[Cite as *State v. Chatman*, 2009-Ohio-2504.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 08AP-803 (C.P.C. No. 07CR-9059)
v.	:	(REGULAR CALENDAR)
Richard A. Chatman,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 28, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Carpenter, Lipps & Leland, LLP, and *Kort Gatterdam*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Richard A. Chatman ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas entered after a bench trial convicting him of one count of murder with specifications, an unspecified felony in violation of R.C. 2903.02, two counts of tampering with evidence, both third-degree felonies in violation of R.C. 2921.12, and one count of having a weapon while under disability, a third-degree felony in violation of R.C. 2923.13.

{¶2} The charges herein arise out of the shooting death of Craig Walton ("Walton") that occurred on August 7, 2007, at the intersection of Kelton Avenue and Mooberry Street in Columbus, Ohio. The following description of events was adduced at trial.

{¶3} On August 7, 2007, 11-year-old Theresa Wilson ("Wilson"), and her mother Mindy Masters ("Masters"), were stopped at a red light at the intersection of Kelton and Mooberry as they were leaving Children's Hospital and going back home to Guernsey County, Ohio. Masters was driving her Dodge Stratus with her boyfriend in the front passenger's seat, and Wilson and Wilson's friend in the backseat. Wilson noticed a black man sitting in a black car near the intersection. Wilson felt afraid because often persons yelled at her and her family as they drove through this part of town during their trips to Children's Hospital. Wilson directed her mother's attention to the black car and asked her mother to lock the doors and roll up the windows. Masters and Wilson testified they saw a Bronco pull up next to the black car, and then they heard a loud boom. The Bronco slowly drove away, and Masters saw that the driver of the black car had been shot. Masters called 911, and informed them of the shooting. Wilson noticed the Bronco had stopped as its brake lights became illuminated. Fearing the persons in the Bronco would return, Masters drove away. Both Masters and Wilson indicated the driver of the Bronco did not appear emotional or upset after the shooting, and at trial both identified appellant as the driver of the Bronco.

{¶4} A different version of events was presented at trial by appellant and his sister, Cynthia Chatman. According to appellant, his and Walton's families were friends, but the relationship became strained when Walton alleged appellant set Walton up to be

robbed. Though he denied any participation in the robbery, appellant had "run-ins" with Walton. Appellant testified someone told him that Walton had hired another person to harm or kill appellant, and this caused appellant to hide out and try to keep a low profile in the weeks preceding the incident.

{¶5} On August 7, 2007, appellant testified he was driving Cynthia's Bronco to his mother's house along with his cousin Clifton Vinson ("Vinson"), Cynthia, and her three children. They spotted Walton's car on a side street, and then Walton began to follow appellant. Appellant and Cynthia testified that appellant stopped at the red light and thereafter Walton pulled his car next to the Bronco. Appellant and Cynthia saw Walton reach down in his car and believed he may have been reaching for a gun. Cynthia laid down on top of her kids, and appellant leaned back to avoid a gunshot he thought may come from Walton. Vinson then grabbed a shotgun from the side of his seat and shot Walton in the head.

{¶6} After the shooting, appellant drove to his mother's house. Vinson disposed of the gun, which was never recovered, and the Bronco was found by the police in appellant's grandmother's garage with the license plates removed. It was stipulated at trial that Vinson was the man who shot Walton, and that appellant was the driver of the Bronco.

{¶7} On December 19, 2007, appellant was indicted on one count of aggravated murder with specifications, an unspecified felony in violation of R.C. 2903.01, one count of murder with specifications, an unspecified felony in violation of R.C. 2903.02, two counts of tampering with evidence, both third-degree felonies in violation of R.C. 2921.12, and one count of having a weapon under disability, a third-degree felony in violation of

R.C. 2923.13. Both the murder and aggravated murder charges contained firearm and drive-by specifications, pursuant to R.C. 2941.145 and 2941.146, respectively. Vinson was indicted on identical charges and entered a plea of guilty to murder. Vinson was sentenced to 18 years to life.

{¶8} On June 30, 2008, appellant entered a written jury waiver, and the matter proceeded to trial before the court. On July 1, 2008, the trial court found appellant not guilty of aggravated murder and guilty of the remaining charges in the indictment. On August 25, 2008, the trial court imposed an aggregate sentence of 28 years to life and awarded 238 days of jail-time credit.

{¶9} Appellant timely appeals and brings the following five assignments of error for our review:

> FIRST ASSIGNMENT OF ERROR
>
> Appellant was deprived of the effective assistance of counsel, contrary to the Ohio and United States Constitution due to counsel's failure to object to the introduction of numerous gory, irrelevant and prejudicial photos whose probative value were substantially outweighed by their prejudicial effect and failure to request an in camera hearing regarding the testimony of the co-defendant.
>
> SECOND ASSIGNMENT OF ERROR
>
> Appellant's convictions for complicity to murder and having a weapon while under a disability were improper as the State did not present sufficient evidence, contrary to the Fifth and Fourteenth Amendments of the United States Constitution and Article One Section Sixteen of the Ohio Constitution, and the convictions were against the manifest weight of the evidence.
>
> THIRD ASSIGNMENT OF ERROR
>
> The trial court erred when it failed to provide Appellant a meaningful opportunity to present a complete defense. Said

> error deprived Appellant of his state and Federal Constitutional rights to confrontation, compulsory process, and due process of law.
>
> FOURTH ASSIGNMENT OF ERROR
>
> Prosecutorial misconduct deprived Appellant of his right to a fundamentally fair trial as guaranteed by the due process clause of the Fourteenth Amendment.
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> FIFTH ASSIGNMENT OF ERROR
>
> The trial court abused its discretion in sentencing Appellant to a prison term of twenty-eight (28) years to life, when it sentenced Appellant's co-defendant, the shooter, to eighteen (18) years to life, pursuant to a plea agreement with the State. Such disparate sentences contravene R.C. 2929.11, and the due process clause of the United States Constitution and corresponding provisions of the Ohio Constitution.

{¶10} In his first assignment of error, appellant contends he was denied effective assistance of counsel. Specifically, appellant argues his counsel failed to object to the numerous gory and prejudicial photographs and failed to request an in camera hearing regarding the testimony of his co-defendant, Vinson.

{¶11} To prove ineffective assistance of counsel, defendant must first prove that counsel's performance was deficient. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2065. To meet the requirement, defendant must initially show counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Id. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. at 689. (Citation omitted.) "Even debatable trial tactics do not constitute ineffective assistance of trial counsel." *State v.*

Jordan, 10th Dist. No. 04AP-827, 2005-Ohio-3790, ¶17, quoting *State v. Nichols* (1996), 116 Ohio App.3d 759, 764.

{¶12} Defendant must next demonstrate that counsel's deficient performance prejudiced the defense by showing that, were it not for the errors, the result of the trial probably would have been different. The failure to prove either prong of the *Strickland* test makes it unnecessary for a court to consider the other prong.

{¶13} During the trial, the parties stipulated to the admission of the photographs, which included depictions of the crime scene as well as the autopsy. In addition, the parties stipulated that appellant was the driver of the Bronco and that Vinson was the shooter. Appellant's theory during the trial was that despite his being the driver, he in no way was an aider and abettor under the state's complicity theory. Nonetheless, appellant contends his trial counsel was ineffective in stipulating to the "gory, irrelevant and prejudicial photographs." (Appellant's brief at 4.) Specifically, appellant states that photographs were used to "hammer the point that Walton was a bloody mess, this was a gruesome shooting, and [appellant] should be found guilty." (Brief at 5.) Appellant also asserts the sole purpose of introducing the pictures was "to inflame the passions of the trier of fact." (Brief at 6.) Therefore, appellant asserts his counsel was ineffective in failing to object to the photographs' admission under Evid.R. 403, and/or in failing to limit the number of photographs admitted because there was no basis to admit the majority of the photographs.

