

[Cite as *State v. Toney*, 2016-Ohio-3296.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	CASE NO. 14 MA 0083
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
AUBREY TONEY,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 2010 CR 1135 A

JUDGMENT: Reversed and Remanded

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: May 31, 2016

[Cite as *State v. Toney*, 2016-Ohio-3296.]
ROBB, J.

{¶1} Defendant-Appellant Aubrey Toney appeals from his conviction and sentence entered in Mahoning County Common Pleas Court for murder, two counts of felonious assault, and attendant firearm specifications. Four issues are raised in this appeal. The first is whether there is a confrontation clause violation. The second is whether the convictions are against the manifest weight of the evidence. The third is whether the trial court was required to merge the felonious assault convictions with the murder conviction. The fourth is whether the trial court made the statutorily mandated consecutive sentence findings in the judgment entry and at the sentencing hearing.

{¶2} For the reasons expressed below, the first three issues lack merit. Accordingly, the convictions are affirmed. However, the fourth issue does have merit; the trial court failed to make the statutorily mandated consecutive sentence findings at the sentencing hearing and in the judgment entry. The sentence is reversed and the matter is remanded for resentencing.

Statement of the Facts and Case

{¶3} At approximately 1:00 p.m. on Saturday, September 25, 2010, Thomas Repchic, age 74, was sitting in his burgundy 1990 Cadillac outside St. Dominic's church on the corner of Southern Boulevard and Lucius Avenue waiting for his wife, Jacqueline Repchic, age 74. Jacqueline worked as a secretary for the church. After she finished for the afternoon, she got in their Cadillac and Thomas drove north on Southern Boulevard.

{¶4} As the Cadillac approached the intersection of Philadelphia Avenue and Southern Boulevard, the passenger of a burgundy Durango that was stopped at the stop sign on Philadelphia Avenue fired seven shots from a .308 rifle at the Cadillac. All seven shots struck the Cadillac at various locations. One shot went through the passenger door and took off Jacqueline's right foot. Her left foot was injured by bullet fragments. Another shot went through the back of the driver's seat, entered Thomas's body through his right shoulder blade, and tore through his right lung and the right side of his heart. Thomas died within seconds of being struck. Jacqueline

was able to steer the car into the curb before it entered the busy Market Street intersection.

{¶15} An investigation began instantly. Detective Martin was one of the officers investigating the matter. At the scene, the police were able to recover one spent .308 casing. Leola Pugh, a witness who lived on Philadelphia Avenue, informed police that prior to the shots she saw a burgundy Durango stopped at the stop sign of Philadelphia Avenue. Tr. 337, 343. Following the shots she saw smoke coming from the passenger side of the Durango. Tr. 337-338. She described the passenger as a skinny black male in his 20s with poofy hair wearing a baseball cap with a C on it. Tr. 336-337. She stated the driver was a light skinned male. Tr. 338.

{¶16} The police put out a be on the lookout (“BOLO”) for a burgundy Dodge Durango. Tr. 944. On Sunday, September 26, the police discovered a burgundy Durango on the west side of Youngstown. Tr. 261, 957. This Durango belonged to Lakeshia Toney, Appellant’s female cousin. Tr. 958. At that point, she denied anyone used the car on September 25. Tr. 959, 960. She permitted Detective Martin to search the vehicle; however, no evidence was found.

{¶17} Detective Martin continued the investigation. Late Sunday afternoon an officer informed Detective Martin that he heard the intended target of the shooting was “Nate Haynes” or “Haynesly” or “Mason” or “OB.” Tr. 965.

{¶18} The next day, Monday, September 27, Detective Martin ran those names through the Ohio law enforcement gateway (“OHLEG”) and discovered Nathan Haynes was the owner of a red 1990 Cadillac. Tr. 965-966. Around that same time, a Crime Stoppers report indicated the driver or shooter of the vehicle was “Aubrey Hornbuckle,” he used “his sister’s Keshia Toney’s vehicle” and it was a case of mistaken identity. Tr. 967. The report indicated the intended target was either a “Piru” or “OB.” Tr. 967. In discussing the case with another detective, that detective told him “Aubrey Hornbuckle” is Aubrey Toney. Tr. 968.

{¶19} Detective Martin immediately attempted to get a statement from Lakeshia; however, she was attending a class at Kent State University. He drove to Kent and took her statement there. Tr. 972. She also went down to the police station

on Tuesday, September 28, and gave a formal statement to the police. Tr. 975. Nathan McKenzie also gave a statement to police that day. Nathan McKenzie is Lakeshia and Appellant's cousin, he was living with Lakeshia, and had information regarding the shooting.

{¶10} Their collective statements provided the police with the following information. Appellant, who goes by the name "Nut," had a "beef" with "OB" and "Piru." OB is Nathan Haynes and he drives a later model burgundy Cadillac. Tr. 405. Piru's real name is Ramses Terry. On the morning of September 25, Lakeshia and Nathan McKenzie went to Lakeshia's cousin's house to borrow a ladder. Tr. 379-380. Appellant's father was there and he told them that Piru was in the vicinity. Tr. 381. Lakeshia called Appellant and relayed that information. Tr. 382. Appellant then asked to speak to Nathan McKenzie. Tr. 383. Following that conversation, Lakeshia dropped Nathan off at Appellant's mother's house so that he could talk to Appellant. Lakeshia then went back to her house.

{¶11} Appellant came to her house around 12:00 pm or 12:30 pm and asked to borrow her Durango. Tr. 386, 391. She allowed him to use it.

{¶12} In the meantime, Nathan McKenzie waited at Appellant's mother's house to speak to him, but Appellant never came. Nathan then called Appellant. Appellant told Nathan he was going to talk to him soon, but he had something to do. Tr. 529. Nathan called a second time. This time there was commotion in the background and he heard Appellant say either "I think we got him" or "I think I got him." Tr. 529-530. Nathan immediately called Lakeshia to come pick him up.

{¶13} Sometime around 1:30 pm Lakeshia went to pick up her daughter and Nathan. During the drive home or shortly after arriving at home, Lakeshia and Nathan found out about the shooting, which caused Nathan to panic. Appellant came to her house by himself, told her it went down, it was going to be alright, there was nothing to worry about, and he was sorry for putting her in the middle. Tr. 397-398. In later conversations, Appellant admitted it was a case of mistaken identity, meaning the correct target was not hit. He also asked Lakeshia if she found any shell casings in the Durango. Tr. 409. She responded that she did not. Tr. 409.

{¶14} Originally she told Appellant she would keep quiet and not talk to the police, but later she changed her mind. Appellant left her messages asking her to be strong and to say Nathan McKenzie did it. Tr. 414. At one point Appellant asked Nathan to tell the police that Nathan took the Durango. Tr. 551. Nathan told Appellant he would not say that. Tr. 551.

{¶15} Statements made to the police by Nathan and Lakeshia indicated that Kevin Agee might also be involved in the shooting.

{¶16} As a result of the investigation an arrest warrant was issued for Kevin Agee and later for Appellant. On September 28, 2010, Agee was interrogated at the police station and made a statement to the police. At some point during the interview, the police left the room and allowed Agee to talk to his mother and grandmother in private. During that period of time Agee made at least two telephone calls on either his or his mother's cellphone. The statements he made to the recipients of the phone calls and to his mother and grandmother implicated himself and Appellant.

{¶17} The grand jury returned a four count indictment against Appellant. 10/7/10 Indictment. The first count was for Aggravated Murder in violation of R.C. 2903.01(A)(F), with a death specification pursuant to R.C. 2929.04(A)(5). Thomas Repchic was identified as the victim of this crime. The second count was for the Attempted Murder of Jacqueline Repchic in violation of R.C. 2923.02(A), a first-degree felony. The third and fourth counts were for the felonious assault of Jacqueline Repchic in violation of R.C. 2903.11(A)(1)(D), both second-degree felonies. All four counts had attendant firearm specifications pursuant to R.C. 2941.145(A).

{¶18} Appellant was arrested in Georgia on October 23, 2010. He entered a not guilty plea in early November 2010. Discovery occurred and eventually the case went to trial in late May 2014. Many witnesses testified at trial, including Lakeshia and Nathan. Agee was also called to testify. He refused to testify based on his rights under the Fifth Amendment. Excerpts from the recorded police interview were played

for the jury. Specifically, the statements Agee made to his mother, grandmother, and the recipients of the phone calls were played.

{¶19} The jury found Appellant not guilty of aggravated murder, but found him guilty of the lesser included charge of murder and the attendant firearm specification. No verdict was reached on the attempted murder charge, but he was found guilty of both felonious assault charges and the attendant firearm specifications. 6/9/14 Jury Verdict.

{¶20} Sentencing occurred on June 19, 2014. Appellant was sentenced to an aggregate sentence of 29 years to life. He received 15 years to life for the murder conviction and a mandatory consecutive three year term for the attendant firearm specification. The trial court merged the two felonious assault convictions. He was then sentenced to eight years for the felonious assault conviction and a mandatory consecutive three year term for the attendant firearm specification. The trial court ordered the felonious assault sentence and the murder sentence to run consecutively to each other. 6/20/14 Sentencing J.E.

{¶21} This timely appeal followed.

{¶22} The second assignment of error, manifest weight of the evidence issue, will be addressed first. The first assignment of error addresses the Confrontation Clause and evidentiary issues. The analysis includes a harmless error review which encompasses a discussion of the evidence. Since the second assignment of error requires a more in depth discussion of the evidence, it is addressed first to reduce redundancy.

Second Assignment of Error

{¶23} Appellant's second assignment of error states:

"Aubrey Toney's convictions were against the manifest weight of the evidence."

{¶24} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). “Weight of the evidence concerns ‘the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.’” *Id.* (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.* at 390.

{¶25} Granting a new trial is only appropriate in extraordinary cases where the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of fact who sits in the best position to judge the weight of the evidence and the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Thus, when there exists two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶26} Appellant's argument that the convictions are against the manifest weight of the evidence focuses on the element of identity. He asserts no one saw the shooting and he was convicted solely on circumstantial evidence. He contends when Agee's telephone conversation is not considered, the state's evidence that he was the shooter is even weaker. He further asserts Nathan McKenzie lacked credibility because he accepted over \$10,000.00 in reward money for his cooperation.

{¶27} Identity is an element of both felonious assault and murder. Admittedly, other than Kevin Agee, no other witness testified that Appellant was the shooter. Agee's recorded statements on the phone and to his grandmother and mother indicated Appellant, who he specifically identified as Nut, was the shooter. That evidence alone satisfies the identity element of the crimes.

{¶28} If we do not consider Agee's statement, there was substantial circumstantial evidence indicating Appellant was the shooter or at the minimum in the Durango when the shots were fired. Identity may be proven by direct or circumstantial evidence. *State v. Taylor*, 9th Dist. No. 27273, 2015–Ohio–403, ¶ 9. "Circumstantial evidence and direct evidence inherently possess the same probative value." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus. "Circumstantial evidence is not inherently less reliable or certain than direct evidence, and reasonable inferences may be drawn from both direct and circumstantial evidence." *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 2012-Ohio-2569, 972 N.E.2d 115, ¶ 66 (12th Dist.).

{¶29} Leola Pugh testified on the date and time in question she saw a burgundy Durango stopped at the stop sign on Philadelphia Avenue at the intersection of Southern Boulevard. She avowed there were two men in the Durango, a driver and a passenger. She heard five or six gunshots and saw smoke come from the passenger side of the Durango. Tr. 337-338. She described the passenger as a skinny black male in his 20s. Tr. 336.

{¶30} Lakeshia's and Nathan McKenzie's testimony established Appellant borrowed Lakeshia's Durango prior to the shooting and returned it after the shooting. Lakeshia avowed that after hearing about the shooting she asked Appellant what happened. She could not recall his verbatim response, but it was something to the effect that "it went down," "it was gonna be okay," and "he was sorry" for putting her "in the middle." Tr. 397-398. In a later conversation, Appellant admitted it was a case of mistaken identity, meaning he did not hit the intended target. He also asked Lakeshia if she found any shell casings in the Durango and asked her to not say anything to the police. Tr. 409. Initially Lakeshia agreed to keep quiet, but later she told him she was going to talk to the police. Appellant left her messages asking her to be strong and to say Nathan McKenzie did it. Tr. 414.

{¶31} Nathan McKenzie's testimony was similar to Lakeshia's testimony as to what occurred on September 25 through September 28. His testimony provided additional information regarding the shooting. He testified he talked to Appellant

twice around the time of the shooting. Tr. 529. The first time Nathan talked to Appellant, Appellant told Nathan he would talk to him later because he had something to do. Nathan explained he was worried about what was going on because Appellant's father saw Piru near his cousin's house. The second time Nathan spoke to Appellant there was commotion in the background. He heard Appellant say either "I think we got him" or "I think I got him." Tr. 529-530. Nathan also testified Appellant asked Nathan to tell the police Nathan took the Durango. Tr. 551. Nathan told Appellant he would not say that. Tr. 551.

{¶32} Lakeshia and Nathan's testimony also established Appellant had a "beef" with OB and/or Piru. Lakeshia also confirmed OB drove a late model burgundy Cadillac. OB testified at trial and verified he drove a late model burgundy Cadillac. Tr. 660. He also stated he heard rumors on the streets that Appellant and Piru had a disagreement. Tr. 660. Piru also testified there was a disagreement with Appellant. Tr. 649-650.

{¶33} Given all of the testimony, a reasonable jury could conclude Appellant had a problem with OB and/or Piru; he borrowed the Durango from Lakeshia; he and Agee mistakenly thought the Repchics' vehicle was OB's vehicle; and shots were fired from the Durango at the Repchics' vehicle. A reasonable juror could also believe Appellant was the shooter. The jury was in the best position to determine whether Leola Pugh's description of the passenger in the Durango matched Appellant.

{¶34} Even if the above circumstantial evidence does not prove he was the shooter, it did prove he was in the Durango at the time the shots were fired, he had problems with either OB and/or Piru, and OB drove a late model Cadillac similar to the one the Repchics drove. The trial court gave an aider/abettor complicity instruction. Tr. 1211-1213. It was explained, "[i]f a person acting with the kind of culpability required for the commission of an offense aids or abets another in committing the offense, that person is guilty of complicity in the commission of the offense, and shall be prosecuted and punished as if he were a principal offender." *State v. Wade*, 2d Dist. No. 06-CA-108, 2007-Ohio-6611, ¶ 20, citing R.C.

2923.03(A)(2) and (F). “To aid or abet’ means to support, assist, encourage, cooperate with, advise, or incite the principal in the commission of the crime.” *Id.*, citing *State v. Johnson*, 93 Ohio St.3d 240, 245, 754 N.E.2d 796 (2001). Appellant’s statements made after the shooting to both Lakeshia and Nathan, and the reasonable inferences that can be drawn from those statements show aiding and abetting. Specifically, Appellant asked them to say Nathan took the Durango, he questioned if there were any casings found in the Durango, he made statements that it was mistaken identity and that he was sorry to put Lakeshia in the middle, and around the time of the shooting Nathan called Appellant and heard him make the statement that he thought they got him.

{¶35} Lastly, Appellant argues Nathan’s testimony is not credible because he received over \$10,000 in reward money for his cooperation. At trial, Nathan and Detective Martin admitted Nathan received reward money. Detective Martin testified Nathan received close to \$11,000.00. Nathan stated it was hard for him to testify and it was never about the reward money. He testified, “Yeah, it was never nothing about no reward money, you know, but I felt like if I was going to say anything, or say what I thought I knew or whatever, then I just wanted to make sure I had a way to get out of here so I wouldn’t have to get into nothing myself.” Tr. 562.

{¶36} A reviewing court must typically give great deference to the fact finder’s determination of credibility. *State v. Swanson*, 10th Dist. No. 10AP–502, 2011–Ohio–776, ¶ 11. In this instance, given Nathan’s statements regarding the reward, we will not second guess the jury on determinations regarding his credibility. The trier of fact was in the best position to view his voice inflections and mannerisms to determine whether his statements were credible.

{¶37} For all the above reasons, this assignment of error is without merit.

First Assignment of Error

{¶38} Appellant’s first assignment of error provides:

“The trial court allowed the State to play a videotape of a non-party as evidence of Toney’s guilt. The videotape was of a one-sided telephone call; heavily

edited; and Toney did not have an opportunity to cross-examine the declarant on those allegedly incriminating statements. Playing it to the jury was error.”

{¶39} At trial, the state called Kevin Agee to testify; Agee was found guilty in a previous trial of being the driver of the Durango when the shooting occurred. On the stand Agee invoked his Fifth Amendment Right against self-incrimination. Thereafter, the state asked for excerpts of Agee’s videotaped interrogation to be played for the jury, and for a verified transcript of those excerpts to be admitted into evidence. Appellant objected and argued that allowing the excerpts to be played for the jury was a violation of the Confrontation Clause. He alternatively argued that if any of the evidence could be admitted, then it could only be the videotape and not the transcript. The trial court permitted the excerpts of the video to be played; it found no Confrontation Clause violation. However, it did not permit the transcript to be admitted into evidence.

{¶40} Five excerpts from Agee’s interrogation were played for the jury. Tr. 1091. The first excerpt was of a phone call made to a person by the name of Trav. Only one side of the conversation could be heard – Agee’s statements. In this excerpt, Agee told the other person somebody told the police everything, and the police knew about “Nut,” “the beef,” and that “Nut” was the shooter. He stated multiple times there was a “rat.” Also in this conversation, Agee informed the recipient of the call that he was in the interrogation room of the police station.

{¶41} The second excerpt was of a question Agee made to his mother and grandmother. He asked how he could get to Mexico without getting caught. This question was made in a whisper.

{¶42} The third excerpt was a phone call. Once again, only one side of the conversation can be heard – Agee’s statements. In this conversation he once again stated somebody they knew told everything to the police.

{¶43} The fourth and fifth excerpts were statements to his mother. These statements were made in a whisper. Agee instructed his mother to tell someone the police knew everything, including that “Nut” was the shooter and Agee was the driver, and there was nothing Agee could do.

{¶44} Appellant argues the introduction of this evidence violates the Confrontation Clause and the evidentiary rules. As to the Confrontation Clause, he argues the statements were testimonial. As to the evidentiary rules, he asserts Agee's statements do not qualify as an out-of-court declaration of a co-conspirator. The state disagrees. It asserts the statements are nontestimonial and thus, there is no Confrontation Clause violation. It further claims the statements are either an out-of-court declaration of a co-conspirator or a statement against interest. Therefore, the statements are not hearsay or constitute an exception to hearsay, and the trial court did not abuse its discretion in admitting them.

{¶45} A de novo standard of review is applied to a claim that a criminal defendant's rights have been violated under the Confrontation Clause. *State v. Durdin*, 10th Dist. No. 14AP-249, 2014-Ohio-5759, ¶ 15; *State v. Barnette*, 7th Dist. No. 11 MA 196, 2014-Ohio-5673, ¶ 26; *State v. Rinehart*, 4th Dist. No. 07CA2983, 2008-Ohio-5770, ¶ 20. If the admission of the statements did not violate the Confrontation Clause, then the trial court's decision to admit the statements under the rules of evidence is reviewed for an abuse of discretion. *State v. Eacholes*, 12th Dist. No. CA2013-11-195, 2014-Ohio-3993, ¶ 16-17 (statement of co-conspirator reviewed for abuse of discretion); *State v. Newsome*, 3d Dist. No. 12-12-03, 2012-Ohio-6119, ¶ 36 (statement against interest). A reviewing court will not disturb the ruling of the trial court as to the admissibility of relevant evidence unless an appellant can demonstrate both an abuse of discretion, and that he or she was materially prejudiced. *Eacholes* at ¶ 17. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

1. Confrontation Clause

{¶46} "The Sixth Amendment's Confrontation Clause provides, '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354 (2004). This protection is applicable to the states through the Fourteenth Amendment of the United States Constitution. *Pointer v. Texas*, 380 U.S. 400, 403-06, 85 S.Ct. 1065,

13 L.Ed.2d 923 (1965). Section 10, Article I of the Ohio Constitution “provides no greater right of confrontation than the Sixth Amendment.” *State v. Arnold*, 126 Ohio St.3d 290, 2010–Ohio–2742, ¶ 12, quoting *State v. Self*, 56 Ohio St.3d 73, 79, 564 N.E.2d 446 (1990).

{¶47} In *Crawford*, the High Court held the Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination.” *Crawford* at 53–54. The Court did not expressly define “testimonial.” However, it did give examples of a core class of testimonial statements. These included *ex parte* in-court testimony or its functional equivalent, extrajudicial statements contained in formalized testimonial materials such as affidavits and depositions, “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” and “[s]tatements taken by police officers in the course of interrogations.” *Id.* at 52. The Court further stated that the Confrontation Clause does not apply to nontestimonial hearsay. *Id.* at 68.

{¶48} The situation before us does not fall neatly within the examples of a testimonial statement. Here, although the statements were recorded during a police interview, the statements were not made as a part of the police interrogation. They were part of conversations that occurred when the police were not present in the interrogation room. We must consider the circumstances to determine whether the above statements are “testimonial.”

{¶49} Many U.S. District Courts within the Sixth Circuit have cited the *Cromer* case as setting forth the prevailing test in the circuit for determining testimoniality. *United States v. Coronado*, E.D. Mich. No. 13-cr-20813 (Nov. 19, 2014); *U.S. v. Thurman*, 915 F.Supp.2d 836 (W.D. Ky.2013). The Sixth Circuit explained, “The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against

the accused in investigating and prosecuting the crime.” *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004).

{¶150} Applying the *Cromer* test, many courts have concluded that phone calls placed from prison between co-defendants are not testimonial. *United States v. Thurman*, 915 F.Supp.2d 836, 854–55 (W.D.Ky.2013). See also, *State v. Dennison*, 10th Dist. No. 12AP-718, 2013-Ohio-5535, ¶ 64; *Saechaeo v. Oregon*, 249 Fed.App'x 678, 679 (9th Cir.2007); *Malone v. Kramer*, E.D. Cal. No. 1:07–cv–00743 AWS SMS(HC) (Apr. 6, 2010) (involving jail phone conversations between accused and his wife); *Ibarra v. McDonald*, N.D. Calif. No. C10–01145 JW (PR) (Apr. 26, 2011).

{¶151} For instance, in *Thurman* two prisoners had phone conversations while in jail that were recorded and offered against them, and both moved to exclude the calls. The district court applied the *Cromer* test and held that while there may be an awareness of the fact the calls would be recorded and possibly used, the defendants were not bearing testimony against one another:

Here, the nature of the statements made by Robinson and Kelly during their jailhouse telephone calls does not appear to the Court to indicate that either declarant intended to bear testimony against the other. It is highly doubtful that either Robinson or Kelly would anticipate that his statements would be used against the other in the investigation of a specific crime. Certainly, both men were well aware that their conversations were recorded, and could be intercepted by law enforcement officers. This general awareness, however, as noted in *Ibarra*, does not translate into an intent to bear testimony against the accused within the meaning of *Cromer*. Rather, all of the conversations contained in exhibits 1–16 seem far more in the nature of the type of casual, offhand remarks made between friends that routinely are held to be non-testimonial in nature. Because these statements are non-testimonial, out-of-court statements, their admissibility is only subject to review under the Federal Rules of Evidence and implicates no confrontation clause concerns.

(Citations omitted.) *Thurman*, 915 F.Supp.2d at 854–55.

{¶52} Here, the manner and means in which the statements were made are akin to recorded jail telephone calls. The statements Agee made to his mother and grandmother about fleeing the country were made in a whisper. This is an indication he knew he was being recorded. Furthermore, nothing on the video indicates the police ever informed him he was not being recorded while they were not in the room. That general awareness, however, does not mean there was intent to bear testimony. The statements were casual offhand remarks between friends and/or a mother and son. The statements were nontestimonial.

{¶53} Admittedly, Appellant was the subject of the conversation and not a party to it. Thus, this case factually differs from *Thurman*. However, that factual distinction does not change the analysis under *Cromer*. *United States v. Coronado*, E.D. Mich. No. 13-cr-20813 (Nov. 19, 2014), citing *United States v. Gibson*, 409 F.3d 325, 338 (6th Cir.2005) (holding that statements between two individuals implicating a third party defendant are not testimonial).

{¶54} Given the above, there is no Confrontation Clause violation. The statements were nontestimonial and admission of the statements was solely subject to the rules of evidence.

2. Rules of Evidence

{¶55} Under the rules of evidence, the state claims the statements were admissible as non-hearsay because they were statements by a co-conspirator or were admissible as an exception to hearsay because they are statements against interest. Appellant argues the state never charged him as a co-conspirator and did not attempt to argue conspiracy at trial. He also focuses on the fact the statements made as part of the telephone calls were only one-sided. He contends the context of the conversations was not known or discernable and thus, those statements are inadmissible.

a. Co-conspirator

{¶56} Evid.R. 801(D)(2)(e) provides a statement is not hearsay if the statement is offered against a party and is “a statement by a co-conspirator of a party

during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.”

{¶157} Appellant argues Agee was not a co-defendant or co-conspirator. He asserts there were no allegations or charges setting forth a conspiracy. Thus, he contends the statements are not admissible under the co-conspirator rule in Evid.R. 801(D)(2)(e).

{¶158} This court disagrees. The state is not required to charge an offender with conspiracy to admit a co-conspirator’s statement. *State v. Robb*, 88 Ohio St.3d 59, 68, 723 N.E.2d 1019 (2000) (“Although the substantive offense of conspiracy was not charged, the state could prove a conspiracy in order to introduce out-of-court statements by conspirators in accordance with Evid.R. 801(D)(2)(e)”). “The statement of a co-conspirator is not admissible pursuant to Evid.R. 801(D)(2)(e) until the proponent of the statement has made a prima facie showing of the existence of the conspiracy by independent proof.” *State v. Carter*, 72 Ohio St.3d 545, 651 N.E.2d 965 (1995), paragraph three of the syllabus.

{¶159} The state contends it presented sufficient evidence to establish a prima facie showing of the conspiracy’s existence by independent proof. It contends the subject of the conspiracy was the feud between Appellant and OB, which Agee aided and abetted Appellant before and after the shooting of the Repchics. It asserts the independent proof of the conspiracy was Lakeshia Toney, Nathan McKenzie, Piru, OB, and Detective Martin’s testimonies.

{¶160} As discussed above, Lakeshia, Nathan, and Piru testified there was a feud between Appellant and OB and/or Piru. Lakeshia, Nathan, Piru and OB testified OB drove a Cadillac similar to the Repchics. Lakeshia avowed Appellant borrowed her Durango shortly before the shooting and returned it sometime after the shooting. After hearing about the shooting she asked Appellant what was going on. He told her “it went down,” apologized for involving her, and told her it was a case of mistaken identity. Appellant also asked her if she found any casings in the Durango. The police testified a casing for a .308 was found at the crime scene. Nathan also testified he called Appellant twice around the time the crime was committed. The first

time Appellant told him he would have to talk to him later. The second time Nathan heard Appellant say either “I think we got them” or “I think I got them.”

{¶61} This testimony could establish independent proof of conspiracy. However, even if the testimony was not sufficient to establish an independent proof of conspiracy, the statements were admissible as a statement against interest.

b. Statement against interest

{¶62} If the statements do not qualify as statements of co-conspirators, then the statements would be hearsay. Hearsay evidence is not admissible unless subject to a relevant exception. Evid.R. 802.

{¶63} Under Evidence Rule 804(B) a statement against interest qualifies as an exception to the hearsay rule. A statement qualifies as a statement against interest if it meets the following:

A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truth worthiness of the statement.

Evid.R. 804(B)(3).

{¶64} In order for Agee's statements to qualify under the statement against interest exception, the state must have established: (1) Agee was unavailable as a witness; (2) the statements were against Agee's interest and tended to subject him to criminal liability; and (3) corroborating circumstances indicate the trustworthiness of the statements. Evid.R. 804(B)(3); *State v. Newsome*, 3d Dist. No. 12-12-03, 2012-Ohio-6119, ¶ 36. All three elements must be present. *Newsome*.

{¶65} The first element is met. The state called Agee to the stand and he asserted his right against self-incrimination. Thus, he was unavailable. *State v. Sumlin*, 69 Ohio St.3d 105, 108, 630 N.E.2d 681 (1994).

{¶66} The second element is also met because Agee's statements expose him to criminal liability. His statements indicate he was the driver. Those statements, along with other evidence, provided sufficient evidence to convict Agee of complicity to commit murder. *State v. Agee*, 7th Dist. No. 12MA100, 2013-Ohio-5382, ¶ 88-89.

{¶67} The third element is sufficient corroborating circumstances indicating trustworthiness of Agee's statements. This element is met by the statements Agee made to his mother. As stated above, Appellant asserts the one-sided telephone conversations should not have been admitted because the context of the conversations is not known or discernable. He asserts Agee could have been talking about another event and it is not known to whom he was talking.

{¶68} While this argument may have merit, the statements during the telephone conversations are the same statements made to his mother. In looking at the statements made to Agee's mother, there are four clear statements: 1) somebody told the police everything; 2) the police knew Agee was the driver; 3) the police knew Nut was the shooter; and 4) Nut was in trouble. These are the same four clear statements he made to the recipients of his two telephone calls. Thus, even if the calls were excluded, those four statements are admissible through the conversations with Agee's mother. The statements made to Agee's mother had sufficient corroborating circumstances indicating the trustworthiness due to the relationship between Agee and his mother. *State v. Newsome*, 3d Dist. No. 12-12-03, 2012-Ohio-6119, ¶ 38 (friendship creates a circumstance indicating trustworthiness), citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 53 ("[W]here a declarant makes a statement to someone with whom he has a close personal relationship, such as a spouse, child or friend, courts usually hold that the relationship is a corroborating circumstance supporting the statement's trustworthiness.").

{¶69} Consequently, the statements made to Agee's mother are admissible as statements against interest. The statements to the recipients of the phone calls are harmless error because those statements are the same ones Agee made to his mother.

{¶70} This assignment of error is meritless; there was no Confrontation Clause violation and the statements were admissible.

Third Assignment of Error

{¶71} Appellant's third assignment of error states:

"The trial court's [sic] erred in failing to merge the offenses of murder and felonious assault."

{¶72} Appellant argues the trial court erred when it failed to merge the murder conviction with the felonious assault convictions. He asserts the murder conviction and one of the felonious assault convictions involved Thomas Repchic. He claims the other felonious assault conviction involved Jacqueline Repchic. Appellant states the trial court correctly merged the two felonious assault convictions even though they allegedly involved different victims, but incorrectly failed to merge the murder conviction with the felonious assault convictions. He claims Ohio law requires the felonious assault of Thomas to be merged with the murder of Thomas because they involved the same victim, were committed by the same conduct, and were committed during a single act with a single state of mind.

{¶73} His argument, however, is factually incorrect. The victim of both felonious assault charges was Jacqueline. 10/7/10 Indictment; 1/19/11 Bill of Particulars. The only charge in which Thomas was named as a victim was the capital murder charge.

{¶74} Despite his incorrect statement of the facts, we will still consider whether the offenses were required to merge.

{¶75} Merger of allied offenses presents a question of law which we review de novo. *State v. Burns*, 7th Dist. No. 09-MA-193, 2012-Ohio-2698, ¶ 60. R.C. 2941.25(A) provides when the same conduct involves two or more allied offenses of similar import, the defendant may only be convicted of one offense. R.C. 2941.25(B)

states when a defendant's conduct involves two or more dissimilar offenses, or when the conduct is similar but is committed separately or with a separate animus, the defendant may be convicted of all offenses.

{¶76} The Ohio Supreme Court's most recent review of R.C. 2941.25 was in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892. In *Ruff*, the Ohio Supreme Court explained when a trial court and/or a reviewing court are considering whether there are allied offenses of similar import that merge into a single conviction, the court must take into account the conduct of the defendant. *Id.* at ¶ 25. It explained the offenses cannot merge if: "(1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation." *Id.* Thus, "the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct." *Id.* at ¶ 26.

{¶77} The Ohio Supreme Court did not stop its instruction at that point. It further explained, "When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts." *Id.* See also *State v. Dumas*, 7th Dist. No. 12 MA 31, 2015-Ohio-2683, ¶ 35 (multiple victims, no merger).

{¶78} On the basis of that law, merger of the felonious assault convictions with the murder conviction was not required; Jacqueline was the victim of the felonious assault convictions, while Thomas was the victim of the murder conviction.

{¶79} This assignment of error lacks merit.

Fourth Assignment of Error

{¶80} Appellant's fourth assignment of error states:

"The trial court's sentencing of Aubrey Toney to consecutive sentences was clearly and convincingly contrary to law as well as an abuse of discretion."

{¶81} Appellant asserts the trial court failed to make the requisite finding when it imposed consecutive sentences. The state concedes error.

{¶82} As aforementioned, the trial court sentenced Appellant to fifteen years to life for the murder conviction, plus an additional mandatory consecutive three years for the attendant firearm specification. The trial court merged the two felonious assault convictions (counts three and four) and sentenced Appellant to eight years on count three plus an additional mandatory consecutive three years for the attendant firearm specification. The trial court then ordered the sentence for the murder conviction and the sentence for the felonious assault conviction to be served consecutive to each other for a total prison term of twenty nine years to life. In making that order the trial court did not make any consecutive sentence findings.

{¶83} When a trial court imposes a consecutive sentence it must make the required R.C. 2929.14(C)(4) findings at the sentencing hearing, and it must incorporate those findings into the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 654, ¶ 29. R.C. 2929.14(C) provides:

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the

courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

{¶84} Accordingly, the statute requires a sentencing court to find “(1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger posed to the public, and (3) one of the findings described in R.C. 2929.14(C)(4)(a), (b) or (c).” *State v. Stillabower*, 7th Dist. No. 14BE24, 2015-Ohio-2001, ¶ 26. “However, a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.” *State v. Bonnell*, 140 Ohio St.3d 209, 218, 2014-Ohio-3177, 16 N.E.3d 659, 666, ¶ 29.

{¶85} Here, the trial court failed to make any of the findings at the sentencing hearing and in the judgment entry. The trial court’s statements at the sentencing hearing and in the judgment entry merely indicated consecutive sentences were imposed; there were no statements remotely indicating the trial court considered R.C. 2929.14(C)(4) when it imposed consecutive sentences for the felonious assault and murder convictions. The trial court failed to comply with R.C. 2929.14(C)(4) and the Ohio Supreme Court’s decision in *Bonnell*. The sentence must be reversed and the case remanded for a new sentencing hearing.

{¶86} This assignment of error has merit.

Conclusion

{¶87} In conclusion, the first, second, and third assignments of error lack merit; but the fourth assignment of error has merit. The convictions are affirmed. The sentence, however, is reversed and the case remanded for resentencing.

Donofrio, P.J., concurs.

Waite, J., concurs.