[Cite as *State v. Braun*, 2009-Ohio-4875.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91131

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEFFREY BRAUN

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED, SENTENCE REVERSED, REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-496324

BEFORE: Gallagher, P.J., Blackmon, J., and Celebrezze, J.

RELEASED: September 17, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Timothy F. Sweeney
Law Office of Timothy Farrell Sweeney
The 820 Building, Suite 430
820 West Superior Avenue
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Brent C. Kirvel
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Jeffrey Braun, appeals his conviction and sentence from the Cuyahoga County Court of Common Pleas. Braun was found guilty, after a jury trial, of aggravated murder with the capital specification that the murder was committed in the course of an aggravated robbery with firearm specifications, aggravated robbery with firearm specifications, tampering with evidence, and having a weapon while under a disability. After the mitigation phase, the jury returned a sentencing verdict of life imprisonment without the possibility of parole. The trial court sentenced Braun to life in prison without parole. For the reasons that follow, we affirm his conviction, but reverse his sentence and remand for resentencing.

{¶ 2} On October 25, 2005, John Chappell, a.k.a. "Pook" (herinafter "the victim" or "Pook"), died from two gunshot wounds to the head. He was found next to an abandoned house at 3302 W. 17th Street, Cleveland, Ohio, in a burning Chevy Blazer. It was close to midnight. When the firefighters arrived, it was clear that the victim was already dead. The point of origin of the fire was the floor of the front passenger compartment, where the victim's feet were located.

{¶ 3} The coroner testified that the victim bled to death from the gunshot wounds. He also testified that there was a 9 percent level of carbon monoxide in the victim's blood and that the carbon monoxide finding may indicate that the victim inhaled burning materials while he was bleeding to death, but the coroner could not say with certainty that the victim was alive at the time of the fire.

{¶ 4} At trial, Tracy Walsh testified that she lived at a house on West Boulevard that people used as a "dope house," a place where people smoked crack. She said that the victim had been "staying" at her place prior to his murder. She testified that the victim was a drug dealer who provided drugs to her in exchange for the use of her 2001 Chevy Blazer. The day of the murder, the victim was at Tracy's house. When the victim took a shower, Tracy answered his cell phone. She testified that Braun, a.k.a. J.B. (hereinafter "Braun" or "J.B."), asked, "Is Pook there?" When she said, "hey, J.B., what's up?" Braun hung up. When the victim got out of the shower, Tracy told him that Braun had called. Tracy remembered that the victim was frantically looking for his set of keys to her vehicle. The victim left in Tracy Walsh's Blazer. She was under the impression that Pook was bringing gas to Braun because he had run out of gas.

{¶ 5} Tracy Walsh testified that at 2:00 a.m., homicide detectives came to her house asking about her vehicle. She learned that someone was found in her "burned up vehicle." She knew it was Pook. She said that they searched her garage for gas cans. The next morning, Tracy called her friend Tyrone Harvey to tell him about Pook's death.

{¶ 6} Tyrone Harvey testified that Tracy Walsh called him and told him about Pook's death. He testified that he went to Tracy's house and then left to look for Braun because he heard that Braun killed Pook. Harvey ran into the co-defendant, John Shear, a.k.a. "Cheese" (hereinafter "Shear" or "Cheese"), and talked to him about Pook's murder and asked Shear if he knew where Braun

was. Shear did not know. Harvey continued to look for Braun. Later that day he drove around with detectives looking for Braun. He never found him.

{¶ 7} Thomas Hall testified that he was dating Tracy Walsh and that he met Braun and Pook one time at Tracy Walsh's house. He testified that he saw Pook give Braun a small-caliber black revolver, possibly a .38 caliber pistol.

{¶ 8} Shannon Holbert, one of Braun's ex-girlfriends, testified that on the night of the murder she was at a motel in Lakewood "getting high." The next morning, Shannon left the motel and started calling the victim because she wanted to buy more drugs to get high again. She testified that she called the victim's cell phone several times. She then heard from another drug dealer that Pook had been murdered. She testified that she was walking on Storer Avenue and was hysterical and crying over what she heard because Pook was her friend and "sex partner." She testified that she saw Braun drive up in a red car and that he asked her to get into the car. She testified that she asked Braun, "did you kill him? Did you kill Pook?" Braun said, "I killed that n***er." She said she then ran away.

{¶ 9} Renita Whitfield testified that she lives two doors down from the alley where the body was discovered. On the night of the murder, she was out on the front porch barbecuing with her husband, sometime between 7 p.m. and 11 p.m. She said that it was dark outside and she heard two male voices arguing in the alley. She said she went inside and then came back out and saw smoke. Soon everyone was outside watching the fire and the firefighters work.

{¶ 10} Michael Graham testified that on the night of Pook's murder, he went with Roy Fitzer and Jeremy Payne to steal a snowblower from Home Depot. After stealing it, they then sold it for $100 worth of crack cocaine and $50 cash. They then went to Dave Essenberg's house at 3444 Storer Avenue to get high, and Braun and Shear were at the house "acting anxious." Braun and Shear kept "pressing" for someone to go buy them gasoline, because their car was out of gas. Graham testified that he, Roy Fitzer, Frank Lewis, and Dave Essenberg walked up to the Dairy Mart on Fulton Road to get gasoline for Braun and Shear and to buy beer. Graham stated that he bought the gas because they kept pressing him and because he did not want to share his drugs with them.

{¶ 11} Graham testified that when they returned with the gasoline, he set the container on the side of the house and went inside and told Braun and Shear the gas was outside. He said that Braun and Shear were in a hurry and anxious to get out of there. They grabbed the gasoline and left.

{¶ 12} Graham testified that he and his buddies then got high. When they ran out of drugs, Graham went to buy more. He went outside to get in the car he had earlier stolen, but it was gone; he thought Braun and Shear had taken it. Graham was mad, so he and Roy Fitzer walked back to the alley where Braun and Shear's vehicle, a black Chevrolet Camero IROC-Z, was parked, and they stole the radio out of it to sell for drugs. While Graham was removing the radio, he and Roy Fitzer saw a set of headlights turn down the alley. They saw Braun

driving Pook's Blazer and Shear following behind in Graham's stolen vehicle. Graham testified that Braun and Shear "flipped them off."

{¶ 13} After they passed, Graham got the radio out and tried to sell it for drugs. Eventually, he went back to Essenberg's house to smoke more crack. He watched the news, which reported that there was a car fire with a woman inside. After the news, Braun called looking for Shear. Graham asked where his stolen car was, and Braun said that he would get it back within a half hour. Braun called again an hour later looking for Shear.

{¶ 14} Graham testified that at some point the next morning, he went outside and noticed that the car he stole had been returned. While he was outside, Shear stopped over and wanted to smoke crack with Graham, so they smoked crack together. Shear offered Graham $40 to steal a car for him. Shear and Graham got into Graham's stolen vehicle and went searching for a car to steal. Graham testified that Shear went into the back alley and got a gun from a car parked in the yard of Bobby Fitzer, Roy Fitzer's twin brother.

{¶ 15} Graham asked Shear if he had anything to do with the girl in the car. Shear said it wasn't a girl, it was Pook. He said that they got into an argument over drugs, Pook was shot, and then they burned him with the gas. Graham said he and Shear continued to drive around looking for a car to steal. Graham found a car to steal, stole the car, got his money, and then went back to Essenberg's house.

{¶ 16} At the house, Graham told Essenberg what Shear had said. Essenberg laughed. Graham got some heroin and went to sleep.

{¶ 17} Graham testified that a day or two later, Roy Fitzer and Braun were riding around getting high and that they stopped at Essenberg's house. Essenberg and Braun started arguing. During the argument, Graham heard Braun say that if it came down to it, he would tell on Shear. Braun was also bragging about how many times he had been to court and won. Essenberg was laughing. Braun told Essenberg that he should shoot him like he shot Pook. Shear pulled up, and Braun told Shear that they had better do something about Essenberg because "he was gonna get them knocked" for "running his mouth too much." Braun said that maybe they should shoot him. Braun then left with Roy Fitzer.

{¶ 18} Graham testified that while he was in prison at Lake Erie Correctional Institution, he was transported back to Cuyahoga County to make a statement to the Cleveland homicide detectives regarding the murder of John Chappell. A month after Graham was returned to prison, Shear was brought to Lake Erie Correctional Institution. Graham requested protective custody because he had made a statement against Shear. Graham heard

Shear say, "I wouldn't play you like that." When Graham got out of "the hole,"[1] he was attacked. Graham was then moved to a different prison.

