**[Cite as *State v. Peterson*, 2015-Ohio-1013.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**Nos. 100897 and 100899**

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DAMON PETERSON**

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-13-571165-E and CR-13-571726-C

**BEFORE:** McCormack, J., Celebrezze, A.J., and Boyle, P.J.

**RELEASED AND JOURNALIZED:** March 19, 2015

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TIM McCORMACK, J.:

**{¶1}** Defendant-appellant, Damon Peterson (a.k.a. "Dame"), appeals his convictions of aggravated murder, murder, felonious assault, aggravated robbery, kidnapping, theft, and having a weapon while under disability, with firearm specifications. He assigns ten assignments of error. Following a thorough review of the record and applicable law, we affirm Peterson's convictions.

## Procedural History

**{¶2}** On January 30, 2013, Peterson was indicted in Cuyahoga C.P. No. CR-13-571165 in a multiple count indictment along with codefendants Demario J. Lane ("Lane" or "Rio"), Darrell Coleman, Steven Mongo, and Torrance Johnson ("TJ").

**{¶3}** Peterson was charged as follows: Count 7 — aggravated murder of Duane Jacobs in violation of R.C. 2903.01(A); Count 8 — aggravated murder of Duane Jacobs in violation of R.C. 2903.02(B); Count 9 — murder of Duane Jacobs in violation of R.C. 2903.02(A); Count 10 — murder of Duane Jacobs in violation of R.C. 2903.02(B); Count 11 — murder of Duane Jacobs as a proximate result of felonious assault in violation of R.C. 2903.02(B); Count 12 — attempted murder of Ayed Kanaan in violation of R.C. 2923.02/2903.02(A); Count 13 — aggravated robbery of the Ya-Ya Market in violation of R.C. 2911.01(A)(1); Count 14 — aggravated robbery of the Ya-Ya Market in violation of R.C. 2911.01(A)(3); Count 15 — kidnapping of Ayed Kanaan in violation of R.C. 2905.01(A)(2); Count 16 — felonious assault of Duane Jacobs in violation of R.C. 2903.11(A)(1); Count 17 — felonious assault of Ayed Kanaan in violation of R.C. 2903.11(A)(2); Count 25 (renumbered 18 for trial) — aggravated murder of Sean Stewart in violation of R.C. 2903.01(A); Count 26 (renumbered 19 for trial) — aggravated murder of Sean Stewart in violation of R.C. 2903.01(B); Count 27 (renumbered 20 for trial) — murder of Sean Stewart in violation of R.C. 2903.02(A); Count 28 (renumbered 21

for trial) — murder of Sean Stewart in violation of R.C. 2903.02(B); Count 29 (renumbered 22 for trial) — murder of Sean Stewart as a proximate result of felonious assault in violation of R.C. 2903.02(B); Count 30 (renumbered 23 for trial) — aggravated robbery of Union Beverage in violation of R.C. 2911.01(A)(1); Count 31 (renumbered 24 for trial) — aggravated robbery of Union Beverage in violation of R.C. 2911.01(A)(3); Count 32 (renumbered 25 for trial) — felonious assault of Sean Stewart in violation of R.C. 2903.11(A)(2); and Count 33 (renumbered 26 for trial) — felonious assault of Sean Stewart in violation of R.C. 2903.11(A)(1). The charges included one- and three-year firearm specifications. This indictment pertains to the events at the Ya-Ya Market on September 25, 2012, and the Union Beverage on October 19, 2012.

**{¶4}** On March 5, 2013, Peterson was indicted in Cuyahoga C.P. No. CR-13-571726 in a multiple count indictment along with codefendants Coleman and Mongo. Peterson was charged as follows: Count 1 — aggravated robbery of Gas USA or Mohammed Widdi in violation of R.C. 2911.01(A)(1); Count 2 — aggravated robbery of Gas USA or Anisha Gibson in violation of R.C. 2911.01(A)(1); Count 3 — kidnapping of Mohammed Widdi in violation of R.C. 2905.01(A)(2); Count 4 — kidnapping of Anisha Gibson in violation of R.C. 2905.01(A)(2); Count 5 — theft of Gas USA or Mohammed Widdi in violation of R.C. 2913.02(A)(1); and Count 8 (renumbered Count 6 for trial) — having weapons while under disability in violation of R.C. 2923.13(A)(3). The charges included one- and three-year firearm specifications. The indictment arose from incidents that occurred at Gas USA on September 21, 2012.

**{¶5}** On December 4, 2013, the cases proceeded to a jury trial. On Case No. CR-13-571726, the jury found Peterson guilty of Counts 1 through 4 and the attendant one- and three-year firearm specifications, Count 5, and Count 8.

**{¶6}** On Case No. CR-13-571165, the jury found Peterson guilty of Counts 8, 10, 11, 13, 15, 17, 26 (new Count 19), 28 (new Count 21), 29 (new Count 22), 30 (new Count 23), 31 (new Count 24), 32 (new Count 25), and 33 (new Count 26), along with the attendant one- and three-year firearm specifications. The jury found Peterson not guilty of Counts 7, 9, 12, 14, 16, 25 (new Count 18), and 27 (new Count 20).

**{¶7}** The court sentenced Peterson in both cases on December 19, 2013. In Case No. CR-13-571726, the court made allied offenses determinations and sentenced on the counts elected by the state. It found that Counts 1, 3, and 5 were allied offenses and merged for purposes of sentencing. It then imposed a prison sentence of ten years consecutive to three years on the firearm specification. The court also found that Counts 2 and 4 were allied offenses and merged for sentencing. The court then imposed a prison sentence of ten years consecutive to three years on the firearm specification. The court sentenced Peterson to 36 months on Count 8 (new 6). The court ordered the terms in Counts 1, 3, and 5, to be served concurrently to the terms in Counts 2 and 4, but consecutively to the prison term in Count 8 (new 6). The aggregate prison sentence for Case No. CR-13-571726 was 16 years.

**{¶8}** In Case No. CR-13-571165, the court made the following allied offenses determination: Counts 8, 10, and 11 merged, and the state elected to sentence on Count 8; Counts 13 and 15 merged, and the state elected to sentence on Count 13; Count 17 stood alone; Counts 26, 28, 29, 32, and 33 merged, and the state elected to sentence on Count 26 (new Count 19); and Counts 30 and 31 merged, and the state elected to sentence on Count 30 (new Count 23).

**{¶9}** The court imposed the following prison sentence in Case No. CR-13-571165: Count 8 — life with the possibility of parole after 30 years, plus three years on the firearm specification;

Count 13 — ten years plus a consecutive three years on the firearm specification; Count 17 — seven years plus a consecutive three years on the firearm specification; Count 26 (new Count 19) — life imprisonment without the possibility of parole plus a consecutive three years on the firearm specification; and Count 30 (new Count 23) — ten years plus a consecutive three years on the firearm specification.

**{¶10}** The court ordered all counts to be served concurrently, with the exception of the firearm specifications and Counts 8 and 26 (new 19). The court also ordered that the sentence in Case No. CR-13-571165 shall be served consecutively to the sentence in Case No. CR-13-571726. The aggregate prison sentence was therefore 15 years (firearm specifications), plus 30 years (Count 8), plus life imprisonment (Count 26/19), plus 16 years (Case No. CR-571726). Finally, the court imposed a fine of $20,000 on Count 26 (new Count 19).

**{¶11}** Peterson now appeals his convictions and sentence.

## Evidence at Trial

### A. Gas USA

**{¶12}** Mohammed Widdi, a manager of the Gas USA on St. Clair Avenue, testified that he was working at the gas station with a clerk, Anisha Gibson, at approximately 7:00 p.m. on September 21, 2012. At that time, a male approached the counter of the store with a can of beer and asked for a lottery ticket. The male handed Widdi a $20 bill, and as Widdi was making change, the male pointed a gun at his face and said, "Give me the money or I'll kill you." Widdi testified that the male then jumped on the counter and "grabbed the money out of the lottery and walked across the counter." He stated that the male then went to the second register, while walking on the counter, where Gibson opened the register for him. Gibson testified that the male pointed the gun at her, and he removed the money from Gibson's register.

**{¶13}** Widdi testified that there was another male standing in the store in front of Gibson. This individual left with the male with the gun. Widdi testified that the male with the gun was walking "nonchalant, nice and slow" and when he reached the door, both individuals ran. One individual ran to the left of the store, towards East 124th Street, and the other individual ran right, towards East 123rd Street. Widdi believed the two individuals were together. At the time of the robbery, only four of the eight installed video surveillance cameras were working. Widdi made a copy of the surveillance video for the police.

**{¶14}** Detective John Riedthaler processed the crime scene. He removed two latent fingerprints from the beer can left on the counter and submitted the prints to the city of Cleveland's fingerprint examiners. The examiners matched the fingerprints to Darrell Coleman.

**{¶15}** Codefendant Darrell Coleman, a.k.a. "Bama," testified against Peterson as a condition of his plea agreement with the state regarding the incidents with which he was involved. Coleman stated that he was not told what to say and that he was instructed to testify "truthfully." He testified that he, codefendant Steven Mongo, and Peterson have committed robberies together and they were involved with the robbery of the Gas USA. Coleman stated that the three of them were just riding around and "just picked that specific spot" to rob in a "spur of the moment."

**{¶16}** According to Coleman, Peterson parked his gold SUV (sport utility vehicle) on a side street. The plan was for Peterson to be the getaway driver and Coleman and Mongo would "scope the place out" in order to see how many people were working, "what's going on, see whose [sic] in there." On the evening of September 21, after Peterson parked his car, Coleman and Mongo entered the Gas USA, pretending to be shopping. Coleman approached the cash register, pulled his gun on the male employee at the counter, and instructed both the male and

female employees to empty the cash registers. Coleman testified that after receiving the money, they fled the gas station and ran back to Peterson's SUV. Coleman stated that the money from the robbery was split equally among them and amounted to "[o]ver a thousand. Something like $1,500, something like that." He admitted, however, that he kept extra cash for himself, stating, "I cuffed a little."

**{¶17}** Steven Mongo also testified against Peterson as a condition of his plea agreement. He testified that he, Coleman, and Peterson drove together in Peterson's SUV to the Gas USA. They discussed robbing the place "if it was sweet." According to Mongo, he entered the store first, in order to survey it, and he is followed by Coleman. He was at the counter when Coleman jumped on the top of the counter and robbed the place. Mongo testified that Coleman left the store first and Mongo followed. He stated that when he returned to the side street where Peterson had parked, he discovered that Peterson had fled in his vehicle. He continued to walk to the next street where Peterson eventually pulled up and picked Mongo up. Mongo testified that he was angry and told Peterson that he thought he left him. Mongo also testified that each of them received approximately $200.

**B. Ya-Ya Market**

**{¶18}** Ayed Kanaan, owner of the Ya-Ya Market on East 99th Street and Union Avenue, testified that he was working at the convenience store the evening of September 25, 2012, when three males came into his store around 9:00 p.m. The first male, Keith Perry, was a regular customer. He purchased some items and left the store. Of the two males remaining in the store, Kanaan described the one male as "younger, * * * round face, nubby hair, short, cocky." He recognized the other male from visiting the store earlier that day. He was taller, with lighter skin, and had "something around his eyes."

**{¶19}** Kanaan testified that the shorter male, later identified as codefendant Steven Mongo, came to the counter and asked for a cigarillo. He gave Kanaan a $20 bill and, after paying for the item, asked for change. As Kanaan was counting the change, the taller male pulled a gun on Kanaan and tried to jump on the counter. Kanaan stated that he was carrying a handgun because he was robbed a week earlier and he was nervous. Kanaan testified that the taller male fired a shot at him and Kanaan returned fire. At that time, the taller male fell back and then ran toward the exit. The shorter male, however, was unable to leave the store as Kanaan held his gun on him, instructing him not to move. Kanaan testified that moments later, the taller male opened the door to the store with his left arm and began to fire while yelling, "Get out!" Kanaan stated that he was addressing the shorter male who purchased the cigarillo. Kanaan fired back.

**{¶20}** When the gun fire ceased, Kanaan noticed the victim, Duane Jacobs, a man who had worked at the store that evening, "twist and [fall]" near the front door. Kanaan called 911. Thereafter, Delilah Turner, who often helped Kanaan at the store, ran into the store to help. Because he had been robbed the week before, Kanaan had a video surveillance system installed. He turned over his copy of the video that had been taken that evening to the police.

**{¶21}** Delilah Turner lived in the upstairs apartment behind the Ya-Ya Market, and she frequently helped Kanaan at the store. Turner testified that she was at the store between 8:30 p.m. and 8:45 p.m. on September 25 and returned home shortly thereafter. While in her residence, she heard shots fired. When the gunfire ceased, she went to her back door and saw two males running down the street toward what looked like a silver vehicle under the streetlight. Turner testified that she saw a larger male wearing a dark hoodie and blue jeans and a thinner male wearing lighter clothing get into the vehicle. The thinner male got into the passenger side

of the vehicle. The larger male was almost left behind because the vehicle began to drive away. She stated that the male threw his hands up, the vehicle stopped, and the male jumped into the rear of the vehicle, behind the driver. The video surveillance revealed the males approaching the vehicle at 8:59 p.m.

**{¶22}** Turner testified that she could only see the back of the vehicle and told police that, at the time, the vehicle looked like a silver Town and Country van. She stated that she never saw the front or sides of the vehicle, but she remembered the rear window of the vehicle. At trial, Turner identified the vehicle depicted in the state's exhibit No. 142 (a gold SUV) as the vehicle she saw the two males get into that evening, recognizing the rear profile of the vehicle she saw on the evening of September 25, 2012. She acknowledged that it was not a minivan.

**{¶23}** Keith Perry, who lived on Union Avenue near the Ya-Ya Market and often helped Kanaan at the store, went to the store on the evening of September 25, 2012. He testified that, as he was leaving the store, two males entered. He overheard one of the males say, "Man, hurry up, come on, come on!" Thereafter, he heard gunfire and he ran for safety. As he was running, Perry testified that he saw two males coming out of the store — "a little chubby one" and "kind of a slim one." He testified that he saw the males running up the street to what appeared to be a silver vehicle. Perry then heard the vehicle screeching away. He stated that he did not get a good look at the vehicle because he was running away. Perry returned home and told his fiancée to call the police. He went back to the store because he "knew the people in the store," and he reported what he saw to the police.

**{¶24}** Kenneth Walker, who lived on East 98th Street, near the Ya-Ya Market, testified that on the evening of September 25, 2012, he was in the store speaking with Jacobs and Kanaan approximately ten minutes before Jacobs was shot. He left the store to go home, which is the

high-rise apartment across the street, only to return because he forgot something. Walker testified that as he was walking back toward the store, he saw two males run past him, one was "a little chubby" and the other was "a little taller than me * * * kind of a slim one." He stated at trial that he saw the males run down East 99th Street, away from Union Avenue, to a vehicle that looked like "a minivan or an SUV, or something." He told police that evening, however, that the vehicle appeared to be a silver minivan. He reported that he only saw the back of the vehicle.

**{¶25}** Darrell Coleman testified that on September 25, 2012, he, Mongo, and Peterson decided to rob the Ya-Ya Market, just four days after robbing the Gas USA, stating, "we was being greedy." He testified that Peterson drove his "champagne gold color SUV" to the store. Peterson parked the SUV approximately six houses down from the Ya-Ya Market on East 99th Street. Coleman, Mongo, Peterson discussed what job everyone had for the robbery. Coleman testified that Peterson was supposed to wait in the car and be the driver.

**{¶26}** Coleman and Mongo went inside the store, and Coleman waited until Mongo reached the cash register. Mongo was acting like he was buying cigarettes. Coleman stated that he jumped on the counter and pulled a gun on the clerk. He testified that he used the same .22 caliber automatic weapon from the Gas USA robbery. He fired the first shot, and then the clerk fired back. At that point, Coleman stated that he got off the counter and started running, as the clerk was firing at him. Coleman testified that he made it out of the store, but he came back for Mongo. While Coleman and the clerk exchanged gunfire, Coleman waved for Mongo to get out of the store. Coleman testified that they ran back to Peterson's vehicle, where Peterson was waiting for them. Coleman entered the passenger side of the car, and Mongo entered the driver's side, and they left the scene.

**{¶27}** Steven Mongo testified that on September 25, 2012, while sitting in Peterson's vehicle, he, Coleman, and Peterson discussed how they would rob the Ya-Ya Market. Mongo stated that the vehicle in which they rode to the Ya-Ya Market was the same vehicle used in the robbery of the Gas USA. Mongo and Coleman exited the vehicle and entered the store. Mongo stated that he went to the counter to buy something, as a distraction, and Coleman robbed the store. He also stated that Coleman fired a shot with the same gun used in the Gas USA robbery, and the clerk returned fire. Coleman left the store and eventually came back to get Mongo, who was being held at gunpoint by the clerk.

**{¶28}** Mongo testified that he and Coleman went to East 99th Street where they "jumped back in Dame['s] vehicle." Coleman got into the passenger side. Mongo stated that Peterson was beginning to drive away, but Mongo arrived in time and entered the back seat. Mongo identified Peterson's vehicle, an Explorer, from the video surveillance taken the evening of September 25, 2012. Mongo testified that later in the evening he saw news reports of the robbery.

**{¶29}** Officer Mark Peysha of the Cleveland Police Department responded to the scene. Officer Peysha observed Duane Jacobs unresponsive and lying inside the doorway of the Ya-Ya Market with a large amount of blood around him. He called for an ambulance, which arrived almost immediately. He interviewed witnesses and took descriptions of the individuals who had robbed the store.

**{¶30}** Dr. Joseph Felo, forensic pathologist, performed an autopsy on Duane Jacobs. He discovered eight injuries to the body. Dr. Felo determined that the cause of death was "gunshot wound of the head with skull and brain injuries."

**{¶31}** Detective James Raynard, a crime technician for the Cleveland Police homicide unit, was called to the Ya-Ya Market at 10:20 p.m. on September 25, 2012. He processed the scene and took photographs. Detective Raynard recovered a fired casing on the floor of the store as well as a spent bullet by the doorway.

**{¶32}** Detective Kathleen Carlin of the Cleveland Police homicide unit, along with her partner, Detective Timothy Entenok, investigated the death of Duane Jacobs at the Ya-Ya Market and assisted with the collection of evidence at the scene. Detective Carlin spoke with Kanaan and nearby residents, who gave descriptions of the perpetrators. The detectives enlisted the assistance of an audiovisual expert with the police department to make still photographs from the video surveillance cameras. The stills depicted the two perpetrators and the vehicle on the scene.

**{¶33}** According to Detective Carlin, FBI agent Andy Burke contacted her regarding Coleman and Mongo. Burke had arrested Mongo and transported him to the police station to be interviewed, where Mongo gave a statement that implicated Peterson, himself, and Coleman in the robbery and murder at the Ya-Ya Market. Mongo was charged with aggravated murder. That same day, the Cleveland Police Department arrested Coleman.

**{¶34}** On November 28, 2012, Detective Carlin learned about a potential witness, Brittany Fredericy. The detectives interviewed Fredericy on two occasions. Based upon the information obtained from Fredericy, the police department issued an arrest warrant for Peterson. Peterson was arrested on January 15, 2013, and he denied knowing Coleman, Mongo, Lane, and TJ.

**{¶35}** Detective Carlin testified that, upon reviewing the video surveillance from the evening of September 25, 2012, she observed video of a Ford Explorer traveling westbound on

Union Avenue "minutes before the robbery," and it turned northbound on East 99th Street. She further testified that the vehicle "never came back into camera view after driving down East 99th Street." Detective Carlin stated that immediately before the robbery, the only vehicle that drove down East 99th Street was the Ford Explorer. There was no video of a silver minivan.

**{¶36}** Brittany Fredericy, who had two children with Darrell Coleman, testified that she lived with Coleman. She stated that Coleman "committed crimes" to support his family. Fredericy knew Peterson, Mongo, Demario J. Lane, and TJ, and she has seen Coleman, Mongo, and Peterson with a gun. She stated that all of the men would mostly spend time at the home she shared with Coleman, and Peterson would drive there in his Explorer.

**{¶37}** Fredericy testified that she saw a picture of Coleman and Mongo on the news, indicating they were wanted by the police. She witnessed Mongo's arrest across the street from her house on November 15. After the arrest, the officers came to her door, where she denied knowing Coleman. Fredericy testified that, thereafter, she phoned Coleman and told him that the police had searched the house and were looking for him. Fredericy was later arrested for tampering with evidence. She identified Coleman and Mongo in the Ya-Ya Market videos and told the police about other robberies they had committed.

**{¶38}** Amanda Tidd, who had two children with Demario Lane and lived with Lane, testified that she knew Coleman, Mongo, and Peterson. She stated that she saw Peterson drive his Explorer approximately two times per week.

**C. Union Beverage**

**{¶39}** Rami Chalhoub, a manager at Union Beverage, a state liquor agency located on Union Avenue, testified that he was working at the store on the evening of October 19, 2012, when he heard "a burst of [gun]shots, three to four shots" from outside the store, then another

two or three shots. He then saw a man, later identified as victim, Sean Stewart, walk in and fall to the floor. Chalhoub recognized the man as a regular customer who had been in the store just 10 to 15 seconds before the gunshots. The store's video surveillance captured the moments in the store before and after the gunshots, and the videos were turned over to the police. Chalhoub stated that not all of the cameras were operable at the time of the shooting. After the victim limped into the store, Chalhoub closed the shutters and called 911. Chalhoub stated that it was a very busy night and people were screaming as they surrounded the victim, attempting to help him by pouring water on him. An ambulance arrived shortly thereafter.

**{¶40}** Michael Frizzell, who was waiting for a friend in a parked car in the parking lot of Union Beverage on the evening of October 19, 2012, testified that he saw the victim, whom he recognized as a friend's brother, come out of the store. He stated that he then heard about seven or eight gunshots, and jumped into the back seat of the car with his friend's children. Frizzell saw the victim fall to the ground, get up, and run back into the liquor store. He stated that he then saw a group of people run away together, including two to three people with guns.

**{¶41}** Darrell Coleman testified that on the evening of October 19, 2012, he, Mongo, Lane, TJ, and Peterson walked to Union Beverage because Peterson's car was broken down at the time. He testified that the five of them were planning to rob someone. Coleman testified that while inside the store, Peterson told him that he found someone to rob, telling Coleman that he had "a lick."

**{¶42}** Coleman then saw Peterson and Mongo outside, near the dollar store, and he saw the victim walk out of the liquor store toward the dollar store. Coleman walked out of the store, following the victim. Coleman testified that as the victim was walking toward Peterson and Mongo, Peterson pulled his gun out, the victim hit the gun, and then Peterson shot the victim

four or five times. Coleman stated that he was trying to get out of the way of the gunfire and he ran toward the victim as the victim was running back to the liquor store, and Coleman pulled his gun out. Coleman heard Peterson tell Mongo to check the victim's pockets, but the victim made it to the store and "from there we all ran." They all returned to the "girl's" house where they met before going to Union Beverage that evening. Coleman testified that Peterson's gun was a .45 caliber Glock.

**{¶43}** Steven Mongo testified that on the evening of October 19, 2012, he was "kicking it" with Bama, Demario Lane, TJ, Peterson, and a group of girls at TJ's cousin, Marisha Jackson's ("Isha"), house for a couple of hours. At some point in the evening, approximately 8:00 p.m., the five men walked to the liquor store. After walking around inside the store for several minutes, they decided to leave. Mongo testified that when he exited the store, he saw that Peterson had a gun pointed at the victim. Peterson told Mongo to "hit his pockets," or go in his pockets, and Mongo "freezes up," and the victim "took off running." Mongo stated that "in a couple of seconds," shots were fired as the victim attempted to run back into the liquor store. Mongo testified that he, Dame, and Coleman returned to Isha's house, where they argued about Mongo's failure to "go in" the victim's pockets. Mongo testified that a couple of days later, at Rio's house, Mongo and Peterson argued again about Mongo's role at Union Beverage and that Peterson blamed Mongo for "fuck[ing] up." He stated that Lane and Coleman were present during this argument.

**{¶44}** At trial, Mongo identified Coleman, Lane, TJ, Peterson, and himself in the videos taken at Union Beverage.

**{¶45}** Codefendant Demario Lane testified against Peterson as a condition of his plea agreement. Lane stated that he knew Peterson, Mongo, TJ, and Coleman. They often hung out

together, and they "rob[bed] people." Lane stated that the group often hung out at Coleman's place. He testified that Peterson was the only member of the group who had a vehicle, which was a gold Explorer.

**{¶46}** Lane testified that on October 19, 2012, the five of them walked to Union Beverage from Isha's house. They did not drive Peterson's truck because it was not working at the time. Lane stated that when they arrived at the store, Coleman purchased a bottle of liquor while Lane attempted to purchase a cell phone. Peterson left the store with Coleman, Mongo, and TJ, while Lane remained in the store, at the phone section. Lane then heard five to seven gunshots while waiting at the phone section. He saw the victim run into the store, saying, "I'm shot! I'm shot!" Lane saw the victim covered in blood. At trial, Lane identified Peterson, Mongo, Coleman, TJ, and himself on the Union Beverage video. Lane testified that a couple of days after the shooting, when Peterson and Mongo were at Lane's home, he heard Peterson yell at Mongo because Mongo "froze up on him again."

**{¶47}** Codefendant TJ testified against Peterson, whom TJ said is one of his best friends. TJ stated that he was prepared to testify truthfully and no one told him what to say. He testified that Peterson used a "beige" Explorer to get around. He also testified that he robbed an individual and obtained a black .45 caliber handgun from the robbery. From that time forward, Peterson possessed the handgun.

**{¶48}** TJ testified that on October 19, 2012, he, Coleman, Peterson, Mongo, and Lane went to TJ's cousin, Isha Jackson's, house at approximately 8:00 p.m. There were other girls there. The group of men decided to walk to Union Beverage. While in the store, TJ received a call from his cousin, Gilbert Foster, who wanted to purchase the .45 caliber handgun from Peterson. TJ gave his phone to Peterson to talk to Foster.

**{¶49}** TJ testified that Coleman, Mongo, and Peterson walked out of the store together, Peterson passed TJ's phone back to Coleman, and Coleman came back into the store to return TJ's phone. TJ stated that he then left the store to continue a phone conversation with his wife and saw Peterson pull out the .45 caliber handgun and point it toward the victim. TJ saw the victim push Peterson and try to smack the gun down. TJ testified that Peterson then shot the victim two or three times, the victim began to run, and Peterson fired "a couple more shots." The victim eventually made it back to the store.

**{¶50}** When the group returned to Isha's house, TJ confronted Peterson about the shooting "in front of everybody," to which Peterson replied that "the dude had about $5,000 in his pocket. I got kids." TJ told Peterson that Peterson almost shot him, and Peterson replied that he saw him and wasn't going to shoot him. TJ stated that he was upset with Peterson for firing shots in his direction.

**{¶51}** Coleman, Peterson, and Mongo got a ride from Peterson's mother, and TJ then walked home, where he told his wife what had happened. After learning from his uncle that the police were looking for him, TJ turned himself in on January 16, 2013.

**{¶52}** Officer Rebecca Werner responded to Union Beverage on the evening of October 19, 2012, to shots being fired. She and her partner attempted to speak with the victim, who was covered in blood, to no avail. They called for an ambulance, managed the large crowd surrounding the victim, interviewed witnesses, and secured the scene. Officer Werner testified that, in speaking with approximately nine witnesses inside the store, they learned "vague suspect information" of "five black males wearing all black with handguns."

**{¶53}** Detective Darryl Johnson of the Cleveland Police Department, responded to the scene, taking pictures, and noting evidence, including spent casings. He assisted with collecting

$408.50 from the victim's clothing. Detective Johnson stated that the money was extremely wet and saturated with blood. Detective David Borden, also of the Cleveland Police Department, submitted to the lab for examination three spent bullets and four spent .45 caliber cartridges found at the scene. Firearms examiner Kristen Koeth determined that the four cartridges were fired from the same .45 caliber Glock handgun.

**{¶54}** Dr. Dan Galita, a forensic pathologist, conducted the autopsy of Sean Stewart. He noted that Stewart suffered three gunshot wounds in the lower abdomen and right upper thigh. Dr. Galita determined that the cause of death was the gunshot wounds. Ballistics confirmed that a .45 caliber handgun, a Glock, was used on the victim.

**{¶55}** Isha, TJ's cousin, who lives five minutes from Union Beverage, testified that Peterson, Mongo, Coleman, TJ, and Lane were at her house the night the liquor store closed on October 19, 2012. TJ was going to purchase a bottle of liquor for Isha and other guests. Isha testified that when the group of men returned from the liquor store, approximately 30 minutes later, they were "kind of hyped and just wasn't normal." They asked if they could spend the night, but Isha told them they had to leave. Shortly after the men left, TJ arrived and sat on her porch. Isha testified that TJ, who was on the phone, appeared to be drunk and breathing heavily, and he seemed "hostile." He did not speak with her, nor did he come inside the house.

**{¶56}** Isha identified Peterson's truck in the state's exhibit No. 766 (the gold Explorer) and further testified that she has seen Peterson drive the "gray" or "tan" truck on numerous occasions, during the "week, at night, weekends." She has never seen him drive any other vehicle. Finally, Isha stated that she had seen each of the men in Peterson's vehicle at one time or another.

**{¶57}** Brittany Fredericy identified Peterson, Mongo, Coleman, TJ, and Lane in the Union Beverage video. Amanda Tidd testified that she overheard a conversation between Peterson and Mongo, during which Peterson told Mongo that he "fucked up" at the liquor store.

**{¶58}** Jamese Johnson, TJ's wife, testified that on October 19, 2012, TJ called her to pick him up at his cousin's house. Jamese stated that TJ "sounded worried and scared" on the phone. When she picked him up in front of Isha's house, he appeared "scared, nervous, and shocked, like he was really worried." Jamese stated that later in the evening, TJ told her and his mother about the events that occurred at Union Beverage. Both Jamese and TJ's mother contacted the police.

**{¶59}** Jamese further testified that Peterson came to their home sometime "after Mongo went to jail." She stated that Peterson's girlfriend owned a "champagne" Explorer and Peterson drove an Explorer. Peterson was looking for TJ, who was not home at the time. Jamese stated that Peterson asked her if TJ was mad at him because he almost shot TJ. Jamese identified Peterson, Mongo, Coleman, Lane, and TJ in the Union Beverage video.

**{¶60}** Terlon Turpin, Peterson's fiancée, testified that she purchased a 1999 gold Ford Explorer in December 2011. Title Loan repossessed the vehicle "sometime before Halloween," October 31, 2012. She stated that she drove the Explorer in August and September 2012. Barbara Bradford, Turpin's employer, testified that Turpin worked part time, 6 to 25 hours per week, at her day care center and that Turpin used to drive a gold Explorer.

**{¶61}** Damon Peterson testified on his own behalf and denied involvement in any crime.

## Assignments of Error

I. The trial court erred by granting the state's motion to join the indictments in one trial which resulted in prejudice to appellant and violated his federal constitutional rights because the joint trial was fundamentally unfair.

II. Appellant's convictions were not supported by sufficient evidence and the trial court erred by denying his motions for acquittal in each case.

III. The convictions were against the manifest weight of the evidence.

IV. The improper comments made by the state amounted to plain error in violation of appellant's right to due process and a fair trial and/or counsel's failure to object to them denied appellant his constitutional right to effective assistance of counsel.

V. The trial court erred by prohibiting appellant from consulting with his attorney during the trial while allowing another witness to consult with his counsel in the middle of that witness's testimony and by overruling objections to questioning not based on evidence.

VI. The trial court improperly limited appellant's cross-examination of a witness and by allowing the state to conduct recross-examination of appellant that was beyond the scope of re-direct.

VII. The trial court erred by overruling appellant's objections to improper comments made by the state concerning appellant's invocation of his federal and state constitutional rights to remain silent and to request counsel.

VIII. The trial court erred by overruling appellant's objections to improper questioning by the state.

IX. Appellant was deprived of his constitutional rights to a fair trial and due process and the effective assistance of counsel and plain error occurred when other acts and irrelevant prejudicial evidence was admitted during trial in violation of Evid.R. 401, 402, 403, and 404(B) and there was no objection to its admission.

X. The trial court erred by imposing consecutive sentences, by failing to merge

all allied offenses of similar import, and by imposing a fine.

**Joinder**

**{¶62}** In his first assignment of error, Peterson contends that the trial court erred by granting the state's motion to join the indictments in one trial. He argues that the joinder of the

indictments was prejudicial and improperly influenced the jury, claiming that combining the indictments implied that Peterson had a propensity for committing armed robberies.

**{¶63}** Under Crim.R. 8(A), which governs the joinder of offenses, two or more offenses may be charged together if the offenses "are of the same or similar character, * * * or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Similarly, Crim.R. 13 provides that a trial court may order two or more indictments or informations, or both, to be tried together, "if the offenses or the defendants could have been joined in a single indictment or information."

**{¶64}** The law favors joining multiple offenses in a single trial if the requirements of Crim.R. 8(A) are satisfied. *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377, ¶ 38. If it appears, however, that the defendant would be prejudiced by the joinder, a trial court may grant a severance. Crim.R. 14; *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 95. The defendant bears the burden of proving prejudice. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 29.

**{¶65}** The state may rebut a defendant's claim of prejudicial joinder in two ways: (1) by showing that, if in separate trials, the state could introduce evidence of the joined offenses as "other acts" under Evid.R. 404(B), which is known as the "other acts" test; or (2) by showing that the evidence of each crime joined at trial is simple and direct, which is known as the "joinder test." *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990). "A trier of fact is believed capable of segregating the proof on multiple charges when the evidence as to each of the charges is uncomplicated." *State v. Lunder*, 8th Dist. Cuyahoga No. 101223, 2014-Ohio-5341, ¶ 33, citing *State v. Torres*, 66 Ohio St.2d 340, 343-344, 421 N.E.2d 1288 (1981). Joinder is

therefore not prejudicial when the evidence is direct and uncomplicated and can reasonably be separated as to each offense. *Id.*

**{¶66}** If the state can meet the requirements of the "joinder test," it need not meet the requirements of the stricter "other acts" test. *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991). A defendant is therefore not prejudiced by joinder when simple and direct evidence exists, regardless of the admissibility of evidence of other crimes under Evid.R. 404(B). *Id.*

**{¶67}** This court reviews a trial court's decision on joinder for an abuse of discretion. *State v. Grimes*, 8th Dist. Cuyahoga No. 94827, 2011-Ohio-4406, ¶ 15, citing *State v. Segines*, 8th Dist. Cuyahoga No. 89915, 2008-Ohio-2041.

**{¶68}** Here, the requirements of Crim.R. 8(A) are satisfied because the offenses were related in character and manner and they constituted a particular course of conduct in which Peterson engaged. The evidence demonstrated that Peterson and his accomplices systematically "scope[d]" out places to rob, confirming whether a particular location was "sweet" for a robbery, and they understood that each of them would have a particular role in the robbery — the distraction who pretended to purchase an item, the gunman who obtained the money, and the getaway driver. And the joinder of the offenses demonstrated Peterson's role in the crime spree.

**{¶69}** Furthermore, the evidence presented by the state was simple and direct. The testimony and evidence presented pertained to three uncomplicated incidents: the robbery at Gas USA on September 21, 2012; the robbery and murder at the Ya-Ya Market on September 25, 2012; and the robbery and murder at Union Beverage on October 19, 2012. There is no evidence in the record that the jury confused the evidence as to the different counts or that the jury was influenced by the cumulative effect of the joinder. In fact, the jury's not guilty verdicts

on several of the charges demonstrated the jury's ability to apply the evidence separately to each offense. Joinder was therefore not prejudicial.

**{¶70}** The trial court did not abuse its discretion in granting the state's motion for joinder. Peterson's first assignment of error is overruled.

**Sufficiency and Manifest Weight of the Evidence**

**{¶71}** Peterson claims that the state failed to provide sufficient evidence to support his convictions. He also argues that his convictions were against the manifest weight of the evidence.

**{¶72}** When assessing a challenge of sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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." *Id.* A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

**{¶73}** While the test for sufficiency of the evidence requires a determination whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 390. Also unlike a challenge to the sufficiency of the evidence, a manifest weight challenge raises a factual issue.

> "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a

> manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

*Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A finding that a conviction was supported by the manifest weight of the evidence, however, necessarily includes a finding of sufficiency. *State v. Howard*, 8th Dist. Cuyahoga No. 97695, 2012-Ohio-3459, ¶ 14, citing *Thompkins* at 388.

**{¶74}** "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

**{¶75}** In Case No. CR-13-571165, Peterson was convicted of aggravated murder in violation of R.C. 2903.01(B) in Count 8 (Jacobs) and Count 26/19 (Stewart) and murder in violation of R.C. 2903.02(B) in Counts 10 and 11 (Jacobs) and Counts 28 and 29 (Stewart). Also in Case No. CR-13-571165, he was convicted of aggravated robbery in violation of R.C. 2911.01(A)(1) and (3) in Count 13 (Kanaan) and Counts 30 and 31 (Stewart). Peterson was also convicted of aggravated robbery in Case No. CR-13-571726 in Count 1 (Widdi) and Count 2 (Gibson).

**{¶76}** In Case No. CR-13-571165, Peterson was convicted of felonious assault, in violation of R.C. 2903.11(A)(1) and (2) in Count 17 (Kanaan) and Counts 32 and 33 (Stewart). He was also convicted of kidnapping in violation of R.C. 2905.01(A)(2) in Count 15 (Kanaan) in Case No. CR-13-571165 and in Count 3 (Widdi) and Count 4 (Gibson) in Case No. CR-13-571726.

**{¶77}** Finally, in Case No. CR-13-571726, Peterson was convicted of theft in violation of R.C. 2913.02(A)(1) in Count 5 (Widdi) and having weapons while under disability in violation of R.C. 2923.13(A)(2) in Count 8.

**{¶78}** R.C. 2903.01(B), aggravated murder, provides that

> [n]o person shall purposely cause the death of another * * * while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, * * * aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

**{¶79}** A person acts purposely when it is his "specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A). "Purpose," therefore, depends on an intended result. *State v. Orr*, 8th Dist. Cuyahoga No. 100841, 2014-Ohio-4680, ¶ 72.

**{¶80}** Circumstantial evidence can be used to demonstrate purpose or intent. *State v. Martin*, 8th Dist. Cuyahoga No. 91276, 2009-Ohio-3282, ¶ 23. Intent may therefore be ascertained from the surrounding facts and circumstances in the case:

> "[The] surrounding facts and circumstances include the nature of the instrument used, its tendency to end life if designed for that purpose, and the manner in which any wounds were inflicted. A jury can infer intent to kill by the defendant's use of a firearm, an inherently dangerous instrumentality, the use of which is likely to produce death."

*Id.*, quoting *State v. Mackey*, 8th Dist. Cuyahoga No. 75300, 1999 Ohio App. LEXIS 5902 (Dec. 9, 1999); *see State v. Tibbs*, 1st Dist. Hamilton No. C-100378, 2011-Ohio-6716, ¶ 48 (shooting victim in the face and head from close range during the course of aggravated robbery demonstrated a specific intent to kill).

**{¶81}** Under R.C. 2903.02(B), felony murder, "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree[.]"

**{¶82}** R.C. 2911.01, aggravated robbery, states that

> (A) [n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall:
>
> (1) [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
>
> * * *
>
> (3) [i]nflict, or attempt to inflict, serious physical harm on another.

**{¶83}** Under R.C. 2903.11(A), felonious assault, "[n]o person shall knowingly * * * (1) [c]ause serious physical harm to another * * *, or (2) [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

**{¶84}** R.C. 2905.01(A)(2), kidnapping, provides that "[n]o person, by force, threat, or deception, * * * shall remove another from the place where the other person is found or restrain

the liberty of the other person * * * [t]o facilitate the commission of any felony or flight thereafter."

**{¶85}** Under R.C. 2913.02(A)(1), theft, "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [w]ithout the consent of the owner or person authorized to give consent."

**{¶86}** Finally, R.C. 2923.13(A)(2), having weapons while under disability, provides as follows:

> Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

**{¶87}** Ohio's complicity statute provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." R.C. 2923.03(A)(2). Under R.C. 2923.03(F), a person who is guilty of complicity in the commission of an offense "shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated * * * in terms of the principal offense."

**{¶88}** As previously stated by this court in *State v. Langford*, 8th Dist. Cuyahoga No. 83301, 2004-Ohio-3733, ¶ 20, 21:

> In order to constitute aiding and abetting, the accused must have taken some role in causing the commission of the offense. *State v. Sims*, 10 Ohio App.3d 56, 10 Ohio B. 65, 460 N.E.2d 672 (1983). "The mere presence of an accused at the scene of the crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor." *State v. Widner* (1982), 69 Ohio St.2d 267, 269, 431 N.E.2d 1025, 1027. * * * 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, 245-246, 2001-Ohio-1336, 754 N.E.2d 796. "Such intent may be inferred from the circumstances surrounding the crime." *Id.* at 246, 754 N.E.2d 796.
>
> Aiding and abetting may be shown by both direct and circumstantial evidence, and participation may be inferred from presence, companionship, and conduct before and after the offense is committed. *State v. Cartellone*, 3 Ohio App.3d 145, 150, 3 Ohio B. 163, 444 N.E.2d 68 (1981), citing *State v. Pruett*, 28 Ohio App.2d 29, 34, 273 N.E.2d 884 (1971). Aiding and abetting may also be established by overt acts of assistance such as driving a getaway car or serving as a lookout. *Id.* at 150, 444 N.E.2d 68. *See State v. Trocodaro*, 36 Ohio App.2d 1, 301 N.E.2d 898 (1973).

**{¶89}** An unarmed accomplice can be convicted of an underlying felony, along with a firearm specification, based on an aider and abettor status. *Howard*, 8th Dist. Cuyahoga No. 97695, 2012-Ohio-3459, at ¶ 24; *State v. Chapman*, 21 Ohio St.3d 41, 487 N.E.2d 566 (1986). The same principle applies to a conviction for having weapons while under disability in violation of R.C. 2923.13(A)(2). *State v. Adams*, 8th Dist. Cuyahoga No. 93513, 2010-Ohio-4478, ¶ 16 (finding that the appellant "constructively" possessed the weapon where there was an accomplice relationship between the physical possessor and the accomplice).

**{¶90}** Upon our review, we find that there was ample evidence to support Peterson's convictions. The testimony and the evidence clearly established that Peterson was complicit in a crime spree that involved aggravated murder, aggravated robbery, kidnaping, felonious assault, guns, and theft.

**{¶91}** The evidence established that the group of men would "scope [each] place out" for purposes of committing a robbery, and each accomplice had his own role in the crime.

Regarding the crimes committed at the Gas USA and the Ya-Ya Market, the evidence showed that Mongo distracted the store's clerk, Coleman pulled the gun on the clerk, and Peterson drove the getaway car. Several witnesses identified Peterson's gold Explorer outside the Ya-Ya Market, which was the only vehicle Peterson was known to have driven and was the only vehicle at the scene of the crime. The evidence also clearly shows that guns were used to facilitate each crime, the victim died from a gunshot wound, and Peterson received a portion of the money obtained from the crime.

**{¶92}** Peterson also argues that there was insufficient evidence to support a conviction for having weapons while under disability in Case No. CR-13-571726 because the verdict form indicated that Peterson had a prior conviction for possession of cocaine from Cuyahoga County and "there was no evidence presented or stipulated to at trial that would support the conclusion that [Peterson] had a prior conviction * * * in Cuyahoga county." We note, however, that the record reflects that Peterson has a prior conviction for drug possession in *Lake* county and the jury was instructed accordingly. The jury instructions correctly identified Peterson's prior conviction "in the court of common pleas, Lake county, Ohio case no. 09CR000100" for "the crime of possession of cocaine, in violation of R.C. 2925.11 of the state of Ohio." Moreover, counsel has stipulated to the prior conviction. The clerical error contained on the verdict form does not support Peterson's argument that there was insufficient evidence of a prior conviction.

**{¶93}** Regarding the crimes committed at the Union Beverage, the evidence established that the men were planning to rob someone that evening, and once inside the store, Peterson had identified a potential target with a lot of cash. The evidence also shows that Peterson shot the victim while instructing an accomplice to go through the victim's pockets, the victim died from a .45 caliber gunshot, and Peterson possessed a .45 caliber handgun.

**{¶94}** Peterson claims that the only evidence of his involvement in the crimes "comes from self-serving testimony of the co-defendants and their loved ones; all who have reasons to lie." The credibility of the witnesses, however, is an issue primarily for the trier of the facts, and a jury is free to believe all, some, or none of the testimony of each witness appearing at trial. And, in fact, the jury was instructed to evaluate the testimony of the accomplices "and to determine its quality and worth or its lack of quality and worth."

**{¶95}** In viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt. We therefore find sufficient evidence to support Peterson's convictions. We further find that after reviewing the entire record, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice. Therefore, Peterson's convictions are not against the manifest weight of the evidence.

**Consulting with Attorney**

**{¶96}** Peterson claims in his fifth assignment of error that the trial court erred when it prohibited him from consulting with his attorney during the trial, specifically, on cross-examination, while allowing another witness to consult with his counsel during the witness's testimony. He argues that the "inconsistent" orders prejudiced him in front of the jury, especially in light of the state's questions that suggested Peterson's attorneys told him how to act.

**{¶97}** The scope of cross-examination lies within the sound discretion of the trial court and is viewed in relation to the particular facts of the case. *State v. Cannon*, 8th Dist. Cuyahoga No. 100658, 2014-Ohio-4801, ¶ 15, citing *State v. Acre*, 6 Ohio St.3d 140, 145, 451 N.E.2d 802 (1983). The exercise of such discretion will not be disturbed absent an abuse of that discretion. *Id.*

**{¶98}** The Sixth Amendment of the Constitution of the United States provides the right of counsel in all criminal prosecutions. *State v. Kajoshaj*, 8th Dist. Cuyahoga No. 76857, 2000 Ohio App. LEXIS 3642, * 11, 12 (Aug. 10, 2000). "The essence of this right is the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial." *Id.*, citing *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Michigan v. Harvey*, 494 U.S. 344, 349, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990).

**{¶99}** A defendant's Sixth Amendment right to counsel can be infringed if the trial court prevents the defendant from consulting with counsel during an overnight recess. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 95, citing *Geders v. United States*, 425 U.S. 80, 91, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). A defendant does not, however, have a constitutional right to consult with an attorney about testimony while testifying. *Conway* at ¶ 96, citing *Perry v. Leeke*, 488 U.S. 272, 284-285, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). "[W]hile a defendant has an absolute right to consultation before he begins to testify, a trial judge can decide that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the defendant an opportunity to consult with his or her attorney." *Id.*, citing *Perry* at 281-282.

**{¶100}** Here, the trial court had discretion to prohibit Peterson from consulting with his attorney during his testimony. Peterson argues, however, that allowing Mongo to consult with his attorney during his testimony was inconsistent and therefore prejudicial to Peterson. We disagree. Mongo was not a party to this case; he was a witness. And the court permitted Mongo to consult with his attorney as part of his Fifth Amendment privilege against self-incrimination because Mongo was Peterson's codefendant. Moreover, there was no objection to allowing Mongo to consult with his attorney while on the stand. Furthermore, the

record shows that the trial court prohibited other non-party witnesses from consulting with their attorneys during their testimony. The trial court therefore did not apply its orders inconsistently.

**{¶101}** Peterson's fifth assignment of error is overruled.

**Cross-Examination**

**{¶102}** In his sixth assignment of error, Peterson claims that the trial court improperly limited his cross-examination of a witness. He argues that the state engaged in new areas by questioning Ayed Kanaan regarding the color of the getaway car and how the conditions outside may have affected the appearance of the car's color. Peterson also argues that the trial court improperly allowed the state to conduct recross beyond the scope of redirect examination when the prosecutor asked Peterson about his need for glasses.

**{¶103}** Evid.R. 611(B) states that cross-examination shall be permitted on all relevant matters and matters affecting credibility. As previously stated, the scope of cross-examination is within the sound discretion of the trial court. *Cannon*, 8th Dist. Cuyahoga No. 100658, 2014-Ohio-4801, at ¶ 15. "Cross-examination of a witness is a matter of right, but the 'extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court.'" *State v. Green*, 66 Ohio St.3d 141, 147, 609 N.E.2d 1253 (1993), quoting *Alford v. United States*, 282 U.S. 687, 691, 51 S.Ct. 218, 75 L.Ed. 624 (1931). The right of cross-examination includes the right to impeach a witness's credibility. *Id.*

**{¶104}** The trial court's discretion extends to recross-examination. *State v. Smith*, 10th Dist. Franklin No. 06AP-1165, 2007-Ohio-6772, ¶ 21, citing *State v. Faulkner*, 56 Ohio St.2d 42, 46, 381 N.E.2d 934 (1978). A trial court must, however, allow recross-examination if new areas are examined on redirect examination. *Id.*

**{¶105}** Here, Peterson claims the court erred when it prohibited his recross-examination of Ayed Kanaan, specifically arguing that the court unfairly limited his examination regarding the color of the getaway car. The record shows that the state asked the witness if there was a difference in the color from the video of the inside of the store as opposed to the color of the outside video. Peterson, however, stated in a sidebar conference that he "wanted to speak about the fact that the two individuals who robbed the store went in different directions." The court denied Peterson's request, stating that there was no new material addressed on redirect. We cannot find the trial court abused its discretion in prohibiting Peterson's recross in this regard.

**{¶106}** Additionally, Peterson appeals the trial court's allowance of the state's recross-examination of Peterson. During cross-examination, the state inquired of Peterson's need for glasses. Defense counsel did not object. On recross, the prosecutor showed Peterson an exhibit that depicted a picture of Peterson and asked if Peterson recognized it. Peterson acknowledged it was a picture of himself, and he admitted that he was not wearing glasses in the picture. Again, there was no objection. Here, the state inquired of Peterson's glasses for impeachment purposes. This type of questioning was within the scope of recross-examination, and the trial court did not abuse its discretion in allowing the questions.

**{¶107}** Peterson's sixth assignment of error is overruled.

## Improper Comments

**{¶108}** Peterson claims in several assignments of error that the state made improper comments, and he argues that the trial court erred by overruling defense counsel's objections to the comments. We will address these arguments together.

### A. Opinions on Credibility

**{¶109}** In his fourth assignment of error, Peterson claims that the state repeatedly shared its opinion with the jury that Peterson was lying; Isha lied during parts of her testimony; and Mongo, Coleman, and Fredericy testified truthfully. He cites to five areas of the transcript in support of his argument, four of which are contained within the prosecutor's closing argument. Peterson claims that the alleged improper comments "amounted to plain error and/or counsel's failure to object to them" resulted in ineffective assistance of counsel.

**{¶110}** Generally, Ohio courts allow prosecutors considerable latitude in closing arguments, commenting freely on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *Lott*, 51 Ohio St.3d at 165, 555 N.E.2d 293, quoting *State v. Stephens*, 24 Ohio St.2d 76, 82, 263 N.E.2d 773 (1970). Nevertheless, they must "avoid insinuations and assertions calculated to mislead" and they may not express their personal beliefs or opinions regarding the guilt of the accused or allude to matters not supported by the evidence. *Id.* at 166. Prosecutors may, however, fairly comment on the credibility of witnesses based on the witnesses' testimony at trial. *State v. Williams*, 8th Dist. Cuyahoga No. 90739, 2012-Ohio-1741, ¶ 12. In that regard, courts must review the prosecutor's statement within the context of the entire trial, rather than take the comments out of context and give them their most damaging meaning. *Id.*, citing *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996).

**{¶111}** In reviewing a claim of prosecutorial misconduct, we must determine whether the comments and questions by the prosecution were improper and, if so, whether they prejudiced appellant's substantial rights. *State v. Smith*, 14 Ohio St.3d 13, 14-15, 470 N.E.2d 883 (1984). An appellate court should only reverse a conviction if the effect of the misconduct "'permeates the entire atmosphere of the trial.'" *State v. Gibson*, 8th Dist. Cuyahoga No. 98725, 2013-Ohio-4372, ¶ 99, quoting *State v. Tumbleson*, 105 Ohio App.3d 693, 699, 664 N.E.2d 1318

(12th Dist.1995). "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 92, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

**{¶112}** The trial court's control over the latitude afforded counsel during closing argument is discretionary and will not be overturned on appeal absent an abuse of discretion. *State v. Grice*, 8th Dist. Cuyahoga No. 97046, 2012-Ohio-1938, ¶ 32, citing *State v. Walters*, 9th Dist. Medina No. 2775-M, 1998 Ohio App. LEXIS 4615 (Sept. 30, 1998).

**{¶113}** Ordinarily, when the defense attorney fails to object to alleged prosecutorial misconduct, he waives all but plain error. *State v. Robinson*, 8th Dist. Cuyahoga No. 99290, 2013-Ohio-4375, ¶ 78. Plain error exists only if the outcome of the trial clearly would have been otherwise but for the error. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 95, 372 N.E.2d 804 (1978).

**{¶114}** The plain error standard differs, however, from the ineffective assistance of counsel standard. *State v. Seeley*, 7th Dist. Columbiana No. 2001 CO 27, 2002-Ohio-1545, ¶ 38; *State v. Murphy*, 91 Ohio St.3d 516, 559, 747 N.E.2d 765 (2001) (Cook, J., concurring). A defendant's claim that his counsel was ineffective for failing to object eliminates the requirement that an objection be made in order to preserve an error for appeal. *State v. Carpenter*, 116 Ohio App.3d 615, 621, 688 N.E.2d 1090 (2d Dist.1996). Because Peterson claims that his trial counsel was ineffective for failing to object, we will not apply the plain error standard to this argument.

**{¶115}** In order to establish a claim of ineffective assistance of counsel, Peterson must prove (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Ohio, every properly licensed attorney is presumed to be competent and, therefore, a defendant claiming ineffective assistance of counsel bears the burden of proof. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

**{¶116}** Counsel's performance will not be deemed ineffective unless and until the performance is proven to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Iacona*, 93 Ohio St.3d 83, 105, 752 N.E.2d 937 (2001). Furthermore, decisions on strategy and trial tactics are generally granted wide latitude of professional judgment, and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers. *State v. Gau*, 11th Dist. Ashtabula No. 2005-A-0082, 2006-Ohio-6531, ¶ 35, citing *Strickland*. Courts must generally refrain from second-guessing trial counsel's strategy, even where that strategy is "questionable," and appellate counsel claims that a different strategy would have been more effective. *State v. Jalowiec*, 91 Ohio St.3d 220, 237, 744 N.E.2d 163 (2001).

**{¶117}** Here, Peterson objects to the prosecutor's comments during Peterson's cross-examination when he is shown the video taken at Union Beverage. Earlier on cross-examination, and upon viewing the video, Peterson identified himself in the video, and the following examination occurred:

> Q: O.K. You walk in. And now you are sizing [Sean Stewart] up, isn't that correct?

A: No, sir, that's not true.

Q: That is a lie?

A: That is a lie.

Q: You didn't see that big wad of money in his hand?

A: No, sir, I did not.

* * *

Q: So when you look up and down, that's not you looking at him with this big wad of money in his hand?

A. No, sir, I'm stepping past the box on the floor.

* * *

Q: And you are not lying?

A: No, sir, I'm not lying.

Q: We will come back to that.

**{¶118}** The prosecutor then, indeed, returned to Peterson's testimony regarding "stepping past the box" moments later, when he continued to show Peterson the video:

Q: This is the line where there is something on the floor you had to walk around, correct?

A: That is correct.

Q: There is nothing on that floor.

A: Because —

Q: Because somebody moved it?

A: I don't know what somebody did with it, sir.

Q: We can watch the entire video. Nobody goes in that line to move anything.

A: Well, I would watch that entire video to prove that.

Q: You are lying. Do you understand that?

A: I'm not lying to you, sir, at all * * *.

Q: Okay. So it just happens that there's nothing there on that floor where you tell us there is?

A: Correct, sir. As in that tape right there.

* * *

Q: You looked up and down to look at Sean Stewart, isn't that correct?

A: No, sir, that is not true at all. I didn't even know Sean Stewart and I didn't even notice him in that store.

**{¶119}** In light of the foregoing exchange, we find nothing improper about the prosecutor's statement. The prosecutor's statement was made in the context of how Peterson's testimony was inconsistent with what the video images depicted.

**{¶120}** The remaining alleged improper comments were made during closing arguments.[1] First, the prosecutor stated, "Isha Jackson * * * [c]learly lied to limit Torrance Johnson's exposure. * * * For some reason she tried to exclude him from being around these guys that night of Sean Stewart's murder." This comment was made in the context of advising the jury that they have heard inconsistent statements, explaining that "[n]o two people that view an event view it exactly the same way. * * * They were concentrating on different things. They might minimize certain individual's interactions." Here, Isha testified that Peterson and his

[1]In support of his argument that the prosecutor made several improper comments during trial, Peterson references pages in the transcript, rather than specific comments or statements made. Therefore, we can only presume what comments contained within the transcript Peterson found improper.

accomplices came to her house after TJ had left; however, TJ testified that he and the others arrived together. The prosecutor noted what the witness's testimony included and invited the jury to examine what reasonable inferences may be drawn from such testimony.

**{¶121}** Peterson next refers this court to a portion of defense counsel's closing argument in which Peterson's own attorney stated, "[B]oth of the prosecutors said Isha is a liar. I'm sorry, [one of them] says she minimized. That sounds like a nice way of saying that she's a liar." According to the record, this comment is attributed to defense counsel and his interpretation of what the prosecutor said; it is not an improper comment actually made by the prosecutor.

**{¶122}** Peterson then directs this court to page 1973 of the transcript, which in large part, consists of the following comments made by the prosecutor:

> Reasonable doubt is not all doubt. You have to use your common sense and your life experiences here.
>
> At the end of the day you are going to have one question to answer. * * * Do you believe Damon Peterson, or do you believe the witnesses who came in for the state of Ohio? That's it. That's what it boils down to. Who got up on the stand and lied.
>
> Mr. Peterson took a long time talking about people, and what they said. But is
>
> that what they said on the stand in this courtroom?

**{¶123}** Again, we find nothing improper about the prosecutor's comments. The prosecutor is asking the jury to consider the character, quality, and consistency of the witnesses, based upon the witnesses' testimony at trial, in order to determine their credibility. The prosecutor's comments direct the jury to "[m]ake your decision," explaining that the jury must "test these people to see if they're telling the truth."

**{¶124}** Finally, the prosecutor stated in closing, regarding Peterson's testimony, "And he is supposed to get on the stand and tell the truth. And what does he do? He lies. And I submit

to you he lies." He followed this statement by explaining to the jury, "It's your decision. You make your decision whether or not he's lying." The prosecutor then questioned aloud, "Why would you lie?" Thereafter, the prosecutor questioned Peterson's testimony regarding the box, "Why lie about the box? Why is that important? * * * [t]hat tape is crucial * * * because it shows the before of what happened that day." In this portion of the transcript, the prosecutor was not opining as to Peterson's credibility; rather the prosecutor properly commented regarding Peterson's credibility in light of his testimony at trial, particularly noting how Peterson's testimony about "stepping past the box" differed from the evidence presented by the video taken at Union Beverage, which showed no box.

**{¶125}** Moreover, we cannot say that the above comments deprived Peterson of a fair trial. In considering these remarks in the context of the entire trial, we cannot find that but for the above comments, the outcome of the proceeding would have been different.

**{¶126}** Having found that the prosecutor's remarks would not have changed the outcome of the trial, we cannot say that Peterson was prejudiced by his defense counsel's failure to object. Peterson's ineffective assistance of counsel claim therefore fails, and his fourth assignment of error is overruled.

**B. Right to Remain Silent**

**{¶127}** In his seventh assignment of error, Peterson claims that the trial court erred when it overruled his objections to the prosecutor's improper comments concerning Peterson's invocation of his right to remain silent and his right to counsel. Specifically, he argues that the state suggested to the jury that he was "dancing around police questioning" because he invoked his right to counsel and his right to remain silent. We do not agree.

**{¶128}** A prosecutor cannot critically comment on a defendant's exercise of his right to remain silent. *State v. Hough*, 8th Dist. Cuyahoga No. 91691, 2011-Ohio-2656, ¶ 7. A prosecutor's comment concerning an accused's Fifth Amendment privilege against self-incrimination "does not constitute a constitutional violation unless the comments are intended to imply that the accused's silence is evidence of guilt." *State v. Brown*, 5th Dist. Muskingum No. CT2013-0004, 2013-Ohio-3608, ¶ 36, citing *Lakeside v. Oregon*, 435 U.S. 333, 338-339, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978).

**{¶129}** In support of his argument, Peterson points to pages 1773 through 1775, which consists of the prosecutor's cross-examination of Peterson regarding audiotaped statements he made to the police, as well as the prosecutor's comments in closing. On cross-examination, the prosecutor asked Peterson if the detectives gave him an opportunity to speak about Union Beverage:

> Q: They asked if you had ever been there. And you said, yeah.
> A: Yes.
>
> Q: And you danced around the question, didn't you?
>
> A: No.
>
> * * *
>
> Q: I'm not going to say anything further, right?
>
> A: Right.
>
> Q: You didn't dance around that question?
>
> A: No, I did not.
>
> Q: No? They asked you, were you ever at the Union liquor store with these guys? And that wasn't danced?
>
> A: I answered that question, and they asked me seven times more.

**{¶130}** Just prior to these questions, the prosecutor asked Peterson to explain his statements regarding "Vel." The prosecutor asked Peterson, "You didn't tell the police who Vel was, isn't that correct? They asked you * * * and you said, I don't know. He's my brother, but I don't know his name. Isn't that correct?" Peterson responded, "I don't recall." In order to refresh Peterson's recollection, the prosecutor played the audiotape of Peterson's statements. Thereafter, the prosecutor inquired again of "Vel":

Q: This is the same Vel you told us, Lavelle Rucker, today or yesterday, isn't that correct?

A: That's correct.

* * *

Q: So when the police asked you if you knew his last name, you were lying to them, isn't that correct?

A: That is not correct.

Q: You just found out your brother's name?

A: I knew Vel since I been incarcerated * * *.

Q: So you just found out his name?

A: Not just today. I been in here for a long time, sir.

Q: Okay, but you didn't tell the detectives when they asked you who Vel was when they asked you? Yes or no. Did you tell them who Vel was?

A: Not at that time, sir.

**{¶131}** We find, in light of the record before us, that the prosecutor was not commenting on Peterson's "silence." Rather, the prosecutor questioned Peterson regarding the statements that he did, in fact, make.

**{¶132}** And in closing argument, the prosecutor stated:

> You heard the snippets of Dame's questioning with police. Do you recall that? And Dame didn't explain himself. He testified the first time he had a chance to explain himself. You heard that.
>
> When he is on the stand, the first time that Dame had a chance to explain himself
>
> and his actions that night was on this stand.

These comments that "Dame didn't explain himself" were made in reference to the fact that Peterson finally had the chance to explain himself on the stand at trial and the jury should consider his testimony compared with the testimony of others. The comments were not intended to imply that Peterson's lack of an earlier silence is evidence of his guilt. The trial court therefore did not err in overruling defense counsel's objection.

**{¶133}** Peterson's seventh assignment of error is overruled.

**C. Leading Questions**

**{¶134}** In his eighth assignment of error, Peterson claims that the trial court erred by overruling objections to various leading questions asked by the state. In support of his argument, Peterson cites, in a lengthy parenthetical, to 34 pages of the transcript during which the state allegedly asked leading questions of its witnesses.

**{¶135}** A "leading question" is "'one that suggests to the witness the answer desired by the examiner.'" *State v. Powell*, 8th Dist. Cuyahoga No. 99386, 2014-Ohio-2048, ¶ 51, citing *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 138. Evid.R. 611(C) provides that leading questions "should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." Leading questions are generally permitted, however, on cross-examination and "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." *Id.* The trial judge has discretion to allow leading questions on direct examination. *Powell*.

**{¶136}** Following a thorough review of the record, we find that the trial court did not abuse its discretion in permitting the questions asked by the state.

**{¶137}** Peterson's eighth assignment of error is overruled.

**Other Acts and Prejudicial Evidence**

**{¶138}** In his ninth assignment of error, Peterson claims that he was deprived of a fair trial when "other acts" evidence and irrelevant prejudicial evidence was admitted, namely gang references and statements regarding an uncharged robbery. He further argues that his trial counsel was ineffective for failing to object to the admission of such evidence.

**{¶139}** A trial court has broad discretion in admitting or excluding evidence, and a trial court's ruling on the admissibility of evidence will be upheld absent an abuse of discretion and a showing of material prejudice. *In re H.A.I.*, 8th Dist. Cuyahoga No. 97771, 2012-Ohio-3816, ¶ 52, citing *State v. Martin*, 19 Ohio St.3d 122, 129, 483 N.E.2d 1157 (1985). An error in an evidentiary ruling does not warrant reversal of the trial court's judgment "unless the trial court's actions were inconsistent with substantial justice and affected the substantial rights of the parties." *State v. Azbell*, 5th Dist. Fairfield No. 04CA11, 2005-Ohio-1704, ¶ 151.

**{¶140}** Under Evid.R. 402, only relevant evidence is admissible. Evid.R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Although relevant, evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403. Unfair prejudice is "that quality of evidence which might result in an improper basis for a jury decision." *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 24.

**{¶141}** Generally, "evidence that an accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime or that he acted in conformity with bad character." *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 15, citing *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975).

**{¶142}** Evid.R. 404(B), "other acts," provides that 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." Such evidence may, however, be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

**{¶143}** R.C. 2945.59, which provides certain exceptions to the common law regarding the admission of evidence of other acts of wrongdoing, provides that

> [i]n 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.

*State v. Terry*, 8th Dist. Cuyahoga No. 100813, 2014-Ohio-4804, ¶ 64.

**{¶144}** In support of his argument regarding gang references, Peterson parenthetically lists 19 pages of the transcript that purportedly contain gang references. Our review of the

transcript, however, reveals that the allegedly improper evidence to which Peterson cites was properly admitted.

**{¶145}** First, defense counsel himself elicited numerous gang references on cross-examination of several of the state's witnesses (tr. 595, 678, 852, 1015, 1050, 1579, 1629, 1630, 1643) and on Peterson's direct examination (tr. 1683, 1684, 1687), thus opening the door to discussions relating to gang involvement. The state, in response to defense counsel's line of questioning, asked for clarification from Mongo and Lane regarding their own gang involvement (tr. 604, 610, 692). None of the witnesses testified that Peterson was involved in a gang.

**{¶146}** Next, Peterson cites to two pages of the transcript in which Agent Burke testified regarding his job duties on the violent crime task force (tr. 1326), stating that his duties included investigating pattern incident violent crimes, such as pattern robberies, murders associated with robberies, gang associations, or "multiple people working together to [commit] robberies." Agent Burke also testified as to how his task force became involved in the investigation into Peterson, Coleman, Mongo, Lane, and TJ (tr. 1329). His limited reference to "gang associations" was clearly limited to a portion of what he does as an agent on the task force, which happened to include gang investigation. His testimony made no reference to any type of gang involvement or affiliation by Peterson. Agent Burke also testified that he investigates "pattern robberies" and robberies involving murder and "multiple people working together to [commit] robberies," which would have explained why he was involved in this aggravated robbery/aggravated murder investigation.

**{¶147}** Finally, Peterson cites to two portions of the transcript that contained gang references made by defense counsel during the sentencing hearing. Clearly, such statements

could not have "improperly tainted [Peterson's] character" where the jury had already rendered its verdict.

**{¶148}** In light of the foregoing, we find the gang references cited by Peterson do not constitute improper "other acts" testimony as contemplated and prohibited under Evid.R. 404(B). The testimony was not admitted in order to show Peterson's propensity or inclination to commit the charged crimes or that he acted in conformity with bad character. *Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, at ¶ 15. Further, we do not find the jury could have been confused or mislead by such testimony. Nor do we find that Peterson was unfairly prejudiced by the testimony. Evid.R. 403.

**{¶149}** Peterson also claims that the state improperly elicited testimony regarding an uncharged robbery that he allegedly committed and that he allegedly brandished a gun at a child. In support of the latter claim, however, Peterson cites to his own counsel's cross-examination of Lane, during which defense counsel asked Lane why he did not like Peterson. Lane responded that Peterson pointed a loaded weapon at his stepson. He later explained on redirect that Peterson "was playing with him." Peterson's argument regarding this testimony is therefore not well taken.

**{¶150}** In support of his argument that the state improperly elicited testimony regarding an uncharged robbery, Peterson cites to testimony from Lane and Coleman, both of whom testified regarding a robbery they had committed. In response to the prosecutor's question, "[D]o you have any knowledge * * * if anybody had a gun at the Union liquor store?" Lane replied, "Yes * * * me, Darrell Coleman, Damon Peterson, [and] Steven Mongo." The prosecutor then asked Lane if he knew who fired his gun on the day of the Union Beverage robbery, to which he replied, "Damon Peterson." Thereafter, the prosecutor asked Lane if he

knew how Peterson obtained the gun, to which Lane replied, "He got it off a robbery that me and him committed."

**{¶151}** Coleman also testified regarding a previous robbery:

Q: Now, just like with Gas USA, can you tell us who was involved in the [Ya-Ya] incident?

A: Me, Steven Mongo, and Damon Peterson.

Q: And what were you guys doing prior to coming to this area?

A: We was just coming from up by Dame's way. We had just robbed somebody.

**{¶152}** The state then questioned Coleman about the shooting at Union Beverage:

Q: And at one point in your testimony you said Dame pulls out a gun (indicating)?

A: Yes.

Q: Did you know that Dame was carrying a weapon that day?

A: Yes.

Q: Do you know what kind of a weapon he was carrying?

A: A Glock * * * 45.

* * *

Q: How do you know that it was a .45 caliber weapon?

A: Because I know that he had it, and I was with him when we robbed the person that he got the gun from.

Q: So he was involved in another robbery where he got that gun?

A: Yeah.

**{¶153}** Thereafter, on redirect, the prosecutor questioned Coleman:

Q: You committed a lot of robberies, is that correct?

A: Correct.

Q: I mean, this is a span of months of committing robberies from May through October, isn't that correct?

A: Correct.

Q: And the people on this board, State's exhibit 777, they were all involved in different robberies with you; is that correct?

A: Correct.

**{¶154}** Finally, TJ testified regarding a robbery that he committed on October 19, 2012, before the robbery at Union Beverage, along with Peterson, Coleman, Lane, and Mongo. He stated that he obtained a .45 caliber handgun from the robbery, which Peterson then took into his possession. He continued to testify that he saw Peterson with a black .45 caliber handgun the day of the shooting at Union Beverage.

**{¶155}** We find the foregoing evidence was properly admitted to prove the identity, motive, and plan of the defendant. The testimony established evidence of a common scheme or pattern in committing robberies involving the same individuals or group of individuals; the crimes were geographically linked; and the robberies occurred within a short time of each other, with at least two occurring on the same day. The evidence was not offered to show that Peterson had the propensity to commit the charged crimes. Moreover, testimony about how Peterson illegally obtained a gun is admissible identity evidence in a case alleging a shooting where the gun purchase is part of the plan to carry out the shooting. *See State v. Kelley*, 1st Dist. Hamilton No. C-140112, 2014-Ohio-5565, ¶ 5. And here, the evidence showed that the gun Peterson obtained from a previous robbery was the gun used on October 19, 2012, at Union Beverage.

**{¶156}** We further find that even if the "other acts" evidence was improperly admitted, its admission would be harmless because we find that the outcome of the trial would have been the

same, in light of the overwhelming evidence presented at trial. *State v. Marquand*, 8th Dist. Cuyahoga No. 99869, 2014-Ohio-698, ¶ 59, citing Crim.R. 52(A) and *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 88. Peterson was therefore not deprived of his constitutional right to a fair trial because of the admission of the evidence of uncharged robberies.

**{¶157}** Peterson also argues that defense counsel's failure to object to the "other acts" evidence resulted in ineffective assistance of counsel. As previously stated, in order to establish a claim of ineffective assistance of counsel, Peterson must prove (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Having found that the challenged testimony was properly admitted, we cannot say that Peterson was prejudiced by his defense counsel's failure to object. His ineffective assistance of counsel claim therefore fails.

**{¶158}** Peterson's ninth assignment of error is overruled.

## Sentence

### A. Allied Offenses

**{¶159}** Peterson claims that the trial court should have merged the aggravated murder of Duane Jacobs (Count 8) with aggravated robbery at the Ya-Ya Market (Count 13). Likewise, he also claims that the trial court should have merged the aggravated murder of Sean Stewart (Count 26, renumbered 19) with the aggravated robbery of Sean Stewart (Count 30, renumbered 23).

**{¶160}** Our review of an allied offenses question is de novo. *State v. Webb*, 8th Dist. Cuyahoga No. 98628, 2013-Ohio-699, ¶ 4, citing *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28.

**{¶161}** R.C. 2941.25(A) provides that when the defendant's conduct can be construed to constitute two or more allied offenses, he may be indicted for all such offenses but may be convicted of only one. On the other hand, if the defendant's conduct was separately committed or committed with a separate animus as to each act, then the defendant may be convicted of all the offenses. R.C. 2941.25(B). This statute protects the constitutional right against double jeopardy, thus prohibiting multiple punishments for the same offense. *State v. Robinson*, 8th Dist. Cuyahoga No. 99917, 2014-Ohio-2973, ¶ 53, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23.

**{¶162}** In *State v Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme Court of Ohio clarified that when considering whether two offenses are allied offenses, the conduct of the accused must be considered. First, the court must determine whether it is possible to commit one offense and commit the other with the same conduct. *Johnson* at ¶ 48. If that is possible, then the court must determine whether the offenses were, in fact, committed by the same conduct — a single act, committed with a single state of mind. *Id*. at ¶ 49; *State v. Eaton*, 8th Dist. Cuyahoga No. 100147, 2015-Ohio-170, ¶ 9. "If the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶ 51.

**{¶163}** Before *Johnson*, the Supreme Court of Ohio has repeatedly held that aggravated murder is not an allied offense of similar import to an underlying aggravated robbery. *State v. Rembert*, 8th Dist. Cuyahoga No. 99707, 2014-Ohio-300; *State v. Coley*, 93 Ohio St.3d 253, 264-265, 2001-Ohio-1340, 754 N.E.2d 1129 (2001), citing *State v. Reynolds*, 80 Ohio St.3d 670, 681, 687 N.E.2d 1358 (1998); *State v. Smith*, 80 Ohio St.3d 89, 117, 684 N.E.2d 668 (1997).

*Johnson*, however, did not change the analysis. In looking to the defendant's conduct, Ohio courts have recognized that the offenses of aggravated robbery and aggravated murder do not merge where the force used to effectuate the murder is far in excess of that required to complete the robbery or the defendant had a separate intent to kill the victim. *State v. Miller*, 8th Dist. Cuyahoga No. 100461, 2014-Ohio-3907 (aggravated murder and aggravated robbery did not merge because degree of force and location of bullet showed a separate intent to kill apart from committing robbery); *Robinson*, 8th Dist. Cuyahoga No. 99917, 2014-Ohio-2973; *State v. Jackson*, 2d Dist. Montgomery No. 24430, 2012-Ohio-2335; *see also State v. Velez*, 8th Dist. Cuyahoga No. 101303, 2015-Ohio-105 (involuntary manslaughter and aggravated robbery do not merge where the stabbing was an additional act of such excessive force that it went beyond being the same conduct necessary to rob the victim and it was an act of harm that had a separate animus and was unnecessary to the commission of the robbery).

**{¶164}** Here, the record demonstrates that the force used to effectuate the aggravated murder of Duane Jacobs at the Ya-Ya Market was far in excess of that required to complete the robbery that it went beyond the same conduct necessary to commit the robbery. Coleman jumped on the counter to gain access to the cash register. He then jumped off the counter and exited the store. Coleman returned moments later, exchanging gunfire with the store's clerk, in order to help Mongo escape. Coleman's actions clearly demonstrate separate intents.

**{¶165}** The record also shows that Peterson committed two separate acts with a separate animus when he shot Sean Stewart at Union Beverage. Peterson held Stewart at gunpoint outside Union Beverage in attempt to rob him. After Stewart pushed Peterson, smacked at his gun, and began to run away, Peterson fired three or four shots at Stewart. The shooting began after the botched robbery attempt, demonstrating a separate animus in his actions.

**{¶166}** In light of the above, the court properly determined that the aggravated robberies and aggravated murders above were not allied offenses.

**B. Consecutive Sentences**

**{¶167}** Peterson claims that the trial court erred by imposing consecutive sentences to a life sentence, arguing that the imposition of such a sentence constituted cruel and unusual punishment.

**{¶168}** Although the Eighth Amendment to the Constitution of the United States prohibits the infliction of cruel and unusual punishment, this constitutional prohibition has been historically limited to barbaric punishment or punishment that is disproportionate to the offense so as to "shock the moral sense of the community." *State v. Johnson*, 8th Dist. Cuyahoga No. 80436, 2002-Ohio-7057, ¶ 119, citing *Robinson v. California*, 370 U.S. 660, 675, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962). A sentence that falls within the statutory guidelines is not excessive and does not constitute cruel and unusual punishment. *Id.*, citing *McDougle v. Maxwell*, 1 Ohio St. 2d 68, 203 N.E.2d 334 (1964); *State v. Accorinti*, 12th Dist. Butler Nos. CA2012-10-205 and CA2012-11-221, 2013-Ohio-4429, ¶ 21.

**{¶169}** Here, Peterson does not argue that any of his individual prison sentences were outside of the statutory sentencing guidelines, that the trial court improperly ordered those sentences served consecutively, or that any of the individual sentences amount to cruel and unusual punishment for his offenses. Rather, Peterson contends that the imposition of a sentence of 30 years to life ordered to be served consecutively to a life sentence serves only to inflict cruel and unusual punishment. This argument is insufficient to demonstrate a cruel and unusual punishment.

**{¶170}** The record shows that each of Peterson's individual prison terms is within the statutory range. Trial courts have full discretion to impose a prison sentence within the statutory range for each offense. *State v. Flagg*, 8th Dist. Cuyahoga Nos. 95958 and 95986, 2011-Ohio-5386, ¶ 16. And where the individual sentences imposed on an offender are within the statutory range and do not amount to cruel and unusual punishment, an aggregate prison term resulting from the consecutive imposition of those sentences does not constitute cruel and unusual punishment. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 23; *Flagg* at ¶ 15.

**{¶171}** Lastly, we find nothing shocking about the specific terms of the sentence and the reasoning for the sentence. Here, an individual who engaged in a violent crime spree received a lengthy prison sentence because he was convicted of multiple offenses, including two aggravated murders, four aggravated robberies involving a firearm, three kidnappings, three felonious assaults, and theft. The fact that the trial court ordered the two life sentences to be served consecutively does not change the appropriateness of the sentence imposed. Peterson's sentence, therefore, is not cruel or unusual.

**C. Imposition of a Fine**

**{¶172}** Finally, Peterson claims that the trial court abused its discretion when it imposed a fine of $20,000 on Count 26 (new 19), the aggravated murder of Sean Stewart, without considering his inability to pay.

**{¶173}** A trial court has broad discretion when imposing financial sanctions upon a defendant, and an appellate court will review the trial court's decision for an abuse of discretion only. *State v. Schneider*, 8th Dist. Cuyahoga No. 96953, 2012-Ohio-1740, ¶ 9, citing *State v. Weyand*, 7th Dist. Columbiana No. 07-CO-40, 2008-Ohio-6360, ¶ 7. An abuse of discretion

implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶174}** R.C. 2929.02 governs the penalties for the crime of aggravated murder, including the imposition of a fine. It provides that "[w]hoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code * * * may be fined an amount fixed by the court, but not more than twenty-five thousand dollars." R.C. 2929.02(A). The statute also provides that the court shall not impose a fine for aggravated murder or murder that "exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death." R.C. 2929.02(C). The burden is on the offender to demonstrate his indigency. *State v. Smith*, 8th Dist. Cuyahoga Nos. 69799, 70451, 71643, 1997 Ohio App. LEXIS 4892, * 23 (Nov. 6, 1997).

**{¶175}** Here, Peterson claims that the trial court erred when it imposed a $20,000 fine on the aggravated murder charge without first considering his inability to pay. Peterson, however, failed to demonstrate on appeal that he filed an affidavit of indigency, nor was there sufficient evidence presented that Peterson was, in fact, indigent. Although the record shows that Peterson was declared indigent by the trial court for purposes of assigned counsel, being declared indigent for purposes of assigned counsel and being declared indigent for purposes of avoiding the imposition of a fine require separate and distinct determinations. *State v. Gibson*, 8th Dist. Cuyahoga No. 82087, 2003-Ohio-5839, ¶ 23, citing *State v. Stearns*, 8th Dist. Cuyahoga No. 71851, 1997 Ohio App. LEXIS 4562 (Oct. 9, 1997).

**{¶176}** In light of the above, because Peterson has not provided this court or the trial court with evidence that he is indigent and cannot pay the fine, we cannot say that the trial court abused its discretion in imposing the $20,000 fine on the aggravated murder conviction.

**{¶177}** Peterson's tenth assignment of error is overruled.

**{¶178}** Judgment affirmed.

It is ordered that appellee recover of 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 convictions 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.

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TIM McCORMACK, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MARY J. BOYLE, P.J., CONCUR