[Cite as *State v. Webster*, 2016-Ohio-2624.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102833

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JULIUS WEBSTER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, MODIFIED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-585728-B

BEFORE: Jones, A.J., E.T. Gallagher, J., and Keough, J.

RELEASED AND JOURNALIZED: April 21, 2016

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

BY: Erika B. Cunliffe
Cullen Sweeney
Assistant Public Defenders
310 West Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

BY: Kevin R. Filiatraut
Christopher D. Schroeder
Assistant Prosecuting Attorneys
The Justice Center, 8th and 9th Floors
1200 Ontario Street
Cleveland, Ohio 44113

PER CURIAM:

{¶1} Defendant-appellant, Julius Webster ("Webster"), appeals his convictions and sentence. He raises the following twelve assignments of error:

> 1. The trial court denied Julius Webster a fair trial when it failed to sever three unrelated cases and thereby caused Webster undue prejudice.
>
> 2. The trial court violated Julius Webster's rights to due process and a fair trial by allowing the prosecution to taint the jury by repeatedly exposing it to irrelevant and highly prejudicial information about his affiliation with a notorious street gang.
>
> 3. The trial court violated Julius Webster's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments as established in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), along with his rights to due process and equal protection, when it permitted the prosecution to exercise a peremptory challenge to remove a prospective African-American juror based on her race.
>
> 4. The trial court erred in finding that the state proved beyond a reasonable doubt in the Stark County robbery (Counts 10 and 11) and in instructing the jury that, as a matter of law, the state had proven venue on those two counts.
>
> 5. The state failed to present legally sufficient evidence to support a conviction for obstructing justice (Count 20).
>
> 6. Julius Webster's murder conviction (Count 4) should be vacated because the jury acquitted him on the underlying felonious assault and the trial court violated his right to due process when it denied his motion pursuant to Crim.R. 29(C)(3) in light of that development.
>
> 7. Defendant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution because counsel failed to elicit evidence at trial of non-compliance with the statutory photo lineup procedures in R.C. 2933.83, and failed to request a jury instruction related to that non-compliance.

8. Webster's rights to due process and a fundamentally fair trial were violated by the prosecutor's improper remarks during closing argument.

9. The trial court improperly admitted a witness's out-of-court statement made during a police interview in violation of the rules of evidence and Webster's state and federal right of confrontation.

10. The trial court violated defendant's state and federal due process right to a fair trial when it improperly provided a flight of "consciousness of guilt" instruction without sufficient factual basis to support such an instruction.

11. Defendant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution due to a series of errors committed by counsel.

12. The trial court's conduct of this trial evidences a bias that violated Webster's right to the presumption of innocence and a fair trial.

{¶2} We find some merit to the appeal, reduce Webster's obstruction of justice conviction on Count 20 to attempted obstruction of justice, and remand the case to the trial court solely for resentencing on Count 20. We affirm the trial court's judgment in all other respects.

I. Facts and Procedural History

{¶3} In May 2014, Webster was charged with several violent offenses in a 23-count indictment. The indictment was comprised of four separate incidents under an umbrella theory that Webster committed each offense in furtherance of his criminal gang, the Heartless Felons.

{¶4} Count 1 alleged that Webster participated in a criminal gang with codefendants Robert Porter, Dawayne Arnold, Derrick Durden, and Lakia Golston, in violation of R.C. 2923.42(A), from June 17, 2013 to December 6, 2013. Webster was

also charged with aggravated murder, murder, multiple counts of aggravated robbery, having a weapon while under disability, felonious assault, tampering with evidence, escape, obstructing justice, retaliation, and intimidation of a crime victim or witness. Many charges included firearm, repeat violent offender, and gang activity specifications.

{¶5} Webster filed pretrial motions, including a motion to suppress evidence, a motion to sever counts in the indictment, and a motion in limine. In the motion to suppress, Webster sought to exclude evidence of an eyewitness' identification of Webster in a photo lineup. In the motion to sever counts, Webster argued many the counts were unrelated to one another, and that joinder of unrelated criminal offenses was unfairly prejudicial.

{¶6} In the motion in limine, Webster sought to prevent the state from arguing and presenting evidence of his involvement in the Heartless Felons. Webster asserted that, in the event the court overruled his motion to sever counts, he would bifurcate all gang-related activity counts and specifications, as well as the having weapons while under disability offenses, and try them to the court. Webster sought to preclude the jury from hearing any evidence that would suggest he was a member of a gang.

{¶7} The trial court denied Webster's motion for severance, and partially granted his motion in limine. In the journal entry denying Webster's motion to sever counts, the court stated:

> Defendant's motion for severance is denied. * * * Following review and a hearing, the court has determined that the offenses are properly joined in this matter. The offenses share a commonality with regard to temporal proximity, were committed while the defendant was being sought on escape

> charges out of Cuyahoga County, and arguably fall under the umbrella of being committed as part of gang activity as charged in the indictment. The court believes that this satisfies the "course of criminal conduct" factors stated in Crim.R. 8. As such, the motion is denied.

The court's journal entry on the motion in limine states, in relevant part:

> The state of Ohio will be permitted to make limited reference to the Heartless Felons organization as that information relates to relationships between various characters involved in the events involved in the instant matter and to show what it believes to be a motive for committing the crimes alleged in the indictment. The state may utilize whatever evidence it deems appropriate to do so but subject to review via objection by the Defendant during the course of the trial.
>
> The state will not be permitted to introduce evidence to a jury regarding the prior convictions of the defendant (unless Defendant chooses to testify) and other alleged members of the Heartless Felons, any expert testimony regarding the specifics of the organization or any other evidence specifically designated for purposes of proving the counts of the indictment that relate solely to gang participation. As above, this ruling is also subject to review and revision by the Court during the course of the trial.

Following the court's rulings, the cases proceeded to a jury trial where the following evidence was presented.

{¶8} On August 10, 2013, two men, armed with guns, robbed the B&B Mart located at 623 Cherry Street in Canton, Ohio. After the men left, Eric Brunner ("Brunner"), a store employee, gave police a description of the suspects and told them that one of the robbers went behind the counter, pushed him to the ground, and held a gun to his head. Brunner also told police that the second gunman fired a shot into the ceiling. The robbers collected cash, cigarettes, lighters, and other merchandise in trash bags.

{¶9} There was a video cassette recorder ("VCR") surveillance system in the store, and a VCR behind the cashier's counter. The robber behind the counter pulled the VCR

out and attempted to remove the tape, but was unsuccessful. Consequently, he threw Brunner into the shelf, causing everything to fall on the ground. Patrolman Scott Jones ("Ptl. Jones") of the Canton Police Department, responded to the scene and later testified at trial that the appearance of the store was consistent with Brunner's description of the events.

{¶10} The surveillance camera captured the robbery on video, but the picture was not clear, and the men's faces were covered with bandanas. However, the robber behind the counter was wearing a blue and white hat that caught the attention of Detective David Fitzgerald ("Det. Fitzgerald") of the Canton police department. Det. Fitzgerald testified that as part of his investigation, he compared clothing found near the vicinity of the store with clothing worn by the robbers in the video. Det. Fitzgerald surmised the robbers threw hats, bandanas, and other items away after the robbery to avoid detection. A blue and white hat found near the store matched the appearance of the hat worn by the person in the video, who attempted to remove the tape from the VCR.

{¶11} Investigators discovered one of Webster's fingerprints on the VCR. They also found a loaded nine-millimeter semiautomatic handgun lying behind a tire in the store's parking lot. DNA analysts tested swabs taken from the gun and live rounds. Webster's fingerprints were not found on these items. However, they found a "mixture" of DNA on the swab taken from the trigger of the gun that contained DNA with a "very distinct" profile of an unidentified man. Webster's DNA was found on the sweatband

inside the blue and white hat and in a spot of blood on the outside of the hat. The store owner, Muhammed Ali, testified that Webster was a regular customer at the store.

{¶12} Thirteen days after the robbery at the B&B Mart, an individual named Rodtez Woody ("Woody") was robbed of his SUV at the Sunoco gas station located at the corner of East 110th Street and St. Clair Avenue. Woody testified that a man came up behind him and choked him while he was pumping gas. Another man held something in his back that Woody believed to be a gun. After the men drove off in the SUV, Woody called 911. Police responded to the scene and located the car later that same day. Police also dusted the vehicle for fingerprints and found Webster's fingerprints on the back window above the gas tank. Another fingerprint recovered from the other side of the car belonged to codefedant Dawayne Arnold. There was also evidence that Webster's cell phone was used at cell towers in the vicinity of the crime.

{¶13} Five days later, an individual named Curtis Marks, Jr. ("Marks") was shot and killed outside the Club Fly Hygh on Superior Avenue near East 71st Street. Marks's friend, Demetrius Thomas ("Thomas"), testified that in the early morning hours of August 29, 2013, he went to the Club Fly Hygh where he happened to meet Marks. At some point in time, Marks and Thomas left the bar and went across the street to smoke a cigar. Shortly thereafter, a man Thomas recognized as Robert Porter ("Porter"), a.k.a. "Pistol Pete," approached them with another man Thomas had never seen before. The man was later identified as Webster.

{¶14} Referring to Thomas, Porter told Webster, "there's Bobo's uncle right there." Webster asked Thomas if that was true, and Thomas confirmed that he was in fact the uncle of a man who goes by the nickname "Bobo." Following this brief exchange, Webster ordered Marks to "give it up," and warned "I'm going to count to three." Marks laughed and said he did not have anything. However, when Webster began counting, Marks told him his "stuff" was "in his drawers." Porter removed items from Marks's pants and pockets. Although the men had Marks's belongings in their possession, Webster continued counting, and at the count of "three," he shot Marks in the side of his chest at point blank range. Neither Webster nor Porter robbed Thomas even though he had $4,700 on his person. After the shot, Webster and Porter walked toward East 71st Street. Porter's girlfriend, Myranette Bradford ("Bradford"), testified that she and Webster's girlfriend, Lakia Golston ("Golston"), drove Porter and Webster home at the end of the night.

{¶15} Later that morning, Thomas went to see Marks at MetroHealth Hospital and learned he had died. A few hours later, Thomas made a written statement to Cleveland police and identified Porter as being involved in the incident, but indicated Porter was not the shooter. Thomas told police the shooter was 5 feet 11 inches to 6 feet tall, with "real low, almost bald hair, a mustache and a little fuzz on his chin, wearing a burgundy hoodie." During his testimony, Thomas clarified that by "burgundy" he meant a shade of "red."

{¶16} Police showed Thomas a "six pack" photo array that did not include a picture of Webster. Thomas concluded that one of the individuals in the array "favor[ed] the shooter," but he was unable to identify the shooter in the lineup. When Thomas was later presented with a second photo array that included Webster, Thomas identified Webster as the shooter.

{¶17} Golston testified that she was with Webster at the Club Fly Hygh on the night of August 28, 2013, into the early morning hours of August 29, 2013. Golston often communicated with Webster through text messages and through their respective Instagram accounts. Golston's Instagram account name was "Queen Kiece," and Webster's was "Man of Loyalty." Golston identified several photographs that were taken on her cell phone or posted on Instagram. One photograph, identified as state's exhibit No. 151, depicted Webster and Porter and was taken on the night of Marks's murder. The picture shows Webster wearing a red hoodie.

{¶18} Golston also identified Webster's handwriting on several letters and envelopes. She testified that Webster sometimes used numeric codes when writing to her. One of the letters was addressed to her in an envelope in someone else's handwriting with the return address from someone named "Robert Marsh" in the Cuyahoga County jail. The letters inside the envelope were written in Webster's handwriting and contained the kind of coded messages Golston had seen Webster use in the past. Golston never received these letters because they were intercepted by officers in the jail.

{¶19} Sergeant Phillip Christopher ("Sgt. Christopher") of the Cuyahoga County Sheriff's Office also testified at trial. He was in charge of jail visitation, phone calls, and mail, and testified that, pursuant to a subpoena, all of Webster's non-attorney mail was monitored by officers in the jail. An officer with extensive knowledge in codes, cracked the numeric code Webster used in his letters and gave Sgt. Christopher a cipher, which he used to decode Webster's letters. A letter previously identified by Golston, stated, in relevant part:

> Now listen, it's a few things I need you to handle. Call 'cuz D and ask him did he get that letter and did he do what I asked of him. If not, we got to get in contact with your son Webbie * * * and tell him he is on my indictment. * * * The poison ass n[---]a is Rodtez Woody. Your son supposed to know boy boy so no more need to be said.
>
> * * *
>
> Well, I am about to end this meeting of the minds. I love you * * *. Be careful what you write me and don't write back to the name on the lope. Write to me.

(Tr. 1890-1891.)

{¶20} Another letter read, in relevant part:

> O-Dog, what up young. How you holdin'. I hoping you moving in a manner of a G. The streets talkin' and they speaking bad upon your name like you about to do the unthinkable. I can't believe it so I will be at court to witness what's what. But other than that everybody good out there. We still movin as one. You know the team. We all mad that ya'll in there but we all will be back at it soon. As them people watching we can't risk puttin name and address on shit but just know the team rooting for ya'll. Stay up my n[---]a on your ten toes.
>
> Real n[---]a signing off.
>
> Below this language, the letter stated:

> My Queen, rewrite this and send it to O-Dog, Robert Porter. Fake name and address on the lope. Oh, yeah, send this other letter to Mitch, Malcolm Wilson, number 650-268.

{¶21} Sgt. Christopher further testified that Porter was in the county jail at the time this letter was confiscated and copied. Although Webster was in jail with Porter simultaneously, there was a separation order that prevented the two men from coming into contact with each other.

{¶22} Detective Ray Burant ("Det. Burant"), a member of the U.S. Marshall Violent Fugitive Task Force, along with another officer, arrested Webster and Golston in Parma, on October 23, 2013. While Det. Burant was sitting in the passenger seat of the vehicle that transported Webster and Golston to the county jail, he overheard Webster tell Golston, "Don't worry, there won't be a trial because there won't be any witnesses." (Tr. 1835.) After Det. Burant told Webster to be quiet, Webster whispered to Golston, "[D]on't worry, aint nobody going to say anything." (Tr. 1835.)

{¶23} Det. Alfred Johnson ("Det. Johnson"), of the Cleveland Police Gang Impact Unit, testified before the jury in a limited fashion. He acquired knowledge of the Heartless Felons, including the identities of several of its members, from his various investigations, but did not discuss any specific details of those investigations in front of the jury. Det. Johnson explained that the Heartless Felons use certain terms when speaking to one another that have a meaning for them that a common person would not understand.

{¶24} Det. Johnson explained that the phrase "no more need be said" means either that an order has been executed or will be executed. Webster used this phrase in his letter to Golston that seemed to make reference to an order that was previously given to gang members to murder Rodtez Woody to prevent him from testifying at trial. The phrase "the unthinkable" means that someone is going to snitch. In the letter, Webster asked Golston to rewrite and send to Porter, Webster tells Porter he knows Porter is thinking of "doing the unthinkable." The phrase "shooting a movie" refers to either a shooting or a robbery.

{¶25} According to Det. Johnson, the Heartless Felons also have a strict code of conduct. One of their rules prohibits a member from "shooting a movie" against another member or the family of another member. Although Det. Johnson did not testify specifically about Thomas, the implication was that Porter and Webster did not rob Thomas because he was the uncle of another Heartless Felons member known as Bobo.

{¶26} The case was submitted to the jury at the end of the state's case. While the jury deliberated, the court heard evidence related to Webster's gang activity, his use of firearms while under disability, and the escape charge. Officer Tony Luketic ("Officer Luketic") of the Adult Parole Authority, testified that he supervises gang members on postrelease control. Officer Luketic became Webster's parole officer upon his release from prison in December 2012. At the time of trial, he was supervising between 30 and 40 members of the Heartless Felons. Officer Luketic testified that Webster stopped

reporting to him in June 2013, and a warrant was issued for his arrest on June 17, 2013. Webster was not arrested until October 2013.

{¶27} Sgt. Christopher discussed some of Webster's other letters that were intercepted in the mail that openly discussed Webster's involvement in the Heartless Felons. In one letter addressed to an Ohio prison inmate named Malcolm Wilson, he discussed concepts such as loyalty and honor and stated, "When I resurrect on them * * * our presence going to be so powerful when we all back at that roundtable I can only hope the streets prepared for what's to come."

{¶28} Det. Johnson presented a PowerPoint presentation detailing the structure of the Heartless Felons and identified specific leaders within the gang's hierarchy. Det. Johnson identified Antonio Peterson, a.k.a L.A. Pone, as the president of the Heartless Felons. He has the title "Godfather." Below the Godfather, there are "Head N[----]s In Charge" or "HNIC," five star generals, bosses, underbosses, and godsons, etc. Each particular rank has a specific role in the gang and answers to people above them in the chain of command. For example, bosses supervise 200 or more members and must finance "the family." (Tr. 2428.) Underbosses keep track of all the bosses and are responsible for carrying out "hits" ordered by the Godfather. Godsons must be present at all meetings and carry out hits on unruly members. (Tr. 2428.) If a member breaks a rule, a godson may place the offending member on a disciplinary plan. (Tr. 2428.) A general is an aggressive person who carries out all hits ordered by the high counsel. Chief of soldiers "shed the most," which means they shed the most blood. (Tr. 2428.)

{¶29} Det. Johnson defined other terms commonly used by the Heartless Felons that were not defined for the jury. The phrase "based on a true story" means that a member has been disloyal and gives a loyal member permission to assault or even kill the disloyal member. The words "Blatt Blatt" or "bbllaaatttt," which are meant to mimic the sound of a machine gun, indicate something is going to happen. Earlier in the trial, a witness named Robert Ivory ("Ivory") testified that he observed a man wearing a red hoodie, standing by a car outside Club Fly Hygh, on the night of Marks's murder. Ivory heard a voice call "Black Black or something like that," and the man by the car, whom Ivory did not know, acknowledged those words.

{¶30} Det. Johnson described specific gang activities. He explained that the Heartless Felons make money for their organization by committing robberies and burglaries and selling illegal guns and drugs. They also raise money by presenting live concerts and selling T-shirts. Det. Johnson referred to previously authenticated text messages in which Webster instructed others to "hit a lick," which means "commit a robbery." Webster also advised other members about scheduled meetings via text messages while traveling between Canton and Cleveland between August 1, 2013 and October 1, 2013.

{¶31} On August 12, 2013, Webster engaged in a lengthy text message exchange with an apparently new member, Derrick Durden ("Durden"). Durden demonstrated his knowledge and loyalty to the gang by reciting important historical dates, recounting the gang's 10 golden rules, and the Heatless Felons' prayer. Webster later called Durden

from the jail on November 27, 2013, seeking his assistance in alerting Dawayne Arnold that he was indicted for the aggravated robbery against Rodtez Woody. According to Det. Johnson, Webster used his Instagram page to communicate with members and thereby further the interests of the gang. On his Instagram account, Webster referred to two of his closest members, Lewis Arnold and Dawayne Arnold, as a "bloodline of bosses."

{¶32} Det. Johnson identified specific leaders of the gang and their assigned territories. One was in charge of the East 30th and Cedar area before going to prison. Another member controlled upper St. Clair and the Lakeshore area. Julius Webster controlled the lower St. Clair and Canton areas. Det. Johnson presented certified copies of indictments and judgments of conviction of each of these members to show their pattern of criminal gang activity.

{¶33} Based on this evidence, the court found Webster guilty of all gang-related counts and specifications, and having weapons while under disability charges. The jury found Webster guilty of the aggravated robbery and murder of Curtis Marks, with one- and three-year firearm specifications, the aggravated robbery of the B&B mart in Canton, with one- and three-year firearm specifications, and attempted tampering with evidence in Canton, with one- and three-year firearms specifications. The court found Webster guilty of gang and repeat violent offender specifications attendant to the aggravated robbery and murder charges.

{¶34} The court sentenced Webster to an aggregate 99 years to life in prison on all counts and specifications. Webster now appeals his convictions and sentence.

II. Law and Analysis

A. Severance of Counts

{¶35} In the first assignment of error, Webster argues the trial court erred in failing to grant his motion to sever counts in the indictment.

{¶36} Under Crim.R. 8(A), 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." Indeed, "'[t]he law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged are of the same or similar character.'" *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990), quoting Crim.R. 8. *See also State v. Dean*, Slip Opinion No. 2015-Ohio-4347, ¶ 59.

{¶37} However, if it appears that a defendant would be prejudiced by the joinder, a trial court may grant a severance pursuant to Crim.R. 14. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 94. To prevail on a claim that the trial court erred in denying a motion for severance, the defendant must affirmatively demonstrate that (1) his rights were prejudiced, (2) at the time of the motion to sever, he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) given the information provided to the court, it abused its discretion in refusing to separate the charges for trial. *State v.*

Schaim, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992), citing *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981), syllabus.

{¶38} The state may rebut a defendant's claim of prejudicial joinder in two ways. First, a defendant is not prejudiced by joinder if the evidence would have come in as other acts evidence under Evid.R. 404(B). *Lott*, 51 Ohio St.3d 160 at 163, 555 N.E.2d 293. Under the second method, the state is not required to meet the stricter "other acts" admissibility test, but is simply required to show that evidence of each crime joined at trial is simple and direct. *Id*., citing *State v. Roberts*, 62 Ohio St.2d 170, 175, 405 N.E. 2d 247 (1980); *Torres*. Thus, a defendant is not prejudiced by joinder where the joined offenses are "'simple and direct, so that a jury is capable of segregating the proof required for each offense.'" *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377, ¶ 39, quoting *State v. Fletcher*, 2d Dist. Clark No. 2003-CA-62, 2004-Ohio-4517, ¶ 41. *See also Lott* at 163.

{¶39} There was separate and distinct evidence to establish Webster's guilt as to each offense. The owner and store clerk of the B&B Mart and Canton police officers testified about the robbery that occurred there. Canton detectives testified that one of Webster's fingerprints was found on the VCR behind the counter, and his DNA was found on a hat discovered outside the B&B Mart that was identical to the hat worn by the robber who attempted to remove the tape from the VCR. The jury could not confuse this evidence with evidence of the offenses that occurred in Cleveland.[1]

[1] The question of whether Cleveland was the appropriate venue for the

{¶40} The robbery of Rodtez Woody's vehicle and the robbery and murder of Marks occurred at different locations on different days and involved different actors and witnesses. Investigators found Webster's and Dawayne Arnold's fingerprints on Woody's vehicle. By contrast, the evidence establishing Webster's guilt with respect to Marks's murder came from eyewitness testimony as well as Webster's admissions in the letters he attempted to send to his girlfriend and other members of the Heartless Felons.

{¶41} Webster committed each of these crimes while on postrelease control and while there was a warrant out for his arrest for failing to report to his parole officer. Evidence showed that the Heartless Felons fund their organization, in part, through robberies and burglaries. Indeed, bosses have a duty to finance the family, and evidence showed that Webster was the head of the St. Clair and Canton territories. Thus, a reasonable inference could be made that Webster committed the robbery in Canton for the purpose of funding the Heartless Felons.

{¶42} There was separate and distinct evidence to support each count in the indictment. Moreover, the evidence showed that the offenses shared a common purpose, motive, or scheme, and were thus part of the kind of course of criminal conduct contemplated by Crim.R. 8. Under these circumstances, we cannot say the trial court abused its discretion in denying Webster's motion to sever counts in the indictment.

{¶43} Therefore, the first assignment of error is overruled.

B. Bifurcated Counts

Canton robbery is the subject of the fourth assignment of error.

{¶44} In the second assignment of error, Webster argues the trial court violated his constitutional rights to due process and a fair trial by allowing the jury to hear highly prejudicial information about his affiliation with the Heartless Felons. He contends that because he bifurcated all charges and specifications related to gang activity, there was no reason for the jury to hear any evidence pertaining to the Heartless Felons whatsoever. He contends any evidence of gang activity was irrelevant and unfairly prejudicial.

{¶45} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, syllabus. We, therefore, will not disturb the trial court's judgment absent an abuse of discretion.

{¶46} Relevant evidence is admissible unless prohibited by an evidentiary rule, statute, or constitutional provision. Evid.R. 402. Evid.R. 403(A) provides that 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. Although most evidence presented by the state is prejudicial, not all evidence is unfairly prejudicial. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215 ¶ 107. The court must balance the prejudicial effect of evidence against its probative value.

{¶47} Evid.R. 404(B) provides that evidence of other acts is inadmissible to prove that the accused acted in conformity with his bad character. However, evidence of prior "bad acts" may be admitted for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evid.R.

404(B). *See also* R.C. 2945.59 (a correlating statute). These exceptions must be construed against admissibility. *State v. Coleman*, 45 Ohio St.3d 298, 299, 544 N.E.2d 622 (1989), *cert. denied*, 493 U.S. 1051, 110 S.Ct. 855, 107 L.Ed.2d 849 (1990).

{¶48} However, if other acts evidence tends to establish an exception, it can be presented even if it negatively affects the defendant's character. *See State v. Jamison*, 49 Ohio St.3d 182, 185, 552 N.E.2d 180 (1990); *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), paragraph one of the syllabus.

{¶49} Evidence of gang membership undoubtedly creates some risk of unfair prejudice. *See United States v. Jobson*, 102 F.3d 214, 219 (6th Cir.1996), fn. 4. Nevertheless, the Ohio Supreme Court has held that evidence of a defendant's gang affiliation is admissible pursuant to Evid.R. 404(B) to show motive. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 170. This is particularly the case where "the interrelationship between people is a central issue." *Id.*, quoting *United States v. Gibbs*, 182 F.3d 408, 430 (6th Cir.1999).

{¶50} Ideally, all evidence of Webster's gang affiliation would be excluded. However, the state has every right to establish a relationship between the relevant actors, if necessary to prove its case. Moreover, the trial court did not give the state carte blanche to introduce any and all evidence of Webster's gang activities. The court specifically excluded evidence of Webster's prior convictions and "any expert testimony regarding specifics of the organization or any other evidence specifically designated for purposes of proving the counts in the indictment that relate solely to gang participation."

(Journal Entry dated Jan. 9, 2015, R. at 60.) Thus, the court only allowed the state to make limited reference to the Heartless Felons (1) as it related to relationships between people involved in the non-gang offenses, and (2) to show what it believed was the motive for committing the crimes alleged in the indictment.

{¶51} Some evidence of Webster's gang involvement was necessary to prove the non-gang-related charges. For example, the state introduced evidence of Webster's letters to Golston and his November 27, 2013 jailhouse call to Derrick Durden to show his consciousness of guilt. One of the letters seemed to allude to an order to murder Rodtez Woody so there would be no witnesses to testify about that robbery. As previously stated, Webster attempted to warn Porter in a letter not to testify against him at trial. The letters, which required decoding, were written in gang lingo that had to be translated so the jury could understand them.

{¶52} Similarly, evidence of Webster's text messages and phone calls were necessary to prove Webster's locations at the time each crime was committed. The photograph taken on Golston's phone an hour before Marks was murdered was necessary to show that Webster was wearing a red hoodie at the time of Marks's murder as described by eyewitnesses. These pieces of evidence were probative of Webster's guilt and explained Webster's motive for the crimes. They were, therefore, admissible under Evid.R. 404(B).

{¶53} Accordingly, the second assignment of error is overruled.

C. Peremptory Challenge

{¶54} In the third assignment of error, Webster argues the trial court erred when it allowed the prosecutor to exercise a peremptory challenge to remove a prospective African-American juror on account of her race. He contends the peremptory challenge violated his constitutional rights to due process and equal protection in violation of *Batson v. Kentucky* , 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

{¶55} In *Batson*, the United States Supreme Court held that purposeful discrimination in the use of peremptory challenges to exclude members of a minority group violates the Equal Protection Clause of the United States Constitution. *Id*. at 82. The *Batson* court set forth a three-step procedure for determining whether a peremptory strike violates equal protection.

{¶56} First, the opponent of the peremptory strike must make a prima facie case of racial discrimination. *Id*. at 96. To establish a prima facie case of purposeful discrimination in jury selection, the accused must demonstrate (1) that members of a recognized racial group were peremptorily challenged, and (2) that the facts and circumstances raise an inference that the prosecutor used the peremptory challenge to exclude the jurors because of their race. *Id*.

{¶57} Second, if the trial court finds that the opponent has set forth a prima facie case, then the proponent of the strike must come forward with a racially neutral explanation for the strike. *Id*. at 97-98. However, the "explanation need not rise to the level justifying exercise of a challenge for cause." *Id*. at 97. Finally, if the proponent

puts forth a racially neutral explanation, the trial court must decide, based on all the circumstances, whether the opponent has proven purposeful racial discrimination. *Id*.

{¶58} During the third step of the *Batson* inquiry, the court "must examine the prosecutor's challenges in context to ensure that the reason is not merely pretextual." *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 65. The judge must "assess the plausibility" of the prosecutor's reason for striking the juror "in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam); *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006).

{¶59} A trial court's finding of no discriminatory intent will not be reversed on appeal unless it was clearly erroneous. *State v. Hernandez*, 63 Ohio St.3d 577, 583, 589 N.E.2d 1310 (1992), following *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). This deferential standard arises from the fact that the third step of the *Batson* inquiry turns largely on the trial court's evaluation of credibility. *See State v. Herring*, 94 Ohio St.3d 246, 257, 2002-Ohio-796, 762 N.E.2d 940, citing *Batson*, at 98.

{¶60} Defense counsel objected to the state's peremptory challenge to excuse juror No. 11, arguing her removal would violate *Batson*. Defense counsel explained the basis for the challenge in order to establish a prima facie case of discrimination, stating:

> We have a *Batson* challenge, your Honor. Number One and Number Two are people of color that are excused for cause. The[re] [are] three

> remaining minority jurors. There is no reason for a pattern to be shown, but we are objecting to the removal of No. 11 by the prosecutor.

{¶61} In response, the court stated: "Before I let [the prosecutor] speak, I can think of about a dozen reasons why she would be excused from the panel." (Tr. 724.) The prosecutor then began to argue why there was no *Batson* violation by explaining there was no pattern of discrimination since the first two jurors were excused for cause. He asserted that "race had nothing to do with the for cause reasons they were excused."

{¶62} Before the prosecutor could continue his argument, the trial court interrupted him and stated: "I apologize for the comment. I am just saying that there is plenty of other reasons that I could see her being removed." The court noted defense counsel's objection and proceeded with voir dire without any further discussion.

{¶63} Webster contends the court's failure to allow the state to present a race-neutral reason for excusing juror No. 11 violated *Batson* and constituted a structural error that demands reversal. Webster cites *Rivera v. Illinois*, 556 U.S. 148, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009), to support his argument. However, in *Rivera*, the United States Supreme Court held that a state court's erroneous denial of a peremptory strike did not amount to a deprivation of a defendant's Fourteenth Amendment due process right and was thus subject to harmless error review. *Id.* at 152.

{¶64} We recognize that *Rivera* involved an alleged deprivation of the defendant's exercise of a peremptory challenge, whereas this case involves the state's use of a peremptory challenge to remove a juror, who was a minority. Nevertheless, we find no structural error in the venire process that would warrant reversal in this case.

{¶65} Structural errors are those errors that "'are so intrinsically harmful as to require automatic reversal (i.e., "affect substantial rights") without regard to their effect on the outcome.'" *State v. Hill*, 92 Ohio St.3d 191, 196, 2001-Ohio-141, 749 N.E.2d 274, quoting *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The United States Supreme Court has held that there is "a narrow class of errors" that qualify as structural errors "that are so serious that they defy harmless error analysis. A structural error is a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Lainfiesta v. Artuz*, 253 F.3d 151 (2d Cir.2001), quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

{¶66} The cases in which the Supreme Court has found a structural error are few in number and involve an egregious violation of the defendant's rights that undermined the integrity of the proceeding. *Lainfiesta*, citing *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable doubt instruction); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial

judge). "Errors of this magnitude are per se prejudicial and require that the underlying conviction be vacated." *Lainfiesta* at 157, citing *Neder*, at 8-9.

{¶67} Although the court's interruption precluded the prosecutor from explaining his race-neutral reasons for dismissing juror No. 11, the important fact is that the court allowed Webster to make his prima facie case of discrimination. This is not a case where the court refused to hear the defendant's *Batson* claim. Therefore, Webster was not deprived of due process, and there was no structural error.

{¶68} We recognize, nonetheless, that the court erred in depriving the state of its duty to explain its reasons, but we find this error harmless. As previously stated, the trial court concluded the *Batson* hearing before the state could provide its race-neutral reasons because the court found numerous legitimate reasons for dismissal on its own. The record supports the court's conclusion.

{¶69} During voir dire, juror No. 11 stated that her next door neighbor worked at the Maple Heights jail, and that it would be a "situational thing" whether she could hold police officers to the same standard as lay witnesses regarding their credibility. She also stated she thought a lawyer treated her son unfairly during his personal injury case because he stereotyped him. (Tr. 60.)

{¶70} Juror No. 11 showed some confusion about her responsibility to determine whether the defendant violated any laws. She thought that by deciding guilt or innocence of an individual the state was making her responsible for that person's failure to follow

the law. (Tr. 423-424.) She felt she would not be able to keep the victim's family and the defendant's family out of her mind during deliberations. (Tr. 370-371.)

{¶71} Additionally, juror No. 11 had preconceived ideas about the quality of the evidence that would be presented during the trial. She stated: "[W]hat's most important, that you are not just giving me a piece or two, that you have all it takes to convince me that this is what had been done and there is no chance that just the two pictures can be, you know, cropped and, you know, manipulated." (Tr. 467-468.)

{¶72} Juror No. 11's comments revealed she would have had difficulty remaining fair and impartial. This is an appropriate race neutral reason for seeking to excuse a juror. Nevertheless, Webster contends the court's failure to strictly comply with the three-step analysis described in *Batson* automatically warrants reversal of his convictions pursuant to *State v. Saunders*, 8th Dist. Cuyahoga No. 102731, 2016-Ohio-292.

{¶73} In *Saunders*, the trial court summarily dismissed a *Batson* claim made against the state's first peremptory challenge. The trial court in *Saunders* stated, "this is his only challenge so far. There are a number of other minorities, so there has to be a pattern." On appeal, this court reversed the defendant's conviction pursuant to *Batson*, holding that "[o]nce the defense challenged a juror's dismissal based on the juror's race, it was incumbent on the court to conduct a *Batson* hearing to decide if there was merit to defense counsel's challenge." *Id.* at ¶ 6.

{¶74} We find *Saunders* distinguishable from the facts presented in this case. There was no evidence in *Saunders* suggesting that the excused juror was incapable of

being fair and impartial. Indeed, the court in *Saunders* found that the trial court did not conduct a *Batson* hearing at all. In this case, Webster made his prima facie case of discrimination, and the state presented part of its race-neutral explanation, when the court interrupted and conducted its own analysis based on the evidence. Juror No. 11 showed an inability to be objective and to keep an open mind. Indeed, her premature suspicion that evidence would be "manipulated," coupled with her opinion that the credibility of police officers should be judged according to a different standard than lay witnesses, indicated an unfair prejudice against the state.

{¶75} Although the court's hearing did not strictly comply with the three-step procedure outlined in *Batson*, the hearing was sufficient to protect Webster's right to due process, and any error in procedure was harmless beyond a reasonable doubt.

{¶76} The third assignment of error is overruled.

D. Venue

{¶77} In the fourth assignment of error, Webster argues the trial court erred in finding and instructing the jury that venue had been conclusively established with respect to the offenses that occurred in Canton, which is located in Stark County.

{¶78} R.C. 2901.12 is Ohio's criminal venue statute. R.C. 2901.12(A) sets forth the general rule that a trial in a criminal case shall be held "in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed." "The purpose of the venue requirement is to give the defendant the right to be tried in the vicinity of the alleged criminal activity, and to limit the state

from indiscriminately seeking a favorable location for trial that might be an inconvenience or disadvantage to the defendant." *State v. Koval*, 12th Dist. Warren No. CA2005-06-083, 2006-Ohio-5377, ¶ 9, citing *State v. Rankin*, 12th Dist. Clinton No. CA2004-06-015, 2005-Ohio-6165, ¶ 11.

{¶79} Venue is not a material element of the offense charged. However, it is a fact that must be proved in criminal prosecutions unless it is waived by the defendant. *State v. Headley*, 6 Ohio St.3d 475, 477, 453 N.E.2d 716 (1983). "The standard of proof is beyond a reasonable doubt, although venue need not be proved in express terms so long as it is established by all the facts and circumstances in the case." *Id*.

{¶80} R.C. 2901.12(H) addresses venue where an offender commits offenses in multiple jurisdictions as part of a course of criminal conduct. That section provides, in relevant part:

> (H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:
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> * * *
>
> (2) The offenses were committed by the offender in the offender's same employment, or capacity, or relationship to another.
>
> (3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.
>
> (4) The offenses were committed in furtherance of the same conspiracy.
>
> * * *

> (6) The offenses were committed along the offender's line of travel in this state, regardless of the offender's point of origin or destination.

The trial court has broad discretion to determine the facts that would establish venue. *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, ¶ 144.

{¶81} In this case, there was evidence that members of the Heartless Felons regularly commit robberies and burglaries in order to finance their organization. There was also evidence that Webster was the head of the Stark County chapter of the organization. Indeed, Webster's cell phone records showed that he communicated with gang members regarding upcoming meetings while he was en route to and from Canton around the time of the robbery. Based on this evidence, the court reasonably concluded that Webster, as an agent of the gang, committed the Canton robbery as part of a course of criminal conduct committed for the purpose of funding the Heartless Felons. We find no abuse of discretion in the court's determination that venue was proper in Cuyahoga County. Therefore, we turn to the question of whether Webster waived his right to trial on the issue of venue.

{¶82} As previously stated, venue must be proven beyond a reasonable doubt even though it is not an element of any particular crime, unless it was waived. *Headley*, 6 Ohio St.3d 475 at 477, 453 N.E.2d 716. Webster contends the court deprived him of his right to a jury trial on the issue of venue. However, Webster waived his right to a jury on all gang-related counts and specifications and sought to exclude all evidence of Webster's gang affiliation because such evidence would be unfairly prejudicial. The state would

have needed to introduce additional gang evidence in order for the state to prove that venue was proper. It is impossible for Webster to have it both ways. Thus, Webster waived his right to a jury trial on the issue of venue when he executed a jury waiver on all gang-related counts.

{¶83} Moreover, the weight of the evidence overwhelmingly supports the court's finding, beyond a reasonable doubt, that venue was proper. Therefore, Webster is unable to demonstrate how he was prejudiced by the court's decision to preclude the jury from deciding if venue was proper. We therefore find no error in the court's instruction to the jury that venue for the Stark County offenses was conclusively established.

{¶84} The fourth assignment of error is overruled.

E. Obstruction of Justice

{¶85} In the fifth assignment of error, Webster argues there was insufficient evidence to support Webster's obstruction of justice charge alleged in Count 20 of the indictment.

{¶86} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶87} Count 20 alleged that Webster obstructed justice, in violation of R.C. 2921.32(A)(3), by warning Dawayne Arnold that he was named on the indictment for the robbery of Rodtez Woody. R.C. 2921.32(A)(3) provides, in relevant part:

> No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime * * * shall * * * [w]arn the other person * * * of impending discovery or apprehension.

{¶88} There is no direct evidence proving that Webster's instructions to warn Dawayne Arnold that he was wanted for robbery were actually carried out. In a letter to Golston, Webster instructed her to call "cuz D" to see if he completed a task Webster had asked him to do. Webster further instructed Golston that if he had not completed the task, she should "get in contact with her son Webbie * * * and tell him he is on my indictment." This letter was intercepted by officers in the county jail and never reached Golston.

{¶89} There was also evidence that Webster gave instructions to his new recruit, Derrick Durden during the recorded phone conversation on November 27, 2013, to warn Dawayne Arnold that he was indicted for robbery. There is no evidence that Durden relayed the message to Dawayne Arnold other than a photograph he posted on Instagram on December 20, 2013, that depicted himself with Dawayne Arnold. To assume that Durden must have warned Dawayne Arnold because they were seen together in a photograph would be speculation. Therefore, we agree with Webster that the state failed to present sufficient evidence that Webster committed the act of obstructing justice alleged in Count 20.

{¶90} However, because there was sufficient evidence that Webster attempted to warn Dawayne Arnold that he was named on the indictment, we reduce his judgment of conviction from obstruction of justice in violation of R.C. 2921.32(A)(3) to attempted obstruction of justice pursuant to R.C. 2923.02 and R.C. 2921.32(A)(3). An appellate court has the authority to reduce a conviction to that of a lesser included offense when it is supported by the record. *State v. Addison*, 8th Dist. Cuyahoga No. 96514, 2012-Ohio-260, ¶ 32, citing *State v. Reddy*, 192 Ohio App.3d 108, 2010-Ohio-5759, 948 N.E.2d 454, ¶ 35 (8th Dist.).

{¶91} Accordingly, the fifth assignment of error is sustained only in part because Webster is not entitled to an absolute acquittal on Count 20.

F. Acquittal on the Felonious Assault Charge

{¶92} In the sixth assignment of error, Webster argues his murder conviction alleged in Count 5 should be reversed because the jury acquitted him of the lesser included offense of felonious assault (knowingly cause serious physical harm) alleged in Count 6. He contends the jury's inconsistent verdicts shows that the state failed to prove all the elements of murder beyond a reasonable doubt.

{¶93} Ever since the United States Supreme Court decided the seminal case of *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932), Ohio courts have held that "a verdict that convicts a defendant of one crime and acquits him of another, when the first crime requires proof of the second, may not be disturbed merely because the two findings are irreconcilable." *State v. Gardner*, 118 Ohio St.3d 420,

2008-Ohio-2787, 889 N.E.2d 995, ¶ 81. *See also State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047; *State v. Adams*, 53 Ohio St.2d 223, 374 N.E.2d 137 (1978).

{¶94} In *Dunn*, the court held that "[c]onsistency in the verdict is not necessary." *Id.* at 393. The Supreme Court upheld Dunn's conviction of "maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor," even though that conviction was inconsistent with his acquittals on charges for unlawful possession and unlawful sale of liquor. *Id*. at 391-394. The court explained that lenity is an appropriate jury power, and while a verdict may result from compromise or mistake on the part of the jury, a judge should not upset the verdict by speculation into such matters. *Id*. at 394. The *Dunn* court concluded that the acquittal resulted from the jury's lenity, and therefore, the jury's verdict did not necessarily "'show that they were not convinced of the defendant's guilt.'" *Id*. at 393, quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir.1925).

{¶95} "'[I]nconsistent verdicts — even verdicts that acquit on a predicate offense while convicting on the compound offense — should not necessarily be interpreted as a windfall for the Government at the defendant's expense.'" *Gardner* at ¶ 81, quoting *United States v. Powell*, 469 U.S. 57, 65, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984). Reaffirming the rule established in *Dunn*, the *Powell* court explained:

> [T]he possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest. This possibility is a premise of *Dunn*'s alternative rationale — that such inconsistencies often are a product

> of jury lenity. Thus *Dunn* has been explained by both courts and commentators as a recognition of the jury's historical function, in criminal trials, to check against arbitrary or oppressive exercises of power by the executive branch.
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> * * *
>
> We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error worked against them. Such an individualized assessment of the reason for inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake.
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> * * *
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> Second, respondent's argument that an acquittal on a predicate offense necessitates a finding of insufficient evidence on a compound felony count simply misunderstands the nature of the inconsistent verdict problem. Whether presented as an insufficiency evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper — the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily — and erroneously — argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient. *Powell* at 66-67.

The *Powell* court further observed that defendants receive adequate protection against jury irrationality or error by a sufficiency of the evidence review at the trial and appellate levels. *Powell* at 68.

{¶96} The jury found Webster guilty of Count 5, which states that Webster "did cause the death of John Doe #1, as a proximate result of the offender committing or attempting to commit an offense of violence that is a felony of the first or second degree,

to wit: felonious assault, in violation of Section 2903.02 of the Revised Code." By finding Webster guilty of murder, the jury had to have found that Webster killed the victim by committing a felonious assault upon him. The fact that the jury acquitted Webster of felonious assault in Count 6 is not necessarily inconsistent with its guilty finding of murder in Count 5. The court instructed the jury to consider each count separately. Once the jury found Webster guilty of murder, which included the act of felonious assault, the jury may have considered the felonious assault charge redundant.

{¶97} Therefore the sixth assignment of error is overruled.

G. Prosecutorial Misconduct

{¶98} We discuss the eighth assignment of error out of order because it relates to our analysis of the seventh and eleventh assignments of error, which address Webster's claims of ineffective assistance of counsel. In the eighth assignment of error, Webster argues the prosecutor made improper remarks during closing argument that deprived him of a fair trial. He contends the prosecutor improperly (1) vouched for the credibility of an essential eyewitness, and (2) impugned the efforts of defense counsel.

{¶99} The test for prosecutorial misconduct in closing argument is "'whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.'" *State v. Hessler*, 90 Ohio St.3d 108, 125, 734 N.E.2d 1237 (2000). The touchstone analysis is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). We must not

review the challenged comments in isolation, but in the context of the entire closing argument.

1. Remarks on Witness Credibility

{¶100} Webster contends the prosecutor vouched for Demetrius Thomas's credibility when he stated:

> You saw Demetrius Thomas. You saw him do what the defendant would say is unthinkable. He came to court. He sat in that chair. Demetrius Thomas came up here, swore to tell the truth and did the unthinkable from this chair. He pointed to the defendant and said he is the one who killed my friend. He is the one that counted to three, and they got whatever they got from my friend and he killed him anyway. He said that. He said that from here. He said that in the courtroom. And that is the unthinkable to Julius Webster. Who does that to the Man of Loyalty? People with courage do, ladies and gentlemen, that's who.

{¶101} The concept of doing "the unthinkable" was a common theme throughout the trial. Webster attempted to ask Golston to rewrite a letter to Porter warning him that "the streets are talkin' and they speaking bad upon your name like you about to do the unthinkable." According to Det. Burant, Webster assured Golston there would not be a trial because "there won't be any witnesses" and "ain't nobody going to say anything." When the prosecutor used the term "the unthinkable" in closing argument, he was reminding the jury of these pieces of evidence, which tended to show Webster's consciousness of guilt. Under these circumstances, the remarks about Thomas doing "the unthinkable" were not improper.

{¶102} Moreover, even if the comments were improper, they did not cause prejudice. Since the jury was reminded of this theme several times throughout the trial,

the jury likely made the inference that Thomas was doing "the unthinkable" independent of the prosecutor's remarks.

2. Facts not in Evidence

{¶103} Webster also argues the prosecutor improperly argued facts not in evidence. Webster asserts the prosecutor misled the jury with the unsupported claim that Webster did not live near Club Fly Hygh. However, defense counsel elicited testimony to show that Webster lived in Canton and was a frequent customer of the B&B Mart. Therefore, the prosecutor's remarks regarding where Webster lived were based on evidence in the record.

3. Reference to a Gang Rule

{¶104} Webster also argues the prosecutor misled the jury by arguing that Webster did not rob Thomas because he was an uncle of a member of the Heartless Felons. As previously mentioned, this relationship was discussed in Webster's November 27, 2013 recorded jail call to Derrick Durden. In the recording, Webster is heard telling Durden that the witness of the murder was comrade Bobo's uncle. Det. Johnson testified that Heartless Felons have a rule against robbing or murdering a family member of a Heartless Felons member. In light of all of this evidence, we cannot say the prosecutor acted inappropriately when it pointed those facts out to the jury.

4. Comments on Witness Availability

{¶105} Webster further argues the prosecutor improperly argued to the jury that "Heartless Felons convince witnesses not to appear." In support of this claim, Webster

cites to pages 2339-2341 of the trial transcript. However, those words do not appear on those pages. Rather, the prosecutor recounts the evidence where (1) Webster attempted to warn Porter not to do "the unthinkable," (2) Webster assured Golston there would be no witnesses to testify at trial, and (3) Webster made reference to a "hit" on Rodtez Woody. The state presented this evidence to show Webster's consciousness of guilt. Since the evidence supported the prosecutor's statements, his remarks were not improper.

5. Defense Counsel's Integrity

{¶106} Finally Webster argues the state impugned the efforts and integrity of defense counsel by comparing counsel to a magician and telling the jury he "hop[es] you won't look behind the curtain or where the slight [sic] of hand is happening." The prosecutor also suggested that the defense's theory was "one of those conspiracies against an innocent man" and called the conspiracy "ridiculous" and "absurd."

{¶107} Webster's trial counsel did not object to the prosecutor's remarks. We therefore review this issue for plain error. 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).

{¶108} Webster contends the prosecutor's comments insinuated that defense counsel was hiding the truth from the jury by distracting them with illogical arguments or pieces of evidence. Personal attacks on defense counsel may arise to the level of

prosecutorial misconduct, but we cannot say the comments at issue here constituted misconduct. The prosecutor was merely arguing that defense counsel was distracting the jury from important facts in evidence.

{¶109} Moreover, we cannot say that the remarks, even if improper, would rise to the level of plain error. Although the trial court did not tell the jury to disregard the specific statements, the jury was instructed that the statements made during closing arguments were not to be considered as evidence. The trial court also instructed the jury that it was the sole judge of the credibility of the witnesses. Thus, curative instructions were given.

{¶110} Therefore, the eighth assignment of error is overruled.

H. Ineffective Assistance of Counsel

{¶111} In the seventh and eleventh assignments of error, Webster argues he was denied his Sixth Amendment right to the effective assistance of counsel. In the seventh assignment of error, he contends his trial counsel was ineffective because they failed to elicit evidence at trial of the state's failure to comply with mandatory procedures set forth in R.C. 2933.83 for identification lineups. In the eleventh assignment of error, he argues he did not receive the effective assistance of counsel because his trial counsel committed "a series of errors."

1. Standard of Review

{¶112} To establish a claim for ineffective assistance of counsel, appellant must show that his counsel's performance was deficient and that the deficiency prejudiced his

defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Under *Strickland*, our scrutiny of an attorney's work must be highly deferential, and we must indulge "a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id*. at 688.

2. Photo Identification

{¶113} Webster argues his trial counsel should have advocated for a jury instruction to allow the jury to consider whether the state complied with the procedures prescribed by R.C. 2933.83 for a proper photo identification. He contends the "folder system" described in the statute is a more reliable method of photo identification than the traditional "six pack" array the police used in this case.[2]

{¶114} R.C. 2933.83 governs eyewitness identification procedures in lineups. As relevant here, R.C. 2933.93(B)(1) provides, in part, that "[u]nless impracticable, a blind or blinded administrator shall conduct the live lineup or photo lineup." A blind administrator "means the administrator does not know the identity of the suspect." R.C. 2933.83(A)(2). "If a blind administrator is conducting the live lineup or the photo lineup, the administrator shall inform the eyewitness that the suspect may or may not be in the lineup and that the administrator does not know who the suspect is." R.C. 2933.83(B)(5).

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[2] Trial counsel filed a motion to suppress evidence of the photo identifications in which counsel argued the presentation of the photo array was unduly suggestive, but did not argue the procedure was improper because the police failed to use a "folder system."

{¶115} Failure to strictly comply with R.C. 2933.83 does not necessarily render a pretrial identification procedure impermissibly suggestive. Further, R.C. 2933.83 does not mandate use of the "folder system"; the "folder system" is simply one system that can be used by law enforcement for photo lineups. *State v. Quarterman*, 8th Dist. Cuyahoga No. 99317, 2013-Ohio-4037, ¶ 29. *See also State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2013-Ohio-3722, ¶ 77.

{¶116} At the suppression hearing, Det. Diaz testified that he created the photo arrays, and Det. Entenok served as the blind administrator in presenting the arrays to Thomas. (Tr. 70, 71.) Det. Entenok testified that he advised Thomas that he had no knowledge of the case or who the suspect was, and that the suspect may or may not be depicted in the photographs. Other than these instructions, Det. Entenok had no further discussion with Thomas. The other detectives waited outside the room during the photo identification process.

{¶117} The transcript from the suppression hearing demonstrates that the police complied with the minimum mandatory procedures for photo lineups set forth in R.C. 2933.83. A trial court is not required to give a jury instruction that is not supported by the evidence in the record. *State v. Gary*, 1st Dist. Hamilton No. C-090643, 2010-Ohio-5321, syllabus. Therefore, even if Webster's trial counsel had requested an instruction regarding the photo lineup procedures set forth in R.C. 2933.83, it is doubtful the court would have granted it and even more doubtful the jury would have found a statutory violation if an instruction had been given. Therefore, Webster fails to

demonstrate he was prejudiced by counsel's decision not to ask for a jury instruction on the propriety of the photo lineup procedures used in this case.

3. "Series of Errors"

{¶118} In the eleventh assignment of error, Webster argues his counsel committed a series of errors that resulted in an unfair trial. He contends his trial counsel (1) "opened the door" to evidence that Webster threatened Porter while in jail, (2) failed to object to a detective's opinion testimony regarding the veracity of a witness, and (3) failed to object to prosecutorial misconduct during closing arguments.

{¶119} During the jury portion of the trial, the state elicited testimony from Sgt. Christopher regarding the "Robert Marsh" letter and Webster's November 28, 2013 phone call to Derrick Durden. On cross-examination, the following exchange took place between defense counsel and Sgt. Christopher:

> Q. Are you aware of an incident where [Porter] falsely reported a threat that was proven to be false that Mr. Webster made to him at a recreation period?
>
> A. I believe I do recall they were passing in the hallway.
>
> Q. And then Mr. Porter made a complaint that he was threatened by Mr. Webster; right?
>
> A. I believe so.
>
> Q. And that turned out to be almost impossible, because that would mean somebody in transport or somebody in the jail didn't follow the rules and allowed them to come in contact?
>
> A. I believe that they had protective custody inmates in recreation, if I remember correctly, or Mr. Webster was in recreation one way or the other,

and they did not know that the recreation area was being used and they did cross paths.

Q. But as far as you know they had no contact?

A. No physical contact.

Q. There was no verbal contact either?

A. I don't recall there being any verbal contact. I think it was just a gesture, maybe.

Q. Yet Mr. Porter reported some type of threat?

A. I believe so.

{¶120} In reviewing claims of ineffective counsel, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moreover, the defendant must overcome the presumption that, under the circumstances, the challenged action "'might be considered sound trial strategy.'" *Id.*, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

a. "Opened the Door"

{¶121} Defense counsel's questions of Sgt. Christopher were not ineffective. The line of questioning did not reflect poorly on Webster's character because it never accused Webster of making a threat. Rather, defense counsel was attempting to show that Porter was a liar and fabricated the threat. Defense counsel later argued that Porter was the likely killer because he has tear drop tattoos on his cheek, which signify to Heartless

Felons that he has murdered someone. Although this strategy proved unsuccessful, Webster was not prejudiced by it.

b. Opinion Testimony of Credibility

{¶122} Webster also argues his trial counsel was ineffective because he failed to object to the prosecutor's line of questioning that elicited improper opinion testimony regarding Bradford's credibility. When Bradford was first interviewed by police, she stated that when she left Club Fly Hygh at closing time, she and Porter were alone. She did not tell police that Golston and Webster were also in the car at that time. Det. Diaz explained that he lied to Bradford and told her there was video evidence of the scene and that she had to be honest. After Det. Diaz made this false statement, Bradford admitted that Webster was also in the car when she left the bar. At this point, the prosecutor asked Det. Diaz whether everyone he questions tells the truth. Det. Diaz replied that witnesses do not always tell the truth and sometimes he lies to witnesses in an attempt to extract more information from them. After this response, the state continued asking questions regarding Det. Diaz's investigation.

{¶123} The prosecutor did not elicit this testimony to show that Bradford was a liar, but to explain why police officers sometimes lie to suspects and witnesses during criminal investigations. In this context, the questioning is innocuous and would not have prejudiced Webster's right to a fair trial.

c. Prosecutorial Misconduct

{¶124} Webster also argues his trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments. However, as discussed in the our analysis of the eighth assignment of error, the prosecutor's remarks regarding Thomas doing "the unthinkable" were not inappropriate when considered in the context of the evidence adduced at trial. Furthermore, Webster failed to show he was prejudiced by the prosecutor's comments.

{¶125} Accordingly, the seventh and eleventh assignments of error are overruled.

I. Confrontation

{¶126} In the ninth assignment of error, Webster argues the trial court erroneously admitted hearsay into evidence and violated his Sixth Amendment right of confrontation. He argues a Canton police officer should not have been permitted to testify regarding Brunner's out-of-court statements.

{¶127} Brunner was the store clerk at the B&B Mart at the time of the robbery. He was not called to testify at trial. Ptl. Jones, who responded to the B&B Mart immediately after the robbery, testified that Brunner told him that one of the robbers touched the VCR. Consequently, the VCR was dusted for fingerprints, and Webster's fingerprints were discovered thereon. Webster asserts that Brunner's statement to police regarding the VCR "was important because it led police to a critical piece of evidence in an otherwise weak case," and argues that Brunner's reliability was never tested because he was not subject to cross-examination. (Appellant's brief p. 60.)

{¶128} The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Evid.R. 801(C). Thus, whenever the state seeks to introduce hearsay into evidence in a criminal proceeding, the court must determine not only whether the evidence fits within an exception to the hearsay rule, but also whether the introduction of such evidence offends an accused's right to confront witnesses against him. *State v. Kilbane*, 8th Dist. Cuyahoga No. 99485, 2014-Ohio-1228, ¶ 29.

{¶129} Evid.R. 803(2) provides an exception to the hearsay rule if the out-of-court statement constituted an "excited utterance," which the rule defines as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "Reactive excited statements are considered more trustworthy than hearsay generally on the dual grounds that, first, the stimulus renders the declarant incapable of fabrication and, second, the impression on the declarant's memory at the time of the statement is still fresh and intense." *State v. Taylor*, 66 Ohio St.3d 295, 300, 612 N.E.2d 316 (1993).

{¶130} To qualify as an "excited utterance" the following four factors must be established:

> (1) there was an event startling enough to produce a nervous excitement in the declaran[t], (2) the statement must have been made while under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have had an opportunity to personally observe the startling event.

State v. Boles, 190 Ohio App.3d 431, 2010-Ohio-5503, 942 N.E.2d 417, ¶ 34 (6th Dist.), citing *State v. Duncan*, 53 Ohio St.2d 215, 373 N.E.2d 1234 (1978). The controlling factor comes down to whether the declaration resulted from impulse as opposed to reason and reflection. *State v. Nixon*, 12th Dist. Warren No. CA2011-11-116, 2012-Ohio-1292, ¶ 13.

{¶131} Brunner's statements to police were made within minutes of the robbery, during which one of the robbers held a gun to Brunner's head. The other robber had just shot a gun into the ceiling. When Ptl. Jones arrived on the scene, Brunner was pacing back and forth. Ptl. Jones testified that he tried to calm Brunner down so that he could get information from him regarding the robbery and the suspects. Ptl. Jones testified that, at the time he spoke with Brunner, he was focused on finding the robbers. Brunner calmed down, but was still under the stress of the robbery when he answered Ptl. Jones's questions. Brunner described the incident and the suspects, including the robber's interest with the VCR. Under these circumstances, Brunner's statements to police fall within the "excited utterances" exception to the hearsay rule. Therefore, we must now determine whether Webster's right of confrontation was violated.

{¶132} In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Confrontation Clause bars the admission of "testimonial statements of witnesses absent from trial." *Id*. at 59. The court explained that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually

prescribes: confrontation." This means that the state may not introduce "testimonial" hearsay against a criminal defendant, regardless of whether such statements are deemed reliable, unless the defendant has an opportunity to cross-examine the declarant. *Id.* at 53-54, 68.

{¶133} However, the *Crawford* court also held that the Confrontation Clause only requires exclusion of "testimonial" as opposed to "non-testimonial" evidence. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). If a statement is not testimonial, the principles embodied in the Confrontation Clause do not apply. *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007).

{¶134} Although the *Crawford* court did not specifically define the term "testimonial," it explained that hearsay statements are implicated by the Confrontation Clause when they are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford* at 52.

{¶135} In *Davis* at 822, decided two years after *Crawford,* the high court held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." By contrast, statements are

testimonial when the circumstances indicate that there "is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. *See also State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, paragraph one of the syllabus.

{¶136} As previously stated, Brunner was still under the stress and shock of the robbery when he made statements to police. The robbery had occurred just minutes before, and the police were concerned with apprehending the suspects before it was too late. Since the police were focused on apprehending the robbers and Brunner was still in shock, nobody was reflecting on how Brunner's statements could be used at trial. Therefore, his statements were nontestimonial and did not violate the Confrontation Clause. And since his statements qualified as an excited utterance, and there was no violation of the hearsay rule, we find the trial court acted within its discretion in allowing Ptl. Jones to testify regarding Brunner's statements.

{¶137} The ninth assignment of error is overruled.

J. Flight Instruction

{¶138} In the tenth assignment of error, Webster argues the trial court violated his constitutional rights to due process and a fair trial by giving the jury a flight or "consciousness of guilt" instruction. He contends there was insufficient factual basis to support such an instruction.

{¶139} The decision whether or not to give a flight instruction is a matter within the trial court's discretion. *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578,

¶ 48-49. We therefore will not reverse the trial court's judgment to give a particular jury instruction absent an abuse of discretion.

{¶140} Flight from justice means escape or affirmative attempt to avoid apprehension. *State v. Wesley*, 8th Dist. Cuyahoga No. 80684, 2002-Ohio-4429, ¶ 19, citing *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1207 (9th Cir. 1991). "'[A] mere departure from the scene of the crime is not to be confused with deliberate flight from the area in which the suspect is normally to be found.'" *State v. Santiago*, 8th Dist. Cuyahoga No. 95516, 2011-Ohio-3058, ¶ 30, quoting *State v. Norwood*, 11th Dist. Lake Nos. 96-L-089 and 96-L-090, 1997 Ohio App. LEXIS 4420 (Sept. 30, 1997). A flight instruction based on the flight of the accused is appropriate when supported by sufficient evidence in the record. *Hill* at ¶ 49.

{¶141} The evidence in this case supported the flight instruction. After Marks's murder, Golston checked into two hotels; one on the west side of Cleveland, the other in Willoughby, Ohio. Golston denied Webster was with her even though she had texted Webster shortly after the shooting to suggest they "get outta town." According to Golston, Porter and his girlfriend came to visit her at both hotels. Thus, a jury could reasonably infer that Webster was with Golston in the hotel despite her denial that he was there.

{¶142} A short time later, Golston sent a screen shot picture of the warrant for Webster's arrest to a friend. It took police approximately two months to find and arrest Webster and Golston. They were simultaneously arrested at Golston's sister's home in

Parma, Ohio. Based on these facts, a jury could reasonably infer that Webster and Golston were fleeing and eluding to avoid arrest. Therefore, we find no abuse of discretion in the court's decision to provide a flight instruction.

{¶143} Accordingly, the tenth assignment of error is overruled.

K. Bias

{¶144} In the twelfth assignment of error, Webster asserts the trial court was biased against him and that his bias infected the jury and deprived him of his right to a fair trial.

{¶145} However, "when a party believes that the trial judge is biased, the proper avenue for redress is filing an affidavit of disqualification." *State v. Castile*, 10th Dist. Franklin No. 13AP-10, 2014-Ohio-1918, ¶ 13. Pursuant to R.C. 2701.03(A) and Ohio Constitution, Article IV, Section 5(C), the Chief Justice of the Ohio Supreme Court has exclusive jurisdiction to hear claims for disqualification. *State v. DeMastry*, 155 Ohio App.3d 110, 126, 2003-Ohio-5588, 799 N.E.2d 229, ¶ 78 (5th Dist.). We are, therefore, without authority to review the trial court's judgment on grounds that the judge was allegedly biased or prejudiced. *Id.*, citing *Beer v. Griffith*, 54 Ohio St.2d 440,441-442, 377 N.E.2d 775 (1978). *See also Jones v. Billingham*, 105 Ohio App.3d 8, 11, 663 N.E.2d 657 (2d Dist. 1995).

{¶146} The twelfth assignment of error is overruled.

III. Conclusion

{¶147} The trial court acted within its discretion in denying Webster's motion to sever counts where there was evidence that the offenses alleged in the counts were committed as part of a common course of conduct with a common purpose. The trial court properly limited evidence of Webster's affiliation with the Heartless Felons to allow the minimum evidence necessary for the state to prove the non-gang-related counts. The trial court did not commit a *Batson* violation when it allowed the state to use a peremptory challenge to remove an African-American juror where the juror admitted she would have difficulty being impartial.

{¶148} The trial court did not commit reversible error when it instructed the jury that venue had been conclusively proven where the evidence overwhelmingly established that venue in Cuyahoga County was proper. The state failed to present sufficient evidence that Webster committed obstruction of justice, but presented enough evidence to support a reduced charge of attempted obstruction of justice. Jury verdicts finding Webster guilty of murder but not guilty of the predicate offense of felonious assault did not warrant reversal where evidence supported jury's finding of guilt on the murder charge.

{¶149} The prosecutor did not commit prosecutorial misconduct in closing argument where prosecutor's remarks were innocuous. Trial counsel was not ineffective for failing to object to evidence of the "six pack" photo arrays where police complied with minimum requirements of R.C. 2933.83. Nor was counsel ineffective for failing to object to a detective's testimony regarding truthfulness during interrogations where the

detective was explaining why he sometimes lied to witnesses. The court acted within its discretion in giving the jury a flight or "consciousness of guilt" instruction where evidence showed Webster attempted to avoid apprehension. We are unable to review Webster's claim that the trial judge was biased because the Ohio Supreme Court has exclusive jurisdiction on that issue.

{¶150} Judgment affirmed in part and modified in part. Webster's obstruction of justice conviction on Count 20 of the indictment is reduced to attempted obstruction of justice. The remainder of the trial court's judgment is affirmed. Therefore, we remand the case to the trial court for the limited purpose of resentencing on Count 20.

It is ordered that appellant recover from appellee 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 as modified, 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.

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, JUDGE