[Cite as *State v. Harwell*, 2015-Ohio-2966.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 25852
	:	
v.	:	Trial Court Case No. 2012-CR-2367
	:	
MICHAEL D. HARWELL	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 24th day of July, 2015.

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Defendant-Appellant-Pro Se

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WELBAUM, J.

{¶ 1} Defendant-appellant, Michael D. Harwell, appeals pro se from the conviction and sentence he received in the Montgomery County Court of Common Pleas after he was found guilty of multiple criminal offenses following a jury trial. For the reasons outlined below, the judgment of the trial court will be affirmed in part, vacated in part, and remanded for the limited purpose of resentencing.

Facts and Course of Proceedings

{¶ 2} On November 16, 2012, the Montgomery County Grand Jury returned a 14-count indictment against Harwell charging him with two counts of felony murder in violation of R.C. 2903.02(B); two counts of attempt to commit felony murder in violation of R.C. 2923.02(A) and R.C. 2903.02(B); two counts of kidnapping in violation of R.C. 2905.01(A)(3) (terrorize/physical harm); two counts of kidnapping in violation of R.C. 2905.01(B)(2) (restrain personal liberty); two counts of kidnapping in violation of R.C. 2905.01(A)(2) (facilitate felony or flight); two counts of felonious assault in violation of R.C. 2903.11(A)(2) (deadly weapon); one count of felonious assault in violation of R.C. 2903.11(A)(1) (serious harm); and one count of having a weapon while under disability in violation of R.C. 2923.12(A)(3) (prior drug conviction). All counts, excluding the count for having a weapon while under disability, also included a three-year firearm specification.

{¶ 3} The foregoing charges stemmed from Harwell's actions after a drug deal went awry on the night of June 15, 2012. Specifically, it was alleged that Harwell kidnapped two men who were involved in the drug deal, Jonathon Lambes and Jason Miller, and drove them to the 3500 block of Guthrie Road in Dayton, Ohio, where he fired several gunshots at them. As a result, Miller was shot multiple times and left to die in the

street, whereas Lambes was able to escape into the woods. Harwell pled not guilty to all of the charges. Harwell then filed a motion to suppress the pretrial identifications of him, as well as his statements to law enforcement, which the trial court subsequently denied. The matter then proceeded to a week-long jury trial.

{¶ 4} At trial, Lambes and his cocaine supplier, Lori Peak, testified against Harwell. Lambes testified that the day before the relevant incident, June 14, 2012, Miller came to his house. During this time, Lambes testified that he showed Miller some cocaine that he was trying to sell. The following day, June 15, 2012, Miller came back to Lambes's house with a man referred to as "B." After meeting B, Lambes testified that Miller called him later in the day and asked if he could get two ounces of cocaine for B.

{¶ 5} Following Miller's request, Lambes testified that he called Peak to see if she wanted to do business with B. Peak testified that she reluctantly agreed to meet B for purposes of selling him two ounces of cocaine. According to Peak, Lambes asked her to remove three grams of cocaine from the two ounces as a finder's fee and replace the three grams with baking soda. Peak testified that she did as Lambes requested. Peak further testified that the cocaine she sold was not "raw," but a 70/30 cut, meaning it was 70 percent cocaine and 30 percent baking soda, fish scale, or creatine.

{¶ 6} After Peak agreed to meet B, Lambes testified that B picked him up at his house and drove him to Peak's residence. When B and Lambes arrived, a male and female were with Peak, as well as Peak's two young daughters. Peak identified the female as a friend named Angela Stark, who also testified at trial. Peak identified the male as "Kevin," her own cocaine supplier.

{¶ 7} Peak testified that she gave B two ounces of cocaine in her kitchen and that

he provided her with $2,400 cash in exchange. She also testified that B asked if she cut the cocaine, to which she responded "no." While Lambes and Stark testified that they did not see the exchange, they both testified that they observed Peak and B talking in the kitchen, as well as the money lying on the kitchen table. Following the transaction, Peak testified that she and B exchanged phone numbers, with B giving Peak the phone number 660-**** and Peak giving B her home phone number.

{¶ 8} When Lambes and B left, Peak testified that she walked to the door and noticed that B drove a white pickup truck with lettering on the doors. She also observed a ladder and ladder rack in the back of the truck. Peak testified that she asked B about the signs on his truck, and in response, he told her that he was in the construction business. Stark, who walked outside to get a marijuana joint from B as he was leaving, also testified that B drove a white pickup truck with lettering on the doors that had a ladder and ladder rack. Lambes further testified that B drove a white pickup truck with a company name on the doors. In addition to the testimony regarding the truck, Peak, Stark, and Lambes all testified that they observed another man in the passenger seat of B's truck; however, the man never went inside Peak's home.

{¶ 9} After leaving Peak's house, Lambes testified that B dropped him off at his house and told him he "had just made a friend." Trial Trans. Vol. IV (June 25, 2013), p. 764. Meanwhile, Peak testified that she dropped off the $2,400 to Kevin and took her cut of the money. When she returned home, Peak testified that she received a call from B at the 660-**** number. Peak testified that B demanded his money back because he was unable to cook the two ounces of cocaine into crack. Peak further testified that B threatened to "shoot up [her] house" and kill her and her children if she did not return his

money. Trial Trans. Vol. V (June 26, 2013), p. 1002. According to Peak, she was very scared and upset with Lambes.

{¶ 10} Approximately one or two hours after being dropped off by B, Lambes testified that he went back to Peak's house to pick up some cocaine. When he got there, he observed Peak on the phone having an "angry conversation" with B. Trial Trans. Vol. IV at 767. Lambes then testified that Peak got off the phone and began screaming at him. After Peak explained what had happened, Lambes testified that he called B from his cell phone multiple times in an attempt to calm him down and work things out. However, Lambes testified that B continued making threats and said he was going to "shoot up the house" if he did not get his money back. *Id*. at 773.

{¶ 11} In light of B's threats, Peak testified that she gathered her two daughters and dropped them off at her aunt's house with Lambes. When Peak and Lambes returned to her house, B and Peak continued to speak with each other over the phone and B continued making threats. As a means of protection, Peak testified that she called Kevin, who later arrived at her house with an unknown male and female. Both Peak and Lambes testified that Kevin was armed. According to Lambes, Kevin and Peak blamed him for the situation with B. Peak recalled Kevin demanding to know why Lambes had brought "this drama" to the house and asked how he intended to fix it. Trial Trans. Vol. V at 1012. At this point, Lambes began making several calls asking his mother and other friends for money.

{¶ 12} Both Lambes and Peak testified that B came back to Peak's house later that night asking "where's the money?" Trial Trans. Vol. IV (June 25, 2013), p. 778. Thereafter, Lambes testified that Kevin and B had a discussion, during which Kevin

blamed everything on him. After Kevin told B he was not going to pay him, Lambes testified that B asked if he had the money. In response, Lambes testified he told B he could get the money, but they would have to drive to a place near Indian Lake to pick it up. B then said: "Well, come on. Let's go." *Id*. at 779.

{¶ 13} Continuing, Lambes testified that B walked him to the passenger door of his white truck, which did not contain any other passengers. When B got in on the driver's side, Lambes testified that he saw B lay a gun in between them and that B kept his hand on the gun as they drove away. After departing, Lambes asked if they were going to Indian Lake, to which B responded "no" that "he's not going out there to get set up." *Id*. at 783. Lambes then testified that he attempted to call his mother, but B took his cell phone. As a result of B flashing a gun and taking his cell phone, Lambes testified that he did not feel free to leave.

{¶ 14} Lambes then testified that B drove him to a Domino's Pizza at the corner of Airway and Smithville Roads. Lambes testified that when they arrived, a purple car pulled up and two or three men walked up to B's truck, one of them being the passenger Lambes had seen in B's truck earlier that day. While at Domino's, Lambes testified that he was permitted to use B's phone to try and find some money to borrow. To that end, Lambes called his mother again, but he was unable to come up with any money. Lambes then testified that he observed B make a few calls, one being to Miller. Lambes heard B tell Miller to meet him on the corner of Huffman Avenue and John Street.

{¶ 15} Melissa Mesarosh, a friend of Miller also testified at trial. Mesarosh testified that Miller was with her when he received a phone call on the night in question from someone named B. According to Mesarosh, Miller seemed nervous on the phone.

She testified that during this phone call Miller said: "Well don't hold this against me, I didn't have anything to do with it, that's why I set you two up and I did—I was—so, I wasn't involved." Trans. Vol. VI (June 27, 2013), p. 1286. Mesarosh also testified that when Miller got off the phone he explained to her that "a B guy had his dude held hostage over some money[.]" *Id*. at 1287. She further testified that Miller said B wanted him to come to John Street "but he was scared to go because he thought they were going to kill him." *Id*. at 1288. Miller also told her that: "[B] just wants me to come down here, he's got my dude held hostage. He just wants me to come down here and get it—settle everything, get everything straight so he'll let my dude go." *Id*. at 1289. Mesarosh claimed Miller left despite his fear of being killed and that she never heard from him again.

{¶ 16} Miller's fiancé, Emily Kincaid, also testified at trial. Kincaid testified that at approximately 11:20 p.m., Miller sent her a text message on the night in question saying "Come to John. If I'm dead, they killed me." *Id*. at 1348. Kincaid took a photograph of the text message and it was admitted as evidence. Kincaid further testified that she had previously dropped off and picked Miller up at John Street on approximately 15 to 20 occasions. She testified that when she went to John Street she would oftentimes see a white truck and a "purplish car" there. *Id*. at 1315.

{¶ 17} When B and Lambes arrived at John Street, Lambes testified that B told him not to run. Lambes also testified that B had threatened him, and as a result of the threats, Lambes stayed in the truck fearing that he would be shot or killed if he attempted to flee. Lambes next saw B walk over to the same purple car that was at Domino's Pizza. Thereafter, he saw Miller walking on John Street. Lambes observed B walk up to Miller, pat him down, and pull something from his waist. B then led Miller to his truck and made

him sit in the backseat. Lambes claimed he had no idea where B was taking them.

{¶ 18} While they were driving, Lambes testified that Miller began to pick a fight with him, calling him names and hitting him in the back of the head. Lambes claimed that Miller offered to "do him in" and asked B for a gun. Trial Trans. Vol. IV (June 25, 2013), p. 795. Lambes also recalled B telling Miller "if you don't kill [Lambes] I'm a kill both y'all." *Id*. at 797. Shortly thereafter, B got off the highway, parked, and told Miller and Lambes to get out of the truck. Lambes testified that when they walked to the back of the truck he saw the man who rode as B's passenger earlier in the day exit the purple car holding a gun, which Lambes believed was a 9 millimeter pistol.

{¶ 19} According to Lambes, the man with the gun then told Miller to get back in the truck and then looked over at B and said "do it." *Id*. at 802. In response, Lambes testified that B approached him and pushed him toward the ground. Lambes then claimed he immediately took off running into the woods. As he was running, he heard four to five gunshots. Lambes testified that the gunshots stopped for about five seconds and then he heard a car door open and close, two more gunshots, a scream, and then a couple of more gunshots.

{¶ 20} While running in the woods, Lambes testified that he fell and hit his head. Lambes also testified that he ran out of his shoes and began crawling with no idea where he was. Eventually Lambes testified that he came out of the woods and onto a road where he saw a house. He testified that he pounded on the door, but no one answered. Lambes testified that he saw another house and did the same, but again, no one answered. Phyllis Rose, a resident of the Guthrie Road area where the incident occurred, testified that on the night in question, someone pounded on her door at

approximately 11:55 p.m., but she did not answer it because her husband was not home.

{¶ 21} Lambes testified that he continued running down the road, but immediately turned around after seeing three shadows. He then he ran toward a golf course where he saw a light in the distance. Lambes followed the light, which ended up being a karaoke bar called the 19th Hole. When he made it to the 19th Hole, he was escorted outside. However, a patron coming out of the bar, Tony Bass, Jr., let Lambes use his phone to call his mother and gave him a ride to a Kroger on Smithville Road where his mother picked him up. Bass testified at trial and confirmed that Lambes was injured, appeared to be in trouble, and that he helped him get to his mother. Lambes's mother also confirmed that she picked Lambes up at Kroger.

{¶ 22} As for Miller, at 12:14 a.m. on the morning of June 16, 2012, a 9-1-1 call was placed by a passer-by, Paula Hawkins, alerting the police to a body lying on the 3500 block of Guthrie Road. Officer David House was one of the first officers to arrive at the scene. House testified that when he arrived he saw Miller's body lying unresponsive in the street in a large pool of blood. Captain Barry Cron of the Dayton Fire Department testified that he assessed Miller's body and that Miller was pronounced dead at the scene. Expert forensic pathologist Dr. Robert Shott also testified at trial and confirmed that Miller's death was caused by multiple gunshot wounds to his head, leg, arms, and abdomen. Shott also testified that cocaine and heroin were found in Miller's system.

{¶ 23} Evidence technician John Malott testified that he conducted a search of the crime scene and discovered four shell casings as well as three plastic baggies containing substances later confirmed to be cocaine and heroin. Lead detective Rebecca Rasor testified that she conducted a second evidence search on June 18, 2012, which led to the

discovery of a fifth shell casing. Chris Monturo, an expert witness from the Miami Valley Regional Crime Lab, testified that all five shell casings were fired from a nine millimeter caliber cartridge case and that the casings were fired from two separate guns.

{¶ 24} Detective Rasor testified that during her investigation, Lambes, Peak, and Stark all identified a photograph of Harwell in a photo spread as being the man they knew as "B." Rasor also obtained the phone records for Miller and Lambes's cell phones, as well as the phone assigned to the number 660-****. According to Rasor, there were no records for the 660-**** cell phone past June 15, 2012, and the records indicated that the 660-**** cell phone had contacted or received calls from Miller's cell phone 11 times that day. Rasor also testified that the 660-**** cell phone had 11 contacts in common with Harwell's three other cell phones, as well as four contacts in common with the calls Harwell made from jail. Furthermore, the State presented testimony from FBI Special Agent Kevin Horan, a cellular analyst, who testified that the 660-**** cell phone was within the vicinity of the cellular tower service near the crime scene.

{¶ 25} Rasor also testified that she obtained BMV records establishing that Harwell owned a white pick-up truck at the time of the incident. A clerk from the Montgomery County Auto Title Department also testified that a duplicate title was issued for Harwell's truck four days after the murder. The clerk further testified that the truck was later transferred to a man named Jeffery Washington with a new title being issued to Washington on September 29, 2012. Lambes, Peak, and Stark all identified a photo of Washington's truck as the truck driven by Harwell on June 15, 2012.

{¶ 26} In his defense, Harwell attempted to establish an alibi through the testimony of his neighbor Demetrice Norris. Norris testified that on June 15, 2012, he saw Harwell

at his house on Lexington Avenue at around 10:00 p.m.; however, Norris could not account for Harwell's whereabouts at the time of the abductions and shootings.

{¶ 27} After hearing all the testimony and evidence, the jury deliberated on Counts One through Thirteen, while Harwell elected to have a bench trial on Count Fourteen, the charge for having a weapon while under disability. Harwell was found guilty of all counts and specifications. After merger, Harwell was convicted of one count of felony murder, one count of attempted murder, two counts of kidnapping, and one count of having a weapon while under disability. The trial court then imposed an aggregate prison term of 32 years to life.

{¶ 28} Harwell now appeals from his conviction and sentence raising nine assignments of error in his initial appellate brief, as well as five additional assignments of error raised in two supplemental merit briefs, for a total of fourteen assignments of error for review. For ease of discussion, we will address Harwell's assignments of error out of order as necessary.

Ineffective Assistance of Counsel

{¶ 29} Harwell raises seven separate assignments of error alleging claims of ineffective assistance of trial counsel. To reverse a conviction based on ineffective assistance of counsel, an appellant must demonstrate both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Trial counsel is entitled to a strong presumption that his or her conduct falls

within the wide range of reasonable assistance. *Strickland* at 688. Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. *State v. Cook*, 65 Ohio St.3d 516, 524-525, 605 N.E.2d 70 (1992); *State v. Rucker*, 2d Dist. Montgomery No. 24340, 2012-Ohio-4860, ¶ 58.

I.

{¶ 30} Under his First Assignment of Error, Harwell argues his trial counsel was ineffective in failing to file a motion to dismiss Counts One and Two of the indictment, which are the two counts for felony murder. In support of his claim, Harwell contends a motion to dismiss should have been filed due to the indictment being fatally defective in that it did not include the essential elements of the predicate offenses to his felony murder charges; i.e., felonious assault and kidnapping.

{¶ 31} The Supreme Court of Ohio has rejected the assertion that the indictment must identify the elements of the predicate offense of the charged crime, as "it is the predicate offense itself and not the elements of the predicate offense that is an essential element of the charged offense." *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, ¶ 10 and 12. Rather, "when the indictment sufficiently tracks the wording of the statute of the charged offense, the omission of an underlying offense in the indictment can be remedied by identifying the underlying offense in the bill of particulars." *Id.* at ¶ 10*, citing State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 30. The Supreme Court has also held that " '[r]eading the felony-murder counts in pari materia with the related felony counts

provide[s] ample notification of the elements of the underlying felonies * * * that the state had to prove.' " *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶ 26, quoting *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 29.

{¶ 32} The indictment in this case tracked the language of the criminal statute for felony murder, R.C. 2903.02(B). For each charge of felony murder, the indictment cited the predicate offense and its correlating criminal statute; namely, R.C. 2903.11 for felonious assault and R.C. 2905.01 for kidnapping. The State also provided Harwell with a bill of particulars that stated the elements of each predicate offense. *See* State's Response to Defendant's Motion for Bill of Particulars (June 14, 2013), Montgomery County Court of Common Pleas Case No. 2012-CR-2367, Docket No. 311. Specifically, the bill of particulars noted that the elements of the predicate offenses were set forth in related felony Counts Six, Eight, Ten, Eleven, and Twelve of the indictment, which are separate counts for felonious assault and kidnapping. Therefore, we find the indictment and bill of particulars in this case provided sufficient notice of the predicate offenses charged in Counts One and Two. Accordingly, Harwell's trial counsel did not provide ineffective assistance in failing to file a motion to dismiss those counts.

{¶ 33} Harwell's First Assignment of Error is overruled.

II.

{¶ 34} Harwell's Second Assignment of Error raises the same argument in his First Assignment of Error, but with respect to Counts Three and Four of the indictment, which charged Harwell with attempt to commit felony murder. Again, Harwell asserts his counsel was ineffective in failing to file a motion to dismiss these counts on the basis that the indictment was defective for failing to include all the essential elements of the

predicate offenses. As noted above, the indictment need not list the elements of the predicate offenses; however, the State concedes that the attempted felony murder charges must be vacated for other reasons announced in *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016.

{¶ 35} In *Nolan*, the Supreme Court of Ohio recently held that "[a]ttempted felony murder is not a cognizable crime in Ohio." *Id*. at syllabus. The court explained that "one cannot commit an attempt offense unless he or she has acted purposely or knowingly." *Id*. at ¶ 7. For felony murder, "though intent to commit the predicate felony is required, intent to kill is not." *Id*. Therefore, "a person can be convicted of [felony murder] even though the death was unintended." *Id.* at ¶ 10. Because "it is impossible to purposely or knowingly cause an unintended death[,]" attempted felony murder is not a cognizable crime. *Id*. Therefore, due to the fact that attempted felony murder is not a cognizable crime and cannot stand, Harwell's attempted felony murder convictions under Counts Three and Four must be vacated and the case remanded for purposes of resentencing the counts and firearm specifications that were merged with Counts Three and Four. This includes Count Thirteen, which is the felonious assault of Lambes with a deadly weapon, as well as all the firearm specifications that are attached to the counts relating to Lambes, i.e., Counts Five, Seven, Nine, and Thirteen.

{¶ 36} Harwell's Second Assignment of Error is sustained.

III.

{¶ 37} Under his Eighth Assignment of Error, Harwell contends that his trial counsel was ineffective in failing to object to his conviction for first-degree felony kidnapping on grounds that his indictment only charged him with second-degree felony

kidnapping. By motion dated May 11, 2015, Harwell voluntarily withdrew this assignment of error. Accordingly, his Eighth Assignment of Error will not be addressed by this court.

IV.

{¶ 38} Under his Ninth Assignment of Error, Harwell argues his trial counsel was ineffective in failing to file an affidavit of indigency to waive court costs.

{¶ 39} "Under R.C. 2947.23, a trial court is required to impose 'the costs of prosecution' against all convicted defendants and render a judgment against the defendant for such costs, even those who are indigent." *State v. Hawley*, 2d Dist. Montgomery No. 25897, 2014-Ohio-731, ¶ 8, citing *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. "A trial court may waive the payment of costs but, * * * an indigent defendant must move for such waiver at sentencing." *Id*., citing *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 11-12. " 'If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard.' " *State v. Lunsford*, 93 Ohio App.3d 195, 2011-Ohio-964, 951 N.E.2d 464, ¶ 14 (2d Dist.), quoting *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 22. "In resolving the costs issue, the trial court may consider any relevant information, including [the offender's] potential ability to pay his court costs in the future." (Citation omitted.) *Id*. at ¶ 17.

{¶ 40} In this case, Harwell has failed to demonstrate resulting prejudice from his counsel's failure to request a waiver of court costs, as Harwell offered no evidence indicating that the trial court would have exercised its discretion to waive court costs had counsel made such a request. Furthermore, the evidence in this case, as well as the

presentence investigation report, indicated that Harwell owned a home improvement business since 1993, and the trial court found that Harwell had the present and future ability to pay restitution in the amount of $3,891.65. As a result, it is unlikely the court would have found him unable to pay court costs, and Harwell has not provided any evidence demonstrating otherwise. Therefore, because Harwell failed to demonstrate a reasonable probability that the trial court would have waived court costs had his counsel requested it, he cannot satisfy the second prong in *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accordingly, his ineffective assistance claim must fail.

{¶ 41} Harwell's Ninth Assignment of Error is overruled.

V.

{¶ 42} Under the First Assignment of Error raised in Harwell's supplemental merit brief, Harwell contends his counsel was ineffective in failing to object to the alternate jurors being present during the jury deliberations. However, after reviewing the record, we find no evidence demonstrating that the alternate jurors were present during deliberation, as the trial court stated the following:

> Alternate jurors were selected to serve in the event of any misfortune to a member of our 12 regular jury panel. What we're going to do in this case is we're going to keep our alternates serving with us, *but they will not be deliberating with the 12 jurors*. * * * But what I'm going to do is those orders that have been applicable to all of our jurors during our recesses about not discussing the case, not conducting any independent investigation, and so on, those orders are going to continue to apply to you even though *I'm not going to allow you to go back to the jury room to*

deliberate.

Trial Trans. Vol. VII (June 28, 2013), p. 1717-1718.

{¶ 43} Shortly after the trial court made the foregoing remarks, the court was informed of an issue with Juror Number Six, who was thereafter excused and replaced by the first alternate juror. *Id*. at 1726-1729. The record does not indicate that the second alternate juror was ever present during the jury deliberations. Accordingly, Harwell's ineffective assistance claim lacks merit.

{¶ 44} The First Assignment of Error in Harwell's supplemental merit brief is overruled.

VI.

{¶ 45} Under the Second Assignment of Error raised in Harwell's supplemental merit brief, Harwell contends his trial counsel was ineffective in failing to object to the trial court's jury instruction on complicity, as he claims the trial court provided an incorrect instruction that prejudiced him. Specifically, Harwell argues that the trial court failed to inform the jury that to find him guilty as an aider and abettor it must find that he acted "with the kind of culpability required for the commission of the offense" as provided by R.C. 2923.03.

{¶ 46} A review of the record reveals that Harwell's trial counsel entered a general objection to the jury instructions with regards "to anything dealing with complicity and aiding and abetting." Trial Trans. Vol. VII (June 28, 2013), p. 1628. While counsel did not state that he was objecting to the complicity instructions for the specific reason given by Harwell in his appellate brief, we do not find that it would have changed the outcome of the case even if counsel had made the specific objection.

{¶ 47} The trial court's jury instructions on aiding and abetting were correct statements of law that included the culpability required for the commission of each offense. Specifically, under each charged offense, the trial court's jury instructions provided the culpability or mens rea required for finding Harwell guilty as an aider and abettor. For example, under Count One, felony murder with the predicate offense of felonious assault, the trial court stated that "an aider and abettor is a person who *knowingly* aids, helps supports, assists, encourages, cooperates with, advises, incites, or directs himself with another person or persons to commit the offense." (Emphasis added.) *Id*. at 1673. Likewise, for Count Two, felony murder with the predicate offense of kidnapping, the trial court stated that "an aider an abettor is a person who *purposefully* aids, helps, supports, assists, encourages, cooperates with, advises, incites, or directs himself with another person or persons to commit the offense." (Emphasis added.) *Id*. at 1680. The trial court provided a similar mens rea specific instruction for every charge. Therefore, because the trial court did not err when instructing the jury on the culpability required to be an aider and abettor, Harwell cannot establish that the outcome of his trial would have been different had counsel objected on those specific grounds. Accordingly, Harwell's ineffective assistance of counsel claim fails.

{¶ 48} The Second Assignment of Error in Harwell's supplemental merit brief is overruled.

VII.

{¶ 49} Similar to his withdrawn Eighth Assignment of Error, under the First Assignment of Error raised in Harwell's second supplemental merit brief, Harwell contends his trial counsel was ineffective in failing to object to the trial court allegedly

"amending" the kidnapping charges during the jury instructions to make them first-degree felonies when he claims the indictment only charged him with second-degree felony kidnapping. According to Harwell, the indictment charged him with second-degree felony kidnapping as opposed to first-degree felony kidnapping because it failed to state that he "did not release the victim in a safe place unharmed." As a result, Harwell claims the trial court erred in instructing the jury on first degree felony kidnapping and that his trial counsel should have raised an objection.

{¶ 50} "Under R.C. 2905.01(C), the offense of kidnapping is generally a first-degree felony but may be reduced to a second-degree felony if 'the offender releases the victim in a safe place unharmed.' " *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 233. *Accord State v. Carver*, 2d Dist. Montgomery No. 21328, 2008-Ohio-4631, ¶ 87. However, "[w]hether the victim is released in a safe place unharmed is not an element of the offense." *Carver* at ¶ 87, citing *State v. Sanders*, 92 Ohio St.3d 245, 265, 750 N.E.2d 90 (2001). "Rather, it is in the nature of an affirmative defense, and the defendant bears the burden of proof on this issue." (Citations omitted.) *Id*.

{¶ 51} Because the "safe place unharmed" language is not an element of kidnapping, it need not be included in the indictment. *State v. Drake*, 10th Dist. Franklin No. 98AP-448, 1998 WL 890169, *6 (Dec. 17, 1998). We also note that Harwell did not present any evidence at trial indicating that the victims were released in a safe place unharmed. Rather, the evidence indicates that Miller was shot multiple times and left to die, whereas Lambes escaped by fleeing into the woods while gunshots were fired at him. "When the victim of a kidnapping escapes of [his or] her own accord, a defendant cannot

establish the affirmative defense that the victim was released unharmed." (Citation omitted.) *State v. White*, 10th Dist. Franklin No. 06AP-607, 2007-Ohio-3217, ¶ 21.

{¶ 52} For the foregoing reasons, the trial court did not err when it instructed the jury on first-degree felony kidnapping. Therefore, an objection on that basis was unwarranted and trial counsel's failure to raise such an objection does not amount to deficient performance. Accordingly, Harwell's ineffective assistance claim must fail.

{¶ 53} The First Assignment of Error in Harwell's second supplemental merit brief is overruled.

Indictment/Jury Instructions/Jury Verdict Forms

{¶ 54} Harwell raises three assignments of error concerning the indictment, jury instructions and jury verdict forms. However, because Harwell did not raise these issues before the trial court, he forfeited all but plain error. *State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891, ¶ 11 (as to jury verdict forms); *State v. Thomas*, 170 Ohio App.3d 727, 2007-Ohio-1344, 868 N.E.2d 1061,¶ 15-16 (2d Dist.) (as to jury instructions); *State v. Vann*, 2d Dist. Montgomery No. 22818, 2009-Ohio-5308, ¶ 10 (as to indictment). Plain error exists when there is error, the error is an obvious defect in the proceedings, and the error affects substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). A court recognizes plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Id*., quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. (Other citations omitted.)

I.

{¶ 55} Under his Third Assignment of Error, Harwell contends the indictment was

defective because it failed to allege all essential elements of the predicate offenses; i.e., felonious assault and kidnapping, and a mens rea for his felony murder charges. As a result of these alleged defects, Harwell also claims it was error for the trial court to instruct the jury on the elements of the predicate offenses.

{¶ 56} The foregoing claims have no merit because Harwell's indictment is not defective. As previously discussed under Harwell's First Assignment of Error, an indictment need not identify the elements of a predicate offense to a charged crime. *Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162 at ¶ 10 and 12. Also, the indictment in this case does not specify a mens rea for felony murder "because R.C. 2903.02(B), the felony-murder statute, does not contain a mens rea component." (Citation omitted.) *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 43. "[A] person commits felony murder pursuant to R.C. 2903.02(B) by proximately causing another's death while possessing the mens rea element set forth in the underlying felony offense. In other words, the predicate offense contains the mens rea element for felony murder." (Citation omitted.) *Id*. "Thus, the mens rea element need not appear in the count for felony murder as long as the mens rea component is specified in the count charging the predicate offense." (Footnote omitted.) *Id*.

{¶ 57} Here, the mens rea for the predicate offenses of felonious assault and kidnapping were specified in separate counts of the indictment as well as in a bill of particulars. As noted earlier, " '[r]eading the felony-murder counts in pari materia with the related felony counts provide[s] ample notification of the elements of the underlying felonies * * * that the state had to prove.' " *Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557 at ¶ 26, quoting *Foust*, 105 Ohio St.3d 137,

2004-Ohio-7006, 823 N.E.2d 836 at ¶ 29. Therefore, the indictment is not defective and there is no basis for his claim that the trial court committed plain error by instructing the jury on the elements of the predicate offenses.

{¶ 58} Harwell's Third Assignment of Error is overruled.

II.

{¶ 59} Under his Fourth Assignment of Error, Harwell contends the jury verdict forms finding him guilty of Counts One through Thirteen are contrary to law because they do not list all the statutory elements of the offenses to which they pertain. However, "[t]here is no requirement that the statutory definition of an offense be included on the verdict form. To the contrary, the inclusion of statutory definitions on a verdict form 'invites confusion and error.' " *State v. Martin*, 2d Dist. Montgomery No. 22744, 2009-Ohio-5303, ¶ 8, quoting *State v. Lampkin*, 116 Ohio App.3d 771, 774, 689 N.E.2d 106 (6th Dist. 1996), at fn. 1. Nevertheless, "when a court submits a verdict form containing a statutory description of the offense, it commits reversible error if the description omits essential elements of that offense." *Lampkin* at 774.

{¶ 60} In this case, a review of the jury verdict forms establishes that the forms do not purport to define the offenses or list the elements, but rather merely provide a label to identify the offense on each form. "Verdict captioning is not an improper practice." (Citation omitted.) *State v. Himes*, 7th Dist. Mahoning No. 08 MA 146, 2009-Ohio-6406, ¶ 31. Labeling verdict forms is a rational way to identify which verdict is for which offense. *Id*., citing *State v. Shaw*, 2d Dist. Montgomery No. 21880, 2008-Ohio-1317, ¶ 22. We have noted that "confusion has been avoided by the trial court's use of jury instructions and verdict forms wherein the court identifies charges by using brief labels

indicating location or some other identifying fact." (Citations omitted.) *Shaw* at ¶ 22. Accordingly, there is no error, let alone plain error, in the jury verdict forms used at Harwell's trial.

{¶ 61} Harwell's Fourth Assignment of Error is overruled.

III.

{¶ 62} Under his Fifth Assignment of Error, Harwell contends the trial court's jury instruction defining the term "cause" was improper. Jury instructions given by a trial court must be "a correct, clear, and complete statement of the law." (Citation omitted.) *State v. Justice*, 2d Dist. Montgomery No. 21375, 2006-Ohio-5965, ¶ 42; *State v. Moore*, 2d Dist. Montgomery No. 24957, 2012-Ohio-3604, ¶ 45. *Ohio Jury Instructions*, CR Section 417.23 defines "cause" and "natural consequences" in the following manner:

> 1. CAUSE. The state charges that the act or failure to act of the defendant caused (death) (physical harm to [person] [property]). Cause is an essential element of the offense. Cause is an act or failure to act which in a natural and continuous sequence directly produces the (death) (physical harm to [person] [property]), and without which it would not have occurred.
>
> 2. NATURAL CONSEQUENCES. The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act or failure to act. The defendant is also responsible for the natural and foreseeable (consequences) (results) that follow, in the ordinary course of events, from the act or failure to act.

Id.

{¶ 63} In this case, the trial court instructed the jury consistent with the foregoing

section of the Ohio Jury Instructions when it provided the following definition of "cause":

> Cause is an essential element of the offense. Cause is an act which in a natural and continuous sequence directly produces the death of a person and without which it would not have occurred. The Defendant responsibility is not limited to the immediate or most obvious result of the Defendant's act. The Defendant is also responsible for the natural and foreseeable results that follow in the ordinary course of events from the act.
>
> * * *
>
> Cause. The State charges that the act of the Defendant caused physical harm to another. Cause is an essential element of the offense. Cause is an act which in a natural and continuous sequence directly produces the physical harm to another and without which it would not have occurred.

Trial Trans. Vol. VII (July 25, 2013), p. 1670, 1672.

{¶ 64} Therefore, because the trial court's instruction as to "cause" provided a correct statement of law and is taken almost verbatim from the Ohio Jury Instructions, the trial court did not err, let alone commit plain error, when it instructed the jury as such.

{¶ 65} Harwell's Fifth Assignment of Error is overruled.

Sentencing

{¶ 66} Harwell raises two assignments of error regarding the trial court's sentencing decision. Under his Seventh Assignment of Error, Harwell contends the trial court erred in ordering consecutive prison terms for two firearm specifications under Counts One (felony murder) and Three (attempted felony murder). However, because

we have already determined that Harwell's conviction for attempted felony murder must be vacated and the matter remanded for resentencing, Harwell's Seventh Assignment of error is rendered moot.

{¶ 67} Next, under the Fourth Assignment of Error raised in Harwell's supplemental merit brief, Harwell contends the trial court erred by imposing restitution in the amount of $3,891.65 without first determining his present and future ability to pay. According to Harwell, he does not have the present and future ability to pay since he is serving a sentence of 32 years to life in prison. Because Harwell did not raise this issue in the trial court, he again forfeited all but plain error. (Citation omitted.) *State v. Edwards*, 10th Dist. Franklin No. 10AP-681, 2011-Ohio-3157, ¶ 27.

{¶ 68} In *State v. Tate*, 2d Dist. Montgomery No. 25386, 2013-Ohio-5167, we stated the following regarding the trial court's duty to determine an offender's present and future ability to pay restitution.

> R.C. 2929.19(B)(5) imposes a duty upon the trial court to consider the offender's present or future ability to pay before imposing any financial sanctions under R.C. 2929.18. The statute does not require the trial court to consider any specific factors when determining the offender's present or future ability to pay financial sanctions. Nor does the statute require a hearing on the matter. The court is also not required to expressly state that it considered a defendant's ability to pay * * *. The record should, however, contain evidence that the trial court considered the offender's present and future ability to pay before imposing the sanction of restitution. The trial court may comply with this obligation by considering a

> presentence-investigation report, which includes information about the defendant's age, health, education, and work history. The court's consideration * * * may be inferred from the record under appropriate circumstances.

(Citations and internal quotations omitted.) *Id.* at ¶ 52.

{¶ 69} We have also noted that "[a] lengthy prison sentence does not necessarily preclude the imposition of financial sanctions." *State v. Western*, 2015-Ohio-627, 29 N.E.3d 245, ¶ 57 (2d Dist.). *See also State v. Fischer*, 2d Dist. Montgomery No. 25618, 2013-Ohio-4817, ¶ 21 (affirming an order of restitution in the amount of $6,025.18, imposed upon a defendant serving a prison sentence of fifty years).

{¶ 70} In support of his claim that the trial court did not consider his present and future ability to pay restitution, Harwell cites to *State v. Garrett*, 2d Dist. Montgomery No. 25426, 2013-Ohio-3035 and *State v. Croom,* 2d Dist. Montgomery No. 25949, 2014-Ohio-2315. In these cases, the offenders were issued prison terms similar in length to Harwell's and we reversed the order of restitution based on the trial court's failure to consider the offenders' present and future ability to pay. The facts of *Garrett* and *Croom*, however, are distinguishable from the present case. In *Garrett*, the presentence investigation report indicated that the offender had no past employment history or demonstrated ability to work, owed child support arrearages, and only completed the eleventh grade. *Garrett* at ¶ 4 and 9. In *Croom*, a presentence investigation report was not completed and the trial court had no information about the offender's level of education, past employment, work experience, assets, or physical or mental health when it imposed restitution. *Croom* at ¶ 12.

{¶ 71} In this case, at the sentencing hearing, the trial court indicated that it reviewed the presentence investigation report, which stated that Harwell graduated from high school in 1989 and thereafter attended some classes at Sinclair Community College. The presentence investigation report also noted that Harwell claimed he owned a home-improvement business, Harwell & Harwell Incorporated, since 1993. In addition, between 1990 and 1993, Harwell claimed he was employed by McCormick Enterprise. It was further reported that Harwell has no outstanding or pending child support cases and that he is in fair health, with some lower back problems and arthritis, which he attributes to working in the construction business for 20 years. However, Harwell does not take any medications nor is he under any medical care. He also does not suffer from any mental health disabilities. Most importantly, upon ordering Harwell to pay restitution, the trial court expressly stated on the record that it "considered the Defendant's present and future ability to pay pursuant to Revised Code 2929.19(B)(6)." Trial Trans. Vol. VIII (July 25, 2013), p. 1768. Therefore, because the record indicates the trial court considered Harwell's present and future ability to pay restitution, the trial court did not commit plain error when it ordered Harwell to pay restitution in the amount of $3,891.65.

{¶ 72} The Fourth Assignment of Error in Harwell's supplemental merit brief is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 73} Under his Sixth Assignment of Error and the Third Assignment of Error raised in his supplemental merit brief, Harwell challenges the legal sufficiency and manifest weight of the evidence for his convictions on Counts One through Thirteen.

{¶ 74} "A sufficiency of the evidence argument disputes whether the State has

presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "When reviewing a claim as to sufficiency of evidence, the relevant inquiry is whether any rational factfinder viewing the evidence in a light most favorable to the state could have found the essential elements of the crime proven beyond a reasonable doubt." (Citations omitted.) *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997). "The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." (Citations omitted.) *Id*.

{¶ 75} In contrast, "[a] weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." (Citation omitted.) *Wilson* at ¶ 12. When evaluating whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine 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 and a new trial ordered." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence." *State v. Adams*, 2d Dist. Greene Nos. 2013 CA 61, 2013 CA 62, 2014-Ohio-3432, ¶ 24, citing *Wilson* at ¶ 14.

{¶ 76} "The credibility of the witnesses and the weight to be given to their

testimony are matters for the trier of facts to resolve." *State v. Hammad*, 2d Dist. Montgomery No. 26057, 2014-Ohio-3638, ¶ 13, citing *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684, *4 (Aug. 22, 1997). "This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the factfinder lost its way." (Citation omitted.) *State v. Bradley*, 2d Dist. Champaign No. 97-CA-03, 1997 WL 691510, *4 (Oct. 24, 1997).

{¶ 77} " 'Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency.' " *State v. Perry*, 2d Dist. Montgomery No. 26421, 2015-Ohio-2181, ¶ 24, quoting *State v. McCrary*, 10th Dist. Franklin No. 10AP-881, 2011-Ohio-3161, ¶ 11. "As a result, 'a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.' " *Id*., quoting *State v. Braxton*, 10th Dist. Franklin No. 04AP-725, 2005-Ohio-2198, ¶ 15.

{¶ 78} As noted earlier, Harwell was convicted of two counts of felony murder in violation of R.C. 2903.02(B), which provides, in relevant part that: "No 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[.]" Therefore, the "commission of another felony offense is a necessary predicate to an R.C. 2903.02(B) offense, and the predicate felony must be a proximate cause of the death R.C.

2903.02(B) prohibits." (Citation omitted.) *State v. Cook*, 2d Dist. Montgomery No. 23721, 2010-Ohio-6222, ¶ 49.

{¶ 79} " ' "Generally, for a criminal defendant's conduct to be the proximate cause of a certain result, it must first be determined that the conduct was the cause in fact of the result, meaning that the result would not have occurred 'but for' the conduct. Second, when the result varied from the harm intended or hazarded, it must be determined that the result achieved was not so extraordinary or surprising that it would be simply unfair to hold the defendant criminally responsible for something so unforeseeable." ' " *State v. Wieckowski*, 2d Dist. Clark No. 2010-CA-111, 2011-Ohio-5567, ¶ 11, quoting *State v. Dixon*, 2d Dist. Montgomery No. 18582, 2002 WL 191582, * 6 (Feb. 8, 2002), quoting LaFave & Scott, *Criminal Law*, Section 35 at 246 (1972).

{¶ 80} In this case, the predicate offenses at issue are felonious assault in violation of R.C. 2903.11 and kidnapping in violation of R.C. 2905.01. Both of these offenses fall under the definition of "offense of violence" under R.C. 2901.01(A)(9) and both are felonies of the first or second degree. Harwell was also charged with six separate counts of kidnapping and three separate counts of felonious assault.

{¶ 81} The relevant definition of felonious assault under R.C. 2903.11(A) is as follows: "No person shall knowingly do either of the following: (1) Cause serious physical harm to another * * *; (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." R.C. 2903.11(A)(1), (A)(2).

{¶ 82} In addition, the relevant definition of kidnapping under R.C. 2905.01(A) is as follows: "No person, by force, threat, or deception * * * 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: * * * (2) To facilitate the commission of any felony or flight thereafter; (3) To terrorize, or to inflict serious physical harm on the victim or another[.]" R.C. 2905.01(A)(2), (A)(3). Under R.C. 2905.01(B), kidnapping is defined as: "No person, by force, threat, or deception, * * * shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim * * *: (2) Restrain another of the other person's liberty." R.C. 2905.01(B)(2).

{¶ 83} With the foregoing standards in mind, we conclude that Harwell's convictions are supported by legally sufficient evidence and are not against the weight of the evidence. Initially, we note that three witness identified Harwell as "B." Peak and Lambes also both testified that they recognized B's cell phone number as 660-****. The various cell phone records admitted by the State demonstrated that the 660-**** cell phone corresponded several times with Peak, Lambes, and Miller on the night of June 15, 2015. In addition, the 660-**** cell phone also had several contacts in common with Harwell's other cell phones. Accordingly, it was reasonable for the jury to conclude that Harwell is B.

{¶ 84} With respect to Harwell's three felonious assault convictions, the jury was presented with testimony and evidence indicating that at least five gunshots were fired at Lambes and Miller. Specifically, five shell casings were found by law enforcement at the scene of the crime and Lambes testified to hearing multiple gunshots as he ran away from Harwell and his accomplice. The testimony from the State's expert indicated that the shell casings were found to be from two separate firearms and Lambes testified that he saw both Harwell and his accomplice with firearms on the night in question. From this evidence, a jury could reasonably conclude that Harwell knowingly fired at least a portion

of the gunshots in an attempt to cause physical harm to Lambes and Miller. Additionally, given that Miller died as a result of multiple gunshot wounds, a jury could also reasonably conclude that Harwell knowingly caused serious physical harm to Miller either as the principal offender or as an aider and abettor. Accordingly, we conclude the weight of the evidence supports Harwell's three convictions for felonious assault.

{¶ 85} The weight of the evidence also supports Harwell's three kidnapping convictions involving Lambes. Lambes' testimony, if believed, clearly establishes that Harwell restrained his liberty through threat of harm. Lambes testified that he felt he had no choice but to leave Peak's house with Harwell. He also testified that he felt threatened when Harwell flashed his gun in the truck and took his cell phone. In addition, Lambes testified that Harwell made threats, which led him to believe that he would have been shot or killed if he tried to escape. Lambes further testified that Harwell specifically told him not to run away. There was also testimony from Mesarosh that Miller had told her that Harwell was holding Lambes hostage. Lambes also testified that when he eventually ran away, four or five shots were fired at him. The foregoing testimony, if believed, sufficiently establishes that Harwell's restraint of liberty over Lambes placed Lambes in fear, facilitated a felonious assault, and also created a substantial risk of serious physical harm to Lambes. Accordingly, the weight of the evidence supports all three kidnapping convictions related to Lambes under R.C. 2905.01(A)(2),(3), and (B)(2).

{¶ 86} With respect to the three kidnapping convictions related to Miller, Mesarosh's testimony, if believed, establishes that Miller was afraid to meet Harwell at John Street for fear of being killed. Mesarosh's testimony further establishes that Miller said he had to go to straighten things out with Harwell so he would let Lambes go. In

other words, the testimony indicates that Harwell restrained Miller's liberty through threat of harm to Lambes. Lambes also testified that Harwell approached Miller by patting him down, removing something from his waistband, and ordering him in the backseat of his truck. In addition, Lambes testified that Harwell threatened to kill Miller if Miller did not kill Lambes. Again this testimony, if believed, sufficiently establishes that Harwell's restraint of liberty over Miller placed Miller in fear, facilitated a felonious assault and murder, and also created a substantial risk of serious physical harm to Miller.

{¶ 87} Having determined that the separate convictions for kidnapping and felonious assault are not against the manifest weight of the evidence, the predicate offense element for felony murder has been satisfied. There is also sufficient evidence in the record indicating that Miller died as a proximate result of the felonious assault and kidnapping committed by Harwell. Therefore, Harwell's felony murder convictions are also not against the manifest weight of the evidence.

{¶ 88} Because Harwell's felony murder, felonious assault, and kidnapping convictions are not against the manifest weight of the evidence, they are necessarily supported by sufficient evidence as well. We have not discussed the two convictions for attempted felony murder as those convictions will be vacated under the authority of *Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016.

{¶ 89} For the foregoing reasons, Harwell's two assignments of error related to the manifest weight and sufficiency of the evidence are overruled.

Conclusion

{¶ 90} Having sustained Harwell's Second Assignment of Error, his two convictions for attempted felony murder are vacated under the authority of *Nolan*. As a

result, the case shall be remanded for purposes of resentencing the counts and firearm specifications that merged with attempted felony murder; namely Count Thirteen, which is the felonious assault of Lambes with a deadly weapon, as well as all the firearm specifications attached to the counts relating to Lambes, i.e., Counts Five, Seven, Nine, and Thirteen. The judgment of the trial court is affirmed in all other respects. Accordingly, the judgment of the trial court is affirmed in part, vacated in part, and remanded for the limited purpose of resentencing as set forth above.

. . . . . .

DONOVAN, J. and HALL, J., concur.

Copies mailed to:

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