶37} Whether a suspect has knowingly, intelligently, and voluntarily waived his *Miranda* rights may be inferred from the totality of the circumstances. *State v. Luther*, 110 Ohio St.3d 270, 2006-Ohio-4477, 853 N.E.2d 279, ¶ 9; *State v. Barker*, 1st Dist. Hamilton No. C-130214, 2014-Ohio-3245, ¶ 12. A suspect makes his

decision to waive his Fifth Amendment privilege voluntarily absent evidence that his will was overborne or that his capacity for self-determination was critically impaired because of coercive police misconduct. *State v. Dailey*, 53 Ohio St.3d 88, 559 N.E.2d 459 (1990), paragraph two of the syllabus; *Jones* at ¶ 20. "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction," the analysis is complete and the waiver is valid as a matter of law. *Dailey* at 91, quoting *Moran v. Burbine*, 475 U.S. 412, 422-423, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986); *Jones* at ¶ 20.

{¶38} Bell argues that the detectives did not inquire about his educational level or explain to him the seriousness of the charges that he faced. But evidence of low mental aptitude does not render a suspect incapable of waiving his *Miranda* rights and is only one factor to be considered. *State v. Hill*, 64 Ohio St.3d 313, 318, 595 N.E.2d 884 (1992); *Barker* at ¶ 13.

{¶39} The record shows that Bell had experience with the criminal justice system. He was lucid and sober, and the recording of the interview shows that he understood his rights. He makes no argument that he suffered any deprivation or that he was subjected to coercive interrogation techniques. Nothing in the record shows that his will was overborne due to coercive police misconduct. Thus, Bell failed to overcome the presumption that his waiver was voluntary, and we overrule his third assignment of error.

V. Mistrial

{¶40} We address the Bell's remaining assignments of error out of order. In his sixth assignment of error, he contends that the trial court erred in overruling his

motion for a mistrial. He argues that he was unduly prejudiced because Smith twice told the jury that he had been to prison. This assignment of error is not well taken.

{¶41} The decision whether to a grant a mistrial lies within the trial court's discretion. A trial court should not order a mistrial merely because an error or irregularity has occurred, unless it affects the defendant's substantial rights. *State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987); *Brown*, 1st Dist. Hamilton No. C-120327, 2013-Ohio-2720, at ¶ 32. The court should declare a mistrial "only when the ends of justice so require and when a fair trial is no longer possible." *State v. Brewster*, 1st Dist. Hamilton Nos. C-030024 and C-030025, 2004-Ohio-2993, ¶ 67, quoting *State v. Broe*, 1st Dist. Hamilton No. C-020521, 2003-Ohio-3054, ¶ 36.

{¶42} The record does not show that the state deliberately elicited testimony from Smith that Bell had been to prison. Smith mentioned it twice, and, both times, the trial court sustained Bell's objections, gave instructions to the jury to disregard those statements, and ordered them stricken. We presume that the jury followed the court's instructions. *Garner*, 74 Ohio St.3d at 59, 656 N.E.2d 623; *Brown* at ¶ 35. Then, the court, outside of the jury's presence, told Smith not to mention again that Bell had been to prison, and she did not.

{¶43} Under the circumstances, Bell's substantial rights were not affected, and he was not denied a fair trial. We cannot hold that the trial court's decision to overrule his motion for a mistrial was so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion. *See Clark*, 71 Ohio St.3d at 470, 644 N.E.2d 331; *Brown* at ¶ 34. Consequently, we overrule Bell's sixth assignment of error.

VI. Other Bad Acts

{¶44} In his seventh assignment of error, Bell contends that the trial court erred when it allowed into evidence correspondence between him and Smith that

were written when both were in jail awaiting trial. He argues that the contents of those letters do not prove any of the elements of the offenses for which he was being tried and that the state only presented them to prove his bad character in violation of Evid.R. 404(A). This assignment of error is not well taken.

{¶45} Character evidence is generally not admissible "for the purpose of proving action in conformity therewith on a particular occasion." Evid.R. 404(A). Further, the prosecution may not present evidence that a defendant has committed other crimes or bad acts independent of the crime for which the defendant is being tried for the purpose of establishing that the defendant acted in conformity with his bad character. Evid.R. 404(B).

{¶46} An exception to the general rule is set forth in Evid.R. 404(B). It provides that evidence of other acts may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Shedrick*, 61 Ohio St.3d at 337, 574 N.E.2d 1065; *State v. Thomas*, 1st Dist. Hamilton No. C-120561, 2013-Ohio-5386, ¶ 20. The other acts need not be similar to the crime at issue. If they tend to show by substantial proof any of the enumerated items, evidence of other acts is admissible. *State v. Coleman*, 45 Ohio St.3d 298, 299, 544 N.E.2d 622 (1989); *Thomas* at ¶ 21.

{¶47} The letters contained Bell's admissions indicating that he had committed the offenses, and his attempts to cover them up, including his plan to blame them on Robinson. The letters were relevant to show Bell's identity as the shooter, as well as his motive, intent and plan. Thus, they were admissible under Evid.R. 404(B). The letters also discussed "loyalty" extensively, and Bell told Smith that she should stick to the plan to blame Robinson and should not implicate him. Attempts at suppression of evidence are "admissions by conduct" and are admissible

to prove identity. *See State v. Richey*, 64 Ohio St.3d 353, 357, 595 N.E.2d 915 (1992); *State v. Hirsch*, 129 Ohio App.3d 294, 306-307, 717 N.E.2d 789 (1st Dist.1998).

{¶48} Bell also contends that the trial court should have excluded the letters as well as the text messages between Bell and Smith under Evid.R. 403(A). It provides that relevant evidence is not admissible if its "probative value is substantially outweighed by the danger of unfair prejudice[.]" The statements in the letters and text messages directly tied Bell to the criminal acts. *See Hirsch* at 306-307. While their admission into evidence was undoubtedly prejudicial, the rule only requires exclusion for "unfair prejudice." *See State v. Langlois*, 2013-Ohio-5177, 2 N.E.3d 936, ¶ 77 (6th Dist.). The evidence was not presented for the sole purpose of appealing to the jurors' emotions, sympathies or biases. *See id.* at ¶ 78. Consequently, we cannot hold that the trial court erred in allowing the letters and text messages into evidence, and we overrule Bell's seventh assignment of error.

VII. Cumulative Error

{¶49} In his ninth assignment of error, Bell contends that he was denied a fair trial due to the cumulative effect of the trial court's errors. The cumulative effect of errors may deprive a defendant of a fair trial even though individual instances of error do not warrant a reversal. The defendant must demonstrate that a reasonable probability exists that the outcome of the trial would have been different absent the alleged errors. *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus; *Lukacs*, 188 Ohio App.3d 597, 2010-Ohio-2364, 936 N.E.2d 506, at ¶ 68.

{¶50} Bell cites four examples of additional alleged errors, in addition to the errors already alleged in his assignments of error, that denied him a fair trial. The

only one with even arguable merit is the fourth, in which he argues that the trial court erred in allowing the testimony of Martin's sister into evidence. We agree that the court erred in allowing her testimony. She had no knowledge of events related to the shooting of Martin, and only testified as to her brother's character, which was improper. *See* Evid.R. 404(A)(2); *State v. Allen*, 73 Ohio St.3d 626, 633, 653 N.E.2d 675 (1995). Her testimony was also irrelevant, particularly given that Bell did not know Martin at the time of the shooting.

{¶51} Nevertheless, that error was harmless beyond a reasonable doubt given the quantum of evidence against Bell. *See Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035, at paragraph seven of the syllabus; *Brundage*, 1st Dist. Hamilton No. C-030632, 2004-Ohio-6436, at ¶ 33. Bell has not demonstrated that absent any errors at the trial, the result of the proceeding would have been different. Consequently, we will not reverse his convictions on the basis of cumulative error, and we overrule his ninth assignment of error.

VIII. Ineffective Assistance of Counsel

{¶52} In his eighth assignment of error, Bell contends that he was denied the effective assistance of counsel. He argues that counsel failed to advise him of the evidence against him so that he could make effective decisions regarding trial strategy. He also argues that his counsel was unprepared to effectively question witnesses. This assignment of error is not well taken.

{¶53} A court will presume that a properly licensed attorney is competent, and the defendant bears the burden to show ineffective assistance of counsel. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988); *Thomas*, 1st Dist. Hamilton No. C-120561, 2013-Ohio-5386, at ¶ 50. To sustain a claim for ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was

deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Thomas* at ¶ 50.

{¶54} The record shows that during trial, Bell complained to the trial court that he had not seen much of the evidence that the state had provided to his attorneys in discovery. He felt that witnesses were lying on the stand and that his lawyers were unprepared to address those lies. He stated that he had prepared questions to ask these witnesses, and that his lawyers were not listening to him. The trial court denied Bell's request for new counsel and told him that his lawyers were doing an excellent job of representing him.

{¶55} The trial court was correct in its assessment. The record shows that Bell's attorneys provided him with a diligent and thorough defense. Bell has not demonstrated that his counsel's representation fell below an objective standard of reasonableness or that, but for counsel's unprofessional errors, the results of the proceeding would have been otherwise. Therefore, he has failed to meet his burden to show ineffective assistance of counsel. *See Strickland* at 687-689; *Thomas* at ¶ 50-52. We overrule Bell's eighth assignment of error.

IX. Weight and Sufficiency

{¶56} In his fourth assignment of error, Bell contends that the evidence was insufficient to support his conviction for the aggravated murder of Martin. Our review of the record shows that rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state proved beyond a reasonable doubt all of the elements of aggravated murder under R.C. 2903.01(B), along with the accompanying specifications. Therefore, the evidence was sufficient to support the conviction. *See State v. Jenks*, 61 Ohio St.3d 259, 574

N.E.2d 492 (1991), paragraph two of the syllabus; *State v. Ojile*, 1st Dist. Hamilton Nos. C-110677 and C-110678, 2012-Ohio-6015, ¶ 48.

