[Cite as *State v. Dortch*, 2012-Ohio-6196.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-125 (C.P.C. No. 11CR-05-2796)
v.	:	(REGULAR CALENDAR)
Joseph L. Dortch,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 28, 2012

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*, for appellee.

Stephen Dehnart, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Joseph L. Dortch, appeals the judgment of the Franklin County Court of Common Pleas convicting him of murder with a firearm specification. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} In June 2011, appellant was indicted for counts of aggravated robbery, murder, and aggravated murder, each with a firearm specification. Appellant was also indicted for one count of receiving stolen property. The aggravated robbery, murder, and aggravated murder charges arose from the November 29, 2011 killing of Frank Turner. The matter proceeded to a jury trial on those counts while appellant pleaded guilty to the count of receiving stolen property. Appellant was tried jointly with Jamaal Massey. Plaintiff-appellee, the state of Ohio, prosecuted Massey as the principal offender and

prosecuted appellant under a theory of complicity by aiding and abetting. At trial, the following evidence was presented.

{¶ 3} The jury heard testimony from Turner's fiancée, Jennifer Hairston. Hairston shared two children with Turner. According to Hairston, Turner operated a "candy store" out of their apartment at 731 Canonby Place where he sold candy, snacks, soda, and drugs such as marijuana and crack cocaine. (Tr. 322.) However, due to the volume of customers that began coming to the apartment throughout the day and night, Turner decided to move the candy store to 713 Canonby Place, the front of which could be seen from the front of 731 Canonby Place.

{¶ 4} Hairston knew appellant since appellant was born and considered him to be a younger member of her family. She had known Massey for one and one-half years before the shooting after being introduced to him by Turner, and she considered him to be a friend of the family. Hairston testified that she drove with Turner and appellant to purchase marijuana to sell at the candy store. According to Hairston, Turner returned from the purchase with two "bricks" of marijuana. (Tr. 328.) Later that afternoon, the three shared lunch, talked, and laughed with each other.

{¶ 5} Hairston testified that Turner hosted a barbeque that evening at 713 Canonby Place. At one point during the barbeque, Hairston observed an incident where Massey appeared with a group of individuals to make a purchase from the candy store. According to Hairston, Turner refused to sell to Massey or the group and turned them away. Later that evening, Turner walked Hairston back to her apartment before returning to the candy store. Hairston testified that, upon leaving Turner's apartment, she observed "a group of boys across the street," one of whom was Massey. (Tr. 339.)

{¶ 6} Hairston was preparing her children for bed when suddenly she heard "a loud boom" outside. (Tr. 341.) Hairston left her apartment and approached the street to see Turner in an apparent confrontation involving Massey, a man named Michael Ford, and appellant. Hairston first saw Turner punch appellant into the bushes by Turner's front door, which confused Hairston given her and Turner's close relationship with appellant. Hairston then ran toward the confrontation and saw Turner begin "tussling" with Massey in the doorway. (Tr. 348.) Throughout the struggle, Hairston saw Turner holding Massey's hand. Hairston testified that she stood on the sidewalk in front of the apartment screaming Turner's name before Turner eventually let go of Massey's hand,

which was holding a gun. Hairston then saw Massey fire a shot causing Turner to fall backward. Hairston testified that Massey continued firing at Turner as Massey began moving away from Turner's apartment. Hairston grabbed Turner in the hallway of Turner's apartment and called 911. According to Hairston, she looked up to see appellant and Massey running in the same direction to the Southpark Apartment Complex.

{¶ 7} The state also presented the testimony of Rodney Gates, who testified that he observed the confrontation and shooting. Gates, who was at the apartment complex visiting his daughter that day, had known both Turner and appellant and had met Massey earlier that day. Later that evening, Gates saw appellant and Massey in front of Turner's apartment, appellant by the front door and Massey by the corner. According to Gates, Turner invited appellant inside the apartment and, shortly thereafter, Massey came from around the corner and entered through Turner's front door. Gates then saw Massey and Turner by the front door struggling for a gun held by Massey. Gates testified that the struggle ended with the sound of a gunshot, which caused Turner to fall. Gates saw Massey fire between four and five additional shots at Turner. Gates testified that Massey and appellant ran from the scene together to a nearby apartment building.

{¶ 8} The jury heard testimony from Tyara Summerall, who was romantically involved with Massey at the time of the shooting. Summerall saw appellant shortly after the shooting. Specifically, Summerall stated that appellant appeared at her front porch talking on his cell phone when she overheard appellant say that Turner had been shot. Summerall testified that appellant changed his clothing by removing "a hoodie and maybe a pair of pants or some shorts." (Tr. 94.)

{¶ 9} Jesse Hemphill testified that he was with Turner immediately before the shooting. Hemphill testified that, after the barbeque, he and Turner were playing cards in the front room of Turner's apartment when Turner got up from the table to answer the door. Hemphill stated that, after Turner opened the door, he was pushed back; however, Hemphill could not see by whom due to a small wall between the front room and the front door. Hemphill then heard multiple gunshots before seeing Turner fall into the kitchen. (Tr. 277.)

{¶ 10} Columbus Police Detective Zane Kirby examined a cell phone found at the murder scene, and he testified that the phone contained photographs of an African–American woman. Summerall confirmed at trial that the pictures were of her. She also

said that the cell phone belonged to appellant. Lastly, the parties stipulated that Franklin County Deputy Coroner Dr. An would testify that Turner died from a bullet that punctured his lung.

{¶ 11} At the close of the evidence, appellant moved for an acquittal pursuant to Crim.R. 29(A). The court granted the motion on the aggravated robbery count and, because of that decision, dismissed the count of aggravated robbery and reduced the aggravated murder charge to a charge of murder. The court denied appellant's motion as it pertained to the reduced murder count, and the jury found appellant guilty of murder with a firearm specification.

II. DISCUSSION

{¶ 12} In a timely appeal, appellant presents the following three assignments of error for our consideration:

> [I.] The trial court erred by not instructing the jury that the defendant, who was being prosecuted as an aider and abettor, must be proven to have had an intent to kill independent of Jamaal Massey's.
>
> [II.] The trial court erred by not sending the jury back for further deliberations after a juror had obviously expressed confusion over her verdict.
>
> [III.] Appellant's convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

A. First Assignment of Error

{¶ 13} In appellant's first assignment of error, he challenges the trial court's decision to provide a single jury instruction regarding the elements of murder when he and Massey were being tried together. The trial court's murder instruction read as follows:

> So before you can find the Defendant under consideration guilty of murder as stated in Count One of their respective indictments, you must find that the State has proved beyond a reasonable doubt that on or about the 29th day of November, 2010, and in Franklin County, Ohio, the Defendant under consideration purposely caused the death of Frank Turner.
>
> A person acts purposely when it his specific intention to cause a certain result. To do an act purposely is to do it intentionally

> and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct. Since you cannot look into the mind of another, you must determine purpose from all of the facts and circumstances in evidence.

(Tr. 528-29.) The trial court then provided the following instruction on complicity by aiding and abetting:

> THE COURT: The State has basically argued to you that the Defendant, Joseph Dortch, may be convicted of murder in Count One as an aider or abettor. An aider or an abettor is one who aids assists or encouraged another to commit a crime and participates in the commission of the offense by some act, word or gesture.
>
> When I say aid, assist or encourage. Abet means to encourage, counsel, incite or assist.
>
> The mere presence of the Defendant at the scene of the crime and guilty knowledge of the crime are not enough to convict that Defendant of aiding and abetting.

(Tr. 531.) According to appellant, the decision to issue a single instruction for both defendants regarding the elements of murder was convoluted and misled the jury into believing that the mental state of Massey was sufficient to convict appellant, even if not shared by appellant. We find this argument unpersuasive for several reasons.

{¶ 14} At the outset, appellant's trial counsel did not object to the instruction appellant now challenges. Before reading the instruction to the jury, the trial court conferred with counsel outside the hearing of the jury and informed counsel that it would define the elements of murder only once, but refer to the "Defendant under consideration" so as to clarify that each charge must be considered separately. (Tr. 530.) All parties agreed to the instruction. Thus, appellant has forfeited all but plain error. *See State v. Vu*, 10th Dist. No. 09AP-606, 2010-Ohio-4019, ¶ 9; Crim.R. 30(A) and 52(B). An alleged error is plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 108. However, even if an alleged error satisfies these conditions, "[n]otice of plain error 'is to be taken with the utmost caution, under exceptional circumstances and

only to prevent a manifest miscarriage of justice.' " *Id.*, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶ 15} Appellant has not demonstrated error, plain or otherwise, in the trial court's jury instructions. " '[A] single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge.' " *State v. Jalowiec*, 91 Ohio St.3d 220, 231 (2001), quoting *State v. Price*, 60 Ohio St.2d 135 (1979), paragraph four of the syllabus. Jury instructions must be read as a whole, and " 'if the law is clearly and fairly expressed, no reversal will be predicated upon error in a portion of the charge.' " *State v. Philpot*, 10th Dist. No. 03AP-758, 2004-Ohio-5063, ¶ 22, quoting *Yeager v. Riverside Methodist Hosp.*, 24 Ohio App.3d 54, 55 (10th Dist.1985); *see also State v. Adams*, 10th Dist. No. 12AP-83, 2012-Ohio-5088, ¶ 27. "Reversal is appropriate only if the instruction given in error is so misleading so as to prejudice the party seeking reversal." *Id.*, citing *State v. Harry*, 12th Dist. No. CA2008-01-0013, 2008-Ohio-6380, ¶ 34.

{¶ 16} Although the trial court instructed the jury about the elements of murder only once, it made clear that appellant and Massey were each charged individually and that the jury was required to consider the charges separately. The trial court stated, "Each charge, of course, is to be examined separately and individually as to each of them." (Tr. 528.) Moreover, the jury was instructed to determine the guilt of the "Defendant under consideration," which served to avoid the risk of confusion that appellant now claims. *See State v. Glover*, 10th Dist. No. 07AP-832, 2008-Ohio-4255, ¶ 79 (the use of "defendant under consideration" language prevents the risk of guilt by association). The trial court explained as much to the jury: "I'm going to use the phrase Defendant under consideration. That's sort of a shorthand to say the Defendant whose case is being considered by you at that time." (Tr. 528.)

{¶ 17} While appellant claims that the instruction effectively relieved the state of its burden to prove that appellant shared the mental state of the principal, the trial court expressly directed the jury that the state was required to prove each element beyond a reasonable doubt. Moreover, the trial court instructed the jury that appellant was being prosecuted under a theory of complicity by aiding and abetting and recited the requirements under R.C. 2923.03(A)(2). Appellant does not challenge the definition of complicity provided by the trial court, and, upon review of the instructions in their entirety, we find they accurately reflect the requirements necessary to be convicted of

complicity to commit murder under R.C. 2903.02(A) and 2923.03(A)(2). Therefore, we find no error, much less plain error, in the trial court's instructions to the jury.

{¶ 18} Accordingly, appellant's first assignment of error is overruled.

B. Second Assignment of Error

{¶ 19} In his second assignment of error, appellant argues that the trial court erred by not sending the jury back for further deliberations based on a response given by Juror No. 11 during the jury polling.

{¶ 20} "R.C. 2945.77 and Crim.R. 31(D) provide for the polling of the jury to determine whether there is a unanimous verdict." *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶ 41; *see also State v. Draughon*, 10th Dist. No. 02AP-895, 2003-Ohio-2727, ¶ 75. In relevant part, R.C. 2945.77 provides, "If one of the jurors being polled declares that said verdict is not his verdict, the jury must further deliberate upon the case." Crim.R. 31(D) similarly allows the trial court to either direct further deliberations or discharge the jury "[i]f upon the poll there is not unanimous concurrence." " 'Both the statute and the rule preclude acceptance of the verdict only if the jury members are not in agreement on the determination of guilt.' " *State v. Garner*, 11th Dist. No. 2007-L-041, 2007-Ohio-5914, ¶ 63, quoting *State v. Brumback*, 109 Ohio App.3d 65, 73 (9th Dist.1996).

{¶ 21} Appellate courts review a trial court's acceptance of a jury's verdict under R.C. 2945.77 and Crim.R. 31(D) for an abuse of discretion. *Garner* at ¶ 62. " 'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). When applying an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990).

{¶ 22} In this case, Juror No. 11 repeatedly expressed her agreement with the finding of guilt, and never disagreed with the written verdict. The trial court first addressed Juror No. 11 in the following exchange:

> THE COURT: And with regards to the State of Ohio versus Joseph Dortch, the finding of guilty of murder and guilty of the firearm specification, are these your verdicts?
>
> JUROR NO. 11: As far as I understood the law, yes.

(Tr. 557.)

{¶ 23} The trial court then discussed with Juror No. 11 whether she believed further deliberations were appropriate:

> THE COURT: Having said that, do you, as you sit here now, feel comfortable with your verdict that this is, in fact, your verdict?
>
> JUROR NO. 11: Yes.

(Tr. 559.)

{¶ 24} Following this exchange, the trial court privately conferred with counsel to discuss how to proceed. Neither counsel requested a mistrial. The trial court concluded its interrogation with Juror No. 11 in the following exchange:

> THE COURT: Okay. Now, do you feel that it would be for you, and for you alone because that's what's important, that there should be some more time spent that you might need some further clarity before you answer my question with regard to the verdict with regard to Joseph Dortch?
>
> JUROR NO. 11: No, Your Honor.
>
> THE COURT: Okay. Then I will ask you with regards to the State of Ohio versus Joseph Dortch, is it, in fact, your verdict that he is guilty of murder and guilty of the firearm specification?
>
> JUROR NO. 11: Yes.
>
> THE COURT: Is there any question, any doubt in your mind? Let me put that this way. Is there any reason, any reasonable doubt in your mind?
>
> JUROR NO. 11: No.

(Tr. 565-66.)

{¶ 25} In our view, this exchange shows that the trial court thoroughly endeavored to ensure that Juror No. 11's verdict was guilty. The trial court accepted Juror No. 11's finding only after Juror No. 11 repeatedly expressed her agreement with the determination of guilt and her lack of reasonable doubt. Juror No. 11 never disagreed with the verdict and explicitly rejected the trial court's invitation to further deliberate on the issue. Accordingly, because the record shows that Juror No. 11 was in agreement with

the finding of guilt, we find no abuse of discretion in the trial court's acceptance of the jury's verdict.

{¶ 26} Accordingly, appellant's second assignment of error is overruled.

C. Third Assignment of Error

{¶ 27} Appellant's third assignment of error argues that his conviction was against the manifest weight of the evidence and not supported by sufficient evidence. Specifically, appellant argues that the testimony offered by Gates and Hairston lacked the credibility necessary to sustain a conviction for murder by aiding and abetting.

{¶ 28} In determining whether a verdict is against the manifest weight of the evidence, an appellate court sits as the "thirteenth juror" and must weigh the evidence to determine whether 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. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). The appellate court must bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances when "the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶ 29} An appellate court does not act as a "thirteenth juror" in determining the sufficiency of the evidence. *State v. New*, 197 Ohio App.3d 718, 2012-Ohio-468, ¶ 8 (10th Dist.). "The issue of sufficiency presents a purely legal question for the Court regarding the adequacy of the evidence." *Id.*, citing *Thompkins* at 386. 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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 30} In this case, appellant was prosecuted for the offense of murder with a firearm specification under a complicity theory. The elements of murder are set forth in R.C. 2903.02(A), which states in relevant part that "[n]o person shall purposely cause the death of another." Ohio's complicity statute, R.C. 2923.03, provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." R.C. 2923.03(A)(2). To prove

complicity by aiding and abetting under R.C. 2923.03(A)(2), the evidence must show that the defendant "supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus. Such intent may be inferred from the circumstances surrounding the crime. *Id*.

{¶ 31} " '[P]articipation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.' " *Id*. at 245, quoting *State v. Pruett*, 28 Ohio App.2d 29, 34 (4th Dist.1971). A common purpose among two people to commit a crime need not be shown by positive evidence but may be inferred from circumstances surrounding the act and from the defendant's subsequent conduct. *State v. Gonzalez*, 10th Dist. No. 10AP-628, 2011-Ohio-1193, ¶ 25, citing *Pruett*. The mere presence of an accused at the crime scene is not, by itself, sufficient to prove that the accused was an aider and abettor under R.C. 2923.03(A)(2). *Johnson* at 243 "This rule is to protect innocent bystanders who have no connection to the crime other than simply being present at the time of its commission." *Id*.

{¶ 32} In this case, the evidence adduced at trial established more than appellant's "mere presence" at the time Massey shot Turner. Multiple witnesses observed appellant with Massey before, during, and after the shooting. Gates and Hairston observed appellant involved in the initial altercation that led to the shooting. Gates saw appellant and Massey approach Turner's apartment together and testified that Turner invited appellant inside while Massey was positioned around the corner. According to Gates, the struggle began only after Massey followed appellant into the apartment. Further, Hairston described running to Turner's apartment and seeing Turner fighting both appellant and Massey. The jury was free to conclude that appellant, who shared a close relationship with Turner and Hairston, exploited his relationship with Turner to gain entry into Turner's house.

{¶ 33} Appellant's participation and shared intent was established by appellant's actions before the shooting and by the fact that appellant did not flee from the scene until after Massey had fired multiple shots at Turner. *See State v. Whitfield*, 2d Dist. No. 22432, 2009-Ohio-293, ¶ 26 (jury could infer defendant's purpose to kill under a complicity theory where the "[d]efendant did not flee from the store until after Pendergrass had fired multiple shots."). Even after the final shot was fired, appellant

chose to flee from the scene with Massey, which further "negate[d] his claimed lack of culpability and, instead, demonstrate[d] furtive conduct reflective of a consciousness of guilt." *State v. Mitchell*, 10th Dist. No. 10AP-756, 2011-Ohio-3818, ¶ 29. The jury heard further circumstantial evidence of appellant's guilt from Summerall, who, immediately after the shooting, observed appellant discussing the shooting on his cell phone and saw him change his clothing. *See State v. Washington*, 10th Dist. No. 09AP-424, 2009-Ohio-6665, ¶ 30 ("And, appellant's fleeing the scene and taking off clothing after the shooting negates appellant's claimed lack of culpability and, instead, evinces furtive conduct reflective of a consciousness of guilt."). Courts have also found evidence of participation and intent where, as here, the defendant does not report the shooting to police. *State v. Fields*, 102 Ohio App.3d 284, 288 (12th Dist.1995)

{¶ 34} Appellant's challenges to the credibility of Gates and Hairston necessarily fail under a review for sufficiency of the evidence. In a sufficiency review, courts "do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the conviction." *State v. Jordan*, 10th Dist. No. 11AP-691, 2012-Ohio-1760, ¶ 15, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79–80; *see also State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶ 135 (reiterating that credibility challenges are "not proper on review of evidentiary sufficiency"). Appellant also fails to establish that Gates and Hairston were so lacking in credibility as to render his conviction against the manifest weight of the evidence. For the reasons stated above, the evidence of appellant's presence, companionship, and conduct before and after the offense was sufficient to support appellant's conviction for murder by aiding and abetting under R.C. 2903.02(A)(1) and 2923.03(A)(1), and did not render appellant's conviction against the manifest weight of the evidence.

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

III. CONCLUSION

{¶ 36} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 37} I respectfully dissent.

{¶ 38} There was simply no evidence before the jury which indicated that Joseph L. Dortch shot Frank Turner. All the evidence indicated that a person named Jamaal Massey shot and killed Turner. The record indicates "Massey" is Jamaal Massey.

{¶ 39} Dortch apparently was punched by Turner and fell into some bushes. Dortch also ran away after "Massey" shot Turner. Neither being punched by someone who later becomes a homicide victim nor running away from the scene of a homicide makes a person guilty of murder or complicity in murder. Changing your clothes later does not increase your inculpability.

{¶ 40} The majority decision does not fully address one of the key issues. Since Dortch was not the person who shot Turner, the prosecution had to be pursuing a theory that Dortch was guilty of complicity. Complicity is defined by R.C. 2923.031(A) as follows:

> No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> (1) Solicit or procure another to commit the offense;
>
> (2) Aid or abet another in committing the offense;
>
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
>
> (4) Cause an innocent or irresponsible person to commit the offense.

{¶ 41} For Dortch to be guilty of complicity in murder, he had to be acting with the kind of culpability required for the commission of murder. Dortch had to be acting with a purpose to kill. The evidence that Dortch was acting with a purpose to kill is utterly lacking. Dortch was present; but not involved in the actual shooting. Mere presence does not indicate guilt, as our past cases have consistently indicated and as the trial judge told the jury.

{¶ 42} The first assignment of error centers on the defective jury instruction with respect to complicity. The jury instruction, especially the requirement of a purpose to kill,

was the critical legal issue in the trial with respect to Dortch. Had the jury understood the correct instruction, the verdict could have been different. The trial judge simply failed to charge the jury on the key mental element. The first assignment of error should be sustained.

{¶ 43} Further, the third assignment of error should have been sustained. First, as indicated above, the required kind of culpability for complicity in murder was not proved.

{¶ 44} Second, the other elements of complicity in murder were not demonstrated at the trial. Dortch was merely present. He did not, in any way, help Massey shoot Turner. Turner and Massey struggled over the gun after Dortch was knocked into the bushes. Massey got free of Turner's grip and shot Turner. Dortch did not participate.

{¶ 45} In plain English, Dortch did not, in any way, help (aid or abet) Massey shoot Turner. Dortch did not ask Massey to shoot Turner (solicit the crime). Dortch was merely present.

{¶ 46} The evidence was simply nonexistent as to the elements of complicity in murder. The evidence was not sufficient. Further, since there was no prosecution evidence to rebut as to the actual elements of complicity in murder, the jury verdict was against the manifest weight of the evidence.

{¶ 47} Since the evidence was not sufficient to support a guilty verdict as to complicity in murder, we should sustain the third assignment of error and remand the case with instructions to the trial court to enter a verdict of "not guilty." Failing that, we should vacate the verdict and remand the case for a new trial. Since the majority of this panel does neither, I respectfully dissent.

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