[Cite as *State v. Johnson*, 2015-Ohio-3113.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 2014CA00189
MIKAL JAMARI JOHNSON	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No.2013CR1880(A)
JUDGMENT:	Affirmed in part; reversed in part and Remanded
DATE OF JUDGMENT ENTRY:	August 3, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY BY: KATHLEEN O. TATARSKY 110 Central Plaza South, Ste. 510 Canton, OH 44702-1413	AARON KOVALCHIK 808 Courtyard Centre 116 Cleveland Avenue N.W. Canton, OH 44702

Gwin, P.J.

{¶1} Appellant, Mikal Jamari Johnson ["Johnson"] appeals his convictions and sentences after a trial to a three-judge panel in the Stark County Court of Common Pleas on one count of Aggravated Murder, R.C. 2903.01(B) with a Death Penalty Specification, R.C. 2929.04(A)(7) and with Firearm Specification, RC 2941.145, one count of Aggravated Robbery, R.C. 2911.01(A)(1) and or (A)(3) with a Firearm Specification R.C. 2941.145, one count of Aggravated Burglary, R.C. 2911.11(A)(1) and/or (A)(2) with a Firearm Specification, R.C. 2941.145 and two counts of Aggravated Burglary R.C. 2911.11(A)(2).

Facts and Procedural History

{¶2} The charges in the case at bar arose from the home invasion aggravated burglary of Kim Eller on November 22, 2013, the home invasion aggravated burglary of Eugene Render on November 18, 2013, and the subsequent home invasion robbery and killing of Eugene Render on November 22, 2013. Johnson waived his right to a jury trial and the case went to trial before a three-judge panel selected pursuant to R.C. 2945.06.

NOVEMBER 18, 2013 - CANTON

{¶3} David Render testified that Eugene Render was his father. David Render stated that his father called him on November 18, 2013 to let him know that someone had tried to break in to his residence. The Canton police were called and Officer Michael Roberts responded and learned from Mr. Render that he heard a loud crash and someone kicking in his door. He yelled out and the intruders ran away.

{¶4} Roberts looked around the home and looked at the door. The doorframe had been splintered and pieces were lying on the floor. He made a police report.

{¶5} David Render stated that he did see damage to his father's home where the breezeway door was broken. David Render wanted his father to come stay with him. However, Mr. Render refused instead boarding up his door with two by fours.

NOVEMBER 22, 2013 - NAVARRE

{¶6} John Burns testified that his address was 266 Bender St. NE., Navarre, Ohio Lot Number 8. Burns testified that he was home the morning of November 22, 2013 when he observed a white vehicle that contained two black men. Burns testified that he saw the two black men walking around the trailer park and then saw them later run past his house.

{¶7} Kim Eller testified that she lives at 266 Bender St. NE. Lot Number 5, Navarre, Ohio. On November 22, 2013, two black men entered her trailer. Eller stated that one man held a gun to her and the other took her computer. Eller stated that of the two individuals that entered her home it was the short one that held the gun to her head while the taller skinnier individual went through the home.

{¶8} Sgt. Chris Hummel of the Navarre Police Department testified that he was on duty November 22, 2013 and he responded to a burglary call at 266 Bender Street. Sgt. Hummel testified that he observed the door had been broken in for that residence. However, Sergeant Hummel stated that his recollection of his report was that Eller told him that the skinnier individual held the gun to her head.

{¶9} Deanna Fisk testified that she was the girlfriend of Japheth Thomas and was familiar with Johnson. Fisk testified that on November 22, 2013 she went with

Thomas, Johnson and an unknown white male to a trailer park in Navarre to "hit a lick."[1] Fisk remembered seeing a BB gun and a pistol in the car while they were on their way to the trailer park. Fisk stated that once they arrived Thomas and Johnson got out of the vehicle with the BB gun and the pistol and within five minutes returned with a broken down laptop.

NOVEMBER 22, 2013 - CANTON

{¶10} David Render testified that he and his wife went to his father's residence on November 22, 2013 after his father had repeatedly not answered phone calls. Upon arriving, he observed the outside door was busted up, glass was knocked out of the screen door, and a door handle was bent. David Render then went into his father's residence where he found a camouflage gun laying on the floor and then ultimately found his father dead on the floor. David Render also observed a Glock on the kitchen table that had its slide closed and the clip was still in it.

{¶11} Three Canton City police patrol cars were dispatched to the home of Mr. Render on Montrose Avenue; Officer Joseph Bays was one of them. Bays went into the house and saw a rifle lying on the breezeway floor, a 9-millimeter Glock pistol on the kitchen table and a body lying on the kitchen floor. One of the medics had cleared the Glock. Officer Bays was instructed by Sgt. George to stand by a hat or a bandanna that was found north of the residence until someone came to collect it.

{¶12} Detective Victor George and agents from the Bureau of Criminal Investigation were called. There was definite evidence that Mr. Render as well as the home invaders fired a weapon.

[1] "Hit a Lick" is urban slang for going to rob someone.

{¶13} The body of Mr. Render was removed by the medics and taken to the hospital. He was pronounced dead at 6:55 pm. Dr. P.S.S. Murthy, the Stark County Coroner, performed an autopsy the next day. In an external examination, Murthy noted two gunshot wounds; one in the right chest and one in the right lower quadrant of his abdomen. The gunshot wound to the chest had an oval appearance and entered the body at a right angle. It perforated the lower lobe of the right lung causing an accumulation of blood and was fatal.

{¶14} The gunshot wound to the abdomen had a different appearance; it scraped the body before it entered. It appeared that Mr. Render was in a crouched position when that bullet entered his body. It entered the right lobe of the liver causing massive damage; it pulpified the liver and was fatal. Dr. Murthy found no stippling or soot meaning that the gun was not shot at close range.

{¶15} Dr. Murthy extracted two large caliber hollow point bullets from Mr. Render's body. They were turned over to Larry Hootman, a crime scene agent with the Attorney General's Bureau of Criminal Investigation.

{¶16} Michael Roberts, a firearms expert with BCI examined the bullet recovered from the body of Mr. Render and the cartridges from the scene. Roberts determined they were Remington brand .40-caliber hollow point bullets meant to cause more damage than full metal jacket bullets. They were all fired from the same firearm. The firearm was not recovered at the scene. However, Roberts opined that they were fired from an operable Smith and Wesson Sigma Series pistol.

{¶17} Jennifer LaCava, a forensic scientist with BCI, tested the blue bandana and hat recovered outside at the scene for DNA. Johnson's DNA was not conclusively

found on either of the items. However, the DNA of Japheth Thomas (JT), Johnson's co-defendant, was found on the hat and the bandana.

{¶18} The blood found on the door of Mr. Render's home was also tested for DNA. It was consistent with the blood of Japheth Thomas.

JAPHETH THOMAS (JT) IS SHOT AND GOES TO TIMKEN MERCY

{¶19} On Friday, November 22, 2013 about 9:00 pm, then Detective Robert Redleski responded to a "shooting casualty" call from Timken Mercy Medical Center. There, Redleski met Japheth Thomas (JT). JT told him he was shot in the left arm at Chips Apartments and gave him two names and phone numbers who could verify the account. Redleski went back to the police station to follow up and learned that JT was a suspect in the theft of a white Nissan crossover.

{¶20} Detective George was alerted to the "shooting casualty" of JT and knew that Mr. Render had fired some shots. He went out looking for JT and the United States Marshal's Task Force (Task Force) found him driving the stolen Nissan on Monday, November 25, 2013 with another male in the car. JT was arrested. A laptop computer was found in the Nissan. The laptop computer found in the white Nissan when JT was arrested was identified by Eller as the stolen computer.

{¶21} The police returned to JT's residence where they conducted a search and brought several persons down to police headquarters for interviews.

{¶22} The interviews conducted by George led to an additional suspect in the killing of Mr. Render - the appellant, Mikal Johnson.

JOHNSON CONFESSES TO THE KILLING AND OTHER BURGLARIES AND ROBBERY

{¶23} Johnson was picked up by the Task Force and brought to the Police Department for questioning. Johnson confessed to the burglary and robbery of Mr. Render. He also confessed to an aggravated robbery that occurred in the morning of November 22, 2013 in Navarre, Ohio. He also confessed to the break-in at the Render home on November 18, 2013.

{¶24} The interview was played for the three-judge panel. Johnson first denied that he participated in the home invasion at the Render house on November 22, 2014. However, after some prompting by Detective George, he admitted to his involvement, told George how the door was broken, how JT was shot and what occurred after the crimes. However, Johnson denied he was the shooter. He did not say JT did the shooting; only that he was not the shooter. He also identified Deanna Fisk and Derrick Wilson as persons he saw the day of the killing at JT's home.

JOHNSON TELLS WITNESSES, "I KILLED SOMEBODY." "I THINK I KILLED HIM."

{¶25} Deanna Fisk, age 15, was the girlfriend of JT and staying at his house in November 2013. She often hung out with JT and Johnson. Indeed, she went with them to "hit a lick" in Navarre on November 22, 2013 in the stolen white Nissan. A laptop computer was stolen. After the Navarre burglary, they all returned to the home of JT and were "chilling."

{¶26} Fisk heard JT and Johnson discussing hitting another lick. They talked about getting guns including a "sniper." The pair left and Fisk remained at the home.