{¶57} Bell primarily argues that Smith's testimony was not credible. But in deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of the witnesses. *Thomas*, 1st Dist. Hamilton No. C-120561, 2013-Ohio-5386, at ¶ 45. Consequently, we overrule Bell's fourth assignment of error.

{¶58} In his fifth assignment of error, Bell contends that the aggravated-murder conviction was against the manifest weight of the evidence. After reviewing the record, we cannot say the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse Bell's conviction and order a new trial. Therefore, the conviction was not against the manifest weight of the evidence. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Blair*, 1st Dist. Hamilton Nos. C-100150 and C-100151, 2010-Ohio-6310, ¶ 24.

{¶59} Again, Bell argues that Smith's testimony was not credible, but matters as to the credibility of evidence are for the trier of fact to decide. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 116; *Thomas* at ¶ 48. We overrule Bell's fifth assignment of error.

X. Allied Offenses

{¶60} In his tenth assignment of error, Bell contends that the trial court erred in failing to merge allied offenses of similar import. He argues that it should have merged counts three, five, and seven, because they were part of a continuing course of conduct. Count three was the aggravated murder of Martin. Court five was the attempted murder of Calloway, and count seven was the aggravated robbery at the house on Enright Avenue. These assignments of error are not well taken.

{¶61} Bell relies upon *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. After the parties submitted their briefs in this case, the Ohio Supreme Court decided *State v. Ruff*, __ Ohio St.3d __, 2015-Ohio-995, __ N.E.2d __, which clarified the court's decision in *Johnson*. *State ex rel. Walker v. State*, __ Ohio St.3d __, 2015-Ohio-1481, __ N.E.2d __, ¶ 4, fn.1.

{¶62} In *Ruff*, the Supreme Court stated that in determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts "must evaluate three separate factors—the conduct, the animus, and the import." *Ruff* at paragraph one of the syllabus. It went on to state that "[t]wo or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at paragraph two of the syllabus.

{¶63} Finally, the court held:

> Under R.C. 2945.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.

Id. at paragraph three of the syllabus.

{¶64} Because counts three and five involved separate victims, the trial court did not err in failing to merge those counts. As to the aggravated-robbery count in count seven, the murder of Martin and the attempted murder of Calloway involved a harm separate from than that involved in the robbery. Martin and

Calloway were both sleeping soundly when Bell entered the home. He did not have to commit or attempt to commit two cold-blooded murders to complete the robbery.

{¶65} Additionally, Bell and Smith had left the house after the shootings. Bell insisted that Smith return to the house to show him where the valuables were located. They reentered the house and grabbed a television and the video-game system before once again leaving the premises. Thus the shootings were completed before the robbery was actually completed, and the robbery in count seven was committed separately from the shootings in counts three and five. *See State v. Fields*, 12th Dist. Clermont No. CA2014-03-025, 2015-Ohio-1345, ¶ 17. Thus, under *Ruff*, the trial court did not err in failing to merge counts three, five, and seven, and we overrule Bell's tenth assignment of error.

XI. Cruel and Unusual Punishment

{¶66} Finally, in his eleventh assignment of error, Bell argues that he was subject to cruel and unusual punishment when the court sentenced him to life without parole plus 45 years. As a general rule, a sentence that falls within the terms of a valid statute cannot amount to cruel and unusual punishment. *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964); *Brewster*, 1st Dist. Hamilton Nos. C-030024 and C-030025, 2004-Ohio-2993, at ¶ 82.

{¶67} Bell has not alleged that the trial court violated any particular sentencing statute. First, Bell was convicted of aggravated murder under R.C. 2903.01(B). Since he did not receive the death penalty, the court had no choice but to sentence him to life in prison on that offense. *See* R.C. 2929.02(A); *State v. Dieterle*, 1st Dist. Hamilton No. C-070796, 2009-Ohio-1888, ¶ 41.

{¶68} The record shows that the rest of Bell's sentences were within the appropriate statutory ranges and that the court made the appropriate findings

justifying consecutive sentences. *See* R.C. 2929.14(A) and (C); *Thomas*, 1st Dist. Hamilton No. C-120561, 2013-Ohio-5386, at ¶ 56-57 and 61. The sentences were not so disproportionate to the offenses as to shock the community's sense of justice. *See State v. Weitbrecht*, 86 Ohio St.3d 368, 370-371, 715 N.E.2d 167 (1999); *Brewster* at ¶ 84.

{¶69} Further, the Ohio Supreme Court has stated that "[w]here none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from the consecutive imposition of those sentences does not constitute cruel and unusual punishment." *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, syllabus. Bell was not subjected to cruel and unusual punishment, and we overrule Bell's eleventh assignment of error.

XII. Summary

{¶70} In sum, we find no merit in any of Bell's assignments of error. Consequently, we affirm the trial court's judgment.

Judgment affirmed.

HENDON, P.J., and **DEWINE, J.**, concur.

Please note:

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