[Cite as *State v. Snowden*, 2019-Ohio-3006.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 28096
	:	
v.	:	Trial Court Case No. 2016-CR-1809
	:	
DEONTE D. SNOWDEN	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 26th day of July, 2019.

. . . . . .

MATHIAS H. HECK, JR., by ANDREW T. FRENCH, Atty. Reg. No. 0069384, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, 301 West Third Street, 5th Floor, Dayton, Ohio 45422

Attorney for Plaintiff-Appellee

MATTHEW M. SUELLENTROP, Atty. Reg. No. 0089655, 6 North Main Street, Suite 400, Dayton, Ohio 45402

Attorney for Defendant-Appellant

. . . . . .

DONOVAN, J.

{¶ 1} Defendant-appellant Deonte D. Snowden appeals his conviction and sentence for two counts of murder (proximate result), in violation of R.C. 2903.02(B), both unclassified felonies, both counts accompanied by a three-year firearm specification; one count of felonious assault (serious physical harm), in violation of R.C. 2903.11(A)(1), a felony of the second degree, accompanied by a three-year firearm specification; one count of felonious assault (deadly weapon), in violation of R.C. 2903.11(A)(2), a felony of the second degree, accompanied by a three-year firearm specification; one count of having weapons while under disability (prior drug conviction), in violation of R.C. 2923.13(A)(3), a felony of the third degree; and one count of bribery (corrupt witness), in violation of R.C. 2921.02(C), a felony of the third degree. After some of the offenses were merged, the court imposed an aggregate sentence of 21 years to life. Snowden filed a timely notice of appeal with this Court on August 21, 2018.

{¶ 2} Shortly after 11:00 p.m. on the night of June 6, 2016, Theodora Watson and her three grandsons, "D.O." (16 years old at the time), "D.E." (13), and "D.S." (10), were getting into her car outside her home in order to drive to a restaurant. Watson and D.E. testified that, just as they were about to leave, the victim, William Sarver, walked up to the driver's side of the vehicle and began a conversation with Watson. Watson testified that Sarver had lived in her neighborhood for several years, and the two were well acquainted. In fact, Sarver, whose nickname in the neighborhood was "Carl Lewis," would routinely shovel the snow at Watson's residence and go to the store for her.

{¶ 3} Watson testified that when Sarver learned that Warner was going to buy food, he handed her a $20 bill to pay for dinner. While she was speaking to Sarver, defendant-

appellant Snowden walked up her driveway talking on a cell phone. Snowden was Watson's husband's nephew, and she had known him for his entire life. Snowden's nickname around the neighborhood was "DeeDot." D.E. also testified that he observed Snowden walking up the driveway toward the vehicle *after* Sarver had already approached the vehicle and begun speaking with Watson. Unlike Watson and D.E., D.S. testified that he observed Snowden walk up to Watson's vehicle before Sarver arrived. Nevertheless, Watson, D.E., and D.S. all testified that, after a short time, Snowden and Sarver got into an argument while they were standing near Watson's vehicle.

{¶ 4} Watson testified that Snowden initially slapped Sarver in the face with an open hand, knocking Sarver backwards. Sarver then slapped Snowden in the same manner. Watson, D.S., and D.E. testified that Snowden then pulled a handgun from the waistband of his pants and fired a single shot, striking Sarver in the abdomen. Watson and D.S. testified that, because it was dark, they never saw the handgun with which Snowden shot Sarver. D.E. testified, however, that from his vantage point inside the vehicle, he was able to see the handgun in Snowden's hand as Snowden shot Sarver.

{¶ 5} Watson, D.S., and D.E. testified that there were no other individuals standing close to Watson's vehicle when Snowden shot Sarver. Specifically, Watson, D.S., and D.E. each testified that Derrick Watson, Theodora's adult son and the boys' father, was not present when Snowden shot Sarver. In fact, they each testified that Derrick did not appear at the scene of the shooting until after the paramedics and police had arrived. Watson testified that there were some people standing in the street talking, but when the shot was fired, they all ran away. Watson, D.S., and D.E. all testified that after shooting Sarver, Snowden ran to a black sedan and drove away. D.S. and D.E. testified that the

vehicle was a black Chevrolet Impala. All three witnesses had observed Snowden in the same vehicle in the past.

{¶ 6} Watson, D.S., and D.E. immediately got out and attempted to help Sarver, who had fallen over into the open rear driver's-side door of Watson's vehicle. Watson called 911 using her cordless home phone, which she had taken with her when they initially left the house for food. We note that the record establishes that, while on the phone with the 911 operator, Watson stated that she was unable to identify the perpetrator. At trial, Watson testified that she told the operator that she could not provide the name of the perpetrator because she was scared and nervous immediately after the shooting occurred. Watson testified that she had no doubt that Snowden shot Sarver. When the paramedics arrived at the scene, Sarver was put in an ambulance and transported to Miami Valley Hospital, where he was later pronounced dead as a result of the gunshot wound.

{¶ 7} Upon arriving at the scene, police officers placed Watson, D.S., and D.E. in separate cruisers to await questioning by detectives. The record establishes that they each separately identified Snowden as the perpetrator and provided a description of his vehicle. Police also discovered a spent .40 caliber shell casing on the ground near Watson's vehicle. We note that no handgun was recovered during the investigation of Sarver's shooting.

{¶ 8} Detective Brad Daugherty from the Montgomery County Sheriff's Office was one of the detectives assigned to investigate Sarver's death. Detective Daugherty testified that he knew Snowden from working with him on other investigations, and he possessed Snowden's cell phone number. Detective Daugherty further testified that he

had spoken with Snowden earlier in the day on June 6, 2016, prior to the shooting. After completing an "exigent circumstance" form, Detective Daugherty requested that the phone service provider "ping" Snowden's cell phone in an attempt to locate him. When an attempt was made to "ping" Snowden's cell phone on the night of the shooting, Detective Daugherty was informed that Snowden's cell phone had been turned off. When the cell phone was "pinged" the following day on June 7, 2016, it was discovered that the cell phone had been turned back on and was in the possession of Snowden's girlfriend. Snowden, however, was not with his girlfriend.

{¶ 9} On June 7, 2016, the police also located Snowden's black Impala car parked in an alleyway against a garage. The vehicle was approximately half a block away from Snowden's mother's house. Police officers found that a large garbage can and a box had been placed in front of the tires of the vehicle. The officers also learned that Snowden's vehicle had been outfitted with distinctive after-market black rims. Dayton Police Detective David House testified that he viewed the placement of the garbage can and box in front of the rims of the vehicle as an intentional attempt at concealment. The police were unable to ascertain Snowden's whereabouts.

{¶ 10} On July 14, 2016, Snowden was indicted for two counts of murder (proximate result) and two counts of felonious assault (serious physical harm and deadly weapon), each of which was accompanied by a three-year firearm specification; he was also indicted on one count of having weapons while under disability (prior drug conviction).

{¶ 11} Detective Daugherty testified that in October 2016, he was provided with a phone number of a cell phone in Snowden's possession. Detective Daugherty testified

that the cell phone was "pinged" to a location in Maricopa, Arizona. Thereafter, Detective Daugherty contacted the U.S. Marshals to assist in Snowden's apprehension. Snowden was arrested in Maricopa and extradited back to Dayton, Ohio, where he was taken into custody and placed in jail. At his arraignment on October 25, 2016, Snowden stood mute, and the trial court entered a plea of not guilty on his behalf.

{¶ 12} On November 22, 2017, Snowden waived his right to a jury trial on the count of having weapons while under disability. Thereafter, the remaining charges in the indictment were tried to a jury on November 27-29, 2017. However, the jury could not reach a verdict regarding any of the offenses, and the trial court declared a mistrial.

{¶ 13} It eventually came to light that in late November 2017, D.E., who testified at trial, received a phone call from Snowden who was in jail. During the conversation, Snowden offered D.E. $2,500 to give testimony favorable to him at trial. On November 30, 2017, Snowden also called Watson from the jail and asked her to change her story regarding her recollection of the events surrounding Sarver's shooting.

{¶ 14} On March 23, 2018, Snowden was additionally charged in a "B Indictment" with one count of bribery (corrupt witness), in violation of R.C. 2921.02(C), a felony of the third degree. On June 26, 2018, Snowden filed a motion for leave to a file a motion to suppress accompanied by a proposed motion to suppress, based upon the authority of *Carpenter v. United States,* __ U.S. __, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018). The trial court granted Snowden's motion for leave on July 2, 2018. The trial court held a hearing on Snowden's motion to suppress on July 9, 2018, immediately prior to the beginning of his second trial. After hearing from both parties, the trial court overruled Snowden's motion to suppress from the bench.

{¶ 15} During the same hearing, Snowden also made an oral motion for the trial court to sever the "B Indictment" from the "A Indictment" for purposes of trial. The trial court overruled Snowden's motion to sever from the bench. Thereafter, the case proceeded to trial, and on July 11, 2018, the jury found Snowden guilty on all counts presented to it. On July 13, 2018, the trial court found Snowden guilty of having weapons under disability following a bench trial. The trial court merged the two counts of murder and the two counts of felonious assault and merged all of the accompanying firearm specifications. The State elected to proceed on Count I, murder (proximate result), which carried a mandatory sentence of 15 years to life in prison. The trial court also sentenced Snowden to three years in prison for having weapons under disability, to be served concurrently to his sentence for murder. The trial court sentenced Snowden to three years for bribery, to be served consecutively to the sentence for murder. Finally, the trial court sentenced Snowden to three years in prison for the firearm specification, to be served consecutively to Snowden's sentence for murder. The aggregate sentence was 21 years to life in prison. The court also ordered Snowden to pay restitution, court costs, and extradition costs.

{¶ 16} It is from this judgment that Snowden now appeals.

{¶ 17} Snowden's first assignment of error is as follows:

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS.

{¶ 18} In his first assignment, Snowden contends that the trial court erred when it overruled his motion to suppress the cell phone "pinging" information that was used to attempt to locate him on the night of the shooting and the following day. In support of

his argument, Snowden relies upon the U.S. Supreme Court's recent opinion in *Carpenter,* __ U.S. __, 138 S.Ct. 2206, 201 L.Ed.2d 507.

{¶ 19} Initially, we note that defense counsel withdrew his challenge to the "pings" that occurred in Maricopa, Arizona. Accordingly, Snowden has waived this portion of his argument on appeal, and we decline to address it.

{¶ 20} In ruling on a motion to suppress, the trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford*, 93 Ohio App.3d 586, 592, 639 N.E.2d 498 (2d Dist.1994); *State v. Knisley*, 2d Dist. Montgomery No. 22897, 2010-Ohio-116, ¶ 30. Accordingly, when we review suppression decisions, we must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Retherford* at 592. "Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *Id*.

{¶ 21} The threshold issue in every Fourth Amendment analysis is whether a particular government action constituted a "search" or "seizure" within the meaning of the Amendment. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). In its early jurisprudence, the Supreme Court determined whether a particular action was a "search" or "seizure" based on principles of property trespass. In *Katz v. United States,* 389 U.S. 347, 353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), however, the Court recognized that the Fourth Amendment also protects certain expectations of privacy, not just physical intrusions on constitutionally protected areas. *Id*.; *Carpenter* at 2213. Under *Katz*, to prove a Fourth Amendment violation, a defendant must show (1)

that the person had a subjective expectation of privacy and (2) that the subjective expectation of privacy is one that society recognizes, or is prepared to recognize, as reasonable. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), citing *Katz* at 361 (Harlan, J., concurring).

{¶ 22} After *Katz*, the Supreme Court rejected the government's "contention that it should be able to monitor beepers in private residences without a warrant if there is the requisite justification in the facts for believing that a crime is being or will be committed and that monitoring the beeper wherever it goes is likely to produce evidence of criminal activity." *United States v. Karo*, 468 U.S. 705, 717, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). The Supreme Court found "[i]ndiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." (Footnote omitted). *Id*. at 716. Later, the Supreme Court held that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo v. United States*, 533 U.S. 27, 40, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

{¶ 23} More recently, the Supreme Court held that attaching a GPS tracking device to a vehicle constitutes a search under the Fourth Amendment. *United States v. Jones*, 565 U.S. 400, 404, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). Two years later, the Supreme Court held that "a warrant is generally required before such a search [of a cell phone], even when a cell phone is seized incident to arrest." *Riley v. California*, 573 U.S. 373, 401, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). The Court recognized that cell

phones hold "the privacies of life," *id*. at 2495, quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886), and noted that "[t]he fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." *Id*.

{¶ 24} In *Carpenter*, __ U.S. __, 138 S.Ct. 2206, 201 L.Ed.2d 507, the defendant challenged on Fourth Amendment grounds the government's warrantless acquisition -- pursuant to 18 U.S.C. 2703 -- of his cell-site location information ("CSLI") from his wireless telecommunications carrier that had been sent to cell towers by his cell phone and stored by that carrier. *Id*. at at 2211-12. The CSLI data acquired in *Carpenter* identified the defendant's movements across nearly 13,000 specific location points during a 127-day span. *Id*. at 2212.

{¶ 25} The government, in response, invoked the third-party doctrine to justify its warrantless acquisition of the CSLI from the carrier. *Id*. at 2219. The Supreme Court held, however, that the government's acquisition of the CSLI from the carrier constituted a search for which the government needed a warrant, because the defendant retained a reasonable expectation of privacy in the CSLI at issue even though he had shared it with his wireless carrier. *Id*. at 2217-20.

{¶ 26} *Carpenter* reasoned that, given the location information that CSLI conveyed and the fact that a cell phone user transmits it simply by possessing the cell phone, if the government could access the CSLI that it had acquired without a warrant in that case, then the result would be that "[o]nly the few without cell phones could escape" what would amount to "tireless and absolute surveillance." *Id*. at 2218. *Carpenter* thus declined to extend the third-party doctrine to the CSLI at issue in that case and instead determined

that the defendant did have a reasonable expectation of privacy in the CSLI that he sought to suppress. *Id*. at 2219-20.

{¶ 27} However, the *Carpenter* court also stated the following regarding the limited application of its ruling:

> Our decision today is a narrow one. *We do not express a view on matters not before us: real-time CSLI* or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* [442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220] and *Miller* [425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71] or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not "embarrass the future." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300, 64 S.Ct. 950, 88 L.Ed. 1283 (1944).

(Emphasis added.) *Id*. at 2220. Accordingly, the Supreme Court has not addressed the narrow issue presented in the instant case: whether police action that causes an individual's cell phone to transmit its real-time location intrudes on any reasonable expectation of privacy.

{¶ 28} Using Snowden's cell phone number on the night of the shooting, Detective Daugherty requested that the phone service provider "ping" Snowden's cell phone in an

attempt to locate him. When an attempt was made to "ping" Snowden's cell phone, Detective Daugherty was informed that Snowden's cell phone had been turned off. When the cell phone was "pinged" the following day, it was discovered that the cell phone had been turned back on and was in the possession of Snowden's girlfriend. Snowden, however, was not present. Therefore, the information gathered by the police in the instant case amounted to "real-time CSLI," and in *Carpenter*, the U.S. Supreme Court expressly declined to discuss the application of the Fourth Amendment to such conduct by law enforcement.

{¶ 29} *Carpenter* specifically addressed the government's ability to utilize cell phone data without a warrant to ascertain a suspect's location and movement over a period of weeks, months, and years. In the instant case, Detective Daugherty pinged Snowden's phone twice, in real time, in an effort to ascertain his whereabouts on the night of the shooting and the following day.

{¶ 30} Here, we find that the trial court should have addressed the applicability of *Carpenter* to Snowden's case, and incorrectly declined to do so. We note that the State in its brief acknowledges that such an analysis should have been done as Snowden's case was still pending at the time that *Carpenter* was decided. *See Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), syllabus. The *Griffith* court held that new rules for the conduct of criminal prosecutions must be "applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id*. at 328; *see also State v. Thompson,* 161 Ohio App.3d 334, 2005-Ohio-2508, 830 N.E.2d 394, ¶ 21-25 (2d Dist.) (applying new criminal law retroactively to case pending on direct appeal).

{¶ 31} We conclude that *Carpenter* has retroactive applicability to Snowden's case. However, "the question of whether a constitutional right is retroactive is distinct from the question of whether an individual is entitled to a remedy from any constitutional violation." *See United States v. Leyva,* E.D. Mich. No. 16-cr-20723, 2018 WL 6167890 (Nov. 26, 2018) (stating that *Carpenter* is retroactive). As the Supreme Court explained in *Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011):

> Our retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available on direct review as a potential ground for relief. Retroactive application under *Griffith* lifts what would otherwise be a categorical bar to obtaining redress for the government's violation of a newly announced constitutional rule. Retroactive application does not, however, determine what "appropriate remedy" (if any) the defendant should obtain. Remedy is a separate, analytically distinct issue. As a result, the retroactive application of a new rule of substantive Fourth Amendment law raises the question whether a suppression remedy applies; it does not answer that question.

Id. at 243-244.

{¶ 32} As an initial matter, we reject the State's argument that *Carpenter* explicitly limited its holding to the collection of seven days or more of CSLI. In fact, the language used by the U.S. Supreme Court arguably suggests just the opposite in the following excerpt:

> * * * [W]e need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth

> Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.

Carpenter at 2272, fn 3.

{¶ 33} In this case, although the State's request for CSLI was limited to a two-day period, there is no rationale that such a request is not a "search." *See State v. Burke*, 11th Dist. Trumbull Nos. 2018-T-0032, 2018-T-0035, 2019-Ohio-1951, ¶ 31-32. Before compelling a wireless carrier to turn over a subscriber's CSLI, the State's obligation is a familiar one – obtain a warrant. This is logically true whether it is one day, two days, three days, or seven days or more of data obtained.

{¶ 34} We note that the State argues that even if the police were required to obtain a warrant prior to pinging Snowden's phone on the dates in question, their failure to do so was harmless because they were ultimately unable to locate him. As previously stated, the first ping of Snowden's phone revealed that it had been turned off. The second ping indicated that, although the phone had been turned back on, it was in the possession of Snowden's girlfriend, and he was not present. Thus, the State argues that the failure of the police to get a warrant was ultimately inconsequential, and therefore the evidence should not be suppressed. We should not be preoccupied with what the State learned, but rather the manner in which the government obtained information about Snowden's cell phone. Furthermore, the State's argument in this regard is undermined by the fact that, at trial, the State argued in its closing argument that Snowden's phone being turned off immediately after the shooting was indicative of his guilt insofar as he was trying to elude law enforcement. Thus, it is apparent that the trial court's refusal to

suppress the cell phone pings were not inconsequential as they were used by the State as evidence of Snowden's guilt at trial.

{¶ 35} Nevertheless, even though obtaining a CSLI without a warrant violates the Fourth Amendment, such evidence need not be suppressed if exigent circumstances exist, and/or the officers acted in good faith.

> The suppression of evidence " 'is not an automatic consequence of a Fourth Amendment violation.' " *State v. Hoffman*, 141 Ohio St.3d 428, 2014-Ohio-4795, * * * 25 N.E.3d 993, [¶ 24] quoting *Herring v. United States*, 555 U.S. 135, 137, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). "The exclusionary rule is a judicially created remedy for Fourth Amendment violations. The question whether the evidence seized in violation of the Fourth Amendment should be excluded is a separate question from whether the Fourth Amendment was violated." *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, * * * 46 N.E.3d 638, [¶ 92] citing *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) and *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

Burke at ¶ 29.

{¶ 36} The *Carpenter* court indicates that certain case-specific exceptions may support a warrantless search of cell-site records under certain circumstances, including "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at 2222, quoting *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865

(2011), quoting *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

{¶ 37} In the instant case, Snowden shot the victim in the presence of multiple witnesses. An important factor in determining whether exigent circumstances exist is the gravity of the underlying offense. *Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). Upon review, we find that an exigency existed. *State v. Johnson*, 187 Ohio App.3d 322, 2010-Ohio-1790, 931 N.E.2d 1162 (2d Dist.) ("[g]enerally, the exigent-circumstances exception to the Fourth Amendment's warrant requirement can apply when the delay associated with obtaining a warrant would result in endangering police officers or other individuals, or would result in concealment or destruction of evidence"). Snowden was identified as the perpetrator, fled the scene, and was armed. Furthermore, Snowden had knowledge that the eyewitnesses observed him commit the homicide, and therefore could implicate him. Thus, exigent circumstances took the police conduct herein outside of the warrant requirement.

{¶ 38} Furthermore, the good faith exception to the warrant requirement is applicable. At the time the police obtained Snowden's CSLI phone records, the police conduct was lawful under both federal and state law in this jurisdiction. An officer who conducts a search in reliance on binding appellate precedent does no more than " 'ac[t] as a reasonable officer would and should act' " under the circumstances. *United States v. Leon*, 468 U.S. 897, 920, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), quoting *Stone v. Powell*, 428 U.S. 465, 539-540, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Therefore, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Davis*, 564 U.S. 229, 241, 131 S.Ct.

2419, 180 L.Ed.2d 285.

{¶ 39} The good-faith exception to the exclusionary rule provides that evidence will not be suppressed "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful or when their conduct involves only simple, 'isolated' negligence." *Id*. at 238. "To trigger the exclusionary rule," the U.S. Supreme Court has said, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States*, 555 U.S. 135, 144, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). Accordingly, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Davis* at 241.

{¶ 40} As was the case in *Burke*, at the time of the search of Snowden's CSLI, *Carpenter* had not yet been decided by the U.S. Supreme Court. The Sixth Circuit's precedent was that individuals "have no such expectation [of privacy] in the locational information" obtained from a wireless carrier. *United States v. Carpenter*, 819 F.3d 880, 888 (6th Cir.2016). According to the Sixth Circuit, obtaining such information was not considered a "search" under the Fourth Amendment. *Id*. at 890. *See also State v. Taylor*, 2d Dist. Montgomery No. 25764, 2014-Ohio-2550, ¶ 7 (finding that appellant had no reasonable expectation of privacy in the pings emitted by the cell phone in his possession; "[t]herefore, no search warrant was required regardless of whether exigent circumstances existed").

{¶ 41} Upon review, we therefore conclude that the detectives who obtained Snowden's CSLI from his service provider "did so in compliance with binding precedent and with an objectively reasonable good-faith belief that their actions were lawful." *Burke*

at ¶ 32.[1] Thus, applying *Carpenter* retroactively leads us to conclude that Snowden's Fourth Amendment rights were violated by the failure to obtain a warrant, but the trial court was not required to exclude the evidence because the presence of exigent circumstances obviated the warrant requirement and the good-faith exception applied. Therefore, the trial court did not err when it overruled Snowden's motion to suppress.

{¶ 42} Snowden's first assignment of error is overruled.

{¶ 43} Snowden's second assignment of error is as follows:

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SEVER PURSUANT TO CRIMINAL RULE 14.

{¶ 44} In his second assignment, Snowden argues that the trial court erred when it overruled his motion to sever the trial of his "B Indictment" for bribery from the trial for the offenses in his "A Indictment" that were directly related to the shooting of Sarver. As previously stated, the "B Indictment" contained one count of bribery stemming from Snowden's offer to pay D.E. $2,500 to change his testimony.

{¶ 45} Crim.R. 8(A) provides as follows:

Joinder of offenses. Two or more offenses may be charged in the same

---

[1] The overwhelming majority of courts to have considered the issue before *Carpenter* have applied the good faith exception and allowed the use of CSLI obtained without a warrant. *See, e.g., United States v. Curtis*, 901 F.3d 846 (7th Cir. 2018); *United States v. Chavez*, 894 F.3d 593 (4th Cir. 2018); *United States v. Joyner*, 899 F.3d 1199 (11th Cir. 2018); *United States v. Chambers*, 2018 WL 4523607 (2d Cir. Sept. 21, 2018) (unpublished); *Leyva*, E.D. Mich. No. 16-cr-20723, 2018 WL 6167890; *United States v. Shaw*, E.D. Ky. 5:17-26-KKC, 2018 WL 3721363 (Aug. 3, 2018); *Burke*, 11th Dist. Trumbull Nos. 2018-T-0032, 2018-T-0035, 2019-Ohio-1951. We acknowledge, however, that the Southern District of Texas in *United States v. Beverly*, declined to apply the good faith exception to CSLI obtained before *Carpenter*. *United States v. Beverly*, S.D. Tex. H:16-215-1, 2018 WL 5297817 (Oct. 25, 2018). *Beverly* involved an unconstitutional statute, not binding judicial precedent as is the case here.

> indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

{¶ 46} "The law favors joinder to prevent successive trials, to minimize the possibility of incongruous results in successive trials before different juries, to conserve judicial resources, and to diminish the inconvenience to witnesses." *State v. Goodner*, 195 Ohio App.3d 636, 2011-Ohio-5018, 961 N.E.2d 254, ¶ 39 (2d Dist.), citing *State v. Schaim*, 65 Ohio St.3d 51, 58, 600 N.E.2d 661 (1992).

{¶ 47} Crim.R. 14 provides:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

{¶ 48} Even if offenses are properly joined pursuant to Crim.R. 8(A), a defendant may move to sever the charges pursuant to Crim.R. 14. In order to affirmatively show

that his rights have been prejudiced by the joinder, the defendant must furnish the trial court with information sufficient to allow the court to weigh the considerations favoring joinder against the defendant's right to a fair trial; to obtain reversal on appeal, the defendant must demonstrate that the trial court abused its discretion in refusing to separate the charges for trial. *Goodner* at ¶ 42. Thus, we review the trial court's decision on severance under an abuse of discretion standard. *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990).

{¶ 49} A defendant normally cannot establish prejudice, however, where either (1) the evidence of each of the crimes joined at trial is simple and direct or (2) the State could have introduced evidence of one offense in a separate trial of the other offense had severance been granted. *State v. Ward*, 2d Dist. Montgomery No. 26773, 2016-Ohio-5354, ¶ 16. If the evidence of other crimes would be admissible at separate trials, any "prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials," and a court need not inquire further. *Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992), citing *Drew v. United States*, 331 F.2d 90 (D.C. Cir.1964).

{¶ 50} Initially, we note that evidence that tends to demonstrate the attempted bribery of a witness by a defendant is admissible against that defendant since such an attempt is an admission of guilt. *See State v. Hunt*, 8th Dist. Cuyahoga No. 84528, 2005-Ohio-1871, at ¶ 8. Accordingly, had the trial court granted Snowden's motion to sever, his phone call to D.E. from the jail offering $2,500 for D.E. to change his testimony would have been admissible to establish Snowden's consciousness of guilt regarding his role in the murder of Sarver. If the charges had been severed, the State would necessarily have

called several of the same witnesses from the trial on the underlying charges to prove motive and interest in connection with the bribery charges, which would have wasted judicial resources and subjected the witnesses to a needless second turn on the stand. Thus, we conclude that since the evidence of Snowden's attempt to bribe D.E. would have been admissible at Snowden's murder trial, the trial court did not err when it overruled his motion to sever.

{¶ 51} Snowden's second assignment of error is overruled.

{¶ 52} Snowden's third assignment of error is as follows:

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN VARIOUS EVIDENTIARY RULINGS.

{¶ 53} In his third assignment, Snowden argues that the trial court made several prejudicial evidentiary rulings which require that his convictions be reversed and that he be granted a new trial.

{¶ 54} Relevant evidence is generally admissible whereas irrelevant evidence is not. Evid.R. 402. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 402; Evid.R. 403(A).

{¶ 55} Trial courts have discretion over the admission or exclusion of evidence, and we review the court's decision for abuse of discretion. *State v. Dyer*, 2017-Ohio-8758, 100 N.E.3d 993, ¶ 24 (2d Dist.). "A trial court abuses its discretion when it makes a

decision that is unreasonable, unconscionable, or arbitrary. An abuse of discretion includes a situation in which a trial court did not engage in a 'sound reasoning process.' Abuse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

Theodora Watson's Testimony

{¶ 56} The first instance of allegedly prejudicial testimony admitted into evidence over objection occurred when, during direct examination, the prosecutor asked Watson if she had ever changed her story regarding the events surrounding Sarver's shooting on the night of June 6, 2016. The following exchange occurred regarding a recorded conversation between Watson and Snowden on November 30, 2017, when Snowden was in jail:

> The State: Ma'am, do you remember back in November of 2017 testifying in another hearing regarding this matter?
>
> Watson: Yes.
>
> Q: And the phone call I'm about to play for you, was that after you received this call from Mr. Snowden?
>
> A: Yes.
>
> (State's Exhibit 29 marked for identification)
>
> Q: Okay. Judge, permission?
>
> (Audio played at 2:58 p.m., ending at 3:00 p.m.)
>
> The State: I want to just stop you there. Was that – do you recognize that voice who answered it?

Watson: Yes.

Q: Who was that?

A: My son, Munchie [Derrick Watson].

Q: Munchie. Okay. So your son, actually, answered the phone call, and then did he give the phone to you?

A: Yes.

Q: Okay.

(Audio played at 3:00 p.m., ending at 3:01 p.m.)

Q: Okay. Ma'am, I want to ask you a couple [of] questions. If you could help – *what was your understanding of why DeeDot, Mr. Snowden, was calling you?*

A: *So I could change my story.*

* * *

Q: *Is that how you took that?*

A: *Yes.*

Q: *Have you ever changed your story in this?*

A: *No.*

Defense Counsel: Objection.

The State: Have you ever identified anyone else as the shooter, besides Mr. Snowden?

Watson: No, sir.

(Emphasis added.) Tr. p. 151-153.

{¶ 57} In a sidebar prior to the above exchange, the trial court overruled a

continuing objection made by defense counsel to the State playing the recorded conversation between Watson and Snowden. During the above exchange, Watson was simply explaining how she interpreted the phone call she received from Snowden. Based upon the conversation, Watson testified that she believed that Snowden wanted her to change her story regarding the shooting. The State's next question to Watson with respect to whether she had ever changed her story was a clarification from Watson regarding Snowden's improper and unsuccessful attempt to influence her testimony. Furthermore, after the objection from defense counsel, the State immediately asked Watson whether she had ever identified anyone other than Snowden as the shooter, to which she replied in the negative.

{¶ 58} Even if the inquiry made by the State regarding whether Watson ever changed her story were improper, we would not reverse Snowden's conviction on this basis because any error was harmless. Crim.R. 52(A) instructs us to disregard "[a]ny error, defect, irregularity, or variance which does not affect substantial rights." *See also* Evid.R. 103(A) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected * * *."). This rule is premised on the idea that the U.S. Constitution guarantees an accused the right to a trial free only from prejudicial error, which is not necessarily a trial free from all error. *See United States v. Hasting*, 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

{¶ 59} Snowden next contends that the trial court erred in allowing Watson to testify at length regarding the $20 bill Sarver handed to her before he was shot. During Watson's direct examination, the following exchange occurred:

The State: Ma'am, the $20 that Mr. Sarver gave to you, what did you do

with that?

Watson: It's in my purse.

Q: You still have it?

A: Yes, I do.

Q: What do you plan on doing with it?

A: Keeping it.

Q: Why?

Defense Counsel: Objection, Your Honor.

Watson: Because –

The Court: Approach.

(At sidebar)

Defense Counsel: Your Honor, I object for relevancy. This is strictly just to invoke sympathy for Mr. Sarver. There's no – the $20 has no other relevance. She's explained why it had been, and that's fine. Now they intend to offer it into evidence; and I would argue it's irrelevant and just meant to invoke sympathy for Mr. Sarver which isn't, I don't think, a proper basis at this point.

The State: My response would be that the $20 testified to that that was an item given to Ms. Watson on the night of the incident. It shows that she has a memory of things that happened. It is also evidence that Mr. Sarver was a very good, close personal friend and that she would have no need, then – I think, ultimately, what the argument's going to be, to make up a story as to who killed him.

Defense Counsel: I would also point out during cross-examination, for what it's worth, her statement at the scene – the only mention of $20 is in her written statement, is that [Snowden] had approached Mr. Sarver, mad, about $20 the Mr. Sarver, apparently, owed [Snowden]. So it's already in contradiction to what she has testified here to today, which will be gone into on cross-examination. But I think – she's testified to where the $20 came from, she's testified he's someone who has known her for 15 – she had known him for 15 years.

The Court: What's the contradiction?

Defense Counsel: She says Mr. Sarver gave her $20. The written statement at the time that she gave – the other statement she gives to the police is that the whole argument started over [Snowden] approaching Mr. Sarver while he was talking to Ms. Watson, that [Snowden] was mad over $20 * * * that Sarver owed [Snowden]. But again, I just don't see how this goes to – and she testified where it came from, she's testified it's (indiscernible).

The Court: Well, is this going to be an issue about the $20, or –

Defense Counsel: It's just – I'm going to use it to impeach her, as far as what she said; but I'm not going to go into who – where the $20 came from or who has the $20. I just – that's why I don't (indiscernible).

The Court: Well –

Defense Counsel: -- the fact that she kept the $20.

The Court – we're (indiscernible).

The State: That's why (simultaneous speaking).

Defense Counsel: But she's testified she kept it. I don't see why she kept it is relevant. They've gotten (indiscernible).

The Court: I'm going to allow it.

(End sidebar)

The State: Ma'am, I just asked you what – why you kept the $20 bill that Mr. Sarver gave you. *Why do you still have it*?

Watson: *I'll keep it forever*.

Q: *You will keep it forever*.

A: *Until I die.*

(Emphasis added.) Tr. p. 154-157.

{¶ 60} Here, we find that the trial court erred when it allowed Watson to testify, over objection, regarding the reason she kept the $20 given to her by Sarver on the night of the shooting. The State's question regarding retention of the $20 was not relevant to the disputed factual issues and evoked an emotional response, not related to Snowden's guilt or innocence. Relevant testimonial evidence tends to prove (or disprove) a material element of an offense. *State v. Harris,* 2d Dist. Montgomery No. 22992, 2010-Ohio-498, ¶ 20; *State v. Gardner*, 59 Ohio St.2d 14, 20, 391 N.E.2d 337 (1979); *see also* Evid.R. 401 ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). We do not see how this evidence tended to prove that Snowden was guilty. However, we find the trial court's error in this regard to be harmless. The admission of this evidence did not materially contribute to

Snowden's convictions because we find it highly unlikely that the jury would have acquitted Snowden in its absence. The prosecutor presented other evidence, independent of the irrelevant testimony regarding the $20 Sarver gave Watson, on which the jury could have based its verdicts. *See Harris* at ¶ 20.

{¶ 61} Lastly, Snowden argues that the trial court erred when it sustained an objection from the State regarding defense counsel's questioning of Watson on cross-examination about the 911 call during the following exchange:

(Audio [911 call] played * * *)

Defense Counsel: And again, you don't remember who it was with you?

Watson: Just my grandkids was there.

(Audio played * * *)

Q: "They" being just your grandsons?

A: Yes.

(Audio played * * *)

Q: Who was putting pressure on it?

A: I don't know.

Q: One of your son – grandsons?

A: No, it wasn't my son.

Q: One of your grandsons?

A: I don't know.

(Audio played * * *)

Q: "Well, what. Well, what," whose voice is that?

A: I don't know.

Q: But you just said it was just – was that a man's voice?

A: I don't know.

Q: Could that have been a kid's voice? Want to listen to it again?

The State: Objection.

The Court: Sustained.

Defense Counsel: Okay. You heard that voice?

Watson: Yes.

Q: Is that man's voice?

A: I don't know.

Q: Are you claiming that could be one of your grandsons' voices?

A: It could have been the oldest.

The State: Objection.

Defense Counsel: Your Honor –

The Court: Okay. Let's move on.

Defense Counsel: Okay.

(Tr. p. 178-179.)

{¶ 62} In our view, it clear from the record that defense counsel asked Watson multiple times whether a male voice heard on the 911 recording could have been one of her grandsons. Watson indicated multiple times that she did not know whose voice was on the recording. The question from defense counsel had been asked and answered, and the trial court did not err when it sustained the State's objection and asked defense counsel to move on with his cross-examination. Additionally, the trial court did not "cut off a relevant line of inquiry" when it sustained the State's objection. In fact, the record

establishes that defense counsel continued questioning Watson regarding the voices that could be heard on the recording after the objection had been sustained.

Bribery Evidence

{¶ 63} Snowden also argues that the trial court erred in admitting the recording of his jail phone calls to Watson and D.E. in which he attempted to influence their testimony; in D.E.'s case, Snowden offered him $2,500 to change his testimony. While Snowden concedes that the recordings of the phone calls were relevant, he argues that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The only prejudice Snowden argues that he suffered was that his first trial ended in a mistrial, but after the State offered the jail telephone call recordings into evidence, he was convicted on all counts. Snowden's argument is without merit.

{¶ 64} The trial court did not err when it admitted the jail phone call recordings into evidence. The probative value of the recordings was indisputable. With respect to the bribery charge, Snowden can be heard offering D.E. $2,500 to change his testimony. The call with D.E. contained the material elements of bribery, which the State had the burden of proving at trial. As previously stated, both phone calls showed a consciousness of guilt on Snowden's part by trying to influence Watson's and D.E.'s testimony. Unfavorable evidence is not equivalent to unfairly prejudicial evidence. *See State v. Geasley*, 85 Ohio App.3d 360, 373, 619 N.E.2d 1086 (9th Dist.1993). Unfairly prejudicial evidence is that which might result in an improper basis for a jury decision. *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001); *State v. Broadnax*, 2d Dist. Montgomery No. 18169, 2001 WL 127779 (Feb. 16, 2001). In the instant case, we conclude that the jail phone call recordings were unfavorable evidence

which were probative of Snowden's guilt for the bribery charge, as well as the shooting death of Sarver. Accordingly, the trial court did not err when it admitted the recordings.

{¶ 65} Snowden's third assignment of error is overruled.

{¶ 66} Snowden's fourth assignment of error is as follows:

DEFENDANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 67} In his fourth assignment, Snowden argues that his convictions were against the manifest weight of the evidence.

{¶ 68} "The manifest-weight-of-the-evidence standard of appellate review set forth in *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), applies in both criminal and civil cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-23." *Mathews v. Mathews*, 2d Dist. Clark No. 2012-CA-79, 2013-Ohio-2471, ¶ 9.

{¶ 69} This court has stated that "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." (Citations omitted). *State v. Jones*, 2d Dist. Montgomery No. 25724, 2014-Ohio-2309, ¶ 8. "When evaluating whether a [judgment] 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.' " *Id*., quoting *Thompkins* at 387.

{¶ 70} 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). However, we extend less deference in weighing competing inferences suggested by the evidence. *Id*. The fact that the evidence is subject to differing interpretations does not render the judgment against the manifest weight of the evidence. *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 14. A judgment should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 71} As previously stated, the evidence adduced at trial established that at approximately 11:00 p.m. on June 6, 2016, Snowden shot and killed Sarver after the two men got into a brief altercation while standing next to Watson's car. Watson, D.S., and D.E., who were sitting inside the vehicle, each testified that Snowden fired a single shot, striking Sarver in the abdomen. Watson and D.S. testified that because it was dark, they never saw the handgun with which Snowden shot Sarver. D.E., however, testified that from his vantage point inside the vehicle, he was able to see the handgun in Snowden's hand when he shot Sarver.

{¶ 72} Furthermore, in late November 2017, D.E., who had testified at trial, received a phone call from Snowden, who was in jail. During the conversation, Snowden offered D.E. $2,500 to give testimony favorable to Snowden at an upcoming hearing. On November 30, 2017, Snowden also called Watson from the jail and asked her to change her story regarding her recollection of the events surrounding Sarver's shooting. As previously stated, evidence that tends to demonstrate the attempted bribery of a witness

by a defendant is admissible against that defendant since such an attempt is an admission of guilt. *See Hunt*, 8th Dist. Cuyahoga No. 84528, 2005-Ohio-1871, at ¶ 8.

{¶ 73} Thus, having reviewed the record, we find no merit in Snowden's manifest weight challenge. It is well settled that evaluating witness credibility is primarily for the trier of fact. *State v. Benton*, 2d Dist. Miami No. 2010-CA-27, 2012-Ohio-4080, ¶ 7. A trier of fact does not lose its way and create a manifest miscarriage of justice if its resolution of conflicting testimony is reasonable. *Id*. Here, the jury quite reasonably credited the State's evidence, which established that Snowden was guilty of the offenses for which he was convicted. Accordingly, the jury did not lose its way and create a manifest miscarriage of justice in reaching guilty verdicts for the charged offenses.

{¶ 74} Snowden's fourth assignment of error is overruled.

{¶ 75} Snowden's fifth assignment of error is as follows:

> THE TRIAL COURT ERRED BY NOT MAKING THE REQUISITE FINDINGS FOR CONSECUTIVE SENTENCES PURSUANT TO R.C. 2929.14(C)(4).

{¶ 76} In his fifth assignment, Snowden argues that the trial court failed to make the requisite findings pursuant to R.C. 2929.14(C)(4) before imposing consecutive sentences.

{¶ 77} In general, it is presumed that prison terms will be served concurrently. R.C. 2929.41(A); *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 23 ("judicial fact-finding is once again required to overcome the statutory presumption in favor of concurrent sentences"). However, R.C. 2929.14(C)(4) permits a trial court to impose consecutive sentences if it finds that (1) consecutive sentencing is necessary to

protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) any of the following applies:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 78} The trial court must make the statutory findings required for consecutive sentences at the sentencing hearing and incorporate those findings into its sentencing journal entry. *Bonnell* at syllabus. To make the requisite "findings" under the statute, " 'the [trial] court must note that it engaged in the analysis "and that it has considered" the statutory criteria and specifie[d] which of the given bases warrants its decision.' " *Id*. at ¶ 26, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999). A trial court need not give a "talismanic incantation of the words of the statute" when imposing consecutive sentences, "provided that the necessary findings can be found in

the record and are incorporated in the sentencing entry." *Id*. at ¶ 37; *see also State v. Thomas*, 8th Dist. Cuyahoga No. 102976, 2016-Ohio-1221, ¶ 16 ("the trial court's failure to employ the exact wording of the statute does not mean that the appropriate analysis is not otherwise reflected in the transcript or that the necessary finding has not been satisfied").

{¶ 79} Initially, we note that the trial court incorporated the requisite findings for the imposition of consecutive sentences into Snowden's judgment entry pursuant to R.C. 2929.14(C)(4). The State concedes, however, that the trial court failed to make the requisite findings for imposing consecutive sentences at Snowden's sentencing hearing. At Snowden's sentencing hearing, the trial court stated the following with respect to the imposition of consecutive sentences:

> The State: And I believe the Court needs to make the consecutive findings on the record for those sentences for Count I, and again the B indictment, based on its additional three years to run consecutive.
>
> The Court: Well, the Court – thank you. *The Court finds that consecutive sentences are necessary to punish the Defendant for the activities in which he has engaged, particularly with regard to the bribery which was consecutive – the Court finds that is the worst form of that offense and consecutive sentencing is necessary then to punish the Defendant for that.*

(Emphasis added.)

{¶ 80} Although the trial court explicitly states that consecutive sentences were necessary to punish Snowden, the trial court did not find that consecutive sentences were not disproportionate to the seriousness of the offender's conduct and to the danger the

offender posed to the public. Additionally, the trial court's statement does not contain any of the requisite findings set forth in R.C. 2929.14(C)(4)(a)-(c). Accordingly, the trial court's findings at the sentencing hearing were not consistent with the judgment entry. Therefore, the case will be remanded to the trial court for it to orally make the additional findings to support the imposition of consecutive sentences.

{¶ 81} Snowden's fifth assignment of error is sustained.

{¶ 82} Snowden's sixth assignment of error is as follows:

> THE TRIAL COURT ERRED WHEN IT ORDERED APPELLANT TO PAY COURT COSTS, RESTITUTION, AND EXTRADITION COSTS EVEN THOUGH HE HAS NO PRESENT OR FUTURE ABILITY TO PAY SUCH A FINANCIAL SANCTION.

{¶ 83} In his sixth assignment, Snowden contends that the trial court erred when it ordered him to pay court costs, restitution, and extradition costs because he has no present or future ability to pay.

Restitution

{¶ 84} R.C. 2929.18(A)(1) allows a trial court to order, as a financial sanction, an amount of restitution to be paid by an offender to his victim "based on the victim's economic loss. * * * If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to

impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount."

{¶ 85} As this Court has noted:

> A trial court abuses its discretion when it orders restitution that does not bear a reasonable relationship to the actual financial loss suffered. [*State v. Johnson*, 2d Dist. Montgomery No. 24288, 2012-Ohio-1230] at ¶ 11. Therefore, we generally review a trial court's order of restitution under an abuse of discretion standard; an abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Id*.; *State v. Naylor*, 2d Dist. Montgomery No. 24098, 2011-Ohio-960, ¶ 22.

State v. Wilson, 2d Dist. Montgomery No. 26488, 2015-Ohio-3167, ¶ 11.

{¶ 86} This Court has further noted:

> An order of restitution must be supported by competent, credible evidence in the record. It is well settled that there must be a due process ascertainment that the amount of restitution bears a reasonable relationship to the loss suffered. A sentence of restitution must be limited to the actual economic loss caused by the illegal conduct for which the defendant was convicted. Implicit in this principle is that the amount claimed must be established to a reasonable degree of certainty before restitution can be ordered.

(Internal citations omitted.) *State v. MacQuarrie*, 2d Dist. Montgomery No. 22763, 2009-Ohio-2182, ¶ 7, quoting *State v. Collins*, 2d Dist. Montgomery No. 21510, 2007-Ohio-5365, ¶ 6.

{¶ 87} The amount of restitution should, if necessary, be substantiated through documentary or testimonial evidence. *State v. Summers*, 2d Dist. Montgomery No. 21465, 2006-Ohio-3199, ¶ 44. The trial court is authorized to base the amount of restitution on an amount recommended by the victim. *State v. Pillow*, 2d Dist. Greene No. 07CA095, 2008-Ohio-6046, ¶ 146; R.C. 2929.18(A)(1). *See also State v. Naylor*, 2d Dist. Montgomery No. 24098, 2011-Ohio-960, ¶ 21.

{¶ 88} A defendant who does not dispute an amount of restitution, request a hearing, or otherwise object waives all but plain error in regards to the order of restitution. *State v. Woods*, 2d Dist. Clark No. 2015-CA-75, 2016-Ohio-1103, ¶ 12. In the instant case, Snowden did not object to the trial court's restitution order of $4,569.75 to be paid to Sarver's relative, Tiffany McGraw, for his funeral expenses. Snowden only requested that, in light of the restitution order, the trial court waive court costs. The trial court declined to waive court costs.

{¶ 89} Upon review, we conclude that the trial court did not err when it ordered Snowden to pay restitution in the amount of $4,569.75 for Sarver's funeral expenses. Before ordering restitution at Snowden's sentencing hearing, the trial court specifically noted that it reviewed and considered Snowden's pre-sentence investigation report (PSI). Snowden's PSI indicated that he was 36 years old and in good physical health at the time of his sentencing hearing. The PSI also indicated that Snowden had completed his education through tenth grade at Trotwood High School. Snowden reported that prior to the offense, he performed "side-work" laying carpet with another individual. Snowden also indicated that he worked part-time performing lawn care work with his uncle. Snowden had been previously employed with TLC Temporary Service, One Source

Cleaning, and the Donut Palace. Finally, Snowden's PSI indicated that he was not on any type of public assistance. Simply put, Snowden was a relatively young, able-bodied man with a documented work history that continued up to when he committed the instant offenses.

Court Costs

{¶ 90} Snowden contends that the trial court abused its discretion by overruling his motion to waive the imposition of court costs. R.C. 2947.23(A)(1)(a) states that "[i]n all criminal cases, * * *, the judge or magistrate *shall* include in the sentence the costs of prosecution, * * *, and render a judgment against the defendant for such costs." (Emphasis added.) In *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8, the Ohio Supreme Court emphasized that R.C. 2947.23 "does not prohibit a court from assessing costs against an indigent defendant; rather it *requires* a court to assess costs against all convicted defendants." (Emphasis sic.) Regardless of Snowden's present or future ability to pay, the trial court cannot have erred by following an unequivocal statutory mandate. *See State v. Brown*, 2017-Ohio-9225, 103 N.E.3d 305, ¶ 30 (2d Dist.).

Extradition Costs

{¶ 91} Lastly, Snowden argues that the trial court abused its discretion when it overruled his motion to waive the extradition costs associated with transporting him from Arizona to Ohio for trial in the amount of $1,715.27.

{¶ 92} R.C. 2947.23(A)(1), which governs the trial court's authority to impose costs on a defendant convicted of a felony, provides, "[i]n all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of

prosecution * * * and render a judgment against the defendant for such costs." The phrase "costs of prosecution" has not been statutorily defined. *City of Middleburg Heights v. Quinones*, 120 Ohio St.3d 534, 2008-Ohio-6811, 900 N.E.2d 1005, ¶ 8. The term "costs," however, has been defined as "the statutory fees to which officers, witnesses, jurors, and others are entitled for their services in an action or prosecution, and which the statutes authorize to be taxed and included in the judgment or sentence." *Id*., citing *State ex rel. Franklin Cty. Commrs.v. Guilbert*, 77 Ohio St. 333, 338, 83 N.E. 80 (1907). "The expenses which may be taxed as costs in a criminal case are those directly related to the court proceedings and are identified by a specific statutory authorization." *Middleburg Heights* at ¶ 8, citing *State v. Christy*, 3d Dist. Wyandot No. 16-04-04, 2004-Ohio-6963.

{¶ 93} R.C. 2949.14, which authorizes the trial court to impose the cost of extradition on a felony defendant, provides:

> Upon conviction of a non-indigent person for a felony, the clerk of the court of common pleas shall make and certify under the clerk's hand and seal of the court, a complete itemized bill of the costs made in such prosecution, including the sum paid by the board of county commissioners, certified by the county auditor, for the arrest and return of the person on the requisition of the governor, or on the request of the governor to the president of the United States, or on the return of the fugitive by a designated agent pursuant to a waiver of extradition except in cases of parole violation. The clerk shall attempt to collect the cost from the person convicted.

{¶ 94} Therefore, under R.C. 2947.23(A)(1) and R.C. 2949.14, the trial court may impose the cost of extradition upon a non-indigent felony defendant if certain criteria are

met. *State v. Jones*, 2d Dist. Montgomery Nos. 25315, 25316, 2013-Ohio-1925, ¶ 15. In Snowden's termination entry, the trial court stated as follows:

> Defendant is hereby ORDERED to pay extradition costs in the amount of $1,715.27 and Judgment is hereby GRANTED against Defendant for said extradition costs to be paid to the Montgomery County Prosecuting Attorney's Office through the Montgomery County Clerk of Courts.

{¶ 95} By ordering Snowden to pay the extradition costs to the prosecutor's office through the Montgomery County Clerk of Courts, the trial court complied with the statutory procedure set forth in R.C. 2949.14. *Jones* at ¶ 15. The trial court filed Snowden's termination entry on August 20, 2018. One day later, Snowden filed a hand-completed copy of Ohio Public Defender form 206R, which is the "Financial Disclosure/Affidavit of Indigency" form utilized for determining whether a defendant is entitled to appointment of counsel. Therein, Snowden averred that he was indigent and was "financially unable to retain private counsel without substantial hardship[.]" *State v. Davenport*, 2018-Ohio-688, 85 N.E.3d 443, ¶ 35 (2d Dist.). Significantly, he did not file his affidavit of indigency until *after* he was sentenced and extradition costs were imposed. At the sentencing hearing, defense counsel merely objected to the imposition of extradition costs, arguing that extradition costs were not recoverable costs and that Snowden already faced a significant burden by having to pay restitution and court costs. In light of the foregoing, we find the following: 1) extradition costs are recoverable; 2) the trial court followed the correct statutory procedure when it imposed extradition costs; and 3) Snowden's PSI established that he was young, able-bodied, and had a documented work history. Therefore, the trial court did not err in concluding that he had the ability to pay toward the costs of his

extradition.

{¶ 96} Snowden's sixth assignment of error is overruled.

{¶ 97} Snowden's seventh assignment of error is as follows:

> THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

{¶ 98} In his seventh assignment, Snowden argues that he received ineffective assistance when his trial counsel: 1) failed to "explore" a letter that was allegedly sent to the trial court by Watson's grandson, D.O.; 2) failed to call Derrick Watson and D.O. to testify at trial; 3) withdrew his objection to admission of the cell phone ping placing Snowden in Arizona; 4) failed to seek exclusion of "any reference to a cell phone being shut off deliberately" by Snowden.

> We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that,

> but for the errors, the result of the trial would have been different. *Id*. 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, 605 N.E.2d 70 (1992).

State v. Mitchell, 2d Dist. Montgomery No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 99} A defendant is not deprived of effective assistance of counsel when counsel chooses, for strategic reasons, not to pursue every possible trial tactic. *State v. Brown*, 38 Ohio St.3d 305, 319, 528 N.E.2d 523 (1988). The test for a claim of ineffective assistance of counsel is not whether counsel pursued every possible defense; the test is whether the defense chosen was objectively reasonable. *State v. Conley*, 2d Dist. Montgomery No. 26359, 2015-Ohio-2553, 43 N.E.3d 775, ¶ 56, citing *Strickland.* A reviewing court may not second-guess decisions of counsel which can be considered matters of trial strategy. *State v. Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985). Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available. *State v. Cook*, 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992).

{¶ 100} Snowden first argues that his counsel was ineffective for failing to "explore" a letter allegedly sent to the trial court by D.O. We note that the letter was attached by Snowden to his appellate brief as Exhibit L. Snowden, however, provides no documentation, such as an affidavit, to authenticate the letter, and he concedes that the letter was never made a part of the record by the trial court or the parties. Accordingly,

the letter, even assuming it is what it purports to be, is outside the record on appeal, and we will not consider it in regard to a claim alleging ineffective assistance. *See State v. Lehman*, 2d Dist. Champaign No. 2014-CA-17, 2015-Ohio-1979, ¶ 10 (it is "well-established that when a claim of ineffective assistance requires the presentation of evidence outside the record, the proper avenue for raising such a claim is through a petition for post-conviction relief rather than on direct appeal").

{¶ 101} Snowden next argues that defense counsel was ineffective for failing to call Derrick Watson and D.O. to testify at trial. Snowden, however, fails to articulate what, if any, relevant testimony either individual could have provided. Simply put, Snowden's argument that Derrick Watson and D.O. should have been called to testify rests upon "mere speculation." *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 119. "Such speculation is insufficient to establish ineffective assistance." *Id*., citing *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 217.

{¶ 102} Snowden also contends that his trial counsel was ineffective for withdrawing his objection to the cell phone pings which placed Snowden in Arizona and led to his capture and eventual extradition to Ohio. At the hearing on the motion to suppress, defense counsel stated that he was unable to establish that the cell phone used to locate Snowden actually belonged to Snowden. Furthermore, defense counsel asserted that he would be unable to establish that Snowden had standing to assert a violation of his constitutional rights. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' * * * A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any

of his Fourth Amendment rights infringed. * * * And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, * * * it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections." *Rakas v. Illinois*, 439 U.S. 128, 133-134, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Ostensibly, without standing, it would have been arguably futile to maintain an objection to the constitutionality of the cell phone pings used to locate Snowden in Arizona. Accordingly, defense counsel's decision to withdraw his objection to the cell phone pings placing Snowden in Arizona did not amount to ineffective assistance of counsel. Assuming arguendo that a possessory interest alone was sufficient, any deficiency by counsel did not create such prejudice as to have affected the outcome of the trial.

{¶ 103} Finally, Snowden argues that defense counsel should have sought to "exclude any reference to a cellphone being shut off deliberately" by Snowden. We note that no testimony was adduced at trial that Snowden "deliberately" turned off his cell phone. Detective Daugherty merely testified that when Snowden's cell phone was pinged on the night of the shooting, the service provider indicated that it had been turned off. Snowden argues that "key evidence went unchallenged" by defense counsel that Snowden's pinged cellphone "was in fact the same phone that only [Watson] described him as using the night of the shooting."

{¶ 104} While one inference that can be made in the instant case is that Snowden deliberately turned his cell phone off in order to evade capture after committing the shooting, none of the witnesses who testified at trial would have any personal knowledge of this event other than Snowden himself. Regardless, Snowden engages in speculation

regarding any additional evidence defense counsel could have adduced regarding the initial ping which revealed that his cell phone was turned off. Accordingly, defense counsel's actions in this regard did not constitute ineffective assistance.

{¶ 105} Snowden's seventh assignment of error is overruled.

{¶ 106} Snowden's eighth assignment of error is as follows:

> REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT DEPRIVED DEFENDANT-APPELLANT OF A FAIR TRIAL.

{¶ 107} In his eighth assignment, Snowden argues that he was deprived of a fair trial based upon alleged instances of prosecutorial misconduct wherein the State misrepresented facts and/or impermissibly vouched for the credibility of its witnesses.

{¶ 108} The sole issue before us is centered on alleged improper statements made by the State during closing arguments, and whether they constituted prosecutorial misconduct. The test for prosecutorial misconduct was established by the Supreme Court of Ohio in *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 119, as follows:

> The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected a substantial right of the accused. *State v. White*, 82 Ohio St.3d 16, 22, 693 N.E.2d 772 (1998). "The benchmark of the prosecutorial misconduct analysis is 'the fairness of the trial, not the culpability of the prosecutor.' " *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 99, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

{¶ 109} We have recognized that prosecutors are given wide latitude in their closing arguments to draw inferences from the testimony heard and the evidence presented, but prosecutors are not given complete and total freedom. *State v. Lillicrap*, 2d Dist. Montgomery No. 23958, 2011-Ohio-3505, ¶ 6. To determine whether a prosecutor's remarks to a jury were prejudicial, affecting substantial rights, a court must focus on the fairness of the trial, not the culpability of the prosecutor. *State v. Apanovitch*, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987). "In reviewing allegations of prosecutorial misconduct, we review the alleged wrongful conduct in the context of the entire trial," and if "it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced and his conviction will not be reversed." *State v. Underwood*, 2d Dist. Montgomery No. 24186, 2011-Ohio-5418, ¶ 21; *see also State v. Hall*, 2d Dist. Montgomery No. 25794, 2014-Ohio-2094, ¶ 19.

{¶ 110} We note that defense counsel failed to object to any of the alleged instances of prosecutorial misconduct argued by Snowden in the instant appeal. Thus, we must review this entire assignment under a plain-error analysis. Crim.R. 52(B) allows a reviewing court to consider errors committed at trial, upon which appellant did not object, only if such errors affected the substantial rights of the appellant. A reviewing court should use the utmost caution in taking notice of plain error and should do so only if it is clear that, but for the error, the result in the trial court would have been different. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus. Notice of plain error should be taken only in exceptional circumstances and only to prevent a manifest miscarriage of justice. *Id*. at paragraph three of the syllabus.

{¶ 111} The first occasion of alleged prosecutorial misconduct occurred when the prosecutor stated, "[D]o you honestly think that those boys would have the capacity to keep this lie, this conspiracy going for over two years without the real truth coming out? * * * I submit to you that those boys have been consistent." Tr. 429-430. Snowden argues that this is a mischaracterization of the evidence submitted at trial which established that the two brothers and Watson were very inconsistent in their individual versions of what they each witnessed during Sarver's shooting. During his own closing argument, Snowden remarked that the "only thing" that Watson, D.S., and D.E. agreed upon was that Snowden was the shooter. Tr. p. 404.

{¶ 112} Snowden then argued that the three accounts varied on many details, and he outlined the alleged inconsistencies for the jury. In response, the prosecutor stated the following in his rebuttal closing argument:

> And they're all going to agree in this case Mr. Sarver got shot, and they all agree who did it.
>
> * * *
>
> The Defense says that details matter, and they really do. We don't disagree with that. They want to portray three different – very different stories, but there really aren't when you think about it. The witnesses have been consistent with themselves and with each other. *And do you honestly think that those boys would have the capacity to keep this lie, this this conspiracy going for over two years without the real truth coming out?*
>
> I mean think about that. That's pretty hard to do. I mean the one thing about a lie is, it's kind of hard to keep track of your lies, but I submit to

> you those boys have been consistent. And what they told you on Monday is what they saw. They didn't ask to be put in this position. Okay? They didn't ask to watch their own cousin gun down a close personal family friend of theirs. You know, our witnesses, we don't to go down to the casting store in the agency and pick our witnesses. They come to us because of what they saw and what they heard.

(Emphasis added.) Tr. p. 429-430.

{¶ 113} In our view, the above statements by the prosecutor constituted a permissible response to defense counsel's statements in his closing. Ultimately, it was the province of the jury to decide if the testimony of Watson, D.S., and D.E. was consistent. The prosecutor's statements were not a mischaracterization of the evidence insofar as Watson, D.S., and D.E. all testified that they observed Snowden shoot Sarver. Accordingly, the prosecutor's statements in this regard did not amount to misconduct.

{¶ 114} Snowden next takes exception to the following statement made by the prosecutor during closing argument: "And the jail calls. You heard the call where the Defendant called [Watson]. You heard that was right after [Watson] testified in a major hearing in this case."

{¶ 115} Here, Snowden argues that the prosecutor's statements amounted to improperly vouching for the credibility of Watson. Upon review, we fail to see how the prosecutor's statements constituted misconduct. Rather, it is apparent that the prosecutor merely wanted to remind the jury that Snowden contacted Watson from the jail in an attempt to influence her testimony at the second trial, thereby establishing his consciousness of guilt for the shooting of Sarver.

{¶ 116} Lastly, Snowden argues that the following statements made by the prosecutor during his rebuttal closing argument were intentionally misleading to the jury and constituted misconduct:

> You know, it's very interesting Defense, in their closing, made reference to the fourth – or the third child, [D.O.]. You heard from the witnesses that can help you. Okay? I submit to you. But, you know, the Defense has subpoena power, too. I mean, they could've called [D.O.]. So the fact that [D.O.] didn't testify should be telling that there's nothing really to offer there. You heard from the witnesses that can help you. That's who we put forth.

{¶ 117} The prosecutor made the above statements in response to defense counsel's statement during his closing argument pointing out that, while Watson, D.S., and D.E. all testified that D.O. was present during the shooting, D.O. did not testify. Defense counsel referred to D.O.'s failure to testify as "interesting." A "comment that a witness other than the accused did not testify is not improper, * * * since the prosecution may comment upon the failure of the defense to offer evidence in support of its case." *State v. Clemons*, 82 Ohio St.3d 438, 452, 696 N.E.2d 1009 (1998). The prosecutor properly replied to defense counsel's intimation that the State's failure to offer the testimony of D.O. supported an inference that his testimony would have been favorable to Snowden by pointing out that Snowden could have offered D.O.'s testimony if it was, in fact, favorable to the defense. *State v. Croom*, 2d Dist. Montgomery No. 25094, 2013-Ohio-3377, ¶ 84. Thus, the prosecutor's statements in this regard did not amount to misconduct.

{¶ 118} Snowden's eighth assignment of error is overruled.

{¶ 119} Snowden's ninth and final assignment of error is as follows:

WHEN TAKEN TOGETHER, THE ERRORS CITED ABOVE CONSTITUTE CUMULATIVE ERROR SUCH THAT THE CONVICTIONS MUST BE REVERSED.

{¶ 120} Under the doctrine of cumulative error, "[s]eparately harmless errors may violate a defendant's right to a fair trial when the errors are considered together. * * * In order to find cumulative error, we first must find that multiple errors were committed at trial." *State v. Harris*, 2d Dist. Montgomery No. 19796, 2004-Ohio-3570, ¶ 40. "A conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus.

{¶ 121} While we found that the trial court's decision to allow Watson to testify regarding why she kept Sarver's $20 bill in her purse was error, we found said error to be harmless beyond a reasonable doubt. Standing alone, this harmless error cannot be the basis for reversal of Snowden's convictions. Notably, we did find a sentencing error in the trial court's failure to make the requisite findings for the imposition of consecutive sentences, as discussed in the fifth assignment of error. However, this error does not implicate the validity of Snowden's convictions for the charged offenses. We therefore find that Snowden has failed to establish cumulative error.

{¶ 122} Snowden's ninth assignment of error is overruled.

{¶ 123} In light of our disposition with respect to Snowden's fifth assignment of

error, the trial court's judgment is reversed with respect to the consecutive sentences, and this matter is remanded to the trial court for resentencing consistent with this opinion. In all other respects, the judgment of the trial court is affirmed.

. . . . . .

TUCKER, J., concurs:

{¶ 124} I concur in the majority opinion's resolution of each assignment of error, and, with one exception, I agree with the majority opinion's reasoning. The exception is in Snowden's first assignment of error relating to the trial court's decision to overrule the suppression motion. We do not need to – and, therefore, we should not – resolve whether Snowden had a reasonable expectation of privacy in the contested CSLI. Accordingly, without expressing a view on the issue, I do not join this portion of the majority's opinion.

. . . . . .

WELBAUM, P.J., concurs.

{¶ 125} I concur in J. Donovan's opinion and in Judge Tucker's concurring opinion.

Copies sent to:

Mathias H. Heck, Jr.
Andrew T. French
Matthew M. Suellentrop
Hon. Gregory F. Singer