[Cite as *State v. McGail,* 2015-Ohio-5384.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-27
	:	
v.	:	Trial Court No. 2013-CR-0437B
	:	
PATRICK A. McGAIL	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 22nd day of December, 2015.

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HALL, J.

{¶ 1} Patrick A. McGail appeals from his conviction and sentence following a jury trial on charges of murder, aggravated burglary, aggravated robbery, and a firearm

specification.

{¶ 2} McGail advances seven assignments of error. First, he alleges that multiple instances of prosecutorial misconduct deprived him of a fair trial. Second, he asserts that juror misconduct deprived him of a fair trial and that the trial court erred in denying a mistrial on that basis. Third, he contends his convictions are against the manifest weight of the evidence. Fourth, he claims the trial court erred in failing to merge his murder and aggravated robbery convictions as allied offenses. Fifth, he asserts that the trial court erred in imposing more than the mandatory-minimum sentence. Sixth, he argues that ineffective assistance of counsel deprived him of a fair trial. Seventh, he raises a claim of cumulative error.

{¶ 3} The State presented evidence at trial that McGail and two companions, Jason Sowers and Brendon Terrel, helped plan and participate in an armed home invasion to steal marijuana from Nathan Wintrow. Text messages between Sowers' phone and McGail's phone included planning of an event involving "Nate" after Sowers got off work at 9 p.m. on October 30, 2013. The messages discuss plans to sell the marijuana they expected to obtain and to split the profits 50/50. On the night of October 30, 2013, Sowers drove them to a parking lot in the vicinity of 218 East Canal Street, a residence shared by Nate Wintrow, his fiancé Saddie Barker, and the couple's two-year-old son. Sowers and his accomplices took with them three masks and two guns. McGail also always carried a U.S. Air Force survival knife that had been given to him by his deceased grandfather. Although McGail testified that he abandoned the others at the parking lot, the remainder of the testimonial and physical evidence indicated that upon exiting Sowers' vehicle, Terrel became nervous and decided to act as a "lookout." McGail

and Sowers proceeded to the back of Wintrow's house where they broke a window, reached inside, and unlocked a rear door. McGail and Sowers entered the house wearing masks and brandishing handguns. They immediately encountered Wintrow, Barker, and a third person, Kyle Ratcliffe, in a small laundry room at the rear of the residence. An altercation ensued. Ratcliffe threw McGail to the ground while Wintrow and Barker fought Sowers. During the fight, Sowers discharged his gun, striking Wintrow in the head with a bullet and killing him. Sowers and McGail then fled the house. Ratcliffe found McGail's knife lying on the floor. He picked it up and threw it at the intruders as they fled through the back yard. Also discovered at or near the scene were a tennis shoe, a handgun, and a white mask. McGail's recovered knife and the discarded mask later were determined to have his DNA on them.

{¶ 4} Shortly after the shooting, police found Sowers in his car in the parking lot where the trio had left it, which was about two blocks from 218 East Canal Street. He was sweating, out of breath, and wearing only one tennis shoe. He initially claimed to have been out jogging. Inside the car, police later discovered the handgun used to shoot Wintrow under the passenger seat, and wrapped in a dark "hoodie" on the passenger seat was a second white mask. At about the same time Sowers was discovered, police found Terrel walking along another nearby street also about two blocks from the scene of the shooting. He was wearing a dark hooded sweatshirt. As he was speaking with officers, a third white mask fell from his sweatshirt. Sowers admitted participating in the home invasion, and Terrel admitted being a lookout. Sowers told police that he and McGail had entered Wintrow's residence armed with guns and intending to steal marijuana. Sowers also admitted being the person who shot Wintrow. Terrel admitted participating in the

planning of the home invasion and serving as the lookout. He also implicated McGail.

{¶ 5} Following the shooting, McGail walked to his girlfriend Jessica Shelton's home, which was a mile or less from the home invasion. She testified that he arrived shortly after 11:00 p.m. He was scared and visibly upset, had a fresh scratch on his nose and cuts on his back and wrist, and was wearing a short-sleeved blue t-shirt. She told the jury that McGail had admitted to her that he went inside Wintrow's residence with Sowers and had gotten into a fight. Shelton said McGail told her he heard a gunshot, saw someone on the floor, and fled the house, dropping his mask and knife. She had reported this same information to the police within a couple days of the shooting. Prior to trial, Sowers and Terrel pled guilty to various charges, and both testified for the State at McGail's trial.

{¶ 6} For his part, McGail testified in his own defense. He claimed the plan to rob Wintrow had been devised by Brendon Terrel's older brother, Rick, who was also a marijuana dealer. Although he admitted being aware of the plan, he testified that he initially thought Rick Terrel was joking. According to McGail, Rick Terrel proceeded to obtain a gun, however, and accompanied McGail, Sowers, and Brendon Terrel in the car they drove to the parking lot near Wintrow's residence. At that point, McGail claimed he realized they were serious and told the group he was not participating and was leaving. McGail testified that Rick Terrel responded by taking McGail's knife and cutting him. McGail fled, leaving behind his knife, mask, and cell phone. He testified that he initially walked to the square in downtown Troy, Ohio, before proceeding to his girlfriend's house. He denied that he told his girlfriend that he was involved in the home invasion or shooting.

{¶ 7} After hearing the evidence, a jury found McGail guilty on all counts. The trial

court imposed an aggregate sentence of 24 years to life in prison. This appeal followed.

{¶ 8} In his first assignment of error, McGail contends multiple instances of prosecutorial misconduct deprived him of his right to a fair trial. Specifically, he claims the prosecutor improperly (1) commented on his post-arrest silence, (2) bolstered the credibility of Sowers' testimony, and (3) commented on the veracity of an investigating detective.

{¶ 9} The test for prosecutorial misconduct is whether the prosecutor's actions or remarks were improper, and if so, whether they prejudicially affected the accused's substantial rights. *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). The question is whether the prosecutor's misconduct so infected the accused's trial with unfairness that the accused's convictions came in violation of the right to due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 644, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

{¶ 10} Here McGail concedes there was no objection at trial to the alleged prosecutorial misconduct, so we are limited to plain-error review. Plain error is not present unless, but for the error complained of, the outcome of the trial would have been different. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus. A finding of plain error should be made with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id*. at paragraph three of the syllabus.

{¶ 11} We find no plain error in the prosecutor's remarks about McGail's post-arrest silence. On several occasions, the prosecutor did elicit testimony and comment on

McGail's silence after his arrest. The first occasion occurred during the State's cross-examination of McGail:

> Q. Okay? Now you're coming in here today and you're saying basically that you're innocent?
>
> A. That's what I'm saying sir.
>
> Q. Okay. And at the time you were seventeen and a half years old. When Officer Cole came out to your house at 1:30/2:00 in the morning, and placed you under arrest, you didn't say a word, did you.
>
> A. I was a little bit taken off guard. I didn't say—
>
> Q. I'm sure you were taken off guard, but you're also being told you're being charged with a crime that you say you didn't commit and you didn't say a word.
>
> A. I was a little bit in shock at the time sir.
>
> Q. Is that a yes or a no?
>
> A. I didn't—I'm just saying that—are you asking if I didn't say a word to them?
>
> Q. Right.
>
> A. Oh, yes sir, that's true.
>
> Q. That's true.
>
> A. Yes sir.
>
> Q. Not a word?
>
> A. Yes sir.
>
> Q. All right and then you were taken into the police department and you

were given the opportunity to give a statement?

A. That's—that is true.

(Trial Tr. Day 5 at 246-247).

{¶ 12} Later during the cross-examination, the prosecutor stated: "I'm going to sum all this up. We already went over the fact that you didn't say anything about this—your claim of innocence when the police officer arrested you." (*Id*. at 255). Finally, the prosecutor addressed McGail's silence in his rebuttal closing argument as follows:

> The contention by the defense that the defendant is innocent in light of all the evidence that I've talked about, just right before this, and his reaction when Officer Cole went to the house and arrested him. Take yourselves back to when you're seventeen/eighteen years old. I know, you know, I've got a –I've got a teenager and when they're that age, they think they know everything. But take yourself back. If you have an officer coming to your door at 1:30 in the morning and accusing you or arresting you for Murder, and you were innocent, wouldn't you say something? Wouldn't you say something? Something? Never said a word. That's huge. You know if you're—you're being arrested for something you didn't do, you'd speak up. * * * He's not going to—who's going to let themselves be hauled off without saying something. That flies in the face of common sense.

(Trial Tr. Day 6 at 83).

{¶ 13} McGail argues that the prosecutor's attempts to impeach his version of events with his post-arrest silence violated his right to remain silent as guaranteed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In support, he

relies primarily on *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). In that case, the defendants gave exculpatory testimony at trial but had remained silent at the time of their arrest after receiving *Miranda* warnings. The State cross examined the defendants about their post-arrest silence, creating an inference that their trial testimony was fabricated. The U.S. Supreme Court held that the use of a defendant's post-arrest, post-*Miranda* silence for impeachment purposes violates due process. *Id*. at 619.

{¶ 14} In the subsequent case of *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the U.S. Supreme Court distinguished *Doyle* on the basis that, unlike *Doyle*, the record did not indicate that the defendant had "received any *Miranda* warnings during the period in which he remained silent immediately after his arrest." *Id*. at 605. The *Fletcher* court reasoned: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id*. at 607.

{¶ 15} In *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, the Ohio Supreme Court recognized *Fletcher's* holding that a defendant's post-arrest, pre-*Miranda* silence could be used to impeach his version of events if he took the stand and testified. The *Leach* court distinguished *Fletcher* and addressed a different issue, which the U.S. Supreme Court had not addressed, holding that a defendant's pre-arrest, pre-*Miranda* silence could not be used as *substantive evidence* of guilt in the State's case-in-chief. *Id*. at ¶ 38.

{¶ 16} Upon review, we find the present case controlled by *Fletcher* because the State used McGail's post-arrest silence for impeachment purposes on cross examination

and, as in *Fletcher*, the record does not indicate that McGail had received any *Miranda* warnings during the period in which he remained silent after his arrest. *Compare In re T.S.*, 10th Dist. Franklin No. 06AP-1163, 2007-Ohio-5085, ¶11 ("In the present case, appellant chose to testify on his own behalf, and there is no evidence of whether or not appellant was given *Miranda* warnings. Thus, the constitutional protections of *Doyle* are not applicable, and the prosecutor could question appellant about his failure to initially provide important details about the accident to the police."); *State v. Walker*, 8th Dist. Cuyahoga No. 94875, 2011-Ohio-1556, ¶ 30 ("Here, there is no indication in the record as to whether Walker had been advised of his *Miranda* rights at the time he remained silent. Thus, in light of *Fletcher*, there was no plain error[.]"). Because the prosecutor's references to McGail's silence were permitted by *Fletcher*, we see no prosecutorial misconduct and certainly no plain error.

{¶ 17} We are equally unpersuaded that the prosecutor engaged in misconduct by personally vouching for Sowers' credibility. On the trial transcript pages cited by McGail, the prosecutor simply asked Sowers whether his prior, out-of-court statements about what had happened were consistent with his trial testimony. Sowers responded that they were. (Trial Tr. Day 3 at 198-199, 201). McGail also claims the prosecutor personally bolstered Sowers' testimony during closing arguments. We disagree. In his own closing argument, defense counsel suggested that Sowers had experienced "some Freudian slips" while testifying and that the prosecutor had "a look on his face" and "didn't like it." (Trial Tr. Day 6 at 43-46). In response, the prosecutor asserted in his rebuttal argument that "there were no Freudian slips" and that there was no "surprised look" on his face when the alleged slips occurred. (*Id*. at 65). The prosecutor's comment about no Freudian slips was a

permissible comment on the evidence, and the denial of a surprised look was a reasonable response to defense counsel's own assertion to the contrary.

{¶ 18} McGail next asserts that the prosecutor improperly vouched for the credibility of detective Christopher Tilley. Specifically, McGail challenges the following statement by the prosecutor in his rebuttal closing argument: "He was on the stand for a long time, and I'll—I'll tell you this, in the fourteen years that he's been at the Troy Police Department, his integrity has never been brought into question until now, and I submit to you that is an act of desperation." (*Id*. at 67). We agree with McGail that this statement was improper insofar as it suggested the prosecutor's knowledge of facts outside the record and implied that the prosecutor found Tilley trustworthy. On a claim of prosecutorial misconduct, however, "the question is whether the prosecutor's misconduct so infected the accused's trial with unfairness that the accused's convictions came in violation of the right to due process." *State v. Jeffery*, 2013-Ohio-504, 986 N.E.2d 1093, ¶ 15 (2d Dist.). We do not find that standard met here with regard to the prosecutor's statement about Tilley. This is particularly true given defense counsel's failure to object to the statement, limiting us to plain-error review.

{¶ 19} Finally, McGail alleges that the prosecutor engaged in misconduct by seizing defense counsel's file prior to sentencing. In a related argument, McGail claims the trial court erred in failing to disqualify the prosecutor from representing the State after defense counsel's file was seized. It appears from the record that the case file was seized pursuant to a search warrant in connection with a criminal investigation involving one of McGail's attorneys. The trial court continued sentencing once to give defense counsel sufficient time to prepare after a copy of the case filed had been returned to the defense

team. During a hearing on the continuance issue, the prosecutor provided the following explanation regarding the seizure of the file:

> PROSECUTOR: Okay. I gave specific orders to law enforcement to go in and ask the office manager for a specific file. They took that file, and they left. They sealed it at the scene, in front of office personnel, and it was given to a Special Master [who has] been appointed by a Judge to go through it for the purpose of making sure that no attorney/client privilege or attorney work product associated with this case is violated. That was returned, under seal, from the Special Master, and this office nor law enforcement is going to break that seal and look into that file until this is—this case is done, Judge. *And to this point, no law enforcement officer and no person from my office has looked at one shred of paper*.

(Emphasis added) (Sept. 23, 2014 Hearing Tr. at 8).

{¶ 20} In refusing to disqualify the prosecutor from McGail's case, the trial court explained prior to sentencing:

> Well, I just had a brief chance to review the [disqualification] motion prior to coming in here. The motion relates to matters that occurred almost a month ago, and I don't know why it took until Friday afternoon at 3:30 to—to bring this to the Court's attention in any kind of formal way and request. And it didn't come up at the sentencing hearing other than as in response to a question from the Court about that issue when it was raised peripherally at the continuance hearing. So there's nothing in the motion itself that contradicts anything that was represented on the record at the continuance

> hearing about the security of the file and did anyone from the State review anything in the file prior to today's hearing. So based upon the limited information the Court has, the Court is not inclined at this—this eleventh hour to continue this status sentencing hearing or to appoint a special master at this point. So the Court will decline to grant the motion or will deny the motion.

(October 6, 2014 Hearing at 4-5).

{¶ 21} Based on the prosecutor's representation to the trial court that no one from his office had looked at any part of defense counsel's case file, we see no abuse of discretion in the trial court's refusal to disqualify the prosecutor from the case. We also cannot say the prosecutor committed misconduct insofar as he represented that he took reasonable precautions to prevent the disclosure of McGail's attorney-client information in connection with the execution of a valid search warrant. The first assignment of error is overruled.

{¶ 22} In his second assignment of error, McGail raises a claim of juror misconduct in a motion for a mistrial, filed two weeks after the verdicts, supported by an affidavit of juror Kylie Spiers. To place this issue in context, additional trial facts are necessary. McGail's witnesses included his sister, Autumn Kunkle, who testified, among other things, that when she and her brother Patrick were growing up the family went to church every Sunday. Daine Mengos, the youth ministry director for St. Patrick's church, testified that she has known the McGail family since before Patrick's birth. When he was a teenager, he participated in many youth ministry activities. He helped with the church festival, visited nursing-home residents, collected items for the Hope Christmas Shop, assisted at the

soup kitchen, and joined the contemporary choir. He was a substitute percussionist in church on and off for two years and, in the year before her testimony, he was in the Lenten play.[1] In addition, Mengos was permitted to identify four group pictures containing McGail in the contemporary choir, at the soup kitchen, and at two other youth-ministry activities. These exhibits were admitted as evidence. McGail's own testimony about his involvement with church was much more limited, almost negligible considering his 100 pages of testimony. He said he loved volunteering through his church. He said growing up, church and school were the most important things for the family and they went to St. Patrick's. He identified himself and his brother in Exhibit P, the photograph of the church choir. He said that he had friends at church and saw them when he was at church projects with the youth group, but outside of that, he didn't have contact with them. He said that to deal with the shame over not doing more to halt the home invasion, he goes to church to ask for forgiveness. Nowhere did he testify to current or recent regular attendance at St. Patrick's Sunday services.

{¶ 23} At several intervals throughout the trial, the court indicated that jurors were not to read or listen to media reports, including reference that such reports often are

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[1] We perceive this testimony to be largely inadmissible. An accused may introduce evidence of a pertinent trait of his character. Evid.R. 404(A)(1). In this case, McGail could introduce evidence of his reputation for truthfulness, because he testified, or for peacefulness, because of the violent nature of the offenses. However, the manner of presentation of such evidence is controlled by Evid. R. 405(A), which provides: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." Although some evidence of a character witness' interrelationship with an accused is admissible to demonstrate knowledge of the particular character trait about which the witness testifies, the testimony of the witnesses in this case went far beyond that permitted testimony. Nevertheless, the State did not object to this improper manner of introduction of character evidence at trial.

incomplete and inaccurate. The court also indicated several times, including in final instructions, that the jurors must decide the case for themselves and may only consider and decide the case on the evidence presented. Finally, we note that there was no inquiry during voir dire about whether any prospective juror might recognize the McGail family from their St. Patrick's church attendance, or from McGail's participation in the Civil Air Patrol, about which there was also substantial evidence, including photographs, introduced by the defense.

{¶ 24} After the verdicts were announced in open court, the defense requested that the jury be polled. Each juror independently confirmed his or her verdict.

{¶ 25} No evidence of published news reports was submitted in support of the new trial motion, and therefore there was no information before the court suggesting that news reports supplied inaccurate or inadmissible prejudicial information. The juror's affidavit we discuss *infra* indicates that another juror told her news reports were "slanted" against McGail, but, without question, so was the evidence as it was admitted. The affidavit asserts that the other juror talked about a news report containing information that McGail was the shooter, but there was actual trial evidence about that contention introduced during defense questioning. The lead investigator, Detective Tilley, testified that he originally believed that Patrick McGail was the shooter. He even professed such belief during the investigation to others. But he also testified that, after receiving the results of ballistics testing, Sowers was the shooter. At trial, there was absolutely no dispute that Jason Sowers was the one who discharged the firearm that killed Nate Wintrow.

{¶ 26} We now turn to the defense mistrial motion. The trial court considered the motion as a motion for a new trial under Crim. R. 33(A)(2), and so shall we. In the affidavit

in support of the motion, in relevant part, juror Spiers averred:

> 3. My decision was influenced to vote "Guilty" when the jury foreman [D.W.] told the jury that he goes to St. Patrick's church the same church that Patrick McGail testified going to and that he had never seen Patrick or his family at that church, so he must be lying.
>
> 4. This information influenced me to not believe Patrick's testimony.
>
> 5. As a result of [D.W.'s] personal representation, I found Patrick McGail "Guilty."
>
> 6. Additionally, during the deliberations several of the jurors discussed how Patrick would not give police the password to search his phone.
>
> 7. I do not remember any testimony regarding Patrick not providing his password to police.
>
> 8. One of the jurors named [T.H.] admitted to me that he read the newspaper articles about this case.
>
> 9. [T.H.] discussed one of these articles to me on the final day of deliberations.
>
> 10. From [T.H.'s] discussion, these articles were slanted against Patrick McGail's innocence, including stating that Patrick was the shooter.
>
> 11. [T.H.'s] representation about what the paper stated also influenced my decision to find Patrick McGail guilty.
>
> 12. [T.H.] also brought his wife to the trial to watch; and she would converse with him during the breaks.

> 13. During deliberations, I asked the Jury Foreman, [D.W.] to submit a question to the judge asking what would happen if we could not reach a unanimous verdict, but he refused to submit the question.
>
> 14. If I had known that there was an option to hold out my vote I would have done so.

(Spiers affidavit accompanying Doc. #60).

{¶ 27} Regardless of the nature of Spiers' allegations, Ohio Evid.R. 606(B) plainly precluded McGail from obtaining a new trial based on them. The rule "governs the competency of a juror to testify at a subsequent proceeding concerning the original verdict." *State v. Schiebel*, 55 Ohio St.3d 71, 75, 564 N.E.2d 54 (1990). It provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. *A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented.* However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or

> evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes.

(Emphasis added.) Evid.R. 606(B).

{¶ 28} "This requirement of outside evidence of misconduct is the aliunde rule[.]" *State v. Kirkby*, 9th Dist. Summit Nos. 27381, 27399, 2015-Ohio-1520, ¶ 11. Aliunde evidence is other distinct or independent evidence beyond that offered by a juror himself. *State v. Gleason*, 110 Ohio App.3d 240, 245, 673 N.E.2d 985 (9th Dist.1996). As the Ohio Supreme Court explained in *Schiebel*:

> In order to permit juror testimony to impeach the verdict, a foundation of extraneous, independent evidence must first be established. This foundation must consist of information from sources other than the jurors themselves, * * * and the information must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence aliunde being introduced first. * * * Similarly, where an attorney is told by a juror about another juror's possible misconduct, the attorney's testimony is incompetent and may not be received for the purposes of impeaching the verdict or for laying a foundation of evidence aliunde.

Schiebel at 75-76. "The purpose of the aliunde rule is to maintain the sanctity of the jury room and the deliberations therein. *State v. Rudge*, 89 Ohio App.3d 429, 438-439, 624 N.E.2d 1069, 1075-1076 [(1993)]. The rule is designed to ensure the finality of jury verdicts and to protect jurors from being harassed by defeated parties." *State v. Hessler*,

90 Ohio St. 3d 108, 123, 734 N.E.2d 1237 (2000).

{¶ 29} Initially, we observe that Evid. R. 606(B) contains three basic parts: (1) the rule excludes inquiry into juror thought process or related statements or the reasoning leading to a juror's conclusions, (2) the rule precludes juror testimony (or affidavit) in the absence of some outside evidence (the actual aliunde part of the rule), and (3) the rule permits juror evidence of threats, bribes, or officer-of-the–court misconduct without limitation (this third section is inapplicable here).

{¶ 30} Applying the first part of the rule, no inquiry can be made, and no evidence may be presented, about what effect any internal information may have had on jurors' thoughts or conclusions or their verdict. In this regard, Ohio Evid.R. 606(B) is consistent with federal Evid.R. 606(b). The exclusion of any evidence of juror mental processes and the exclusion of evidence concerning the effect of any internal information on their deliberations has been approved by the Supreme Court of the United States. In *Tanner v. United States*, 483 U.S. 107, 116-34, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), the Supreme Court examined the history of Rule 606(b) in upholding the exclusion of evidence offered by two jurors concerning allegations that other jurors used drugs and alcohol during the course of the trial. The court concluded the issue was internal in nature, rather than external, and could not be the subject of inquiry pursuant to Rule 606(b). The Court explained that public policy considerations have long emphasized the necessity of shielding jury deliberations from public scrutiny.

{¶ 31} Applying *Tanner* and Ohio Evid. R. 606(B), we are required to ignore the parts of Spiers' affidavit indicating how any information she heard may have influenced her decision-making process or her verdict. We must also ignore any suggestion of what

any other juror's mental process may have been as to what that other juror was thinking in any way. That means the affidavit's information about what she thought, how her guilty verdict was influenced, what other jurors thought, or how their verdicts were influenced, or what discussions jurors had about the evidence or their deliberations is excluded. As a consequence, the only parts of the affidavit that remain after application of the first part of Evid.R. 606(B) are (1) another juror stated he goes to St. Patrick's and he had never seen Patrick or his family there, and (2) another juror told Spiers that he read newspaper articles that were slanted against McGail's innocence and that stated that McGail was the shooter.[2]

{¶ 32} The next step in our analysis is whether the two referenced parts of Spiers' affidavit, raising the possibility that extraneous prejudicial information was improperly brought to her attention, and that were not excluded by the first part of Evid.R. 606(B), are excluded by the second "aliunde" portion of the rule. Under Evid.R. 606(B), we conclude neither of the remaining averments should be considered in the absence of some "outside evidence," beyond her own affidavit, corroborating what she said. Although McGail has no such evidence, he argued below, and maintains on appeal, that Evid.R. 606(B) is unconstitutional as applied in this case.[3]

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[2] We note that Spiers' allegations concerning jurors' discussion of McGail's failure to provide his phone password to police, a juror bringing his wife to court and talking to him during breaks, and the jury foreman's refusal to submit a question to the judge are internal deliberation events that are wholly inadmissible. Moreover, assuming they are true, those allegations do not constitute misconduct. Evidence was admitted that McGail's phone was password-protected and that police could not access it. A foreperson is not required to submit another juror's question to the judge. The allegations about the juror bringing his wife to court do not establish that anything improper was discussed.

[3] McGail raised his constitutional challenge to the applicability of Evid.R. 606(B) in a

{¶ 33} This court has recognized that it "cannot use Ohio Evid. R. 606(B) to entirely avoid constitutional violations." *State v. Buelow*, 2d Dist. Clark No. 06-CA-29, 2007-Ohio-131, ¶ 84, citing *State v. Franklin*, 2d Dist. Montgomery No. 19041, 2002-Ohio-2370, ¶ 55, citing *Doan v. Brigano*, 237 F.3d 722, 727-729 (6th Cir.2001). In *Buelow*, this court noted that the federal Sixth Circuit Court of Appeals in *Mason v. Mitchell*, 320 F.3d 604, 636 (6th Cir.2003), also had "cited *Doan* in holding that when Ohio courts have applied Ohio Evid.R. 606(B) 'to dispose of biased jury claims,' the courts have 'violated clearly established Supreme Court precedent that recognizes the fundamental importance of a defendant's constitutional right to a fair trial.'" *Buelow* at ¶ 84. Nonetheless, in *Buelow* we first applied the aliunde rule to exclude a post-verdict juror's affidavit, which stated that he may have been incompetent from mental illness, because there was no evidence beyond that affidavit of the juror himself. *Id.* at ¶ 82. We then also went on to consider the affidavit, "[a]ssuming for the sake of argument that we should apply the rule followed by the federal courts." *Id*. at ¶ 88. Nevertheless, we ultimately concluded that inquiry into an internal jury irregularity should only apply " 'in the gravest and most important cases.' " *Id*., quoting *Anderson v. Miller*, 346 F.3d 315, 327 (2d Cir.2003) (internal citations omitted), and Buelow's case did not qualify under that limited category. *Id*.

{¶ 34} Furthermore, we distinguish *Doan*, as did the trial court, by the nature of the extrinsic information brought before the jury in that case. In *Doan*, a child was found dead while in the defendant's care. Doan denied that he had been able to observe bruises on

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motion for reconsideration of the denial of his motion for a mistrial. (Doc. #63). We believe this adequately preserved the issue for appeal because the trial court's denial of the motion for a mistrial remained interlocutory as McGail had not yet been sentenced. The trial court overruled that motion after considering *Doan v. Brigano, infra*. (Doc.# 70).

the child while caring for her earlier in the evening because the household was poorly lit. A juror conducted an experiment, at home, putting lipstick on her arm to simulate a bruise and attempting to view the mark in a room with lighting similar to that described at trial. The juror later presented the results of her experiment to the jury. After verdict, the juror signed an affidavit about her actions. No evidence aliunde of the experiment was presented. In Doan's habeas corpus appeal, the Sixth Circuit Court of Appeals concluded that the juror was acting as a witness in her statements to the other jurors about the experiment. The court held that to the extent Ohio Evid.R. 606(B) excluded *any* consideration of the evidence about an out-of-court experiment that was not subject to cross examination and that might have been flawed in its methodology, the rule was unconstitutional. *Doan*, 237 F.3d at 736. Eventually, though, the *Doan* court concluded that the jury's consideration of the out-of-court experiment was harmless error. *Id.* at 739.

{¶ 35} We also observe that the Sixth Circuit's *Doan* criticism of Ohio's aliunde rule seems to have been diminished by *Brown v. Bradshaw*, 531 F.3d 433 (6th Cir.2008), and citations to it. In post-conviction relief proceedings, Brown had submitted a juror's affidavit alleging that "other jurors yelled and screamed at her in the jury room, pounded the table with their fists, isolated her, accused her of holding things up, blamed her for keeping the other jurors from returning to their families, and bullied her into changing her vote." *Id.* at 436. In the appeal of Brown's subsequent habeas corpus case, the Sixth Circuit observed that the juror's evidence is inadmissible under Ohio Evid. R. 606(B) and there is "no constitutional impediment" to enforcement of the rule. *Id.* at 438. *Accord Hoffner v. Bradshaw*, 622 F.3d 487, 501 (6th Cir.2010) ("This court has previously held that there is no 'constitutional impediment to enforcing' Ohio's *aliunde* rule.").

{¶ 36} Unlike Ohio's Evid.R. 606(B), which precludes a juror from testifying about extraneous prejudicial information brought to the jury's attention in the absence of other (i.e., non-juror) supporting evidence, the federal rule provides otherwise. Federal Evid.R. 606(b)(2)(A) contains an exception allowing a juror to testify about whether "extraneous prejudicial information was improperly brought to the jury's attention." Case law demonstrates that this exception is rooted in common law and in the U.S. Constitution. *See*, *e.g.*, *Garcia v. Andrews*, 488 F.3d 370, 376 (6th Cir. 2007), quoting *Nevers v. Killinger*, 169 F.3d 352, 373 (6th Cir. 1999) ("'When a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information was on that jury.'"); *Robinson v. Polk*, 438 F.3d 350, 360 (4th Cir. 2006) (recognizing that the exception allowing evidence of an external influence on the jury's verdict embodies the Sixth Amendment's Confrontation Clause protections). As another federal circuit court has explained, "[t]he Sixth Amendment guarantee of a trial by jury requires the jury verdict to be based on the evidence produced at trial." (Citation omitted.) *Estrada v. Scribner*, 512 F.3d 1227, 1238 (9th Cir. 2008); *see also Loliscio v. Goord*, 263 F.3d 178, 185 (2d Cir. 2001) ("[A] criminal defendant's Sixth Amendment rights are implicated when a jury considers incriminating evidence that was not admitted at trial."). "'A juror's communication of extrinsic facts implicates the Confrontation Clause.'" (Citations omitted.) *Estrada* at 1238. "'The juror in effect becomes an unsworn witness, not subject to confrontation or cross examination.'" (Citations omitted.) *Id*. "That the unsworn testimony comes from a juror does not diminish the scope

of a defendant's rights under the Sixth Amendment." (Citations omitted.) *Id*. In *United States v. Lloyd*, 462 F.3d 510, 518 (6th Cir.2006), the Sixth Circuit Court of Appeals observed that a juror's allegations about *external* influences on the verdict may establish a Sixth Amendment violation, although in *Lloyd* allegations of *internal* influence (pressure from other jurors) did not require further inquiry. These Sixth Amendment concerns do not exist with respect to a juror's allegations about influences *internal* to the deliberation process. "[T]he Sixth Amendment's guarantees do not require judicial consideration of juror allegations regarding influences internal to the deliberation process." *Robinson* at 362-363, citing *Tanner v. United States*, 483 U.S. 107, 127, 107 S. Ct. 2739, 97 L.Ed. 2d 90 (1987).

{¶ 37} In McGail's case, we see no reason not to apply Ohio's aliunde rule in regard to the complaint about church attendance that, in our view, was related to internal processes of a juror in deliberations. Assuming that during deliberations a juror who was a parishioner from St. Patirck's reported that he had never seen McGail or his family at the church, we fail to see how such a comment, absent external experimentation or investigation, is sufficient to ignore the limitations of Evid.R. 606(B). Moreover, with respect to newspaper stories, assuming that a juror reported what is contained in Spiers' affidavit, without any suggestion or evidence that the reports contained information that was contrary to evidence presented in open court, we apply the aliunde rule and exclude the juror's allegation of misconduct because there is no "other evidence" to support it.

{¶ 38} Even if we did not exclude the juror's averments about McGail's evidence of church affiliation and the references to news reports, we determine that neither issue supports a finding that the information was prejudicial to him. In *State v. Kehn,* 50 Ohio

St.2d 11, 361 N.E.2d 1330 (1977), the Ohio Supreme Court stated: "It is a long standing rule of this court that we will not reverse a judgment because of the misconduct of a juror unless prejudice to the complaining party is shown." *Id*. at 19, citing *Armleder v. Lieberman*, 33 Ohio St. 77 (1877). Indeed, it is "extraneous *prejudicial* information" that Evid.R. 606(B) addresses. Constitutional Sixth Amendment errors concerning extrinsic information before the jury are subject to a harmless-error analysis. *Mason v. Mitchell*, 320 F.3d at 638. In that evidence of the effect of extraneous information on the mind of any juror is inadmissible, a "trial court's post-verdict determination of extra-record prejudice must be an objective one," focusing on the information's probable effect on a "hypothetical average juror." *United States v. Calbas*, 821 F.2d 887, 896, fn. 9 (2d Cir.1987).

{¶ 39} We have already indicated that McGail's testimony about his church activities was minimal. He did not testify about current or recent church involvement. He referred to some of the same information introduced by Diane Mengos, the director of youth activities. Mengos' testimony was undisputed and was supported by photographs of McGail in the midst of various church groups, some of which were unquestionably at church facilities. In light of the evidence, no reasonable juror, or hypothetical average juror, could believe McGail's credibility would be diminished by a parishioner who had not seen McGail or his family at the church.

{¶ 40} In a similar vein, as we have already indicated, there was no information before the trial court that any inaccurate, inadmissible or prejudicial information was in any news reports. We have carefully reviewed and analyzed the entire record and transcript. The evidence itself was increasingly "slanted" against McGail with each

passing day. We have also noted that defense questioning revealed that the lead detective initially believed McGail was the shooter. But at trial it was undisputed that Sowers fired the one and only gunshot that killed Nate Wintrow. In light of the evidence, no reasonable juror, or hypothetical average juror, could believe that the references in Spiers' affidavit to information from news reports was anything other than what was admitted in court. Therefore, the information was not prejudicial to McGail.

{¶ 41} The second assignment of error is overruled.

{¶ 42} In his third assignment of error, McGail contends his convictions are against the manifest weight of the evidence. The essence of his argument is that the testimony of Sowers and Terrel was inconsistent and unbelievable, that his testimony was plausible and believable, and that the DNA evidence was neither dispositive nor inconsistent with his version of events.

{¶ 43} When a conviction is challenged on appeal as being against the weight of the evidence, an 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." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 44} Contrary to McGail's argument we view the evidence against him as convincing. McGail asserts elsewhere in his brief that "[t]his case came down to whom

the jury believed." (Appellant's brief at 16). But McGail's testimony was contrary to each of the other non-character witnesses. As set forth above, Sowers, Terrel, and McGail's girlfriend, Jessica Shelton, all implicated him in the crime. McGail provided a different version of events and maintained that he disassociated himself with the crime before it occurred when he realized his co-defendants were serious. On appeal, McGail characterizes the trial testimony of Sowers and Terrel as "inherently suspicious" because they received plea bargains to testify against him and, therefore, had an incentive to lie. It is equally true, however, that McGail also had an incentive to lie in the hope of securing an acquittal and avoiding a lengthy prison term.

{¶ 45} With regard to alleged inconsistencies in the testimony provided by Sowers and Terrel, McGail focuses on issues such as whether he was the mastermind behind the home invasion and whether, or to what extent, Brendon Terrel's older brother, Rick, also participated. (Appellant's brief at 32-34). These issues, however, were not central to McGail's guilt. Although the evidence supports a finding that McGail did devise the plan to rob Wintrow, the jury still could have found McGail guilty even if it believed that Rick Terrel primarily had planned and directed the home invasion. The central issue for the jury was whether it believed the testimony of Sowers, Brendon Terrel, and Jessica Shelton (who testified that McGail had admitted his involvement to her), each of whom implicated McGail in the home invasion, or whether it believed McGail's own testimony that he backed out before the crimes occurred and did not obtain his injuries inside Wintrow's house. We also note that although McGail challenged Jessica Shelton's testimony, we perceive little that would cause the finder of fact to doubt her credibility.

{¶ 46} In a manifest-weight analysis, the credibility of the witnesses and the weight

to be given to their testimony are primarily for the trier of facts to resolve. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the 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 fact on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way. *State v. Bradley*, 2d Dist. Champaign No. 97–CA–03, 1997 WL 691510 (Oct. 24, 1997).

{¶ 47} Here we cannot say the jury clearly lost its way in believing the testimony of Sowers, Terrel, and Shelton. Although that testimony alone makes McGail's convictions not against the weight of the evidence, the jury also heard evidence that McGail had cuts and scratches on his nose, back, and wrist. These injuries were consistent with him having been involved in an altercation inside Wintrow's residence. With regard to the wrist injury, McGail claimed that happened as a result of police handcuffs. That explanation falls short when Jessica Shelton described a similar injury to McGail when he appeared at her house hours before his arrest and handcuffs. As noted above, McGail's knife and mask with McGail's DNA on them also were found at or near the crime scene. Although McGail attempted to provide a plausible explanation for his injuries and the presence of the mask and knife, the jury had discretion to disbelieve his testimony and to find him

guilty. There was no dispute that two intruders entered the Wintrow household with masks. During argument, McGail's counsel said the second intruder must have been Brendon Terrel. But with respect to the mask found in the back yard, containing McGail's DNA, it makes no sense that Terrel discarded this mask when fleeing because when Terrel was discovered, he had his own mask hidden under his sweatshirt. The jury had ample reasons to disregard McGail's explanations. Having reviewed the entire record, we find that his convictions are supported by the record and are therefore not against the manifest weight of the evidence. The third assignment of error is overruled.

{¶ 48} In his fourth assignment of error, McGail claims the trial court erred in failing to merge his aggravated robbery and murder convictions as allied offenses for purposes of sentencing. Applying the test set forth in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, McGail argues (1) that it is possible to commit aggravated robbery and murder with the same conduct and (2) that he did commit these two offenses with the same conduct and with the same animus. Therefore, he contends they were subject to merger.

{¶ 49} As McGail recognizes, the test established in *Johnson* for determining whether offenses merge under R.C. 2941.25(A) has two steps. First, the court must determine "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *Johnson* at ¶ 48. If the offenses can be committed by the same conduct, "then the court must determine whether the offenses *were* committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " (Emphasis added.) *Id*. at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). "If the answer to both questions is yes, then

the offenses are allied offenses of similar import and will be merged." *Id*. at ¶ 50. But "if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R .C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Id*. at ¶ 51.

{¶ 50} More recently, the Ohio Supreme Court held that two or more offenses are of dissimilar import "when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 23. Therefore, offenses do not merge and a defendant may be convicted and sentenced for multiple offenses if any of the following are true: "(1) the offenses are dissimilar in import or significance * * *, (2) the offenses were committed separately, [or] (3) the offenses were committed with separate animus or motivation." *Id*. at ¶ 25. This analysis "may result in varying results for the same set of offenses in different cases. But different results are permissible, given that the statute instructs courts to examine a defendant's conduct—an inherently subjective determination." *Id*. at ¶ 32, citing *Johnson* at ¶ 52.

{¶ 51} Most recently, the Ohio Supreme Court addressed the allied-offense issue again in *State v. Earley*, Slip Opinion No. 2015-Ohio-4615. There the majority characterized the analysis in its earlier *Johnson* lead opinion as "largely obsolete." *Id*. at ¶ 11. The *Earley* court instead embraced *Ruff*, which, as noted above, considers a defendant's *conduct*, his *animus*, and the *import* or significance of his offenses. Applying *Ruff*, the *Earley* court concluded that misdemeanor OVI and felony aggravated vehicular assault "are offenses of dissimilar import and significance that are to be punished

cumulatively." *Earley* at ¶ 20. For purposes of our analysis here, we note that a defendant bears the burden of establishing entitlement to merger, and we review a trial court's ruling on the issue de novo. *State v. LeGrant*, 2d Dist. Miami No. 2013-CA-44, 2014-Ohio-5803, ¶ 15.

{¶ 52} With the foregoing standards in mind, we believe the trial court erred in refusing to merge McGail's aggravated robbery and murder convictions at sentencing. Because McGail has briefed his argument under the *Johnson* test, we first will apply *Johnson*, which, despite its proclaimed obsolescence, retains similarity to the *Ruff* standard, particularly with respect to the *conduct* and *animus* issues, before resolving the allied-offense issue under *Ruff*, which predominately addressed when a dissimilar *import* exists.

{¶ 53} With regard to the first step of *Johnson's* merger analysis, we agree with McGail that it is possible to commit aggravated robbery and murder with the same conduct. McGail was convicted of murder under R.C. 2903.02(B), which provides: "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 * * *." McGail also was convicted of aggravated robbery under R.C. 2911.01(A)(1), which provides: "No person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it."

{¶ 54} The foregoing statutory language persuades us that it is possible to commit murder in violation of R.C. 2903.02(B) and aggravated robbery in violation of R.C.

2911.01(A)(1) with the same conduct. Indeed, a victim could die from the use of a deadly weapon in the course of an aggravated robbery, resulting in the victim's murder. The first prong of the old *Johnson* test is satisfied.

{¶ 55} The more difficult question is whether McGail did commit the two offenses with the same conduct and the same animus. Addressing this issue, we have recognized that "where the force used to effectuate an aggravated robbery is far in excess of that required to complete the robbery, or where the circumstances suggest that a separate intent to kill existed, the offenses of aggravated robbery and murder do not merge." *State v. Jackson*, 2d Dist. Montgomery No. 24430, 2012-Ohio-2335, ¶ 140 (citing cases). We addressed the issue again in *State v. Metcalf*, 2d Dist. Montgomery No. 24338, 2012-Ohio-6045, reasoning:

> "[W]here the force used to effectuate an aggravated robbery is far in excess of that required to complete the robbery, or where the circumstances suggest that a separate intent to kill existed, the offenses of aggravated robbery and murder do not merge." [*Jackson*] at ¶ 140, citing *State v. Diggle*, 3d Dist. Auglaize No. 2-11-19, 2012-Ohio-1583, *State v. Ruby*, 6th Dist. Sandusky No. S-10-028, 2011-Ohio-4864, ¶ 61, and *State v. Tibbs*, 1st Dist. Hamilton No. C-100378, 2011-Ohio-6716, ¶ 48. The separate intent to kill is an element of aggravated felony murder. R.C. 2903.01(B). In *Tibbs*, the First District considered whether aggravated felony murder and aggravated robbery merged. Reviewing the evidence, the court said that the defendant's "immediate motive" was to steal, at gunpoint, the victim's drugs. *Tibbs* at ¶ 43. The defendant ended up shooting the victim in the face and

head from close range. The court found that the "evidence of the manner in which [the defendant] had shot [the victim] * * * demonstrated a specific intent to kill [the victim], separate from the immediate motive of robbing him." (Citations omitted.) *Id*. The court held that "[w]here * * * the offender's conduct demonstrated a purpose—a specific intent—to kill while, or in the course of, committing an aggravated robbery, * * * the two offenses were committed with a separate animus and thus were separately punishable under R.C. 2941.25(B)." *Id*. at ¶ 48.

In *Jackson*, we considered whether felony murder (murder as a proximate result of committing a felony) and aggravated robbery merged. In that case, the defendant entered the victim's apartment and shot him four times, once in the head at close range, and robbed him. The defendant was found guilty on (among other counts) a count of aggravated robbery (deadly weapon) and a count of felony murder (proximate result of aggravated robbery). We concluded on *Jackson's* facts that "the trial court could have reasonably concluded that [the defendant]'s use of force exceeded that necessary to complete the robbery or that he had a separate intent to kill [the victim]." *Jackson* at ¶ 141. The circumstances, we said, in which the defendant shot the victim could be seen one of two ways. On the one hand, the defendant could have shot the victim when he lunged toward the defendant, trying to thwart the robbery. The evidence showed that for one of the shots, the defendant had his gun against the top of the victim's head. Such a degree of force, we said, suggests that it was more than the force

> required to rob the victim. *Id*. On the other hand, the defendant may have targeted the victim because he was a drug-dealer. The defendant "may have assumed that [the victim] was armed and chose to use deadly force to ensure his own safety." *Id*. Under either view, we said, it was reasonable to find that the defendant's murder animus differed from his aggravated-robbery animus. In other words, "the intent to kill was separate from the intent to commit robbery." *Id*. We held, therefore, that the trial court did not err by refusing to merge the offenses of aggravated robbery and felony murder.
>
> Like in *Tibbs* and *Jackson*, the evidence in the present case allows the inference of a separate intent to kill. Metcalf pulled the trigger with the end of the barrel less than 2 feet from Johnson's head. The use of this much force was excessive. There is no evidence of an argument between Metcalf and Johnson. Nor is there any evidence of a struggle between them.

Id. at ¶ 14-16.

{¶ 56} We find the present case distinguishable from *Jackson* and *Metcalf*. Unlike those cases, the evidence before us suggests no separate intent by Sowers to kill Wintrow. In fact, the weight of the evidence indicates that Sowers had no specific intent to kill Wintrow at all. At the time of the shooting, Sowers and McGail were struggling with three occupants of the home in a small laundry room. One of the occupants, Saddie Barker, testified that she and Wintrow were struggling with Sowers, trying to push him out of the house. (Trial Tr. Day 2 at 106). At one point, Barker "slammed [Sowers] up against the door, and that's when the gunshot went off." (*Id*.). For his part, Sowers recalled that

the gun he was holding "went off" when he was pushed. (Trial Tr. Day 3 at 176). He agreed with a characterization of the gunshot as a "reflex." (*Id*.). Thus, the gun appears to have discharged accidentally during the struggle. Although that fact does not preclude a felony-murder conviction, it does indicate the absence of any intent to kill separate and apart from the intent to rob.

{¶ 57} Unlike *Metcalf*, the deadly force Sowers used also does not appear to be intentionally far in excess of that required to complete the robbery. In finding the shooting of the victim excessive in *Metcalf*, we stressed the absence of a struggle between the perpetrator and the victim. *Metcalf* at ¶ 16. Here, however, Sowers and McGail were engaged in a hand-to-hand struggle with three occupants of the home when the gun discharged. In light of the occupants' physical resistance, we cannot say Sowers' use of the weapon at his immediate disposal, a loaded handgun he was holding in his extended arm, constituted a degree of force far in excess of what was necessary to accomplish the robbery. Even if that use of force was accidental, it was part and parcel of the ongoing attempt to steal Wintrow's marijuana. In short, we fail to see any separate animus for the single gunshot or any separate conduct that it involved apart from the ongoing robbery.

{¶ 58} In opposition to the foregoing conclusion, the State cites *State v. Russell*, 2d Dist. Montgomery No. 23454, 2010-Ohio-4765, for the proposition that felony murder and aggravated robbery are not allied offenses because "[c]omparing the elements of the two offenses in the abstract, commission of neither offense necessarily results in commission of the other." *Id*. at ¶ 40. In reaching this conclusion, we reasoned: "Aggravated robbery plainly may be committed without causing the death of anyone, and felony murder may be committed without engaging in aggravated robbery. The felony

murder statute requires causing the death of another as the proximate result of committing any first or second-degree felony offense of violence, not just aggravated robbery." *Id*. at ¶ 41.

{¶ 59} The State's reliance on *Russell* is unpersuasive, however, because the opinion in that case predated *Johnson*, *supra*, in which the Ohio Supreme Court explicitly rejected the abstract-comparison approach used in *Russell*. We note too that the more recent *Ruff* opinion did not alter *Johnson's* rejection of the abstract-comparison approach, which remains inapplicable in Ohio. As explained above, the question *is not* whether, in the abstract, it is possible to commit one offense without committing the other. *Johnson* at ¶ 48. Rather, "the question is whether it is possible to commit one offense *and* commit the other with the same conduct" (and the same animus). *Id*. Based on our analysis here, we conclude that McGail's commission of murder and aggravated robbery involved the same conduct committed with the same animus.

{¶ 60} We reach the same conclusion under the *Ruff* standard, which the Ohio Supreme Court applied in *Earley*. We see nothing in *Ruff* that alters or undermines the foregoing analysis about McGail's commission of murder and aggravated robbery involving the same conduct committed with the same animus. For the reasons set forth above, we conclude that the two offenses were not committed separately and were not committed with a separate animus or motivation. These findings remain pertinent under *Ruff*, which, as noted above, provides that offenses do not merge if "(1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation." *Ruff* at ¶ 25; *see also id*. at ¶30-31.

{¶ 61} The only remaining question is whether McGail's murder and aggravated robbery offenses are of dissimilar import. *Ruff* itself amplified this aspect of the allied-offense test. Under *Ruff*, "two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable."[4] *Ruff* at ¶ 23.

{¶ 62} Here McGail's aggravated robbery and murder offenses did not involve separate victims. The victim of the aggravated robbery was Nate Wintrow, whose marijuana McGail and his companions attempted to steal. Wintrow likewise was the victim of the murder. The harm resulting from each offense also was not separate and identifiable. The pertinent aggravated robbery statute, R.C. 2911.01(A)(1), provides: "No person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it." Here McGail and his companions attempted to commit a theft offense, the stealing of Wintrow's marijuana. But they did not succeed in taking any marijuana. Therefore, the harm resulting from the aggravated robbery cannot be the loss of Wintrow's marijuana. Without question, the real harm resulting from the aggravated robbery in this case is precisely the type of harm that R.C. 2911.01(A)(1) is

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[4] We note that *Ruff* involved the merger of aggravated burglary and rape. In *Ruff*, the Ohio Supreme Court reversed and remanded "for the court of appeals to consider whether the import of the aggravated burglary and the import of the rape were similar or dissimilar" under the test set forth therein. *Ruff* at ¶ 29.

intended to prevent—Wintrow's loss of his life as a result of being shot when Sowers used a deadly weapon while attempting to commit a theft offense. The harm resulting from the murder, of course, is the same—Wintrow's loss of his life.

{¶ 63} We conclude, therefore, that the murder and aggravated robbery offenses are not of dissimilar import or significance. This is particularly true in light of our finding above that the murder was part and parcel of a struggle during an on-going attempt to steal Wintrow's marijuana. Accordingly, the trial court erred in failing to require merger of the two offenses and to have the State elect the offense on which McGail would be sentenced. The fourth assignment of error is sustained.

{¶ 64} In his fifth assignment of error, McGail asserts that the trial court erred in imposing more than the statutory mandatory-minimum sentence. He advances two arguments in support. First, he contends his sentence is disproportionate to the sentences received by Sowers and Terrel, raising an inference that the trial court punished him for exercising his right to a trial. Second, he claims the trial court abused its sentencing discretion under the two-part test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, and failed to consider his status as a juvenile as a mitigating factor.

{¶ 65} We find McGail's arguments unpersuasive. McGail received a mandatory prison term of 15 years to life for murder, a concurrent six-year term for aggravated robbery, a consecutive six-year term for aggravated burglary, and a consecutive three-year term for a firearm specification, resulting in an aggregate 24-year sentence. McGail asserts that Sowers, the admitted shooter, received an aggregate sentence of 18 years to life and that Terrel, the lookout, received an aggregate 14-year prison term.

{¶ 66} In order to prevail on his claim of disproportionality, McGail must establish that he, Sowers, and Terrel are similarly situated with regard to sentencing. *See*, *e.g*., *State v. Kosak*, 2d Dist. Greene No. 2013 CA 67, 2014-Ohio-2310, ¶ 20. But they are not. As part of his plea agreement, Sowers pled guilty to the same offenses as McGail, admitting guilt and agreeing to testify for the State against McGail. Sowers' admission of guilt and cooperation with the State in its prosecution of McGail adequately explain the shorter sentence he received and distinguish his situation from McGail's. As for Terrel, he pled guilty only to aggravated robbery, aggravated burglary, and a firearm specification. He also testified for the State in its prosecution of McGail. Again, his admission of guilt, cooperation with the State, and the absence of a murder conviction in his case adequately explain the shorter sentence he received and distinguish his situation from McGail's. "A sentence that is appropriate for a particular criminal offense may be mitigated in recognition of a defendant's choice to waive a constitutional right and co-operate with the authorities[.]" *State v. Smith*, 2d Dist. Clark No. 08-CA-37, 2009-Ohio-1041, ¶ 16; *see also State v. Dawson*, 2d Dist. Montgomery No. 21768, 2007-Ohio-5172, ¶ 23 ("Though a court may not impose a harsher sentence than it otherwise would have imposed when the defendant elects to exercise his constitutional right to a trial, the court may impose a more lenient sentence than it otherwise would have when a defendant enters a plea of guilty or no contest[.]").That is what occurred here.

{¶ 67} We also find no evidence that the trial court punished McGail for exercising his right to a trial. McGail infers an intent to punish from the trial court's statements at sentencing about him continuing to maintain his innocence, thereby showing a lack of

remorse. McGail reasons that "[s]uch statements create the appearance that [he] was punished for exercising his right to a trial, since all defendants going to trial necessarily must assert their innocence." (Appellant's brief at 40). We disagree. A trial court is entitled to consider a defendant's lack of remorse by maintaining his innocence at sentencing, and doing so is not the same as punishing him for having exercised his right to a trial. *See*, e.*g*., *State v. Jackson*, 2d Dist. Montgomery No. 20819, 2005-Ohio-4521, ¶ 15; *State v. Russell*, 8th Dist. Cuyahoga No. 88008, 2007-Ohio-2108, ¶ 23.

{¶ 68} Finally, we reject McGail's argument about his aggregate 24-year sentence being an abuse of discretion. As an initial matter, we no longer apply the abuse-of-discretion standard set forth in *Kalish*, *supra*. Rather, we apply the standard found in R.C. 2953.08(G)(2) to determine whether we "clearly and convincingly" can say either (1) that the record does not support specified sentencing findings or (2) that the sentence is contrary to law. *See*, *e.g*., *State v. Boysel*, 2d Dist. Clark No. 2013-CA-78, 2014-Ohio-1272, ¶ 10, quoting *State v. Rodeffer*, 2d Dist. Montgomery Nos. 25574, 25575, 25576, 2013-Ohio-5759, ¶ 29-31.

{¶ 69} Here McGail admits that no aspect of his sentence is contrary to law. (Appellant's brief at 40-41). We agree. The trial court expressly considered the statutory seriousness and recidivism factors as well as the statutory principles and purposes of sentencing. We note too that each of McGail's sentences was within the statutory range, and the trial court made the findings required by R.C. 2929.14(C)(4). With regard to whether the record clearly and convincingly fails to support those findings, McGail makes no direct argument. Under his abuse-of-discretion argument, however, he does assert that the trial court overemphasized his alleged role as the "mastermind" of the home

invasion and underemphasized his status as a juvenile at the time. To the extent that these arguments are relevant to the trial court's consecutive-sentence findings, McGail has failed to establish that the record clearly and convincingly fails to support them.

{¶ 70} McGail admits that Sowers and Terrel both testified about him having a leadership role in the home invasion. He maintains that "[t]hey are simply not to be believed." (Appellant's brief at 43). But the jury was free to believe these witnesses, and the trial court was too. With regard to McGail's status as a juvenile, the record reflects that he was approximately five months shy of his 18th birthday when he committed the crimes at issue. The trial court was well aware of this fact, and we are unpersuaded that McGail's status as a juvenile at the time of his crimes made the trial court's sentencing findings clearly and convincingly unsupported by the record. The fifth assignment of error is overruled.

{¶ 71} In his sixth assignment of error, McGail contends ineffective assistance of counsel deprived him of his right to a fair trial. He cites several alleged instances of such ineffective assistance, including: (1) disclosing privileged information and suborning perjury, (2) failing to prepare, conducting improper impeachment, and making "bizarre statements" during cross examination, (3) failing to object to a violation of his constitutional rights, and (4) failing to succeed in getting video clips of interviews admitted into evidence.

{¶ 72} To prevail on a claim for ineffective assistance, a defendant ordinarily must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show deficiency, the defendant must show that trial counsel's representation fell below an objective standard of

reasonableness. *Id*. Prejudice exists and a reversal is warranted only where the defendant shows a reasonable probability that but for counsel's deficient performance the result of the proceeding would have been different. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). "In certain cases, such as where defense counsel has an actual conflict of interest, the standard used to determine the existence of ineffective assistance of counsel is different." *State v. Cranford*, 2d Dist. Montgomery No. 23055, 2011-Ohio-384, ¶ 61. "In those cases, where counsel has breached his duty of loyalty to his client and his duty to avoid conflicts of interest, the defendant is not required to show that he or she has been prejudiced by counsel's deficient performance." *Id*. "Rather, prejudice is presumed if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Id*.

{¶ 73} In his first argument, McGail alleges an actual conflict of interest below. He argues as follows:

> Throughout the trial in this matter, McGail was represented by Christopher Bucio, a partner at Robert Kelly & Bucio, and Joshua Albright, an associate at Bucio's firm. At some point during McGail's representation the law firm had cause to believe that Albright was engaged in wrongdoing and contacted the Troy Police Department. During questioning of Albright on September 5, 2014, Albright asserted that he was jealous, suffered from a mental health problem, and a substance abuse problem that caused his criminal misconduct. See Motion for New Trial Out of Time. In addition, Albright disclosed privileged information regarding McGail's case, including

> making allegations that McGail engaged in perjury at the instruction of his counsel and made further allegations that an expert report was altered to remove incriminating statements by McGail. Id. These statements resulted in the issuance of a search warrant and a seizure of McGail's file by the State, which occurred almost a month before McGail was even sentenced.

(Appellant's brief at 45).

{¶ 74} In support of the foregoing allegations, McGail references a "Motion for New Trial Out of Time" and one or more supporting affidavits. Elsewhere in his brief, he claims Albright's "wrongdoing" involved alleged theft from the law firm. (Appellant's brief at 12). Unfortunately, McGail has not identified the new-trial motion by date or docket number, and it is not in our record. It may be that he filed the motion after filing his notice of appeal. In any event, even if we assume his allegations are true, we see no actionable ineffective assistance of counsel based on Albright's conduct. Albright's alleged criminal actions involved himself and his law firm. They did not create an actual conflict of interest in McGail's case. Moreover, Albright's disclosure of confidential or privileged information about perjury in McGail's case allegedly occurred on September 5, 2014 *after* the trial had concluded. Although suborning perjury undoubtedly constitutes deficient representation, we fail to see how coaching McGail to give perjured testimony or removing incriminating statements from an expert report, even if these acts occurred, possibly could have prejudiced McGail's case before the jury. Moreover, when Albright disclosed the alleged perjury, it is not clear that he was actively representing McGail or doing anything in the case. The trial had ended, and sentencing had not occurred. We note too that Albright did not participate in McGail's subsequent sentencing hearing and that the

sentences imposed on the murder conviction and the firearm specification were mandatory. The only discretionary sentences the trial court imposed were a concurrent six-year term for aggravated robbery and a consecutive six-year term for aggravated burglary. Nothing in the record suggests that Albright's allegations had any impact on these sentences. Therefore, we see no prejudice to McGail and no basis for reversal.

{¶ 75} McGail next alleges ineffective assistance based on Albright's "(1) apparent failure to prepare adequately for trial, (2) improper impeachment of witnesses, and (3) bizarre statements during cross-examination[.]" (Appellant's brief at 46). McGail asserts that these deficiencies "would seem to support [Albright's] claims that he had mental health or substance abuse problems during the course of the trial." (*Id*.). Having reviewed the record, it is not apparent to us that Albright was impaired during trial. As for McGail's general claims about a lack of preparation, improper impeachment, and bizarre statements, he cites nothing in particular and makes no effort to demonstrate prejudice. Although this court has reviewed the entire record, it need not scour the transcripts searching for deficiencies in Albright's performance so serious as to warrant a finding that the outcome likely was affected.

{¶ 76} McGail's claim about counsel's failure to object to a violation of his constitutional rights is equally unpersuasive. This argument concerns the lack of an objection when the prosecutor confronted McGail about his silence at the time of his arrest. In our resolution of the first assignment of error above, we found nothing improper about the State's use of McGail's post-arrest silence for impeachment purposes on cross examination. Therefore, defense counsel did not provide deficient representation by failing to object.

{¶ 77} Finally, McGail alleges ineffective assistance of counsel based on a failure to succeed in getting video clips of interviews admitted into evidence. This argument concerns videotaped police interviews of Abby Moss (the girlfriend of Brendon Terrel's older brother Rick) and Jason Sowers. McGail contends that "[f]or each of the videos that defense counsel wished to play there could have been an argument for admission of the video which counsel was unable to articulate." (Appellant's brief at 47). McGail also stresses "the fact that there was no proffer of what the videos would show, so the matters were not properly preserved for appeal." (Id.).

{¶ 78} We see no ineffective assistance of counsel with regard to the videos. McGail himself acknowledges that there was no proffer of the videos, so the issue was not preserved and we cannot assess prejudice. In any event, McGail also has failed on appeal to identify any grounds for admitting the video-taped interviews into evidence. Defense counsel attempted to admit into evidence and show an hour-long interview of Moss to Detective Tilley. (Trial Tr. Day 4 at 87-88). The trial court only allowed the video to be used to refresh Tilley's recollection. (*Id*. at 122). We see no error in this ruling. We also see no prejudice to McGail. If defense counsel wanted to know anything about what was said during the interview, he was free to ask Tilley, who was free to answer consistent with the evidentiary rules. If Tilley had trouble answering, defense counsel was free to refresh his recollection with the video. We see no need for it to be admitted into evidence and shown to the jury in its entirety.

{¶ 79} We reach the same conclusion with regard to the interview of Sowers. Defense counsel attempted to admit into evidence and show a video of that interview to

the jury. He made the attempt during his cross examination of Tilley. We see no error in the trial court's refusal to admit the video into evidence and no prejudice to McGail for the same reasons that we found no error and no prejudice when defense counsel sought to admit a video of Moss' interview into evidence when cross examining Tilley. Defense counsel also sought to use a portion of that video to refresh the recollection of Sowers' mother, Jessica Lowe, who was present during her son's interview. On the cited transcript pages, defense counsel sought to refresh her recollection as to whether her son was the shooter during the home invasion. (Trial Tr. Day 5 at 137-145). She testified that she believed her son was the shooter but did not remember whether she had learned that during his interview. (*Id*. at 141). She also said she did not know whether viewing a video of the interview would refresh her recollection. (*Id*. at 142). Ultimately, the trial court refused to allow defense counsel to use the video to refresh her recollection about whether she learned her son was the shooter during the interview. (*Id*. at 145). Although McGail claims this ruling was erroneous, we fail to see how it makes any difference or how he was prejudiced. Lowe testified that her son Jason Sowers was the shooter, Jason Sowers himself testified that he was the shooter, and no one at trial disputed that he was the shooter. That being so, it matters not whether Lowe learned that fact during her son's interview. The sixth assignment of error is overruled.

{¶ 80} In his seventh assignment of error, McGail raises a claim of cumulative error. He contends the effect of the errors alleged in his first six assignments of error, even if individually harmless, cumulatively deprived him of a fair trial.

{¶ 81} It is true that separately harmless errors may violate a defendant's right to a fair trial when the errors are aggregated. *State v. Madrigal*, 87 Ohio St.3d 378, 397, 721

N.E.2d 52 (2000). To find cumulative error, we first must find multiple errors committed at trial. *Id*. at 398. We then must find a reasonable probability that the outcome below would have been different but for the combination of separately harmless errors. *State v. Thomas*, 2d Dist. Clark No. 2000-CA-43, 2001 WL 1103328 (Sept. 21, 2001). In our review of McGail's other arguments, we have not found multiple instances of harmless error. Therefore, we find no prejudicial cumulative error. The seventh assignment of error is overruled.

{¶ 82} Based on the reasoning set forth above, the trial court's judgment is affirmed in part, reversed in part, and the cause is remanded. The trial court's judgment is reversed with regard to its failure to merge McGail's murder and aggravated robbery convictions as allied offenses of similar import. As set forth in our analysis of the fourth assignment of error, the cause is remanded for merger of the murder and aggravated robbery convictions and for the State's election between the two convictions for purposes of sentencing.

{¶ 83} In all other respects, the trial court's judgment is affirmed.

. . . . . .

FAIN, J., concurs.

FROELICH, P.J., concurring:

{¶ 84} The prosecutor's remarks in closing that he has a teenager and he knows how they act, and that the jurors should place themselves in the position of the defendant when the police came to the door, cross over the line of the jury's evaluating the evidence based on reason and common sense into the prohibited "golden rule" argument.

Especially without defense objection, they were harmless in the context of this trial.

{¶ 85} On a different concern, I would find that a defense attorney's "coaching" Appellant to give perjured testimony or the attorney's removing incriminating statements from an expert report are defects in representation that could require reversal regardless of prejudice – perhaps depending on the client's degree of sophistication and involvement, i.e., a defendant should not benefit by trying to cheat the system and then be entitled to a new trial if the deception and dishonesty are discovered and ultimately unsuccessful. Regardless, this record contains only unsubstantiated and vague allegations of such perfidy that fall far short of overcoming the presumption of effective representation.

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