{¶14} Initially, we note that the admission of photographic evidence is left to the sound discretion of the trial court, and a trial court may indeed reject a photograph, otherwise admissible, due to its inflammatory nature if on balance the prejudice outweighs

the relevant probative value. *State v. Mauer* (1984), 15 Ohio St.3d 239, 264-65. While concededly many of the photographs in this case are gruesome, "the mere fact that a photograph is gruesome or horrendous is not sufficient to render it per se inadmissible." Id. at 265, citing *State v. Woodards* (1966), 6 Ohio St.2d 14, 25.

{¶15} Further, as the Supreme Court of Ohio stated in *Maurer*, "[t]he fact that appellant stipulated the cause of death does not automatically render the photographs inadmissible." Id. at 265. Additionally, "relevant evidence, challenged as being outweighed by its prejudicial effects, should be viewed in a light most favorable to the proponent of the evidence, maximizing its probative value and minimizing any prejudicial effect to one opposing admission." Id., citing *United States v. Brady* (C.A.6, 1979), 595 F.2d 359.

{¶16} Here, because there was not a jury as this matter was tried to the bench, the decision to stipulate to the photographs' admissibility could constitute sound trial strategy. Debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel. *Jordan*, supra. Defense counsel's decision to stipulate to evidence is generally considered a tactical decision. *State v. Townsend*, 9th Dist. No. 23397, 2007-Ohio-4421, ¶27, citing *State v. White* (Nov. 15, 1995), 9th Dist. No. 16900. See also *State v. Pridgen*, 5th Dist. No. 2004 CA 00313, 2005-Ohio-3291, reversed on other grounds, 107 Ohio St.3d 1421, 2005-Ohio-6124 (strategic decision to stipulate to evidence did not constitute ineffective assistance of counsel). Had defense counsel objected to the admission of the photographs, the trial court would have then been required to review and scrutinize each and every photograph to determine its admissibility. Hence, we can discern a tactical decision from counsel's actions as the

court, as trier of fact, would have reviewed the photographs nonetheless. For this same reason, appellant is unable to establish prejudice by his counsel's actions as the trial court would have reviewed these photographs regardless of whether or not defense counsel objected to their admission. We cannot say there is a probability sufficient to undermine the confidence in the outcome of this case; therefore, we are not able to find appellant was prejudiced by his counsel's actions. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

{¶17} Furthermore, "[w]e indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *State v. White* (1968), 15 Ohio St.2d 146, 151; *State v. Nasser*, 10th Dist. No. 02AP-1112, 2003-Ohio-5947, ¶57, appeal not allowed by 101 Ohio St.3d 1490, 2004-Ohio-1293. To demonstrate the trial court's decision was based on improper evidence, appellant directs us to the trial court's comments made at Vinson's plea and sentencing hearings that the photographs were "too gruesome to display" and that "this is by far the worst I've seen, the absolute worst." (Appellant's brief at 9.) With respect to his own proceedings, appellant goes on to contend only that the trial court "continued at [appellant's] sentencing indicating that he listened and seen firsthand the gruesome details of the offense." (Brief at 9.)

{¶18} First, the quoted portions of the trial court's comments are from Vinson's proceedings, not appellant's. Secondly, appellant's reference to the trial court's comments in his own case were, as appellant directs, made at appellant's sentencing, after appellant had been found guilty. Accordingly, we find nothing in the record to affirmatively demonstrate the trial court considered anything but relevant, material, and competent

evidence in arriving at its judgment. While the photographs depicting the facts of this case are unpleasant, it is because they depict a close-range blow to the head from a shotgun. However, the record is devoid of any evidence that the trial judge, as trier of fact, was inflamed by the gruesome nature of the crime so as to undermine one's confidence in the verdict, that as will be discussed infra, is supported by the remaining evidence. *State v. Keene*, 81 Ohio St.3d 646, 1998-Ohio-342.

{¶19} Also under this assigned error, appellant contends that if this court should find the issue raised in his third assignment of error was not preserved for review, his trial counsel was ineffective on this basis as well. For the reasons following in our disposition of appellant's third assignment of error, we find no merit to this portion of appellant's argument.

{¶20} Accordingly, we overrule appellant's first assignment of error.

{¶21} In his second assignment of error, appellant challenges both the sufficiency and the weight of the evidence with respect to his convictions for complicity to murder and having a weapon while under disability.

{¶22} The Supreme Court of Ohio described the role of an appellate court presented with a sufficiency-of-the-evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed[.])

{¶23} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Thus, a jury verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks,* supra.

{¶24} A manifest-weight argument is evaluated under a different standard. "The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." (Citation omitted.) *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *Thompkins*, at 387. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed 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 the conviction. Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶25} A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶26} Appellant asserts there was no direct evidence that he was guilty of complicity to murder by aiding and abetting. In order to support a conviction for complicity by aiding and abetting in the commission of a crime, it must be shown 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* (2001), 93 Ohio St.3d 240, syllabus. The defendant's "intent

may be inferred from the circumstances surrounding the crime." Id. "The mere act of driving away from the scene of a shooting perpetrated by a passenger of a vehicle has been held to be sufficient to uphold a conviction based on complicity where the circumstances show the driver knew shots were being fired by the passenger." *State v. Garner*, 10th Dist. No. 07AP-474, 2008-Ohio-944, ¶21, citing *State v. Jones*, 10th Dist. No. 02AP-1390, 2003-Ohio-5994.

{¶27} Here, Wilson and Masters, two independent eyewitnesses from Guernsey County, Ohio, both testified that while stopped at a red light they saw Walton sitting in a car near the intersection of Kelton Avenue and Mooberry Street. Both Wilson and Masters testified a Bronco pulled up next to Walton's car, and then they heard a loud boom. According to Wilson, after the shot was fired, the driver of the Bronco "started pulling away really slow" and the driver "was just staring at us with his arm out of the window." (Tr. 63-64.) As Masters drove up to Walton's car, Wilson testified the Bronco "slammed on his brakes." (Tr. 66.) During the trial, Wilson identified appellant as the driver of the Bronco.

{¶28} Masters testified she was at the red light when she saw a black man sitting in his car. A Bronco pulled up at "a very slow rate" to the light. (Tr. 108.) Masters then heard a "big boom." (Tr. 93.) After that, the Bronco "drove away real slow." (Tr. 96.) According to Masters, after the shot was fired, "he was going real slow in front of my car with his arm out the window staring at me in my face." (Tr. 93.) Indicating she would never forget the driver's face, Masters identified appellant at trial.

{¶29} Masters pulled up to the black car as she was calling 911. Masters went to exit her car, but her daughter and boyfriend told her not to because the Bronco's brake

lights came on; therefore, Masters left. Detectives from the Columbus Police Department went to Guernsey County the next morning to interview Masters and to show her a photo array, from which Masters identified appellant as the driver of the Bronco.

{¶30} Moreover, appellant knew the shotgun was in the vehicle. According to Columbus Police Detective Wayne Buck, appellant told him Vinson got the shotgun out prior to stopping at the intersection, that the gun was on Vinson's lap, and that Vinson had it raised up to the window prior to them stopping at the red light. Appellant also told Detective Buck that this was not a planned act and that the gun was out because Walton was following appellant.

{¶31} Appellant testified there was no plan to shoot Walton and that the only reason Vinson took the gun out of the bag was because Walton began following the Bronco containing appellant and his family. Cynthia also testified that Walton followed the Bronco for several blocks and that the Bronco was stopped first at the red light when Walton pulled up next to them and reached down as if reaching for a weapon.

{¶32} However, based on the evidence and the testimony of the witnesses, viewed in a light most favorable to the prosecution, as is required, we cannot say there is insufficient evidence to support the murder conviction based on complicity. The evidence offered demonstrated appellant was the driver of the vehicle from which Vinson fired a shot from a shotgun, of which appellant was aware was being aimed out the window. Further, the testimony of Wilson and Masters indicates Walton was stopped near the intersection when the Bronco pulled up next to Walton and does not support appellant's testimony that they were being followed by Walton. Thus, we cannot say there was insufficient evidence for the trial court as trier of fact to conclude appellant aided and

abetted Vinson, or to make the inference that appellant shared Vinson's intent in the commission of the crime. See *Garner*, supra.

{¶33} Similarly, we cannot say that the conviction is against the manifest weight of the evidence. The basis for appellant's manifest-weight challenge is the witnesses' conflicting testimony and inconsistencies with respect to some of the details surrounding the events. Essentially, appellant challenges the witnesses' credibility.

{¶34} All of what appellant argues, however, was presented to, and rejected by, the trier of fact. As previously stated, the weight to be given to the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *DeHass*, supra. While this case does indeed turn on circumstantial evidence, as we indicated previously, the Supreme Court of Ohio has held that "[a] conviction can be sustained based on circumstantial evidence alone." *State v. Franklin* (1991), 62 Ohio St.3d 118, 124, citing *State v. Nicely* (1988), 39 Ohio St.3d 147, 154-55. In fact, circumstantial evidence may " ' "be more certain, satisfying and persuasive than direct evidence." ' " *State v. Ballew*, 76 Ohio St.3d 244, 249, 1996-Ohio-81, quoting *State v. Lott* (1990), 51 Ohio St.3d 160, 167, quoting *Michalic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 330, 81 S.Ct. 6, 11. Furthermore, a conviction is not against the manifest weight of the evidence simply because the trier of fact chose to believe the prosecution's witnesses and to not believe appellant. *State v. Rippey*, 10th Dist. No. 04AP-960, 2005-Ohio-2639.

{¶35} After carefully reviewing the trial court's record in its entirety, we conclude that there is nothing to indicate that the trier of fact clearly lost its way or that any miscarriage of justice resulted. Consequently, we cannot say that appellant's murder conviction is against the manifest weight of the evidence.

{¶36} Regarding his conviction for having a weapon while under disability, appellant argues there was no evidence presented that he "ever knowingly acquired, had, carried, or used the firearm." (Appellant's brief at 16.) Therefore, appellant contends the only possible way to convict him of this charge was if he aided and abetted someone with a disability. Because there is no evidence in the record that Vinson was under a disability at the time of the shooting, appellant contends he cannot be convicted of having a weapon while under disability.

{¶37} Appellant was found guilty of having a weapon while under disability ("WUD") in violation of R.C. 2923.13, which provides in pertinent part:

> (A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> * * *
>
> (3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

{¶38} Here, it was stipulated that appellant was under indictment for possession of cocaine at the time of the offense, thus appellant's argument hinges on the notion that he did not possess the gun at issue.

{¶39} In order to "have" a firearm, one must either actually or constructively possess it. *State v. Hardy* (1978), 60 Ohio App.2d 325, 327; *State v. Messer* (1995), 107 Ohio App.3d 51, 56. "Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his

immediate physical possession." *State v. Wolery* (1976), 46 Ohio St.2d 316, 329, cert. denied, 429 U.S. 932, 97 S.Ct. 339. Constructive possession may also be achieved by means of an agent. *Hardy*, at 327; *United States v. Clemis* (C.A.6, 1993), 11 F.3d 597, cert. denied, 511 U.S. 1094, 114 S.Ct. 1858 (constructive possession of a firearm exists when a defendant knowingly has the power and intention at any given time to exercise dominion and control over a firearm, either directly or through others). Moreover, we recognize that constructive possession of a weapon, even absent actual physical possession, may be established by a totality of evidence establishing an accomplice relationship between the physical possessor and his or her accomplice. *State v. McConnell* (Oct. 13, 1983), 8th Dist. No. 45294. Thus, if appellee proved beyond a reasonable doubt that appellant constructively possessed the firearm, then appellant could indeed be found guilty of having a weapon while under disability, and whether or not Vinson had a disability would be irrelevant.

{¶40} From the testimony, including that of appellant, although Vinson used the weapon, appellant had knowledge of its presence. Appellant testified he knew Vinson obtained the gun a few days prior to the shooting, knew the gun was in the vehicle on the day of the shooting, and saw Vinson hold the gun up to the window upon stopping at the intersection. Further, regarding the gun, appellant testified, "I always drive the truck, so it stayed on the passenger's side like in the behind on the side of the passenger's side." (Tr. 256.)

{¶41} Based on the record, we find sufficient evidence that appellant possessed the firearm. *State v. Ridley*, 10th Dist. No. 03AP-1204, 2005-Ohio-333 (defendant and accomplice who used the gun to commit robbery were in close proximity of gun such that

it was easily accessible to defendant and one could find possession for purposes of WUD charge); *State v. Dorsey*, 10th Dist. No. 04AP-737, 2005-Ohio-2334 (The defendant had the ability to exercise dominion and control over the firearm found in between the console and the passenger's seat, thus he constructively possessed it.). Furthermore, we cannot say the trial court clearly lost its way or that the conviction constitutes a manifest miscarriage of justice.

{¶42} For the foregoing reasons, appellant's second assignment of error is overruled.

{¶43} In his third assignment of error, appellant contends the trial court denied him the ability to present a complete defense. Under this assigned error, appellant asserts he desired to call Vinson as a witness but was precluded because the prosecution indicated it would withdraw Vinson's plea bargain if Vinson testified for appellant. Also under this assigned error, appellant asserts the trial court erred in not requiring Vinson to take the stand to determine whether or not he would assert his Fifth Amendment rights. In support of this argument, appellant relies on *Columbus v. Cooper* (1990), 49 Ohio St.3d 42.

{¶44} The trial court, however, committed no error in either regard. As the record reflects, the trial court stated:

> Certainly, if you would like to call him as a witness and you believe that he may testify, you can call him, and we will see whether or not he asserts his Fifth Amendment rights. If he does so, we can do that.

(Tr. 19.)

{¶45} Moreover, even if appellant had called Vinson to testify, as recently stated by this court in *State v. Whiteside*, 10th Dist. No. 08AP-602, 2009-Ohio-1893, despite the

defendant's reliance on *Cooper*, there is no "right" of a defendant to call a witness solely for the purpose of invoking his or her Fifth Amendment rights. Id. at ¶58, citing *State v. Reed*, 10th Dist. No. 08AP-20, 2008-Ohio-6082, ¶54. The Supreme Court of Ohio in *State v. Kirk* (1995), 72 Ohio St.3d 564, expressly limited and distinguished *Cooper* and held that a trial court may exclude a person from appearing as a witness on behalf of a criminal defendant at trial if the court determines that the witness will not offer any testimony but merely intends to assert the Fifth Amendment privilege against self-incrimination. Id. at paragraph one of the syllabus.

{¶46} Despite *Kirk*'s holding, appellant relies on *State v. Reiner* (2001), 93 Ohio St.3d 601 ("*Reiner II*"). This court has noted, however, in previous cases that while persuasive, *Reiner II* was a plurality decision and, therefore, is not controlling. See *Whiteside*; *Reed*. Also, as noted in *Whiteside*, *Reiner II* did not discuss *Kirk*, and our research has revealed no case that has cited *Reiner II* for the proposition set forth by appellant. Instead, *Kirk* continues to be cited for its holding that a trial court may exclude a person from appearing as a witness on behalf of a criminal defendant at trial if the court determines that the witness will not offer any testimony but merely intends to assert the Fifth Amendment privilege against self-incrimination. *Whiteside*, at ¶60.

{¶47} Therefore, while it does not appear the trial court ever precluded appellant from calling Vinson as a witness, even if appellant had made such a request, the record reflects a strong indication that Vinson would have asserted only his Fifth Amendment rights, and, therefore, there would be no error in the trial court's exclusion of such testimony.

{¶48} Accordingly, appellant's third assignment of error is overruled.

{¶49} In his fourth assignment of error, appellant contends prosecutorial misconduct deprived him of his right to a fair trial.

{¶50} The test for prosecutorial misconduct is, first, whether the conduct is improper, and second, whether the conduct prejudicially affected the substantial rights of the accused. *State v. White*, 82 Ohio St.3d 16, 22, 1998-Ohio-363; *City of Columbus v. Rano*, 10th Dist. No. 08AP-30, 2009-Ohio-578, ¶21. The prosecutor's conduct cannot be grounds for a new trial unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 405. In considering prejudice, we must consider the following factors: (1) the nature of the remarks; (2) whether counsel objected; (3) whether the court gave corrective instructions; and (4) the strength of the evidence against the defendant. *State v. Tyler*, 10th Dist. No. 05AP-989, 2006-Ohio-6896, ¶20.

{¶51} The alleged misconduct in the case at bar is appellant's allegation that the prosecutor sought to prohibit Vinson from testifying on appellant's behalf by refusing to give Vinson the deal the state had offered if Vinson testified for appellant. However, because appellant's arguments are based on speculation, we find no merit to the same.

{¶52} Prior to opening statements, defense counsel raised several matters, one of which pertained to Vinson's testimony. Defense counsel told the trial court that through communication with Vinson's counsel and appellant, defense counsel was under the impression that Vinson would testify in appellant's trial and that Vinson's testimony would be "consistent with the defense's theory." (Tr. 14.) Defense counsel went on to state that Vinson's counsel instructed that Vinson has a Fifth Amendment right he plans on asserting, and that the prosecutor indicated that if Vinson testified as a witness "he would not be given the deal he's offered." (Tr. 15.)

{¶53} In response, the prosecutor stated, in part:

> Your Honor, as far as the codefendant goes, Mary Smith represents Clifton Vinson. She made it very clear to the Court and to the prosecutor and to [appellant's counsel] she had no intention of ever letting her client testify in this case. She was on his behalf asserting his Fifth Amendment right.
>
> However, she did indicate to us and to [appellant's counsel] that there were parts of his testimony that would have been very beneficial to the State.
>
> So even though that was out there, we are choosing not to call him. He has the same Fifth Amendment rights to prevent us from calling him as he does to prevent the defendant in this case from calling him, so I don't believe there is any error there as well.

(Tr. 17.)

{¶54} Thereafter, as indicated previously, the trial court stated to defense counsel that "if you would like to call him as a witness and you believe that he may testify, you can call him, and we will see whether or not he asserts his Fifth Amendment rights." (Tr. 19.)

{¶55} Based on the foregoing, we find the record does not support appellant's theory of prosecutorial misconduct. First, there is no evidence of what Vinson's testimony would consist if he had testified. Though appellant alleges Vinson's testimony would have been favorable to the defense, the prosecutor indicated at trial that Vinson's testimony would be favorable to the state. There was no attempt to proffer Vinson's testimony, and there is no evidence in the record such as an affidavit or otherwise stating what the testimony would have been. Without such, it is pure speculation to conclude there was prosecutorial misconduct and that prejudice resulted from the same. Secondly, the record reveals a strong indication from both parties that Vinson would assert his Fifth Amendment rights if called to testify. Third, the record is devoid of any evidence that

Vinson's plea was not entered into voluntarily, or that he was promised anything in exchange for his plea. In fact, the transcript of Vinson's plea hearing demonstrates Vinson stated he was not promised any leniency in exchange for his plea, nor was he pressured or forced to enter his plea. Again, without any evidence, we are left only with speculation and conjecture, and cannot find prosecutorial misconduct, much less prejudice to the defendant, based on the same.

{¶56} Accordingly, we find no merit to appellant's argument and therefore overrule appellant's fourth assignment of error.

{¶57} In his final assignment of error, appellant contends the trial court abused its discretion when it sentenced appellant to 28 years to life because his co-defendant Vinson was sentenced to an aggregate term of only 18 years to life. Under this assigned error, appellant emphasizes that he was not the principal offender in this case as it was Vinson who actually shot Walton.

{¶58} Vinson was sentenced to an aggregate term of incarceration of 18 years to life pursuant to the jointly recommended sentence arising out of Vinson's plea agreement. It appears on the murder convictions that both appellant and Vinson were sentenced to 15 years to life, but appellant had two additional specifications, one for the use of a firearm, and one for discharging a firearm from a motor vehicle, resulting in a sentence of 23 years to life. Thereafter, the trial court imposed an aggregate sentence of five years on the two tampering-with-evidence convictions and the WUD conviction and ordered the five years to run consecutive to the sentence imposed on the murder conviction. Hence, the real issue before us is whether the consecutive five-year sentence for the tampering and WUD convictions is contrary to law. We find that it is not.

{¶59} According to R.C. 2953.08(G), an appellate court may modify a sentence or remand for resentencing if the appellate court clearly and convincingly finds: (1) the record does not support the sentence, or (2) the sentence is contrary to law. *State v. Webb*, 10th Dist. No. 06AP-147, 2006-Ohio-4462, ¶11, citing *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660; *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶9. "In applying the clear and convincing as contrary to law standard, we would 'look to the record to determine whether the sentencing court considered and properly applied the [non-excised] statutory guidelines and whether the sentence is otherwise contrary to law.' " Id. at ¶19, quoting *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶15.

{¶60} Pursuant to R.C. 2929.11(B), "a felony sentence shall be 'consistent with the sentences imposed for similar crimes committed by similar offenders.' " *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶8. " 'Consistency, however, does not necessarily mean uniformity. Instead, consistency aims at similar sentences. Accordingly, consistency accepts divergence within a range of sentences and takes into consideration a trial court's discretion to weigh relevant statutory factors. * * * Although offenses may be similar, distinguishing factors may justify dissimilar sentences.' " Id., quoting *State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845, ¶24.

{¶61} "Therefore, a consistent sentence is not derived from a case by case comparison; rather, the trial court's proper application of the statutory sentencing guidelines ensures consistency." *Hayes*, at ¶9, citing *State v. Hall*, 10th Dist. No. 08AP-167, 2008-Ohio-6228, ¶10. "Indeed, appellate courts have rejected consistency claims where one person involved in an offense is punished more severely than another involved

in the same offense. Additionally, we note there is no requirement that co-defendants receive equal sentences." Id., citing *Hall*, at ¶10, citing *State v. Templeton*, 5th Dist. No. 2006-CA-33, 2007-Ohio-1148, ¶98; *State v. Brewer*, 11th Dist. No. 2008-A-0005, 2008-Ohio-3894, ¶19.

{¶62} Accordingly, in order to demonstrate that a sentence is inconsistent, a defendant cannot simply present other cases in which a person convicted of the same offense received a lesser sentence; but, rather, a defendant claiming inconsistent sentencing must show that the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12. Id. at ¶10, citing *State v. Holloman*, 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶19.

{¶63} In the sentencing entry, the trial court stated that it "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12." (Judgment Entry at 1.) Additionally, the trial court "weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and 2929.14." (Entry at 1.) Such a notation in the trial court's sentencing entry is sufficient to satisfy the consistency requirement in R.C. 2929.11(B). *Hayes*, at ¶11, citing *State v. Todd*, 10th Dist. No. 06AP-1208, 2007-Ohio-4307, ¶16, citing *State v. Daniel*, Franklin App. No. 05AP-564, 2006-Ohio-4627, ¶50.

{¶64} Additionally, in the case at bar, the trial court heard statements from the victim's mother and considered the presentence investigation report that showed appellant's extensive criminal history. Upon review, we find appellant has not demonstrated that his sentence is contrary to law, and, accordingly, we overrule appellant's fifth assignment of error.

{¶65} For the foregoing reasons, appellant's five assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH, P.J., and TYACK, J., concur.

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