[Cite as *State v. Jewett*, 2013-Ohio-1246.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-1028 (C.P.C. No. 10CR-02-1076)
Craig Jewett,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 29, 2013

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

Clark Law Office, and *Toki Michelle Clark*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Craig Jewett ("defendant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a jury verdict, of one count of murder, in violation of R.C. 2903.02 and two counts of aggravated arson, in violation of R.C. 2909.02. Because: (1) sufficient evidence and the manifest weight of the evidence support defendant's convictions; (2) the trial court did not plainly err in failing to severe the joint trial; (3) the trial court did not err in its evidentiary rulings; (4) defendant failed to establish either actual prejudice resulting from the pre-indictment delay or that plaintiff-appellee, the State of Ohio ("State"), failed to commence prosecution on the felony murder charge within the statutory

limitations period; and (5) emergency personnel are statutory victims under aggravated arson, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On February 18, 2010, the State filed a joint indictment against defendant and Kelly Miller, charging both men with one count of felonious assault, a felony of the second degree, three counts of murder, unclassified felonies, three counts of involuntary manslaughter, felonies of the first degree, one count of aggravated arson, a felony of the first degree, and one count of aggravated arson, a felony of the second degree. The first count of the indictment charged Miller only with one count of obstructing official business, a felony of the fifth degree. The events giving rise to the indictment occurred on April 20, 2002.

{¶ 3} In 2002, defendant was married to an African-American woman known as Carmen. Carmen was also dating Miller. Despite the somewhat unusual relationship, defendant and Miller were also good friends. Carmen, defendant, and Miller would all periodically stay at a homeless shelter in Columbus, Ohio. In 2002, however, Carmen began residing at 255 South Gift Street with a white male named John "Jack" Miller ("the victim"). Carmen would take care of the victim, who was overweight, blind, and not particularly mobile.

{¶ 4} On the afternoon of April 20, 2002, the Columbus Fire Department responded to a call of an individual experiencing a seizure at 255 South Gift Street. When the paramedics arrived, they found the victim and an African-American female on the porch of the residence. Although the victim claimed to have experienced a seizure, the victim appeared alert and orientated, atypical characteristics for an individual who recently experienced a seizure. The paramedics observed that the victim was anxious, near hyperventilating, sweating profusely, and, in general, "very unhealthy." (Tr. 345.)

{¶ 5} While the paramedics were treating the victim, a white male wearing jeans and a blue and white stripped shirt began yelling toward the house from the sidewalk, just beyond the fence of the property. A witness walking by noted that the man, later identified as Miller, was "cussing and screaming at the paramedics." (Tr. 101.) The paramedics asked Miller to leave, sensing "there was going to be a confrontation between [them] trying to help [the] patient and this gentlemen" yelling. (Tr. 58-59.)

Miller continued "yelling at the individual on the porch," causing the victim to become "all worked up." (Tr. 336.) When Miller continued yelling and refused to leave, the paramedics called the police for assistance. As Miller left, he yelled "I'll be back," or "I'm going to get you." (Tr. 57.)

{¶ 6} Later that day, defendant and Miller met up with their friend David McGowan. The men walked to a store, purchased some beer, and proceeded toward Dodge Park. On the way to the park, the men stopped at 255 South Gift Street to see if Carmen was home. When no one responded to their knock on the front door, defendant and Miller walked around to the back door and entered the house. Defendant and Miller opened the front door for McGowan, who walked in and saw the victim sitting on the couch. McGowan asked the victim if Carmen was home. When the victim told McGowan that Carmen was not home, McGowan exited the house and sat on the front porch. While defendant and Miller were inside the house with the victim, McGowan heard the victim "halfway crying" saying "I didn't do it * * * [o]r, I'm sorry, something like that." (Tr. 517.) Miller came to the front door and told McGowan "I think you should leave." (Tr. 518.) McGowan left and walked to the park where he met his friend Jason Jones. Shortly thereafter, McGowan and Jones saw black smoke rising over 255 South Gift Street.

{¶ 7} At 8:35 p.m., on April 20, 2002, the Columbus Fire Department responded to the report of a fire at 255 South Gift Street. After the firefighters entered the house, they discovered the victim's badly burnt body in the front room on the first floor of the house. The fire investigator determined the fire originated in the front room, close to where the firefighters found the victim's body. A canine trained to detect ignitable liquids alerted to the presence of ignitable liquid in the house. After ruling out other possible causes of the fire, the investigator concluded that the cause of the fire was an ignitable liquid poured in the front room and ignited by human hands.

{¶ 8} While the firefighters addressed the fire, police officers attempted to control the crowd of spectators surrounding the house. A white female walked up to one of the officers and told the officer she knew who started the fire. The female pointed across the street to defendant and Miller and said, "[t]hose are the two men that are

walking." (Tr. 692.) Officers arrested defendant and Miller and placed them in separate police cars.

{¶ 9} The joint trial of defendant and Miller began on April 11, 2011. Prior to the presentation of evidence, the State agreed to dismiss the felonious assault charge. The State also dismissed the three involuntary manslaughter charges during trial.

{¶ 10} On April 21, 2011 the jury returned verdicts finding defendant and Miller each guilty of one count of murder and two counts of aggravated arson. The trial court sentenced defendant to a prison term of 15 years to life on the murder charge, 10 years on the first degree felony aggravated arson, and 8 years on the second degree felony aggravated arson. The judge ordered defendant to serve the prison terms concurrently.

II. ASSIGNMENTS OF ERROR

{¶ 11} Defendant appeals, assigning the following assignments of error:

> [I.] A TRIAL COURT COMMITS ERROR WHEN IT DENIES A MOTION TO SEVER IN A CRIMINAL CASE WHERE THE DEFENSE OF ONE CO-DEFENDANT IS RESTRICTED IN ORDER TO ACCOMMODATE THE DEFENSE OF THE OTHER CO-DEFENDANT.
>
> [II.] A TRIAL COURT COMMITS ERROR WHEN IT DISALLOWS A CRIMINAL DEFENDANT FROM CROSS-EXAMINING AN EXPERT WITNESS WITH A LEARNED TREATISE.
>
> [III.] THE TRIAL COURT ERRED WHEN IT ALLOWED A PROSECUTOR TO REFRESH THE MEMORY OF A WITNESS WITH A STATEMENT HE DID NOT WRITE, PARTICULARLY WHERE THE WITNESS NEVER ASSERTED A FAILURE TO RECALL.
>
> [IV.] THE TRIAL COURT ERRS WHEN IT ALLOWS A PARTY TO CALL TWO EXPERT WITNESSES WHOSE TESTIMONY IS IDENTICAL.
>
> [V.] A TRIAL COURT VIOLATES A DEFENDANT'S RIGHT TO A SPEEDY TRIAL WHERE IT PROCEEDS ON A CRIMINAL CASE OVER NINE YEARS AFTER THE ALLEGED CRIMINAL INCIDENT TAKES PLACE.
>
> [VI.] THE CONVICTION OF APPELLANT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

> [VII.] THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE DEFENDANT'S MOTION FOR ACQUITTAL.
>
> [VIII.] A TRIAL COURT ERRS WHEN IT ALLOWS A CRIMINAL DEFENDANT TO BE CHARGED WITH THE OFFENSE OF MURDER BASED UPON A FELONIOUS ASSAULT, AFTER IT DETERMINES THE FELONIOUS ASSAULT IS TO BE DISMISSED DUE TO SPEEDY TRIAL GROUNDS.
>
> [IX.] A TRIAL COURT COMMITS ERROR WHERE IT DECLARES THAT EMERGENCY PERSONNEL ARE VICTIMS FOR AGGRAVATED ARSON PURPOSES.

{¶ 12} For ease of discussion, we address defendant's sixth and seventh assignments of error first.

III. SIXTH AND SEVENTH ASSIGNMENTS OF ERROR—CRIM.R. 29 AND MANIFEST WEIGHT

{¶ 13} Defendant's seventh assignment of error asserts the court erred in failing to grant his Crim.R. 29 motion. Defendant moved for acquittal pursuant to Crim.R. 29 at the close of the State's evidence. Defendant's sixth assignment of error asserts his convictions are against the manifest weight of the evidence.

{¶ 14} Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence." *State v. Hernandez,* 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 6; *State v. Tenace,* 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37.

{¶ 15} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins,* 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Conley*, 10th Dist. No. 93AP-387 (Dec. 16, 1993).

When reviewing the sufficiency of the evidence the court does not weigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79.

{¶ 16} Defendant summarily asserts, in support of his seventh assignment of error, that "after reviewing the evidence in a light most favorable to the State, this appellate court should reverse and remand the instant case." Although defendant sets forth the correct legal standard for reviewing a criminal conviction on sufficiency grounds, defendant provides neither citations to the record nor citations to pertinent authority to support this assignment of error, as required by App.R. 16(A)(7). Pursuant to App.R. 12(A)(2), an appellate court may disregard an assignment of error if the party raising the assignment of error fails to identify in the record the error on which the assignment of error is based. *See also State v. Williams*, 10th Dist. No. 02AP-507, 2003-Ohio-2694, ¶ 54. Although we would be justified to disregard this assignment of error, in the interests of justice, we have thoroughly reviewed the record before us and conclude that the evidence was sufficient to support defendant's convictions.

{¶ 17} The jury found defendant guilty of felony murder as defined in R.C. 2903.02(B), finding defendant caused the victim's death while committing or attempting to commit felonious assault. Felonious assault under R.C. 2903.11 prohibits any person from knowingly causing serious physical harm to another. The mens rea for felony murder is the intent that is required to commit the underlying predicate offense. *State v. Maynard*, 10th Dist. No. 11AP-697, 2012-Ohio-2946, ¶ 17, citing *State v. Walters*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶ 61. *See* R.C. 2901.22(B).

{¶ 18} The State's evidence indicated that Miller was at the victim's house during the afternoon of April 20, 2002, acting "exceptionally aggressive," yelling at the victim, and threatening that he would "be back." (Tr. 354, 57.) Later that same day, defendant, Miller, and McGowan went to the victim's house. McGowan heard defendant ask the victim in a "[k]ind of mean" tone why the victim did not accept defendant's calls. (Tr. 524.) McGowan heard the victim "halfway crying" saying "I didn't do it[,] I was[n't] the one who didn't accept the call." (Tr. 517-18.) Miller came to the door and told McGowan to leave "because he [didn't] think [McGowan] should be [t]here." (Tr. 519.) Shortly thereafter, the house was on fire. That night, police apprehended defendant and Miller walking together in the vicinity of 255 South Gift Street.

{¶ 19} After police apprehended defendant and Miller, the canine trained to detect ignitable liquid performed a "sniff lineup" on defendant and Miller, and alerted to the presence of ignitable liquid on both men. The investigator collected defendant's and Miller's clothing that night, in order to test the clothing for the presence of ignitable liquid. The firefighters who collected the clothing noticed what appeared to be blood stains on both men's jeans and removed the apparent blood stains for DNA testing. Three different blood stains on defendant's jeans matched the victim's DNA, while two blood stains on Miller's jeans matched the victim's DNA.

{¶ 20} Approximately two weeks after the fire, Jones and McGowan saw defendant and Miller walking together by the Scioto River in downtown Columbus. When McGowan told defendant and Miller that he "didn't have nothing to do with" the fire at 255 South Gift Street, Miller reassured McGowan that he knew McGowan was not involved with the crime. (Tr. 533.) Miller told McGowan that, if McGowan were ever accused, Miller and defendant "would take the blame." (Tr. 533.) Miller told McGowan that defendant had strangled the victim and set the house on fire. Defendant, who was present while Miller spoke, did not take exception or otherwise indicate that Miller was lying.

{¶ 21} Jones also testified about the riverfront meeting, explaining that defendant confessed to strangling the victim and setting the house on fire. Defendant told Jones "[h]e didn't really mean to kill" the victim, but "they set the fire to cover up the crime." (Tr. 903.)

{¶ 22} The State also presented the testimony of Michael Ostrander, defendant's former co-worker, who also testified that defendant confessed to murdering the victim and setting the house on fire. Defendant told Ostrander he went to 255 South Gift Street to get money from the victim, as defendant used to take money from the victim to support defendant's crack cocaine addiction. When the victim stood up and said he would not give defendant the money, defendant "hit the dude; and when [the victim] fell to the ground, [defendant] started kicking him." (Tr. 872.) When the victim was no longer moving, and defendant had determined the victim did not have any money, "he set the house on fire and left the scene." (Tr. 872.)

{¶ 23} The coroner, Dr. Patrick Fardal, determined the victim did not die from the smoke caused by the fire, as the autopsy did not reveal soot in the victim's airway. Dr. Fardal discovered that the victim had a markedly enlarged heart, weighing 580 grams, and concluded the victim died of a cardiac arrest brought on by an arrhythmia, "an abnormal heartbeat, [or] an electrical conductivity that causes the heart to beat irregularly." (Tr. 425.) Due to the extent of the thermal injuries on the victim's body, Dr. Fardal was unable to identify any superficial injuries such as "a bruise or something from a strike, et cetera." (Tr. 411.) Dr. Fardal was able to detect "a minor injury" on the scalp where "there was a little bit of hemorrhaging," which occurred on or about the time of death. (Tr. 416.)

{¶ 24} Dr. Jacob Kolibash testified as an expert in cardiovascular medicine, explaining that there is "[a]lmost always" a predisposing event which causes an arrhythmia. (Tr. 667.) Dr. Kolibash opined that "[t]he stress imposed by the event that happened" triggered the arrhythmia which led to the victim's death. (Tr. 677.)

{¶ 25} The evidence thus circumstantially indicated that defendant and Miller assaulted the victim: Miller, acting aggressively, threatened to return to 255 South Gift Street; defendant and Miller were at the victim's residence later that day; McGowan heard the victim halfway crying and apologizing as defendant spoke to the victim in a mean tone; the coroner detected a minor injury on the victim's scalp; both defendant and Miller had the victim's DNA on their clothing; and police apprehended defendant and Miller walking together in the vicinity of 255 South Gift Street after the fire. Defendant confessed to Jones that he strangled the victim, and confessed to Ostrander that he hit and kicked the victim. Miller told McGowan that defendant strangled the victim.

{¶ 26} Accordingly, sufficient evidence supported the jury's conclusion that defendant caused the victim's death as a result of committing or attempting to commit felonious assault. A defendant's conduct is the proximate cause of a victim's injuries when the consequence was "foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by his conduct." *State v. Losey*, 23 Ohio App.3d 93, 96 (10th Dist.1985). A cardiac arrest falls within the scope of the risk created by defendant's conduct of assaulting an overweight, unhealthy,

blind man. *Compare State v. Emch*, 6th Dist. No. L-99-1292 (Sept. 22, 2000) (finding the defendant proximately caused the victim's death where the victim, who suffered from severe heart disease, had a heart attack after the defendant crashed his vehicle into the victim's bedroom at 3:00 a.m.).

{¶ 27} Defendant's convictions for aggravated arson required the State to prove that defendant, by means of fire or explosion, knowingly "[c]reate[d] a substantial risk of serious physical harm to any person other than the offender," and that defendant "[c]ause[d] physical harm to any occupied structure." R.C. 2909.02(A). "Based upon the very nature of the crime, proof of arson must, of necessity, often rely heavily on circumstantial evidence." *State v. Weber*, 124 Ohio App.3d 451, 462 (10th Dist.1997), citing *State v. Pruiett*, 9th Dist. No. 12858 (Apr. 15, 1987).

{¶ 28} During the afternoon of April 20, 2002, while Miller was yelling at the victim, a witness walking down Gift Street heard Miller threaten to "come back and burn this bitch down." (Tr. 102.) Defendant and Miller went to the victim's house later that day. When the firefighters arrived on the evening of April 20, 2002, there was heavy fire showing on the first floor of 255 South Gift Street, the flames were blowing 15 to 20 feet out the windows. A witness at the scene identified Miller and defendant to officers as the individuals who started the fire. The canine alerted to the presence of ignitable liquid on both defendant and Miller, and alerted to the presence of ignitable liquid inside the house. Forensic testing revealed gasoline in the debris from the house and on the socks, shirts, jeans, and shoes of both defendant and Miller. Defendant confessed to both Jones and Ostrander that he set the house on fire; Miller told McGowan defendant set the fire.

{¶ 29} Based on the foregoing, there was sufficient evidence to support the finding that defendant, by means of a fire ignited by gasoline, knowingly caused physical harm to the occupied structure at 255 South Gift Street. *See State v. Woogerd*, 10th Dist. No. 05AP-45, 2007-Ohio-1518, ¶ 26 (finding sufficient evidence to support aggravated arson conviction because "an ignitable fluid was used in setting the fire; [and] the presence of an ignitable fluid was found on defendant's clothing and shoes").

{¶ 30} Sufficient evidence also supported the jury's conclusion that defendant, by means of the fire, knowingly created a substantial risk of serious physical harm to

another person. Although the evidence indicated the victim died before the fire began, "[t]he statutory definition of 'substantial risk of serious physical harm' to any person [in R.C. 2909.02] includes the creation of such a risk to firefighters. *See* R.C. 2909.01(A) and (B)(1)(a)." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, ¶ 138.

{¶ 31} Lieutenant Clyde Williamson testified regarding the dangers firefighters face when entering a structure engulfed in flames. He explained that firefighters could breathe in poisonous smoke, or a "backdraft situation" could occur, where firefighters entering an enclosed room expose a fire burning therein to oxygen, creating "basically an explosion." (Tr. 117.) Lieutenant Williamson explained that the use of an accelerant such as gasoline creates additional risks, as gasoline will cause the fire to burn hotter and faster. Gasoline may seep into the flooring, causing the building "to be weak, and at any time you could have a collapse." (Tr. 118.) Based on such testimony, there was sufficient evidence for the jury to conclude that defendant would have been aware that, as a result of using gasoline to set a house on fire, emergency personnel would respond to the scene and enter the house to extinguish the fire, placing their own lives in great danger.

{¶ 32} Because the evidence, when viewed in the light most favorable to the State, was legally sufficient to support defendant's convictions, the trial court properly overruled defendant's Crim.R. 29 motion.

{¶ 33} Defendant's sixth assignment of error asserts his convictions are against the manifest weight of the evidence presented at trial. Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *Thompkins* at 386. When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*. *Thompkins* at 387 (noting that "[w]hen 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"). In the manifest weight analysis the appellate court considers the credibility of the witnesses and determines whether 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.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1983). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 34} Defendant asserts his convictions are against the manifest weight of the evidence because the evidence "establishes that [defendant] was not at the Gift Street address when the fire occur[red]." Appellant's brief, at 12. However, ample circumstantial evidence, including defendant's presence at the victim's house before and after the fire and defendant's confession to setting the house on fire, indicated that defendant was at the victim's house when the fire occurred. "Under Ohio law * * * circumstantial evidence can have the same probative value as direct evidence, and '[a] conviction can be sustained based on circumstantial evidence alone.' " *State v. Fausnaugh*, 10th Dist. No. 11AP-842, 2012-Ohio-4414, ¶ 26, quoting *State v. Franklin*, 62 Ohio St.3d 118, 124 (1991), citing *State v. Nicely*, 39 Ohio St.3d 147, 154-55 (1988).

{¶ 35} Defendant further contends that the evidence "establishes that co-defendant Kelly Miller was seen running from the house as a neighbor watched," but that "[t]his neighbor did not see [defendant] at all." Appellant's brief, at 12. Officer Charles Radich, one of the officers assisting with crowd control during the fire, testified that a female witness from the crowd told him, "[t]here's Kelly. He might have something to do with this." (Tr. 761.) Officer Bryan Maselli, the other officer assisting with crowd control, testified that the witness said she knew who started the fire, pointed across the street to defendant and Miller, "said, [t]hose are the two men that are walking," and provided Officer Maselli with the names "Kelly and Craig Jewett." (Tr. 692, 709.) Officer Maselli stated the witness told him that she had seen "him come from the side of the house; and as soon as he came from the side of the house, the house went up in flames." (Tr. 693.) Thus, while there were some inconsistencies about what the witness at the scene of the fire said, the jury was free to believe all, part or none of either officer's testimony. *Raver*. Moreover, even if the jury believed that the witness only

identified Miller as the individual who started the fire, defendant's presence with Miller before and after the fire was indicative of defendant's participation in the crime.

{¶ 36} Defendant also asserts that while Miller reeked of gasoline, and gasoline was cited as the cause of the fire, police testified that defendant did not smell of gasoline. Officer Radich placed defendant in his police cruiser and stated that defendant did not smell of gasoline. Officer Maselli arrested Miller, placed Miller in his police cruiser, and noticed the "immediate" and "overwhelming smell of gas[oline]." (Tr. 710.) However, the canine alerted to the presence of ignitable liquid on defendant's jeans and forensic testing revealed gasoline on defendant's shirts, jeans, socks, and shoes from that evening. Christa Rajendram, the criminalist who tested defendant's clothes for gasoline, stated that the scientific instrument used to detect gasoline could detect as little as ten microliters of gasoline, an amount slightly smaller than a tear drop. (Tr. 374-75.)

{¶ 37} Defendant finally contends that, because he was walking next to Miller, traces of gasoline could have transferred from Miller's clothes onto his clothes. Rajendram explained on cross-examination that, if an article of clothing saturated with gasoline were in contact with another gasoline-free article of clothing "for a while," then the other clothing item would "absorb the liquid from the other." (Tr. 378-79.) Thus, gasoline would only have transferred from Miller to defendant if defendant and Miller were in contact with one another, not merely if they were walking side by side as the evidence indicated.

{¶ 38} Engaging in the limited weighing of the evidence which we are permitted, the record does not indicate that the jury clearly lost its way. The circumstantial evidence indicating that defendant assaulted the victim and started the fire, including defendant's confession to the same, provided the just with credible, competent evidence on which to find defendant guilty of murder and aggravated arson beyond a reasonable doubt.

{¶ 39} Based on the foregoing, defendant's sixth and seventh assignments of error are overruled.

IV. FIRST ASSIGNMENT OF ERROR—SEVERANCE

{¶ 40} Defendant's first assignment of error asserts the trial court erred in denying defendant's motion to sever the joint trial. Defendant, however, did not file a motion to sever. Although Miller moved to sever the joint trial, defendant did not join Miller's motion. Because defendant failed to make a motion to sever, we review for plain error. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 108. *See also State v. Crosky*, 10th Dist. No. 06AP-816, 2007-Ohio-6533, ¶ 23, fn. 3 (noting an "[a]ppellant's failure to object, notwithstanding her co-defendant's objection, waives all but plain error").

{¶ 41} Under Crim.R. 52(B), plain errors or defects affecting substantial rights may be noticed even though they were not brought to the attention of the court. The rule places three limitations on a reviewing court's decision to correct the error, despite the absence of a timely objection at trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. First, there must be an error, i.e., a deviation from a legal rule. *Id.* Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), the error must be an "obvious" defect in the proceedings. *Id.* And third, the error must have affected "substantial rights," meaning the error must have affected the outcome of the trial. *Id.*

{¶ 42} Crim.R. 8(B) provides that two defendants may be jointly indicted and tried for a non-capital offense as long as " 'they are alleged to have participated in the same act or transaction * * * or in the same course of criminal conduct.' " *Walters* at ¶ 21, quoting *State v. Cotton*, 2d Dist. No. 15115 (Dec. 6, 1996). Pursuant to Crim.R. 14, however, "[i]f it appears that a defendant or the state is prejudiced by a joinder of * * * defendants * * * for trial * * *, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

{¶ 43} The law generally favors joinder of defendants and the avoidance of multiple trials. *Walters* at ¶ 21. Joinder of trials conserves judicial and prosecutorial time, lessens the expenses multiple trials entail, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries. *Id.* While judicial economy generally weighs in favor of a trial court's decision to

try defendants together, judicial economy does not outweigh a defendant's right to a fair trial. *Id.* at ¶ 30, citing *State v. Brown*, 2d Dist. No. CA 8560 (Oct. 11, 1985).

{¶ 44} To determine whether a trial court abused its discretion in deciding not to sever a joint trial, we must determine whether the joint trial was " ' "so manifestly prejudicial that the trial judge [was] required to exercise his or her discretion in only one way-by severing the trial. * * * A defendant must show clear, manifest and undue prejudice and violation of a substantive right resulting from failure to sever." ' " *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶ 41, quoting *State v. Johnson*, 10th Dist. No. 96APA06-751 (Mar. 4, 1997), quoting *State v. Schiebel*, 55 Ohio St.3d 71, 89 (1990). A defendant may establish prejudice sufficient to warrant severance " 'when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant.' " *Walters* at ¶ 25, quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Defendants " 'are not entitled to severance merely because they have a better chance of acquittal in separate trials.' " *Walters* at ¶ 38, quoting *Zafiro* at 540.

{¶ 45} Defendant asserts the joint trial prejudiced his case because Miller reeked of gasoline, while a police officer noted defendant did not smell of gasoline, and because a witness spotted Miller leaving the victim's home shortly after the fire. Defendant alleges this testimony "spilled over and implicated [defendant] because it allowed the jury to draw the inference that [defendant] worked in concert with" Miller. Appellant's brief, at 4-5. Defendant asserts that, if he were tried separately from Miller, he stood "a strong chance of acquittal given the bleak evidence against him in this case." Appellant's brief, at 5.

{¶ 46} While defendant points to some evidence indicative of Miller's guilt, there was ample other evidence in the record to support defendant's convictions. In every trial where defendants are tried jointly, there is a risk that information introduced against one of the co-defendants may "spill over" against the other defendant. *Wilkerson* at ¶ 35, quoting *State v. Wyche*, 10th Dist. No. 87AP-878 (Feb. 21, 1989), citing *United States v. Lotsch*, 102 F.2d 35, 36 (2d Cir.1939). "The existence of * * * a 'spill-over' or 'guilt transference' effect turns in part on whether the numbers of conspiracies and conspirators involved were too great for the jury to give each defendant

the separate and individual consideration of the evidence against him to which he was entitled." *State v. Allen*, 5th Dist. No. 2009-CA-13, 2010-Ohio-4644, ¶ 76, citing *United States v. Gallo*, 763 F.2d 1504, 1526 (6th Cir.1985), citing *United States v. Tolliver*, 541 F.2d 958, 962 (2d Cir.1976).

{¶ 47} Even where a defendant alleges that information introduced against a co-defendant has spilled over against the defendant, there is "no resulting prejudicial effect when the evidence of each crime as alleged against each defendant is simple and distinct." *Wyche*. "In such cases, the jury is capable of separating the proof required for each charge as to the individual defendants." *Id.*, citing *State v. Roberts*, 62 Ohio St.2d 170, 175; *State v. Torres*, 66 Ohio St.2d 340, 343-44 (1981). *See also Roberts* at 175 (stating that a defendant alleging prejudice from a joint trial must show that "the proof for an offense for which he was convicted would have been insufficient had these cases not been joined in the same trial"); *Allen* at ¶ 76 (noting that, in a joint trial, the court's "primary concern is whether the jury will be able to segregate the evidence applicable to each defendant and follow the limiting instructions of the court as they apply to each defendant").

{¶ 48} The trial court instructed the jury to "consider and determine each of the defendants' verdicts separately," explaining that "[e]ither, both or neither of the defendants can be found guilty, or not guilty, of each count of the indictment." (Tr. 1078.) The court also provided the jurors with separate verdict forms for each defendant.

{¶ 49} The evidence against each defendant was simple and distinct. The evidence demonstrated that: defendant was at the victim's house arguing with the victim shortly before the incident; defendant was apprehended in the vicinity of 255 South Gift Street shortly after the incident; defendant's clothing from the night of the incident contained gasoline and the victim's DNA; and defendant confessed to Ostrander and Jones that he assaulted the victim and set the house on fire. There is no indication that the jury had any trouble following their instruction to consider the evidence against each defendant separately.

{¶ 50} We detect no plain error in the joint trial of defendant and Miller. Based on the State's evidence against defendant, it is apparent that the outcome of defendant's trial would have been the same if defendant were tried separately from Miller.

{¶ 51} Based on the foregoing, defendant's first assignment of error is overruled.

V. SECOND ASSIGNMENT OF ERROR—LEARNED TREATISE

{¶ 52} Defendant's second assignment of error asserts the trial court erred in preventing defendant from cross-examining an expert witness with a learned treatise. " 'The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.' " *State v. Robb*, 88 Ohio St.3d 59, 68 (2000), quoting *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Absent an abuse of discretion as well as a showing that the accused has suffered material prejudice, an appellate court will not disturb the ruling of the trial court as to the admissibility of evidence. *State v. Martin*, 19 Ohio St.3d 122, 129 (1985).

{¶ 53} The trial court admitted Fire Investigator Gregory Haggit as an expert in the field of fire investigation. Haggit was responsible for the investigation of the fire scene, and determined the fire was the result of an ignitable liquid poured by human hands.

{¶ 54} During cross-examination, Miller sought to impeach Haggit by asking him questions about a publication from the National Fire Protection Association ("NFPA"), "a couple o[ther] publications," and the "federal fire marshal's guide as far as investigating and collecting evidence at the scene of a possible fire." (Tr. 188.) The State informed the court that, while it was familiar with the NFPA publication, it was not familiar with the other documents, and noted that Miller had not provided the State with any of the proposed impeachment documents during discovery. The court ruled that Miller could use the NFPA publication to impeach Haggit, as the State was familiar with that document, but ruled that Miller could not use the other publications, as the State was unfamiliar with them. Miller objected under Evid.R. 803(18), asserting that the rule gave him a right to impeach an expert with a learned treatise. Defendant joined

in Miller's objection, asserting that Miller could use the documents for impeachment purposes as Haggit was an expert in fire investigation.[1]

{¶ 55} Defendant cites to Evid.R. 803(18) and contends that, because Haggit stated he was aware of the NFPA publication, and was an expert in the field of fire investigation, "[t]he defense should have been given the ability to cross-examine him fully about the learned treatise." Appellant's brief, at 6. Defendant does not assert any error regarding the federal fire marshal's guide or the other publications Miller's counsel sought to use for impeachment.

{¶ 56} Evid.R. 803(18) provides that "[t]o the extent called to the attention of an expert witness upon cross-examination * * * statements contained in published treatises, periodicals, or pamphlets on a subject of * * * science * * *, established as a reliable authority by the testimony or admission of the witness" are not excluded as hearsay. "If admitted, the statements may be read into evidence but may not be received as exhibits." Evid.R. 803(18). "The rationale behind this hearsay exception is that a finder of fact should have the benefit of expert learning on a subject, even though it is hearsay, so long as the authority of a treatise is sufficiently established." *Bradley v. Ohio Dept. of Transp.*, 10th Dist. No. 11AP-409, 2012-Ohio-451, ¶ 19, citing *Costantino v. Herzog*, 203 F.3d 164, 170-71 (2d Cir.2000).

{¶ 57} The record reveals that Miller thoroughly cross-examined Haggit regarding the NFPA publication. Miller's counsel cross-examined Haggit regarding the NFPA publication's recommendation to use a video camera instead of a photographic camera to record the scene of a fire; the recommendation that fire investigators wear rubber gloves when collecting evidence; and the recommendation to place all items suspected to contain accelerant material in metal cans or glass jars. At Miller's request, Haggit also read a portion of the NFPA publication into the record. The court did not limit Miller's cross-examination of Haggit about the NFPA publication in any way.

{¶ 58} Although defendant makes no argument regarding the admissibility of the other impeachment documents, we note that any error the trial court may have

[1] Although the transcript indicates the speaker is "Ms. Arsenault," one of the prosecutors in the action, the speaker must have been Mr. Armengau, defendant's counsel, as the speaker begins by stating "please, on behalf of Mr. Jewett," and makes an argument in favor of using the documents. (Tr. 194.)

committed by excluding those documents amounted to harmless error. Miller did thoroughly cross-examine Haggit with the NFPA publication, and the record contained substantial circumstantial evidence of defendant's guilt, including defendant's presence at the victim's house before and after the offense; the presence of gasoline and the victim's DNA on defendant's clothing; and defendant's confessions to Jones and Ostrander. Accordingly, even if Miller had cross-examined Haggit regarding the other publications, the outcome of the trial would not have differed.

{¶ 59} Based on the foregoing, defendant's second assignment of error is overruled.

VI. THIRD ASSIGNMENT OF ERROR—REFRESHED RECOLLECTION

{¶ 60} Defendant's third assignment of error asserts the trial court erred when it allowed the State to refresh a witness's recollection with a document the witness did not write, and where the witness did not indicate an inability to recall. Defendant's contentions under this assignment of error revolve around the State's direct examination of Firefighter Norman Atwood.

{¶ 61} Atwood responded to the seizure report during the afternoon, and returned to the victim's house that evening after the fire. After police apprehended Miller, Atwood identified Miller as the individual who had been yelling at the paramedics that afternoon, noting that Miller "was still wearing the exact same shirt" from earlier in the day. (Tr. 338.) The State asked Atwood if he heard any of the words Miller was yelling that afternoon. Atwood stated he "heard it all * * *, but * * * was actually focusing on the patient." (Tr. 339.) Atwood explained that, on the night of the incident, the detective investigating the homicide interviewed him; the interview was tape recorded, but the tape was accidently destroyed at some point prior to trial. The detective had made a written summary of the interview, and Atwood indicated that he had reviewed the summary prior to testifying. The State asked Atwood if it would refresh his recollection to review the summary, Atwood said it would.

{¶ 62} Counsel for Miller objected, arguing that Atwood should not be permitted to refresh his recollection with a statement someone else prepared. Counsel for defendant also objected, asserting that while the State could use anything to refresh the witness's recollection, the statement at issue presented a problem under *Crawford v.*

Washington, 541 U.S. 36 (2004), because the defense could not cross-examine the detective who wrote the report. The court allowed the State to use the document to refresh Atwood's recollection. Upon his refreshed recollection, Atwood was able to testify that defendant, while at the fence that afternoon, stated "he would be back." (Tr. 344.)

{¶ 63} Defendant's counsel objected to the use of the summary only on the basis of *Crawford*, and not for any of the reasons now asserted. "An objection to evidence on one ground does not preserve an objection on another ground, absent plain error." *State v. Barnes*, 10th Dist. No. 04AP-1133, 2005-Ohio-3279, ¶ 28, citing *State v. Watkins*, 10th Dist. No. 90AP-15 (Aug. 30, 1990), citing *State v. Davis*, 1 Ohio St.2d 28 (1964). Miller's counsel's objection to this testimony did not preserve the objection for defendant. *See Crosky*.

{¶ 64} Evid.R. 612 permits a party to use a writing to refresh a witness's recollection either while the witness is testifying or before the witness testifies. While a witness may review a writing to refresh their recollection, the witness "may not read the statement aloud * * * or otherwise place [the statement] before the jury." *State v. Ballew*, 76 Ohio St.3d 244, 254 (1996). The substantive evidence before the jury is the witness's testimony based upon their refreshed recollection. *State v. O'Keefe*, 11th Dist. No. 2002-A-0015, 2004-Ohio-5300, ¶ 74.

{¶ 65} "Evid.R. 612 does not require that the witness have prepared the document used to refresh his recollection." *Id.*, citing Weissenberger, *Ohio Evidence*, Section 612.3, 312 (2004). "The 'writing' discussed in Evid.R. 612 does not have to be an original document or recording. * * * Nor does it have to be executed or previously adopted by the testifying witness." *State v. McQueen*, 12th Dist. No. CA99-05-083 (Jun. 26, 2000), citing Weissenberger, *Ohio Evidence Treatise*, Section 612.3, 282 (2000). Accordingly, the trial court did not err in allowing the State to use the detective's summary to refresh Atwood's memory.

{¶ 66} In order to refresh the recollection of a witness under Evid.R. 612, a three-part test must be satisfied: (1) the memory of the witness must be exhausted or nearly exhausted; (2) the writing does refresh the recollection of the witness; and (3) the opposing party is provided an opportunity to inspect the writing and further cross-

examine the witness with regard to the writing. *In re Baby C*, 10th Dist. No. 05AP-1254, 2006-Ohio-2067, ¶ 72. Defendant takes issue with the first prong, alleging that Atwood's memory was not exhausted.

{¶ 67} When the State asked Atwood if he heard what Miller was saying during the afternoon, Atwood responded "I heard it all. I heard every single bit of it, but I was actually focusing on the patient. So my priority at that point was patient care. [Firefighter] Jeff Smith's priority at that point was keeping [Miller] on that side of the fence." (Tr. 339.) Atwood then indicated that it would refresh his memory as to the statements Miller made if he were able to review his summary.

{¶ 68} The State asserts that, while the prosecutor's foundation was "perhaps not artfully stated, Atwood did not provide specific responses to the prosecutor's question regarding Miller's statements." Appellee's brief, at 11. While Atwood stated he heard everything Miller said, Atwood did not repeat Miller's statements, and indicated that his attention was on the victim, not Miller. We find no plain error on the facts before us. Firefighter Jeff Smith similarly testified that Miller stated he would "be back" while standing at the fence line of the victim's house during the afternoon. (Tr. 57.) Thus, Atwood's testimony to the same based upon his refreshed recollection was cumulative of other evidence already before the jury. The outcome of the trial would not have differed if Atwood had not testified regarding Miller's statements.

{¶ 69} Based on the foregoing, defendant's third assignment of error is overruled.

VII. FOURTH ASSIGNMENT OF ERROR—TWO EXPERTS

{¶ 70} Defendant's fourth assignment of error asserts the trial court erred by permitting the State to present two expert witnesses to testify regarding the cause of death. Defendant contends the admission of Dr. Kolibash's testimony was error because his testimony was identical to Dr. Fardal's testimony, Dr. Kolibash based his testimony solely on information provided to him by others, and because "it was prejudicial to [defendant] to fight the two experts presented at trial by the state." Appellant's brief, at 9. "We will not disturb a trial court's decision to admit or exclude evidence, including expert testimony, absent a clear showing that the trial court abused its discretion in a manner causing material prejudice." *Lucero v. Ohio Dept. of Rehab. & Corr.*, 10th Dist.

No. 11AP-288, 2011-Ohio-6388, ¶ 10, citing *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66 (1991).

{¶ 71} Dr. Fardal, the coroner, explained his findings from the autopsy, concluding that the victim died as a result of an arrhythmia. While Dr. Fardal explained that an arrhythmia "is an abnormal heartbeat," Dr. Fardal admitted that cardiology was beyond his area of expertise, and explained that he was not an expert on arrhythmias "or what has to occur in order to trigger an arrhythmia." (Tr. 425.) Dr. Fardal recommended having a cardiologist review the autopsy material "to see if the heart was indeed the potential cause of death of this patient." (Tr. 424.)

{¶ 72} Dr. Kolibash, a practicing cardiologist with 37 years of experience, explained that the victim's enlarged heart placed the victim at an "independent risk for a cardiac event, an arrhythmia or an electrical event," which would be a "sudden death" type event. (Tr. 634, 636.) Dr. Kolibash explained that an electrical network controls the "normal rhythmicity of the heart," and an arrhythmia is simply an irregularity of the heart rhythm. (Tr. 637.) Dr. Kolibash explained that there is "usually a predisposing event that triggers the arrhythmia," such as physical or emotional stress. (Tr. 640.) Dr. Kolibash stated that, hypothetically, if the victim were scared for his life, or if the defendants verbally or physically assaulted him, either scenario could trigger a fatal arrhythmia in the victim. Dr. Kolibash opined that, based upon his review of the record, the victim's death was not a random, sudden death type event. He explained the "trigger" to the victim's arrhythmia was "[t]he stress imposed by the event that happened." (Tr. 677.)

{¶ 73} Both defendant and Miller objected to Dr. Kolibash's testimony under Evid.R. 702 asserting that, as Dr. Fardal already testified regarding the cause of death, Dr. Kolibash's testimony was unnecessary. The court overruled defendants' objections, noting Dr. Fardal recommended that a cardiologist be consulted regarding the cause of death.

{¶ 74} Pursuant to Evid.R. 702, a witness may testify as an expert if their testimony relates to matters beyond the knowledge or experience of lay persons, they qualify as an expert based on their specialized knowledge, skill, experience, training, or education, and their testimony is based on reliable scientific, technical, or other

specialized information. Trial courts generally should admit expert testimony when it is relevant and when the criteria of Evid.R. 702 are satisfied. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 23, quoting *State v. Nemeth*, 82 Ohio St.3d 202, 207 (1998).

{¶ 75} Dr. Kolibash qualified as an expert under Evid.R. 702: his testimony regarding the cause of arrhythmias related to a matter beyond the knowledge of lay persons, he qualified as an expert in cardiology based on his 37 years of experience, and his testimony was based on reliable scientific information gained through his years of education and experience. Dr. Kolibash's testimony was also relevant. Although Dr. Fardal was able to testify that the victim died from an arrhythmia, Dr. Fardal did not know what caused the arrhythmia. Dr. Kolibash explained that emotional or physical stress may cause an arrhythmia, and stated that stress at the time of the victim's death caused the victim's fatal arrhythmia.

{¶ 76} Dr. Kolibash's testimony was not identical to Dr. Fardal's testimony as defendant asserts. Each doctor testified regarding their area of expertise: Dr. Fardal testified about the results of the autopsy; and Dr. Kolibash testified about the causes of arrhythmias. Defendant also contends he was prejudiced by having to fight two experts, but does not explain how the testimony of the two experts prejudiced his case. Beyond mere speculation, we detect no actual prejudice to defendant. Each expert presented relevant, scientific testimony based on the expert's respective area of expertise. Accordingly, the trial court did not err in admitting Dr. Kolibash's testimony under Evid.R. 702.

{¶ 77} Defendant also contends the trial court erred in admitting Dr. Kolibash's testimony where Dr. Kolibash based his testimony "solely upon information provided to him by others." Appellant's brief, at 8. Pursuant to Evid.R. 703, the "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing."

{¶ 78} Dr. Kolibash explained that, in preparation for trial, he reviewed the autopsy report, police reports of the events, and the patient's medical records. While the autopsy report was admitted into evidence, neither the police reports nor the prior medical records were admitted into evidence. Miller objected to Dr. Kolibash's

testimony asserting that, because the police reports were not in evidence, Dr. Kolibash was basing his opinion regarding the cause of death on facts not in evidence. Defendant joined in Miller's objection, noting that Dr. Kolibash's conclusion in his official report, that the "circumstances at the time of this individual's death also involved extreme emotional stress," was an opinion based on facts not in evidence. (Tr. 650-51; State's exhibit N.) The State responded noting that the facts contained in the police reports were "going to come out in testimony and have come out in testimony." (Tr. 652.)

{¶ 79} Evid.R. 703 is written in the disjunctive, thus expert "[o]pinions may be based on perceptions *or* facts or data admitted in evidence." (Emphasis added.) *State v. Solomon*, 59 Ohio St.3d 124, 126 (1991). Dr. Kolibash admitted he did not have any personal contact with the victim and based his opinion regarding the victim's death solely on the records the State provided to him.

{¶ 80} "[E]ach element of fact upon which the opinion is based must either be perceived by the expert or admitted during the course of the trial." *State v. Jones*, 9 Ohio St.3d 123, 124-25 (1984). Thus, "an expert witness may base an opinion solely on evidence admitted at trial." *State v. Krzywkowski*, 8th Dist. No. 80392, 2002-Ohio-4438, ¶ 113. In *Krzywkowski*, the court found no error where a social worker "relied upon evidence that was admitted into evidence, specifically the children's behavior[,] * * * all of which had been admitted into evidence during direct testimony by either the children or the foster mothers." *Id.* at ¶ 114.

{¶ 81} In *State v. Clark*, 2d Dist. No. 84 CA 60 (Aug. 12, 1986), the state's expert based his opinion regarding the defendant's sanity on "police reports and statements of witnesses * * *, all of which were not admitted into evidence." *Id.* "[T]he facts on which [the expert] based his opinion were nevertheless admitted into evidence by way of the trial testimony of the police and lay witnesses who had given the statements." *Id.* Thus, "the trial court did not err in admitting [the expert's] opinion testimony" because "the facts contained in the documents [the expert] considered were in evidence." *Id.*

{¶ 82} Although Dr. Kolibash's conclusion regarding the circumstances at the time of the victim's death was based on police reports not admitted into evidence, the trial court did not err in admitting Dr. Kolibash's testimony because the evidence presented at trial demonstrated that the circumstances at the time of the victim's death

were stressful. Shortly before the victim's death, McGowan heard the victim halfway crying and apologizing while defendant spoke to him in a mean tone. Ostrander testified that defendant had gone to the victim's house in search of drug money and, when the victim stood up and said he would not give defendant any money, defendant hit and kicked the victim. Defendant told Jones he strangled the victim. Thus, because the facts in the police reports indicating that the circumstances at the time of the victim's death were stressful, were admitted into evidence through other witness's testimony, the trial court did not err in admitting Dr. Kolibash's testimony under Evid.R. 703.

{¶ 83} Dr. Kolibash's reliance on the patient's prior medical records amounted to harmless error, as Dr. Kolibash did not use those records to opine on any ultimate question of fact in the case.

{¶ 84} Based on the foregoing, defendant's fourth assignment of error is overruled.

VIII. FIFTH AND EIGHTH ASSIGNMENTS OF ERROR—PRE-INDICTMENT DELAY AND STATUTE OF LIMITATIONS.

{¶ 85} Defendant's fifth assignment of error asserts the trial court violated his right to a speedy trial when the court proceeded on a criminal case over nine years after the incident occurred. Defendant notes that, while the incident occurred in April 2002, the trial took "place eight years later in 2010." Appellant's brief, at 9. Defendant was indicted on February 18, 2010; his trial began on April 11, 2011. Defendant asserts the "eight years delay has prejudiced" him, "because several witnesses in his case have, in the years since, picked up new cases and are now testifying against him to better their own criminal plea bargaining options." Appellant's brief, at 10.

{¶ 86} Although defendant uses the words "speedy trial" in his assignment of error, and cites one case which speaks to speedy trial violations under the Sixth Amendment, the substance of defendant's assignment of error and his argument in support of the assignment of error, relate only to the State's pre-indictment delay. *See United States v. Lawson*, 780 F.2d 535, 541 (6th Cir.1985) (noting that, although the defendants claimed "their 'speedy trial' rights protected under the Sixth Amendment were violated," the case, "however, involve[d] only *preindictment* delay and thus d[id]

not implicate the 'speedy trial' Act, which is triggered only after indictment"). (Emphasis sic.) Moreover, defendant did not file a motion to dismiss in the trial court for a post-indictment speedy trial violation, and accordingly waived any post-indictment speedy trial claim. *See State v. Berry*, 10th Dist. No. 97AP-964 (June 29, 1999) (noting "[a] defendant must assert the issue of denial of a speedy trial at or prior to the commencement of trial or the issue is waived on appeal"); *State v. Turner*, 168 Ohio App.3d 176, 2006-Ohio-3786, ¶ 21 (5th Dist.) (noting "an appellant cannot raise a speedy trial issue for the first time on appeal").

{¶ 87} Defendant did not file a motion to dismiss for pre-indictment delay in the trial court. As defendant raises the issue regarding pre-indictment delay for the first time on appeal, we review for plain error.

{¶ 88} "The constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution, as well as to unjustifiable delays after indictment." *State v. Meeker*, 26 Ohio St.2d 9 (1971), paragraph three of the syllabus. An unjustifiable delay between the commission of an offense and a defendant's indictment, resulting in actual prejudice to the defendant, is a violation of the right to due process of law. *State v. Luck*, 15 Ohio St.3d 150 (1984), paragraph two of the syllabus. In *Luck*, the Supreme Court of Ohio adopted a two-part test to determine whether pre-indictment delay constitutes a due process violation. A defendant initially must produce evidence demonstrating that the delay caused actual prejudice to his or her defense. *State v. Dennis*, 10th Dist. No. 05AP-1290, 2006-Ohio-5777, ¶ 19, citing *Luck* at 157-58. After a defendant establishes actual prejudice, the burden will shift to the state to produce evidence justifying the delay. *Id.*, citing *Luck* at 158. *See also State v. Whiting*, 84 Ohio St.3d 215, 217 (1998).

{¶ 89} "The determination of 'actual prejudice' involves 'a delicate judgment based on the circumstances of each case.' " *State v. Walls*, 96 Ohio St.3d 437 (2002), ¶ 52, quoting *United States v. Marion*, 404 U.S. 307, 325 (1971). Any claim of prejudice, "such as the death of witnesses, lost evidence, or faded memories, must be viewed in light of the state's reason for the delay to determine whether a defendant will suffer actual prejudice at trial." *Dennis* at ¶ 19, citing *State v. Weiser*, 10th Dist. No. 03AP-95, 2003-Ohio-7034, ¶ 38; *State v. Peoples*, 10th Dist. No. 02AP-945, 2003-Ohio-4680,

¶ 30. "Proof of actual prejudice must be specific, particularized, and non-speculative; a court will not speculate as to whether the delay somehow prejudiced a defendant." *Id.*, citing *Peoples; Weiser*.

{¶ 90} Defendant asserts he suffered actual prejudice as a result of the eight-year delay between the events and the indictment because certain witnesses incurred criminal charges during the eight-year gap and testified against defendant to better their own criminal plea bargaining options. Defendant contends Ostrander "is one such witness who testified against" him. Appellant's brief, at 10. Ostrander was in prison awaiting trial on his own separate criminal charges when he testified for the State.

{¶ 91} Defendant has failed to present specific, particularized proof of actual prejudice resulting from the State's eight-year delay in filing the criminal charges. It was defendant's jailhouse confession to Ostrander, and not the State's eight-year delay, which caused Ostrander to testify against defendant. While it was fortuitous that Ostrander, defendant's former co-worker, was in jail at the same time as defendant, defendant could have confessed to a fellow inmate even if the State filed the charges immediately after the incident. Ostrander's testimony was also cumulative of other evidence presented at trial, as defendant similarly confessed to Jones.

{¶ 92} Moreover, the record supports the State's asserted justification for the delay that "transient witnesses had to be located and interviewed before the State could seek an indictment." Appellee's brief, at 17. Fire Investigator Haggit testified that any delay in bringing the charges was because several witnesses were homeless and difficult to locate for questioning. McGowan and Jones, two key witnesses for the State, both testified that they were homeless at the time of the incident. "[I]nvestigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused,' * * * precisely because investigative delay is not so one-sided." *United States v. Lovasco*, 431 U.S. 783, 795 (1977), quoting *Marion* at 324.

{¶ 93} Defendant's eighth assignment of error asserts the trial court erred when it allowed the State to charge defendant with murder based on felonious assault. Defendant's argument in support of his eighth assignment of error summarily states "[s]ee arguments under Assignment of Error No. 5." Appellant's brief, at 13. Defendant has failed to separately argue his eighth assignment of error, as required by App.R.

16(A)(7) and, pursuant to App.R. 12(A)(2), we may choose to disregard any assignment of error an appellant fails to separately argue. *See Foy v. Trumbull Corr. Inst.*, 10th Dist. No. 11AP-464, 2011-Ohio-6298, ¶ 13. However, in the interests of justice, we will address defendant's eighth assignment of error as argued under his fifth assignment of error.

{¶ 94} Defendant contends the State could not charge him with felony murder premised on felonious assault, where the applicable limitations period for the felonious assault charge had expired. R.C. 2901.13(A)(1)(a) provides that "a prosecution shall be barred unless it is commenced within the following periods after an offense is committed: (a) For a felony, six years." R.C. 2901.13(A)(2) provides that "[t]here is no period of limitation for the prosecution of a violation of * * * [R.C.] 2903.02." The jury convicted defendant of committing murder under R.C. 2903.02(B).

{¶ 95} R.C. 2901.13(A)(2) is clear, there is no period of limitation for felony murder under R.C. 2903.02. The elements of felony murder may contain another offense, and R.C. 2901.13 does not indicate that a prosecution for felony murder is barred where the limitations period for the predicate offense has passed. "Thus, the running of a statute of limitation for a predicate offense does not indirectly impose a statute of limitations on felony murder, which has no statute of limitation." *State v. Adams*, 7th Dist. No. 08 MA 246, 2011-Ohio-5361, ¶ 145. *See also State v. Dawson*, 8th Dist. No. 63122 (Nov. 18, 1993). Accordingly, although the limitations period may have expired on the felonious assault charge, the State could still indict defendant for murder premised on felonious assault.

{¶ 96} Based on the foregoing, defendant's fifth and eighth assignments of error are overruled.

XI. NINTH ASSIGNMENT OF ERROR—EMERGENCY PERSONNEL

{¶ 97} Defendant's ninth assignment of error asserts the trial court erred when it declared that emergency personnel were victims for purposes of aggravated arson. Defendant's contentions under this assignment of error are unclear. Defendant notes the trial court permitted the State to include emergency personnel as potential victims in the jury instructions for the aggravated arson charge. Defendant contends the "defense objected on the basis that nowhere in [defendant's] Indictment nor in his Bill

of Particulars d[id] it mention that emergency personnel were a part of his case at all." Appellant's brief, at 13. Defendant asserts we should sustain this assignment of error because he lacked "notice that emergency personnel were a part of this case." Appellant's brief, at 13.

{¶ 98} Although Miller objected to the State's proposed jury instruction including emergency personnel as victims under aggravated arson, defendant did not join in that objection. Defendant also did not voice any objection or file any motion regarding the indictment or bill of particulars. Accordingly, we review for plain error.

{¶ 99} Under aggravated arson, "[t]o 'create a substantial risk of physical harm to any person' includes the creation of a substantial risk of serious physical harm to any emergency personnel," including firefighters. R.C. 2909.01(A) and (B). While "[d]anger is an obvious occupational hazard for firefighters, * * * the General Assembly knew that when it enacted R.C. 2909.01(A)(1) and included emergency personnel within the class of persons who could be victimized by aggravated arson." *State v. Poelking*, 8th Dist. No. 78697 (Apr. 11, 2002).

{¶ 100} To the extent defendant contends the trial court erred by including emergency personnel in the jury instructions, we find no error. " 'A jury instruction is proper when it adequately informs the jury of the law.' " *State v. Conway* , 10th Dist. No. 03AP-585, 2004-Ohio-1222, ¶ 24, quoting *State v. Moody*, 10th Dist. No. 98AP-1371 (Mar. 13, 2001), citing *Linden v. Bates Truck Lines, Inc.*, 4 Ohio App.3d 178 (12th Dist.1982). Because the statute includes emergency personnel in the definition of "any person other than the offender" for purposes of aggravated arson, the jury instruction adequately informed the jury of the law.

{¶ 101} To the extent defendant contends the indictment or bill of particulars were deficient for not listing emergency personnel as potential victims under the aggravated arson charge, we also find no error. The "requirements of an indictment may be met by reciting the language of the criminal statute." *State v. Murphy*, 65 Ohio St.3d 554, 583 (1992); Crim.R. 7(B). Count 9 of defendant's indictment alleged that on April 20, 2002 defendant, by means of fire or explosion, did knowingly create a substantial risk of serious physical harm to any person other than himself. The charge tracks the language of R.C. 2909.02(A). Furthermore, "the name of the victim is not

required in the indictment when the identity of the victim is not an essential element of the crime." *State v. Williams*, 8th Dist. No. 84894, 2005-Ohio-1866, ¶ 18. *See also State v. Martin*, 10th Dist. No. 02AP33, 2002-Ohio-4769, ¶ 35. Aggravated arson requires only that a defendant create a substantial risk of serious physical harm to any person other than himself. Accordingly, the identity of the victim was not an essential element of aggravated arson.

{¶ 102} Defendant also requested and received a bill of particulars from the State. The bill of particulars specifically referred to R.C. 2909.02. R.C. 2909.01 provides definitions for sections 2909.01 to 2909.07 of the Revised Code. Because the statute specifically includes firefighters as individuals who may be victimized by a defendant's conduct under R.C. 2909.02(A)(1), defendant had notice that emergency personnel were potential victims under the aggravated arson charge.

{¶ 103} Based on the foregoing, defendant's ninth assignment of error is overruled.

{¶ 104} Having overruled defendant's nine assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, P.J, and TYACK, J., concur.
