[Cite as *State v. Tuggle*, 2010-Ohio-4162.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1317

Appellee — Trial Court No. CR0200603159

v.

Antoine Tuggle — **DECISION AND JUDGMENT**

Appellant — Decided: September 3, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Kenneth J. Rexford, for appellant.

* * * * *

COSME, J.

{¶ 1} Appellant, Antoine Tuggle, appeals from a judgment of the Lucas County Court of Common Pleas after a resentencing on four counts of complicity. For the reasons set forth below, we affirm the judgment of the trial court.

I. PROCEDURAL BACKGROUND

{¶ 2} This is appellant's second appeal to this court. In *State v. Tuggle*, 6th Dist. No. L-07-1284, 2008-Ohio-5020, appellant's first appeal, this court affirmed appellant's convictions and sentences. After the Supreme Court of Ohio declined jurisdiction to hear appellant's appeal and the United States Supreme Court denied appellant's petition for writ of certiorari, appellant returned to the trial court, arguing that the original sentencing entry was void because postrelease control was required but not properly included in the sentence. The trial court agreed and resentenced appellant to essentially the same sentence as before.

{¶ 3} We consider this appeal because we have held that "in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence." *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 6, certiorari denied (2008), ___ U.S. ___ 129 S.Ct. 463, 172 L.Ed.2d 332, superseded by statute on other grounds as stated in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434.

{¶ 4} Further, in *State v. Mitchell*, 6th Dist. No. L-10-1047, 2010-Ohio-1766, ¶ 16, this court held that a trial court's noncompliant sentencing entry was not a final judgment for purposes of the rules of criminal procedure, and therefore defendant's

appeal from that sentencing entry did not preclude defendant from appealing the trial court's subsequent corrected judgment of conviction and resentence. Thus, unless the Supreme Court of Ohio decides otherwise, this court will apply *Mitchell* to the facts of this case. As such, appellant's original appeal is a legal nullity, and this appeal following resentencing is appellant's first appeal as of right.

{¶ 5} Here, appellant was sentenced to an indefinite term of 18 years to life. Although only the complicity to murder charge required parole, postrelease control was required for all of the charges. Thus, we consider appellant's seven assignments of error.

II. FACTUAL BACKGROUND

{¶ 6} The factual details of the events that took place before, during, and after the shooting death of Jerome Saxton are set forth extensively in this court's decision in *State v. Tuggle*, 6th Dist. No. L-07-1284, 2008-Ohio-5020. We summarize them here for the convenience of the reader.

{¶ 7} In the early morning hours of June 5, 2006, Saxton was shot to death inside his car while driving on Lincoln Street in Toledo, Lucas County, Ohio. The state alleged that Saxton was shot by either appellant or his co-defendant Brandon Calhoun. The state also alleged that appellant, Calhoun, and others, were either the principal offender or had aided and abetted the others in causing the death of Saxton. The state suggested that the shooting was gang-related.

{¶ 8} The testimony of the witnesses at trial revealed that the early morning shooting was precipitated by two fights that had occurred days earlier, the first between appellant's brother, Jerry or Gerald ("Jerry") and an alleged Nine Hundred member. The second fight was between appellant and Donte Gilmer, ("Juvie") a Nine Hundred member. Clearly, there was some tension between appellant, a member of the Hill Side gang, and members and friends of a street gang known as the Nine Hundred Boys ("Nine Hundred") or South Side Folks.

{¶ 9} On the night of the shooting, a third altercation occurred between appellant and Lawrence Glover, a Nine Hundred member, at the Blueprint nightclub in downtown Toledo. Officers of the Toledo Police Department intervened and detained appellant. Later, around 2:30 a.m., Saxton was shot while driving his car as part of a group of 50-70 people in 10-20 cars on Lincoln Street. According to witness testimony, a fight was expected by some of the witnesses. Key to this case was testimony that pointed to appellant as the instigator of the incident at the Blueprint and that he initiated the idea for members of the Nine Hundred gang to come to Lincoln Street. Also, appellant and co-defendant Calhoun, were seen outside appellant's aunt's home on Lincoln Street with guns. The police investigation could not determine who began shooting, those in cars on the street or those gathered in front of several houses.

{¶ 10} Appellant and Calhoun were indicted by the Lucas County Grand Jury on September 27, 2006, for: (1) murder, in violation of R.C. 2903.02(B) and 2929.02; (2)

involuntary manslaughter, in violation of R.C. 2903.04(A); (3) aggravated riot, in violation of R.C. 2917.02(A)(2) and (C); and (4) felonious assault, in violation of R.C. 2903.11(A)(2). Attached to each count was also a firearm specification, in violation of R.C. 2941.145 and a "gang" specification, in violation of R.C. 2941.142. Implicit in the indictment were the charges of complicity pursuant to R.C. 2923.03(F). Appellant pled not guilty and his trial began on May 21, 2007.

{¶ 11} On September 30, 2008, this court rejected all of appellant's assignments of error and concluded that sufficient evidence was presented to support appellant's four convictions and firearm specifications. Appellant's co-defendant Calhoun pled guilty to involuntary manslaughter with a gun specification and to aggravated riot. While awaiting sentencing and as part of his plea, Calhoun testified on behalf of the state. The jury found appellant guilty of complicity to all four counts and the firearm specification.

{¶ 12} The court sentenced appellant as follows: Count No. 1, complicity in the commission of murder-15 years to life in prison, three years mandatory firearm specification, served consecutively to each other, for a total incarceration of 18 years to life; Count No. 2, complicity in the offense of involuntary manslaughter-ten years in prison, three years mandatory incarceration as to the firearm specification, to be served consecutively to each other, but concurrently to other sentences imposed; Count No. 3, complicity in the offense of aggravated riot-one and one-half years in prison, three years mandatory incarceration as to the firearm specification, to be served consecutively to

each other, but concurrently to all other sentences imposed; and Count No. 4, complicity in the offense of felonious assault-eight years in prison, three years mandatory incarceration as to the firearm specification, to be served consecutively to each other, but concurrently to all other sentences imposed.

{¶ 13} Appellant's resentencing is essentially the same.

III. AMENDMENT TO THE INDICTMENT

{¶ 14} In his first assignment of error, appellant maintains that:

{¶ 15} "The trial court erred by allowing the prosecution to violate the rights of the accused to presentment to a grand jury and to due process, in violation of both the Ohio Constitution and the United States Constitution, when the court allowed the state to amend the charges filed by the grand jury to include allegations of co-conspirators not named in the grand jury indictment."

{¶ 16} Appellant complains that this issue is "somewhat complicated," and his original appellate counsel argued this point "ineloquently" during the first appeal. Appellant maintains that the issue is not whether complicity could be stated in terms of the complicity statute or in terms of the principal offense. Rather, appellant argues that the identification of Calhoun as a co-defendant in the indictment set forth a presumption that other individuals were not involved. As such, appellant argues that the change from

the charge in the indictment to the bill of particulars adding "other complicitors" to the allegations of complicity constituted an impermissible amendment to the indictment.

{¶ 17} We disagree.

{¶ 18} Section 10, Article I of the Ohio Constitution provides that, "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury * * *." Thus, the Ohio Constitution guarantees an accused that the essential facts constituting the offense for which he is tried will be found in the indictment by the grand jury. *Harris v. State* (1932), 125 Ohio St. 257, 264. The grand jury functions both to determine whether there is probable cause to believe that an offense has been committed and to protect citizens from unfounded prosecutions. *United States v. Sells Engineering, Inc*. (1983), 463 U.S. 418, 423, 103 S.Ct. 3133, 77 L.Ed.2d 743.

{¶ 19} "Under the respective provisions of the Ohio and United States Constitutions, an individual accused of a felony is entitled to an indictment setting forth the 'nature and cause of the accusation.' (Internal citations omitted). These provisions are designed to compel the government to aver all material facts constituting the essential elements of the offense so that the accused may not only have adequate notice and an opportunity to defend, but also to protect himself from any future prosecution for the same offending conduct. (Internal citations omitted). It is not, however, necessary that an indictment contain a recitation of the evidence supporting the various facts; it is

enough that the indictment contains language sufficient to alert the person named therein that certain generally specified conduct constitutes a violation of an existing statute. (Internal citations omitted)." *State v. Gringell* (1982), 7 Ohio App.3d 364, 366.

{¶ 20} Once an indictment has been returned by a grand jury, it may not be substantively amended without reconvening the grand jury. *Stirone v. U.S.* (1960), 361 U.S. 212, 215-216, 80 S.Ct. 270, 4 L.Ed.2d 252. A substantive amendment occurs when the prosecution or the court literally or constructively alters the terms of the indictment after it has been returned by the grand jury. See, id. at 217. A court may not convict a defendant on a charge essentially different from that found by the grand jury. *State v. Headley* (1983), 6 Ohio St.3d 475, 478-479.

{¶ 21} Crim.R. 7(D) permits a court to "amend an indictment 'at any time' if the amendment does not change 'the name or identity of the crime charged.'" *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, ¶ 1. The charging instrument need not contain great specificity. " * * * The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. * * * " Crim.R. 7(B).

{¶ 22} Appellant complains that the failure of the court to require the identity of the "other complicitors" effectively amended the indictment by changing the terms of the indictment after the grand jury had considered the evidence presented to them. Appellant

insists that the grand jury must have had evidence only of Calhoun's participation in these crimes in order to name him and not "other complicitors."

{¶ 23} While appellant does not suggest that the name, identity, or penalty of the crimes changed, he contends that the state failed to provide proof of complicity between the appellant and the named co-conspirator, Calhoun, relying instead, on evidence of complicity between appellant and unnamed "other complicitors". As such, appellant argues that an amendment has occurred.

{¶ 24} Appellant relies upon *United States v. Salinas* (5th Cir. 1981), 654 F.2d 319, 324, to argue that the identity of conspirators is "of essence to the allegation" and that any change in the named or unnamed conspirators constitutes an impermissible amendment to the indictment.

{¶ 25} In *United States v. Salinas* (5th Cir. 1981), 654 F.2d 319, 324, overruled in part on other grounds, *U.S. v. Adamson* (5th Cir. 1983), 700 F.2d 953, the court held that the indictment charging Salinas with aiding and abetting a specific named individual was amended when the judge *modified an essential element of the offense* by expanding the indictment to include other individuals not named in the indictment. While appellant in this case argues the similarities with the changes made in *Salinas*, there are some key distinctions.

{¶ 26} In *Salinas*, the relevant issue appeared in count one which specifically alleged that Woodul, as principal to the offense, caused a misapplication of bank funds

and charged Salinas, as a director of the bank, with aiding and abetting Woodul. The evidence, however, showed that a different bank officer, Nance, not Woodul, authorized the illegal transaction and that Salinas was not a director of the bank. The trial court attempted to overcome the erroneous specificity of the charge by broadening its instructions to the jury allowing a guilty verdict if Salinas aided and abetted any officer, director, or employee of the bank.

{¶ 27} However, in this case, appellant, along with Calhoun, was charged as principal of the offenses committed. The charges against appellant were not dependent upon evidence that a named principal committed an act which he then aided, as was the situation in *Salinas*. Instead, the indictment here charged appellant as a principal.

{¶ 28} The complicity statute, R.C. 2923.03(F), provides that "[a] charge of complicity may be stated in terms of this section, or in terms of the principal offense." Therefore, "a defendant charged with an offense may be convicted of that offense upon proof that he was complicit in its commission, even though the indictment is 'stated * * * in terms of the principal offense' and does not mention complicity. Where one is charged in terms of the principal offense, he is on notice, by operation of R.C. 2923.03(F), that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. See *State v. Keenan* (1998), 81 Ohio St.3d 133, 151 * * *." *State v. Herring* (2002), 94 Ohio St.3d 246, 251.

{¶ 29} Furthermore, Ohio courts have not applied *Salinas* to limit prosecution of complicity offenses to only the named individuals in an indictment. According to R.C. 2923.03(F), since the indictment does not even need to mention the words "complicity," "conspiracy," or "aiding and abetting," in order for a jury to convict on complicity to an offense, it then follows that the indictment need not mention the identity of an individual with whom a defendant is complicit.

{¶ 30} As in *Salinas*, the grand jury in this case could have charged "unnamed individuals" in the indictment. The grand jury could have also chosen not to name Calhoun. However, since the identity of the principal is not an essential element of the offense that the state must prove in order to support a conviction of complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the identification of Calhoun or "other complicitors" in the indictment was not necessary to show that appellant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that appellant shared the criminal intent of the principal. See *State v. Johnson* (2001), 93 Ohio St.3d 240, syllabus. Furthermore, appellant had notice of the state's intent to argue complicity. The bill of particulars demonstrated for appellant that the indictment against him alleged the commission of offenses "in complicity with Brandon Calhoun and other complicitors."

{¶ 31} Because there was no change to the penalty or degree of the charged offense, and because there was evidence sufficient to show that appellant had conspired

with Calhoun or "other complicitors" to commit the offenses charged in the indictment, there was no impermissible amendment to the indictment when the state added "other complicitors" to the bill of particulars. Nor did the state need to establish the identity of these "other complicitors" in order to convict appellant of complicity.

{¶ 32} The charges of complicity did not constructively amend the indictment because complicity need not be stated in terms of the complicity statute but may be stated, as it was in this case, in terms of the principal offenses. Accordingly, appellant's first assignment of error is not well-taken.

IV. OPINION TESTIMONY

{¶ 33} In his second assignment of error, appellant maintains that:

{¶ 34} "The trial court erred, abused its discretion or committed plain error when it allowed the jury to consider evidence the admission of which violated the rule against opinion testimony."

{¶ 35} Appellant complains that Detective Allen's testimony as to "why potential witnesses did not show up to testify or otherwise cooperate violated Evid.R. 701." Appellant argues that Detective Allen's testimony was not relevant.

{¶ 36} We disagree.

{¶ 37} Appellant's counsel did object to the admission of this opinion testimony. Thus, we review the trial court's decision to admit Detective Allen's lay witness

testimony under Evid.R. 701 according to an abuse-of-discretion standard. *City of Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 113. See *State v. Myers* (1993), 87 Ohio App.3d 92, 98.

{¶ 38} Under Evid.R. 701 and 704, a lay opinion on the ultimate issue to be decided by the trier of fact can be given if the standards of admissibility under Evid.R. 701 are met. See *Lee v. Baldwin* (1987), 35 Ohio App.3d 47, 49. Under Evid.R. 701, "lay opinion must be: (1) 'rationally based on the perception of the witness,' i.e., the witness must have firsthand knowledge of the subject of his testimony and the opinion must be one that a rational person would form on the basis of the observed facts; and (2) 'helpful,' i.e., it must aid the trier of fact in understanding the testimony of the witness or in determining a fact in issue." See id.

{¶ 39} In this case, Detective Allen, an officer who investigates crimes and often deals with youth and gang member witnesses, offered his opinions as to why the witnesses would not want to testify, based upon his own observations and perceptions. His testimony added to the understanding of how his investigation was conducted and presented information that might aid the jury in determining credibility and motivation for some of the witness testimony.

{¶ 40} In addition, Detective Allen's reference to "Juvie" as a missing witness merely indicated why that person was not being called to testify personally regarding the alleged altercation between him and appellant. The detective's testimony that other

witnesses had told him about the alleged altercation was offered, not for the truth of the matter, but to show Detective Allen's reasons for initially investigating appellant and to show a possible motive for why appellant might have been involved in the events on Lincoln Street. Thus, Detective Allen's testimony fell within the criteria for admissibility under Evid.R. 701, and the trial court did not abuse its discretion in permitting his testimony.

{¶ 41} Accordingly, appellant's second assignment of error is not well-taken.

V. RIGHT OF CONFRONTATION

{¶ 42} In his third assignment of error, appellant maintains that:

{¶ 43} "The trial court denied to the accused his right of confrontation when the court barred the defense efforts to effectively cross-examine the state's chief witness, Lawrence Glover, as to his cell phone records."

{¶ 44} Appellant argues that Lawrence Glover himself could have authenticated the business record or that the phone records could have been used to refresh Glover's memory.

{¶ 45} We disagree.

{¶ 46} As its basis for denying admission of Glover's cell phone records, the trial court expressly relied on Evid.R. 803(6). That rule states:

{¶ 47} "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

{¶ 48} "(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

{¶ 49} A telephone record or other such document may fall within the Evid.R. 803(6) business record exception. *State v. Hirtzinger* (1997), 124 Ohio App.3d 40, 49, citing *State v. Knox* (1984), 18 Ohio App.3d 36, 37. In order for a document to be admissible, however, it must satisfy the requirements of authentication. *State v. Smith* (1989), 63 Ohio App.3d 71, 74.

{¶ 50} The record establishes that the proper foundational testimony was not present to authenticate Glover's cell phone records. The admission or exclusion of

evidence rests in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 180.

{¶ 51} Having failed to authenticate the cell phone records, appellant suggests that the records could have been used instead to "refresh" Glover's memory of whether he initiated the call himself. But Glover had testified that appellant called him and asked if they were coming to meet him on Lincoln Street - presumably "to fight for the little revenge." Appellant contends that the cell phone records show that it was Glover who called him - that he did not call Glover. Appellant relies on Evid.R. 612 to support the proposition that he could have impeached Glover's recollection of the call with the records. It was not established, however, that Glover lacked a present recollection of the information or events. As such, the cell phone records could not be used to circumvent Evid.R. 607's limitations in the impeachment of the witness.

{¶ 52} Therefore, we cannot say that the trial court abused its discretion in denying appellant the use of the unauthenticated cell phone bill to cross-examine Glover and impeach his testimony.

{¶ 53} Accordingly, appellant's third assignment of error is not well-taken.

VI. EFFECTIVE ASSISTANCE OF COUNSEL

{¶ 54} In his fourth assignment of error, appellant contends that:

{¶ 55} "The appellant was denied effective assistance of counsel, in violation of his rights under both the Ohio Constitution and the United States Constitution."

{¶ 56} We disagree.

{¶ 57} To establish a valid claim for ineffective assistance of counsel, an appellant must demonstrate that: (1) defense counsel's performance was so deficient that he or she "was not functioning as the 'counsel' guaranteed by the Sixth Amendment"; and (2) defense counsel's errors prejudiced the defendant, depriving him of a trial "whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. The defendant bears the burden of proof on both prongs because a properly licensed attorney is presumed competent in Ohio. *State v. Jackson* (1980), 64 Ohio St.2d 107, 111.

{¶ 58} In this case, appellant relies on the errors alleged in his first, second, and third assignments of error regarding the amendment to the indictment, opinion testimony and the admissibility of the cell phone records. Based upon our disposition of those assignments of error, we conclude that appellant has not established the first prong of the *Strickland* test.

{¶ 59} The introduction of the cell phone records to impeach Glover's testimony could have been proper, but without someone from the cell phone company to authenticate the document, it was inadmissible. "The mere failure to subpoena a witness

is not a substantial violation of an essential duty to a client in the absence of a showing that such testimony of the witnesses would have assisted the defense." *Middletown v. Allen* (1989), 63 Ohio App.3d 443, 448.

{¶ 60} Trial counsel did question Glover about whether he had placed the initial call to appellant or if appellant had called him. Other than to undermine Glover's credibility, appellant does not explain why it was so important to show that Glover had initiated the call. The fact that appellant and Glover had a conversation that evening prior to the Lincoln Street shooting supports the theory that appellant knew or should have known a fight might take place and that appellant conspired in the shooting incident that took the life of Saxton.

{¶ 61} Even if trial counsel was deficient in not obtaining a subpoena for Glover's cell phone records, in order to establish prejudice, appellant must show that there is a reasonable probability that but for counsel's mistakes, the result of the trial would have been different. *State v. Hamblin* (1988), 37 Ohio St.3d 153, certiorari denied (1988), 488 U.S. 975, 109 S.Ct. 515, 102 L.Ed.2d 550. Appellant did not do so. In any event, the remaining evidence of guilt is sufficient to find the error harmless. See *State v. Hirtzinger* (1997), 124 Ohio App.3d 40, 49. Therefore, appellant has failed to demonstrate that his trial counsel was ineffective.

{¶ 62} Accordingly, appellant's fourth assignment of error is not well-taken.

VII. INSTRUCTIONS TO THE JURY

{¶ 63} In his fifth assignment of error, appellant argues that:

{¶ 64} "The court erred when it refused to instruct the jury on self-defense."

{¶ 65} Appellant claims that this court erred in its earlier opinion when it "opined that there was a lack of evidence that either Calhoun or [appellant] acted in such a way as to amount to self-defense or defense of others. The focus seems to be on the lack of magic words, such as 'I fired shots to protect myself from imminent death' or 'I fired shots to protect so-and-so from imminent death.'"

{¶ 66} We disagree.

{¶ 67} Self-defense is an affirmative defense, and the burden of going forward with evidence of self-defense and the burden of proving self-defense by a preponderance of the evidence is upon the accused. R.C. 2901.05(A); *State v. Jackson* (1986), 22 Ohio St.3d 281, 283.

{¶ 68} "To establish self-defense, a defendant must prove (1) that the defendant was not at fault in creating the situation giving rise to the affray, (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force, and (3) that the defendant did not violate any duty to retreat or avoid the danger." *State v. Barnes* (2002), 94 Ohio St.3d 21, 24, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, 79-80. "If a defendant fails to prove any one of these elements, he has failed to demonstrate that he

acted in self-defense." *State v. Gillespie*, 172 Ohio App.3d 304, 2007-Ohio-3439, ¶ 12, citing to *State v. Jackson* (1986), 22 Ohio St.3d 281, 284.

{¶ 69} "In determining whether a defendant has sufficiently raised an affirmative defense such as self-defense to warrant a jury instruction, the test to be applied is whether the defendant has introduced evidence that, if believed, is sufficient to raise a question in the minds of reasonable persons concerning the existence of the offense. *State v. Melchior* (1978), 56 Ohio St.2d 15 * * *. Because proof of an affirmative defense creates reasonable doubt of a defendant's guilt, its proof is a bar to criminal liability for the offense charged." *Gillespie* at ¶ 13.

{¶ 70} Appellant argues that the elements of self-defense were established because appellant was not at fault for the shooting, was in imminent danger of death when others began shooting at him, his only escape was to shoot back, and he was unable to retreat. Although appellant describes the drive-by shooting as "[q]uick, crazed, and violent", there is no evidence regarding any actions by the victim against appellant, or that appellant feared for his life or acted in self-defense or in defense of others.

{¶ 71} Accordingly, appellant's sixth assignment of error is not well-taken.

VIII. MANIFEST WEIGHT OF THE EVIDENCE

{¶ 72} In his sixth assignment of error, appellant argues that:

{¶ 73} "The convictions for Count I (complicity to commit murder), Count II (complicity to commit involuntary manslaughter), Count II [sic] (complicity to commit aggravated riot), and Count IV (complicity to commit felonious assault) were against the manifest weight of the evidence."

{¶ 74} Appellant complains that "the prosecution placed its entire theory on a strained complicity theory" and there was no evidence that appellant fired the shot that killed Sexton. Appellant argues that there was no proof that he "even knew that Calhoun was out there, firing his weapon" and therefore, could not have aided or abetted Calhoun in committing the offenses.

{¶ 75} We disagree.

{¶ 76} The manifest weight of the evidence indicates that the greater amount of credible evidence supports one side of an issue more than the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. The appellate court considers all of the evidence, sits as a "thirteenth juror," and decides whether a greater amount of credible evidence supports an acquittal such that the jury "clearly lost its way" in convicting the appellant. Id. See *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652. See, also, *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175.

{¶ 77} Further, questions regarding the "[w]eight of evidence and credibility of witnesses are matters for the trier of fact. The factfinder can observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and the examiner, and watch the witness's reaction to exhibits and the like. Determining credibility from a sterile transcript is far more difficult. A reviewing court must, therefore, accord due deference to the credibility determinations made by the factfinder." *State v. York*, 6th Dist. No. WD-03-017, 2003-Ohio-7249, ¶ 10, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of syllabus.

{¶ 78} In this case, each conviction was for complicity to commit the particular offense charged. Concerning complicity, we have observed that Ohio law is well-settled that, to convict an offender of complicity, the state need not establish the principal's identity. Rather, R.C. 2923.03(C) only requires that the state prove that a principal committed the offense. *State v. Perryman* (1976), 49 Ohio St.2d 14, paragraph four of the syllabus, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3136, 57 L.Ed.2d 1156. However, conviction of the principal offender is not a prerequisite to finding a defendant guilty of complicity. *In re Miskow* (1988), 61 Ohio Misc.2d 229, 231.

{¶ 79} There is sufficient competent, credible evidence to permit reasonable minds to find appellant guilty of each of the charged crimes. The evidence strongly supports a finding that appellant could have fired the shot that hit Saxton, and that he aided or abetted Calhoun in committing the offenses. A reasonable inference can be made either

that shots from appellant's weapon directly caused Saxton's death, or that he was, at the least, conspiring with others, including Calhoun, in conduct which resulted in the shooting and subsequent death of Saxton.

{¶ 80} A person aids and abets another when he supports, assists, encourages, cooperates with, advises, or incites the principal in the commission of the crime, and shares the criminal intent of the principal. *State v. Johnson* (2001), 93 Ohio St.3d 240, syllabus. Such intent may be inferred from the circumstances surrounding the crime. Id. Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed. *State v. Pruett* (1971), 28 Ohio App.2d 29, 34. Specifically, when a person sets in motion a "sequence of events, the foreseeable consequences of which were known or should have been known to him at the time, he is criminally liable for the direct, proximate and inevitable consequences of death resulting from his original act." *State v. Williams* (1990), 67 Ohio App.3d 677, 683. "It is not necessary that the accused be in a position to foresee the precise consequence of his conduct; only that the consequence be foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by his conduct." *State v. Losey* (1985), 23 Ohio App.3d 93, 95-96.

{¶ 81} Finally, concerning the firearm specifications, witness testimony indicated that appellant was standing outside the house with a firearm which he openly fired at vehicles on the street. No evidence was presented that his firearm was inoperable.

Therefore, the verdict is supported by sufficient competent, credible evidence permitting reasonable minds to find appellant guilty of the offenses of complicity.

{¶ 82} Accordingly, appellant's sixth assignment of error is not well-taken.

IX. SUFFICIENCY OF THE EVIDENCE

{¶ 83} In his seventh assignment of error, appellant contends that:

{¶ 84} "The convictions for Count I (complicity to commit murder), Count II (complicity to commit involuntary manslaughter), Count II [sic] (complicity to commit aggravated riot), and Count IV (complicity to commit felonious assault) were not supported by sufficient evidence."

{¶ 85} Appellant complains only that "the prosecution presented no evidence of any of the elements of a complicity case."

{¶ 86} We disagree.

{¶ 87} When an appellant challenges his conviction as not supported by sufficient evidence, an appellate court construes the evidence in favor of the prosecution and determines whether such evidence permits any rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, superseded by constitutional amendment on other grounds in *State v. Smith* (1997), 80 Ohio St.3d 89; *State v. Thompkins* (1997), 78 Ohio

St.3d 380, 386. See *Jackson v. Virginia* (1979), 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560. See, also, *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 78.

{¶ 88} In a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility, instead, it assumes the state's witnesses testified truthfully and determines whether or not that testimony satisfies each element of the crime. *State v. Woodward*, 10th Dist. No. 03AP-398, 2004-Ohio-4418, ¶ 16. In other words, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks* at paragraph two of the syllabus; *Yarbrough* at ¶ 79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim); *State v. Lockhart* (Aug. 7, 2001), 10th Dist. No. 00AP-1138. A guilty verdict will not be disturbed on appeal unless reasonable minds could not reach the conclusion reached by the trier-of-fact. *Jenks* at 273; *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶ 89} Appellant was convicted of complicity to commit murder, complicity to commit involuntary murder, complicity to commit aggravated riot, and complicity to commit felonious assault. Our analysis will start with the complicity to commit the particular offense charged. R.C. 2923.03, defining complicity, provides, in pertinent part, that:

{¶ 90} "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶ 91} "(1) Solicit or procure another to commit the offense;

{¶ 92} "(2) Aid or abet another in committing the offense;

{¶ 93} "(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

{¶ 94} "(4) Cause an innocent or irresponsible person to commit the offense.

{¶ 95} "(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

{¶ 96} " * * *

{¶ 97} "(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

{¶ 98} With this overall framework in mind, we examine each of appellant's convictions to determine whether the evidence was sufficient to support the jury's verdicts.

(1) Count No. 1: Complicity to Commit Murder

{¶ 99} Appellant was convicted of complicity to commit murder, a violation of R.C. 2903.02(B), commonly known as felony murder. This section 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 and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

{¶ 100} Under Ohio's felony murder doctrine, a defendant can be held liable for a death that results from the actions of his co-felon. *State v. Washington* (Feb 7, 2002), 8th Dist. No. 79300. In *State v. Dixon* (Feb. 8, 2002), 2d Dist. No. 18582, (abrogation recognized on other grounds), the court explained that under the "proximate cause theory" of felony murder:

{¶ 101} "[I]t 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. A 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." Citing *State v. Chambers* (1977), 53 Ohio App.2d 266, 269. See *State v. Bumgardner* (Aug. 21, 1998), 2d Dist. No. 97-CA-103; *State v. Lovelace* (1999), 137 Ohio App.3d 206. Consequently, a defendant may be held criminally liable for the unintended death that results from the commission of a first or second degree felony.

{¶ 102} The offense of violence in this case is felonious assault, a second degree felony, defined by R.C. 2903.11(A)(2), which states:

{¶ 103} "(A) No person shall knowingly * * *:

{¶ 104} "(2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

{¶ 105} The culpable mental state set forth above is defined in R.C. 2901.22(B) as:

{¶ 106} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 107} Therefore, felony murder as defined in R.C. 2903.02(B), with the underlying offense of violence being felonious assault, is supported where the evidence presented "establishes that the defendant knowingly caused physical harm to the victim." *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, syllabus.

{¶ 108} The evidence in this case, when viewed in the light most favorable to the prosecution, was sufficient to prove the elements of complicity to commit murder. "[To] support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the

crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson* (2001), 93 Ohio St.3d 240, syllabus.

{¶ 109} Ohio law is further well-settled that, to convict an offender of complicity, the state need not establish the principal's identity. Rather, R.C. 2923.03(C) only requires that the state prove that a principal committed the offense. *State v. Perryman* (1976), 49 Ohio St.2d 14, paragraph four of the syllabus, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3136, 57 L.Ed.2d 1156. "Principal offender" under R.C. 2923.03(F) means the actual killer, but not necessarily the "sole" offender, meaning that there can be more than one principal offender since there can be more than one actual killer. *State v. Calwise*, 7th Dist. No. 00 CA 77, 2003-Ohio-3463, ¶ 33.

{¶ 110} In this case, it could not be proven who fired the shot that killed Saxton. It was sufficient that appellant, Calhoun, or others were aware that the conduct of firing weapons at occupied vehicles would likely cause serious injuries to or even kill someone. Witnesses testified that appellant was seen shooting a firearm at cars on Lincoln Street. As well, Calhoun testified that he shot his firearm and that it was possible that his shot could have been the one that hit Saxton. Therefore, a reasonable inference can be made either that shots from appellant's weapon directly caused Saxton's death, or that he was, at the least, conspiring with others, including Calhoun, in conduct which resulted in the shooting and subsequent death of Saxton.

{¶ 111} Although circumstantial, the testimony and evidence presented and inferences drawn from it supported the jury's finding that appellant acted knowingly and in concert with others. Appellant did not need to know that a gun would be used; rather all that is necessary is that he be involved in the fight. Therefore, as to the complicity to commit felonious assault, there was sufficient evidence to prove the elements of the offense beyond a reasonable doubt. Accordingly, the verdict was supported by sufficient evidence on all elements of the crime of complicity to commit felony murder.

(2) Count No. 2: Complicity to Commit Involuntary Manslaughter

{¶ 112} R.C. 2903.04(A), dealing with involuntary manslaughter, states: "No person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony." Involuntary manslaughter under R.C. 2903.04(A) is a lesser included offense of murder. See *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶ 79. See, also, *State v. Rohdes* (1986), 23 Ohio St.3d 225, 227; *State v. Kidder* (1987), 32 Ohio St.3d 279, 282. Thus, "proof of felony murder, R.C. 2903.02(B) would always and necessarily prove involuntary manslaughter, R.C. 2903.04(A)," *State v. Dixon* (Feb. 8, 2002), 2d Dist. No. 18582, where as here, a comparison of the two reveals that "they do not prohibit identical activity and require identical proof." Id. See *State v. Jones*, 8th Dist. No. 80737, 2002-Ohio-6045, ¶ 134-135.

{¶ 113} Because we have concluded that sufficient evidence exists to support a conviction of murder, we conclude that there was also sufficient evidence to support a conviction of involuntary manslaughter. Therefore, the verdict was supported by sufficient evidence on all elements of the crime of complicity to involuntary manslaughter.

(3) Count No. 3: Complicity to Commit Aggravated Riot

{¶ 114} R.C. 2917.02, aggravated riot, states that:

{¶ 115} "(A) No person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of the Revised Code:

{¶ 116} "(1) With purpose to commit or facilitate the commission of a felony;

{¶ 117} "(2) With purpose to commit or facilitate the commission of any offense of violence;

{¶ 118} "(3) When the offender or any participant to the knowledge of the offender has on or about the offender's or participant's person or under the offender's or participant's control, uses, or intends to use a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code. * * * "

{¶ 119} R.C. 2917.11, disorderly conduct, provides that:

{¶ 120} "(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following:

{¶ 121} "(1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior;

{¶ 122} "(2) Making unreasonable noise or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person;

{¶ 123} "(3) Insulting, taunting, or challenging another, under circumstances in which that conduct is likely to provoke a violent response;

{¶ 124} "(4) Hindering or preventing the movement of persons on a public street, road, highway, or right-of-way, or to, from, within, or upon public or private property, so as to interfere with the rights of others, and by any act that serves no lawful and reasonable purpose of the offender;

{¶ 125} "(5) Creating a condition that is physically offensive to persons or that presents a risk of physical harm to persons or property, by any act that serves no lawful and reasonable purpose of the offender.

{¶ 126} "(B) No person, while voluntarily intoxicated, shall do either of the following:

{¶ 127} "(1) In a public place or in the presence of two or more persons, engage in conduct likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities, which conduct the offender, if the offender were not intoxicated, should know is likely to have that effect on others;

{¶ 128} "(2) Engage in conduct or create a condition that presents a risk of physical harm to the offender or another, or to the property of another."

{¶ 129} In this case, the trial court specifically noted that testimony was presented that appellant had engaged in fighting, challenging others to fight, and in violent behavior by shooting at vehicles - all actions which would cause inconvenience, annoyance, alarm, or risk of physical harm to others or their property. According to witness testimony, these actions took place while appellant was with at least two other persons and that he acted with or contacted others to meet and fight with other gang or neighborhood group members on Lincoln Street. Therefore, we conclude that sufficient evidence was presented as to all the elements of complicity to commit aggravated riot.

(4) Count No. 4: Complicity to Commit Felonious Assault

{¶ 130} Appellant was convicted of complicity to commit felonious assault, a violation of R.C. 2903.11(A)(2), which states: "No person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

{¶ 131} R.C. 2923.11(A) defines "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." A deadly weapon includes by definition, a firearm. R.C. 2923.11(B)(1) defines a "firearm" as "any deadly weapon capable of

expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. * * *" Further, "[w]hen determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm." R.C. 2923.11(A)(2).

{¶ 132} Here, the evidence was sufficient to support defendant's conviction for felonious assault under complicity theory. Appellant was seen shooting a firearm at cars on Lincoln Street. Appellant had also challenged others to fight and contacted others to meet and fight. Calhoun admitted that he shot his firearm and that it was possible that his shot could have been the one that hit Saxton. See *State v. Murray*, 11th Dist. No. 2003-L-045, 2005-Ohio-1693, ¶ 35-40, appeal not allowed, 106 Ohio St.3d 1508, 2005-Ohio-4605. Thus, at the very least, the evidence demonstrated that appellant conspired with others to cause harm by means of a deadly weapon.

{¶ 133} Therefore, we conclude that appellant's conviction for complicity to commit felonious assault was supported by sufficient evidence.

(5) Firearm Specifications

{¶ 134} Finally, appellant argues that the evidence was insufficient to show that he knew a firearm was going to be used during the fight, Therefore, according to

appellant, the elements for a gun specification cannot be proved beyond a reasonable doubt.

{¶ 135} R.C. 2941.145 defines a firearm specification. This section states:

{¶ 136} "Imposition of a three year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." R.C. 2945.145(A).

{¶ 137} Appellant appears to be of the impression that he had to have knowledge that a gun was going to be used, and the state had to prove that knowledge in order for him to be guilty of the firearm specification.

{¶ 138} In *State v. Chapman* (1986), 21 Ohio St.3d 41, the Supreme Court of Ohio indicated that an individual indicted for and convicted of violating R.C. 2911.01, aggravated robbery, and of a firearm specification under R.C. 2941.141, is subject to sentencing enhancement pursuant to former R.C. 2929.71, regardless of whether he or she was the principal offender or an unarmed accomplice. Id. at syllabus. Thus, an accomplice to a crime is subject to the same prosecution and punishment as the principal

offender under R.C. 2923.03(F). *State v. Jackson*, 169 Ohio App.3d 440, 2006-Ohio-6059, ¶ 32, citing *State v. Hanning* (2000), 89 Ohio St.3d 86, 92.

{¶ 139} Since an accomplice can be determined to meet the element of possession of a weapon because the principal has a weapon, an accomplice can be found guilty of the firearm specification even though he is unarmed and had no knowledge that the firearm was being used. As the *Chapman* court explained, R.C. 2923.03(F), the complicity statute states, "Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender." *Chapman*, 21 Ohio St.3d at 42-43. Thus, regardless of whether appellant is the principal offender or an unarmed accomplice, he is subject to a firearm specification conviction.

{¶ 140} Here, Calhoun admitted to using a firearm. The evidence also established that appellant was seen shooting a firearm at cars on Lincoln Street. Because there was sufficient evidence for complicity to commit murder, complicity to commit involuntary murder, complicity to commit aggravated riot, and complicity to commit felonious assault, there is also sufficient evidence for the firearm specifications.

{¶ 141} Further, to support a conviction for a firearm specification, the state had to prove beyond a reasonable doubt that the firearm was operable or could readily have been rendered operable at the time of the offense. R.C. 2941.145 and 2923.11(B)(1); *State v. Murphy* (1990), 49 Ohio St.3d 206, 208. The admission by Calhoun that he fired

a gun and that appellant was seen firing a gun is sufficient evidence upon which to support a finding that the firearm was operable. Therefore, the convictions for the firearm specifications were supported by sufficient evidence.

{¶ 142} Accordingly, we conclude that sufficient evidence was presented to support appellant's four convictions and firearm specifications. Appellant's eighth assignment of error is not well-taken.

X. CONCLUSION

{¶ 143} The trial court's original sentencing entry was not a final judgment. As such, appellant's appeal from the resentencing entry was proper; res judicata and collateral estoppel were inapplicable.

{¶ 144} Concerning appellant's assignments of error, we conclude: (1) there was no amendment to the indictment; (2) there was no plain error in permitting certain portions of Detective Allen's testimony that were based on his experience, training and knowledge of "gangs"; (3) there was no abuse of discretion in denying appellant the use of the unauthenticated cell phone bill to cross-examine Glover and impeach his testimony; (4) appellant failed to demonstrate that his trial counsel was ineffective; (5) there was insufficient evidence presented at trial to warrant an instruction on self-defense; (6) the convictions are not against the manifest weight of the evidence, the jury did not

lose its way in convicting appellant; and (7) sufficient evidence was presented to support appellant's four convictions and firearm specification.

{¶ 145} Wherefore, based upon the foregoing, the judgment of the Lucas County Common Pleas Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE