[Cite as *State v. Banks*, 2010-Ohio-5714.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-1087 (C.P.C. No. 08CR10-7352)
v.	:	No. 09AP-1088 (C.P.C. No. 08CR11-8386)
Sherrard R. Banks,	:	
		(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 23, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Keith O'Korn, for appellant.

APPEALS from the Franklin County Court of Common Pleas

SADLER, J.

{¶1} Defendant-appellant, Sherrard R. Banks, appeals from two separate judgments of conviction and sentence entered by the Franklin County Court of Common Pleas pursuant to jury verdicts finding appellant guilty of murder, robbery, and carrying a concealed weapon.

{¶2} The charges against appellant arose from the shooting death of Trey Banks, no known relation to appellant, and appellant's subsequent arrest while in possession of the alleged murder weapon.

{¶3} Trey Banks died from a single gunshot wound on the evening of July 25 and the morning of July 26, 2008 at the Eastmoor Square Apartment Complex in Franklin County. Five days later, on July 31, 2008, Columbus police arrested appellant, who was in possession of a loaded gun. Appellant was charged with carrying a concealed weapon and, in a separate indictment, the murder and robbery of Trey Banks. The trial court granted the prosecution's motion to join the two indictments for trial.

{¶4} The jury convicted appellant based on eyewitness and cell phone records placing him at the scene, testimony regarding prior bad blood between appellant and the victim, ballistics evidence that appellant's gun was the same weapon used to kill Trey Banks, and testimony by a jailhouse informant that appellant had confessed to the killing.

{¶5} Appellant brings the following eight assignments of error on appeal:

> ASSIGNMENT OF ERROR #1
>
> THE IMPROPER JOINDER OF THE CCW CASE AND MURDER CASE VIOLATED CRIM.R. 8 AND 14, AND DEPRIVED APPELLANT OF A FAIR TRIAL UNDER FEDERAL AND OHIO DUE PROCESS GUARANTEES.
>
> ASSIGNMENT OF ERROR #2
>
> THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS TO SUPPRESS EVIDENCE AND STATEMENTS THEREBY VIOLATING HIS RIGHTS UNDER THE 4TH AMENDMENT OF THE U.S. CONSTITUTION AND SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #3

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS IDENTIFICATION THEREBY VIOLATING HIS RIGHTS UNDER THE 5TH AND 14TH AMENDMENTS OF THE U.S. CONSTITUTION.

ASSIGNMENT OF ERROR #4

WHEN IT LIMITED THE DEFENSE IN CROSS EXAMINING THE STATE'S ONLY WITNESS THAT SAID THAT APPELLANT CONFESSED, THE COURT VIOLATED APPELLANT'S CONFRONTATION AND DUE PROCESS CLAUSE RIGHTS UNDER THE FEDERAL AND OHIO CONSTITUTIONS, AND ALSO VIOLATED ITS OWN PRIOR ORDER, OHIO'S HEARSAY RULES, RULE OF COMPLETENESS, AND THE RULE CONCERNING CROSS EXAMINATION.

ASSIGNMENT OF ERROR #5

ADDITIONAL EVIDENTIARY RULINGS CONSTITUTED ABUSES OF DISCRETION AND, INDIVIDUALLY AND COLLECTIVELY, VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL, WITH THE OTHER ERRORS.

ASSIGNMENT OF ERROR #6

APPELLANT'S CONVICTIONS WERE BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #7

IN CONTRAVENTION OF RECENT U.S. SUPREME COURT PRECEDENT, *OREGON V. ICE*, THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION, AND THE RE-ENACTED OHIO SENTENCING CODE, THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED STATUTORY FINDINGS PURSUANT TO R.C.

> §§2929.14(E)(4), 2929.41(A). ALSO, THE TRIAL COURT ISSUED A VOID AND ABUSIVE SENTENCE.
>
> ASSIGNMENT OF ERROR #8
>
> TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION.

{¶6} We will first address appellant's sixth assignment of error, which asserts that his conviction was supported by insufficient evidence or was against the manifest weight of the evidence. The legal concepts of sufficiency of the evidence and weight of the evidence involve different determinations. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. As to sufficiency of the evidence, " 'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." Id., citing Black's Law Dictionary (6th ed.1990). A determination as to whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386. The relevant inquiry on review of the sufficiency of the evidence 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." (Emphasis sic.) *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. A reversal based on insufficient evidence has the same effect as a not guilty verdict because such a determination "means that no rational factfinder could have voted to convict the defendant." *Tibbs v. Florida* (1982), 457 U.S. 31, 41, 102 S.Ct. 2211, 2218.

{¶7} As opposed to the concept of sufficiency of the evidence, the court in *Thompkins* noted that "[w]eight 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.' It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." *Thompkins* at 387, quoting Black's Law Dictionary at 1594.

{¶8} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. at 387. An appellate court should reverse a conviction as against the manifest weight of the evidence in only the most "exceptional case in which the evidence weighs heavily against the conviction," *State v. Martin* (1983), 20 Ohio App.3d 172, paragraph three of the syllabus, instances in which the jury "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id.

{¶9} Officer Darryl Holland of the Columbus Division of Police testified that he went to Eastmoor Square apartments on the night of July 25, 2008, responding to a radio dispatch of a reported shooting. Upon arrival shortly after midnight, he found a young black male, unresponsive but still alive, lying in the courtyard of the apartment complex. A single bullet wound was apparent and what appeared to be some of the victim's belongings were scattered on the ground about him. Paramedics arrived shortly

thereafter, and after briefly attending to the victim, pronounced him dead at about 12:29 a.m.

{¶10} Officer Raymond Miller, who arrived at the scene shortly after Officer Holland, also testified and gave a corroborating account of their intervention at the crime scene.

{¶11} Detective Kevin Jackson of the Crime Scene Search Unit testified about his efforts on the night in question to photograph the crime scene and collect and preserve evidence. He arrived on the scene between 1:00 and 2:00 in the morning. He described the photographs he took of the crime scene, and identified evidence marker cones he had placed on the scene for certain important pieces of material evidence. These included a spent bullet near the victim's body and various personal items scattered around the body. Among these were, according to the detective's log, cell phone parts, a small amount of cash, and a credit card.

{¶12} Detective Jackson described the situation in which he found the spent bullet, and stated that although he and other investigators conducted an extensive search, they were unable to locate a corresponding spent cartridge casing, such as might have been ejected from a semi-automatic handgun. The detective testified that this preliminarily, but not conclusively, indicated to investigators that a revolver, rather than semi-automatic weapon, would have been used in the shooting.

{¶13} On cross-examination, Detective Jackson stated that he did not run fingerprint checks on any of the items, including the money and credit card, found in the vicinity of the victim. When questioned he stated that in addition to the $6.55 in cash and valid credit card found near the victim, the victim retained his tennis shoes, which are

often the object of robberies. Detective Jackson also acknowledged that photographs indicated that the victim appeared to have retained an earring in his left ear.

{¶14} Dr. Tha Lyong An of the Franklin County Coroner's office performed the autopsy of the victim. She testified that the cause of death was a single gunshot wound to the chest with laceration of the left lung and heart, and extensive bleeding as evidenced by large quantities of blood in the chest cavity. The entrance wound was above the left nipple and the exit wound was located in the left mid-back near the spine, giving a direction of travel for the bullet from front to back and somewhat downward. Dr. An testified that the body showed no evidence of soot or stippling, such as would be produced by a close-range gunshot.

{¶15} Denise Larkins, a resident of Eastmoor Square apartments, testified that on the night in question she was in her apartment and heard what sounded like a firecracker. When she and her boyfriend went outside they saw the victim on the ground coughing up blood. He was trying to voice words, but Larkins could not understand what he was saying.

{¶16} Larkins further testified that earlier on the night in question, she saw a man she knew as "SB" among groups of people standing about at the apartment complex. She knew SB from having seen him at the apartment complex over the past few years. Larkins identified appellant in open court as SB, corroborating a prior identification from a photo lineup performed for the police in October 2008 in connection with the investigation.

{¶17} Lester Scarf, an employee of the Sprint/Nextel cell phone company, gave technical testimony regarding the handling of cell phone calls by cell phone towers in

service, and the extent to which a call location can be pinpointed by the manner in which it switches between towers and is located in various directions in relation to a given tower.

{¶18} Jeff Strahm, a custodian of records for Sprint/Nextel, testified and provided records related to the cell phone number that the state identified as belonging to appellant.

{¶19} John Cooke, a criminal intelligence analyst with the Ohio Attorney General's office, used the information provided by the Sprint/Nextel records to prepare a map showing cell phone towers in central Ohio and call locations for the identified number in relation to the homicide location. For the number in question, Cooke determined that there were 23 calls between 10:40 p.m. and 1:01 a.m. on the night in question going through towers in the shooting area on the east side of Columbus. After a one-half hour lapse, three more calls occurred, all handled through west side Columbus towers. Of the calls made on the east side during the period in question, four went to two local taxi cab companies.

{¶20} Trey Banks' mother, Terry Martin, testified that Trey lived with her at the time of his death. He had been paid by his employer on July 25. She last saw him at between 5:30 and 6:00 p.m. on that day. At that time, he was wearing, as he did every day, a necklace that Martin had given him for Christmas. Martin testified that she has been unable to locate that necklace since.

{¶21} Mark Hardy, a forensic specialist employed by the Columbus Division of Police as supervisor of the firearms examination area of the police lab, testified about his examination of the Taurus .38 Special revolver taken from appellant at the time of his arrest and the spent bullet recovered at the scene of the shooting. He first examined the

weapon for operability, and determined that it had a significant mechanical flaw but was nonetheless operable. The flaw involved the link between the trigger and the cocking mechanism, so that the gun could not fire multiple shots by simply repeatedly pulling the trigger. Instead, the user would be forced to manually cock the gun between shots to set the hammer in the ready position and advance the cylinder to the next chamber. This would not impair the gun's capacity to fire one shot, or several shots at a slower rate than if the weapon were in its designed condition.

{¶22} Hardy then testified about his efforts to establish a ballistic match between the gun and the spent bullet found at the shooting scene. Hardy compared the recovered bullet with several test rounds fired from the gun. He opined that both the general ballistic characteristics and specific microscopic features on the spent round presented a match to this particular weapon.

{¶23} David Smith, who for a time shared a cell with appellant awaiting trial at the Jackson Pike Jail, testified regarding his conversations with appellant during that period. Smith and appellant knew each other from high school and had at one time contemporaneously dated the same woman.

{¶24} Smith testified that appellant confessed to having shot someone at Eastmoor Square Apartments. Appellant stated that this was an individual with whom he had a past altercation, and when they had again encountered each other, appellant had "shot the guy and robbed him for what he had." (Tr. 793.) Smith further testified that appellant had told him that the gunshot was to the stomach and that appellant had taken the victim's jewelry and money. According to Smith, appellant also stated that the gun

was the same weapon for which he had been charged for carrying a concealed weapon, i.e., the gun with which appellant was arrested.

{¶25} Under direct and cross-examination, Smith conceded that he was testifying pursuant to a plea agreement for reduction of his sentence in another unrelated case in which he had also agreed to testify against his four co-defendants.

{¶26} Under both the sufficiency and manifest weight standard, the evidence is sufficient to convict appellant. If the jury believed Smith's testimony regarding appellant's confession that he had shot and robbed a man at Eastmoor Square Apartments, using the same gun with which he was arrested, this would support conviction. While the jury could have used the fact that Smith was testifying pursuant to a plea bargain to discount his testimony, the jury chose not to do so and was under no obligation to do so. *State v. Bliss,* 10th Dist. No. 04AP-216, 2005-Ohio-3987, ¶26. Nor was the jury obligated to discount Smith's testimony due to any possible bias resulting from the fact that he and appellant had simultaneously dated the same woman.

{¶27} The cell phone analysis presented by the state, as well as eyewitness testimony, placed appellant in the vicinity of the shooting at the appropriate time period. Mr. Hardy's testimony regarding the bullet match between the gun with which appellant was arrested and the spent bullet found near the victim's body, in conjunction with appellant's admission to his arresting officer that he bought the gun about a week before he was arrested (and thus shortly before the murder), support conviction.

{¶28} While appellant argues on appeal that the presence of some valuables near the victim's body may negate the occurrence of robbery, and that the state could not definitively prove that the bullet found at the scene was one that actually killed the victim,

this goes to the weight of the circumstancial evidence and does not require the jury to disregard it entirely.

{¶29} In summary, there was sufficient evidence both under a sufficiency analysis and a manifest weight analysis to, in conjunction with the inferences permissibly made by the jury, support appellant's conviction for robbery and murder. Appellant's sixth assignment of error is overruled.

{¶30} Appellant's first assignment of error asserts that the trial court abused its discretion in joining the murder and robbery indictment with the concealed weapon indictment for common trial. We review a trial court's decision on joinder of offenses for trial under an abuse of discretion standard. *State v. LaMar,* 95 Ohio St.3d 181, 2002-Ohio-2128, ¶49. The term "abuse of discretion" connotes more than a mere error in law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157. Crim.R. 8(A) provides that 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." To maximize judicial economy and minimize the risk of inconsistent outcomes, the law favors joinder of criminal offenses for trial where appropriate. *State v. Coleman*, 85 Ohio St.3d 129, 136, 1999-Ohio-258; *State v. Tores* (1981), 66 Ohio St.2d 340, 343. To determine whether a criminal defendant would be prejudiced by joinder of offenses for trial, the trial court should assess "(1) whether evidence of the other crimes would be admissible even if the

counts were severed, and (2) if not, whether the evidence of each crime is simple and distinct." *State v. Schaim*, 65 Ohio St.3d 51, 59, 1992-Ohio-31.

{¶31} Appellant argues that in the present case, the evidence in his concealed weapon case, which included his flight from police and admission regarding ownership of the gun, would not have been admitted in the murder case if the matters had not been joined. Appellant argues that, logically, it follows that he was deprived of the opportunity to simply stipulate in his murder trial to possession of the gun in question at the time of his arrest.

{¶32} With respect to the stipulation, there would have been no obligation for the state to accept such a stipulation in preference to presenting it as evidence during trial. Moreover, the evidence presented in support of the carrying a concealed count would have been admissible as other-acts evidence to prove identity under Evid.R. 404(B), since possession of the gun linked to the shooting formed " 'part of the immediate background of the alleged act which forms the foundation of the crime charged in the [murder] indictment.' " *State v. Lowe* (1994), 69 Ohio St.3d 527, 531, quoting *State v. Curry* (1975), 43 Ohio St.2d 66, 73. Possession of the handgun a few days after the shooting was "inextricably related to the alleged criminal act" in the murder and robbery trial. *Curry* at 73. See also *State v. Williams*, 73 Ohio St.3d 153, 158, 1995-Ohio-275 (possession of alleged murder weapon was "so blended or connected" with the murder that proof of possession explained the circumstances of the murder and went to proof of the elements thereof); *State v. Nelms,* 10th Dist. No. 06AP-1193, 2007-Ohio-4664, ¶23 (possession of alleged murder weapon would have been admissible as "other acts" evidence in murder trial, even if charges were severed).

{¶33} Under the facts of this case we find no abuse of discretion on the part of the trial court in joining the charges for common trial, and appellant's first assignment of error is overruled.

{¶34} Appellant's second assignment of error asserts that the trial court erred when it denied appellant's motion to suppress evidence and statements obtained in connection with his arrest. The material evidence in question was the gun that was in his possession at that time, and the most significant statement was the one he made to the arresting officers that he had bought the gun for $100 about a week previously because he felt threatened by the "Crips" gang.

{¶35} The arresting officers, Hatfield and Steele, testified at the suppression hearing regarding circumstances of the arrest. They first saw appellant among a group of young men standing in the street near a parked car. As the officers approached in their cruiser, most of the group returned to the sidewalk, but appellant walked away from them. The officers pulled up next to appellant to speak with him, at which point both officers noticed appellant "blading" his body away from the officers, that is, presenting his profile; the officers recognized this as a common posture assumed by persons attempting to conceal contraband.

{¶36} Officer Steele engaged appellant in conversation and told appellant that he should not walk in the street. Officer Steele asked if appellant lived in the apartment complex and asked to see some identification.

{¶37} At this point, both officers testified, appellant fled rapidly on foot. Officer Hatfield chased appellant on foot while Officer Steele followed in the cruiser. During the chase, Officer Hatfield saw appellant reaching into his waistband and, correctly thinking

that appellant had a gun, Officer Hatfield drew his own and ordered appellant to the ground. After appellant complied, Officer Hatfield noticed the barrel of the gun protruding from beneath appellant's left shoulder. The officers secured the gun and placed appellant in their cruiser after handcuffing him. Officer Hatfield testified that he read appellant a constitutional rights waiver before questioning appellant. The interrogation was not videotaped and appellant did not sign a written rights waiver. During initial questioning by the arresting officers, appellant told them that he had purchased the gun about a week before for $100 to protect himself from the Crips gang members.

{¶38} Appellant argues on appeal that the circumstances of the stop and eventual arrest by police violated his constitutional right against unreasonable search and seizure and his right to advisement of his constitutional rights under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, including that he had a right to remain silent when questioned.

{¶39} The Fourth Amendment to the United States Constitution, as applied to this case to the Fourteenth Amendment and Section 14, Article 1 of the Ohio Constitution, prohibits the government from conducting warrantless searches and seizures, rendering them unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 514; *State v. Mendoza,* 10th Dist. No. 08AP-645, 2009-Ohio-1182. Evidence obtained solely by means of an unconstitutional search or seizure may be inadmissible. *State v. Carrocce,* 10th Dist. No. 06AP-101, 2006-Ohio-6376, ¶27, citing *Wong Sun v. United States* (1963), 371 U.S. 471, 484-85, 83 S.Ct. 407, 416. The

state bears the burden of establishing the validity of a warrantless search. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, paragraph two of the syllabus; *State v. Moyer,* 10th Dist. No. 09AP-434, 2009-Ohio-6777.

{¶40} With respect to appellant's statements, the trial court found credible the officers' statements that appellant was advised of his rights under *Miranda.* That testimony constituted competent, credible evidence to support the trial court's conclusion. Once he was advised, the court was free to "infer a waiver from the suspect's behavior, viewed in light of all the surrounding circumstances." *State v. Murphy*, 91 Ohio St.3d 516, 518, 2001-Ohio-112. "Where a suspect speaks freely to police *after* acknowledging that he understands his rights, a court may infer that the suspect implicitly waived his rights." (Emphasis sic.) Id. at 519. Both officers testified that appellant readily volunteered his statements after being advised of his rights, and was not pressured or threatened into speaking to the officers.

{¶41} We accordingly find that the trial court did not err when it refused to suppress appellant's verbal statements made in the course of his arrest.

{¶42} With respect to the initial stop that led to appellant's flight, apprehension, and discovery of the gun, the court had before it the officers' testimony that they did not restrain appellant when they first approached him in their cruiser, but merely approached him to question him after observing him in the street and his behavior, which contrasted that of the other persons with whom he was associating. A police officer does not effect a seizure merely by approaching an individual and asking a few questions. *Florida v. Bostick* (1991), 501 U.S. 429, 435, 111 S.Ct. 2382, 2386. "While most citizens will respond to a police request, the fact that people do so, and do so without being told they

are free not to respond, hardly eliminates the consensual nature of the response." *Immigration & Naturalization Serv. v. Delgado* (1984), 466 U.S. 210, 216, 104 S.Ct. 1758, 1762. Police are therefore "generally permitted to approach an individual, even if they have no basis to conclude that he is suspicious, and may ask questions of and request identification from the individual 'as long as the police do not convey a message that compliance with their requests is required.' " *State v. Franklin,* 97 Ohio St.3d 1, 2002-Ohio-5304, ¶11, quoting *Bostick,* 501 U.S. at 435, 111 S.Ct. at 2386. The evidence presented at the hearing supported the trial court's conclusion that the initial conversation with officers did not, at least before appellant terminated the interview by fleeing, escalate into an investigatory detention.

{¶43} Once appellant chose to abruptly terminate his consensual interview with police by means of flight, the arresting officers were justified in the initiating a valid stop under *Terry v. Ohio* (1967), 392 U.S. 1, 88 S.Ct. 1868. *Terry* sets forth an exception to the warrantless seizure requirements under the constitution. Under *Terry,* a police officer conducting an investigatory stop pursuant to reasonable suspicion based on specific and articulable facts that an individual is or has been engaged in a criminal activity may detain the individual by means and for a length of time that will vary with the circumstances. Id., 392 U.S. at 21, 88 S.Ct. at 1879. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus. When assessing the circumstances of the stop, the court should consider and evaluate them "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88. Courts should give "due

weight to [the officer's] experience and training and view the evidence as it would be understood by those in law enforcement." Id. at 88.

{¶44} "Although '[a] suspect is "free to leave" a non-seizure interview, * * * when he does so by abruptly bolting after having consented to talk, the officers are free to draw the natural conclusions.' " *Moyer* at ¶22, quoting *State v. Holloway* (Sept. 28, 2000), 10th Dist. No. 99AP-1455. "Headlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Illinois v. Wardlow* (2000), 528 U.S. 119, 124, 120 S.Ct. 673, 676.

{¶45} When appellant bolted from the interview area, and even more so when he reached towards his waistband while running as the officers pursued, the officers were justified in concluding that they had before them specific and articulable facts to support a reasonable suspicion of criminal activity warranting an investigative stop. Although that stop in this instance took place at gunpoint, the right to make an investigatory stop "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it," *Graham v. Connor* (1989), 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, and officers conducting a *Terry* stop are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." *United States v. Hensley* (1985), 469 U.S. 221, 235, 105 S.Ct. 675, 683-84. Otherwise put, when a *Terry* stop is "predicated on the suspicion that a person might be concealing a firearm, the threat to an officer's safety is so manifestly obvious that the use of force is largely justified." *State v. Taylor,* 8th Dist. No. 92382, 2009-Ohio-5822, ¶19.

{¶46} In summary, the facts of the case support that the initial stop was not a seizure, and that the subsequent chase and apprehension resulted in a valid investigatory stop pursuant to *Terry.* Suppression of the evidence thus obtained, in this instance the firearm, was not warranted, and the trial court did not err in denying appellant's motion to suppress. Appellant's second assignment of error is accordingly overruled.

{¶47} Appellant's third assignment of error asserts that the trial court erred when it denied his motion to suppress a pretrial identification from a photo lineup of appellant by the eyewitness that placed him near the scene of the crime shortly before the shooting, Denise Larkins.

{¶48} A defendant's right to due process of law prohibits the use of identifications that, under the totality of the circumstances, are impermissibly suggestive and present an unacceptable risk of misidentification. *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375. However, convictions based on "eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967, 971. A reviewing court, when assessing the reliability of a pretrial identification, will consider the totality of the circumstances including (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's attentiveness, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty demonstrated at confrontation (here, presentation of the photo lineup), and (5) the time between the crime and the confrontation. *Biggers,* 409 U.S. at 199-200, 93 S.Ct. at 382.

{¶49} Detective Robert Powers testified at the suppression hearing, although he was not the detective that actually presented the photo array from which Larkins identified appellant as "SB," the individual she had seen in the vicinity a short time before the shooting and periodically at the apartment complex over time before that. Appellant essentially argues now that Powers's testimony is insufficient to establish the reliability of the photo lineup identification and oppose the motion for suppression, because Powers was not present when Larkins identified appellant from the photo lineup and could not establish whether the circumstances surrounding the identification met the constitutional standard.

{¶50} The burden is on the defendant to establish that an identification procedure was impermissibly suggestive and the resulting identification unreliable. *State v. Sharp,* 10th Dist. No. 09AP-408, 2009-Ohio-6847, ¶14. Beyond the fact that it was not the officer who conducted the identification procedure with Larkins that testified at the suppression hearing, appellant suggests nothing to show that the photo identification was constitutionally defective or unreliable. As the burden is on appellant to support suppression at the initial hearing and remains on appellant to show error by the trial court in failing to grant suppression, appellant must articulate some set of facts or circumstances to establish that the identification was unreliable. Appellant has failed to do so, and appellant's third assignment of error is accordingly overruled.

{¶51} Appellant's fourth assignment of error asserts that the trial court erred in limiting defense cross-examination of David Smith, appellant's cellmate who testified that appellant had admitted to the killing. On cross, defense counsel attempted to ask Smith if

appellant had stated that he was concerned that the gun in question could "have murder on it." (Appellant's brief, 18.) The prosecution objected, but the record does not clearly indicate whether the court sustained or overruled the objection. Defense counsel at that time did not restate the question and obtain a response from the witness. (Tr. 802-11.) Subsequently, after intervening testimony from another witness, defense counsel proffered to the court the question he would have asked, apparently in the belief that the court had sustained the state's objection: "Isn't it true that Mr. Banks stated to you that he hopes there is no murder on that gun because he just got it off the street last week?" (Tr. 854.) At this point the trial court indicated that it would have allowed counsel to ask this question, whereupon counsel requested that Smith be returned to the stand to answer the proffered question. The trial court ultimately declined to recall the witness. (Tr. 901.)

{¶52} Appellant now argues that the confusion surrounding the cross-examination of Smith, and the trial court's later refusal to recall Smith to the stand, violate his right to confront his accusers guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. The ability to cross-examine adverse witnesses is a significant aspect of his constitutional right to confront witnesses. *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 679, 106 S.Ct. 1431, 1435. However, trial courts may impose reasonable limits on cross-examination in order to preclude "harassment, prejudice, confusion of the issues, the witness's safety, repetitive testimony, or marginally relevant interrogation." *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001-Ohio-4, citing *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435. A reviewing court will not reverse the trial court's limitation or prohibition on cross-examination unless the

trial court abused its discretion in so ruling. *State v. Reed,* 10th Dist. No. 09AP-84, 2009-Ohio-6900, ¶7. A trial court's decision not to recall a witness would also be reviewed under an abuse of discretion standard. *State v. Spirko* (1991), 59 Ohio St.3d 1, 28.

{¶53} The issue before this court is not whether the proffered question was admissible, but whether defense counsel in fact had the opportunity to ask it. A defendant's constitutional right to confront witnesses by effective cross-examination is a right to have the *opportunity* to do so. *Delaware v. Fensterer* (1985), 474 U.S. 15, 20, 106 S.Ct. 292, 294, and the failure of the defense in the present case to ask the question did not result from a denial of opportunity. In response to the initial attempt by defense counsel to ask the question, the trial court in fact responded not by sustaining the state's objection to the question, but by stating that it would grant defense counsel some "leeway" in the area. (Tr. 804.) The fact that defense counsel declined to pursue the line of questioning does not result in a constitutional deprivation. Appellant's fourth assignment of error is accordingly overruled.

{¶54} Appellant's fifth assignment of error collectively addresses a variety of disputed evidentiary rulings made by the trial court. These include the admissibility of testimony and exhibits concerning the use of cell phone records to establish appellant's location on the night of the shooting, the admission of alleged statements by appellant regarding gang activity made at the time of his arrest, admission of testimony from the victim's mother that the victim had been paid by his employer on the day he was shot, and prohibition of testimony regarding what kind of trauma a victim might have sustained

from having a chain necklace yanked from his neck. On appeal, appellant argues that these evidentiary rulings individually and collectively amount to an abuse of discretion that denied appellant a fair trial.

{¶55} Generally, an admission of evidence lies within the discretion of the trial court and evidentiary rulings will not be disturbed on appeal in the absence of an abuse of discretion that has resulted in the material prejudice to the defendant. *State v. Conway,* 109 Ohio St.3d 412, 2006-Ohio-2815, ¶62; *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290.

{¶56} With respect to the testimony and exhibits used to establish the location of appellant's cell phone on the night in question, appellant challenges the admissibility of John Cooke's testimony and the maps Cooke created to plot the resulting location data and convert information from phone and cell tower records. Appellant argues that this procedure clearly requires specialized knowledge, skill, experience, training or education possessed by an expert qualified under Evid.R. 702.

{¶57} Cooke is a criminal intelligence analyst with the Organized Crime Division of the Ohio Attorney General's office. During his preliminary testimony, Cooke stated that he had 21 years of experience in the field, including eight in the military. Cooke also stated that he attended the Federal Law-Enforcement Training Center and had other specialized training, which included analysis of "cell phone information, tower records, and the like." (Tr. 645.) His training from the federal Drug Enforcement Administration Academy and the military was specific to this kind of analysis. (Tr. 655-56.)

{¶58} The trial court treated Cooke as an expert, even though the prosecution had not specifically asked for him to be qualified as such: "[w]hile the state does not ask me

to qualify him as an expert, I do believe he has the ability to speak to the records that he created." (Tr. 651.) Based upon the above-outlined work experience, qualifications, and training, it was within the trial court's discretion to consider Cooke an expert and admit his testimony.

{¶59} The case of *Wilder v. State* (2010), 191 Md.App. 319, relied upon by appellant, does require the prosecution to offer expert testimony to explain the function of cell phone towers, tracking, and locating techniques. This case from another jurisdiction is, of course, no more than persuasive, but we need not consider whether it should be applied as the law in Ohio because the case warrants no reversal even if applied. In the matter before us, the state did present an expert employed by Nextel to establish the basics of cell phone technology. The trial court then treated Cooke as an expert for purposes of applying the technological information supplied by the Nextel employee. In contrast, *Wilder* held that "the use of cell phone site location evidence and the accompanying testimony of a law enforcement officer who explained its use require the qualification of the sponsoring witness as an expert." Id. at 364. That is precisely what happened in the present case, since the phone company employees were properly qualified. Thus, even applying the narrow approach proposed in *Wilder*, we find no error in the trial court's admission of the cell phone evidence.

{¶60} Appellant also challenges admission of an alleged statement by appellant made to police in the cruiser at the time of his arrest, when he stated that he had acquired the gun for protection from the Crips gang. The trial court in contrast did sustain an objection to admission of information regarding appellant's alleged membership in the

rival Bloods gang. Appellant argues that there was no gang specification under R.C. 2941.142 in his indictment, and any reference to gang involvements, however tangential, was prejudicial because it encouraged the jury to infer that appellant had some gang involvement.

{¶61} While gang affiliation testimony has been found admissible to prove the defendant's motive, *State v. Clark*, 12th Dist. No. CA2007-03-037, 2008-Ohio-5208, and *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, that exception would not apply in the present case because the statement in question went, at best, to establish appellant's motive for owning the gun, not committing the crimes with which he was charged. We find, however, that the admitted statement does not support prejudicial error warranting reversal because it did not go to prove appellant's own bad character by gang involvement, but referred to the gang membership of other individuals. Any prejudice therefore is minimal, and no error is found.

{¶62} Appellant in addition argues that the trial court erred in allowing the victim's mother to testify that Trey Banks had been paid on the day he was killed. This evidence supported an inference that Trey Banks would have had on his person larger sums than were found around his body, and that appellant, consistent with his statements to Smith in jail, had taken this money. Appellant alleges that an insufficient foundation was laid for the victim's mother to have reliable knowledge about his pay dates. Because it was established that Trey Banks lived with his mother, sufficient foundation was laid to establish that she would be familiar with his pay dates, and the trial court did not err in allowing this testimony.

{¶63} In addition, appellant argues that the trial court improperly prevented Dr. An from testifying about what trauma might be found on a body if a chain had been yanked from its neck. The trial court did not allow the question on the basis that it called for speculation. Implied in this are reservations because the question omitted the facts necessary for an informed answer by Dr. An, including material used in the chain, the size of the chain, the nature of the fastener, and position of the body. It was within the trial court's discretion to refuse to allow the question in this form.

{¶64} In summary, we find that the trial court's evidentiary rulings, individually or in the aggregate, either were not error or do not rise to the level of prejudicial error, and appellant's fifth assignment of error is overruled.

{¶65} Turning to appellant's seventh assignment of error, appellant argues that the trial court erred by imposing consecutive sentences without making the statutorily-required findings once required by R.C. 2929.14(E)(4) to overcome the presumption set forth in R.C. 2929.41(A) favoring concurring sentences. Appellant concedes that, under the Supreme Court of Ohio's ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the requirement of judicial and fact-finding, pursuant to R.C. 2929.14(E)(4), was declared unconstitutional and that portion of the sentencing statute was severed and struck down.

{¶66} Appellant argues that the United States Supreme Court decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, nullified the pertinent holding in *Foster* and revised the statutory requirement of judicial fact-finding before imposition of consecutive criminal sentences. Appellant also argues that the Ohio legislature has from time to time "re-enacted" R.C. 2929.14(E)(4) by restating the language of that section when making

amendments to other subsections of R.C. 2929.14. This court has uniformly rejected both lines of argument. See, e.g., *State v. Johnson*, 10th Dist. No. 09AP-1065, 2010-Ohio-3381, and *State v. Busby*, 10th Dist. No. 09AP-1119, 2010-Ohio-4516. Until the Supreme Court of Ohio considers and rules upon the impact of *Ice* on the holding in *Foster*, we remain bound by *Foster*.

{¶67} In addition, appellant argues that the trial court improperly considered his courtroom demeanor at trial. The trial court apparently noted appellant's indignation at various points in the proceedings, and apparently took this as a sign of lack of genuine remorse, a factor to be considered in sentencing under R.C. 2929.12(B)(5). Absent more, this was not error. Appellant also points to the fact that the trial court refused to waive payment of court costs. In light of the fact that appellant filed no motion to waive costs and filed no affidavit of indigency, the issue is waived. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, paragraph two of the syllabus and ¶23.

{¶68} Finally, appellant argues that the sentencing entry incorrectly imposes a five-year post-release control term on the robbery count instead of the statutorily-defined three-year term, although the trial court did properly notify the defendant of the three-year post-release control term verbally at the sentencing hearing. The state concedes the incorrect term but argues that, pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of the syllabus, when a trial court fails to properly impose post-release control, corrective procedures set forth in R.C. 2929.191 apply. That section, however, applies only to cases in which the trial court failed to impose any post-release control in the sentencing entry or failed to properly notify the defendant at the sentencing

hearing that he would be subject to post-release control. R.C. 2929.191 provides for a limited corrective procedure in such cases that eliminates the need for a full-scale resentencing, but by its own terms it cannot govern the case before us, in which the trial court advised appellant of post-release control and imposed it in the sentencing entry, but for an excessive term.

{¶69} The state also argues that, pursuant to R.C. 2929.14(F)(1), "the failure of a court to include a post-release control requirement in the sentence * * * does not negate, limit, or otherwise affect the mandatory period * * * required for the offender." The state's position is that if a complete failure to impose post-release control will not negate, limit or otherwise affect the statutorily-mandated period, a mistaken reference to five years post-release control instead of three years is equally ineffective. We disagree. Imposition of a longer term of post-release control does not equate to an imposition of no term, and R.C. 2929.14(F)(1) is inapplicable.

{¶70} The remedy for sentencing error, in the absence of any of the newer statutory exemptions given above for cases of omission, remains either correction of clerical error by means of nunc pro tunc entry or avoidance of the unlawful sentence and imposition of a new sentence at a full sentencing rehearing. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. Given that the trial court announced the correct term of post-release control during the course of the sentencing hearing, it is apparent that the incorrect term stated in the sentencing entry does not reflect the actual decision of the court in imposing sentence. As such, the clerical error reflected in the entry may be corrected by means of a nunc pro tunc entry entered by the trial court.

{¶71} A nunc pro tunc order corrects a judicial entry that contains error in the recordation of a court's decision. *State v. Nye* (June 4, 1996), 10th Dist. No. 95APA11-1490; *State v. Jama*, 10th Dist. No. 09AP-872, 2010-Ohio-4739. Specifically, the order corrects errors that are merely clerical, and this type of error does not involve any legal determinations. *Warren v. Warren*, 10th Dist. No. 09AP-101, 2009-Ohio-6567, ¶7, 11; *State v. Brown*, 10th Dist. No. 08AP-747, 2009-Ohio-1805, ¶8. Stated another way, a nunc pro tunc order shall not modify a court's judgment or render a decision on a matter when none was previously made. *Nye*. Consequently, an entry corrected by a nunc pro tunc order must reflect what the court had actually decided, not what the court might or should have decided. *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, ¶14. See also *Norris v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 05AP-762, 2006-Ohio-1750, ¶12 (noting that a nunc pro tunc order is limited to memorializing what the court previously decided).

{¶72} The matter shall therefore be remanded to the trial court for the court to enter a nunc pro tunc judgment reflecting the actual decision of the court on the duration of community control on the robbery count.

{¶73} In summary, appellant's seventh assignment of error addressing sentencing issues is overruled in part and sustained in part.

{¶74} Appellant's eighth assignment of error asserts that he was denied the effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. In order to establish a claim of ineffective assistance of counsel, a defendant must first demonstrate that his trial counsel's performance was so deficient that it was unreasonable under prevailing

professional norms. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064. The defendant must then establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 466 U.S. at 694, 104 S.Ct. at 2068.

{¶75} "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, 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., 466 U.S. at 689, 104 S.Ct. at 2065, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. A verdict adverse to a criminal defendant is not of itself indicative that he received ineffective assistance of trial counsel. *State v. Hester* (1976), 45 Ohio St.2d 71, 75.

{¶76} Appellant first argues the trial counsel was ineffective for failing to argue that the arresting officers lacked authority to make the initial stop of appellant for the minor misdemeanor traffic offense of standing or walking in the street. Our analysis of appellant's arrest set forth in our discussion of appellant's second assignment of error negates his line of argument since we have found that the trial court correctly concluded that appellant's first stop did not constitute the *Terry* stop, but merely a voluntary interview

by the officers, and the subsequent detention under *Terry* stop guidelines was prompted by appellant's flight from the interview.

{¶77} Appellant also argues that trial counsel was ineffective for failing to effectively pursue the line of questioning regarding Smith's purported prior statement that appellant had said that he hoped there was "no murder on that gun." (Tr. 854.) Pursuant to our discussion of appellant's fourth assignment of error, we have concluded that the trial court gave counsel the opportunity to pursue this line of inquiry, so the only issue is whether counsel was ineffective for not actually asking such a question. In the absence of a proffer, it is difficult to, first, conclude that the failure to inquire along this line constituted an unprofessional error, and second, state that the outcome of the trial would have been clearly different if trial counsel had done so. "This court will not sustain an ineffective assistance of counsel claim based on pure speculation as to what a witness might have said at trial." *State v. Turner*, 10th Dist. No. 04AP-364, 2004-Ohio-6609, ¶27.

{¶78} Finally, appellant argues that counsel was ineffective for failing to file a motion to waive payment of court costs or an affidavit of indigency. We cannot conclusively find that the trial court would have granted such a motion, and so we cannot find error under the *Strickland* standard because the outcome of the trial would not have been clearly different.

{¶79} We accordingly find that appellant's eighth assignment of error is without merit and is overruled.

{¶80} In summary, we find that appellant's first, second, third, fourth, fifth, sixth, and eighth assignments of error are without merit and must be overruled. Appellant's seventh assignment of error is overruled in part and sustained in part, and the matters will

be remanded to the trial court for correction by means of a nunc pro tunc entry to impose the correct term of post-release control for the robbery conviction.

Affirmed in part, reversed in part;
causes remanded with instructions.

BRYANT and KLATT, JJ., concur.

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