[Cite as *State v. Rader*, 2011-Ohio-5084.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-11-310
	:	O P I N I O N
- vs -		10/3/2011
	:	
JASON RADER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR-2010-08-1230

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RINGLAND, J.

{¶1} Defendant-appellant, Jason Rader, appeals from his conviction in the Butler County Court of Common Pleas for one count of tampering with evidence, one count of obstructing justice, and one count of complicity to murder. For the reasons outlined below, we affirm.

{¶2} Appellant was charged with the above named offenses after he allegedly aided and abetted Bryan Hodge, his childhood friend, in the July 29, 2010 murder of Michael Huff in

the city of Hamilton, Butler County, Ohio. After the trial court denied his motion to suppress, and following a three-day jury trial, appellant was found guilty on all charges and sentenced to serve a total of 20 years in prison.

{¶3} Appellant now appeals from his conviction, raising five assignments of error for review. For ease of discussion, appellant's second assignment of error will be addressed out of order.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED BY FAILING TO SUSTAIN APPELLANT'S MOTION TO SUPPRESS."

{¶6} In his first assignment of error, appellant argues that the trial court erred by denying his motion to suppress statements he made during three police interviews conducted in the early morning hours of July 29, 2010 following Huff's death "because [he] was not re-mirandized prior to each interrogation." We disagree.

{¶7} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Henriksson*, Butler App. No. CA2010-08-197, 2011-Ohio-1632, ¶9; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. When considering a motion to suppress, the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility. *State v. Eyer*, Warren App. No. CA2007-06-071, 2008-Ohio-1193, ¶8. In turn, the appellate court must accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Lange*, Butler App. No. CA2007-09-232, 2008-Ohio-3595, ¶4; *State v. Bryson* (2001), 142 Ohio App.3d 397, 402. After accepting the trial court's factual findings as true, the appellate court must then determine, as a matter of law, and without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *State v. Forbes*, Preble App. No. CA2007-01-001, 2007-Ohio-6412, ¶29; *State v. Dierkes*, Portage

App. No. 2008-P-0085, 2009-Ohio-2530, ¶17.

{¶8} It is well-established that a suspect who is subject to a custodial interrogation must be advised of his *Miranda* rights. *State v. Revels*, Butler App. Nos. CA2001-09-223, CA2001-09-230, 2002-Ohio-4231, ¶20, citing *State v. Treesh*, 90 Ohio St.3d 460, 470, 2001-Ohio-4. However, it is equally well-established that "a suspect who receives adequate *Miranda* warnings prior to a custodial interrogation need not be warned again before each subsequent interrogation." *State v. Zenowicz*, Sandusky App. No. S-06-032, 2007-Ohio-3682, ¶18; *Wyrick v. Fields* (1982), 459 U.S. 42, 48-49, 103 S.Ct. 394; *State v. Barnes* (1986), 25 Ohio St.3d 203, 208. That is, "[p]olice are not required to re-administer the *Miranda* warnings when a relatively short period of time has elapsed since the initial warnings." *State v. Streeter*, 162 Ohio App.3d 748, 2005-Ohio-4000, ¶19; *State v. Mack* , 73 Ohio St.3d 225, 232, 1995-Ohio-273.

{¶9} In *State v. Roberts* (1987), 32 Ohio St.3d 225, the Ohio Supreme Court found the following factors indicative of whether *Miranda* warnings initially provided to a suspect remain effective during subsequent interrogations: (1) the length of time between the giving of the first warnings and the subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the subsequent statement differed from any previous statements; and (5) the apparent intellectual and emotional state of the suspect. Id. at 232, following *State v. McZorn* (1975), 288 N.C. 417, 434. In making such a determination, courts are to look at the totality of the circumstances. *State v. Lester* (1998), 126 Ohio App.3d 1, 6; *State v. Brewer* (1990), 48 Ohio St.3d 50, 60.

{¶10} In this case, at 3:26 a.m. the morning of July 29, 2010, appellant signed a *Miranda* waiver form acknowledging Detective Steven Rogers of the Hamilton City Police

Department had advised him of his *Miranda* rights as he sat unrestrained in a police station interview room. Once appellant signed the *Miranda* waiver form, Detective Rogers questioned appellant for approximately 15 minutes before exiting the interview room to talk to Detective James Smith. According to Detective Rogers, appellant was "obviously upset" during this interview.

{¶11} Upon returning to the interview room, which occurred "probably 45 minutes to an hour" later, Detective Rogers, who was now accompanied by Detective Smith, "reminded [appellant] that he had been Mirandized." In explaining matters further, Detective Smith testified that "when I initially first met [appellant] and spoke with him, I sat down and I said, [appellant], now you have been Mirandized. You understand all of your rights, correct? And [appellant] said, yes." Thereafter, upon questioning appellant for approximately 45 minutes, the detectives stopped the interview and again exited the interview room. According to Detective Rogers, appellant was "more calm" during this interview.

{¶12} Approximately one hour later, Detective Rogers and Detective Smith returned to the interview room and again "reminded" appellant that they had read him his *Miranda* rights. However, after just a "short period of time," the detectives ended the interview because appellant was "sticking with the same things." An audio recording of this interview indicates it lasted approximately 12 minutes.

{¶13} After a thorough review of the record, and upon considering the factors set forth in *Roberts*, we find the *Miranda* warnings originally issued to appellant by Detective Rogers that morning remained effective despite the two breaks in appellant's interrogation. As the record indicates, after being advised of his *Miranda* warnings, appellant was interviewed three times in the same police station interview room over a period of approximately four hours. During this time, appellant, who was initially "upset," but who became "more calm" as the interviews progressed, provided the detectives with a similar story that was not markedly

different from any of his previous statements.

{¶14} In addition, although later accompanied by Detective Smith, each interview was conducted by Detective Rogers after appellant was "reminded" of his *Miranda* rights. Based on these facts, we find the *Miranda* warnings originally provided to appellant by Detective Rogers had not become so stale as to dilute their effectiveness. See *State v. Montgomery*, Licking App. No. 2007 CA 95, 2008-Ohio-6077, ¶52; *State v. Anderson*, Trumbull App. No. 2009-T-0041, 2010-Ohio-2291, ¶31; *State v. Parrish*, Montgomery App. No. 21091, 2006-Ohio-2677, ¶28-31; *State v. Tobias* (Sept. 15, 2000), Montgomery App. No. 17975, 2000 WL 1299535, at *6. Therefore, because the *Miranda* warnings initially provided to appellant remained in effect throughout each of the three interviews, the trial court did not err by denying appellant's motion to suppress. Accordingly, appellant's first assignment of error is overruled.

{¶15} Assignment of Error No. 3:

{¶16} "THE TRIAL COURT ERRED WHEN IT ADMITTED INTO EVIDENCE IMPROPERLY AUTHENTICATED PHONE CALLS."

{¶17} In his third assignment of error, appellant argues that the trial court erred by admitting an unauthenticated audio recordings of several alleged jailhouse conversations between appellant and his then incarcerated wife because "[t]he source of information, method and preparation indicates a lack of trustworthiness[.]"[1] We disagree.

{¶18} To be admissible, an audio recording must be authentic, accurate, and trustworthy. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶109; *State v. Coleman*,

1. Appellant characterizes the evidence admitted as "telephone records of phone calls," which, according to him, constitutes inadmissible hearsay unless properly authenticated by "an employee of the telephone company" under Evid.R. 803(6). However, contrary to appellant's claim, the record indicates that the evidence admitted was audio recordings of alleged jailhouse telephone conversations between appellant and his then incarcerated wife. The audio recordings, therefore, were clearly not hearsay as they constituted appellant's own statements offered against him at trial. See Evid.R. 801(D)(2)(a); see, e.g., *State v. Johnson*, Butler App. No. CA2002-04-100, 2003-Ohio-2540, ¶20-22.

85 Ohio St.3d 129, 141, 1999-Ohio-258. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by introducing "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A); *State v. Bettis*, Butler App. No. CA2004-02-034, 2005-Ohio-2917, ¶26. This standard is not rigorous and the threshold of admissibility is low. *State v. Steele*, Butler App. No. CA2003-11-276, 2005-Ohio-943, ¶115, citing *State v. Easter* (1991), 75 Ohio App.3d 22, 25. In turn, because "conclusive evidence as to authenticity and identification need not be presented to justify allowing evidence to reach the jury," the evidence required to establish authenticity need only be sufficient to afford a rational basis for a jury to decide that the evidence is what its proponent claims it to be. *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶17, 30.

{¶19} Turning to the facts of this case, in order to establish that the audio recording was what the state claimed it to be; namely, recordings of jailhouse conversations between appellant and his then incarcerated wife, the state was not required to "prove beyond any doubt that the evidence is what it purports to be." *State v. Moshos*, Clinton App. No. CA2009-06-008, 2010-Ohio-735, ¶12, quoting *State v. Aliff* (Apr. 12, 2000), Lawrence App. No. 99CA8, 2000 WL 378370, at *9. Instead, the state needed only to demonstrate a "reasonable likelihood" that the recording was authentic. *Bell*, 2009-Ohio-2335 at ¶30, citing Evid.R. 901(B)(1); *State v. Brantley*, Butler App. No. CA2006-08-093, 2008-Ohio-281, ¶34. Such evidence may be supplied by, but is not limited to, the testimony of a witness with knowledge, voice identification, or by evidence that a call was made to the number assigned at the time by the telephone company to a particular person. See Evid.R. 901(B)(1), (5), and (6); see, also, *Moshos* at ¶14; *State v. Small*, Franklin App. No. 06AP-1110, 2007-Ohio-6771, ¶38.

{¶20} That said, after a thorough review of the record, we find appellant stipulated to

the authenticity of the audio recording at trial. In fact, as appellant's trial counsel stated: "Judge, I would be satisfied with [the investigator with the Butler County Prosecutor's Office] authenticating that the [recordings] that [the state] used * * * are in fact what he had downloaded" from the "sheriff's site." As this court has stated previously, "[a] party will not be permitted to take advantage of an error which he himself invited or induced the court to make." *State v. Abercrombie*, Clermont App. No. CA2001-06-057, 2002-Ohio-2414, ¶28.

{¶21} Regardless, even if appellant had not stipulated to its authenticity, we find no error in the trial court's decision to admit the audio recording into evidence. Here, when asked on direct examination "who [he was] on the phone with," appellant testified that he was talking to his wife. In addition, on cross-examination when asked if the audio recording was of "[him] talking to [his] wife," appellant testified affirmatively. In turn, by affirmatively identifying his own voice on the audio recording, appellant simply cannot now claim the audio recording somehow lacks "trustworthiness" by calling into question its authenticity. Therefore, even if appellant had not stipulated to its authenticity, because appellant testified that the audio recording was of "[him] talking to [his] wife," any error the trial court may have made by admitting the audio recording into evidence was, at best, harmless. Accordingly, appellant's third assignment of error is overruled.

{¶22} Assignment of Error No. 4:

{¶23} "THE TRIAL COURT ERRED BY ALLOWING THE JURY TO REVIEW AND HAVE WHAT WAS ALLEGEDLY A TRANSCRIPT OF STATE'S EXHIBIT 1, 2 AND 3."

{¶24} In his fourth assignment of error, appellant initially argues that the trial court erred by permitting the jury to review a transcript of the alleged jailhouse conversations between appellant and his then incarcerated wife while the audio recording was played during trial. We disagree.

{¶25} At the outset, we note that appellant failed to object to the trial court's decision

to provide the jury with a transcript of the alleged jailhouse conversations at trial. Appellant, therefore, has waived all but plain error on appeal. See *State v. Wyatt*, Butler App. No. CA2010-07-171, 2011-Ohio-3427, ¶22, citing *State v. Blevins*, 152 Ohio App.3d 39, 2003-Ohio-1264, ¶21. As this court has stated previously, "[n]otice of plain error must be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Clements*, Butler App. No. CA2009-11-277, 2010-Ohio-4801, ¶7, citing *State v. Long* (1978), 53 Ohio St.2d 91, 95. An error does not rise to the level of plain error unless, but for the error, the outcome of the trial would have been different. *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, ¶38.

{¶26} That said, "[a] trial court has discretion to allow jurors to see copies of a written transcript while they listen to a tape recording." *State v. Bell*, Scioto App. No. 07CA3131, 2008-Ohio-823, ¶24, citing *State v. Blankenship* (May 22, 1985), Wayne App. No. 2050, 1985 WL 10768, at *2; see, also, *State v. Miller* (Aug. 10, 1998), Madison App. No. CA97-10-050, at 9-10. Moreover, as noted by the Ohio Supreme Court, "[w]here there are no 'material differences' between a tape admitted into evidence and a transcript given to the jury as a listening aid, there is no prejudicial error." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶98, quoting *State v. Waddy* (1992), 63 Ohio St.3d 424, 445.

{¶27} In this case, appellant did not identify any alleged discrepancies between the audio recording and the transcripts at trial, nor has appellant done so on appeal. In fact, appellant did not even provide this court with a copy of the transcript for review. Appellant, therefore, simply cannot show any resulting prejudice. See *State v. Murphy* (1992), 65 Ohio St.3d 554, 580; see, also, *State v. Hall*, Mahoning App. No. 08-MA-4807, 2009-Ohio-4807, ¶83; *State v. Kenney* (May 10, 2000), Holmes App. No. CA93-480A, 2000 WL 699673, at *9; *State v. Moore* (June 26, 1996), Hamilton App. No. C-950009, 1996 WL 348193, at *13. Accordingly, having found no error, let alone plain error, appellant's first argument lacks

merit.

{¶28} Appellant also argues that the trial court erred by failing to collect the transcript from the jury once the playing of the audio recording had concluded. According to appellant, by failing to collect the transcript, the trial court gave "the jury the opportunity to read the transcripts over and over even [when] the recordings were not being played." However, besides appellant's bare assertions to the contrary, the record is simply devoid of any evidence indicating the trial court allowed the jury to use the transcript for anything other than a listening aid while the recording was being played. In fact, as appellant readily admits, "[t]he record fails to show the fate of the transcripts once they reached the hands of the jury." Appellant's claim, therefore, is based on nothing more than pure speculation and is clearly insufficient to establish plain error. See, e.g., *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶108 (finding no plain error where defendant's claim was "totally speculative"); *State v. Wayne*, Butler App. No. CA2006-06-128, 2007-Ohio-3351, ¶32 (stating "speculation is insufficient for a finding of plain error"). Accordingly, having also found no merit to this argument, appellant's fourth assignment of error is overruled.

{¶29} Assignment of Error No. 5:

{¶30} "THE JURY'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶31} In his fifth assignment of error, appellant claims that his conviction for complicity to murder stands against the manifest weight of the evidence. In support of this claim, appellant argues that "all witnesses who actually saw the fight testified it was [Hodge] who was pounding the victim, not the defendant-appellant." This argument lacks merit.

{¶32} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Clements*, Butler App. No. CA2009-11-277, 2010-Ohio-4801, ¶19. A court

considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Lester*, Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James*, Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide since it is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence. *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Therefore, the question upon review is whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶33} Appellant was charged with complicity to murder after he allegedly aided and abetted Hodge, his childhood friend, in Huff's murder in violation of R.C. 2923.02(A)(2) and 2903.02(B), an unclassified felony. Pursuant to R.C. 2903.02(B), Ohio's felony murder statute, "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code." According to the bill of particulars, the "offense of violence" in this case was felonious assault in violation of R.C. 2903.11(A)(1), a second-degree felony.

{¶34} To support a conviction for complicity by aiding and abetting under R.C. 2923.03(A)(2), "the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the

defendant shared the criminal intent of the principal." *State v. Gragg*, 173 Ohio App.3d 270, 2007-Ohio-4731, ¶20, quoting *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus. Evidence of aiding and abetting may be shown by direct or circumstantial evidence, and participation in criminal intent may be inferred from presence, companionship, and conduct before or after the offense is committed. *State v. Israel*, Butler App. No. CA2010-07-170, 2011-Ohio-1474, ¶33, citing *Gragg* at ¶21; *State v. Mota*, Warren App. No. CA2007-06-082, 2008-Ohio-4163, ¶19. However, "the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor." *State v. Widner* (1982), 69 Ohio St.2d 267, 269. Instead, "there must be some level of active participation by way of providing assistance or encouragement." *State v. Nievas* (1997), 121 Ohio App.3d 451, 456; *State v. Coleman*, Butler App. No. CA2010-12-329, 2011-Ohio-4564, ¶9.

{¶35} At trial, Tim Smith, appellant's neighbor, testified that at approximately 9:00 p.m. on July 28, 2010, he heard "a bunch of yelling" and "screaming" coming from appellant's home and saw appellant "on top of somebody inside the kitchen" forcing him to the floor "getting their butt whooped" for "at least a couple minutes." Not wanting to get involved, and believing it was "just drunken people over there just acting crazy," Smith testified that he went back into his home and laid down on the couch. In further describing the man he saw appellant on top of that evening, Smith testified that he was "just a little guy" that was "way smaller" than appellant. Smith also testified that although he did not know the man's name, he knew the man appellant was forcing to the ground drove a red pick-up truck and had helped appellant move just a few months earlier.

{¶36} In addition, Brittany Smith, Tim Smith's daughter, testified that as she was outside grilling dinner for her father that evening, she heard "everybody yelling" and saw two men, who she later identified as Hodge and Huff, exit appellant's house through the kitchen

door. Brittany then testified that while Hodge was "hitting" Huff and telling him that he was "going to kill [him]," appellant got into Huff's red pick-up truck, "pulled the console down and started sticking stuff in his pockets." Brittany then testified that she saw Hodge and appellant "pick [Huff] up and throw him in the cab of the truck." Now scared for her own life, Brittany testified that she went back inside when she heard the sound of glass breaking, "smacking," and Hodge and appellant "saying, wake the f*** up, wake the f*** up."

{¶37} Also at trial, Dawn Couch testified that while she and her sister were driving through town, the pair turned down a nearby alleyway when they came across an unconscious "man badly beaten in a pool of blood and two other guys." According to Couch, the two men, who were "very hyped up," and who she later identified as Hodge and appellant, approached the vehicle and claimed "everything [was] okay." Couch then testified that appellant, who had blood on his clothes and hands, and who "admitted to beating this man," told her that the man "got what he * * * definitely deserved." Couch then testified that she saw the two men drag Huff out of the alleyway when "they started kicking him again." Thereafter, when asked if it was "apparent" that appellant had been involved in Huff's beating, Couch testified affirmatively.

{¶38} Furthermore, Brian Johnson, another neighbor of appellant, testified that while he was walking his dog by appellant's house at approximately 10:15 p.m., appellant asked if he had "seen the fight" and informed him that the "guy's in the truck." Upon approaching the red pick-up truck, Johnson testified that he saw Huff "slumped over." Unable to detect a pulse, Johnson then testified that he told appellant to call 911. Once the police arrived, appellant, who at that time was sweeping up broken glass and washing away the blood with water, was taken in for questioning. Huff, who sustained significant bruising over his entire body, as well as a broken arm, a broken neck, numerous fractured ribs, a torn kidney, and extensive internal bleeding, later died from his injuries.

{¶39} The state also presented evidence indicating appellant's bloody palm print was found on the side of Huff's red pick-up truck, as well as audio recordings of alleged jailhouse conversations between appellant and his then incarcerated wife on July 26, and July 27, 2010, in which he explained how he was trying to get Huff to his house so that he and Hodge could "beat his f****** ass" and "knock his teeth out," as well as an audio recording of a conversation on July 28, 2010 at 9:50 p.m., mere moments after the brutal beating, in which appellant admits to taking part in the attack.

{¶40} In his defense, appellant testified that on the evening of July 28, 2010, he and Hodge walked to the nearby store to get something to drink. According to appellant, he was only planning on getting a "juice or something," but Hodge ended up "talking [him] into getting an alcoholic beverage." Thereafter, upon returning from the store, appellant testified that he got a bloody nose when he and Hodge were listening to music and "wrestling around." When asked if he was "on top of [Hodge] in the kitchen," appellant testified, "I'm sure several times."

{¶41} Continuing, appellant then testified that while he and Hodge were hanging out, he received a call from Huff, his "friend," who wanted to come over and apologize for recently causing strain to their relationship. Knowing Hodge and Huff did not get along, appellant testified that he told Huff that Hodge was already there and that he did not want him to come over. Huff, despite appellant's warnings, decided to come to appellant's house anyway. Thereafter, upon Huff's arrival, appellant testified that Huff apologized and said he could "give [him] a free shot in the mouth." Appellant, however, told Huff that he was not going to hit him, but "before [he] could even finish what [he] was going to say," Hodge said, "Okay, I will, and punched him at that time."

{¶42} After Hodge and Huff began to fight, appellant testified that he "told them if they were going to do that, then they should go outside." Appellant then testified that Hodge and

Huff went outside through the back kitchen door causing the glass to break when the door "shut real hard." Following the two men outside, appellant then testified that while Hodge was "on top of [Huff] punching him," he got into Huff's red pick-up truck to see if he "had another beer or some cigarettes." Finding neither, appellant testified that he "got back out of the truck, came around and stopped [Hodge]."

{¶43} Once the fighting stopped, which he classified as a "vicious assault," and after a car containing Couch and her sister pulled down the alley, appellant testified that he helped Hodge pick Huff up, put him in his red pick-up truck, and "[tried] to get him to wake up." However, when their efforts proved unsuccessful, appellant testified that Hodge called his friend to pick him up while he started to clean up the blood and the broken glass. Appellant then testified that he called 911 after Johnson was unable to detect Huff's pulse.

{¶44} Also in his defense, appellant testified that shortly after the beating ceased, and while Huff lay bleeding and unconscious in his red pick-up truck, he received a call from his then incarcerated wife so he "told her about the fight * * * then and there." Thereafter, when asked why he told her he had participated in the attack, appellant testified that "[t]hat was a lie" and that he "didn't want her to think that someone was fighting [his] battles." Appellant, who claimed to have never hit Huff that evening, also testified that he did not invite Huff to his house so that he and Hodge could "beat him up."

{¶45} After a thorough review of the record, and although appellant may claim that he did not assist Hodge in the attack, but instead, actually tried to break up the fight, it is well-established that "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶11; *State v. Bromagen*, Clermont App. No. CA2005-09-087, 2006-Ohio-4429, ¶38. In turn, because the state presented overwhelming competent, credible evidence indicating appellant, at a

minimum, supported, assisted, and cooperated with Hodge, his childhood friend, in the brutal beating outside his Hamilton home that ultimately resulted in Huff's death, the jury did not clearly lose its way so as to create such a manifest miscarriage of justice requiring appellant's complicity to murder conviction be reversed. See *Mota*, 2008-Ohio-4163 at ¶21-26; see, also, *State v. Hermann*, Erie App. No. E-01-039, 2002-Ohio-7307; *State v. Horton*, Franklin App. No. 03AP-665, 2005-Ohio-458, ¶33-34. Therefore, because we find the state presented overwhelming evidence supporting the jury's finding of guilt, appellant's fifth assignment of error is overruled.

{¶46} Assignment of Error No. 2:

{¶47} "THE TRIAL COURT ERRED WHEN IT REFUSED TO INCLUDE A JURY INSTRUCTION ON A LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER OR COMPLICITY TO INVOLUNTARY MANSLAUGHTER."

{¶48} In his second assignment of error, appellant argues that the trial court erred by failing to instruct the jury on the lesser-included offense of complicity to involuntary manslaughter. In support of this claim, appellant argues that "the evidence was insufficient to show [he] aided Mr. Hodge in committing a felonious assault," a second-degree felony underlying his complicity to murder charge, and therefore, because the jury could have determined that he merely aided Hodge in committing aggravated assault, misdemeanor assault, or attempted theft, an instruction on complicity to involuntary manslaughter was warranted. This argument lacks merit.

{¶49} Jury instructions are matters left to the sound discretion of the trial court. *State v. Harry*, Butler App. No. CA2008-01-013, 2008-Ohio-6380, ¶35, citing *State v. Guster* (1981), 66 Ohio St.2d 266, 271. This court, therefore, reviews the trial court's decision refusing to provide the jury with a requested jury instruction for an abuse of discretion. *State v. Gray*, Butler App. No. CA2010-03-064, 2011-Ohio-666, ¶23, citing *State v. Wolons* (1989),

44 Ohio St.3d 64, 68. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶50} A jury instruction on a lesser-included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense. *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶136, citing *State v. Carter*, 89 Ohio St.3d 593, 600, 2000-Ohio-172. An instruction is not warranted, however, simply because the defendant offers "some evidence" to establish the lesser-included offense. *State v. Gray*, Butler App. No. CA2010-03-064, 2011-Ohio-666, ¶23, citing *State v. Shane* (1992), 63 Ohio St.3d 630, 632-633. Instead, there must be "sufficient evidence" to "allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included (or inferior-degree) offense." (Emphasis sic.) *State v. Anderson*, Butler App. No. CA2005-06-156, 2006-Ohio-2714, ¶11, quoting *Shane* at 632-633. In other words, "[a] trial court does not abuse its discretion by not giving a jury instruction if the evidence is insufficient to warrant the requested instruction." *State v. Cutts*, Stark App. No. 2008CA000079, 2009-Ohio-3563, ¶72, citing *State v. Lessin*, 67 Ohio St.3d 487, 494, 1993-Ohio-52. In making this determination, the trial court must consider the evidence in a light most favorable to the defendant. *State v. Braylock*, Lucas App. No. L-08-1433, 2010-Ohio-4722, ¶33, citing *State v. Smith*, 89 Ohio St.3d 323, 331, 2000-Ohio-166.

{¶51} As this court has stated previously, involuntary manslaughter is a lesser-included offense of murder. See *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶82; see, also, *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶79. However, although involuntary manslaughter is a lesser-included offense, based on the evidence presented in this case, no jury could have reasonably concluded that

appellant aided Hodge in anything other than felonious assault that ultimately resulted in Huff's death for nothing in the record indicates the brutal attack amounted to anything less than serious physical harm, nor does the record indicate that the attack was brought on as a result of serious provocation by Huff constituting aggravated assault, or in an attempt to deprive Huff of his property. See *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶49; *State v. Finley*, Hamilton App. No. C-061052, 2010-Ohio-5203, ¶30; *State v. Mitchell*, Columbiana App. No. 05 CO 63, 2008-Ohio-1525, ¶121-123. Therefore, because the evidence did not reasonably support an acquittal on the complicity to murder charge and a conviction on the lesser-included offense of complicity to involuntary manslaughter, the trial court did not err by failing to instruct the jury as such. Accordingly, finding no error in the trial court's decision, appellant's second assignment of error is overruled.

{¶52} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.