{¶27} That evening, Johnson and JT returned to the home running. Johnson was first; JT followed. JT showed her his arm where he was shot. Johnson was upset. Fisk testified,

> **A.** Um, Mikal came running through the back door saying he killed somebody, and I asked him where's JT at, where's JT at, and JT runs in like two, I don't know, a couple minutes back behind him and JT was shot.
>
> **Q**. Okay.
>
> So after they leave at some point you say Mikal [Johnson] comes running in?
>
> **A**. Um-hum.
>
> **Q.** And he says what?
>
> **A.** That he killed somebody.
>
> **Q.** Okay.
>
> Was he - - did he appear to be upset?
>
> **A.** Yeah, he was running back and forth real fast taking off his gloves and his hat and his shoes and stuff saying he killed somebody.

3T. at 18.

{¶28} Derrick Wilson was at JT's home that evening. It was a Friday and on Fridays he had no school and liked to party, drinking and smoking weed. He saw Johnson and JT leave around 6:00 to hit a lick. Wilson thought they would return with a couple of "flat screens and a gun or something."

{¶29} JT and Johnson returned between 7:00 p.m. and 11:00 p.m. Johnson came in first and was frantic. He had a silver and black handgun. "He was saying I think

I killed him." Johnson left and Wilson went with Fisk and JT in the white Nissan to the hospital.

{¶30} Christopher Knight saw JT and Johnson on November 22, 2013. He was a friend of Fisk, JT's girlfriend. They came to his home early that day to borrow some money. Toward evening, JT and Fisk returned. JT was carrying a black bag and Knight believed there was a pistol in it.

{¶31} Later that day, Knight learned that JT had been shot. He saw JT again after he returned from the hospital. He had a bandage on his arm. JT told Knight what happened. Knight testified,

> Yes. In his own – he said basically what – they went to do this and they kicked in a door and the old man, his words, was – started blasting at him and that his friend returned fire –

4T. at 89.

{¶32} When Detective George interviewed Johnson, he admitted to the home invasion at the Render home on Monday, November 18 and claimed to use BB guns:

> **GEORGE**: ...That house you were both at earlier in the week? Do you remember that.
>
> **JOHNSON**: Yes.
>
> **GEORGE**: And you kicked that door in because it was locked or whatever and the old guy woke up and come out. You heard him, and what did the both of you do"
>
> **JOHNSON**: I ran.
>
> **GEORGE**: Both of you did?

JOHNSON: Yes.

GEORGE: But then you decided to go back on Friday, right?

JOHNSON: Yeah

State's Exhibit 2.

{¶33} Upon cross-examination Detective George admitted that he asked Johnson 20 to 30 times to confess to being a shooter of Eugene Render; however, Johnson denied it every single time. Detective George also stated there was no physical evidence tying Johnson to being a shooter in this case. Detective George acknowledged that there were conflicting reports on whether or not Johnson was the individual who shot Eugene Render. Detective George admitted that he decided Johnson was the shooter based upon the fact that more people said Johnson was the shooter.

VERDICT AND SENTENCING

{¶34} The three-judge panel returned a unanimous verdict that Johnson was guilty of all charges in the indictment including aggravated murder and that he was the principal offender.

{¶35} A separate and subsequent penalty trial was conducted some four days later. The state called no witnesses. Johnson called his counselor, his biological mother and his grandparents. The penalty phase concluded with the testimony of Dr. Jeffrey Smalldon, a forensic psychologist hired to evaluate and conduct testing on Johnson. Smalldon concluded that Johnson was competent, but emotionally immature. He was born to a mother who took crack during her pregnancy and he suffered from attention

deficit disorder and depression. He was 18 when he committed the robbery, burglaries and killing.

{¶36} After hearing the evidence at the penalty phase, the three-judge panel began its deliberations and returned with a decision that the aggravating circumstance of the killing did not outweigh the mitigating circumstances. The panel spared Johnson from the death penalty, but concluded that the appropriate sentence for the killing of Mr. Render was life without parole.

{¶37} Johnson was sentenced to life without parole as well as eleven year sentences for the additional burglaries [Counts 5 and 6] and an additional three years on the firearm specifications. In all, Johnson received a prison term of life without the possibility of parole and an additional 25 years.

Assignments of Error

{¶38} Johnson raises three assignments of error,

{¶39} "I. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶40} "II. APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS VIOLATED WHEN THE TRIAL COURT PERMITTED THE ADMISSION OF HEARSAY STATEMENTS.

{¶41} "III. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING APPELLANT TO SERVE MAXIMUM CONSECUTIVE SENTENCES."

I.

{¶42} In his first assignment of error, Johnson challenges the sufficiency of the evidence; he further contends his convictions are against the manifest weight of the evidence produced by the state at trial.

{¶43} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id.; see also *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶68.

{¶44} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio–355. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but

depends on its effect in inducing belief." (Emphasis sic.) Id. at 387, 678 N.E.2d 541, *quoting* Black's Law Dictionary (6th Ed. 1990) at 1594.

