[Cite as *State v. Hubbard*, 2004-Ohio-4627.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 83384

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
CORDELL HUBBARD	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	SEPTEMBER 2, 2004
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-435700
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant appeals the conviction and sentence handed down by the Court of Common Pleas, Criminal Division, on charges of aggravated murder, complicity in the commission of aggravated murder, murder, complicity in the commission of murder, two counts of kidnapping, two counts of complicity in the commission of kidnapping, two counts of felonious assault, and two counts of complicity in the commission of felonious assault.

{¶2} Appellant was indicted and tried with two codefendants, Nichole Hubbard, appellant's sister, and Ru-el Sailor.[1] At the conclusion of trial, appellant was found guilty of complicity to commit aggravated murder (Count 2), murder (Count 3), complicity to commit murder (Count 4), kidnapping (Counts 5 and 7), complicity to commit kidnapping (Counts 6 and 8), felonious assault (Counts 9 and 10) and complicity to commit felonious assault (Counts 11 and 12), all with one-year firearm specifications. Prior to sentencing, the trial court merged counts 2, 3 and 4, counts 5 and 6, counts 7 and 8, counts 9 and 11, and counts 10 and 12. The trial court then sentenced appellant to a total of 23 years to life in prison, and appellant now presents his timely appeal. We affirm the conviction and sentence for the reasons set forth below.

{¶3} The facts relative to this case are as follows. On the evening of November 17, 2002, Nichole Hubbard, Clark Williams ("Williams"), Maria Whitlow and Omar Clark ("Clark") were "hanging

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[1] Appeals pending. See *State v. Ru-El Sailor*, Cuyahoga App. No. 83552; *State v. Nicole Hubbard*, Cuyahoga App. No. 83389.

out" at the home of Ellen Taylor. Later in the evening, Nichole, Williams, Clark, and Whitlow left to procure drugs. Nichole gave Williams twenty dollars to purchase a "wet" cigarette[2], with the understanding that he was to pay her back in full. Whitlow did not participate in the drug buy and was dropped off at her house before the purchase was made. After smoking the wet cigarette, Williams repaid Nichole only ten dollars, arguing that she shared in the drugs and should bear some of the cost. Nichole became enraged and accused Williams and Clark of cheating or "playing" her. She called her brother, appellant, on her cell phone; she then got in her car and left. Williams and Clark proceeded down Englewood Road toward the home of Ellen Taylor.

{¶4} A short time later, appellant and Ru-el Sailor arrived on Englewood Road. Appellant and Williams argued about the money Nichole claimed Williams owed to her. Meanwhile, Clark confronted Sailor, who was the driver of the car. Williams noticed that appellant used his cell phone during the altercation; he then noticed that Sailor was holding a gun on him. Williams began to run when shots rang out. In the melee, Clark was shot eleven times and killed. Williams suffered a slight gunshot wound but survived the attack.

{¶5} Detective James Metzer of the Cleveland Police Department was assigned to investigate the case. He spoke with Williams and with Nichole Hubbard, who made a statement to police with an

[2] A cigarette dipped in a solution containing PCP.

attorney present. Within one month of the shooting, Williams was able to identify appellant from a photo array as the man he had argued with on the night in question; he later identified Ru-el Sailor as the "shooter." Nichole Hubbard stated that she had indeed argued with Williams and had tried to contact her brother, but was only able to reach his voice mail and did not speak to him on the night in question. She also told the detective that Williams threatened her with a gun before she left the scene; however, Williams denied having a gun and no evidence that he was armed was presented.

{¶6} During the course of his investigation, Det. Metzer learned that Nichole Hubbard actually made seven calls to her brother's cellular phone between 11:57 p.m. and 12:47 a.m. on the night in question, and none of those calls was referred to voice mail. This information was confirmed by cellular phone records obtained from Verizon Wireless and Sprint Communications and introduced into evidence.

{¶7} Appellant was indicted and tried with Ru-el Sailor and Nichole Hubbard; of the defendants, only Ru-el Sailor testified. Williams and other witnesses to the shooting took the stand. Nichole Hubbard's statement to the police was also admitted as evidence. As to the appellant, the jury returned guilty verdicts on all counts except aggravated murder. At his sentencing hearing, appellant stated that he was with a man named Will on the night of the shooting and that Sailor was not there. However, at a hearing

on Sailor's motion for a new trial, appellant testified that he shot Clark in self-defense (a defense never asserted at trial) while accompanied by a man named William Sizemore and that Sailor had nothing to do with the shooting.

{¶8} Appellant now assigns thirteen assignments of error for our review.

{¶9} "I. THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION FOR SEVERANCE FROM HIS SISTER AND CO-DEFENDANT NICHOLE HUBBARD WHICH WAS A CLEAR *BRUTON* VIOLATION."

{¶10} Pursuant to Crim.R. 13, a court may order two or more indictments and/or defendants tried together, if the offenses or the defendants could have been joined in a single indictment. See, also, R.C. 2941.04. "Joinder is liberally permitted to conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to the witnesses. See *State v. Torres* (1981), 66 Ohio St.2d 340, 343, 421 N.E.2d 1288; 2 LaFave & Israel, Criminal Procedure (1984) 354-355, Section 17.1." *State v. Taylor*, Cuyahoga App. No. 82572, 2003-Ohio-6861, ¶27; see, also, *State v. Thompson* (1988), 127 Ohio App.3d 511, 523; *State v. Clifford* (1999), 135 Ohio App.3d 207, 211; *State v. Waddy* (1992), 63 Ohio St.3d 424, 428. To prevail on a claim that the trial court erred in denying a motion to sever, the defendant must affirmatively demonstrate (1) that his or her rights were prejudiced, (2) that at the time of the motion to sever, the defendant provided the trial court with sufficient

information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial. *State v. Schaim*, 65 Ohio St.3d 51, 59, 1992-Ohio-31, 600 N.E.2d 661, citing *State v. Torres* (1981), 66 Ohio St.2d 340, 20 O.O.3d 313, 421 N.E.2d 1288, syllabus.

{¶11} Appellant argues that his rights were prejudiced by the trial court's failure to sever his case from the case of his sister, codefendant Nichole Hubbard, because the prosecution introduced a statement given by Nichole Hubbard to police regarding the events that occurred on the night in question. In general, an accused's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is violated in a joint trial with a nontestifying codefendant by the admission of extrajudicial statements made by the codefendant inculpating the accused. *State v. Moritz* (1980), 63 Ohio St.2d 150, paragraph one of the syllabus, 407 N.E.2d 1268, following *Bruton v. U.S.* (1968), 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. *Crawford v. Washington* (2004), 124 S.Ct. 1354, 158 L.Ed.2d 177, syllabus. But, "'[t]he mere finding of a violation of the *Bruton* rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted

evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.' See, also, *Harrington v. California* (1969), 395 U.S. 250; *Parker v. Randolph* (1979), 442 U.S. 62, 60 L.Ed.2d 713; and *Elliott v. Thompson* (C.A.6, 1979), 599 F.2d 767, certiorari denied 62 L.Ed.2d 190." *State v. Merriweather*, (Mar. 28, 1991), Cuyahoga App. No. 58089, at 13-14.

{¶12} In the instant case, Detective James Metzer testified that, during his investigation of the crime, Nichole Hubbard voluntarily gave a statement. Nichole stated that she had called her brother only once during the night in question and that she did not reach him, but instead got his voice mail; she did not leave a message, but hung up the phone.[3]

{¶13} The question, then, is whether this information inculpates appellant such that *Bruton* would apply. Pursuant to the hearsay rule, a declarant's invocation of his Fifth Amendment right against self-incrimination has been held to render the declarant "unavailable" for purposes of a hearsay exception. *State v. Gilliam*, 70 Ohio St.3d 17, 1994-Ohio-348, 635 N.E.2d 1242,

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[3] Testimony given by both Brett Trimble, records custodian for Sprint Communications, and by Kristin Clark, records custodian for Verizon Wireless, disputes this fact. Trimble, Clark and Metzer all testified that the cellular phone records indicate seven calls between Nicole's cell phone and the cell phone number assigned to appellant, and no calls were referred to voice mail.

overruled on other grounds; *State v. Madrigal,* 87 Ohio St.3d 378, 2000-Ohio-448, 721 N.E.2d 52; *State v. Landrum* (1990), 53 Ohio St.3d 107, 113, 559 N.E.2d 710. It is clear that Nichole's statement is admissible pursuant to the hearsay exception found in Evid.R. 804(B)(3), which states:

{¶14} "A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest 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 indicated the trustworthiness of the statement." See, also, *State v. Allen,* Cuyahoga App. No. 82556, 2004-Ohio-3111.

{¶15}After a review of the statement in question, we cannot hold that it implicates appellant in the shooting, thus, *Bruton* would not apply and appellant has not been denied his rights under the Confrontation Clause. In fact, there was limited reference to appellant in the statement; it dealt, in large part, with Nichole's involvement in the activities prior to the shooting. Further, Nichole stated that she did not know who was responsible for the shooting. Therefore, the statement itself does not inculpate the appellant, and Nichole cannot be a "witness against" appellant such

that *Bruton* would apply. Moreover, even if we were to find that the *Bruton* rule applied in this case and was violated by the trial court's failure to sever the proceedings, there existed sufficient evidence against the appellant, as discussed below, to render any such failure harmless error.

{¶16}For these reasons, we find no error in the trial court's denial of the motion for separate trials, and this assignment of error is overruled.

{¶17}"II. THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATION TESTIMONY OF CLARK WILLIAMS [aka CLARK LAMAR]."

{¶18}"V. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATION TESTIMONY OF STATE WITNESS TENNITA JOHNSON."

{¶19}An appellate court will not reverse a trial court's findings relative to a motion to suppress unless the trial court's decision is not supported by competent, credible evidence. *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100; see, also, *State v. Winand* (1996), 116 Ohio App.3d 286, 688 N.E.2d 9; *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 645 N.E.2d 802. "In a hearing on a motion to suppress evidence, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer* (1996), 112 Ohio App.3d 521 at 548, 679 N.E.2d 321, quoting *State*

v. Venham (1994), 96 Ohio App.3d 649, 653, 645 N.E.2d 831. However, once accepting those facts as true, the appellate court must independently determine, as a matter of law and without deference to the trial court's conclusion, whether the trial court met the applicable legal standard. *State v. Williams* (1993), 86 Ohio App.3d 37, 41, 619 N.E.2d 1141. When a witness has been confronted with a suspect before trial, due process requires a court to suppress an identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances. *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, and *Neil v. Biggers* (1972), 409 U.S. 188, 196-198. However, no due process violation will be found where an identification does not stem from an impermissibly suggestive confrontation, but is instead the result of observations at the time of the crime. *Coleman v. Alabama* (1970), 399 U.S. 1, 5-6.

{¶20}The United States Supreme Court in *Manson v. Brathwaite* and *Neil v. Biggers*, supra, developed a two-step process in determining the reliability of the eyewitness identification process. This two-step process initially requires that the appellant prove that the identification procedure used was unnecessarily and impermissibly suggestive. The Supreme Court held that the trial court must then balance the suggestiveness of the identification procedure against the following factors: 1) the

opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the length of time between the crime and the confrontation. *State v. Sanders* (June 15, 1989), Cuyahoga App. No. 55524 at page 7.

{¶21}Appellant puts forth three assignments of error regarding identification testimony in this case. Specifically, the state presented two eyewitnesses who identified appellant as an aggressor on the evening in question.

A. Identification Testimony of Clark Williams

{¶22}Appellant argues that the testimony of Clark Williams regarding the identification of appellant was not credible because Williams was under the influence of drugs on the night in question and his ability to perceive the appellant was impaired because the street was dark when the shooting took place. Appellant does not argue, however, how the photo array presented to the witness by detectives was unnecessarily and impermissibly suggestive. Instead, he proposes that the photo array was somehow flawed because the investigating detective "did not use the descriptions given by witnesses to compile the photo array." (Appellant's Brief p. 15.) In general, "[i]t is not a requirement for the use of photo arrays that all pictures shown must be of the same type. Neither is it required that they bear no differing marks or blemishes. Neither is it required that but one photo of an accused

be used. The only inquiry is whether the photo or procedure used was 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *State v. Green* (1990), 67 Ohio App.3d 72 at 79, citing *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253; see, also, *State v. Miller,* Cuyahoga App. No. 80999, 2003-Ohio-164. Therefore, whether each and every suspect included in the photo array exactly matched the descriptions of witnesses to the crime is immaterial, as long as the array itself was not impermissibly suggestive. Moreover, there is no automatic preclusion of a proper in-court identification even if there were erroneous pretrial identification procedures. *State v. Jackson* (1971), 26 Ohio St.2d 74, 269 N.E.2d 118, syllabus.

{¶23}In the instant case, all the suspects depicted in the photo array in question were similar in appearance and build to the appellant, and all had varying degrees of facial hair.[4] Further, the witness testified that he was certain that appellant was the man he had the altercation with because he had a face-to-face argument with him and was able to watch him closely while appellant was using his cell phone during the argument. Finally, Williams was able to identify appellant from the photo lineup within one month of the shooting. Williams testified that he was able to make the identification with "no uncertainty" the instant that he viewed

[4] The photo array in which appellant was included was made part of the record as State's Exhibit 131.

the photo array. Therefore, we find the identification procedure used with this witness was not unnecessarily or impermissibly suggestive, and appellant's second assignment of error is overruled.

B. Identification Testimony of Tennita Johnson

{¶24}Appellant again argues that the photos used in the photo array shown to witnesses by police bore no resemblance to him. As discussed above, this is not the case. Witness Tennita Johnson, a resident of Englewood Drive, testified that she witnessed the argument between appellant, Sailor, Williams and the victim first, as she drove by, and then from her driveway, a few houses from where the altercation took place. All the men turned to look at her as she drove by, allowing her a good look at their faces. She was certain appellant was the man she saw in the street, and she was able to positively identify him from a photo array within days of the incident. Recordings revealed that Ms. Johnson was unable, on the night of the incident, to give a description to a 911 operator of the individuals involved in the altercation as it was occurring. However, the field report created by investigating police officers indicates that Ms. Johnson did give them a description that evening and made a positive identification of appellant soon thereafter and again just prior to trial. Again, we find that the photo array presented to Ms. Johnson in this case was not impermissibly suggestive and the identification procedure was proper and admissible.

{¶25}Appellant also argues that Ms. Johnson's testimony was "significant and unexpected," thereby prejudicing appellant. (Appellant's Brief, p. 17.) Pursuant to Crim.R. 16(B)(1)(e), the prosecution has the obligation of making known to the defense prior to trial the names and addresses of all witnesses the prosecution intends to call. The purpose of Crim.R. 16 is to prevent surprise and the secreting of evidence favorable to one party. *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3, 511 N.E.2d 1138. If there is a failure to comply with this discovery rule, the trial court may grant a continuance, preclude the prosecution from calling that witness, or make "such other order it deems just under the circumstances." Crim.R. 16(E)(3). A trial court must inquire into the circumstances producing the alleged violation of Crim.R. 16 and then impose the least severe sanction that is consistent with the purpose of the rules of discovery. *Papadelis*, supra, paragraph two of the syllabus. However, the imposition of sanctions for discovery violations is within the discretion of the trial court. *State v. Harcourt* (1988), 46 Ohio App.3d 52, 54, 546 N.E.2d 214. Prior to trial, appellant had filed a motion to suppress[5] identification testimony, upon which a hearing was held. Witnesses Larry Braxton, Detective Veverka, Clark Williams and Detective Metzer testified at that hearing; Ms. Johnson was not called at that time, and the motion was overruled. There seems to have been

[5] Co-defendant Ru-el Sailor also made a similar motion, and one hearing was held on both motions.

some dispute as to whether the prosecution did or did not reveal that Ms. Johnson was to be called as a prosecution witness prior to the initial hearing on appellant's motion to suppress, and this issue was raised during trial when Ms. Johnson was called as a prosecution witness. At that time, the trial court conducted a voir dire examination of Ms. Johnson, outside the presence of the jury, and counsel for appellant was allowed to renew his motion for suppression of her testimony. The trial court then overruled the motion to suppress as to Ms. Johnson, finding that the photo array was not impermissibly suggestive. We find no abuse of discretion in this action, and we further find that the trial court properly complied with Crim.R. 16. As discussed above, we agree with the trial court's finding on this issue and therefore overrule appellant's fifth assignment of error.

{¶26}"III. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO PRESENT TESTIMONY OF ELLEN TAYLOR REGARDING STATEMENTS ALLEGEDLY MADE TO HER BY CO-DEFENDANT NICHOLE HUBBARD IMPLICATING APPELLANT AND THE ADMISSION OF THIS TESTIMONY WAS VIOLATIVE OF HIS RIGHT TO CONFRONTATION AND DUE PROCESS."

{¶27}"IV. APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT DENIED THE APPELLANT'S MOTION FOR MISTRIAL WHEN THE STATE HAD PRESENTED BELATED IDENTIFICATION WITNESS TESTIMONY DURING THE MIDDLE OF TRIAL ALTHOUGH THE APPELLANT HAD TIMELY FILED A MOTION TO SUPPRESS IDENTIFICATION TESTIMONY AND A HEARING WAS HELD ON THAT MOTION."

{¶28}A trial court's denial of a motion for mistrial will not be reversed upon appeal absent an abuse of discretion. *Apaydin v. Cleveland Clinic Found.* (1995), 105 Ohio App.3d 149, 152. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Clark* (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331; *State v. Moreland* (1990), 50 Ohio St.3d 58, 61, 552 N.E.2d 894; *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. In order to have an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias. *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 256, 662 N.E.2d 1. Moreover, when applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181; *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

{¶29}In his third assignment of error, appellant argues that witness Ellen Taylor's testimony regarding statements made by Nichole Hubbard to her in a cell phone call were grounds for a mistrial. As discussed pursuant to Assignment of Error I, Nichole Hubbard was unavailable as a witness due to her invocation of her right to remain silent. However, this statement attributed to

Nichole is not a testimonial statement, such that *Crawford*, supra, would apply. Not all hearsay implicates the core concerns of the Sixth Amendment. *State v. Allen*, Cuyahoga App. No. 82556, 2004-Ohio-3111. Therefore, we find no abuse of discretion in admitting this testimony. As discussed pursuant to assignment of error V, we find no abuse of discretion in the court's handling of Ms. Johnson as a "surprise" witness. Accordingly, this assignment of error is overruled.

{¶30}Assignments of error VI, VII, VIII, IX, X, XI and XII are substantially interrelated; therefore, for the sake of judicial economy, we will address them together.

{¶31}"VI. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE DUE TO STATE'S FAILURE TO PRESENT SUFFICIENT EVIDENCE OF GUILT FOR THE CHARGE OF COMPLICITY TO COMMIT AGGRAVATED MURDER."

{¶32}"VII. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE DUE TO STATE'S FAILURE TO PRESENT SUFFICIENT EVIDENCE OF GUILT FOR THE CHARGE OF MURDER."

{¶33}"VIII. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE DUE TO STATE'S FAILURE TO PRESENT SUFFICIENT EVIDENCE OF GUILT FOR THE CHARGE OF COMPLICITY TO COMMIT MURDER."

{¶34}"IX. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE DUE TO STATE'S FAILURE TO PRESENT SUFFICIENT EVIDENCE OF GUILT FOR THE CHARGE OF KIDNAPPING."

{¶35}"X. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE DUE TO STATE'S FAILURE TO PRESENT SUFFICIENT EVIDENCE OF GUILT FOR THE CHARGE OF COMPLICITY TO COMMIT KIDNAPPING."

{¶36}"XI. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE DUE TO STATE'S FAILURE TO PRESENT SUFFICIENT EVIDENCE OF GUILT FOR THE CHARGES OF FELONIOUS ASSAULT."

{¶37}"XII. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE DUE TO STATE'S FAILURE TO PRESENT SUFFICIENT EVIDENCE OF GUILT FOR THE CHARGE OF COMPLICITY TO COMMIT FELONIOUS ASSAULT."

{¶38}Crim.R. 29 provides for a judgment of acquittal if the evidence is insufficient to sustain a conviction and states in pertinent part:

{¶39}"The court, on motion of the defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the

evidence is insufficient to sustain a conviction on such offense or offenses. ***"

{¶40}Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 55 Ohio Op. 388, 124 N.E.2d 148. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed. 2d 652, 663, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560. A judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent credible evidence which goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407.

{¶41}In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court reexamined the standard of review to be applied by an appellate court when reviewing a claim of insufficient evidence:

{¶42}"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of 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.

(*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)" Id. at paragraph two of the syllabus.

{¶43}Appellant was found guilty of kidnapping, felonious assault and murder as both the principal actor and as an accomplice, pursuant to R.C. 2923.03. The trial court properly merged these counts for sentencing. Under R.C. 2941.25, "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." A major crime often includes as inherent therein the component elements of other crimes and these component elements, in legal effect, are merged in the major crime. *State v. Williams* (Apr. 22, 1993), Cuyahoga App. No. 62040 at 14, citing *State v. Botta* (1971), 27 Ohio St.2d 196, 201, 271 N.E.2d 776.

{¶44}R.C. 2923.03 states in pertinent part:

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

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

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

{¶48}A person aids or abets another when he supports, assists, encourages, cooperates with, advises, or incites the principal in the commission of the crime and shares the criminal intent of the principal. *State v. Johnson*, 93 Ohio St. 3d 240, 2001-Ohio-1336,

754 N.E.2d 796. "Such intent may be inferred from the circumstances surrounding the crime." Id. at 246; see, also, *State v. Langford*, Cuyahoga App. No. 83301, 2004-Ohio-3733.

{¶49}When viewing the facts of this case in the light most favorable to the prosecution, it is undisputed that Cordell Hubbard was not the "shooter" in this case and that the only weapon seen by any witness was brandished by codefendant Ru-el Sailor. Sailor testified during the trial that he and appellant were together the entire night and that they visited a number of bars and a cabaret between approximately 11:00 p.m. and 4:00 a.m. on the night in question. Sailor denied involvement in the shooting and disavowed any knowledge of appellant's involvement.

{¶50}However, eyewitnesses, including Clark Williams, made positive identifications of Sailor and appellant as the aggressors at the scene of the murder, and cellular phone records support Williams' testimony as to the sequence of events that set in motion what became the murder of Omar Clark. Testimony of other witnesses also supports Williams' version of the events.

{¶51}After a thorough review of the record in this case, we find that there exists competent, credible evidence as to each count of complicity on which appellant was convicted, and a reasonable jury could have found that the elements of the crimes were proved beyond a reasonable doubt. Appellant received a phone call from his sister, which prompted him to proceed to Englewood Avenue in search of Clark and Williams. He engaged Williams in a

verbal confrontation and confirmed with his sister/codefendant via cell phone that Williams was indeed the man who had "played" her. Williams further testified that he did not feel free to leave during the verbal altercation in that appellant was hostile and Sailor was pointing a gun at him. Williams, and other witnesses, also testified that appellant stated to him prior to making that call, "if [my sister] says you did it, you outta here." It is clear from the record that appellant intended to detain and harm Clark and Williams when he arrived at Englewood; even if he was not the "gunman," he clearly acted in complicity with Ru-el Sailor. Therefore, we hereby overrule assignments of error VI, VIII, X and XII.

{¶52}Assignments of error VII, IX and XI are also overruled. As discussed above, there was competent, credible evidence that appellant was, at the very least, an active accomplice to the shooting death of Omar Clark. Appellant was found guilty of all counts for which he was charged, except for aggravated murder. An accomplice may be prosecuted and punished as if he was the principal offender pursuant to R.C. 2923.03. Further, the trial court merged the appropriate counts in this case prior to sentencing such that the appellant was not subject to separate sentences for allied offenses. Therefore, these assignments of error lack merit.

{¶53}"XIII. THE VERDICTS FINDING THE APPELLANT GUILTY ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND ARE CONTRARY TO LAW."

{¶54}The standard employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. Instead, "the [appellate] court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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." *State v. Martin* (1983), 20 Ohio App.3d 172,175, 485 N.E.2d 717, citing *Tibbs v. Florida*, (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 752.

{¶55}We cannot find that the jury lost its way in this case. As discussed above, there was substantial, credible evidence on which the jury could have based its decision that appellant was not only present at the time of the shooting but was aiding and abetting codefendant Sailor in the murderous plot. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. Upon reviewing the entire record, we find no reason that the jury's reliance on the evidence presented created a manifest miscarriage

of justice, and the appellant's final assignment of error is hereby overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

TIMOTHY E. McMONAGLE, J., AND

ANTHONY O. CALABRESE, JR., J., CONCUR.

of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).