

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	<b>O P I N I O N</b>
Plaintiff-Appellee,	:	
- VS -	:	<b>CASE NO. 2011-P-0012</b>
WILLIAM D. BUTCHER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2010 CR 0288.

Judgment: Affirmed.

*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*Jacquenette S. Corgan*, P.O. Box 2780, Akron, OH 44309-2780 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, William D. Butcher, appeals from the judgment of conviction, after trial by jury, entered by the Portage County Court of Common Pleas convicting him on one count of aggravated murder, one count of aggravated robbery, and four counts of kidnapping. For the reasons discussed in this opinion, the judgment of the trial court is affirmed.

{¶2} On April 18, 2010, Ericka Rouser invited her friend, Clifford Cummings, to dinner at her apartment with her and her four young children. While Rouser prepared

the food, Cummings sat at a glass-top, kitchen table, reading the paper. The two engaged in small talk while three of Rouser's four children played.

{¶3} The placid atmosphere was broken, however, when four masked men suddenly entered the apartment, wielding weapons and demanding money. The first individual to gain entry, Lawrence Burfitt, immediately struck Cummings on the head with a tire iron; Burfitt then bashed Rouser across the arm with the cudgel and smashed the kitchen table with the weapon. The second to enter, Damiyon Baxstrumn, not to be outdone by Burfitt, struck Cummings on the head with an air pistol disguised to look like a firearm, then held the gun to Cummings' face demanding money. Beside Baxstrumn stood Jarmel Latimer, brandishing a knife, and appellant, who was unarmed.

{¶4} While Burfitt pushed Rouser and two of her three children into a utility closet in the kitchen, Latimer lunged at Cummings with the knife, cutting him in various areas of his body. Despite his injuries, Cummings fought back, grabbing Baxstrumn and then Butcher. Latimer subsequently joined the fight, and Cummings wrestled with the three men for his life. When Baxstrumn stood up and extricated himself from the struggle, Butcher was able to gain control of Cummings' arms. Cummings, rendered defenseless by Butcher's hold, was then stabbed by Latimer in the chest. The knife sunk deeply into the helpless Cummings and the four attackers fled the apartment with Cummings' wallet and truck keys.

{¶5} Rouser, horrified and hysterical, exited the closet and immediately called 911. She quickly checked on Cummings, who was obviously hurt badly, but alert and verbal; she then located her third child, who had ran upstairs immediately after the commencement of the invasion.

{¶6} Police and emergency personnel arrived within minutes. Initially, Cummings was conscious, lucid, and able to communicate well with police and paramedics. Because of the amount of bloodshed, however, the emergency responders were unable to clearly assess the severity of his injuries. They were, furthermore, unable to get a stretcher into the apartment due to the narrowness of the doorway. Aware of the situation, Cummings exclaimed, “I’m dying, man, I’ve got to get the fuck out of here.” Cummings subsequently stood up and, with an officer’s assistance, walked himself to the ambulance.

{¶7} As the paramedics sped to the hospital, Cummings’ condition quickly deteriorated. By the time they reached the emergency room, Cummings was completely unresponsive. Despite aggressive attempts to resuscitate him by emergency room doctors and other personnel, Cummings passed away shortly after his arrival. According to autopsy reports, Cummings died from a stab wound that punctured the heart muscle causing cardiac tamponade, i.e., an excessive accumulation of blood in the pericardial sac that, due to the pressure, caused Cummings’ heart to fail.

{¶8} Within days of the murder, the four individuals were apprehended. Appellant was eventually indicted on charges of aggravated murder, in violation of R.C. 2903.01(B), with three specifications of aggravating circumstances, pursuant to R.C. 2929.04(A)(7); aggravated burglary, in violation of R.C. 2911.11(A)(1) and (2); aggravated robbery, in violation of R.C. 2911.01(A)(1) and (3); and four counts of kidnapping, in violation of R.C. 2905.01(A)(2) and (3).<sup>1</sup> The matter proceeded to jury trial. After the state rested, the trial court granted appellant’s motion for acquittal

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1. For clarity, the kidnapping charges were based upon the state’s allegations that appellant, during the invasion and assault, was complicit in the kidnapping of Rouser and each of her three children.

relating to the aggravating circumstances attached to the aggravated murder charge. As a result, the specifications were dismissed; however, the trial court overruled appellant's motion pertaining to the other counts.

{¶9} After deliberations, the jury found appellant guilty on all counts. The trial court subsequently sentenced appellant to life imprisonment with parole eligibility after 30 years for aggravated murder and a consecutive term of nine years for kidnapping Rouser. The court merged the aggravated burglary and aggravated robbery convictions and sentenced appellant to nine years on the merged conviction to be served concurrently to the aforementioned sentences. Finally, the court sentenced appellant to eight years for each of the three kidnapping convictions relating to Rouser's children to run concurrently with one another and concurrently with the other sentences.

{¶10} Appellant now appeals his convictions and assigns three errors for this court's review. His first assignment of error alleges:

{¶11} "Appellant Butcher's convictions for aggravated murder and kidnapping should be reversed as they are against the manifest weight of the evidence."

{¶12} Under his first assignment of error, appellant argues that his convictions for aggravated murder and kidnapping resulted in a miscarriage of justice because the jury instructions failed to state that he could be regarded as the principal offender if the jury found he was complicit in the crimes. We do not agree.

{¶13} We must first mention that the substance of appellant's initial assignment of error challenges the content of the trial court's jury instructions rather than the actual weight of the evidence supporting his convictions for aggravated murder and kidnapping. For purposes of a coherent analysis, we shall first construe this assigned

error thusly. We note, however, appellant failed to object to the jury instructions at trial. As a result, absent plain error, appellant waived any right to appeal this issue. See, e.g., *State v. Underwood*, 3 Ohio St.3d 12 (1983), syllabus. We shall therefore review appellant's contention and consider whether the alleged defect affected appellant's substantive rights. Civ.R. 52(B).

{¶14} After the close of evidence, the trial court provided the following jury instructions relating to complicity:

{¶15} The law allows complicity in violation of Ohio Revised Code Section 2923.03 to be charged in terms of complicity or in terms of a principal offense.

{¶16} Complicity is aiding and abetting another in committing an offense or soliciting or procuring another to commit an offense acting with the culpability required for the commission of that offense.

{¶17} Aided and abetted means supported, assisted, encouraged, cooperated with, advised or incited.

{¶18} Solicited means to seek, to ask, to influence, to invite, to tempt, to lean on or to bring pressure to bear.

{¶19} Procured means to get, obtain, induce or bring about or motivate.

{¶20} The mental culpability for a complicitor or a principal are the same, either purposely, knowingly or recklessly. Those terms will be defined for you at a later time.

{¶21} A principal is one who actually commits the act or offense.

{¶22} The trial court's instructions continued to define the crimes with which appellant was charged and the appropriate mens rea for each crime.

{¶23} The foregoing instructions were sufficient to apprise the jury that appellant could be found guilty as a principal offender or as a complicitor. Given the evidence in this case, the jury could not have found appellant guilty as the principal on the charges of aggravated murder and kidnapping. Nevertheless, the instructions were clear that a complicitor is one who aids or abets in the commission of an actual offense. The jury was provided all necessary information for it to reach a conclusion regarding whether, given the evidence, appellant was guilty of complicity to aggravated murder and complicity to kidnapping. The instructions were therefore legally adequate for the jury to draw conclusions on appellant's criminal liability as it relates to the crimes of aggravated murder and kidnapping.

{¶24} Appellant, however, complains that the instructions were flawed because they failed to advise the jury that a complicitor could be held to the same criminal culpability as the principal offender. We fail to see how adding this information to the instructions would have assisted the jury in concluding appellant was complicit in the crimes of aggravated murder and aggravated kidnapping. While appellant is correct that, statutorily, a defendant found guilty of complicity shall be prosecuted and punished as though he was the principal, the import of this point of law relates to a legal issue, not a factual issue. The absence of this information from the jury instructions, therefore, did not interfere with the jury's ability to determine whether, in light of the evidence adduced at trial, appellant was complicit in the charged crimes. We find no plain error and therefore, in this regard, appellant's first assignment of error is overruled.

{¶25} As indicated at the outset, appellant does not, in substance, make a full challenge to the weight of the evidence supporting his convictions; he does, however, make passing references as to what the evidence, in his view, failed to show. Deferring to these references and recognizing his assigned error is styled as a challenge to the weight of the evidence, we shall, in fairness to appellant, consider whether the prosecution met its burden of persuasion on the charges of which appellant was convicted. A manifest weight challenge concerns:

{¶26} [T]he inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.” (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing Black’s Law Dictionary (6th Ed.1990), at 1594.

{¶27} An appellate court must bear in mind the trier of fact’s superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The power to reverse on “manifest weight” grounds should be utilized only in exceptional circumstances when “the evidence weighs heavily against the conviction.” *Thompkins, supra*. Hence, a reviewing court will not reverse a conviction if there is substantial evidence upon which

the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Johnson*, 58 Ohio St.3d 40, 42 (1991).

{¶28} A summary of the primary evidence germane to appellant's convictions will serve as a foundation for our analysis. At trial, Ericka Rouser testified that, as she was preparing dinner for her family and Cummings, four masked men entered her apartment with weapons. Rouser testified Cummings was immediately hit in the head with a gun and another individual smashed her glass kitchen table with a "long pole." She stated two of her three children that were in the apartment ran to her as the third ran upstairs. While the other three attackers descended upon Cummings, Rouser testified the man who smashed the table then grabbed her arm, demanded money, and pushed her and the two remaining children into a utility closet in the kitchen.

{¶29} Although she attempted to leave the closet for the purpose of finding her third child, the door was slammed shut by one of the assailants. According to Rouser, she was warned to be quiet and threatened if she told anyone or called the police, the assailants would return and kill her. Rouser did not witness any other aspects of the invasion; when she was able to exit the closet, however, she saw Cummings lying on the floor covered in blood. She phoned 911 and frantically demanded emergency assistance.

{¶30} When police arrived, Rouser reported she recognized the demeanor and voice of one of the attackers as one Damiyon Baxstrumn, a young man who lived near her apartment in Terrill Commons, on Cleveland Street in Ravenna, Ohio. Rouser testified she was acquainted, and generally friendly, with Baxstrumn. In fact, Baxstrumn had occasion to visit her apartment from time-to-time and had even met Cummings on



several occasions. Rouser further testified that, on the Friday before the attack, Baxstrumn had expressed an interest in developing a relationship with her. When Rouser rebuffed Baxstrumn's advances, he appeared to be "upset" and had "an attitude."

{¶31} Damiyon Baxstrumn agreed to provide truthful testimony for the state of Ohio in exchange for a plea to life with the possibility of parole in 25 years. Baxstrumn testified that he lived with his grandmother approximately 40 or 50 yards from Terrill Commons. He testified he was acquainted with Rouser and had met Cummings "[a]bout three times." And, Baxstrumn testified he had recently gone to a drive-thru with Cummings where he saw Cummings was carrying "[a] stack, a wad of money."

{¶32} On the afternoon of April 18, 2010, Baxstrumn testified he was walking home from work at a local Wendy's restaurant. On his way, he cut through Terrill Commons and noticed Cummings' car in front of Rouser's apartment. Baxstrumn testified "I knew [Cummings] was there. I thought of relieving him of his drugs and money." Baxstrumn explained to the jury that he then called appellant, who he had known for a few years and, within 15 to 20 minutes, appellant, Jarmel Latimer, and Lawrence Burfitt arrived at Baxstrumn's home in a vehicle driven by Burfitt. Baxstrumn stated he entered the car and discussed his plans to rob Cummings.

{¶33} Baxstrumn testified the group drove to Kent and obtained an air pistol. As they drove back to the apartment complex, Latimer used a kitchen knife to cut eyeholes in a beanie hat and a shirt to disguise himself and Burfitt. Baxstrumn testified he covered his face with a red bandana and appellant wore a "dew rag like that you tie around your head."

{¶34} Burfitt drove the group into Terrill Commons and exited the vehicle, Baxstrumn with the air gun; Burfitt with a tire iron; and Latimer with a knife. Appellant was unarmed. Inside the apartment, Rouser, three of her four children, and Cummings were preparing for dinner. Baxstrumn testified that Burfitt entered the apartment first and demanded money and drugs from Cummings. When Cummings stated he had none, Baxstrumn stated Burfitt struck Cummings with the tire iron and broke the glass table in Rouser's kitchen. Baxstrumn testified he then assaulted Cummings by striking him in the head with the air gun. Burfitt, who also testified for the state under a similar deal as Baxstrumn's, confirmed Baxstrumn's testimony regarding how the plan was hatched, as well as the basic features of the initial assault. Burfitt further admitted to striking Rouser across the arm with the tire iron after assaulting Cummings.

{¶35} After hitting Cummings with the gun, Baxstrumn testified he pointed the weapon at Cummings, repeating Burfitt's initial demands. According to Baxstrumn, Latimer and appellant were standing near him at the time and Latimer "hit [Cummings] in his chest a few times \* \* \*" with a jabbing motion. Although outnumbered, Baxstrumn testified Cummings grabbed him and appellant; and the men began to wrestle. During the tussle, Baxstrumn stated he looked up and saw Burfitt forcing Rouser into a closet in the kitchen.

{¶36} Burfitt confirmed Baxstrumn's observations, testifying he pushed Rouser and "her kids" into the closet. As he did this, Burfitt testified he could see the others wrestling with Cummings. According to Burfitt, Baxstrumn left the fight and came into the kitchen and began searching the apartment's cupboards. Burfitt testified he then trained his attention to the fight and saw appellant holding Cummings' arms as Latimer

stabbed him in the chest. After the stabbing, the men left, taking, in Baxstrumn's words, Cummings' "wallet, his keys. His life."

{¶37} After leaving the scene, the four men went to Baxstrumn's house, dropped off their weapons, Cummings' keys, and a hat. Baxstrumn changed clothes and the men drove to Kent where Latimer's girlfriend, Tashiahna Pique, lived. Pique testified the men arrived at her apartment on the evening of April 18, 2010. She stated she knew appellant and Baxstrumn, but had never met Burfitt until that night. Pique testified she thought it was odd that, upon their arrival, appellant, Burfitt, and Latimer changed clothes.

{¶38} When the four men arrived, various others were at Pique's apartment, including Maurice Bayless, a friend of appellant. According to Bayless, when the group arrived, he noticed several of them had blood on their clothes and immediately left to change. Appellant eventually spoke to Bayless, stating "I didn't do nothing Reece," but then admitted, "it got out of hand a little bit." Appellant told Bayless the group " \* \* \* went in the house, put the girl in the closet, whatever \* \* \* dude got handled a little bit, might be something wrong with him.

{¶39} Later, Baxstrumn received a call from his grandmother informing him they were looking for him. Baxstrumn did not return home that night, and the Ravenna Police Department executed a search warrant for his bedroom. The police recovered a St. Louis baseball cap, shoes, two black t-shirts with large wet spots, and a red bandana. In a laundry hamper, they found a kitchen knife stained with blood and wrapped in paper towels and tape; a black hat with eye holes cut into the fabric; an air

pistol; and a set of keys, which included Cummings' vehicle key. Each individual was ultimately arrested for the home invasion and eventual murder of Cummings.

{¶40} Finally, the state called Christopher Brock to testify. Brock was being held on a felonious assault charge in the Portage County Jail when appellant was initially processed and held for Cummings' murder. Brock and appellant shared neighboring cells in the jail. Brock testified he had known appellant before they were mutually jailed and, during their mutual incarceration, they had occasion to converse. According to Brock, appellant admitted his involvement in the murder, but bragged that "they can't prove it because they had no DNA \* \* \*." Appellant further recounted that, although he did not directly murder Cummings, he "was punching the guy in the face while one of the guys was stabbing him \* \* \*."

{¶41} Brock testified he came forward with the information approximately ten days after his release from jail and did not receive any promises from the prosecutor or police in return for his testimony. With respect to Brock's motive for providing the information, he testified: "What he told me was bothering me and watching somebody walk away and possibly get away with murder isn't right."

{¶42} Forensic tests later revealed that the blood on the knife was consistent with Cummings' DNA profile and a DNA sample found on the knife's handle was consistent with Latimer's profile. Both black shirts and the right shoe also included blood, which was consistent with Cummings' DNA. Moreover, DNA profiles were found on the hat that were consistent with appellant's, as well as two other individuals; the other samples, however, were too diffuse for specific conclusions to be drawn.

{¶43} With these facts in mind, we shall consider whether the jury clearly lost its way in finding appellant guilty on all counts included in his indictment.

{¶44} R.C. 2903.01(B) is the statutory provision governing the crime of aggravated murder in this case. That section prohibits purposely causing the death of another while committing or attempting to commit an enumerated list of offenses; here, kidnapping, aggravated robbery, and aggravated burglary. Pursuant to R.C. 2901.22(A):

{¶45} “[a] person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.”

{¶46} Aggravated robbery is governed by R.C. 2913.01, and provides, in pertinent part:

{¶47} No person, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶48} (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

{¶49} \* \* \*

{¶50} (3) Inflict, or attempt to inflict, serious physical harm on another.

{¶51} Aggravated burglary is governed by R.C. 2911.11, and provides, in relevant part:

{¶52} (A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶53} (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

{¶54} (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶55} R.C. 2905.01 governs the crime of kidnapping and provides, in relevant part:

{¶56} (A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen \* \* \*, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person for any of the following purposes:

{¶57} \* \* \*

{¶58} (2) To facilitate the commission of any felony or flight thereafter;

{¶59} (3) To terrorize, or to inflict serious physical harm on the victim or another[.]

{¶60} Force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1).

{¶61} Finally, R.C. 2923.03, Ohio's complicity statute, provides, in relevant part:

{¶62} "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶63} "\* \* \*

{¶64} "(2) Aid or abet another in committing the offense[.]"

{¶65} An individual aids or abets in a crime assisting or facilitating the commission of the crime, or promoting its accomplishment. See, e.g., *State v. Johnson*, 93 Ohio St.3d 240, 243 (2001). Pursuant to R.C. 2923.03(F) a complicitor "\* \* \* shall be prosecuted and punished as if he were a principal offender."

{¶66} We shall first address appellant's merged convictions for aggravated robbery and aggravated burglary. The evidence adduced at trial demonstrated that, upon arrival at Baxstrumn's house, Baxstrumn explained his plan to enter Rouser's apartment and rob Cummings. There was no evidence that appellant was coerced into participating and no evidence that he retreated prior to entering the residence. To the contrary, according to Burfitt, immediately prior to the men entering the apartment, Baxstrumn advised the group: "If you scared get the fuck out the kitchen right now." No one left and the four men proceeded to forcibly enter the Rouser residence. The manifest weight of the evidence demonstrates that appellant, either directly or by way of assisting or cooperating with his co-defendants, forcibly entered Rouser's home with the purpose of robbing Cummings and, in the course of doing so, assisted and/or supported one or more of his co-defendants in inflicting serious physical harm on Cummings. Appellant was therefore properly found guilty of complicity to aggravated robbery and complicity to aggravated burglary.

{¶67} With respect to complicity to aggravated murder, the jury heard evidence via the testimony of Burfitt that appellant held the victim's arms as Latimer thrust the knife into Cummings' chest. Moreover, Christopher Brock testified that appellant admitted to punching the victim, essentially incapacitating him, as his co-defendant committed the stabbing. The jury heard no evidence that was contradictory to or inconsistent with Burfitt's first-hand observation of the crime. And, while Brock's testimony indicated appellant did more than "merely" hold Cummings' arms, it did not change the essence or quality of appellant's involvement in the murder. Under any construction, appellant's actions rendered Cummings defenseless such that Latimer could execute the coup de grace without the victim's resistance. There was, therefore, sufficient, persuasive evidence that appellant was complicit in purposefully causing the death of Cummings in the course of *both* an aggravated burglary and aggravated robbery.

{¶68} Finally, the evidence demonstrated that appellant supported and, by doing nothing to prevent the occurrence, cooperated with Burfitt in forcefully removing, as well as restraining the liberty of, Rouser and two of her three children from the kitchen into a utility closet to facilitate the robbery and ultimate murder of Cummings. There was no evidence that appellant discouraged the kidnappings; rather, Maurice Bayless indicated that appellant essentially acknowledged his complicity when appellant told him that the group "went in the house and put girl in the closet." The jury, therefore, did not lose its way in convicting appellant on the three kidnapping counts related to the victims forced into the kitchen closet.



{¶69} Appellant was also convicted of complicity to kidnapping the child who ran upstairs as the four men forced their way into the apartment. To be properly convicted of this crime, the prosecution was required to prove that appellant was complicit in either removing the six-year-old girl from the place where she was found or restraining her liberty, by any means, to either facilitate the commission of a felony or flight thereafter or to terrorize the child.<sup>2</sup>

{¶70} We first point out that there was no evidence that appellant or his co-defendants either forced, threatened, or chased the child upstairs. Rather, the testimony indicates the child, perhaps instinctively, made the voluntary, and obviously astute decision to remove herself from what she correctly perceived to be a dangerous situation. Thus, the jury could not have concluded that any of the assailants, by any means, removed the young girl from where she was found upon their entry. We shall therefore consider whether the assailants' conduct was sufficient to restrain the child's liberty to facilitate the underlying crimes and the attackers' later flight or to terrorize the child. We hold that the evidence supports such a conclusion.

{¶71} A person's liberty is restrained when the offender limits the victim's freedom of movement in any fashion for any period of time. *State v. Totarella*, 11th Dist. No. 2009-L-064, 2010-Ohio-1159, ¶118; see also *State v. Woodson*, 8th Dist. No. 95852, 2011-Ohio-2796, ¶13. Consequently, the element of restraint does not depend on "the manner a victim is restrained. Rather, it depends on whether the \* \* \* restraint is such as to place the victim in the offender's power and beyond immediate help, even though temporarily. \* \* \* [Thus], the restraint involved need not be actual confinement,

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2. Terrorize, for purposes of the kidnapping statute, has been defined as "to fill with terror or anxiety." *State v. Leasure*, 6th Dist. No. L-02-1207, 2003-Ohio-3987, ¶46, quoting Merriam Webster's Collegiate Dictionary (10th Ed.1996), 1217.

but may be merely compelling the victim to stay where [she] is.” Committee Comments to R.C. 2905.01. See also *State v. Walker*, 9th Dist. No. 2750-M, 1998 Ohio App. LEXIS 4067, \*5 (Sept. 2 1998).

{¶72} The evidence demonstrated that the men’s act of forcibly entering the apartment with weapons and assaulting Cummings not only prompted the child to flee to the upstairs of the apartment, but also caused her to remain in that area of the apartment with no reasonable option of escape. Because the child was unable to leave the upstairs while the men were in the home, the inference can be drawn that the child was compelled, by virtue of the men’s presence, to stay upstairs, much like her mother and siblings were compelled to remain in the closet, until the attackers fled with whatever they chose to take. We therefore hold the jury did not lose its way in finding appellant was complicit in kidnapping the six-year-old because the evidence demonstrated that, by his conduct, appellant aided in restraining the youth for the purpose of terrorizing her or to facilitate the commission of a robbery.

{¶73} Appellant’s first assignment of error is without merit.

{¶74} Appellant’s second assignment of error provides:

{¶75} “The trial court violated Butcher’s rights under the United States and Ohio Constitutions and committed reversible error when it imposed sentences upon Butcher for allied offenses of similar import.”

{¶76} Under this assignment of error, appellant asserts several arguments. First, he contends the trial court erred when it merged the aggravated robbery and aggravated burglary convictions, but nevertheless sentenced him to serve concurrent nine-year terms of imprisonment. Appellant next argues the trial court erred in

sentencing him to the three counts of kidnapping Rouser's children when it purportedly stated on record those convictions merged with the conviction for Rouser's kidnapping. Finally, appellant contends the trial court erred in sentencing him to nine years for Rouser's kidnapping because it was an allied offense of similar import to the aggravated murder conviction.

{¶77} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Supreme Court of Ohio construed R.C. 2941.25(A). In doing so, the court observed:

{¶78} In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. [*State v. Blankenship*, 38 Ohio St.3d [116,] 119 [(1988)], (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

{¶79} If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a

single state of mind.’ [State v.] *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50, (Lanzinger, J., dissenting).

{¶80} If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶81} Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. *Johnson, supra*, at ¶48-51.

{¶82} We first point out that appellant did not seek merger of any of the various counts of which he was convicted. The Supreme Court of Ohio, however, has repeatedly held “that the imposition of multiple sentences for allied offenses of similar import is plain error.” *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31, citing *State v. Yarborough*, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶96-102. With this in mind, we proceed to analyze appellant’s arguments.

{¶83} In this case, the trial court sentenced appellant first to life imprisonment for complicity to aggravated murder; nine years for the kidnapping conviction related to Rouser, to be served consecutively to the aggravated murder sentence; nine years for the merged counts of robbery and aggravated burglary, to be served concurrently with the foregoing sentences; and eight years for the remaining three kidnapping convictions, all to be served concurrently with the foregoing sentences.

{¶84} Appellant first asserts the trial court erred in sentencing him to concurrent terms for each merged count of aggravated robbery and aggravated burglary. A close

reading of the sentencing entry, however, shows the trial court did not enter judgment as appellant alleges. In its judgment on sentence, the trial court specifically stated appellant shall be sentenced to “[n]ine (9) years \* \* \* for Merged Counts Two and Three, to run concurrent to the aforementioned sentences.” The plain language of the entry therefore indicates the court properly merged the convictions of aggravated robbery and aggravated burglary and entered a single sentence of nine years for the merged conviction. Appellant’s argument on this point is without merit.

{¶85} Appellant next asserts the trial court committed reversible error when it merged the three kidnapping convictions relating to Rouser’s children, yet sentenced him to serve concurrent eight-year terms on each conviction concurrently with the kidnapping conviction of Rouser. The record does not support appellant’s assertion. Neither the transcript of the proceedings at the sentencing hearing, nor the judgment entry on sentence state or suggest the trial court merged or intended to merge the three kidnapping convictions relating to Rouser’s children. The trial court specifically sentenced appellant on each discrete kidnapping conviction to a specific term without merging them for purposes of sentencing. We discern no error in the trial court’s decision to run the kidnapping sentences concurrently with the nine-year term imposed for the kidnapping of Rouser.

{¶86} Appellant next argues his kidnapping convictions should have been merged with the aggravated murder conviction. In support, appellant cites the First Appellate District’s decision in *State v. Howard*, 1st Dist. No. C-100240, 2011-Ohio-2862. In that case, the court observed that, under the right circumstances, a kidnapping conviction can be merged with an aggravated murder conviction. For example, if the

restraint or movement of the victim is simply *incidental* to the murder, there can be no separate animus and the crimes will be allied offenses of similar import. *Id.* at ¶57, citing *State v. Logan*, 60 Ohio St.2d 126 (1979), syllabus. While the First District's statement of law is correct, this case does not present facts to support a merger of *these* kidnappings with *this* aggravated murder.

{¶87} The facts of this case demonstrate that, while the kidnappings occurred very close in time to the murder of Cummings, they were not incidental to the commission of the murder. Rather, after striking Cummings and Rouser with the tire iron, Burfitt corralled Rouser and her children into the kitchen closet. As Burfitt, the principal in the kidnapping, apparently remained near the closet, appellant, with the remaining co-defendants, murdered Cummings. The act which formed the basis of the kidnapping charges was completely separate from the murder, and the kidnappings and murder were clearly a result of separate animi. The facts of this case, therefore, simply do not support a merger of appellant's convictions for kidnapping with the conviction for aggravated murder.

{¶88} Appellant's second assignment of error is without merit.

{¶89} Appellant's final assignment of error provides:

{¶90} "The court abused its discretion when it imposed a sentence of life without the possibility of parole for 30 years upon Butcher."

{¶91} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio established a two-prong analysis for an appellate court reviewing a felony sentence. In the first step, we analyze whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." *Id.* at ¶26. Next, we consider, with

reference to the guidelines set forth under R.C. 2929.11 and R.C. 2929.12, whether the trial court abused its discretion in imposing an appellant's sentence. *See Kalish, supra.*

{¶92} Appellant does not argue his sentence was contrary to law; rather, he asserts the trial court abused its discretion because the sentence he received for his conviction on complicity to aggravated murder was disproportionately severe to the evidence of his involvement in the crime. We do not agree.

{¶93} The evidence at trial, none of which was specifically contested by appellant, demonstrated that the murder was committed in the course of executing a planned robbery in which appellant was a ready, willing, and voluntary participant. Before the fatal injury, Cummings was beaten with a tire iron and pistol whipped with an air gun, ever protesting that he had neither money nor drugs to surrender to his attackers. Unsatisfied with this answer, and notwithstanding the already harsh injuries, the assailants continued their assault. When the beaten and bloodied victim attempted to defend himself, however, appellant, either by punching, arm-hold, or both, rendered Cummings defenseless as Latimer thrust a knife into his heart. These facts, supported by testimony at trial, do not suggest appellant's legally valid sentence was disproportionate to the severity of the crime or unreasonable under any analysis. The trial court did not abuse its discretion when it imposed its sentence for appellant's conviction for complicity to aggravated murder.

{¶94} Appellant's third assignment of error is without merit.

{¶95} For the reasons discussed in this opinion, appellant's conviction for complicity to aggravated murder; his merged conviction for aggravated robbery and aggravated burglary; his conviction for complicity to kidnapping Rouser and her children

that were forced into the closet with her; and his conviction for kidnapping the child who ran and remained upstairs are all affirmed. Accordingly, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.