> When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the fact finder's resolution of the conflicting testimony. Id. at 387, 678 N.E.2d 541, *quoting Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that "'the jury 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, supra*, 78 Ohio St.3d at 387, *quoting State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id.
>
> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
>
> * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent

> with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

AGGRAVATED BURGLARY - NOVEMBER 18, 2013

{¶45} Johnson argues that his conviction for aggravated burglary of the Render residence in Canton, Ohio on November 18, 2013 was against the manifest weight and the sufficiency of the evidence because the state failed to prove beyond a reasonable doubt that he had a deadly weapon or dangerous ordinance on his person or under his control.

{¶46} Aggravated burglary under R.C. 2911.11(A)(1) and/or (A)(2), provides

> No person, by force, stealth, or deception, shall trespass in an occupied structure ...when another person other than an accomplice of the offender is present, with purpose to commit in the structure ...any criminal offense, if any of the following apply: (1) the offender inflicts, or attempts or threatens to inflict physical harm on another, (2) the offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶47} The only testimony presented at trial indicated that on November 18, 2013, Johnson was in possession of "pellet BB Guns." State's Exhibit 2, at 10-11.

{¶48} R.C. 2923.11(A) defines a "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

{¶49} Although it is not a firearm, a BB gun can be a deadly weapon if the BB is expelled at a sufficient rate of speed. *State v. Brown*, 101 Ohio App.3d 784, 788, 656 N.E.2d 741 (1st Dist. 1995). The Ohio Supreme Court, in dicta, acknowledged that:

> [o]ne may use a BB gun (*State v. Ewing* [Mar. 27, 1980], Cuyahoga App. No. 41080 [1980 WL 354847], unreported), or a pellet gun (*State v. Scales* [Sept. 27, 1979], Cuyahoga App. No. 39763 [1979 WL 210581], unreported) in the commission of a theft offense and be found guilty of aggravated robbery.

State v. Gaines, 46 Ohio St.3d 65, 68, 545 N.E.2d 68 (1989).

{¶50} Courts agree that regardless of whether a BB or pellet is powerful enough to cause death, a BB gun can be a deadly weapon because the body of the gun itself can be used to bludgeon. *State v. Hicks*, 14 Ohio App.3d 25, 469 N.E.2d 992 (8th Dist. 1984); *State v. Ginley*, 8th Dist. Cuyahoga No. 90724, 2009-Ohio-4701, 2009 WL 2894333. The gun's capability as a deadly weapon is a factual issue to be determined by the trier of fact. *Brown* at 788, 656 N.E.2d 741. If no evidence is presented to show that a BB gun can be lethal in its use, it cannot be *presumed* to be capable of inflicting death. *State v. Brown*, 101 Ohio App.3d 784, 656 N.E.2d 741(1st Dist. 1995).

{¶51} In *State v. Brown*, the defendant used a BB gun to assault the victim. The issue turned on whether the BB gun used by the defendant was a deadly weapon "capable of inflicting death." The First District reversed the defendant's conviction for felonious assault after determining the state failed to prove the BB gun used by the defendant had been "capable of inflicting death."

{¶52} In *Brown*, the First District noted that in *Hicks*, the court based its conclusion that the toy gun in that case was in fact a deadly weapon on the arresting officer's testimony that the toy gun was made of metal and that the police had investigated crimes where such objects had been used as bludgeons, as well as its own examination of the toy gun. Id.

{¶53} The First District explained that, in contrast to *Hicks,* there was no evidence that the *Brown* defendant ever used or threatened to use the BB gun as a bludgeon, nor could any inference of such use be made from the evidence. The BB gun was not introduced in evidence, and the only description of it was that it was long and had a pump.

{¶54} In *State v. White*, 8th Dist. No. 92972, 2010–Ohio–2342, another BB gun case, the court reached a different result, based on the evidence presented at trial. The Eighth District reasoned that the trier of fact heard testimony that the gun was made of "hard" plastic; in addition, pictures of the gun recovered on the scene showed a warning engraved on the gun stating: "Not a toy. Misuse may cause fatal injury." The Court further noted that the pistol-whipping the victim received had caused bleeding and swelling on his face. The Court reasoned if the gun could open cuts and bruise the face, the trier of fact could rationally have concluded that this evidence was sufficient to demonstrate the bludgeoning power of the BB gun, thereby confirming that the BB gun could be used as a deadly weapon.

{¶55} In the case at bar, the actual pistols were not entered into evidence at trial. Nor was any testimony presented during the trial concerning the size and weight, shape or design of the BB guns. No evidence was presented that the BB guns were ever used

or threatened to be used as a bludgeon, nor could any inference of such use be made from the evidence. *See, State v. Hammond*, 8th Dist. Cuyahoga No. 99074, 2013-Ohio-2466.

{¶56} In the case at bar, there was no evidence, testimonial or otherwise, presented at trial to show the pellet BB guns were heavy enough to be used as a deadly bludgeon, or capable of inflicting death in other manner.

{¶57} Based on the foregoing analysis, we conclude that there is insufficient evidence to establish the use of a "deadly weapon," an essential element for the offense of aggravated burglary in connection with the aggravated burglary of the Render residence in Canton, Ohio on November 18, 2013.

AGGRAVATED BURGLARY – NOVEMBER 22, 2013

{¶58} Johnson contends that his conviction for the Aggravated Burglary of Kim Eller's home that occurred on November 22, 2013 in Navarre, Ohio was against the manifest weight and the sufficiency of the evidence because the state failed to prove beyond a reasonable doubt that he had a deadly weapon or dangerous ordnance on his person or under his control.

{¶59} At trial, Ms Eller testified on cross-examination,

Q. Ms Eller, the gun that you saw in their hand could you tell whether that was a real or whether it was a - - like one of those Airsoft Pistols?

A. It was a real gun.

Q. And how would you know that?

A. Just by looking at it; you could tell it was a real gun.

3T. at 48.

{¶60} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Johnson had a deadly weapon or dangerous ordnance on his person or under his control. We hold, therefore, that the state met its burden of production regarding each element of the crimes of Aggravated Burglary of the Eller residence on November 22, 2013 and, accordingly, there was sufficient evidence to support Johnson's conviction.

{¶61} Although Johnson presented evidence, and cross-examined the witnesses to show that their testimony was conflicting and that they had incentive to place the blame on Johnson, the three-judge panel as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the trier of fact may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the three-judge panel need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks, supra.*

{¶62} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

NOVEMBER 22, 2013 - AGGRAVATED MURDER WITH FIREARM (COUNT ONE); AGGRAVATED ROBBERY (COUNT THREE) AND AGGRAVATED BURGLARY (COUNT FOUR).

{¶63} Jackson further argues that there was insufficient evidence that he was the principal offender in the shooting death of Eugene Render on November 22, 2013. Johnson points to a lack of physical evidence, uncertainty of facts and credibility of witnesses.

{¶64} Johnson was convicted of aggravated murder under R.C. 2903.01(B), which provides that "[n]o person shall purposely cause the death of another... while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit ... aggravated robbery and/or aggravated burglary." He was also convicted of capital specifications to that count under R.C. 2929.04(A)(7) and of being the principal offender - the actual killer. Johnson, however, did not receive the death penalty.

{¶65} R.C. 2901.22 Culpable mental states, provides:

> (A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition

> against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

{¶66} In *State v. Jester,* 32 Ohio St.3d 147, 152, 512 N.E.2d 962, 968(1987), the Ohio Supreme Court held:

> Where an inherently dangerous instrumentality was employed, a homicide occurring during the commission of a felony is a natural and probable consequence presumed to have been intended. Such evidence is sufficient to allow a jury to find a purposeful intent to kill. *State v. Clark* (1978), 55 Ohio St.2d 257, 9 O.O.3d 257, 379 N.E.2d 597, *syllabus; State v. Johnson* (1978), 56 Ohio St.2d 35, 10 O.O.3d 78, 381 N.E.2d 637.

Accord, State v. Widner, 69 Ohio St.2d 267, 431 N.E.2d 1025(1982) (finding purpose to kill in passenger's firing gun at individual from moving vehicle); *State v. Dunlap*, 73 Ohio St.3d 308, 316, 652 N.E.2d 988(1995), *certiorari denied* (1996), 516 U.S. 1096, 116 S.Ct. 1096, 133 L.Ed.2d 765. *State v. Banks,* 10th Dist. No. 01 AP–1179, 2002–Ohio–3341 at ¶ 24.

> The trier of fact may infer an intention to kill from the surrounding circumstances where the natural and probable consequence of a defendant's actions is to produce death. *State v. Robinson* (1954), 161 Ohio St. 213, 118 N.E.2d 517, paragraph five of the syllabus; *State v. Edwards* (1985), 26 Ohio App.3d 199, 200, 499 N.E.2d 352. Here, defendant looked at a group of individuals, pointed a semi-automatic handgun in their direction, and fired five shots. In so doing, one of the

> bullets fired from the handgun struck and killed his driver, Andre J. Bender. Although defendant claims the evidence equally supports a conclusion that he was merely trying to scare individuals in the group by firing the handgun into the air, "[t]he act of pointing a firearm and firing it in the direction of another human being is an act with death as a natural and probable consequence." *State v. Brown* (Feb. 29, 1996), Cuyahoga App. No. 68761, unreported. *Compare State v. Jester* (1987), 32 Ohio St.3d 147, 152, 512 N.E.2d 962 (when an inherently dangerous instrumentality is employed in the commission of a robbery, such evidence permits a jury to find a purposeful intent to kill).

State v. Turner, 10th Dist. No. 97APA05-709, 1997 WL 798770(Dec. 30, 1997), *quoting State v. Brown*, 8th Dist. No. 68761, 1996 WL 86627(Feb. 29, 1996) *dismissed, appeal not allowed*, 77 Ohio St.3d 1468, 673 N.E.2d 135.

{¶67} Johnson was further convicted of aggravated robbery under R.C. 2911.01(A)(1) and/or (A)(3). That statute provides that "no person, in attempting, or committing a theft offense,.. or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have 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; (3) Inflict, or attempt to inflict, serious physical harm on another".

{¶68} Johnson was also unanimously convicted of aggravated burglary under R.C. 2911.11(A)(1) and/or (A)(2) for the events that occurred in the Render home on November 22, 2013. That statute provides that "[n]o person, by force, stealth, or

deception, shall trespass in an occupied structure ...when another person other than an accomplice of the offender is present, with purpose to commit in the structure ...any criminal offense, if any of the following apply: (1) the offender inflicts, or attempts or threatens to inflict physical harm on another, (2)the offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control".

{¶69} Johnson does not challenge the evidence that the crimes of aggravated murder, aggravated burglary and aggravated robbery occurred on the evening of November 22, 2013. Mr. Render was found on his kitchen floor with two fatal gunshot wounds. The door was broken, bullet cartridges were scattered in the home and shattered glass was found in the breezeway. Indeed, Johnson admitted to the home invasion. He was with JT when Mr. Render was killed. Johnson's sole argument centers upon whether the evidence produced by the state at trial proves beyond a reasonable doubt that Johnson was the actual killer - the principal offender.

{¶70} The capital specification with which Johnson was charged requires the defendant to be "the principal offender in the commission of the aggravated murder." R.C. 2924.07(A)(7). The Ohio Supreme Court has consistently interpreted this element to require the defendant to be "the actual killer." *State v. Taylor*, 66 Ohio St.3d 295, 612 N.E.2d 316, 325 (1993); *State v. Wiles*, 59 Ohio St.3d 71, 571 N.E.2d 97, 122 (1991), *cert. denied*, 506 U.S. 832, 113 S.Ct. 99, 121 L.Ed.2d 59 (1992); *State v. Penix*, 32 Ohio St.3d 369, 513 N.E.2d 744, 746 (1987); *see also Mitchell v. Esparza*, 540 U.S. 12, 18, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003) (acknowledging this interpretation). Other formulations of "actual killer" are that the defendant "personally performed every act constituting the offense of aggravated murder," *State v. Sneed*, 63 Ohio St.3d 3, 584

N.E.2d 1160, 1168 (1992), *cert. denied*, 507 U.S. 983, 113 S.Ct. 1577, 123 L.Ed.2d 145 (1993). When the defendant and a coconspirator are present at the time and place of the murder, there must be evidence showing that the defendant struck the fatal blow(s). *See State v. Cunningham*, 105 Ohio St.3d 197, 824 N.E.2d 504, 512, 531 (2004*), cert. denied,* 546 U.S. 851, 126 S.Ct. 110, 163 L.Ed.2d 122 (2005); *Taylor*, 66 Ohio St.3d at 308, 612 N.E.2d at 325. “So while [Johnson] can be convicted of aggravated murder in violation of R.C. 2903.01(B) without being the actual killer, but by aiding and abetting the actual killer, that finding cannot be bootstrapped into a finding that he is the principal offender for purposes of receiving the death penalty under R.C. 2929.04(A)(7).” *Taylor*, 66 Ohio St.3d at 308, 612 N.E.2d 316, 325 (1993).

{¶71} In the case at bar, Johnson was with JT at the time Render was shot. The evidence indicates that both were involved in the crimes and were present on the night of the murder. There can be more than one actual killer—and thus more than one principal offender—in an aggravated murder. *See State v. Joseph*, 73 Ohio St.3d 450, 469, 653 N.E.2d 285, 300(1995) (Moyer, C.J., dissenting in part and concurring in part); *Accord*, *State v. Stojetz*, 84 Ohio St.3d 452, 458–459, 705 N.E.2d 329(1999); *State v. Keene*, 81 Ohio St.3d 646, 655, 1996-Ohio-342, 693 N.E.2d 246(1998).

{¶72} As previously noted, Deanna Fisk and Derrick Wilson both testified at trial that Johnson returned after the evening home invasion of Mr. Render on November 22 in a panic. He started removing his shoes, jacket and clothing saying, “I think I killed someone." Wilson saw Johnson with a silver and black handgun when he returned.

{¶73} Christopher Knight, a witness presented by Johnson during his case, testified that he saw JT immediately after he returned from the hospital. JT told him that the "old man started blasting and his friend returned fire."

{¶74} If the state relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E. 2d 492(1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668(1997). "Circumstantial evidence and direct evidence inherently possess the same probative value [.]" *Jenks,* 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, "[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." *Jenks*, 61 Ohio St.3d at 272, 574 N.E. 2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293(1990), *citing Hurt v. Charles J. Rogers Transp. Co,* 164 Ohio St. 329, 331, 130 N.E.2d 820(1955). Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott*, 51 Ohio St.3d at 168, 555 N.E.2d 293, *citing Hurt,* 164 Ohio St. at 331, 130 N.E.2d 820.

{¶75} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Johnson was the individual who shot Eugene Render in his home on November 22,

2013. We hold, therefore, that the state met its burden of production regarding each element of the crimes of Aggravated Murder with a principal offender specification and, accordingly, there was sufficient evidence to support Johnson's conviction.

{¶76} The three-judge panel was well aware that JT would benefit from his girlfriend's Deanna Fisk's testimony. They were also aware, by virtue of the witnesses who testified that Johnson had denied being the person who shot Mr. Render. Therefore, whether Fisk, Wilson and Knight were credible was a question for the three-judge panel to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶77} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA–5758, 1982 WL 2911(Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578(1978). The Ohio Supreme Court has emphasized: "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012-Ohio-2179, *quoting Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of

witnesses. *See, e.g., In re Brown*, 9th Dist. Summit No. 21004, 2002–Ohio–3405, ¶ 9, *citing State v. DeHass*, 10 Ohio St .2d 230, 227 N.E.2d 212(1967).

{¶78} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.'" *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶79} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶80} The three-judge panel as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the [trier of fact] may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No.

99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the [trier of fact] need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks, supra.*

{¶81} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The three-judge panel neither lost their way nor created a miscarriage of justice in convicting Johnson of the charges.

{¶82} Based upon the foregoing and the entire record in this matter, we find Johnson's convictions were not against the sufficiency or the manifest weight of the evidence. To the contrary, the three-judge panel appears to have fairly and impartially decided the matters before them. The three-judge panel as a trier of fact can reach different conclusions concerning the credibility of the testimony of the state's witnesses and Johnson and his witnesses. This court will not disturb the trier of fact's finding so long as competent evidence was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The three-judge panel heard the witnesses, evaluated the evidence, and was convinced of Johnson's guilt.

{¶83} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crimes beyond a reasonable doubt.

{¶84} Johnson's sole assignment of error is affirmed, in part and overruled, in part.

{¶85} Johnson's conviction and sentence on Aggravated Burglary of the home of Eugene Render, 316 Montrose Avenue, NW, Canton, Ohio on November 18, 2013 as set forth in Count Five of the Indictment filed January 28, 2014 is reversed and this case is remanded to the trial court for proceedings in accordance with our opinion and the law.

II.

{¶86} In his second assignment of error, Johnson argues that statements by Detective George during his direct examination that he interviewed co-defendant Japheth Thomas (JT) and other persons who were present in JT's residence on November 25, 2013 and that after those interviews Johnson became an additional suspect was hearsay and violated his right to confront witnesses and deprived him of a fair trial. Specifically,

> [HARTNETT] Through your interviews then Mikal Johnson is an additional suspect that you're looking for?
>
> [GEORGE] Correct.
>
> [HARTNETT] After interviewing JT did you still have the second suspect as Mikal Johnson?
>
> [GEORGE] Yes.

3T. at 103.

{¶87} "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is generally not admissible unless it falls within one of the recognized exceptions. Evid.R. 802; *State v. Steffen*, 31 Ohio St.3d 111, 119, 509 N.E.2d 383(1987).

{¶88} "The hearsay rule…is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements-the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine-are generally absent for things said out of court." *Williamson v. United States*, 512 U.S. 594, 598,114 S.Ct. 2431, 2434(1994).

{¶89} In the case at bar, Detective George did not testify to any specific statement made by JT. Testimony from additional witnesses at trial established that JT and Johnson were involved in the crimes alleged in the Indictment. Johnson's own witness, Christopher Knight, testifed seeing Johnson and JT together and, that JT was carrying a black bag containing a pistol. Later he observed JT with a bandage on his arm. When ask what had happened Knight testified that JT said they kicked in the door, the "old man" started blasting and his [JT's] friend returned fire.

{¶90} In *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, the Ohio Supreme Court considered the standard to be applied in determining harmless error where a criminal defendant seeks a new trial because of the erroneous admission of evidence under Evid.R. 404(B). The court summarized its analysis in the subsequent decision of *State v. Harris*, 2015-Ohio-166, —– N.E.3d ——–, ¶ 37:

> Recently, in *Morris*, a four-to-three decision, we examined the harmless-error rule in the context of a defendant's claim that the erroneous admission of certain evidence required a new trial. In that decision, the majority dispensed with the distinction between constitutional and non-constitutional errors under Crim.R. 52(A). Id. at ¶ 22–24. In its place, the following analysis was established to guide appellate courts in determining whether an error has affected the substantial rights of a defendant, thereby requiring a new trial. First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. Id. at ¶ 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. Id. at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt.

Id. at ¶ 29, 33.

{¶91} In examining the record to determine this issue, we may give weight to the fact that the error occurred in a trial to a three-judge panel, rather than in a jury trial. *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65(1968); *State v. Austin*, 52 Ohio

App.2d 59, 70, 368 N.E.2d 59(1976). Indeed, a judge is presumed to consider only the relevant, material and competent evidence in arriving at a judgment, unless the contrary affirmatively appears from the record. *State v. White*, supra, 15 Ohio St.2d at page 151, 239 N.E.2d 65; .*State v. Eubank*, 60 Ohio St.2d 183, 187, 398 N.E.2d 567, 569-570; *Columbus v. Guthmann*, 175 Ohio St. 282, 194 N.E.2d 143(1963), paragraph three of the syllabus.

{¶92} Based upon the entire record before us, we conclude that any error in the admission of the testimony was harmless and if that error had not occurred, the trier of the facts would have made the same decision.

{¶93} Johnson's second assignment of error is overruled.

III.

{¶94} In his last assignment of error, Johnson claims that the trial court abused its discretion in ordering Johnson to serve maximum consecutive sentences. Johnson makes three claims: the first prong of the standard set forth in *State v. Kalish,* 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124, was not met; he did not have a prior criminal record and a sentence of 22 years in addition to a sentence of life without parole served "no real purpose."

{¶95} The General Assembly has enacted Am.Sub.H.B. No. 86 ("H.B. 86"), effective September 30, 2011. *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.2d 659, ¶20. In Am.Sub. H.B. 86, the General Assembly revived R.C. 2929.14(E)(4) and renumbered it as R.C. 2929.14(C)(4), which now provides:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison

terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish **665 the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(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.

See, Bonnell, ¶22. In *Bonnell,* the Ohio Supreme Court noted,

With exceptions not relevant here, if the trial court does not make the factual findings required by R.C. 2929.14(C)(4), then "a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States." R.C. 2929.41(A).

> Thus, judicial fact-finding is once again required to overcome the statutory presumption in favor of concurrent sentences.

Bonnell, ¶23.

{¶96} While the sentencing court is required to make these findings, it is not required to give reasons explaining the findings. Id. at ¶ 27; Furthermore, the sentencing court is not required to recite "a word-for-word recitation of the language of the statute." *Bonnell* at 29. "[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." Id. A failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law. *Bonnell* at ¶ 34. The findings required by R.C. 2929.14(C)(4) must be made at the sentencing hearing and included in the sentencing entry. Id. at the syllabus. However, a trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court. *Bonnell,* ¶30.

{¶97} . In the case sub judice, Johnson does not appear to dispute that his felony sentences are all within the statutory parameters for the various felonies. *See Kalish, supra.*

{¶98} During the sentencing hearing, Johnson's trial counsel noted that he had no criminal convictions as an adult. The court stated,

> [THE COURT]: That's fine. I am still going to impose the consecutive sentences based upon the course of conduct. The code indicates history of criminal conduct. It doesn't specify whether it's adult of juvenile*, but for purposes of this sentencing, at your request I'll disregard that so that we don't have to have any type of issue whatsoever*, but it's just sufficient that the course of conduct is such that consecutive sentences, in this Court's view, are necessary as indicated by the Court.

Sent. T., Sept. 10, 2014 at 21-22(Emphasis added). Accordingly, the record does not support Johnson's contention that the trial court improperly or mistakenly considered his prior criminal record or lack thereof.

{¶99} The trial court noted that Johnson had previously been adjudicated a delinquent child; that he showed no signs of rehabilitation; demonstrated a pattern of drug or alcohol abuse and refused treatment at Quest. Finally, that he showed no genuine remorse. The trial court noted the 88-year-old age of one of the victims. The trial court then noted that consecutive sentences are necessary to protect the public from future crime, the sentences are not disproportionate to the seriousness of the conduct and that at least two of the multiple offenses were committed as part of a course of conduct and that no single term could adequately reflect the seriousness of the conduct. These findings were also reflected in the trial court's sentencing entry filed September 22, 2014.

{¶100} We find the trial court adequately made the findings required by R.C. 2929.14(C)(4) in considering Johnson's total sentence, and we hold the trial court's

consecutive sentences in this matter are not unreasonable, arbitrary, or unconscionable, and are otherwise not contrary to law.

{¶101} Johnson's third assignment of error is overruled.

Conclusion

{¶102} The judgment of the Stark County Court of Common Pleas is affirmed, in part and reversed, in part. Johnson's conviction and sentence on Aggravated Burglary of the home of Eugene Render, 316 Montrose Avenue, NW, Canton, Ohio on November 18, 2013 as set forth in Count Five of the Indictment filed January 28, 2014 is reversed and this case is remanded to the trial court for proceedings in accordance with our opinion and the law. This decision in no way affects the guilty verdicts and sentences issued by the three-judge panel on any other count of the indictment It only affects the entry of conviction and sentence on Count Five of the Indictment. The decision of the Stark County Court of Common Pleas is affirmed in all other respects.

By Gwin, P.J.,

Delaney, J., and

Baldwin, J., concur