[Cite as *State v. Conner*, 2010-Ohio-6500.]

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

State of Ohio — Court of Appeals No. L-09-1159

Appellee — Trial Court No. CR0200901085

v.

Brandon Lamont Conner — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that found appellant guilty of one count of felonious assault, one count of complicity to robbery and one count of kidnapping. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} On the night of December 3, 2008, Michael Dantzler was picked up by some men he knew and taken to the Toledo apartment of a "friend" where he was

severely beaten at the hands of several individuals. At some point during the assault, Dantzler was forced to strip to his underwear and his hands and feet were bound. After the beating, Dantzler was locked in a closet. While he was in the closet, someone poured hot grease on his back and burned him with a hot knife. Later that night, Dantzler was wrapped in a blanket and placed in the back of a car. Dantzler was driven around the area for a while until one of the individuals in the car cut the ties around his ankles and threw him in a ditch in Perrysburg Township. With his hands still bound and wearing only boxer shorts, Dantzler eventually made his way to a local farmhouse. Dantzler was able to awaken the residents, who called the police. At approximately 2:00 a.m., the responding officers found Dantzler in a shed behind the house, soaking wet and covered with mud. One of the officers testified that the temperature that night was in the teens. The officers saw that Dantzler's hands were tied behind his back and observed the remnants of shoestrings around his ankles. Dantzler's face was bruised and battered and his eyes were swollen shut. According to the officers, he appeared to be suffering from hypothermia and was "scared to death." Dantzler was taken to the hospital, where he was treated for a concussion, facial contusions and swelling, and burns on his back; he was released later that day. In the morning, detectives were able to identify the spot where it appeared Dantzler had climbed out of the ditch, which contained four to six inches of water.

{¶ 3} On January 13, 2009, appellant was indicted on six felony counts in connection with the assault on Dantzler: one count of felonious assault in violation of

R.C. 2903.11(A)(1); one count of felonious assault in violation of R.C. 2903.11(A)(2); one count of aggravated robbery in violation of R.C. 2911.01(A)(1); one count of robbery in violation of R.C. 2911.02(A)(2); one count of kidnapping in violation of R.C. 2905.01(A)(3) and (C), and one count of kidnapping in violation of R.C. 2905.01(A)(2) and (C).

{¶ 4} Trial before a jury commenced on May 6, 2009. On May 8, 2009, at the close of the state's evidence, appellant moved for acquittal as to the charge of aggravated robbery. The motion was granted and the aggravated robbery charge was dismissed.

{¶ 5} On May 9, 2009, the jury returned its verdicts. Appellant was found not guilty of one felonious assault charge in violation of R.C. 2903.11(A)(2). Upon notification by the jury that it could not reach a unanimous verdict as to the offense of kidnapping in violation of R.C. 2905.01(A)(3) and (C), the trial court declared a mistrial as to that count. Appellant was found guilty of one count each of felonious assault, complicity to robbery and kidnapping as set forth above. Appellant was sentenced to serve a sentence of seven years as to the felonious assault conviction and four years as to the complicity to robbery conviction; those sentences were ordered to be served concurrently. Appellant was sentenced to a term of eight years as to the kidnapping conviction, with that sentence to be served consecutively to the first two, for a total of 15 years incarceration.

{¶ 6} Appellant now sets forth the following assignments of error:

{¶ 7} "Assignment of Error I: The trial court erred by not granting a mistrial after the state disclosed Conner was in custody, and the state shifted the burden of proof to Conner during closing arguments.

{¶ 8} "Assignment of Error II: Conner's 15-year sentence was disproportionate to similarly situated defendants. As such, his rights to Equal Protection and Due Process of law were violated.

{¶ 9} "Assignment of Error III: Conner's sentence was improper because the convictions were allied offenses of similar import.

{¶ 10} "Assignment of Error IV: Conner's sentence was imposed in violation of *State v. Foster* because the trial court made numerous findings of fact.

{¶ 11} "Assignment of Error V: The trial court abused its discretion by imposing such a lengthy sentence.

{¶ 12} "Assignment of Error VI: Conner's due process and statutory rights to a speedy trial were violated.

{¶ 13} "Assignment of Error VII: Conner's right to due process was violated because the jury instruction for complicity, for which Conner was not indicted, was vague and was not done for each individual count.

{¶ 14} "Assignment of Error VIII: The prosecutor engaged in a pattern of misconduct that precluded Conner from receiving a fair trial.

{¶ 15} "Assignment of Error IX: The convictions are against the manifest weight of the evidence.

{¶ 16} "Assignment of Error X: The conviction for complicity to commit robbery was not supported by sufficient evidence.

{¶ 17} "Assignment of Error XI: White should not have been permitted to testify as the state failed to identify him as a witness in a timely manner and failed to timely produce a recorded statement he gave in violation of Rule 16."

{¶ 18} Appellant's assignments of error are reviewed out of order; appellant's second through fifth assignments will be addressed together at the end of this decision as all raise issues related to appellant's sentence.

{¶ 19} As his first assignment of error, appellant sets forth two arguments in support of his claim that the trial court erred by denying his requests for a mistrial.

{¶ 20} Generally, the granting or denying of a mistrial rests within the sound discretion of the trial court. *State v. West*, 6th Dist. No. WD-07-002, 2008-Ohio-368, ¶ 28, citing *State v. Sage* (1987), 31 Ohio St.3d 173. An appellate court will not disturb this exercise of discretion absent a showing that the accused has suffered material prejudice. Id. Further, granting a mistrial is only necessary where a fair trial is no longer possible. Id., citing *State v. Franklin* (1991), 62 Ohio St.3d 118.

{¶ 21} First, appellant argues that the trial court should have declared a mistrial after the state disclosed that appellant was in custody during trial. Appellant had been unable to make bail after his arrest and was dressed in street clothes during his trial so that the jury would not speculate as to why he was in custody.

{¶ 22} This information was revealed during the victim's testimony. During direct examination of Dantzler, the prosecutor asked him if he currently resided in the Lucas County jail; Dantzler responded that he did. The prosecutor then asked Dantzler if he knew where appellant resided and Dantzler responded, "In the jail, too." Defense counsel objected and a discussion was held at the bench.

{¶ 23} Defense counsel moved for a mistrial, arguing that appellant was prejudiced by the jury learning that he was incarcerated because the jury might then assume he was being held on other matters in addition to the instant charges. Counsel argued that no instruction to the jury would be adequate to cure the damage done by Dantzler's statement. The prosecutor responded that the question was asked because he intended to elicit testimony from the witness that the witness and the defendant had a conversation in jail relative to a potential payoff if the victim did not testify.

{¶ 24} After a lengthy discussion of the matter, court was recessed for the day. The matter was debated further in chambers the following day before trial resumed. The trial court ultimately denied the motion for a mistrial, commenting that while the question was "probably inartfully drawn," it was made with the intent to "get into matters that would have been admissible and relevant." The trial court asked defense counsel if he wanted a curative instruction, noting that sometimes "less is better." Counsel agreed to "just move on."

{¶ 25} Having thoroughly reviewed the entire transcript of appellant's trial, we find that appellant has not shown that he suffered material prejudice as a result of

Dantzler's statement, or that a fair trial was no longer possible once the statement was made. In addition, given the other evidence introduced at trial which supports the jury's verdicts, we cannot say that appellant was denied a fair trial because the jury heard a statement that appellant was being held in custody during the trial. Therefore, this argument is without merit.

{¶ 26} As his second argument in support of this assignment of error, appellant asserts that the trial court should have granted a mistrial because the state improperly shifted the burden of proof during closing argument. At issue is the following statement by the prosecutor: "There is no dispute that this happened to [the victim]. None. You haven't heard anything from the defense denying. It is not contradicted that it happened." Defense counsel then asked to approach the bench and stated that the prosecutor was "getting pretty close to shifting the burden to the defendant" and moved for a mistrial. The prosecutor then stated that he was simply stating that the defense had not argued that the assault had not been made on Dantzler. The court reminded the prosecutor to make sure the jury understands that the burden is with the state.

{¶ 27} After the discussion at the bench, the prosecutor continued as follows: "Like we talked about in voir dire, you understand the defendant has no burden in this case. He has no burden of proof. He doesn't have to prove a single thing. It's on the State to prove that. It's undisputed that this happened to him."

{¶ 28} Generally, prosecutors are entitled to considerable latitude in opening statement and closing arguments. *State v. Gravelle,* 6th Dist. No. H-07-10, 2009-Ohio-

1533, ¶ 20, citing *State v. Ballew* (1996), 76 Ohio St.3d 244, 255. Since isolated instances of prosecutorial misconduct are generally harmless, any alleged misconduct in the closing argument must be viewed within the context of the entire trial to determine if any prejudice has occurred. See *Ballew*, supra; *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420. To determine if the alleged misconduct resulted in prejudice, an appellate court should consider the following factors: (1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the defendant. *State v. Braxton* (1995), 102 Ohio App.3d 28, 41.

