[Cite as *State v. O'Neal*, 2015-Ohio-537.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 13-CA-90 and 13-CA-91
	:	
DAVID J. O'NEAL	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Court of Common Pleas, Case Nos. 12-CR-317 and 12-CR-445
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	February 10, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
GREGG MARX FAIRFIELD CO. PROSECUTOR 239 West Main St., Suite 101 Lancaster, OH 43130	THOMAS R. ELWING 60 West Columbus St. Pickerington, OH 43147

Delaney, J.

{¶1} Appellant David J. O'Neal appeals from the November 26 and 27 Judgment Entries of Sentences of the Fairfield County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} Destin Thomas and Delshawn Walker were friends who shared an apartment at 7277 Brooke Boulevard, Reynoldsburg, Fairfield County in July 2012 in a large complex known as the Brentwood Lakes Apartment Community. The specific building Destin and Walker lived in was the Essex although the complex contained other buildings.

{¶3} Destin and Walker both had an interest in music and were involved in audio engineering. They were known to record their own rap music and that of other artists. Walker owned expensive audio engineering equipment including, e.g., a MacBook computer, microphones, and "an Mbox mini," essentially tools of a mobile recording studio. Walker used the stage name "Shawn Vandz" in shows around the Columbus area.

{¶4} In the early morning hours of July 17, 2012, Walker left the apartment for his day job where he worked from 8:00 a.m. to 2:00 p.m. Destin was asleep in his own bedroom when Walker left.

{¶5} Shortly before 8:30 a.m., another resident of the apartment building observed two men outside the door of the apartment of Destin and Walker.

Destin Thomas Calls 911 from his Bedroom

{¶6} Around 8:45 a.m., Destin called 911 to report a burglary in progress. Destin told the 911 operator he heard someone break into the apartment and they were now moving around inside. He was locked in his bedroom. The 911 tape was played at trial.

{¶7} Ptl. William Kaufman of the Columbus Police Department responded to the call of the burglary in progress. As he approached the Brentwood Lakes apartment complex, radio traffic told him the suspect or suspects were still inside the apartment and the 911 dispatcher was listening to a confrontation between the suspects and the caller.

{¶8} Kaufman pulled up in front of Destin's apartment, parked 2 or 3 spaces west of the apartment's "breezeway," and pulled his weapon. He could hear voices from the apartment but didn't see anyone at first. Suddenly two men burst out of the apartment running toward Kaufman and he immediately noticed the individual in front had a gun in his hand.

{¶9} As the two approached Kaufman, the first man raised the gun. The second suspect was directly behind him. Kaufman fired two shots at the first man and he fell to the ground. The second man kept running and Kaufman followed him very briefly before returning to where the first man lay with the gun beside him on the ground. Kaufman called in the shooting over the radio.

{¶10} As Kaufman stood over the man on the ground, he observed the man wore only shorts and no shirt or shoes. As another officer ran up to Kaufman, he stated, "I think this was the homeowner" because he realized it was unlikely someone

would stage a home invasion wearing only shorts. The man on the ground, deceased, was identified as Destin Thomas. The gun beside him on the ground was found to be unloaded.

{¶11} The gun was "covered in a lot of blood" and later revealed a mixture of the D.N.A. of two different individuals. The major donor was Destin Thomas. Appellant could not be excluded as the minor donor.

Flight and Pursuit

{¶12} The hunt for the man chasing Destin began in earnest. Kaufman did not get a good look at the suspect. A description was broadcast of a black male wearing a black hooded sweatshirt and gray sweatpants.[1]

{¶13} One detective observed a suspect fleeing eastbound; the man wore a sleeveless black shirt and long black shorts. He jumped a fence when he saw officers in pursuit. Ptl. Billie Camp Donovan was one officer who got a good look at the suspect. After chasing the suspect some distance, he escaped.

{¶14} A maintenance man for a neighboring apartment building was outside when a man approached him and asked to use his cell phone. The man seemed nervous and had blood on his chin and was covered in scratches. After the man walked away, the maintenance man called police and reported the suspicious individual.

{¶15} Another man was waiting for ride to work when he was approached by a young black male who looked "roughed up:" he had holes in his t-shirt and a cut on his chin. The young black male asked to use his cell phone and the two started walking

[1] At least one description noted the suspect wore "dreads," or short braids in his hair. Appellant did not wear dreads at the time of the offense and no suspect with "dreads" was located.

together. The young black male asked where they were and the phone owner responded Pheasant Run Apartments. The pair observed a police cruiser approaching and the young black male asked the man to say they had been together all day.

{¶16} Ptl. Billie Camp Donovan got out of the cruiser, approached the young black male, and said, "We've been looking for you all day." She recognized him as the suspect they pursued earlier in the day and identified him as appellant at trial.

{¶17} Appellant threw down the cell phone and started running. He ran a short distance ahead of Donovan, jumped into her cruiser, and sped away. Donovan drew her weapon and fired at the cruiser, shattering the rear window. She radioed "10-3" for "officer in trouble." The suspect drove the cruiser a short distance, crashed into air-conditioning units of another apartment building, jumped out and took off running again. The damage to the cruiser, a 2011 Ford Crown Victoria, totaled $3,907.42.

{¶18} Officers continued to pursue appellant throughout the apartment buildings. A resident told an officer "I think the guy you're looking for is right outside my door laying down." As the officer ascended the stairs he heard running footsteps and observed appellant descend from the third floor, run to a balcony, and jump off. Appellant was identified as the same suspect officers pursued earlier although he was now shirtless. Once appellant hit the ground, he was apprehended.

Appellant Denies Responsibility for Destin's Death

{¶19} Appellant was transported to Grant Hospital for treatment for his injuries. Ptl. Jesse Perkins heard appellant laughing as he was transported onto an elevator. Perkins asked what was so funny and appellant responded, "You all's the one that shot him" then "rap[ped] about homicide and shooting people."

The Investigation: Physical Evidence Left Behind

{¶20} The officer returned to the apartment where appellant was observed hiding and discovered a discarded t-shirt. A pair of gray sweatpants was found outside another apartment.

{¶21} Investigators searched Destin's apartment. The front door was broken with the deadbolt still in the "out" position. The condition of the door frame led police to conclude the door was kicked in.

{¶22} The interior of the apartment was in disarray, especially in the bedroom identified as Destin's. The door lock on the bedroom door was shattered. A chair and suitcase had been knocked over; the mattress and box spring were pulled from the bed frame; and bloodstains were found on the mattress, walls, pillow, and floor.

{¶23} More blood evidence was found immediately outside. In the shrubs, police found a bed sheet with blood on it. A pillar and the sidewalk also yielded drops of blood.

{¶24} D.N.A. testing revealed appellant's D.N.A. on evidence recovered including the black t-shirt, the blood drops in the foyer of Destin's apartment, blood drops on the pillar outside the apartment, the bed sheet, Destin's pillowcase, and the mattress cover from Destin's bed. Other items revealed a mixture of D.N.A. from which neither Destin nor appellant could be excluded as donors: the gun and the sweatpants.

Appellant's Incriminating Texts and Phone Calls

{¶25} A black Samsung cell phone was recovered from appellant at the hospital. Upon receipt of a search warrant and court order for cell phone records, the following text messages were discovered. The "target phone" is owned by appellant and the

telephone number 216-673-9057 is assigned to this phone. The following content is from appellee's exhibit 56 and testimony of appellee's investigators, *sic* throughout.

Time of Text sent on July 17, 2012	Text from Target Phone (Appellant)	Incoming Text	Phone Number of Incoming Text	Incoming Phone Owner
01:00:41	im hittin it in the am..in like 6 hours. But I don't wanna sell none of the studio shit. I wanna keep it. this nigga say its lean in there too so ill sell			
01:00:58	that			
02:01:06	make sure you up by 7			
09:00:32	Im porably bouta go to jail..Police lookin for me			
09:05:38	Im in some trouble bro bro..know that i love you and imma be okay			
09:09:52	2166238331..call him and find out where im at			
09:10:01	I mean 614			
09:13:10		He ain't pick up	614-893-8429	Kevin Fluellen
09:15:43	Might be goin to jail			
09:16:23		4 wat?	216-633-8874	Unknown
09:16:36		Where are you at?	614-893-8429	Kevin Fluellen
09:17:12	Brice and new albany			
09:17:28	Apartment complex..			
09:17:47	I need flex number asap!!			
09:19:56		Bro see if they	614-893-8429	Kevin

		still out there		Fluellen
09:20:53	I cant!! Im hidin in a shed if I come out im gone			
09:22:14		Bro i gotta kno the name of the apartments	614-893-8429	Kevin Fluellen
09:23:22	Call christain			
09:24:21	They start with a B...Down the street from mt. carmel..I know its a right hand turn past the sign			
09:26:15	Wherever shawn bandz live at..But cant nobody know i was here			
09:46:07		Bro I'm looking for you..but I need you to help me find you	614-893-8429	Kevin Fluellen
10:10:33	Phone bouta die			

{¶26} An investigator testified that appellant's cell phone placed him in the area of the crime scene that morning. Appellant's phone was placing and receiving calls until 10:27 a.m. when calls started going to voice mail, indicating the phone was off or the battery was dead.

{¶27} Appellant's friend Christian Coleman testified appellant called him on the morning of July 12, 2012 from an unfamiliar number and asked Coleman to call a third person to contact appellant's brother because appellant needed a ride.

{¶28} Kevin Fluellen, another friend of appellant's, reluctantly testified appellant called him on the morning of July 17, 2012 asking Fluellen to pick him up near Mt. Carmel Hospital. Fluellen drove around looking for appellant but wasn't able to find him.

{¶29} Dominique McDearmon, another friend of appellant's, testified appellant called her on the morning of July 17, 2012 and sounded "scared." He asked her to give him a ride and when she was not able to, asked her to call "Flex."

{¶30} Police spoke to Delshawn Walker in the course of their investigation and learned Walker possessed a concealed-carry permit. Walker owns a Glock firearm but told police Destin hated guns and there were no other guns in the apartment. Walker's Glock was in his vehicle at his workplace when the break-in occurred. Walker testified he knows an individual named "Flex" through his music career and "Flex" knew where Walker lived. Neither Walker nor Destin knew appellant and appellant had never been to the apartment to Walker's knowledge.

Fairfield County Court of Common Pleas Case No. 2012-CR-317

{¶31} On July 27, 2012, appellant was charged by indictment with one count of grand theft of a motor vehicle, a felony of the fourth degree, pursuant to R.C. 2913.02(A)(1) and 2913.02(B)(2) [Count I]; one count of receiving stolen property, a felony of the fourth degree, pursuant to R.C. 2913.51 [Count II]; one count of vandalism, a felony of the fifth[2] degree, pursuant to R.C. 2909.05(B)(2) [Count III]; and one count of obstructing official business, a felony of the fifth degree, pursuant to R.C. 2921.31(A) [Count IV].

[2] The original indictment stated Count III was a felony of the third degree. This was amended on July 30, 2013.

Fairfield County Court of Common Pleas Case No. 2012-CR-445

{¶32} On September 28, 2012, appellant was charged by indictment as follows:

Count	Offense	R.C. Section	Degree	Firearm Specification
I	Felony Murder	2903.02(B)		Yes
II	Agg. Burglary	2911.11(A)(2)	1st	Yes
III	Agg. Burglary	2911.11(A)(1)	1st	Yes
IV	Robbery	2911.02(A)(1)	2nd	Yes
V	Agg. Robbery	2911.01(A)(3)	1st	Yes

{¶33} Appellee's bill of particulars was filed on June 13, 2013 in case number 12-CR-317 but applies to the indictment in case number 12-CR-445. The pertinent portion describing the offenses states:

> * * * *.
>
> The specific facts to the counts being that around 8:45 a.m. on July 17, 2012, Destin Thomas called 911, reporting a break-in at his and Delshawn Walker's residence at 7277 Brooke Boulevard, Columbus, Ohio. It is believed that the defendant and his accomplice(s) had kicked in Mr. Thomas's door with the intent to steal stereo equipment. The State has evidence that the aggravated burglary and/or aggravated robbery were premeditated, and that the defendant was involved in the planning. The defendant or his accomplice carried a gun with them into the apartment, with the purpose of using the weapon to aid them in the commission of aggravated burglary and aggravated robbery. The weapon was intended to inflict or threaten to inflict injury on the person residing in 7277 Brooke Boulevard, which was Destin

> Thomas. Destin Thomas was inside of his apartment at the time the defendant attempted to commit the offenses of aggravated burglary and aggravated robbery with a weapon. It is believed that Destin Thomas fought with the defendant and/or his accomplice, took the gun from one of them, and fled out of his apartment with the gun. Detectives found blood stains inside of Mr. Thomas' apartment, and some of the stains match the defendant's DNA.
>
> With regards to count one, Destin Thomas fled from the crime with the gun he had wrestled away from the defendant or his accomplice, and the defendant and/or his accomplice was chasing after him. Because the defendant or his accomplice was were pursuing Destin Thomas at the time he was killed, Destin Thomas' death happened during or after the course of the aggravated burglary and/or aggravated robbery. Therefore, the defendant's conduct is the proximate cause of Destin Thomas' death. Without the aggravated burglary and the aggravated robbery committed by the defendant and his accomplice(s), Destin Thomas would still be alive. With respect to all counts of the indictment, the State requests a complicity instruction.
>
> * * * *.

{¶34} On August 19, 2013, the trial court ordered the two cases to be tried jointly but not consolidated. Appellant entered pleas of not guilty to the charges and the two cases proceeded to joint trial by jury.

Trial

{¶35} The parties agreed to the following stipulations relevant to our review: 1) aggravated burglary [R.C. 2911.11(A)(1) and (A)(2)], burglary [R.C. 2911.12(A)(1) and (A)(2)], aggravated robbery [R.C. 2911.01(A)(3)], and robbery [R.C. 2911.02(A)(1)] are felonies of the first or second degree and are offenses of violence as defined in R.C. 2901.01; 2) the Smith and Wesson .38 caliber revolver serial number 13D5475 is a deadly weapon; 3) the 2011 Ford Crown Victoria [police cruiser] is a motor vehicle as defined in R.C. 4501.01; 4) the police cruiser is owned, leased, or controlled by the Columbus Police Department; 5) Billie Donovan was a police officer working for the Columbus Police Department on July 17, 2012 and was therefore a public official pursuant to R.C. 2921.01(A).

{¶36} Appellant moved for a judgment of acquittal pursuant to Crim.R. 29(A) at the close of appellee's evidence and at the close of all of the evidence. The motions were overruled. The jury was instructed upon complicity for all charges and specifications in addition to the charges as a principal offender.

{¶37} Appellant was found guilty as charged.

Sentencing Issues: Merger of Allied Offenses

{¶38} After trial, appellant filed a motion to merge allied offenses for sentencing and appellee responded.

{¶39} In case number 2012-CR-0317, appellant was sentenced to consecutive prison terms of 17 months on Count I [grand theft of a motor vehicle], 11 months on Count III [vandalism], and 11 months on Count IV [obstructing official business]. The

trial court found Count II, receiving stolen property, was an allied offense of Count I, theft of a motor vehicle, thus those offenses merged for sentencing.

{¶40} In case number 12-CR-445, appellant was sentenced to consecutive prison terms of 15 years to life on Count I [felony murder], 9 years on Count II [aggravated burglary], and 9 years on Count III [aggravated burglary]. The trial court imposed three additional one-year terms for the firearm specifications accompanying Counts I, II, and III. The remaining offenses, Counts IV [robbery] and V [aggravated robbery], were found to be allied offenses of similar import which merged for sentencing.

{¶41} Appellant now appeals from the judgment entries of his convictions and sentences.

{¶42} Appellant raises six assignments of error:

ASSIGNMENTS OF ERROR

{¶43} "I. THE TRIAL COURT ERRED IN FAILING TO MERGE ALL ALLIED OFFENSES OF SIMILAR IMPORT AT SENTENCING."

{¶44} "II. THE MANIFEST WEIGHT OF THE EVIDENCE DID NOT SUPPORT APPELLANT'S CONVICTIONS FOR MURDER AND COMPLICITY TO MURDER."

{¶45} "III. INSUFFICIENT EVIDENCE SUPPORTED APPELLANT'S CONVICTIONS FOR MURDER AND COMPLICITY TO MURDER."

{¶46} "IV. THE APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN THE JURY WAS INFORMED THAT HE HAD BEEN IN PRISON AND THE TRIAL COURT FAILED TO DECLARE A MISTRIAL."

{¶47} "V. APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL AS A RESULT OF PROSECUTORIAL MISCONDUCT."

{¶48} "VI. THE CONVICTIONS FOR MURDER AND COMPLICITY TO MURDER WERE IN VIOLATION OF THE APPELLANT'S RIGHT TO A UNANIMOUS VERDICT."

ANALYSIS

I.

{¶49} In his first assignment of error, appellant argues the trial court failed to merge all allied offenses of similar import at sentencing on case number 12-CR-445. We disagree.

{¶50} R.C. 2941.25 states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶51} Historically, Ohio courts have struggled to interpret the language of R.C. 2941.25. *State v. Huhn*, 5th Dist. Perry No. 13 CR 0057, 2014-Ohio-5559, ¶ 11, citing

State v. Rogers, 2013–Ohio–3235, 994 N.E.2d 499 (8th Dist.) at ¶ 9. For a number of years, the law in Ohio concerning R.C. 2941.25 was based on *State v. Rance*, 85 Ohio St.3d 632, 636, 710 N.E.2d 699, 1999–Ohio–291, wherein the Ohio Supreme Court had held that offenses are of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. The *Rance* court further held that courts should compare the statutory elements in the abstract. Id. at 637.

{¶52} However, in 2010 the Ohio Supreme Court decided *State v. Johnson*, 128 Ohio St.3d 153, 2010–Ohio–6314, 942 N.E.2d 1061, which specifically overruled the 1999 *Rance* decision. The Court held: "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." Id. at the syllabus.

{¶53} The instant case is factually complex and requires us to consider our standard of review. In *State v. Williams*, the Ohio Supreme Court held that an appellate court reviews a trial court's R.C. 2941.25 decision de novo. 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245 at ¶ 1.

{¶54} We therefore turn to the record on appeal. In addition to the evidence and arguments at trial, both parties presented the trial court with sentencing memoranda in support of their merger arguments. Appellant argued the counts of felony murder, aggravated burglary, aggravated robbery, and robbery [and the accompanying firearm specifications] must merge into a single offense for purposes of sentencing because "[t]hese offenses were all committed as the result of a single break-in, involving a single victim, for the single purpose of committing the theft of studio equipment." (Appellant's

"Motion to Merge Allied Offenses for Sentencing," 6). Further, appellant argued, the evidence at trial and the jury instructions establish the predicate offense of felony murder is aggravated burglary, aggravated robbery, or robbery, thus those counts must merge.

{¶55} Appellee argued, on the other hand, that appellant's conduct does not support merger:

> * * * *. The Defendant's conduct began with the commission of an aggravated burglary, in violation of R.C. 2911.11(A)(2), when, while in possession of a Smith and Wesson .38 caliber revolver, he broke down the front door to 7277 Brooke Boulevard, intending to steal the stereo equipment and "lean" (a slang term for marijuana) that he believed he would find inside. This offense was committed and completed upon the Defendant's entrance to that apartment. The 911 call placed by Destin Thomas * * * reveals the timeline of events in this case. In that call, Defendant and his unknown accomplice walked around the apartment while Mr. Thomas remained on the line with the 911 dispatcher. After two minutes, the Defendant and his accomplice turn their attentions to Mr. Thomas' room and, on the call, the sounds of the bedroom door being forced open can be heard.
>
> After forcibly kicking down the door to Mr. Thomas' room, the Defendant can be heard talking to Mr. Thomas before Mr. Thomas began telling him to go. After commenting that "someone called the

> cops," the Defendant and Mr. Thomas struggled. This struggle, during which it seems that Mr. Thomas gained control of the firearm, constituted the offense of Aggravated Burglary, in violation of R.C. 2911.11(A)(1). The Defendant used force to trespass in a separately secured portion of 7277 Brooke Boulevard. Mr. Thomas told the 911 dispatcher that he was locked in his room. During this half-minute struggle, Mr. Thomas sustained physical injury—the abrasions, as noted by the coroner. The commission of this offense was completed when their struggle ended.
>
> After the struggle ends, the Defendant continues to ignore Mr. Thomas' repeated entreaties to leave. He tells Mr. Thomas, "You're gonna be killed or get the fuck up." Mr. Thomas tells the Defendant he doesn't know "where it's at." The Defendant states that he will leave if he gets his gun. For almost a minute, the Defendant repeats the he won't leave (*sic*). The Defendant's conduct during this time constitutes the offense of Aggravated Robbery. The commission of this final offense is an allied offense of Murder.
>
> * * * *.
>
> "State's Sentencing Memorandum," 6.

{¶56} At sentencing, the trial court stated its decision regarding allied offenses is based upon "all of the evidence presented" but does not cite the specific facts relied upon. (T. 62).

{¶57} In *Williams*, supra, the Ohio Supreme Court describes the basis of our de novo review:

> As in cases involving review of motions to suppress, "the appellate court must * * * independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. In cases like this, it is the jury making factual determinations, and the reviewing court owes deference to those determinations, but it owes no deference to the trial court's application of the law to those facts.
>
> *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 26.

{¶58} Appellee's argument against merger is premised largely upon the 911 tape. This is the rare case in which the 911 tape is transcribed into the record at pages 150 to 152 of the transcript. This transcription contains numerous notations of "inaudible" and "unidentified sounds," to the extent that little of the facts contained in appellee's summary are contained in the transcript. The 911 tape was admitted into evidence as appellee's Exhibit 7 and we have reviewed it, also finding significant portions to be inaudible.

{¶59} The Ohio Supreme Court has further instructed us that we are required to "review the entire record, including arguments and information presented at the sentencing hearing, to determine whether the offenses were committed separately or with a separate animus." *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982,

999 N.E.2d 661, syllabus. Therefore, while we find portions of the 911 tape to be inaudible, we have appellee's uncontroverted arguments as to what the tape contains. Appellant relied upon a general theory of merger of allied offenses at the trial level and did not refute appellee's factual allegations.

{¶60} Appellant bears the burden of establishing his entitlement to merger at sentencing. *State v. Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). The Ohio Supreme Court anticipates the issue of merger will be fully litigated at sentencing, with neither party limited to theories argued at trial. *Washington*, supra, 2013-Ohio-427 at ¶ 20-21.

{¶61} In this case, appellant has not rebutted appellee's argument regarding the contents of the 911 tape. In the absence of rebuttal, we are left with appellee's account of what the tape contains, which does support the trial court's findings that felony murder [Count I], aggravated burglary [Count II], and aggravated burglary [Count III] are not allied offenses of similar import.

{¶62} Our analysis begins with the elements and corresponding allegations. Appellant was convicted of Count I, felony murder, pursuant to R.C. 2903.02(B), which states "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree * * *." Appellee contends the predicate offense for felony murder was aggravated robbery [Count V] and this offense occurred when appellant allegedly threatened Destin after struggling with him in the bedroom and then refused to leave without his gun. Aggravated robbery pursuant to R.C. 2911.01(A)(3) is defined as: "No person, in attempting or committing a theft offense, as defined in section

2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, or attempt to inflict, serious physical harm on another." Appellee asserts abrasions found on Destin's body were inflicted by appellant.

{¶63} Appellant was also convicted of Count II, aggravated burglary, pursuant to R.C. 2911.11(A)(2), which states:

> No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if * * * [t]he offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

This offense occurred, says appellee, when appellant broke in the front door of the apartment.

{¶64} Appellant was convicted of Count III, aggravated burglary, pursuant to R.C. 2911.11(A)(1), which states:

> No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if * * * [t]he

offender inflicts, or attempts or threatens to inflict physical harm on another.

{¶65} Appellee asserts this offense occurred when appellant broke into Destin's bedroom.

{¶66} The trial court agreed with appellee, finding the predicate offense of aggravated robbery [Count V] merged with Count I, felony murder, along with Count IV, robbery. The trial court declined to merge Count II, aggravated burglary, and Count III, aggravated burglary, with Count I, felony murder. Appellant was sentenced to consecutive terms on each offense and three mandatory one-year terms upon each accompanying firearm specification.

{¶67} We find appellant's acts of breaking into the apartment with a firearm, breaking into Destin's bedroom and struggling with him, and chasing him out of the apartment constituted separate offenses or were committed with a separate animus as to each. R.C. 2941.25(B). The trial court did not err in concluding the felony murder and aggravated burglary charges were not subject to merger.

{¶68} Appellant's first assignment of error is therefore overruled.

II., III.

{¶69} In his second and third assignments of error, appellant argues his convictions for murder and complicity to murder are against the manifest weight and sufficiency of the evidence. We disagree.

{¶70} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard

of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶71} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶72} Appellant challenges only his convictions upon murder and complicity to murder, arguing Officer Kaufman killed Destin Thomas solely because Destin pointed a gun at Kaufman. R.C. 2903.02(B) states, "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree * * * ." Appellant concedes his

convictions for the predicate offenses of aggravated burglary, aggravated robbery, and robbery are supported by sufficient evidence. He argues, though, that his commission of those offenses did not proximately result in the death of Destin Thomas; Destin's act of raising the gun at Kaufman broke the chain of causation. We disagree with appellant's underlying premise that Kaufman's act of firing upon Destin, who was carrying a gun as he fled from appellant or an accomplice, was not a foreseeable result of appellant's actions.

{¶73} Appellant's argument has been thoroughly analyzed and rejected elsewhere. In *State v. Dixon*, 2nd Dist. Montgomery No. 18582, 2002-Ohio-541, 2002 WL 191582, abrogated on other grounds, our colleagues on the Second District Court of Appeals concluded Ohio recognizes the proximate-cause theory of felony murder:

> With respect to felony murder, two opposing theories of criminal responsibility exist. Under the "agency theory," the State must prove that either the defendant or someone acting in concert with him, an accomplice, killed the victim and that the killing occurred during the perpetration of and in furtherance of the underlying felony offense. *Moore v. Wyrick* (8th Cir.1985), 766 F.2d 1253; *State v. Chambers* (1977), 53 Ohio App.2d 266, 56 ALR3d 239. **Under the "proximate cause theory," it is irrelevant whether the killer was the defendant, an accomplice, or some third party such as the victim of the underlying felony or a police officer**. Neither does the guilt or innocence of the person killed matter. Defendant can be held criminally responsible for the

> killing regardless of the identity of the person killed or the identity of the person whose act directly caused the death, so long as the death is the "proximate result" of Defendant's conduct in committing the underlying felony offense; that is, a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience. *Id; State v. Bumgardner* (August 21, 1998), Greene App. No. 97-CA-103, unreported; *State v. Lovelace* (1999), 137 Ohio App.3d 206, 738 N.E.2d 418.
>
> Reviewing the precise wording used in the felony murder statute at issue, R.C. 2903.02(B), that provision states that "no person shall cause the death of another *as a proximate result of*" committing or attempting to commit an offense of violence that is a felony of the first or second degree. That wording clearly indicates an intent on the part of the Ohio legislature to adopt a proximate cause standard of criminal liability.
>
> *State v. Dixon*, 2nd Dist. Montgomery No. 18582, 2002-Ohio-541, 2002 WL 191582, * 6-7. (Emphasis added.)

{¶74} And further, for a definition of "proximate cause," the *Dixon* court looked to *State v. Lovelace,* 137 Ohio App.3d 206, 216, 738 N.E.2d 418 (1st Dist.1999):

> Generally, for a criminal defendant's conduct to be the proximate cause of a certain result, it must first be determined that the conduct was the cause in fact of the result, meaning that the result

> would not have occurred "but for" the conduct. Second, when the result varied from the harmed intended or hazarded, it must be determined that the result achieved was not so extraordinary or surprising that it would be simply unfair to hold the defendant criminally responsible for something so unforeseeable. LaFave & Scott, Criminal Law (1972), Section 35, 246.

{¶75} In the instant case, Destin's death would not have occurred but for appellant's conduct in breaking into Destin's apartment, struggling with him, and chasing him from the apartment as he fled with the gun of appellant or his accomplice. We find Destin's death was foreseeable or should have been; being shot by law enforcement in the ensuing aftermath of a home invasion is well within the scope of risk posed by appellant's act. "Foreseeability is determined from the perspective of what the defendant knew or should have known, when viewed in light of ordinary experience." *Dixon*, supra, 2002-Ohio-541, 2002 WL 191582, at *7.

{¶76} Appellant's convictions for felony murder and complicity to felony murder are supported by sufficient evidence and are not against the manifest weight of the evidence. Appellant's second and third assignments of error are overruled.

IV.

{¶77} In his fourth assignment of error, appellant argues the trial court should have declared a mistrial when a witness mentioned appellant "called him from prison." We disagree.

{¶78} Appellee's evidence at trial established appellant called several friends and relatives on the morning of July 17, 2012 attempting to have someone pick him up.

One of those people was his friend Christian Coleman, a witness for appellee. Coleman testified appellant seemed "casual" during the first call, in which he asked Coleman to call his brother through a third party to come pick appellant up. During a second call, though, appellant sounded "scared." The following conversation then took place:

> * * * *.
>
> [PROSECUTOR]: All right. Now, subsequently, after all that happened that day, have you ever spoken to the Defendant about this incident, about the 17th of July of 2012?
>
> [COLEMAN]: No, sir.
>
> [PROSECUTOR]: Have you spoken to him at all, period, about anything?
>
> [COLEMAN]: I got like a phone call one time from him.
>
> [PROSECUTOR]: Yes.
>
> [COLEMAN]: And it was—of course, it was from prison. And he just---
>
> [DEFENSE COUNSEL]: Objection, your honor.
>
> THE COURT: Sustained.
>
> * * * *.
>
> T. 849.

{¶79} Appellant moved for a mistrial at that point and later outside the presence of the jury but the motions were overruled. Appellant also declined an immediate curative instruction. Upon later discussion, appellant agreed the trial court could instruct the jury not to consider any "detention" of appellant during final instructions.

{¶80} The curative instruction in this case was an adequate remedy for the witness's fleeting comment which did not merit a mistrial. The trial court did not abuse its discretion in refusing to grant a mistrial; it was not unreasonable, arbitrary, or unconscionable to admonish the jury to ignore any "detention" by appellant rather than grant a mistrial. See, *State v. Parker*, 5th Dist Stark No. 2013CA00217, 2014-Ohio-3488, at ¶ 36-37. Curative instructions are presumed to be an effective way to remedy errors that occur during trial. *State v. Treesh,* 90 Ohio St.3d 460, 480, 2001–Ohio–4, 739 N.E.2d 749. "A trial jury is presumed to follow the instructions given to it by the judge." *Beckett v. Warren,* 124 Ohio St.3d 256, 2010–Ohio–4, 921 N.E.2d 624, ¶ 18.

{¶81} Appellant's fourth assignment of error is overruled.

V.

{¶82} In his fifth assignment of error, appellant argues he was denied his due process right to a fair trial because of prosecutorial misconduct by appellee. We disagree.

{¶83} In closing, defense trial counsel told the jury that in order to accept appellee's theory of the case and find appellant guilty of felony murder, the jurors must disbelieve Officer Kaufman's testimony that victim Destin Thomas aimed the gun at him because the illogical decision by a victim to aim a gun at a police officer is not a natural and foreseeable result of appellant's conduct. On rebuttal, the prosecutor stated this argument is incorrect because Kaufman testified the events happened so quickly he doubted Destin realized he was a police officer:

> * * *. Officer Kaufman testified very clearly that this happened in a split second. In fact, he said to you that he thinks it happened so

> fast that he doubts that Destin ever even knew he was a cop. He said that to you. This happened like that.
>
> * * * *.
>
> T. 1446.

{¶84} Appellant now argues the prosecutor misstated the evidence, although no such objection was raised at trial. After closing arguments were concluded but before jury instructions, appellant argued the prosecutor misrepresented the evidence and the trial court advised the jury was instructed to use their collective memories to determine what the true state of the evidence is. T. 1470-1471.

{¶85} In fact, appellant concedes here it is reasonable to conclude from Kaufman's testimony the victim did not recognize Kaufman as a police officer, yet maintains this was improper argument by appellee because Kaufman never explicitly stated as much. We note defense trial counsel[3] introduced Kaufman's interview with Sgt. Pilya who investigated the police-involved shooting internally for the Columbus Police Department and the following recorded conversation was played for the jury:

> * * * *.
>
> SGT. PILYA: Even though this incident took place in a very short time span, do you believe that the suspects that came running out of the apartment recognized you to be a police officer?
>
> OFFICER KAUFMAN: No. I don't know what they were thinking. In all honestly (*sic*), I don't know what they were thinking.

[3] Defense trial counsel is appellate counsel.

SGT. PILYA: Do you believe it happened so fast that they wouldn't have time to put that together?

OFFICER KAUFMAN: I don't know.

* * * *.

T. 221-222.

{¶86} And upon questioning of Kaufman during redirect by the prosecutor:

* * * *.

[PROSECUTOR]: At some portion on that [written statement to internal investigators], did you say, in fact, your feet may have been still moving [when firing at Destin Thomas]?

[KAUFMAN]: Yes.

[PROSECUTOR:] And that it happened real fast?

[KAUFMAN]: The shooting itself, yes.

[PROSECUTOR]: You don't know for a fact that he saw how you were dressed; correct?

[KAUFMAN]: Correct.

[PROSECUTOR]: And you, in fact, didn't see how he was dressed initially.

[KAUFMAN]: Correct.

[PROSECUTOR]: Because everything happened so fast.

[KAUFMAN]: Yes.

* * * *.

T. 235-236.

{¶87} We disagree with appellant's characterization of the prosecutor's statement as a misrepresentation of the evidence. The test for prosecutorial misconduct is whether the prosecutor's remarks and comments were improper and if so, whether those remarks and comments prejudicially affected the substantial rights of the accused. *State v. Lott,* 51 Ohio St.3d 160, 555 N.E .2d 293 (1990), cert. denied, 498 U.S. 1017, 111 S.Ct. 591, 112 L.Ed.2d 596 (1990). In reviewing allegations of prosecutorial misconduct, we must review the complained-of conduct in the context of the entire trial. *Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

{¶88} Defense trial counsel did not object to the alleged improper comments. If trial counsel fails to object to the alleged instances of prosecutorial misconduct, the alleged improprieties are waived, absent plain error. *State v. White*, 82 Ohio St.3d 16, 22, 1998-Ohio-363, 693 N.E.2d 772 (1998), citing *State v. Slagle*, 65 Ohio St.3d 597, 604, 605 N.E.2d 916 (1992). We therefore review these allegations under the plain-error standard.

{¶89} We find no error here. The prosecutor's statement was a reasonable comment on the evidence and permissible argument. We further find, upon reviewing the prosecutor's remark in the context of the entire trial, these comments did not prejudicially affected the substantial rights of appellant. *State v. Brown*, 5th Dist. Stark No. 2012CA00040, 2013-Ohio-2220, at ¶ 37, appeal not allowed*,* 136 Ohio St.3d 1512, 2013-Ohio-4657, 995 N.E.2d 1214, ¶¶ 34-38 (2013) and *appeal not allowed,* 137 Ohio St.3d 1462, 2013-Ohio-4657, ¶¶ 34-38 (2013).

{¶90} Appellant's fifth assignment of error is overruled.

VI.

{¶91} In his sixth assignment of error, appellant argues he was denied a unanimous jury verdict on his convictions for murder and complicity to murder. We disagree.

{¶92} Appellant asserts he was denied a unanimous verdict because the jury was instructed it could find the predicate offense to felony murder was "aggravated burglary, and/or robbery, and/or aggravated robbery." A unanimous jury verdict is required by Crim.R. 31(A). "Although Crim.R. 31(A) requires juror unanimity on each element of the crime, jurors need not agree to a single way by which an element is satisfied." *State v. Gardner,* 118 Ohio St.3d 420, 2008–Ohio–2787, 889 N.E.2d 995, ¶ 38, citing *Richardson v. United States,* 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). "[A] 'jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime.'" Id*.,* quoting *Richardson.*

{¶93} We find the trial court properly instructed the jury because substantial evidence supports each alternative means of felony murder. The Court's reviewed similar facts in *State v. Johnson*, 46 Ohio St.3d 96, 104-05, 545 N.E.2d 636 (1989):

> Thus, the prevailing rule is, "a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where an indictment alleges numerous factual bases for criminal liability." [Citations omitted].

However, if a single count can be divided into two or more "distinct conceptual groupings," the jury must be instructed specifically that it must unanimously conclude that the defendant committed acts falling within one such grouping in order to reach a guilty verdict. [Citations omitted.]

In the case *sub judice,* appellant suggests that he could have been convicted by less than a unanimous jury since some of the jurors could have found that he murdered [the victim] while committing aggravated robbery, some that he murdered her while attempting to commit aggravated robbery, some that he murdered her while fleeing immediately after committing aggravated robbery, and some that he murdered her while fleeing immediately after attempting aggravated robbery. However, even assuming *arguendo* that the jury had split on the alternatives offered by the specification, each juror still would have agreed that the appellant had murdered [the victim] in conjunction with at least attempting to commit aggravated robbery, and this alone would have been adequate to sustain the conviction.

We believe the jury was faced with a "single conceptual grouping of related facts," rather than two or more "distinct conceptual groupings." *United States v. Duncan*, 850 F.2d 1104, 1112-1113 (C.A. 6, 1988). Essentially, the alternatives presented to the jury and charged in the specifications were not conceptually

> distinct. Therefore, a “patchwork” or less than unanimous verdict was not possible. Furthermore, even if we would accept appellant's contention, the record fails to indicate any potential for jury confusion. * * * *.

{¶94} Similarly, in the instant case, by necessity each juror would have agreed appellant murdered Destin Thomas in conjunction with commission of a felony offense of violence of the first or second degree and this alone would sustain the felony murder conviction. We therefore find the trial court’s general unanimity instruction to be sufficient.

{¶95} Appellant was not deprived of a unanimous jury verdict and his sixth assignment of error is therefore overruled.

CONCLUSION

{¶96} Appellant's six assignments of error are overruled and the judgments of the Fairfield County Court of Common Pleas are affirmed.

By: Delaney, J. and

Wise, P.J.

Baldwin, J., concur.