{¶ 19} Sandy Seidenwand, a.k.a. Sandy Shear, the mother of the co-defendant Shear, was called as a court's witness. She testified that she had no idea that her son had a cell phone registered in her name. She also testified that she gave her son addresses of people while he was in prison and that she tried to investigate the case herself. Taped telephone conversations between Shear and his mother while Shear was in prison were played for the jury.[2]

{¶ 20} Cuyahoga County Corrections Officer George Metz testified that one day when he was transporting Braun back to his pod,[3] Braun saw Frank Lewis and yelled, "You're a f***ing snitch, a b**** who better shut up." Braun also said, "I got something for all you snitching b****es."

{¶ 21} Daniel Quarrick testified that around Halloween 2005, he ran into Braun at Martin's Deli on West 25th Street. Quarrick said Braun was selling chains (necklaces). Quarrick looked at the chains, some of which appeared to be broken. Quarrick testified that he got into Braun's "dirty"

---

[1] The segregation unit is known as "the hole."

[2] The audiotapes were not sent to the court of appeals.

[3] In the county jail, a "pod" is a unit of cells that typically holds 29 inmates. The cells surround a day area where there are tables, telephones, and a television. Inmates spend time in lock down and time in the day area.

(stolen) car, and they went back to Quarrick's house to get money so he could buy one of the chains. When they got back to Quarrick's house, Quarrick noticed that his girlfriend had left with his money, so Quarrick could not buy the chain. He testified that Braun wanted money or cocaine, but Quarrick had only heroin. He also testified that Braun showed him a revolver while they were in the car together. The next day, Quarrick said he was delivering heroin and making some "buys" when he ran into Shear. Shear had a .380 automatic pistol with him.

{¶ 22} Quarrick testified that a few months later, he ended up in Cuyahoga County jail. Shear was in the same pod as Quarrick and was bragging to him about Pook's death. Shear told him that he and Braun called the victim to get some drugs and to set up a robbery. They robbed, killed, and "burned him up." Shear went on to say they saw Pook in an alley, Braun robbed him, and Pook started getting loud, so Braun shot him. Shear said he didn't think it was going to happen like that; it was supposed to be just a robbery. Shear said he didn't want to leave the situation with Pook and the blood in the Blazer, so he helped Braun dispose of Pook.

{¶ 23} After hearing this, Quarrick wrote a letter to Detective Sweeney of the Cleveland Police Department First District telling him that he had information regarding the murder of Pook. Eventually, Quarrick made a statement to police. Quarrick then received a letter from Shear telling

him to tell the homicide detectives that his statement was a lie. Quarrick testified that Shear tried to "detour" him from testifying. He testified that he was receiving threats.

{¶ 24} Angela Casto, Shear's ex-girlfriend, testified that Shear spoke with her and asked her to be a witness in his case and to say she was with him the night Pook died. Shear blamed Braun for the murder, but said that he helped Braun get rid of the body. Angela Casto refused to be his alibi. Angela also testified that she notified the homicide detectives about letters written by Braun to Shear while in prison. The letters were picked up by the police.

{¶ 25} Kimberly Ferline, Braun's ex-girlfriend, testified that Braun asked her to be his alibi for the night of Pook's murder. He asked her to say that they had a spaghetti dinner together. At first she agreed, but then she changed her mind.

{¶ 26} Kimberly Ferline said that Braun also asked her to go to Kelly Mechling's house to see if the gun still was on top of the garage. Braun told her to throw the gun into the lake. Kimberly went to the house, squeezed between the garage and a tree, and was able to reach the top of the garage by standing on some debris. She checked the roof and the gutter and did not find the gun. She told Braun she didn't find it, and he said that Shear must have gotten it.

{¶ 27} Detective Henry Veverka of the Cleveland Police Department Homicide Unit testified about his investigation into John Chappell's murder. He testified that at the beginning of the investigation, all he had to work with were the nicknames of the victim (Pook) and of the suspects (Cheese and J.B.). On October 30, 2005, Det. Veverka learned that Braun, Roy Fitzer, and John Shear were wanted in connection with the robbery and attempted murder of Tom McDonald. From this report, he was able to connect Braun and Shear to the nicknames J.B. and Cheese, and put together a photo array for Tracy Walsh. She identified Braun as J.B. and Shear as Cheese. Det. Veverka testified that there were approximately seven phone calls made to Pook's cell phone between 9:30 and 10:45 p.m. from Shear on the night of the murder.

{¶ 28} On November 1, 2005, Braun and Roy Fitzer were arrested for robbery and the attempted murder of Tom McDonald. Det. Veverka and his partner, Det. James Metzler, interviewed both individuals in connection with Pook's murder. Pook had still not been positively identified as John Chappell. Det. Veverka testified that Braun was read his rights and agreed to talk to them without an attorney present. Braun said he did not know anything about Pook's death, but that he had heard he was the last to see him. He knew Pook from the neighborhood and had bought drugs from him in the past. He gave the detectives Pook's cell phone number. Braun said

that both he and Pook had stayed at Tracy Walsh's house for a few days, along with several other people. Braun said that he was at Kelly Mechling's house when he learned about Pook's death from Tyrone Harvey. He said he did not see Pook on the night of his murder, but that he did call Pook around four or five o'clock to ask him for gasoline. Braun said that on the night of the murder, he was riding around with a male he knew only by the name of "Cheese." He said they ran out of gas on Denison Avenue, so he and Cheese went to Athens Pizza on West 88th Street and Denison Avenue, ordered a pizza, and called Pook for gas. Braun said he borrowed a cell phone from a guy behind the counter to call Pook.

{¶ 29} Braun told the detectives that they waited a half hour for Pook and then Braun called him again to ask Pook where he was. Pook told him that he forgot, so Braun told him "never mind we have the gas." Braun said Cheese left and got some gas, but he did not know how. First Braun told the detectives that they drove to Kelly Mechling's house and spent the night. Then he told detectives that they dropped the car off at some female's house and walked to Kelly Mechling's house around 7:00 or 8:00 p.m.

{¶ 30} Braun declined to make a written statement. He turned over his clothes for testing and submitted buccal swabs.

{¶ 31} Det. Veverka testified that on November 3, the body was identified, through fingerprints, as John Chappell. He notified the family

and continued his investigation. Det. Veverka interviewed approximately 40 people and took statements when appropriate.

{¶ 32} Det. Veverka testified that he received letters from an inmate by the name of Matthew Stedman, who claimed that Braun had admitted to numerous criminal acts, including the murder of Pook. Stedman was interviewed, and a statement was taken.

{¶ 33} On February 14, 2006, Braun called the detectives from county jail and told them that he wanted to speak with them again. Braun made a second statement. He said that he had nothing to do with Pook's murder. He said he saw the statement Roy Fitzer had given wherein he told the police that Braun gave him a gun "with a body on it," meaning it had been used in a murder. Braun said that he had been hanging out with Shear for about three days before Pook was killed and that they were getting high and "hitting licks" on Denison Avenue. He explained that they were taking "dope" from "dope boys" and not paying for it.

{¶ 34} Braun said that on the day of the murder, he was with Shear and they were "tricking some dope boys out of their drugs." He said they ran out of gas somewhere in the industrial area by Almira Avenue. He said they walked to Athens Pizza, ordered a pizza, and called Pook for gas. Braun said after waiting for awhile, he went across the street to the deli and called Pook again. He said that Shear pulled up, they got their pizza and went to Kelly

Mechling's house to smoke some dope. Cheese then took Braun to his girlfriend Kimberly Ferline 's house. She had made him a spaghetti dinner, they had some friends over, played spades, and smoked crack.

{¶ 35} Braun told detectives that at about 10:00 to 10:30 that evening, Cheese showed up and was acting really nervous and had a "bunch of crack." Braun said he went with Shear to Kelly Mechling's house, smoked some more crack, and passed out at Kelly's. The next morning he heard from some unknown female that Pook had been killed.

{¶ 36} Matthew Stedman testified that he was currently serving time for aggravated murder and attempted arson. He testified that in November 2005 he was transferred back to Cuyahoga County jail for a postconviction motion hearing. While in county jail, he was in the same pod as Braun. He testified that Braun approached him because he recognized him from 2001 when they had served time in Ross Correctional Institution. Stedman testified that Braun started telling him that he was under indictment for aggravated robbery, aggravated burglary, and attempted murder, and that he was a person of interest in two other homicide cases. Braun told him about using crack cocaine and robbing drug dealers, home invasions, and different things that he did to support his habit and make money.

{¶ 37} Stedman testified that Braun gave details about the case he was arrested on, as well as Pook's murder. Braun told him that he set up Pook by

calling him and telling him that his car had run out of gas and asked him to bring him some gas. He said that when Pook showed up, he killed him. Braun said that he and Shear dragged Pook's body back to the truck, poured gas all over him and the truck, and set it on fire. Braun told Stedman that he used the same gun that was used in the Tom McDonald case to kill Pook. He said it was a .38. He said Roy Fitzer was the last to use the gun.

{¶ 38} Braun told Stedman that Shear had fled the state to avoid being indicted for the homicide. He also told Stedman that he had set up an alibi for Pook's murder. He explained that he went to a pizza place, called Pook for gas, and then ordered a pizza and had it delivered to his car so that the delivery person could see him and be his alibi for the time of Pook's death. Braun also told him that he was going to use his girlfriend and some other "upstanding citizens" to claim he was with them at the time of the crime.

{¶ 39} Braun told Stedman that he could not be indicted for capital murder because they did not know that a robbery had occurred. Braun continued to brag and laugh about Pook's murder and the Tom McDonald robbery.

{¶ 40} Braun asked Stedman to help him draft a motion to marry his girlfriend, Kimberly Ferline. Braun was under the impression that if he married her, she could not testify against him in trial. Braun also told Stedman that if he ever testified against him, Braun would have him killed.

{¶ 41} Stedman testified that Braun said that he should be applauded for killing Pook because Pook was a drug dealer and Braun did society a favor. Braun told Stedman to tell Shear, when he saw him, to shut his mouth about the murder. Stedman relayed the message to Shear.

{¶ 42} Stedman kept a written journal of all the conversations he had with Braun and then sent them to the prosecutor's office, asking for consideration in his own case. Stedman was told no.

{¶ 43} When Braun found out that Stedman was to testify against him in the Tom McDonald case, Braun shouted through the bars "You f***ed up, you f***ed up, you messed with the wrong guy. You're dead, you're f***ing dead, I'm going to get you."

{¶ 44} Tom McDonald testified that he sold drugs and that on October 29, 2005, Braun and Roy Fitzer broke down his door and robbed him. He testified that Braun hit him over the head with a golf club and Roy Fitzer shot him three times. McDonald testified that after he was shot, Braun went through his pockets and took his money. He said the money was still on fire because the bullet had gone through the money. Braun asked him where the dope was, but McDonald did not tell him. McDonald testified that he was shot with a .38. He said that one bullet was still lodged in his spine, and another was fused to the bones in his ankle. One bullet went through his thigh and was found lodged in a kitchen cabinet.

{¶ 45} Keith Martin from Revol Wireless testified regarding the logistics of outgoing and incoming calls for cellular phones, the location and function of cell towers in Cleveland, and the data contained in account history documents. Martin explained that there were more than 300 Revol wireless towers in the city and that each tower's radius is typically one mile. When an individual "sends" a call, it is picked up by the cell tower, transported across local lines (telephone lines), and is sent to the tower closest to the person receiving the call. If the sender or the receiver of the call is in motion, most likely the cell will hit different towers.

{¶ 46} Martin testified regarding the accounts of Sandy Shear (a.k.a. Seidenwand) and Elizabeth Arcuri. The cell phone number assigned to Sandy Shear's account was the cell phone number known to be used by the co-defendant Shear. The cell phone number assigned to Elizabeth Arcuri's account was used by the victim.[4]

{¶ 47} The account history showed numerous cell phone calls from Shear to the victim throughout the day and night of the murder. According to the records, prior to Shear's call, the victim was located near cell phone tower 25, which is the tower near Tracy Walsh's house. Shear called six times that night (9:08, 9:46, 10:15, 10:22, 10:26, 10:36) while the victim was

[4] Arcuri testified that she let the victim open up and use a cell phone account in her name.

near tower 25. The history indicates that the victim's cell phone then traveled near cell tower 178, located on Lorain Avenue, then west to tower 30 on Train Avenue, and then west to tower 154 on Fulton Avenue. The records show that at 10:45 p.m., Shear called the victim, and both cell phones were at tower 30. Shear made one more call to the victim's cell phone at 10:58 p.m., near cell tower 42 at 3445 West 17th Street. The records indicate that by that time, the victim's cell was off, out of the area, or damaged. The victim's body was found at 3302 West 17th Street near cell tower 42.

{¶ 48} Nicholas Mavorois testified for the defense. He verified his cell phone number, which records show was used to call the victim on the day of the murder at 4:26 p.m. He testified that he owns two Athens Pizza stores, one on Denison Avenue and one on Rocky River Drive. He testified that he sometimes lets customers use his cell phone rather than the business phone. He did not know or remember Braun.

{¶ 49} Linda Houli testified for the defense. She testified that she owns Linda's Deli at 8708 Denison Avenue. She verified her business number, which appeared on the victim's account summary. At 4:59 p.m., someone used her business phone to call the victim on the day of his murder. She testified that she lets customers use the business phone. She testified that she did not know or remember Braun.

{¶ 50} Kelly Mechling testified for the defense. She testified that she lived at 3317 Trowbridge and that on the night of the murder Braun and Shear were at her house celebrating her friend Dana Sanders's birthday. She testified that she went to sleep next to Shear at approximately 10:30 p.m. Shear had already passed out. She testified that Braun was there, smoking crack with two females, Dana and Sheryl, when she fell asleep. Kelly testified that she and Shear woke up around 8:00 to 8:30 in the morning and that Braun and the girls were still smoking crack. She testified that they were at her house when they saw the news about the victim's death.

{¶ 51} On cross-examination, Kelly Mechling admitted that she did not remember the night of the murder, but was reminded by the defense's investigator that "Braun said it was the night of Dana's birthday party." The defense's investigator spoke with her in December 2007, more than two years after the murder. Kelly was adamant that she remembered when she went to bed the night of Dana's birthday. Kelly admitted that she did not know the date of Dana's birthday. In addition, in her statement to police a few weeks after the murder, she denied that Braun and Shear were at her house on the night of the murder or the day after. Kelly insisted that she didn't know dates, but she remembered Dana saying it was her birthday and that they were "partying" (smoking crack) because of it.

{¶ 52} Thomas Rea testified for the defense. He was the investigator for Braun. He acknowledged that when he spoke to Kelly, he asked her if she remembered the night of Dana's birthday party. He admitted that Braun told him to remind her that Pook was murdered on the same night as Dana's birthday.

{¶ 53} Corrections Officer Adam Broeckel testified for the defense. He stated that he was escorting Braun back to his pod when another inmate, Frank Lewis, waved to Braun. CO Broeckel testified that Braun got upset and screamed "don't wave to me. You're trying to kill me." Braun told the CO that Lewis was testifying against him.

{¶ 54} Dana Sanders Newberry testified for the defense. She testified that her date of birth is October 25, 1972, and that in 2005 she celebrated her birthday with her mother at a bar and later at Kelly Mechling's house on Trowbridge Avenue. She said that she called Robert Mechling, a.k.a. Uncle Bob, Kelly's brother and Tracy's ex-husband, who told her to come over because they were partying at his sister's house and he had a present for her. She went over there around ten or eleven and "kicked it all night." She testified that when she got there, she was already drunk because she had been drinking with her mother since 8:00 p.m. She said that when she arrived, Cheese was already asleep and so was Kelly. She testified that it was the first time she had met J.B. and Cheese. She said she hung out with

J.B., getting to know him. She said they drank, smoked crack, and "had sex." She stayed at Kelly's all night and part of the morning with J.B.

{¶ 55} On cross-examination Dana testified that she had not spoken to Braun since that night, but heard he was in jail. She stated that in December 2007, the defense investigator met with her and spoke about her birthday in 2005. She admitted that Braun wrote her sister-in-law a letter, but she denied reading it (because she cannot read) and denied that her sister-in-law told her what the letter said.

{¶ 56} Braun took the stand in his defense. He admitted to being a convicted felon and spending most of his adult life in prison. He testified that he carried a .380 automatic. He admitted to robbing drug dealers and taking money, drugs, guns, and jewelry from them. He denied talking to Stedman. He denied seeing Shannon Holbert the day after Pook's murder. He insisted that Holbert was lying because he never steals red cars because "the color red is a beacon, you know what I mean, it's a dangerous color," "too many people notice red cars." He denied asking Kimberly Ferline to be his alibi and asking her to get rid of the gun. He denied attempting to sell chains to Daniel Quarrick. He denied any involvement in the Tom McDonald robbery, other than being present. He denied killing Pook.

{¶ 57} Braun testified that on October 25, 2005, he and Shear were driving around in a stolen IROC getting high and "hitting licks," meaning

robbing drug dealers. He said they rode up and down Denison Avenue near W. 80th and W. 90th Streets looking for drug dealers to rob when they ran out of gas. He and Shear walked up to Athens Pizza to call someone to bring them gas. Braun said that neither of them had a cell phone. Braun testified that he asked the guy behind the counter to call Pook to bring them gas. Braun said they waited for about a half hour. They ordered a pizza, and then Shear decided to leave; Braun thought Shear was going to steal another car. Braun walked across the street to the deli to buy a beer and call Pook again. He said he called Pook and asked him where he was, and Pook said he was looking for a gas can. Braun said he walked back across the street to the pizza place and saw Shear pull up in the IROC. Shear told him that he had gone and got gas. They got their pizza, ate it in the car, and then headed toward Lorain Avenue.

{¶ 58} While they were driving, Braun saw a drug deal "go down," so he told Shear to pull over. Braun got out and robbed the drug dealer of approximately an ounce of crack cocaine, $2,000, a .40 caliber gun, and jewelry (chains). Braun jumped back in the car, and Shear drove away. They went to Bob Fitzer's house and smoked some crack.

{¶ 59} Braun testified that he left Shear there and walked to Kelly Mechling's house. He said it was about 5 or 6 p.m. He said her grandkids were there, so he went to Kim Ferline's. Kim was yelling at him because he

was never around. Braun testified that they smoked a little, and then he left to go back to Kelly Mechling's to get high for the night.

{¶ 60} Braun testified that he sent Kelly's brother, Uncle Bob, who lived in a camper in Kelly's backyard, to the store to buy crack pipes and beer. He testified that in the inner city, delis sell crack pipes, each disguised as a glass tube with a rose in it. He said that when Uncle Bob came back, Braun set out the crack on a plate and divided it up for everyone. Braun testified that a female named Dana came over and Uncle Bob said it was her birthday, so Braun gave her some crack. Braun said between 10:00 and 11:00 p.m., Shear showed up; he was high and passed out on the bed. Kelly fell asleep next to him. He testified that Dana and he smoked crack, drank, and had sex all night. He testified that he didn't leave until late morning.

{¶ 61} Braun testified that a day or two later, he heard from Shear that Pook was dead and that people were saying Braun had killed him.

{¶ 62} On cross-examination, it was pointed out to Braun that Shear called Pook from his cell phone twice before they called from the pizza shop and the deli, but on direct Braun said neither of them had a phone. Braun said he didn't remember Shear calling Pook. Braun said that he might have called Pook from the Zenith Court alley to let him know that they got gas, because Shear found his cell phone under the seat of the IROC.

{¶ 63} Braun insisted that everyone was "lying on him." He stated that the prosecutor set it all up and told the witnesses what to say.

{¶ 64} Braun was found guilty of aggravated murder with the capital specification that the murder was committed in the course of an aggravated robbery with firearm specifications, aggravated robbery with firearm specifications, tampering with evidence, and having a weapon while under a disability. After the mitigation phase, the jury returned a sentencing verdict of life imprisonment without the possibility of parole. The trial court sentenced Braun to life in prison without parole.

{¶ 65} Braun appeals, advancing fifteen assignments of error for our review.

> **"1. The state improperly, illegally and unconstitutionally withheld exculpatory and/or impeachment evidence from the defense in violation of the discovery rules and its obligations under *Brady v. Maryland*."**

{¶ 66} In *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, the United States Supreme Court held that a criminal defendant may claim denial of due process where the state fails to disclose the existence of potentially exculpatory evidence. "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment,

irrespective of the good faith or bad faith of the prosecution." Id. at 86, 83 S.Ct. at 1196-1197, 10 L.Ed.2d at 218. But, "in determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. This standard of materiality applies regardless of whether the evidence is specifically, generally or not at all requested by the defense." *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus, following *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481. See, also, *State v. Treesh* (2001), 90 Ohio St.3d 460, 475, 739 N.E.2d 749, 767.

{¶ 67} Braun complains that the state failed to disclose "three categories of *Brady* material."[5] We will address each in turn. First, Braun claims that the state did not timely disclose the full written statements of three witnesses, James Reardon, Stephen Lenchak, and Jeremy Payne, who reported that the co-defendant made admissions that he shot Pook and

[5] On May 26, 2009, the trial court ordered the defense counsel to submit items turned over to the defense in the state's supplementary discovery response dated August 27, 2007. The state filed a motion to supplement the record on appeal. The defense opposed said motion. This court granted the state's motion to supplement the record and ordered the trial court to transfer all remaining exhibits to this court. The supplemental discovery response included copies of the police report, which included summaries of witness statements, including those of Reardon, Lenchak, and Stedman.

burned him beyond recognition. The state contends that summaries of the statements of Reardon and Lenchak, two of the three witnesses, were given to the defense in the state's supplemental discovery, dated August 27, 2007, and that Braun has not shown prejudice.

{¶ 68} In reviewing this issue, we remain mindful that it is the burden of the defense to prove a *Brady* violation rising to the level of denial of due process. *State v. Jackson* (1991), 57 Ohio St.3d 29, 33, 565 N.E.2d 549, 555, citing *Talamante v. Romero* (C.A.10, 1980), 620 F.2d 784; *Monroe v. Blackburn* (C.A.5, 1979), 607 F.2d 148. See, also, *State v. Wickline* (1990), 50 Ohio St.3d 114, 117, 552 N.E.2d 913, 917. In order to find reversible error based upon a *Brady* violation, we must find that the violation was material. *State v. Iacona*, 93 Ohio St. 3d 83, 92, 2001-Ohio-1292. Further, a *Brady* violation involves the discovery, *after trial*, of information that was known to the prosecution but unknown to the defense. *Wickline*, 50 Ohio St.3d at 116; citing *United States v. Agurs* (1976), 427 U.S. 83, 87.

{¶ 69} In this case, the record reflects that summaries of Reardon's and Lenchak's statements were given to the defense well in advance of trial. These summaries contained statements allegedly made by Braun's co-defendant regarding the murder, which included statements that support the conclusion that the co-defendant shot the victim. Nevertheless, the summaries indicated that the co-defendant had an accomplice, who was

present and helped him burn the body. *State v. Adams*, Trumbull App. No. 2000-T-0149, 2004-Ohio-3510, ¶39. The summary of witness Payne's statement, which was not given to the defense, included statements made by the co-defendant about the murder that were allegedly made in Braun's presence. The full written statements of all three witnesses were given to Braun before testimony began.

{¶ 70} Braun did not articulate to the trial court, nor does he explain to this court, exactly what material evidence was contained in the full witness statements that may have made the difference between conviction and acquittal. See *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus. "Exculpatory evidence" is defined as evidence favorable to the accused, which "if disclosed and used effectively, * * * may make the difference between conviction and acquittal." *U.S. v. Bagley* (1985), 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481.

{¶ 71} Although the state neglected to disclose one of the statements or its summary prior to the start of trial, we find that the statement was not material. Further, there is nothing in the full statements that was not in the summaries, nor is there anything that exculpates Braun, or would have made the difference between conviction and acquittal. The summaries given to defense were sufficient. The state did not violate *Brady*.

{¶ 72} Next, Braun argues that the state failed to disclose Stedman's "extensive international history of impersonation and skilled deception" in violation of *Brady*.

{¶ 73} The requirements of *Brady* apply not only to exculpatory material, but also to evidence that impeaches the credibility of a prosecution witness. *Bagley*, supra, at 676. Again, it is the burden of the defense to prove a *Brady* violation rising to the level of denial of due process.

{¶ 74} Braun does not contend that Stedman's criminal record was not provided, or that the state or the police knew of all of Stedman's escapades. In fact, defense counsel specifically asked Stedman if he informed the state or the detective about his flight to avoid prosecution, to which Stedman responded "no." Further, the transcript reveals that Stedman acknowledged that he was serving life in prison for aggravated murder and that he was extradited from Thailand five years after the crime was committed. On cross-examination, Stedman answered every question posed about his background, aliases, criminal activity, and travels to avoid the authorities. We fail to see how Braun's due process rights were violated.

{¶ 75} Finally, Braun argues that he should have been informed that his co-defendant Shear and Tracy Walsh suffer from bipolar disorder, and that Daniel Quarrick suffers from both bipolar disorder and schizophrenia.

{¶ 76} A *Brady* violation involves the discovery, *after trial*, of information which was known to the prosecution but unknown to the defense. The duty to

disclose extends to information in the possession of the prosecutor's office or in the possession of the law enforcement agency investigating the offense. *Kyles v. Whitley* (1995), 514 U.S. 419, 434.

{¶ 77} First, there is nothing in the record to suggest the state or the police were privy to the mental health issues faced by these individuals and concealed it from Braun. Second, Braun fails to articulate why these individuals' mental health issues would impeach their credibility or exculpate Braun. Finally, Braun cites no law to support his argument that the state must delve into a witness's medical records searching for impeaching information and then turn confidential medical information over to defense counsel.

{¶ 78} We find that the state did not violate the discovery rule or *Brady*. Accordingly, Braun's first assignment of error is overruled.

> **"2. The trial court denied Braun's right to a fair trial and to the effective assistance of counsel when it denied Braun's request for a continuance that was made immediately after the state provided to him, moments before opening statements, with exculpatory evidence contained in statements the state had concealed for more than a year that Braun's co-defendant had admitted shooting the victim."**

{¶ 79} Under this assignment of error, Braun contends that the trial court abused its discretion when it denied Braun's motion for continuance, which was requested after Braun's counsel received the three witness statements discussed in the first assignment of error. Braun's counsel argued that time was needed to investigate the late disclosures, specifically that Braun's co-defendant was the shooter, not Braun.

{¶ 80} "'[T]he grant or denial of a continuance is a matter [that] is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.'" *State v. Jones*, 91 Ohio St.3d 335, 342, 2001-Ohio-57, 744 N.E.2d 1163, quoting *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 21 O.O.3d 41, 423 N.E.2d 1078.

{¶ 81} We find that the trial court did not abuse its discretion when it denied Braun's request for a continuance. The allegation that the co-defendant was the shooter was not new information to Braun. That information was provided to the defense in the statement summaries on August 27, 2007. In addition, Braun was provided with the state's witness list well in advance of trial, which included these three individuals' names and last known addresses. Finally, the defense had more than ample time to investigate these individuals prior to the start of trial on January 14, 2008. Accordingly, Braun's second assignment of error is overruled.

"3. The state's failure to inform the defense of the existence of informant Matthew Stedman's 'journals' and letters, and to provide copies of those important documents to the defense prior to trial, denied Braun a fair trial, due process of law, and the effective assistance of counsel."

{¶ 82} Braun argues that the state did not inform the defense about the existence of, or provide copies of, Stedman's letters to the police and the

prosecutor's office. We disagree. A review of the record reveals that Braun's contention is untrue. A summary of Stedman's various letters and interviews with the detectives was provided to the defense in one of the state's supplemental discovery responses. There is nothing material in the handwritten journals that is not contained in the summaries. As a result, we overrule Braun's third assignment of error.

"4. The trial court erred in denying Braun's request to order the prosecutor's file submitted for an in camera review by the trial court and sealed for appellate review by this court."

{¶ 83} Braun complains that the trial court should have conducted an in camera inspection of the prosecutor's file and sealed it for appellate review.

{¶ 84} A trial court need not conduct an in camera inspection of the prosecutor's file or order the file be sealed for appellate review any time the defendant so requests. *State v. Adams*, Trumbull App. No. 2000-T-0149, 2004-Ohio-3510; *State v. Alexander* (Nov. 29, 1996), 11th Dist. No. 93-T-4948.

{¶ 85} An in camera inspection is not required when an appellant makes a general request for *Brady* material. *State v. Lawson*, 64 Ohio St.3d 336, 344, 1992-Ohio-47. "[A] specific request will sometimes require the trial court to review the contested matter in camera to determine whether it is material or exculpatory despite representations to the contrary by the prosecutor." Id.

{¶ 86} Prior to trial, Braun filed numerous motions seeking to ensure that the state complied with the discovery requirements of *Brady*. The state filed a bill

of particulars, a discovery response, and at least fifteen supplemental discovery responses, as well as numerous other motions. This particular motion requested, generally, that the trial court review the prosecutor's file and then seal it for appellate review if necessary, but Braun did not make a specific request, and he submitted no facts to the trial court that would indicate that impeachment material or exculpatory material actually existed.

{¶ 87} We find that the trial court did not err when it denied Braun's motion; therefore, Braun's fourth assignment of error is overruled.

> **"5. Because jailhouse informant Matthew Stedman's motive to fabricate evidence of Braun's guilt - i.e., his motive to secure from the state favorable consideration in his own pending criminal case - existed the moment Stedman began documenting for the state his alleged contemporaneous jailhouse conversations with Braun, as Stedman's own letters to the state confirm, the trial court violated Evid.R. 801(D)(1)(b) when it granted the state's improper request on redirect to admit into evidence Stedman's undisclosed, and highly prejudicial, 'journals' and letters as 'prior consistent statements' necessary to rebut an alleged defense charge of recent fabrication."**

{¶ 88} Under this assignment of error, Braun argues that the trial court erred when it allowed the state to introduce, on redirect, Stedman's written journals of the conversations he had with Braun. Braun contends that Stedman had an improper motive the moment he began speaking with Braun, and thus, his journals were inadmissible hearsay. Braun further asserts that the journals contained numerous prejudicial references to other crimes, charged and uncharged.

{¶ 89} Initially, we note that questions regarding the admissibility of evidence are left to the sound discretion of the trial court and will not be reversed absent a showing of an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus.

{¶ 90} Evid.R. 801(D)(1)(b) provides that a prior statement by a witness is not hearsay if

> **"(1). The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive * * *."**

{¶ 91} In order to be admissible, prior consistent statements had to have been made before the existence of any motive or influence to falsify testimony. *State v. Glossip*, Warren App. No. CA2006-04-040, 2007-Ohio-2066.

{¶ 92} Here, Stedman testified at trial and was subject to cross-examination. Braun implied throughout Stedman's cross-examination that Stedman's only goal was to get out of jail, and that was why he was testifying against Braun. Stedman testified that he kept a journal of the conversations he had with Braun and turned the journals over to the state. Although Stedman acknowledged that he hoped for consideration from the state, he testified that he was repeatedly told that there would be no consideration for his testimony against Braun. We find that the journals were admissible to rehabilitate Stedman after Braun implied that Stedman was falsifying his testimony to obtain a shorter sentence. As a result, we overrule Braun's fifth assignment of error.

"6. The trial court erred in permitting the introduction of evidence of 'other acts' of Jeffrey Braun, and in overruling various motions in limine, motions to strike, and motions for mistrial regarding 'other acts' evidence, thus violating Braun's Fourteenth Amendment rights to a fair trial and due process of law."

{¶ 93} Braun complains that the trial court improperly admitted "other acts" evidence, which included: (1) Braun's involvement in the attempted murder and robbery of Tom McDonald on October 29, 2005; (2) Braun's alleged involvement in a murder and robbery at the Peanut Bar; (3) Braun's alleged involvement in a murder at the Lucasville prison; (4) Braun's alleged involvement in the theft of a Corvette and $40,000 from a 53-year-old woman; (5) Braun's alleged involvement in shooting up "a guy's house"; and (6) Braun's alleged involvement in the armed robbery and shooting of a drug dealer.

{¶ 94} Evid.R. 404(B) provides the following:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

{¶ 95} R.C. 2945.59 provides the following:

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such

proof may show or tend to show the commission of another crime by the defendant."

{¶ 96} The state provided notice in advance of trial of its intention to present other acts testimony. The trial court held a hearing on the matter and ultimately determined that the state could present evidence of the crime against Tom McDonald. Braun argues that his involvement in the attempted murder and robbery of Tom McDonald, which occurred three days after John Chappell was murdered, was improperly admitted to show Braun's propensity to commit crime. The state contends that the evidence was admitted to prove motive, intent, and identity.

{¶ 97} In *State v. Lowe*, 69 Ohio St.3d 527, 1994-Ohio-345, 634 N.E.2d 616, the Supreme Court of Ohio advised as follows:

"Other acts can be evidence of identity in two types of situations. First are those situations where other acts 'form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment,' and which are 'inextricably related to the alleged criminal act.'
"Other acts may also prove identity by establishing a modus operandi applicable to the crime with which a defendant is charged. 'Other acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B).' 'Other acts' may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense. While we held in [*State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180] that 'the other acts need not be the same as or similar to the crime charged,' the acts should show a modus operandi identifiable with the defendant.

> **"A certain modus operandi is admissible not because it labels a defendant as a criminal, but because it provides a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator. Other acts evidence is admissible to prove identity through the characteristics of acts rather than through a person's character. To be admissible to prove identity through a certain modus operandi, other-acts evidence must be related to and share common features with the crime in question."** (Internal citations omitted.) Id. at 531.

{¶ 98} The state argued that during the days before and after the victim's murder, Braun and Shear were on a crime spree to support their drug habits. The state contended that Braun and Shear robbed and shot drug dealers for money and drugs, and that the McDonald case proved identity through the characteristics of the acts.

{¶ 99} According to Braun's statement to the detectives, on the three days before the victim was murdered, he and Shear were smoking crack and "hitting licks" on Denison Avenue, meaning that they were stealing drugs from "dope boys." Stedman testified that Braun told him about using crack cocaine and robbing drug dealers and invading homes to support his habit and make money. Braun explained to Stedman how he, Shear, and Roy Fitzer planned to rob Tom McDonald, a drug dealer. Braun stated that they "busted through the door" and argued with McDonald. Roy Fitzer shot McDonald three times with a .38 revolver while Braun hit McDonald with a golf club and stole his money, leaving him for dead.

{¶ 100} The crimes were close in time and location, and the motive for both crimes was the same. We find the evidence of the crime against Tom McDonald to be admissible other acts evidence.

{¶ 101} As far as Stedman's journal concerning Braun's alleged involvement in an armed robbery and shooting of a drug dealer, we find this to be admissible to prove identity because the crime discussed is related to and shares a common feature with the crime in question.

{¶ 102} Braun's alleged involvement in the theft of a Corvette and $40,000 from a 53-year-old woman was inadmissible other acts evidence. The state, however, could ask Braun whether he knew the victim, visited the victim, or stole her car and money. Evid.R. 607 and 608(B). Nevertheless, the state is stuck with Braun's response because it is a collateral matter. The police report should not have been admitted into evidence because specific instances of conduct by a witness may not be proved by extrinsic evidence. See Evid.R. 608(B). Notwithstanding its improper admission, we find the admission of the police report to be harmless error in light of the overwhelming evidence of Braun's guilt.

{¶ 103} Regarding Stedman's journals detailing Braun's alleged involvement in a murder and robbery at the Peanut Bar, Braun's alleged involvement in a murder at the Lucasville prison, and Braun's alleged involvement in shooting up "a guy's house," we find evidence of these other acts

inadmissible. Nevertheless, we conclude the evidence to be harmless and conclude that Braun's substantial rights were not prejudiced because Braun took the stand and testified to a whole litany of criminal activity, including promoting prostitution, robbery, drug trafficking, car theft, drug use, as well as his fear that he was going to be indicted for the Peanut Bar murder and the murder of a girl on Denison Avenue. See *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3615 (finding the admission of prior bad acts to be harmless error since the defendant testified to having been in more than 100 fights in prison and stabbing four people). In addition, Stedman's journals regarding the other acts were somewhat illegible and incomprehensible. Finally, the trial court gave a limiting instruction to the jury, explaining that the prior bad acts evidence can be considered only for the purpose of deciding whether it proves the absence of mistake or the defendant's motive, opportunity, intent or purpose, preparation, or plan to commit the offense charged.

{¶ 104} Obviously, a better course of action would have been for the state or court to redact all references to other crimes detailed in Stedman's journals. Even so, we find the evidence of Braun's guilt to be overwhelming and thus overrule Braun's sixth assignment of error.

"7. The trial court's admission of hearsay statements of alleged co-conspirator John Shear was in violation of Evid.R. 801(D)(2)(e) and Braun's constitutional right to confront the witnesses against him."

{¶ 105} Braun argues that statements attributed to his co-defendant Shear were inadmissable because the state failed to present competent independent proof of a conspiracy, and that the statements were testimonial and thus violated his right to confront witnesses against him. Specifically, he complains about the statements made by Shear regarding Shear's efforts to manipulate Michael Graham's testimony by having him assaulted in prison, statements made by Shear to his mother discussing the crime and his efforts to cover it up,[6] statements made by Shear to inmate Daniel Quarrick bragging about the murder he and Braun committed, and statements made by Shear to his then-girlfriend Angie Casto, blaming Braun for the killing but telling her he helped Braun dispose of the body and requesting her to be his alibi.

{¶ 106} The state argues that all statements were admissible as statements by a co-conspirator pursuant to Evid.R. 801(D)(2)(e). Under Evid.R. 801(D)(2)(e) 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.

{¶ 107} The statement of a co-conspirator is not admissible until the proponent of the statement has made a prima facie showing of the existence of the conspiracy by independent proof. *State v. Smith*, 87 Ohio St.3d 424, 434, 2000-Ohio-450, citing *State v. Carter* (1995), 72 Ohio St.3d 545, 651 N.E.2d 965,

[6] We note that most of the statements made by Shear to his mother were taped conversations, which are not in the appellate record.

paragraph three of the syllabus. A prima facie case is made where the evidence introduced is sufficient to support, but not compel, a particular conclusion, and which only furnishes evidence that the jury may consider and weigh, but need not accept. *State v. Martin* (1983), 9 Ohio App.3d 150, 458 N.E.2d 898, citing *Cleveland v. Keah* (1952), 157 Ohio St. 331, 105 N.E.2d 402.

{¶ 108} The proponent of the statement must establish: (1) the existence of a conspiracy; (2) the defendant's participation in the conspiracy; (3) the declarant's participation in the conspiracy; (4) that the statement was made during the course of the conspiracy; and (5) that the statement was in furtherance of the conspiracy. *State v. Milo* (1982), 6 Ohio App.3d 19, 451 N.E.2d 1253.

{¶ 109} A conspiracy does not necessarily end with the commission of the crime. *State v. Siller*, Cuyahoga App. No. 80219, 2003-Ohio-1948. A statement made by a co-conspirator after the crime may be admissible under Evid.R. 801(D)(2)(e) if it was made in an effort to conceal the crime. Id.

{¶ 110} A review of the record confirms that the state set forth a prima facie case, by independent proof, of the conspiracy between Braun and Shear. State's witness Michael Graham testified that Braun and Shear were together on the night of the murder at Dave Essenberg's house on Storer Avenue. Graham testified that Braun and Shear pressured Graham to get gasoline for them, claiming that their car was out of gas. Graham went to the gas station and bought gasoline for them. He testified that when he returned with the gasoline,

Braun and Shear were in a hurry and anxious to get out of there. They left with the gasoline. Later that evening, Graham saw Braun driving the victim's Blazer down the alley by Essenberg's house with Shear following behind in Graham's vehicle. The victim was later found in the Blazer.

{¶ 111} Graham also testified that the next day, Shear and Braun were at Essenberg's house. Graham testified that Braun told Shear that they should shoot Essenberg because he would "run his mouth" and get them "knocked." We find that the state set forth sufficient independent evidence of the conspiracy between Braun and Shear that continued well after the crime itself.

{¶ 112} We find that the testimony regarding Shear's efforts to manipulate or stop Michael Graham from cooperating with the state constituted admissible co-conspirator statements made in furtherance of the conspiracy. As for the statements made by Shear to his mother, unfortunately, we cannot review the statements in their entirety because the audiotapes were not included in the record on appeal. Any lack of diligence on the part of an appellant to secure a portion of the record necessary to his appeal should inure to appellant's disadvantage rather than to the disadvantage of appellee. *State ex rel. Montgomery v. R & D Chemical Company* (1995), 72 Ohio St.3d 202, 648 N.E.2d 821. When portions of the transcript, or in this case, the audiotapes, are not part of the record, the appellate court must presume regularity in the decision below. *State v. Farris*, Cuyahoga App. No. 84795, 2005-Ohio-1749.

{¶ 113} As for Shear's statements to Quarrick bragging about the murder, we find that the statements were not made in furtherance of the conspiracy, and thus inadmissible. Nevertheless, we find the admission to be harmless due to the timing of the witness. Quarrick was the 22nd witness out of 32 witnesses that testified for the state during its case-in-chief. At that point, there was an abundant amount of evidence of Braun's guilt, and this was merely cumulative evidence. See *State v. Smith*, 87 Ohio St.3d 421, 2000-Ohio-450 (finding co-conspirators' statements bragging about the murder to be harmless error because of the timing of the witness's testimony and the other evidence of defendant's guilt).

{¶ 114} Regarding Shear's statements to his then-girlfriend Angie Casto, we find his statements requesting her to be an alibi witness were in furtherance of the conspiracy, and thus admissible under Evid.R. 801(D)(2)(e). As for the statements by Shear blaming Braun for the murder, we find those statements were not in furtherance of the conspiracy, and thus inadmissible. Again, however, we find the admission to be harmless in light of the overwhelming evidence of Braun's guilt presented prior to Angie Casto taking the stand. She was the 23rd witness.

{¶ 115} Further, we find no merit to Braun's argument that the admission of Shear's statements violated his confrontation rights. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the

witnesses against him." In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the Supreme Court announced a new standard for assessing whether hearsay statements, otherwise admissible under principles of evidence, violate the mandate of the Confrontation Clause. Under this rule, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is * * * confrontation." 541 U.S. at 68-69, 124 S.Ct. 1354. The proper inquiry is "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* (C.A.6, 2004), 389 F.3d 662, 675.

{¶ 116} Here, the statements were admitted into evidence under the theory that they were statements made by a co-conspirator in furtherance of the conspiracy, which are not hearsay statements. See Evid.R. 801(D)(2)(e). Co-conspirator statements are inherently nontestimonial because the purpose for making the statements is not for later use at trial. See *United States v. Mooneyham* (C.A.6, 2007), 473 F.3d 280, 286 (applying *Crawford* to co-conspirator statements). By definition, such statements are not by their nature testimonial; the one making them has no "awareness or expectation that his or her statements may later be used at a trial." (Internal quotation omitted.) *Cromer*, 389 F.3d. at 674. Moreover, the *Crawford* court specifically identified statements in furtherance of a conspiracy as examples of statements that are inherently nontestimonial. See 541 U.S. at 51, 56, 124 S.Ct. 1354.

{¶ 117} After *Crawford*, nontestimonial statements continue to be analyzed with respect to the Confrontation Clause under the rule of *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597. See 541 U.S. at 68, 124 S.Ct. 1354; *United States v. Gibson* (C.A.6, 2005), 409 F.3d 325, 337-38 (noting that *Crawford* did not disturb the rule that nontestimonial statements are constitutionally admissible if they satisfy the *Roberts* standard). Under this rule, statements may be admitted in absence of cross-examination only when they bear adequate indicia of reliability or when they fall within a "firmly rooted" exception to the hearsay rule. See *Roberts*, 448 U.S. at 66, 100 S.Ct. 2531; *Crawford*, 541 U.S. at 42, 124 S.Ct. 1354. Co-conspirator statements in furtherance of a conspiracy are both inherently trustworthy and "firmly rooted." "[T]he Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)." *Bourjaily v. United States* (1987), 483 U.S. 171, 183-84, 107 S.Ct. 2775, 97 L.Ed.2d 144.

{¶ 118} In summary, we find that the admission of co-conspirator statements does not violate the Confrontation Clause. Further, we find that the state set forth a prima facie showing that a conspiracy existed between Braun and Shear. Finally, the statements that we found were made in furtherance of the conspiracy were admissible as nonhearsay statements pursuant to Evid.R. 801(D)(2)(e), and the remaining statements were improperly admitted but harmless. Accordingly, Braun's seventh assignment of error is overruled.

"**8. The trial court's failure to allow the defense to present evidence that another person had admitted to killing the victim deprived Braun of a fair trial and of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution."**

{¶ 119} Under this assignment of error, Braun contends that his constitutional right to present a defense was infringed when the trial court did not allow the testimony of Tracy Mechling claiming that her ex-husband, Robert Mechling, a.k.a. Uncle Bob, told her that he killed the victim. Braun argues that the statement was admissible as an excited utterance, a present sense impression, or a statement against interest.

{¶ 120} The trial court held a hearing outside the presence of the jury. At the hearing, Tracy Mechling testified that she spoke with her ex-husband on the telephone and that "he was a little bit upset and not himself, and he told, he said that he had killed someone. And I was like, okay, whatever, Bob, I don't want to hear that. He said, no, Trace, really. And he sounded very, very upset. But Bob does lie. Bob does, you know, tell stories, but he did seem upset." Tracy could not remember when he called. She could not remember when she called the police or what she told the police. She testified that Robert Mechling said he killed and "burnt" someone. She admitted that her ex-husband lies and tells stories. She testified, "I'm sorry someone lost their life, but I really don't care." The court found that the statements were not excited utterances but rather

a dialogue between the couple. The court further noted that Robert Mechling was available to testify.

{¶ 121} Availability to testify is immaterial if statements are admissible as present sense impressions or excited utterances. See Evid.R. 803. A present sense impression is a statement describing or explaining an event or condition while the declarant was perceiving the event or immediately thereafter. Evid.R. 803(1). An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Evid.R. 803(2).

{¶ 122} We agree with the trial court that Robert Mechling's statements to Tracy were not excited utterances because they were not made while under the stress of the event. Further, the statements were not present sense impressions because they were not made during or immediately after the event.

{¶ 123} Since the record indicates that Robert Mechling was available to testify, the statements are not admissible as statements against interest under Evid.R. 804(B)(3). Moreover, a statement tending to expose the declarant to criminal liability offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement. Braun did not set forth corroborating circumstances.

{¶ 124} We find that the trial court did not err when it ruled Tracy's testimony regarding what her ex-husband said to her was inadmissible hearsay. Accordingly, Braun's eighth assignment of error is overruled.

"9. The trial court erred in admitting the bullet evidence allegedly from the Tom McDonald crime scene."

{¶ 125} Braun complains that there was not a proper chain of custody for the admission of the pellet, claiming that the pellet may or may not have been found in Tom McDonald's apartment. In addition, he complains that the ballistics report was not provided until jury selection.

{¶ 126} As the Supreme Court of Ohio noted in *State v. Richey* (1992), 64 Ohio St.3d 353, 360, the claim of authenticity goes to the credibility of the evidence as opposed to its admissibility:

> **"Authentication 'is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.' Evid.R. 901(A). The possibility of contamination goes to the weight of the evidence, not its admissibility. 'A strict chain of custody is not always required in order for physical evidence to be admissible.' *State v. Wilkins* (1980), 64 Ohio St.2d 382, 389, 18 O.O.3d 528, 532, 415 N.E.2d 303, 308; see *State v. Downs* (1977), 51 Ohio St.2d 47, 63, 5 O.O.3d 30, 38, 364 N.E.2d 1140, 1150."**

{¶ 127} We note that Braun cites no law to support his argument that the pellet is inadmissible. Since a strict chain of custody is not required for admissibility and Braun cites no law to support his argument nor does he provide any other reason that the pellet was inadmissible pursuant to App.R. 12(A)(2), we decline to address this argument any further.

{¶ 128} Braun's ninth assignment of error is overruled.

> **"10. The trial court's arbitrary rulings that (1) Braun himself was not permitted to review any of the state witnesses' prior written statements, and (2) such statements could not be used by Braun's counsel in cross-examining a state witness without the entire written statement being submitted to the jury, denied Braun's confrontation rights, denied him the right to effective cross-examination, and interfered with his defense, in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and comparable provisions of the Ohio Constitution."**

{¶ 129} Braun complains that the trial court erred when it ruled that Braun himself could not view the witness statements, and that if a statement was used on cross-examination, then the entire statement would be submitted to the jury.

{¶ 130} Crim.R. 16(B)(1)(g) provides for the in camera inspection of a witness's written or recorded out-of-court statement to determine whether the statement is inconsistent with the witness's testimony (in which case it may be used in cross-examining the witness). "Under the rule, counsel for both parties must be given the opportunity to: (1) inspect the statement personally; and (2) call to the court's attention any perceived inconsistencies between the testimony

of the witness and the prior statement." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, quoting *State v. Daniels* (1982), 1 Ohio St.3d 69, 1 OBR 109, 437 N.E.2d 1186, syllabus.

{¶ 131} Crim.R. 16(B)(1)(g) gives Braun's *attorney* the right to inspect the written statements of a witness after direct examination. The rule does not allow the defendant himself to review the written statements. We find no case law and Braun cites no cases to support his argument that he personally should have been permitted to examine the witness statements. Further, Evid.R. 611(A) states that the trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." We find that the trial court did not err when it denied Braun's request to review the statements himself.

{¶ 132} Further we find that the trial court did not err when it instructed Braun's attorney that if part of the written statement was used on cross-examination, then the entire statement would be submitted to the jury. It has long been held that when a portion of a prior written statement is used to impeach a witness by showing an inconsistency with the current testimony, the entire document may be admitted on rebuttal, to rehabilitate the witness. *Shellock v. Klempay Bros.* (1958), 167 Ohio St. 279, 282, 148 N.E.2d 57; see, also, *State v. Loper*, Cuyahoga App. Nos. 81400, 81297, 81878, 2003-Ohio-

3213; *State v. Johnson* (Nov. 12, 1998), Cuyahoga App. No. 57790; *State v. Rivera* (Nov. 9, 1989), Cuyahoga App. No. 56158.

{¶ 133} Braun's tenth assignment of error is overruled.

"11. Prosecutorial misconduct deprived Braun of his constitutionally guaranteed right to a fair trial, in violation of the Fifth and Fourteenth Amendments, to the United States Constitution and Section 10, Article I of the Ohio Constitution."

{¶ 134} A prosecuting attorney's conduct during trial does not constitute grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402-405; *State v. Gest* (1995), 108 Ohio App.3d 248, 257. The touchstone of a due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209. The effect of the prosecutor's misconduct must be considered in light of the whole trial. *State v. Durr* (1991), 58 Ohio St.3d 86, 94; *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. Furthermore, a prosecutor is afforded wide latitude during closing argument, and it is within the trial court's sound discretion to determine whether a comment has gone too far. *State v. Benge*, 75 Ohio St.3d 136, 1996-Ohio-227.

{¶ 135} Braun enumerates eight claimed instances of prosecutorial misconduct and argues that the cumulative effect of the misconduct denied him a fair trial.

{¶ 136} First, Braun alleges that the prosecutor failed to comply with his obligations under *Brady* and Crim.R. 16. We find no merit to this claim. As

we stated under the first and third assignments of error, the prosecutor did not violate *Brady* or Crim.R. 16.

{¶ 137} Second, Braun complains that the prosecutor intentionally placed irrelevant and prejudicial evidence before the jury when he examined Shear's mother, Sandy Seidenwand, and played portions of the taped conversations she had with Shear. As stated previously, the audiotapes are not included in the record on appeal. Any lack of diligence on the part of an appellant to secure a portion of the record necessary to his appeal should inure to appellant's disadvantage rather than to the disadvantage of appellee. *State ex rel. Montgomery*, supra. Consequently, we find no prosecutorial misconduct.

{¶ 138} Third, Braun asserts that it was prosecutorial misconduct to introduce Stedman's journals on redirect examination. We addressed this issue in the fifth assignment of error, and found that the journals were admissible.

{¶ 139} Fourth, Braun complains about the other acts evidence that was admitted. We addressed this argument in Braun's sixth assignment of error, finding that some of the acts were inadmissible; however, we found the error to be harmless since Braun took the stand and testified to a whole litany of criminal activity.

{¶ 140} Fifth, Braun alleges that it was improper for the prosecutor to elicit testimony regarding the anonymous tip to Crime Stoppers that Braun was responsible for the victim's murder. The record indicates that Braun's objection was sustained and the jury was told to disregard the testimony. Jurors are

presumed to follow the instructions of the court, and Braun offers no evidence that the jury failed to abide by the trial court's instruction. See *State v. Charley*, Cuyahoga App. No. 82944, 2004-Ohio-3463. Even if the prosecutor's question was improper, we cannot say that Braun did not have a fair trial.

{¶ 141} Braun also contends that the state improperly attempted to introduce evidence that Shear made an oral "proffer" to the police blaming Braun for the killing. The record reveals that at a sidebar discussion, it was agreed that the state could not pursue that line of questioning. The prosecutor followed the ruling.

{¶ 142} Braun's sixth contention is that the prosecutor repeatedly belittled and mocked Braun in front of the jury for asserting his constitutional right to assist in his own defense. Cross-examination is "permitted on all relevant matters and matters affecting credibility." *State v. Slagle* (1992), 65 Ohio St.3d 597, 605, quoting Evid.R. 611(B). The scope of cross-examination lies within the sound discretion of the trial court in relation to the particular facts of the case. Id. A review of the transcript does not support Braun's contention that the prosecutor mocked and belittled Braun. We find the cross-examination of Braun to be consistent with the particular facts of the case.

{¶ 143} Next, Braun alleges that the prosecutor made numerous prejudicial and improper comments during closing argument and the guilt phase. He complains that the prosecutor argued that the crime against Tom McDonald was "corroborative of the deed, the evil deed that was done to Mr. Chappell." A

review of the record indicates that this statement is taken out of context, and the actual statement by the prosecutor was not improper.

{¶ 144} Braun alleges that the prosecutor attempted to shift the burden of proof to the defense by stating that the defense has subpoena power, too. In *State v. Clemons*, 82 Ohio St.3d 438, 452, 1998-Ohio-406, the Ohio Supreme Court recognized that the prosecution is entitled to comment on defense counsel's failure to offer evidence or to call witnesses other than the defendant. Accordingly, the prosecutor's statements were not improper.

{¶ 145} Braun points out that in closing argument the prosecutor called the defense attorney "underhanded." Braun's attorney objected, and the court sustained the objection. Although the comment was improper, we do not find that the comment denied Braun a fair trial.

{¶ 146} Braun complains that the prosecutor improperly vouched for its witness Quarrick, as well as the investigation by the police. The record does not support Braun's contention that the prosecutor vouched for the credibility of the witness or the police investigation.

{¶ 147} Braun also asserts that the prosecutor "got into the defendant's face" at the end of closing argument in an improper and offensive way. The record reveals that Braun's attorney objected to the prosecutor "getting in the defendant's face"; the court overruled the objection. The Ohio Supreme Court has held that the prosecution is entitled to some latitude and freedom of expression in closing arguments, but cannot deliberately saturate the trial with

emotion. *State v. Keenan* (1993), 66 Ohio St.3d 402. We cannot say that the prosecutor's action denied Braun a fair trial.

{¶ 148} Finally, Braun complained that it was improper for the prosecutor to tell the jury that there were "only really two options here," life without any chance of parole and death, which dismissed the other two life sentence options that the jury is required to consider. We do not find the statement to be improper. "Prosecutors can urge the merits of their cause and legitimately argue that defense mitigation evidence is worthy of little or no weight." *State v. Wilson* (1996), 74 Ohio St.3d 381, 399.

{¶ 149} Braun's eleventh assignment of error is overruled.

> **"12. The performance of trial counsel was deficient, and deprived Braun of the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution."**

{¶ 150} Braun concedes that his trial counsel properly objected to and preserved all issued raised on appeal. He asserts that if any issues were not properly identified and preserved, then counsel's performance was deficient.

{¶ 151} Pursuant to App.R. 12(A)(2) we decline to address this assignment of error because Braun has failed argue the error separately. Braun's twelfth assignment of error is overruled.

> "**13. Braun's convictions are based on insufficient evidence and/or are against the manifest weight of the evidence, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution."**

{¶ 152} When an appellate court reviews a record upon a sufficiency challenge, "'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. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 153} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." (Internal quotes and citations omitted.) *Leonard*, 104 Ohio St.3d at 68, 2004-Ohio-6235.

{¶ 154} Braun asserts that his convictions are against the manifest weight, and the evidence is insufficient, because the state's witnesses were "snitches, informants, and mentally ill drug addicts" who are not credible. He further argues that the state's case is "a lot of innuendo, rumors, and alleged statements attributed to Braun," which does not satisfy the standard of beyond a reasonable doubt.

{¶ 155} We find that there was sufficient evidence that Braun committed these crimes. There was testimony that Braun and Shear were looking for gasoline on the night of the murder, and that Braun called the victim to bring Braun gas. The victim left Tracy Walsh's house to bring gas to Braun and never returned. Braun was seen driving the victim's Blazer down an alley with Shear following behind, after they had obtained gas from Michael Graham. Braun himself admitted to robbing drug dealers with Shear and that each of them carried a gun. After viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the crimes proved beyond a reasonable doubt.

{¶ 156} The record reflects that most of the state's lay witnesses were drug users, felons, and jailhouse snitches. Nevertheless, credibility issues are within the province of the jury. In *State v. Golden* (Dec. 20, 2001), Franklin App. No. 01AP-367, the defendant argued his conviction was against the manifest weight of the evidence, as the witnesses were either on drugs or intoxicated at the time of the incident. In affirming, the court found "the jury was able to observe these witnesses and determine whether they were believable," and concluded "assessment of credibility was within the province of the trier of fact." Id.

{¶ 157} "The jury was free to believe all, part, or none of the testimony of each witness." *State v. Colvin*, Franklin App. No. 04AP-421, 2005-Ohio-1448, at ¶34. Moreover, an appellate court may not substitute its judgment for that of

the trier of fact on the issue of witness credibility unless it is manifestly clear that the fact-finder lost its way. *State v. Green*, Franklin App. No. 03AP-813, 2004-Ohio-3697, at ¶25. See, also, *State v. Covington*, Franklin App. No. 02AP-245, 2002-Ohio-7037, at ¶28. Upon the record before us, we find the jury's verdicts were supported by the manifest weight of the evidence. Accordingly, Braun's thirteenth assignment of error is overruled.

"**14. Braun was denied his constitutional right to a fair trial by the cumulative effect of all the many and serious errors that occurred during his trial."**

{¶ 158} Braun argues that his convictions should be reversed based on the cumulative error doctrine.

{¶ 159} In *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623, the court held that pursuant to the cumulative error doctrine "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal."

{¶ 160} In the instant case, as discussed above, although we find several instances of harmless error, we do not find that Braun was denied a fair trial. Accordingly, the cumulative error doctrine does not apply, and Braun's fourteenth assignment of error is overruled.

"15. The trial court's sentencing judgment is defective because the sentences for all but the aggravated murder were not imposed in open court and are improperly consecutive."

{¶ 161} The jury returned from its sentencing deliberations with a sentence of life without the possibility of parole. The trial court immediately imposed the sentence for the aggravated murder conviction, but did not impose sentence for the three other crimes that Braun was found guilty of committing. In the journal entry, however, Braun was sentenced for the other crimes of which he was found guilty. Braun argues, and the state concedes, that this violates Crim.R. 43(A).

{¶ 162} Crim.R. 43(A) provides that a defendant has the right to be present when sentence is imposed. If there exists a variance between the sentence pronounced in open court and the sentence imposed by a court's judgment entry, a remand for resentencing is required. *State v. R.W.*, Cuyahoga App. No. 80631, 2003-Ohio-1142; *State v. Carpenter* (Oct. 9, 1996), Hamilton App. No. C-950889.

{¶ 163} Accordingly, Braun's fifteenth assignment of error is sustained. His sentence is reversed and the case is remanded for resentencing.

{¶ 164} Affirmed in part, reversed in part, and case remanded for resentencing.

It is ordered that appellant and appellee share the 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. 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR