[Cite as *State v. Coleman*, 2011-Ohio-1889.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 10AP-265 (C.P.C. No. 08CR-12-8790)
v.	:	No. 10AP-266 (C.P.C. No. 09CR-02-1055)
Dred Coleman,	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on April 19, 2011

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

Todd W. Barstow, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} In these consolidated appeals, defendant-appellant, Dred Coleman, appeals from judgments of sentence and conviction entered by the Franklin County Court of Common Pleas following a jury trial in which appellant was found guilty of aggravated murder, aggravated burglary, having a weapon while under disability, and tampering with evidence.

{¶2} On December 19, 2008, appellant was indicted in common pleas case No. 08CR-8790 on one count of having a weapon while under disability, in violation of R.C. 2923.13, and one count of tampering with evidence, in violation of R.C. 2921.12; the latter count included a firearm specification. On February 24, 2009, appellant was indicted in

common pleas case No. 09CR-1055 on two counts of aggravated murder, in violation of R.C. 2903.01, and one count of aggravated burglary, in violation of R.C. 2911.11. Each of these counts included a firearm specification. The indictments arose out of the shooting death of Darryl Wood on December 9, 2008.

{¶3} The trial court subsequently ordered a joinder of the indictments, and the cases came for trial before a jury beginning October 28, 2009. At trial, the state presented evidence that Darryl Wood ("Wood"), Rudolph Lynch, and Keith James were each indicted on drug charges in Franklin County in June of 2008. Those three individuals appeared in Franklin County Common Pleas Court on December 8, 2008, at which time the prosecutor "made Keith James' attorney aware that Darryl [Wood] intended to cooperate against the two co-defendants." (Tr. 470.) The case was then continued because of Wood's indication of cooperation. On December 9, 2008, Wood was shot and killed at his residence on 2320 Argyle Drive, Columbus. Appellant, the nephew of Rudolph Lynch, and another individual, Ramon Blevins, were arrested shortly after the shooting. Blevins entered a guilty plea to a charge of murder, with a firearm specification, in connection with the shooting death of Wood, and is currently serving a sentence of 18 years to life at the Ross Correctional Institute.

{¶4} Blevins, age 25, testified on behalf of the state at appellant's trial, and gave the following testimony. Blevins, an acquaintance of appellant, is a resident of Cleveland. Blevins first met Lynch at appellant's residence in early December of 2008. On Friday, December 5, 2008, the three men got into a van driven by Lynch and traveled from Cleveland to Columbus, where they rented a room at a Motel 6 on Brice Road; Lynch paid for the room.

{¶5} On the morning of Monday, December 8, the three men drove to Wood's neighborhood and parked several houses away from his residence. Lynch watched Wood's house from the van; Blevins believed they were watching the house "[f]or a burglary to occur." (Tr. 498.) Lynch told Blevins that Wood usually went to work in the morning, but Wood did not leave for work on this particular date. After approximately one hour, Lynch drove appellant and Blevins back to the motel.

{¶6} The next morning, December 9, the three men returned to Wood's neighborhood and sat in the van near his home. They watched Wood and his wife leave their residence that morning. Blevins and appellant then went to the rear of the house, while Lynch remained outside. Blevins was wearing a gray hoodie, a tan coat, white tennis shoes, blue jeans, gloves, and a mask. Appellant was wearing a gray hoodie, gloves, dark pants, and black tennis shoes with white soles. Blevins jimmied the back door and they entered the residence. Blevins began searching the house for marijuana. He went to the basement and tossed two items to the floor, not realizing they were bales of marijuana. Blevins then went upstairs to tell appellant he could not find anything.

{¶7} At about that time, Wood returned to his residence, and appellant and Blevins ran downstairs and hid in a laundry area. Blevins heard two voices upstairs. Wood started to come downstairs, but he noticed appellant. Wood asked appellant what he was doing there, and Wood then ran upstairs and yelled to someone "[g]et my gun." (Tr. 516.) Appellant went up the stairs directly behind Wood. Blevins began running up the stairs, but, halfway up the stairway, he heard a couple of gunshots from the front yard. He went outside and saw Wood lying on the ground. During the shooting incident, Blevins heard Wood pleading: "Don't kill me." (Tr. 549.) Blevins had earlier observed a .357 revolver in the van in a box.

{¶8} Appellant started running across the backyard, and Blevins followed after him and jumped over a fence. (Tr. 518.) A short time later, Blevins threw his tan coat, gloves, and mask into a trash can. Appellant gave Blevins his gloves, and Blevins also threw those into a trash can. Blevins observed the revolver in appellant's hand, and appellant threw the weapon into a nearby sewer. (Tr. 525.)

{¶9} At the time the shots were fired, several neighbors called 911, and police officers soon arrived and were given a description of "a couple of suspicious male blacks" in a backyard residence. (Tr. 103.) One officer observed the two suspects and gave chase on foot. Appellant was arrested after a brief foot chase. Blevins hid underneath a van, but was soon discovered by police officers and arrested.

{¶10} Later that evening, Blevins and appellant were released from police custody. They went to a nearby restaurant, and appellant called his uncle. Lynch arrived a short time later, but when appellant and Blevins went to the parking lot, Lynch was gone. Blevins and appellant then boarded a COTA bus; after a few stops, Lynch got on the same bus and handed appellant some clothes.

{¶11} Blevins and appellant eventually got off the bus and began walking toward Brice Road. They returned to the Motel 6, but were informed that their room was no longer rented. Appellant phoned his brother and arranged to have money sent by wire to pay for bus fare for Blevins and appellant to return to Cleveland. At the Motel 6, appellant told Blevins that Wood "was supposed to testify against his uncle." (Tr. 543-44.) The two men began walking toward a nearby store, but they were again taken into custody by police officers who had been following them. At trial, Blevins denied firing the shots that killed Wood.

{¶12} Ronald Jones, the uncle of Wood, had accompanied his nephew to the Franklin County Courthouse on the morning of December 8, 2008. At that time, an individual named Keith James "made threatening statements to my nephew." (Tr. 335.) Jones was at Wood's residence on the date of the shooting, and gave the following testimony of the events that day. On the morning of December 9, Wood drove to Jones' residence and picked up his uncle at approximately 8:30 a.m. Wood drove to a nearby gas station, but after receiving a telephone call from "Butch," a friend, Wood drove back to his residence. (Tr. 284.) Butch arrived at Wood's residence in a green pickup truck, and the three men then went inside the house.

{¶13} Jones began watching television in the living room, while Wood and Butch went into the kitchen area. Wood walked toward his bedroom, but then returned to the kitchen. Wood then stated, "[s]omeone is in my house, they have a gun, get out." (Tr. 289.) Jones heard a gunshot and exited the house through the front door. Jones went to the next-door neighbor's house and knelt behind an SUV. Jones heard at least four or five gunshots. Jones also heard his nephew fall down and yell out: "No, man, no." (Tr. 291.) Jones saw Wood on the ground and his body shaking. Jones observed someone wearing white tennis shoes "walk up on him." (Tr. 292.) He heard two more shots after seeing the individual approach his nephew. Jones then observed two men running away. One of the individuals ran toward Meredith Avenue. Jones was unable to see the faces of these individuals, but he observed that they were both black males.

{¶14} Charles "Butch" Martin, age 43, a high school acquaintance of Wood, was also at Wood's residence on the date of the shooting. Martin testified that he drove to Wood's house on December 9, shortly before 9:00 a.m. Wood’s uncle was at the residence when he arrived. While standing in the kitchen, Martin heard Wood scream

out: "Uncle Ron, get the gun, there is somebody in the house." (Tr. 357.) Martin ran toward the back door, attempting to unlock it. The screen door was locked, so Martin threw himself against the screen and knocked the screen out. Martin ran toward a hill in the backyard and heard five shots. He then heard three more shots, and as he jumped over a fence he heard two more shots. Martin asked a neighbor to call 911.

{¶15} At the scene of the shooting, police officers recovered several bales of marijuana from Wood's residence. Police officers found a firearm in a sewer near Bethesda Avenue and Elton Road. Officers also found a coat, a pair of brown gloves, and a mask while searching a trash can.

{¶16} Dr. Tae Lyong An, a deputy coroner with the Franklin County Coroner's Office, conducted an autopsy on Wood. Dr. An noted five entry wounds and two exit wounds on the body. The entry wounds were to the victim's left front chest, the back of the head, the right upper back, the left mid-back area near the spine, and the right forearm. The bullet wound to the chest lacerated the left lung, while the wound to the head lacerated the victim’s brain. Dr. An opined that the cause of death was the "multiple gunshot wounds, laceration multiple internal organs." (Tr. 456.)

{¶17} Mark Hardy, a forensic scientist with the Columbus Police Department, opined that five bullets retrieved from the victim following the autopsy had been fired from the .357 Smith & Wesson revolver recovered from the sewer. (Tr. 739.) A forensic scientist testified that swabs taken from the hands of Blevins and appellant both tested positive for gunshot residue.

{¶18} Andre Brown, age 20, is currently incarcerated for murder. In November of 2008, Brown was incarcerated in the Franklin County Jail, where he met appellant. Brown watched a newscast involving the shooting of Wood. Brown told appellant that he

knew a girl who lived near the house where the shooting occurred. Appellant wanted to know the name of the girl "to use the girl [Brown knew] as an alibi." (Tr. 634.) Appellant told Brown that he had already told a detective that a girl was his alibi. According to Brown, appellant was worried his co-defendant would "tell on him." (Tr. 638.) Appellant told Brown that he and his co-defendant "had came down here for his uncle, he had paid him to kill a dude so he wouldn't testify on him the next day or something, and he basically told me what happened." (Tr. 639.) Appellant said that "they came in a cab, jumped out of the car, he seen him, he shot him, he ran, and threw the gun in the backyard." (Tr. 639.) Appellant also told Brown he was worried "there was some gunpowder on his hoodie. He didn't know if it would be on there or not." (Tr. 642.) Following this conversation, Brown contacted Ann Pennington, the lead police detective in the case involving Wood.

{¶19} Robert Mason, age 42, is currently incarcerated, and was previously held in the Franklin County Jail in December 2008, where he met appellant. Appellant asked Mason "about gunshot residue on a jacket and if I thought that it would be able to be detected in a test, and I said yes, I thought that it would." (Tr. 661.) Later, Mason told appellant about someone who owed him money. Appellant "said to me that he could have that taken care of." (Tr. 662.) According to Mason, appellant stated during this conversation that he "would just put two or three in the MF'er like I did down here." (Tr. 662.) Later, appellant told Mason he was worried about information he had given to Brown "about the murder." (Tr. 663.)

{¶20} Columbus Police Detective Ann Pennington, the lead homicide detective on the case, testified that Brown had contacted her on December 12, 2008, stating he had information. Brown told the detective that appellant related he and Blevins had shot and

killed Wood because he was going to testify against appellant's uncle. Brown told Pennington that appellant wanted Brown to find a girl to play the part of "Pebbles" for him as an alibi. Pennington testified that Tamara Lynch, the wife of Rudolph Lynch, had rented a van around the time of the shooting, and that the van had been returned on the afternoon of December 9.

{¶21} Appellant testified on his own behalf, and gave the following account. On December 5, 2008, appellant and his uncle went to Cleveland to pick up Blevins. They drove to Columbus, and appellant and Blevins stayed at a Motel 6 near Brice Road. On December 9, Lynch picked up appellant and Blevins and drove to a residence; Lynch stated that there were "many pounds of marijuana in this house." (Tr. 1096.) Blevins was ready to enter the house, but appellant was reluctant and would not go inside without a mask. Lynch told appellant to get out of the van, so appellant began to walk through the neighborhood in the direction they had come from. Approximately eight minutes later, Blevins came running toward him, out of breath. Blevins told him to call his uncle. While walking through a backyard, appellant saw a police officer approach them, and appellant began running, jumping over a fence. Appellant eventually surrendered to the police.

{¶22} Appellant denied ever entering the house or being in the backyard of Wood's residence. According to appellant, he was three streets from the residence when he thought he heard gunshots. When questioned by detectives, appellant told them he was in the area looking for a girl named "Pebbles." (Tr. 1104.) He acknowledged at trial that there was no girl named Pebbles.

{¶23} Following deliberations, the jury returned verdicts finding appellant guilty on all counts. In case No. 09CR-1055, the trial court merged the aggravated murder counts and sentenced appellant on Count 2. The court imposed a sentence of life without parole

on the aggravated murder count, plus an additional three-year term for the firearm specification, and the court imposed a sentence of ten years on the aggravated burglary charge, with an additional three years for the firearm specification. The trial court ordered the sentences to run consecutive to each other and consecutive to case No. 08CR-8790. In case No. 08CR-8790, the trial court imposed a sentence of five years of incarceration on the count of having a weapon under disability, to run concurrent to a one-year term (with a one-year firearm specification) on the count of tampering with evidence.

{¶24} On appeal, appellant sets forth the following three assignments of error for this court's review:

> I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF AGGRAVATED MURDER, BURGLARY AND TAMPERING WITH EVIDENCE AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> II. APPELLANT WAS DEPRIVED OF HIS RIGHT TO BE PRESENT AND TO THE PRESENCE AND ASSISTANCE OF HIS COUNSEL DURING A CRITICAL STAGE OF HIS JURY TRIAL, AND HIS RIGHT TO DUE PROCESS AND A FUNDAMENTALLY FAIR JURY TRIAL AS REQUIRED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTIONS FIVE, TEN AND SIXTEEN OF THE OHIO CONSTITUTION AND CRIMINAL RULE 43(A).
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> III. THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUISITE FACTUAL FINDINGS; THEREBY DEPRIVING APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION SIXTEEN OF THE OHIO CONSTITUTION.

{¶25} Under his first assignment of error, appellant challenges his conviction for aggravated murder, arguing that the conviction was not supported by sufficient evidence. Specifically, appellant challenges the sufficiency of the evidence to support the element of prior calculation and design. Appellant also argues that such conviction was against the manifest weight of the evidence.

{¶26} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. The test is a question of law. Id. The appellate court's function is to determine whether, when viewing the evidence in a light most favorable to the state, any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. The existence of conflicting evidence does not render the evidence insufficient as a matter of law. *State v. Murphy*, 91 Ohio St.3d 516, 543, 2001-Ohio-112. The trier of fact makes determinations of credibility and the weight to be given to the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A jury may believe or disbelieve all, part, or none of a witness' testimony. *State v. Antill* (1964), 176 Ohio St. 61, 67; *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21.

{¶27} The test for determining whether a conviction is against the manifest weight of the evidence differs somewhat from the test as to whether there is sufficient evidence to support the conviction. With respect to manifest weight, the evidence is not construed most strongly in favor of the prosecution, but the court engages in a limited weighing of the evidence to determine whether there is sufficient competent, credible evidence which

could convince a reasonable trier of fact of appellant's guilt beyond a reasonable doubt. See *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387. "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." *State v. Trembley*, 10th Dist. No. 10AP-132, 2010-Ohio-6528, ¶16, citing *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. An appellate court reviews 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 trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "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.

{¶28} "A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial." *Trembley* at ¶17, citing *Raver* at ¶21. Determinations of credibility and the weight to be given to the evidence are for the trier of fact. *DeHass*. Thus, even though the appellate court sits as a "thirteenth juror" when considering the manifest weight of the evidence, 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, ¶22-23.

{¶29} At the outset, we note that while appellant's statement of assignment of error lists each of his convictions (i.e., aggravated murder, aggravated burglary, tampering with evidence, and having a weapon under disability), the argument set forth in the body of the first assignment of error only addresses the sufficiency and manifest weight of the evidence regarding his conviction for aggravated murder. Specifically,

appellant argues that the element of prior calculation and design was lacking because Blevins testified that the intent of the burglary of Wood's home was to steal drugs and money, not to kill Wood. According to appellant, the testimony of Blevins indicates that appellant and Blevins entered the house and began searching for drugs, and that the return of Wood appeared to be a surprise; further, that appellant only began shooting at Wood after Wood confronted him in the basement. Appellant notes that another of the state's witnesses, Jones, observed an individual with white tennis shoes standing over his nephew, while the evidence indicates appellant was wearing black tennis shoes at the time of the incident.

{¶30} R.C. 2903.01(A) states in part: "No person shall purposely, and with prior calculation and design, cause the death of another." Pursuant to R.C. 2901.22(A), "[a] person acts purposely when it is his specific intention to cause a certain result." Intent may be determined from the surrounding facts and circumstances. *State v. Johnson* (1978), 56 Ohio St.2d 35, 38. An intent to kill may be presumed where the natural and probable consequence of an act is to produce death and the jury may conclude from the surrounding circumstances that there was an intention to kill. *State v. Robinson* (1954), 161 Ohio St. 213. It is presumed that a person intends the natural, reasonable, and probable consequences of his voluntary acts. *State v. Nabozny* (1978), 54 Ohio St.2d 195.

{¶31} In *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph one of the syllabus, the Supreme Court of Ohio held:

> Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.

{¶32} Prior calculation and design can be formed over a short time period. For example, in *Robbins*, the court upheld a finding of prior calculation and design where the defendant was the aggressor and had accosted the decedent in an apartment building hallway, knocking him to the floor. The defendant then went into his adjacent apartment, retrieved a long knife, and stabbed the victim to death "instants later." *Robbins* at 79.

{¶33} In the present case, the state presented evidence indicating that appellant's uncle, Rudolph Lynch, had been charged with a serious drug offense, and that Wood had agreed to testify against him. Several days before the shooting, appellant, who had been living with his uncle, accompanied his uncle to Cleveland to pick up Blevins. Lynch then drove them to Columbus, where Lynch rented a motel room for the two men. The day prior to the shooting, Lynch drove appellant and Blevins to Wood's neighborhood, where they watched his house for approximately one hour. The next day, they returned and waited for Wood and his wife to leave the house and then entered it, searching for drugs and money. Blevins testified that he observed a .357 revolver in the van.

{¶34} When Wood returned to his house, Blevins and appellant hid in the basement. Wood started down the stairs, but then noticed appellant. As Wood ran upstairs, appellant chased after him and multiple shots were fired outside. Wood was heard saying, "[d]on't kill me" or "[n]o, man, no" before he was killed. (Tr. 291; 549.) Wood was shot five times, including three wounds to the back of the body (head, upper back and mid-back). The testimony by Jones was that the last two shots were fired at close range as the shooter was standing over Wood. (Tr. 293.) Appellant and Blevins fled the area after the shooting and disposed of a weapon, coats, gloves, and a mask. Appellant himself testified he told the police that he lied about his alibi being a girl named "Pebbles."

{¶35} Blevins testified that appellant told him that Wood had agreed to testify against Lynch. Further, two jailhouse informants provided testimony about encounters with appellant following the shooting. Andre Brown testified that appellant told him that he and Blevins came to Columbus with his uncle, and that his uncle "had paid him to kill a dude so he wouldn't testify on him." Appellant expressed concern to Brown about gunshot residue on his clothing, and that he was worried his co-defendant would "tell on him." The other informant, Mason, similarly testified that appellant expressed concern about gunshot residue on his clothing.

{¶36} Upon review, considering all of the facts and circumstances, including the number of shots fired and the location of the wounds on the victim's body, there was evidence upon which a reasonable trier of fact could have found that appellant made a calculated decision to kill Wood. Here, construing the evidence most strongly in favor of the state, there was sufficient evidence for the jury to have found that the state proved, beyond a reasonable doubt, the element of prior calculation and design necessary to convict appellant of aggravated murder.

{¶37} In arguing that his conviction was against the manifest weight of the evidence, appellant challenges the credibility of the testimony of Blevins as well as the testimony of the "jailhouse informants." However, as noted by the state, Blevins' testimony was corroborated by other evidence. The state introduced evidence that a van was rented by Lynch's wife during the time surrounding the events. Cell phone records indicated that appellant phoned Lynch shortly after the incident. Blevins testified that he threw a mask, gloves, and coat in the trash, where they were later recovered by police officers. Blevins also testified that appellant threw the weapon into a sewer, and officers recovered the weapon from that location. A Motel 6 employee testified that appellant

appeared to be in charge, and that appellant kept trying to call his uncle. As to the credibility of Brown, one of the informants, the record reflects similarities between Blevins' version of the events and the testimony given by Brown. Further, it was within the province of the jury to believe or disbelieve Brown's testimony, including testimony that appellant stated his uncle "paid him to kill a dude so he wouldn't testify."

{¶38} Upon review, giving deference to the jury's determinations regarding credibility, and having reviewed the entire record, we do not find that 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. Accordingly, the conviction is not against the manifest weight of the evidence. Finally, although appellant's assignment of error only addresses the conviction for aggravated murder, we further note that a review of the record indicates there was sufficient evidence to support appellant's remaining convictions, and that those convictions are similarly not against the manifest weight of the evidence.

{¶39} Based upon the foregoing, appellant's first assignment of error is overruled.

{¶40} Under his second assignment of error, appellant contends that he was deprived of his right to be present and to have the presence and assistance of his counsel during a critical stage of his jury trial. Specifically, appellant argues there is nothing in the record indicating he was present during the reading of a question submitted to the jury during deliberations.

{¶41} A criminal defendant has a fundamental right to be present at all critical stages of his criminal trial. Section 10, Article I, Ohio Constitution; Crim.R. 43(A); *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3246, ¶100. "An accused's absence, however, does not necessarily result in prejudicial or constitutional error." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶90. " '[T]he presence of a defendant is a condition of due

process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' " Id., quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-08, 54 S.Ct. 330, 333, overruled on other grounds *Duncan v. Louisiana* (1968), 391 U.S. 145, 154, 88 S.Ct. 1444, 1450. Thus, a violation of Crim.R. 43(A), where the defendant is absent, although improper, can constitute harmless error where no prejudice is suffered. *State v. Williams* (1983), 6 Ohio St.3d 281, 286-87.

{¶42} Although appellant did not argue such in his written brief, at oral argument his counsel argued that the error was structural in nature, requiring no showing of prejudice. Structural errors "defy harmless-error analysis and are cause for automatic reversal" without a showing that a substantial right has been affected. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶16. A structural error is a " 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' " *State v. Hill*, 92 Ohio St.3d 191, 197, 2001-Ohio-141, quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 309, 111 S.Ct. 1246, 1265. "Such errors 'infect the entire trial process,' [*Brecht v. Abrahamson* (1993), 507 U.S. 619, 630, 113 S.Ct. 1710, 1717], and 'necessarily render a trial fundamentally unfair,' [*Rose v. Clark* (1986), 478 U.S. 570, 577, 106 S.Ct. 3101, 3106]." *Hill*. "Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence * * * and no criminal punishment may be regarded as fundamentally fair.' " *Hill*, quoting *Rose v. Clark* (1986), 478 U.S. 570, 577-78, 106 S.Ct. 3101, 3106.

{¶43} The Twelfth District and the Second District have held that failure to comply strictly with Crim.R. 43(A) is not a structural error. See *State v. Armas*, 12th Dist. No. CA2004-01-007, 2005-Ohio-2793, ¶27 ("Statutory or rule violations, even serious ones,

will not sustain a structural-error analysis"); *State v. Vinzant*, 2d Dist. No. 18546, 2001-Ohio-7005. This court has previously recognized that a defendant's absence is not a structural error, and even if improper, can constitute harmless error where no prejudice is suffered. *State v. Reed*, 10th Dist. No. 09AP-1164, 2010-Ohio-5819; *State v. Warren*, 10th Dist. No. 10AP-376, 2010-Ohio-5718.

{¶44} In the present case, there was no objection made to the trial court, and we therefore review this assignment of error under a plain error analysis. Although generally a court will not consider alleged errors that were not brought to the attention of the trial court, Crim.R. 52(B) provides that the court may consider errors affecting substantial rights even though they were not brought to the attention of the trial court. " 'Plain error is an obvious error * * * that affects a substantial right.' " *Yarbrough* at ¶108, quoting *State v. Keith*, 79 Ohio St.3d 514, 518, 1997-Ohio-367. An alleged error constitutes plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different. Id. "Notice of plain error is taken with utmost caution only under exceptional circumstances and only when necessary to prevent a manifest miscarriage of justice." *State v. Martin*, 10th Dist. No. 02AP-33, 2002-Ohio-4769, ¶28.

{¶45} Appellant argues that the trial court's handling of the jury's question was improper since defense counsel was in Cleveland, and the record does not demonstrate that appellant was present during the reading of the question, or even informed of the existence of the question. Appellant contends that having counsel present to discuss a substantive question with his client is an important and critical juncture in the case.

{¶46} The record demonstrates that, during deliberations, defense counsel requested permission to return to Cleveland. Counsel stated: "I have requested the assistance of a local attorney. * * * He is in court on Monday, and he is available." (Tr.

1329.) Counsel also stated that he had spoken with his client, and that "Mr. Coleman is in agreement and he understands that Mr. Ireland is now added on our team." (Tr. 1329.) Defense counsel also stated: "I explained to Mr. Coleman jury deliberation is not a critical state of the case. However, I'll be available by cell phone for any questions that the jury may have and I would partake fully in helping answer any questions they may have." (Tr. 1330.) The trial court then addressed appellant and inquired as to his understanding, and appellant indicated he was in agreement.

{¶47} The jury question at issue, which occurred during deliberations on November 9, 2009, is as follows: "Does complicity apply to every part of every count of each indictment? For example, does complicity apply to the 'firearm specification'?" The trial court's response was, "Yes. Please see page 16 para 1 of your instructions." Next to this notation are the judge's initials. After the notation is written, "Agreed to by Liz Geraghty and Fred Crosby at 1:45," and the bailiff's signature appears on the page.

{¶48} The Supreme Court of Ohio has held that when a defendant's counsel is present via telephone and consulted concerning the answer to be given, any error regarding the defendant's absence is harmless error. *State v. Franklin*, 97 Ohio St.3d 1, 18, 2002-Ohio-5304, citing *State v. Taylor* (1997), 78 Ohio St.3d 15, 25.

{¶49} Upon review, we conclude that appellant's presumed absence was harmless error. As noted above, the record reflects that, even though counsel was in Cleveland, counsel was consulted as to the jury's inquiry by telephone before an answer was given, and that counsel was in agreement with the answer provided to the jury. Here, the answer merely reinforced the earlier instruction, and appellant has not demonstrated prejudice or shown how his presence would have altered the trial court's response. Further, the answer was "innocuous," as in *Taylor* at 26 (trial court's answer to

jury, without consulting defense counsel, was incorrect; however, question and answer were innocuous, and therefore judge's brief answer was harmless).

{¶50} Appellant cites *State v. Wade*, 10th Dist. No. 03AP-774, 2004-Ohio-3974, and *State v. Sales*, 10th Dist. No. 02AP-175, 2002-Ohio-6563, as supporting his argument that his presence was required. Those cases, however, are distinguishable from the facts of this case because, in both of those cases, the record was unclear whether the defendant or counsel was present during the preparation of the answers to the questions. In the instant case, appellant waived his counsel's physical presence, but counsel was consulted by telephone and approved the answer given to the jury. Given these facts, we cannot say that the trial court's procedure was other than harmless error.

{¶51} Based upon the foregoing, appellant's second assignment of error is overruled.

{¶52} Under his third assignment of error, appellant contends that the trial court erred by imposing consecutive sentences without making requisite factual findings, thereby depriving him of due process of law. Appellant notes that, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio found R.C. 2929.14(E)(4) unconstitutional and severed that statutory provision, leaving trial courts with the discretion to impose consecutive sentences without the need for factual findings. Appellant argues that *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, has in effect, revived R.C. 2929.14(E)(4).

{¶53} Subsequent to the time for filing briefs in this case, the court rendered its decision in *State v. Hodge,* 128 Ohio St.3d 1, 2010-Ohio-6320*,* in which the court addressed this issue and held that *Ice* does not revive R.C. 2929.14(E)(4). Specifically, in *Hodge* at paragraph two of the syllabus, the court held in part: "The United States

Supreme Court's decision in *Oregon v. Ice* * * * does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*." Accordingly, because trial judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences, appellant's third assignment of error is without merit and is overruled.

{¶54} Based upon the foregoing, appellant's first, second, and third assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are hereby affirmed.

Judgments affirmed.

KLATT and TYACK, JJ., concur.

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