{¶ 29} This court has thoroughly reviewed the record of proceedings in the trial court and, upon consideration of the prosecutor's remarks in the context of the entire record, we find that the statements did not amount to prosecutorial misconduct sufficient to warrant the granting of a motion for a mistrial. It is clear from the transcript as set forth above that the prosecutor complied with the trial court's admonition and emphasized to the jury that the burden of proof was on the state, not the defendant. We therefore find that this argument has no merit.

{¶ 30} Accordingly, we find that the trial court's decisions to deny appellant's two motions for a mistrial were not unreasonable, arbitrary or unconscionable. Appellant's first assignment of error is not well-taken.

{¶ 31} In his sixth assignment of error, appellant asserts that he was not brought to trial within the time parameter set forth in R.C. 2945.71(C)(2) for a defendant who is in

custody. Appellant cites several occurrences which he claims unreasonably delayed his trial date and resulted in his not being brought to trial within 90 days as required for a defendant who is in custody.

{¶ 32} Under Ohio law, a person who has been charged with a felony must ordinarily be brought to trial within 270 days of his or her arrest. R.C. 2945.71(C)(2). However, in computing the amount of time that has elapsed for speedy trial purposes, "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E). A defendant's speedy trial time rights may be waived or the period tolled under certain circumstances. *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶ 11.

{¶ 33} Pursuant to R.C. 2945.72(E), the time for bringing a defendant to trial can be extended by the amount of time between the filing of a motion to suppress and the trial court's decision on the motion. However, the extension of time authorized under R.C. 2945.72(E) to rule on a defendant's motion to suppress is subject to a requirement of reasonableness. *State v. Arrizola* (1992), 79 Ohio App.3d 72.

{¶ 34} In the case before us, appellant was served with a warrant on January 14, 2009. He was in custody at that time for other charges, the details of which are not in the record of this case. Because he was in custody, the state was required to bring him to trial within 90 days, barring any events to toll the running of time pursuant to R.C. 2945.72. Appellant was brought to trial on May 6, 2009, which was 112 days later. However, on April 10, 2009, appellant filed a motion to suppress all evidence seized as a

result of a search of his vehicle and his person. A hearing was held on April 13 and on May 5, 2009; the trial court denied the motion. Therefore, based on the law set forth above, the period of time charged against the state was tolled for 25 days. When appellant's trial commenced on May 6, 2009, he had been held for 112 days from the time the warrant was served in this case. Allowing the 25 days for the trial court to rule on the motion to suppress, only 87 days were charged against the state.

{¶ 35} We note that the Rules of Superintendence for the Courts of Ohio provide that a motion shall be ruled upon within 120 days from the date the motion is filed. Sup.R. 40(A)(3). While the 120-day time frame is only a general guideline, in this instance it serves as a useful indication of what amount of time would be appropriate for the trial court to rule on the motion to suppress. Based on the foregoing, we find that the total of 25 days it took for the trial court to rule on appellant's motion to suppress was not excessive or unjustified. Therefore, that amount of time was chargeable to appellant and the speedy trial time was properly extended. Appellant was brought to trial within the 90-day limit and, accordingly, his sixth assignment of error is not well-taken.

{¶ 36} In his seventh assignment of error, appellant asserts that he was prejudiced because the jury instruction for complicity, for which appellant was not indicted, was vague and was not given for each count in the indictment.

{¶ 37} Because appellant did not object to the jury instruction, our review of the alleged error is discretionary and limited to plain error only. Crim.R. 52(B) provides that "* * * plain errors or defects affecting substantial rights may be noticed although they are

not brought to the attention of the trial court." This court has held that "* * * In order to prevail on a claim governed by the plain error standard, appellant must demonstrate that the outcome of his trial would clearly have been different but for the errors he alleges." *State v. Jones,* 6th Dist. No. L-05-1101, 2006-Ohio 2351, ¶ 72. (Citations omitted.)

{¶ 38} Appellant argues that the trial court's instruction on complicity was "at best, an abbreviated version" and was faulty because the trial court did not give the proper definition of "aided or abetted." Appellant also asserts that the trial court omitted words from its definition of "aided or abetted," but does not specify the words that should have been included.

{¶ 39} The trial court gave the following instructions relevant to this assignment of error:

{¶ 40} "Complicity. You, the jury, may also consider the legal concept of complicity with respect to each count in the indictment. Complicity means no person, acting with the kind of culpability required for the commission of the offense, shall aid or abet another in committing the offense.

{¶ 41} "* * *

{¶ 42} "Aided or abetted. Aided or abetted means supported, cooperated with, advised, or incited. The mere presence of the defendant, Brandon Conner, at the scene of the felonious assaults, and/or the robbery, and/or the kidnapping, and the fact that he was acquainted with the co-defendants, is insufficient proof that he aided and abetted the co-

defendants in the commission of the felonious assaults, and/or the robbery, and/or the kidnapping.

{¶ 43} "* * *

{¶ 44} "The defendant cannot be found guilty of the complicity unless any or both of the felonious assaults, and/or the robbery, and/or any or both of the kidnappings were actually committed."

{¶ 45} The trial court's instruction as to complicity and the definition of "aided or abetted" were neither vague nor improperly worded. Appellant argues that the instruction "caused great confusion" for the jury; however, there is no evidence of that. The instruction as set forth above was clear and sufficient. This argument is without merit. Further, a charge of complicity may be stated in terms of the principle offense. R.C. 2923.03(F); *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 32. Appellant has failed to demonstrate plain error and his seventh assignment of error is not well-taken.

{¶ 46} In his eighth assignment of error, appellant asserts that the prosecutor engaged in a pattern of misconduct that deprived appellant of a fair trial. In support, appellant argues that the prosecutor improperly stated in closing that Dantzler was "left for dead" and referred to appellant as a "vigilante;" vouched for numerous witnesses; falsely stated that appellant "conceded" Dantzler suffered "serious physical harm," and improperly attempted to remedy what appellant refers to as Dantzler's inaccurate testimony about nearly drowning in the ditch by telling the jury the testimony was understandable "considering what he had gone through."

{¶ 47} The test for prosecutorial misconduct is whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. The touchstone of analysis is "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219. Generally, prosecutors are entitled to considerable latitude in opening and closing arguments. *State v. Ballew* (1996), 76 Ohio St.3d 244. Moreover, the prosecutor's conduct must be viewed in the context of the entire trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410.

{¶ 48} Having reviewed the state's closing argument in the context of all of the evidence presented at trial, we find this argument to be without merit. The prosecutor did not refer to appellant as a "vigilante." Rather, he described the manner in which the victim was assaulted, kidnapped and left in a ditch, possibly in retaliation for having stolen one of the co-defendant's guns, as "vigilantism." Additionally, the expression "left for dead" as used by the prosecutor could arguably apply in this situation, in light of evidence that showed appellant was beaten, stripped nearly naked, and left in a water-filled ditch in a rural area with his hands tied behind his back in the middle of a December night when the temperature was in the teens. As to the prosecutor "vouching" for his witnesses, appellant mischaracterizes the statement. The prosecutor suggested that rather than fabricate a story, the witnesses testified as to what they saw without embellishment. Finally, appellant asserts he was prejudiced by the prosecutor's comment that the defense conceded Dantzler had suffered "serious physical harm." The record

reflects that defense counsel objected to the statement and the trial court sustained the objection. Thereafter, the prosecutor reminded the jury that the defense had referred to Dantzler's broken nose as described in the medical reports; the prosecutor then stated that a broken nose falls within the definition of "serious physical harm."

{¶ 49} Upon consideration of the foregoing, this court finds that appellant has not demonstrated that the outcome of his trial would have been different but for the prosecutor's statements as discussed above. Accordingly, appellant's eighth assignment of error is not well-taken.

{¶ 50} In his ninth assignment of error, appellant asserts that his convictions are against the manifest weight of the evidence. In his tenth assignment of error, he asserts that his conviction for complicity to commit robbery was not supported by sufficient evidence.

{¶ 51} A manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins,* 78 Ohio St.3d 380, 387. In making this determination, the court of appeals sits as a "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 reversed and a new trial ordered." *Thompkins* supra, at 386, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 52} In contrast, "sufficiency" of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *Thompkins,* supra, at 386. When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A conviction that is based on legally insufficient evidence constitutes a denial of due process, and will bar a retrial. *Thompkins,* supra, at 386-387.

{¶ 53} In support of his ninth assignment of error, appellant asserts that there was a lack of credible evidence that he is guilty of the charges against him. Appellant challenges the credibility of the state's witnesses, asserting that "everyone who testified was extremely impaired" and that the testimony was "almost nonsensical." Appellant further argues that the witnesses "would say anything to get a great deal" from the state.

{¶ 54} Michael Dantzler testified that at approximately 12:30 a.m. on December 4, 2008, he was at a friend's apartment in Holland, Ohio, smoking marijuana when he saw several people he knew drive up. A few minutes later, Dantzler voluntarily left with them to go to the apartment of Brandy Johnson in Toledo. Appellant and several other individuals were at Johnson's apartment when Dantzler arrived. After Dantzler sat down

in a chair in the kitchen, appellant walked behind him and hit him on the side of the head with a handgun. Appellant then asked Dantzler about their friend Roosevelt Kelly's gun, which had been taken from the apartment. When Dantzler fell out of the chair, Kelly and appellant kicked him in the face and hit him again with the gun. The two men then took off Dantzler's shirt, pants and shoes and used his shoestrings to tie his hands and feet behind his back. The men picked Dantzler up and put him in a closet. While appellant was tied up in the closet, several of the men poured hot grease on his back and continued to beat him. Dantzler then overheard the others discussing what to do with him.

{¶ 55} After a while, someone wrapped Dantzler in a blanket and put him, still tied up, in the back of a truck owned by Andreas Ladd, who was someone else Dantzler knew. Dantzler's eyes were almost swollen shut but he was able to see appellant sitting in the back of the truck with him. Eventually, the truck stopped; appellant opened the door and Dantzler fell out onto the road. Someone cut Dantzler's feet loose and threw him in a ditch with his hands still tied behind his back. Dantzler was able to work his way to the side of the ditch and walk up the embankment. He then saw some house lights in the distance. He walked toward the light and approached a house. Dantzler kicked the door until someone answered and said he had called the police. When the police arrived, they cut his hands free, wrapped him in a blanket and put him in a cruiser to get warm. Eventually, appellant was taken to the hospital and treated for his injuries.

{¶ 56} The state presented the testimony of two Perrysburg Township police officers who responded to the scene. Officer Scott Mezinger testified that he and his

partner were the first to respond and found Dantzler with his hands tied behind his back and wearing only boxer shorts. Mezinger stated that Dantzler was covered with mud and that his face was bruised, battered and swollen. Dantzler was scared to death and kept screaming for help, afraid that his assailants would come back for him. The officer stated that the temperature was "probably in the teens." Perrysburg Township Detective Monica Gottfried testified that the water in the ditch where it appeared Dantzler had been abandoned was four to six inches deep. She observed tire tracks next to the ditch and a spot on the ditch bank where it appeared someone or something had climbed out of the ditch, dragging mud up the side and smashing down the grass and weeds.

{¶ 57} Toledo Police Detective Bill Seymour testified as to his investigation of Brandy Johnson's apartment. Seymour reported seeing a chair in the kitchen with duct tape on the legs and two rolls of duct tape in a closet on the main floor. Detective Jerry Schriefer testified that he found what he thought might be two small samples of blood in the back of a Suburban that belonged to Andreas Ladd, one of the co-defendants. The detective collected the carpet with the blood stains and submitted it for testing, which showed that the sample was presumptive positive for blood. Toledo Police Detective Raynard Cooper testified that he spoke to Dantzler in the hospital and took the names of the individuals Dantzler said were involved. Cooper eventually talked to Brandy Johnson, Latasha Stewart and Andreas Ladd. Based on the information they gave him, he issued warrants for appellant, Keith White and Roosevelt Kelly.

{¶ 58} Brandy Johnson testified that appellant, White and Kelly brought Dantzler to her apartment and tied him up and beat him while she was present. Johnson had smoked marijuana and taken some Ecstasy at some time during the day or evening. After Dantzler fell to the floor, appellant handed his gun to another man who pointed it at Dantzler and told him to strip. She saw appellant "stomp" on Dantzler and help Kelly tie him up. She further testified that after beating Dantzler, appellant, Kelly and White tied him up and burned him on the back with a knife they heated on the stove. They also put hot grease on his back. Someone took several dollars out of Dantzler's pocket and put it on the kitchen table; Johnson put the money in her own pocket. After that, they put Dantzler in a closet. Johnson did not come to Dantzler's defense because Kelly had told her that if she called the police he would do the same things to her as he did to Dantzler. Johnson eventually saw appellant and the others wrap Dantzler in a blanket and carry him out the back door to Ladd's truck. She saw appellant, Kelly, White, Ladd and Latasha Stewart get in the truck. Johnson spoke to the police the night of the assault and eventually was charged with respect to some of the crimes that were committed. Johnson further testified that she had received no promises from attorneys or the police regarding her testimony.

{¶ 59} Latasha Stewart testified that she went to Johnson's apartment on the night of December 3, 2008, with Ladd. She went in the apartment to use the bathroom and saw White, Johnson, Kelly and appellant; she did not see Dantzler. Eventually, she returned to Ladd's truck with Ladd, Kelly, White and appellant. The men told Stewart to drive

"far out somewhere." Stewart eventually was told to stop so that the men could help Kelly "with his clothes." She recalled being "somewhere in Perrysburg" on a gravel road. Stewart waited while the others went to the back of the truck; she heard them arguing but could not see anything. She then heard "a lot of commotion" and a splash. Stewart also heard Kelly say, "Mother F-er, find your way back." The men jumped back in the truck and told Stewart to "drive, just drive." Stewart returned to Johnson's apartment in Toledo, where appellant and Kelly got out; she and Ladd then drove away. Finally, Stewart testified that although she initially was not truthful with investigators, she eventually turned herself in and was testifying willingly. She stated that the prosecutor had not promised her anything for her testimony and that she remained under indictment for kidnapping and obstructing justice at that time.

{¶ 60} Keith White testified that he met Dantzler in the fall of 2008. On December 3, 2008, White was at Johnson's apartment with appellant, Kelly and some others when Kelly asked White to drive to Holland to get Dantzler. Kelly wanted to find out if Dantzler had taken his gun and White was the only person who knew where to find Dantzler. That evening, White, Kelly and appellant drove to Holland; Dantzler got in the car with them and they returned to Johnson's apartment. White left for a while later in the evening and returned to Johnson's shortly after midnight. When he walked into the apartment, it was "messed up." He saw Kelly sitting on a chair in front of a closet holding a gun. When White looked in the closet, he saw Dantzler "hogtied." Dantzler looked like "he was beat" and in pain, and asked White to help him. White left because

he "didn't want nothing to do with it," but returned after a short while. White then got in the truck with Stewart, Ladd, Kelly and appellant; Dantzler was in the back. The truck eventually stopped on a gravel road. White heard Kelly get out of the truck but did not attempt to see what was happening. As he sat in the truck, he took Dantzler's ID, which had been put in a plastic bag, and threw it out the window. White heard the back door open but did not see how Dantzler got out of the truck. After Dantzler was thrown in the ditch, everyone else in the truck returned to the apartment in Toledo. White testified that he had not been promised anything for his testimony.

{¶ 61} Andreas Ladd, whose truck was used to take Dantzler to the site in Perrysburg Township where he was abandoned, testified that at approximately 3 a.m. on December 4, 2008, he and Stewart drove to Johnson's apartment to meet some friends. When Ladd walked into the apartment, White and Kelly said, "Look at your boy." Ladd looked in a closet and saw Dantzler on the floor, in his underwear and hogtied with string and duct tape. Ladd testified that he and Dantzler were friends and that he tried unsuccessfully to talk the others into letting Dantzler go. Appellant and Kelly then wrapped Dantzler in a blanket and carried him out to the back of Ladd's truck. Appellant sat in the back with Dantzler and Kelly told Stewart where to drive. The truck eventually stopped and appellant cut the shoestrings from Dantzler's legs. Ladd then saw Kelly throw Dantzler in a ditch. Ladd testified that he was not given any promises regarding the charges against him in exchange for his testimony.

{¶ 62} In response to appellant's argument that the state's witnesses had no credibility due to their associations, heavy drinking and drug usage, we look to the following words of the United States Supreme Court in *Manson v. Braithwaite* (1977), 432 U.S. 98: "It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness * * *." *Manson,* at 113. *Manson* further noted that "Evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of * * * testimony that has some questionable feature." Id. at 116.

{¶ 63} Given the foregoing, after having considered all of the evidence in the record, we are unable to find that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins,* supra, at 387. Accordingly, appellant's ninth assignment of error is not well-taken.

{¶ 64} In support of his tenth assignment of error, appellant argues that his conviction for complicity to commit robbery was legally insufficient because the state failed to establish an amount of loss or what items were stolen. Appellant asserts that an amount of loss is an essential element of the offense of robbery.

{¶ 65} R.C. 2911.02, robbery, states in relevant part:

{¶ 66} "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 67} "* * *

{¶ 68} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another."

{¶ 69} R.C. 2913.02 defines a theft offense as depriving an owner of property or services without the owner's consent. To "deprive" is defined in R.C. 2913.01(C)(1) and (2) as "withholding property of another permanently, or for a period that appropriates a substantial portion of its value or use, * * * or [disposing] of property so as to make it unlikely that the owner will recover it."

{¶ 70} In the case before us, the victim testified that his clothes, wallet and cell phone were taken from him. The jury clearly believed that when Dantzler was abandoned in a ditch, tied up and wearing only his underwear after suffering physical harm, it was unlikely Dantzler would recover his clothing or other possessions and that, therefore, the testimony was sufficient to establish robbery.

{¶ 71} As to complicity, this court has held that complicit behavior may be inferred from the defendant's presence, companionship and conduct before and after the offense is committed. *State v. Pino*, 6th Dist. No. WD-07-020, 2008-Ohio-3578, ¶ 28; *State v. Boyd*, 6th Dist. No. OT-06-034, 2008-Ohio-1229. Again, the jury clearly believed testimony showed appellant was, at a minimum, present at the time the offense was committed.

{¶ 72} Based on the foregoing, we find that there was sufficient evidence for a rational trier of fact to find the elements of complicity to commit robbery proven beyond

a reasonable doubt and, accordingly, appellant's tenth assignment of error is not well-taken.

{¶ 73} In his eleventh assignment of error, appellant asserts that the trial court should not have permitted witness Keith White to testify because the state failed to identify him as a witness in a timely manner and failed to produce the witness's recorded statement, in violation of Crim.R. 16. Appellant argues that the state's actions resulted in his being unprepared to cross-examine the witness and that failure to disclose a recorded statement was tantamount to "trial by surprise."

{¶ 74} A trial court's decision on whether to exclude a witness based on a lack of timely discovery will only be disturbed on appeal in the event of an abuse of discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶ 75} When a prosecutor violates Crim.R. 16 by failing to provide the name of a witness, a trial court does not abuse its discretion by allowing the witness to testify where the record fails to disclose: (1) a willful violation of the rule, (2) that foreknowledge would have benefited the accused in the preparation of his or her defense, or (3) that the accused was unfairly prejudiced. *State v. Scudder* (1994), 71 Ohio St.3d 263, 269.

{¶ 76} After reviewing the record and the guidelines set forth in *Scudder*, supra, we find that the trial court did not abuse its discretion in allowing White to testify. We note first that appellant has not shown that the prosecutor willfully violated the discovery

rules. The record reflects that White was capias throughout most of appellant's court proceedings and was not available to the state until a few days before trial when White contacted a prosecutor and a detective regarding the case and asked to make a statement. The following day, White spoke to the prosecutor, a detective and his own lawyer; the statement was recorded. Two days before trial, the prosecutor orally informed appellant's counsel that White was a potential witness. The events as described do not show bad faith on the part of the state.

{¶ 77} Further, appellant has not shown how knowing about White's testimony sooner would have benefited him in the preparation of his case, or that he was unfairly prejudiced. Defense counsel objected to White's testimony, but then stated that he had been provided with a copy of White's recorded statement and had listened to it. Counsel also stated that there was nothing in the tape that caused undue surprise. At that time, the trial court noted that White's testimony would most likely be the same as that presented by several other co-defendants who had already testified, and allowed the testimony.

{¶ 78} Based on the foregoing, we find that the trial court did not abuse its discretion by allowing White's testimony and appellant's eleventh assignment of error is not well-taken.

{¶ 79} Lastly, we will consider appellant's second, third, fourth and fifth assignments of error, all of which raise issues related to sentencing. In his second assignment of error, appellant asserts that his 15-year sentence is disproportionate to that of co-defendant Roosevelt Kelly, who was sentenced to serve four years for his

involvement in these offenses, according to appellant. In further support of this argument, appellant states that charges brought against Ladd and Johnson were dismissed. However, we are unable to consider appellant's argument as it relates to the sentences imposed on his co-defendants because the record before this court contains no information as to the charges brought against the other individuals or the disposition of their cases. Therefore, appellant's second assignment of error is not well-taken.

{¶ 80} In support of his third assignment of error, appellant asserts that the offenses for which he was sentenced were allied offenses of similar import and that the convictions should therefore have been merged. In support, appellant argues that the incidents of kidnapping, felonious assault and complicity to robbery "occurred in one event." First, appellant argues that the assault occurred simultaneously with the kidnapping. In making this argument, it appears that appellant believes that the only act of kidnapping occurred in Johnson's kitchen when Dantzler initially was tied to the chair and beaten. Appellant does not present a discernible argument as to why the complicity to robbery sentence should have been merged with the others.

{¶ 81} R.C. 2941.25 serves to protect criminal defendants from multiple punishments for the same offense and provides:

{¶ 82} "(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.

{¶ 83} "(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." (Emphasis added.)

{¶ 84} This court has already determined that felonious assault and robbery are not allied offenses because the commission of one does not necessarily result in the commission of the other. *State v. White*, 6th Dist. No. L-07-1196, 2009-Ohio-4587, ¶ 20. Upon our review of the elements of these two offenses, we find that the elements do not correspond. A person may commit a robbery by attempting to inflict or threatening to inflict physical harm, whereas felonious assault requires serious physical harm. Conversely, simply causing serious physical harm does not automatically equate to the commission of a robbery.

{¶ 85} The elements of kidnapping, however, require further consideration. This court recently found that because kidnapping is often consumed by other crimes it requires the application of guidelines established in *State v. Logan* (1979), 60 Ohio St.2d 126. See *State v. Brown*, 6th Dist. No. WD-09-058, 2010-Ohio-1968. In *Logan*, the Supreme Court of Ohio found that in order to determine whether or not kidnapping and another offense are allied offenses of similar import, a sentencing court must consider the following:

{¶ 86} "(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is *prolonged*, the confinement is secretive, or *the movement is substantial* so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions; * * *." (Emphasis added.)

{¶ 87} Accordingly, we find that the acts of kidnapping were committed with a separate animus in this case and appellant was properly convicted and sentenced separately for kidnapping. Appellant's third assignment of error is not well-taken.

{¶ 88} In his fourth assignment of error, appellant asserts that the trial court improperly made findings of fact during sentencing by using words such as "horrific," "anarchy," and "despicable." Appellant argues that the trial court's statements violated *State v. Foster* (2006), 109 Ohio St. 3d 1.

{¶ 89} Upon a thorough review of the transcript of appellant's sentencing hearing, this court finds that the trial court did not make findings in violation of *Foster*, supra, which holds that trial courts are no longer required to make findings or give reasons for imposing maximum, consecutive or greater than minimum sentences.

{¶ 90} The language to which appellant objects was used to describe appellant's conduct. Implicit in the trial court's sentencing colloquy was its belief that appellant should be punished for his conduct and that society needed to be protected from him. Nowhere in the trial court's colloquy is there evidence that the court went afoul of *Foster*

by engaging in judicial fact finding when imposing appellant's sentence. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 91} As his fifth assignment of error, appellant asserts that the trial court was unable to fairly and impartially sentence him based on the evidence presented, the sentences imposed on the co-defendants, and the trial court's statements during sentencing. Appellant does not support this claim with specific references to the record. As to the co-defendants' sentences and language used by the trial court, we have addressed those issues under appellant's second and fourth assignments of error and found them to be without merit.

{¶ 92} In Ohio, sentencing courts have full discretion to impose a sentence within the statutory range. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 11.

{¶ 93} The sentencing range for a first-degree felony is three, four, five, six, seven, eight, nine or ten years. R.C. 2929.14(A)(1). Appellant was convicted of complicity to aggravated robbery and kidnapping, both first-degree felonies; the trial court imposed sentences of two years and eight years, respectively. The sentencing range for a second-degree felony is two, three, four, five, six, seven or eight years. R.C. 2929.14(A)(2). Appellant was convicted of felonious assault, a second-degree felony, and sentenced to a term of seven years. All of appellant's sentences were within the statutory range.

{¶ 94} Further, the record reflects that in sentencing appellant the trial court considered the overriding purposes and principles of felony sentencing as well as the

seriousness of the offenses and the impact on the victim, as required. See R.C. 2929.11(A) and (B); R.C. 2929.12.

{¶ 95} Based on the foregoing, we find that the trial court did not abuse its discretion in sentencing appellant. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 96} On consideration whereof, this court finds that appellant was not prejudiced or denied a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs of this appeal are assessed to appellant.

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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE