[Cite as *State v. Hernandez-Martinez,* 2012-Ohio-3754.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-04-068
	:	O P I N I O N
- vs -		8/20/2012
	:	
EDEL HERNANDEZ-MARTINEZ a.k.a. JHUSTIN HERNANDEZ,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-06-0992

Michael T. Gmoser, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Brian K. Harrison, 16 North Main Street, Middletown, Ohio 45042, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Edel Hernandez Martinez, appeals his conviction in the Butler County Court of Common Pleas on two counts of aggravated murder, unclassified felonies, in violation of R.C. 2903.01(A), one count of attempted aggravated murder, a first-degree felony in violation of R.C. 2923.02(A)-2903.01(A), with specifications to each of those three counts for discharging a firearm from a motor vehicle in violation of R.C. 2941.146 and

for participating in a criminal gang in violation of R.C. 2941.142, and one count of participating in a criminal gang, a second-degree felony in violation of R.C. 2923.42. For the reasons set forth below, we affirm.

{¶ 2} It was alleged that appellant was complicit in a gang-related drive-by shooting on July 13, 2008, outside of Casa Tequila in Fairfield. The local leader of the MS-13 gang, Hector Retana, was identified as the driver and shooter, while appellant was accused of aiding Retana as a passenger. Following a four-day jury trial, appellant was found guilty and sentenced to 78 years to life in prison for the above-named offenses.

{¶ 3} Appellant now appeals from his convictions, raising five assignments of error for review. Additional facts will be discussed as necessary under the relevant assignments of error.

{¶ 4} Assignment of Error No. 1:

{¶ 5} THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS APPELLANT MADE TO POLICE.

{¶ 6} Appellant was interviewed on four separate occasions in relation to the shooting at Casa Tequila: (1) on January 9, 2009, at the Cincinnati Police Department; (2) on January 28, 2009, at appellant's home; (3) on July 16, 2010, at the Fairfield Police Department following appellant's arrest; and (4) on July 18, 2010, at the Butler County Jail. Appellant sought to suppress statements made during those four interviews on the basis that he did not knowingly or voluntarily waive his Fifth Amendment rights. The trial court denied appellant's motion to suppress. The court found that the first two interrogations were noncustodial, and that appellant made a knowing waiver of his constitutional rights regarding the third and fourth. Appellant does not argue against the trial court's finding that the first two statements were noncustodial, and we therefore limit our discussion to the third and fourth interrogations.

{¶ 7} Appellate review of a ruling on a motion to suppress presents a mixed question

of law and fact. *State v. Rader*, 12th Dist. No. CA2010-11-310, 2011-Ohio-5084, ¶ 7. When considering a motion to suppress, the trial court assumes the role of the trier of fact, and therefore is in the best position to resolve factual questions and evaluate the credibility of witnesses. *In re J.B.*, 12th Dist. No. CA2004-09-226, 2005-Ohio-7029, ¶ 52, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). "Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. Geldrich*, 12th Dist. No. CA2006-10-267, 2008-Ohio-2622, ¶ 13, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶ 8} It is well-established that before law enforcement officials question a suspect in custody, the suspect must be advised of his *Miranda* rights and make a knowing and intelligent waiver of those rights before any statements obtained during the interrogation will be admissible as evidence. *State v. Treesh*, 90 Ohio St.3d 460, 470, 2001-Ohio-4. *Miranda* requires that the suspect be warned: "[1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Florida v. Powell*, __ U.S. __, 130 S.Ct. 1195, 1203 (2010), quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602 (1966). These four warnings are invariable, but the United States Supreme Court has never required *Miranda* warnings to be given in a specific form. *Powell* at 1204; *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶ 68. Instead, the warnings must touch all of the bases required by *Miranda*. See *State v. Dailey*, 53 Ohio St.3d 88, 90-91 (1990); *Duckworth v. Eagan*, 492 U.S. 195, 200, 109 S.Ct. 2875 (1989). "In determining, whether police officers adequately conveyed the four warnings, * * * reviewing courts are not required to examine the words

employed 'as if construing a will or defining the terms of an easement.'" *Powell* at 1204, quoting *Duckworth* at 203. Rather, the inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*. *Powell* at 1204, citing *California v. Prysock*, 453 U.S. 355, 361, 101 S.Ct. 2806 (1981).

{¶ 9} Appellant's third interrogation took place at the Fairfield Police Department following his arrest. Appellant argues that his waiver was not knowing and voluntary because: (1) police could not confirm whether he had been *Mirandized* upon his arrest; (2) he was suffering from an obvious head injury; and (3) while he was read an unsigned rights explanation form in Spanish, he was interrogated in English. We disagree.

{¶ 10} First, whether appellant was *Mirandized* upon arrest is irrelevant to whether his statement in the third interrogation should have been suppressed. The relevant question is whether the warnings were reasonably conveyed to appellant prior to his giving the statement.

{¶ 11} Detective Mike Woodall stated that he informed appellant that he was going to advise him of his *Miranda* rights in Spanish and then in fact read him those rights from a Spanish *Miranda* card. After reading appellant his rights, Woodall stated that appellant indicated that he understood the warnings and that he wished to speak to him without an attorney. According to Woodall, it was appellant who then initiated speaking to Woodall in English. Appellant therefore indicated that he understood and made a knowing waiver in Spanish, then voluntarily began speaking in English during the interrogation. A review of appellant's third interview makes it abundantly clear that he had no problem communicating in English. There is nothing in that set of facts to indicate that appellant was not making a knowing and voluntary waiver of Fifth Amendment rights. Furthermore, appellant fails to argue at any point that he in fact was unable to understand the warnings or waiver in either language.

{¶ 12} Appellant's argument that he did not make a knowing waiver of his rights because the police failed to have him sign a *Miranda* card is also without merit. The record indicates that appellant orally expressed that he understood his rights and was willing to talk to the detectives without the presence of an attorney. The failure of the detectives to have appellant sign the waiver form does not render that waiver invalid. See *State v. Harvey*, 12th Dist. No. CA90-06-117, 1990 WL 235517 (Dec. 31, 1990); *State v. Streeter*, 162 Ohio App.3d 748, 2005-Ohio-4000, ¶ 29 (6th Dist.); *State v. Llanderal-Raya*, 9th Dist. No. 04CA0079-M, 2005-Ohio-3306, at ¶ 30 (express written waiver not require for valid waiver).

{¶ 13} Finally, appellant failed to present any evidence that the head injury he sustained had any impact on his ability to knowingly and voluntary waive his Fifth Amendment rights. In addition, Woodall stated that appellant had been offered medical treatment multiple times on the day of the interrogation and consistently refused.

{¶ 14} The fourth interrogation took place two days after the third. Appellant argues that his statements from the last interrogation should be suppressed because he had asked about an attorney during the third interview two days earlier. He further argues that while he signed a *Miranda* waiver form, Officer Rebecca Ervin did not confirm whether appellant was literate in either English or Spanish. Finally, appellant argues he was incited to sign the form only after detectives read the indictment against him in its entirety without the benefit of an attorney to explain it. Again, we disagree.

{¶ 15} We first note that appellant failed to raise at trial the issue that he requested and was denied an attorney prior to the fourth interrogation. Because he failed to raise this issue at the trial level, he has waived the issue on appeal. Second, appellant again fails to allege that the use of both English and Spanish resulted in his failure to understand the rights that were being read to him or placed in front of him. The mixed use of these languages alone is not sufficient to render his waiver invalid. Rather, he must have actually failed to

knowingly and voluntarily waive his Fifth Amendments rights as a result. Appellant provided no evidence to indicate that was the case.

{¶ 16} Finally, appellant seems to argue that he was incited to make a statement, thus rendering his waiver involuntary. "The test for voluntariness under a Fifth Amendment analysis is whether or not the accused's statement was the product of police overreaching." *State v. Winterbotham*, 2nd Dist. No. 05CA100, 2006-Ohio-3989, ¶ 30. A suspect makes a voluntary confession absent evidence "that his will was overborne and his capacity for self-determination critically impaired because of coercive police conduct." *Colorado v. Spring*, 479 U.S. 564, 574, 107 S.Ct. 851, 857 (1987). "In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Lawson*, 12th Dist. No. CA99-12-226, 2001 WL 433121, * 8 (Apr. 30, 2001). We cannot find that reading appellant's indictment prior to advising him of his *Miranda* rights was so coercive as to render his will overborne and critically impair his capacity for self-determination.

{¶ 17} In light of the foregoing, having found that appellant made a knowing, voluntary and intelligent waiver of his Fifth Amendment rights, appellant's first assignment of error is overruled.

{¶ 18} Assignment of Error No. 2:

{¶ 19} THE STATE'S DELAYED DISCLOSURE OF WITNESS INFORMATION VIOLATED APPELLANT'S RIGHTS TO CONFRONTATION AND TO A FAIR TRIAL.

{¶ 20} Within this assignment of error, appellant raises two issues for our review. First, he argues that "Criminal Rule 16(D), as applied in this case, denied [a]ppellant his constitutional rights to confrontation and to a fair trial without adequate due process."

Second, appellant argues that the prosecuting attorney abused his discretion in not disclosing witness information. We disagree.

{¶ 21} Appellant first argues that the trial court abused its discretion and violated his due process rights by not compelling the state to disclose the names of six witnesses.[1] However, a criminal defendant is not constitutionally entitled to discovery in a criminal case. *State v. Craft*, 149 Ohio App.3d 176, 2002-Ohio-4481, ¶ 11 (12th Dist.), citing *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837 (1977). In fact, the due process clause of the Fourteenth Amendment to the United States Constitution does not require the prosecution in a state criminal case to reveal before trial the names of all witnesses who will testify unfavorably to the defense. *State v. Bradley*, 4th Dist. No. 1583, 1987 WL 1703, * 11, (Sept. 22, 1987), citing *Weatherford* at 549.

{¶ 22} Additionally, the three previously undisclosed witnesses who testified at trial were subject to cross-examination by appellant.[2] See *State v. Daniels*, 92 Ohio App.3d 473, 480 (1st Dist.1993). Accordingly, appellant's argument that he was not able to confront the witnesses against him in violation of his constitutional rights is without merit.

{¶ 23} Appellant next argues that the prosecutor abused his discretion in not disclosing witness information. The trial court, upon motion by the defendant, must review the prosecuting attorney's decision of nondisclosure for abuse of discretion. Crim.R. 16(F). If, after the hearing, the trial court finds no abuse of discretion, then a copy of any discoverable material that was not disclosed before trial must be provided to the defendant no later than the start of trial. Crim.R. 16(F)(5). However, if there is a finding of abuse of discretion, then the trial court may order disclosure, grant a continuance, or order any other

1. The state initially filed a certification of nondisclosure for seven witnesses, but at the hearing the state revealed it did not intend to call Witness 22 or Witness 24, and that Witness 23 would be revealed later that day.

2. The state did not call undisclosed Witness 18 at trial.

appropriate relief. Crim.R. 16(F)(1).

{¶ 24} The granting or overruling of discovery motions in a criminal case rests within the sound discretion of the court. *Craft* at ¶ 10. Abuse of discretion is more than an error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Id.*, citing *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶ 25} Crim.R. 16 governs discovery in criminal cases. Although a witness list is required by Crim.R. 16(I), Crim.R. 16(D) permits a prosecuting attorney to decline to disclose to the defendant the names of witnesses as long as the prosecutor certifies nondisclosure is for one of the five reasons enumerated in this section. One such reason is because "[t]he prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion." Crim.R. 16(D)(1). In support of nondisclosure, the state's reasonable, articulable grounds "may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information." Crim.R. 16(D)(5).

{¶ 26} At the Crim.R. 16(F) hearing, the prosecutor provided details regarding the four witnesses: (1) witness 18 was a member of the MS-13 gang and feared retaliation for his cooperation; (2) witness 19 was a witness to a direct statement by appellant and whose family, friends, and employment put witness 19 in close proximity to members of the MS-13 gang; (3) witness 20 was an eyewitness to the events on the night in question and has family, friends and living circumstances that put them in close proximity to MS-13 gang members, and was personally threatened during the pendency of this case; and (4) witness 21 was also an eyewitness to the events on the night and to multiple other murders committed by MS-13 gang members. It should be noted that the record indicates that witness 21's written

statement was provided to appellant with only the witness's identifying information redacted.

{¶ 27} Based on the foregoing facts, appellant failed to show that the trial court's refusal to reveal the identities of the four witnesses was arbitrary or unreasonable. The prosecutor provided reasonable, articulable grounds, including the nature of the case, a prior threat to one of the witnesses, and the known practices of the MS-13 gang in punishing those who cooperate with law enforcement, to believe that disclosure would compromise the witnesses' safety and possibly subject them to intimidation or coercion. As this case involved the activities of a known, violent street gang, it was appropriate for the court to consider whether the gang would retaliate against those persons set to testify against appellant. The gang's history of punishing those who cooperate with law enforcement indicated that these witnesses could be subject to threats or harm if their identities were revealed. We hold that under these circumstances, the trial court did not abuse its discretion in finding that the prosecutor had valid grounds under Crim.R. 16(B) for not disclosing the names of these four witnesses.

{¶ 28} In light of the foregoing, having found that the trial court did not abuse its discretion in refusing to disclose witness information when the prosecution provided evidence that such disclosure would compromise the safety of the witnesses and subject them to intimidation or coercion, appellant's second assignment of error is overruled.

{¶ 29} Assignment of Error No. 3:

{¶ 30} APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 31} Within his third assignment of error, appellant argues that his convictions for aggravated murder and attempted aggravated murder were against the manifest weight of the evidence. We disagree. We note initially that while appellant references his conviction for participation in a criminal gang within this assignment of error, he does not provide any

argument against his conviction on that count. We therefore limit our discussion to appellant's convictions for aggravated murder and attempted aggravated murder.

{¶ 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*, 12th Dist. 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*, 12th Dist. No. CA2003-09-244, 2004-Ohio-2909, ¶ 33; *State v. James*, 12th Dist. 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 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*, 12th Dist. No. CA2005-08-367, 2006-Ohio-3621, ¶ 34; *State v. DeHass*, 10 Ohio St.2d 230 (1967), 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*, 12th Dist. No. CA2007-03-082, 2008-Ohio-4502, ¶ 25; *State v. Blanton*, 12th Dist. No. CA2005-04-016, 2006-Ohio-1785, ¶ 7.

{¶ 33} Aggravated murder in violation of R.C. 2903.01(A) is defined as "purposely and with prior calculation and design caus[ing] the death of another." "Attempt" is defined in R.C. 2923.02(A), which states, "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶ 34} Appellant's argument focuses on the aiding and abetting portion of the

complicity statute. To support a conviction for complicity by aiding and abetting, "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 (12th Dist.), 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*, 12th Dist. No. CA2010-07-170, 2011-Ohio-1474, ¶ 33, citing *Gragg* at ¶ 21; *State v. Mota*, 12th Dist. 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*, 69 Ohio St.2d 267, 269 (1982). Instead, "there must be some level of active participation by way of providing assistance or encouragement." *State v. Nievas*, 121 Ohio App.3d 451, 456 (8th Dist.1997); *State v. Rader*, 12th Dist. No. CA2010-11-310, 2011-Ohio-5084, ¶ 34.

{¶ 35} By appellant's own admission, there was a plan in place to commit murder on the night in question. Appellant claims that Retana was to commit the offense, but that he was nearby to provide backup in case anything went wrong, and to finish the job if necessary. There was conflicting evidence at trial regarding appellant's presence in the assailant vehicle. During his interviews with police, appellant repeatedly denied being in the vehicle. In contrast, another passenger in the vehicle, Corinna Barrios, testified that appellant was in the front passenger seat. The testimony of Barrios was supported by Bienvenida Ramos, who testified that she saw three or four people in the assailant vehicle.

{¶ 36} Appellant argues that because there was conflicting testimony at trial regarding his presence in the vehicle, his convictions were against the manifest weight of the evidence.

However, "[a] defendant is not entitled to a reversal on manifest weight grounds simply because there was inconsistent evidence presented at trial." *State v. Jones*, 12th Dist. No. CA2011-05-044, 2012-Ohio-1480, ¶ 28, quoting *State v. McDowell*, 10th Dist. No. 10AP-509, 2011-Ohio-6815, ¶ 61. The jury, as the trier of fact, was permitted to judge the credibility of the witnesses and return a verdict in accordance with its findings.

{¶ 37} Barrios testified that the driver of the vehicle, Hector Retana, told appellant that he was "going to have to complete his mission and he could not fail." According to Barrios, appellant responded that "he was not going to fail." Barrios then stated that they drove slowly around the Casa Tequila parking lot, during which time Retana reach under the seat and handed appellant a pistol. During the second lap around the parking lot, Barrios testified that appellant handed Retana back the pistol, stating, "let's leave. There is nobody here." According to Barrios' testimony, Retana shortly thereafter told appellant to move aside and roll down the window. Barrios testified that appellant then rolled down the window and moved out of the way while Retana shot outside of the passenger side window.

{¶ 38} The intent on the night in question, by appellant's own admission, was to murder a few people with whom Retana had been quarreling. Evidence was introduced at trial that appellant did more than stand by and wait, but rather aided Retana by searching for the victims, and upon discovering them, rolling down the window and moving out of the way so that Retana could fire. Furthermore, according to the testimony of Barrios, appellant at one point held the gun himself, having promised not to fail in his mission this time.

{¶ 39} Appellant next argues that even if Barrios' testimony is to be believed, she supports appellant's theory of termination. The affirmative defense of termination pursuant to R.C. 2923.03(E), provides that it "is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his

criminal purpose." The burden is on the defendant to prove the elements of an affirmative defense by a preponderance of the evidence. *State v. Martin*, 21 Ohio St.3d 91 (1986); *State v. Miller*, 149 Ohio App.3d 782, 2002-Ohio-5812, at ¶ 7 (1st Dist.).

{¶ 40} To prove termination, appellant would have to show that he manifested a complete and voluntary renunciation of his criminal purpose. Appellant argues that by handing the pistol back to Retana and stating, "let's leave," it was shown that he did not share Retana's criminal intent and that he did not want to carry out the shooting. However, according to Barrios' testimony, appellant's full statement was, "let's leave. There is nobody here." This does not indicate a termination of complicity, but rather an acceptance that the opportunity to complete the offense had not presented itself. See *State v. Kane*, 12th Dist. No. CA83-09-076, 1984 WL 3309 (Apr. 23, 1984) (abandonment must be complete and voluntary in order to exculpate a defendant, and abandonment is neither complete nor voluntary where one abandons an attempted crime for fear of detection or when he realizes that he cannot complete the crime). Furthermore, testimony at trial indicated that upon locating the victims, appellant rolled down the window and leaned out of the way so that the shooter could fire, thus further evidencing appellant's failure to renunciate the criminal purpose.

{¶ 41} Based upon this evidence, we simply cannot say the jury clearly lost its way so as to create a manifest miscarriage of justice requiring appellant's aggravated murder and attempted aggravated murder convictions be reversed.

{¶ 42} In light of the foregoing, having found that appellant's aggravated murder and attempted aggravated murder convictions were not against the manifest weight of the evidence, appellant's third assignment of error is overruled.

{¶ 43} Assignment of Error No. 4:

{¶ 44} THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING

CONSPIRACY.

{¶ 45} Appellant argues that the trial court erred in instructing the jury on conspiracy pursuant to the complicity statute. We disagree.

{¶ 46} Jury instructions are matters left to the sound discretion of the trial court. *State v. Harry*, 12th Dist. No. CA2008-01-013, 2008-Ohio-6380, ¶ 35, citing *State v. Guster*, 66 Ohio St.2d 266, 271 (1981). This court, therefore, reviews the trial court's decision to provide the jury with a requested jury instruction for an abuse of discretion. *State v. Gray*, 12th Dist. No. CA2010-03-064, 2011-Ohio-666, ¶ 23, citing *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989). 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.

{¶ 47} Appellant initially argues that the indictment and bill of particulars did not provide him notice that the state intended to pursue a complicity by conspiracy charge. First, we agree with the state that the "offense of complicity may be charged either under R.C. 2923.03, the statute prohibiting complicity, or in terms of the principal offense." *State v. Coleman*, 37 Ohio St.3d 286 (1988). Appellant was indicted on the principal offenses of aggravated murder and attempted aggravated murder, and the bill of particulars specifically stated that appellant could be "charged and/or considered as either a principal offender or a complicitor." Therefore, appellant was put on notice that he may be charged with complicity in those offenses. Once appellant was put on notice that he may be charged with complicity, he was also put on notice that he could be charged with complicity by conspiracy pursuant to the complicity statute. R.C. 2923.03(A)(3) makes clear that conspiring "with another to commit the offense in violation of section 2923.01" allows for a charge under the complicity statute. *State v. Carte*, 8th Dist. No. 91534, 2009-Ohio-4193, ¶20-22. Therefore, upon notice he may be charged with complicity, appellant was also put on notice that the state may

pursue a theory of conspiracy within the complicity statue.

{¶ 48} Appellant next argues that the court erred in instructing the jury on two types of complicity: (1) aiding and abetting pursuant to R.C. 2923.03(A)(2); and (2) conspiracy pursuant to R.C. 2923.03(A)(3). However, as this court has held, "an indictment may present all three theories of complicity within a single count of an indictment." *State v. Hoop*, 134 Ohio App.3d 627, 635-6 (12th Dist.1999), citing *State v. Washington*, 11th Dist. No. 95-L-128, 1997 WL 1843865 (Jan. 10, 1997). Appellant's arguments fail to distinguish between a conspiracy charge under the conspiracy statute, and a conspiracy charge under the complicity statute. Under the latter, there is no conflict between the degrees of offenses being considered in relation to the aiding and abetting and conspiracy subsections of the complicity statute.

{¶ 49} In light of the foregoing, having found that appellant was put on notice that he may be charged with conspiracy under the complicity statute and that the trial court did not err in providing such instruction, appellant's fourth assignment of error is overruled.

{¶ 50} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.