[Cite as *State v. Zander*, 2010-Ohio-631.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. DAVID J. ZANDER Appellant	C. A. No. 24706 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 200 08 2815(B)

DECISION AND JOURNAL ENTRY

Dated: February 24, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, David Zander, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On September 4, 2008, Zander was indicted with two co-defendants on the following charges: one count of aggravated murder in violation of R.C. 2903.01(A), with a firearm specification; one count of aggravated murder in violation of R.C. 2903.01(B), with a firearm specification; one count of aggravated robbery in violation of R.C. 2911.01(A)(1), with a firearm specification; and one count of having weapons under disability in violation of R.C. 2923.14. These charges stemmed from the death of Jason Reid in the early morning hours of August 20, 2008.

{¶3} Zander pleaded not guilty and the matter was tried to a jury under a complicity theory. After the State rested, Zander moved for acquittal pursuant to Crim.R. 29. Zander

renewed his motion at the close of his case. The trial court denied his Crim.R. 29 motion in both instances.

{¶4} The jury found Zander guilty of aggravated murder in violation of R.C. 2903.01(B), but not the accompanying firearm specification. He was found not guilty of the remaining offenses as well as their accompanying firearm specifications. The trial court sentenced Zander to life in prison, with eligibility for parole after 25 years. Zander filed a motion for acquittal or in the alternative, a new trial, which the trial court denied.

{¶5} Zander now appeals from his conviction, asserting seven assignments of error for our review. Some of his assignments of error have been combined for ease of analysis.

II

Assignment of Error Number One

"THE TRIAL COURT'S FINDING OF GUILT WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

{¶6} In his first assignment of error, Zander argues that the State failed to prove an essential element of the aggravated murder charge because he was acquitted of the aggravated robbery offense. Zander asserts that, because the State failed to prove the predicate offense of aggravated robbery, his conviction for aggravated murder is based on insufficient evidence and is against the manifest weight of the evidence. Specifically, Zander argues that the jury did not believe that there was any intent to steal property from Reid, only an intent to reclaim property that Reid had taken from others. We disagree.

{¶7} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1. "While the test for sufficiency requires a determination of 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." Id., citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at paragraph two of the syllabus; see, also, *Thompkins*, 78 Ohio St.3d at 386.

In *State v. Roberts*, this Court explained:

> "[S]ufficiency is required to take a case to the jury[.] *** Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at *2.

Accordingly, we address Zander's challenge to the weight of the evidence first, as it is dispositive of his claim of sufficiency.

{¶8} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant

a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶9} Zander was convicted of aggravated murder under R.C. 2903.01(B), which 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 [or] robbery[.]" Zander's indictment listed aggravated robbery, robbery, or felonious assault as the predicate offense for his aggravated murder charge. The State concedes, however, that it was seeking a conviction for aggravated robbery as the underlying offense, which corresponds to the jury instructions as well. Accordingly, we turn to the aggravated robbery elements as found in R.C. 2911.01(A)(1), which states that "[n]o person, in attempting or committing a theft offense, *** or in fleeing immediately after the attempt or offense, shall *** [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[.]" A "theft offense" occurs when a person "with purpose to deprive the owner of property or services, *** knowingly obtain[s] or exert[s] control over [that person's] property *** [w]ithout the[ir] consent." R.C. 2913.02(A)(1). Furthermore, R.C. 2923.03(A)(2) 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[.]" The jury was instructed on complicity as an aider and abettor and was specifically advised that Zander was to be regarded as if he were the principal offender if he aided, helped, assisted, or associated with others in the commission of, or for the purpose of committing, a crime. See R.C. 2923.03(F).

{¶10} At trial, the State presented Steven Evans, Zander's manager, who testified that Reid, the victim, and Zander both worked in sales for Iowa Steak Company. Evans had assigned the two to work together on the same sales route three to four weeks before Reid's death. The men drove a company truck and at the end of each day they met Evans for the daily "turn-in" where they gave him all the money they had collected from that day's sales. Turn-ins usually occurred between 8:00 – 9:00 p.m., but on August 19, 2008, Evans waited until approximately 11:00 p.m. for the men to return. When the truck returned, however, Zander was alone. Evans testified that Zander was "highly irritated" and slammed the door of the truck when he exited. Zander explained to Evans that he was "very P.O.[']ed" at Reid because he had stolen money from the sales the two had made that day. Consequently, Zander had to pay $180 to cover their turn-in, which he did. According to Evans, Zander then stated that "[Reid] was going to have a bullet in his back" and that the next morning they would "find [Reid] stinking in the Summit Lake with a bullet in his back."

{¶11} Evans testified that when Zander came to work the next day, he told Evans that Barberton Police were trying to contact him. Evans testified that Zander was "nervous" and had mentioned he "wanted to get out of the way, get out of town, [and] stay low for awhile." Evans encouraged Zander to go to the police station to see what they wanted and offered to go with him. In the course of their conversation, Zander told Evans that the night before, Reid had gone to a "drug house and assaulted a lady and stole the drugs and cash from her."

{¶12} Evans accompanied Zander to the police station where Zander talked to the Barberton police. According to Evans, when Zander left the police station, he "went to the front of the vehicle and vomited, sat down, held his head in his lap and said that he was going to be indicted for murder."

{¶13} On cross examination, Evans admitted that he had three previous criminal convictions in Ohio as well as one in California. He further testified that he was aware that Reid was using heroin and taking Percocet and that he had tried to help Reid with his drug problem by sending him to work in Nashville for nearly two weeks to get away from things. Evans stated he was aware that Reid and Zander frequently loaned one another money, but reiterated that the two had a very good relationship, worked well together, and that Zander let Reid move in to live with him at Zander's grandmother's house in Canton. Evans also admitted to smoking marijuana with his employees after work in the past, but stated that he no longer does that.

{¶14} Kelly Graham testified that she knew Zander through Reid and another friend, Terry Lee Wilson. Initially, Graham had met Wilson through a mutual friend who was the mother of his child. Graham testified that in early 2008, she was looking for a place to live when Wilson showed her the apartment across the hall from his in a rental house in Barberton. Wilson fronted her the deposit money and first month's rent, which enabled her to move into the upstairs apartment directly across the hall from his. There was a third apartment on the upper level which was vacant.

{¶15} Graham testified that shortly after she moved in to the apartment, Wilson introduced her to heroin. When Graham tried to quit using heroin, Wilson threatened to "go after" her family and children, which she believed he would do based on what she had seen him do to others. After she began using heroin with him, she began selling it, too. Initially, she sold drugs in exchange for getting them for free from Wilson, but at some point, Wilson had her transacting most of his heroin sales and making drug runs to Cleveland for him. She kept a safe under her bed with drugs and money in it and had drug supplies including syringes, tie-offs, and baggies throughout her apartment. Because Wilson had a "no men policy," Graham was only

allowed to sell to women. Graham testified she sold anywhere from $1,300 to $10,000 worth of drugs a day, and at one point, she sold $37,000 worth of drugs in two weeks.

{¶16} Graham stated that her relationship with Wilson was strictly one of friendship, but that after a period of time, he became increasingly controlling over her: he monitored her coming and going from the apartment by way of cameras in the hallway and in her apartment; installed a tracking system in the car he had given her to see where she was when she was not at the apartment; and acted as a "banker" for her by cashing all her paychecks and paying her rent and other bills with the money. Graham testified that "things got a little sticky [relative to] money issues one month" and Wilson's "business partner" told Wilson he "didn't want a girl in the picture," so she quit selling drugs for him and returned to dancing at an area nightclub, Jen's Den.

{¶17} Graham met Reid in the spring of 2008. He approached her at Jen's Den and asked if she "kn[e]w anyone that sells dog food," which she knew to mean he was looking to buy heroin. He told Graham he "spen[t] about $500 a day" on heroin, which she later found to be true. Over time, Reid began purchasing heroin from Wilson and Graham, but Wilson later "cut him off" because Reid "owed a lot of money."

{¶18} Graham testified as follows to the events as they unfolded the night of Reid's death. Reid arrived at her apartment between 9:30 – 10:00 p.m. frantic and sweating. Reid told Graham that he needed to see Wilson because he had "just [done] a bad thing." Reid explained that he was in Canton with some "very, very bad people" and had "smoked up all [their] crack[and] did all their drugs," but that he did not have any money to pay for the drugs. When the people he was with left the room to go get a gun, Reid stole all the money they had left on the table and ran out of the house.

{¶19} Reid asked Graham if he could borrow money from her to pay back the people he was with in Canton. She agreed to give him half of the money. When she went into her bedroom to get her money, Reid kicked her in the back, knocking her to the floor. Reid continued to kick Graham in the head, spit on her, punch her in the face, and began choking her, while asking her where her money was. When Graham yelled for Wilson to help her from next door, Reid hit her again, knocking her head against her bedboard. Graham saw Reid open her wallet and then blacked out. When she awoke, she had her cell phone cord wrapped around her neck and Wilson was in her bedroom. The $387 Graham had in her wallet was gone, as were the six bundles of drugs she was storing in her bedroom for Wilson. The six bundles were worth approximately $7,200 given that the each bundles contained approximately 10 baggies of heroin.

{¶20} When Wilson entered her room, he was angry that she had let Reid take his drugs and that she had not used the taser he gave her to stop Reid. Wilson left her room to go into the opening underneath the attic floor that they called "the grudge" to get his gun and gloves. Shortly thereafter, Wilson left the apartment on foot to go look for Reid, stating "now [Reid] is mine." Wilson returned to his apartment, however, having been unable to find Reid.

{¶21} At approximately 1:30 a.m., Graham got a phone call from Zander telling her that he had just talked to Reid. Zander relayed that during his call with Reid, Reid said that he had beat and robbed Graham earlier that night. Reid told Zander that he did not know what to do now, but asked Zander for help and wanted Zander to pick him up from the Knotty Pine Saloon in Barberton.

{¶22} Zander asked Graham during their call if she was alright and told her Reid had also stolen money from him earlier that day while they were at work. Graham went across the hall to Wilson's apartment and let him know that Zander was on the phone and that he knew

where Reid was. Wilson told Graham to get out of the room while he talked to Zander, which she did.

{¶23} After the call, Zander came to Graham's apartment. Zander came into her apartment to talk to Wilson, telling Wilson that he wanted some drugs, but that he did not have any money. According to Graham, Zander told Wilson that if Wilson helped him out with a few bags of heroin, he would show Wilson where Reid was. Graham testified that Zander said "sort of a scratch my back, scratch your back thing." Wilson then told Graham to get two bags of heroin for Zander, which she did. Zander and Wilson began talking about how they "were going to do it." Graham told the men not to take the gun, but they did. The two men called Wilson's friend, James Ware, to come over, as he was the person Wilson generally used to carry out his threats to hurt people.

{¶24} Graham testified that before leaving, Ware kept hitting his hands together stating "Let's do it, let's do it. Let's take care of this MF'er" and Zander said "let's just tie bricks to his ankles." Graham explained that the men had decided that Zander would go into the Knotty Pine Saloon where Reid was and convince Reid to come out of the bar with him. Once outside, the men were then going to "take care of him."

{¶25} Zander, Wilson, and Ware left the apartment and returned approximately 20 minutes later. All three men came back up to Wilson's apartment. When she asked them what had happened, Ware held up his hand motioning to her to stop talking. Initially, Wilson simply said "God save him" then explained that "I fired once, I fired twice, and the gun got jammed." Graham asked Zander if Reid was alright and Zander shook his head "no" and had tears in his eyes. Wilson later opened the magazine of the gun and a bullet dropped out, at which point he stated "Oh, God saved [Reid's] life today."

{¶26} Zander left the apartment, but called Wilson for help 20 minutes later because he had run out of gas. Wilson left to help Zander and told Graham to clean up the gun and put it back up in "the grudge" while he was gone. Graham followed Wilson's instructions, but she put the gun in a different spot where Wilson would not find it because she knew there were two remaining bullets in it and she was fearful of what Wilson might do to her, given that she knew what had transpired that night.

{¶27} Upon cross examination, Graham admitted that she and Zander were friends and that Zander was concerned about her being beaten up by Reid that night. She further stated that Zander was concerned about Reid that night, too, and that Zander wanted to get Reid help for his drug problem. Graham initially denied some statements made in her direct examination, but admitted to such statements after her memory was refreshed with a transcript of her testimony. Graham also testified that Zander, Wilson, Ware, and a fourth person, Joshua Fitzgerald, left in the car together to go to the Knotty Pine Saloon.

{¶28} Graham admitted that she had called 911 hours after Reid assaulted her, but that she told police only about the assault and the stolen money, not the drugs Reid had taken from her. She made the call while taking a friend home that night, so the police did not come to her apartment, but instead told her to come to the station the next day and file a police report.

{¶29} Graham also admitted that when Barberton police questioned her on August 20, 2008, she did not tell them everything she knew and admitted that she went into greater detail when questioned by police two days later. When shown the police report taken on August 22, 2008 and questioned about her statement that Wilson had tried to shoot Reid 12 times, she was unable to recall telling police that and admitted "I might have been exaggerat[ing]." She likewise admitted that her work as a dancer required she use elements of acting and theatrics.

{¶30} Barberton police officer Laura Hendricks testified that she was the first officer to respond to the call that there was a man in the alley behind Barberton Printshop. When she arrived, she found Reid on the ground face up with his hands over his head clutching gravel and his shirt partially pulled up over his stomach. His pockets were pulled outward from his pants and he appeared to be dead, but she checked for breathing. After determining Reid was dead, she called for the medic unit and additional police assistance, including the detective bureau and her sergeant. She testified there were "drag marks" in the gravel near Reid and that she found a bullet near his body and one shell casing in the alley when returning to her patrol car.

{¶31} Barberton police detective Gerard Antenucci testified that when he arrived at the scene, Reid's pockets were pulled out and next to his body was a pack of Newport cigarettes, a bullet, and a few coins. There was no cash, wallet, or identification found on his person. Reid's shoes were off his feet and there was a drag mark near his body which measured over three feet. Detective Antenucci noticed abrasions on Reid's face, arms, and chest area, which he testified were consistent with being dragged face down across the gravel. There was a mark on the side of Reid's body, which Detective Antenucci suspected was a result of him being kicked.

{¶32} Upon closer examination of the body, Detective Antenucci discovered a blood-stained area on the back of Reid's shirt surrounding a gunshot wound. He also searched the unopened pockets of Reid's cargo shorts and found another box of cigarettes in one pocket and seven bundles of heroin bound with blue rubber bands in the other pocket. A total of 63 individual baggies of heroin were found on Reid's body. Detective Antenucci stated he was able to identify Reid at the scene because Reid had been in the Barberton jail a week earlier on drug possession charges, in addition to the fact that Reid had a tattoo on his abdomen with his last

name in it. Detective Antenucci also knew from Reid's recent arrest that Reid lived in Canton and worked with Zander at Iowa Steak Company.

{¶33} Detective Antenucci testified that when police canvassed the area in and around the alley, they recovered another shell casing and one more bullet. The location of the shell casings led police to conclude that the shooter fired at Reid from the west side of the alley, in the general direction of the Knotty Pine Saloon. Detective Antenucci estimated that Reid's body was approximately 120 yards from the corner of the Knotty Pine Saloon.

{¶34} Detective Antenucci went to the Knotty Pine Saloon and questioned the bartender from the night before. She informed him there was a patron at the bar who had tried to make a call to Canton at about 1:00 a.m. which would not go through on the bar's phone. The bartender said he then borrowed a cell phone from another patron to make the call. Based on this and other information that Detective Antenucci had learned from outside sources, he contacted Zander to discuss Reid's death and the phone call Reid made. Detective Antenucci also learned that Reid had "robbed" Graham earlier that night, before going to the Knotty Pine Saloon.

{¶35} Detective Antenucci testified that upon obtaining a warrant and searching Wilson's apartment, police found approximately $5,500 in cash, various drug paraphernalia, a police scanner, several prepaid cell phones, an electronic scale, tie-offs, syringes, and packing materials, including blue rubber bands. Graham consented to police searching her apartment and "the grudge," where they found ammunition, heroin, crack and powder cocaine, drug paraphernalia, and a fireproof box. Police were unable to find a gun until Graham showed them where it was hidden in "the grudge." The gun was loaded with four nine millimeter rounds and had "night sights" to aid in firing in a dark setting. Detective Antenucci testified that the head

stamps on the bullets found in "the grudge" matched the head stamps police recovered at the crime scene.

{¶36} Upon cross examination, Detective Antenucci confirmed that when he first questioned the bartender at the Knotty Pine Saloon, she identified a different patron, not Reid, as the one who used the phone the night before. He further confirmed that when he started investigating Reid's death, he received information about Wilson from area detectives who were working on a narcotics investigation.

{¶37} Detective Antenucci testified as to his interview with Graham on the evening of August 20, 2008, in which she told him the following chain of events which had occurred the night before: Reid stole drugs and money from her, she screamed for Wilson to help, Wilson initially pursued Reid on foot and later assembled others to go find Reid. Detective Antenucci admitted that he was unaware Graham was a night club dancer, but he did know that she sold heroin for Wilson.

{¶38} Detective Antenucci clarified that his investigation revealed the following facts. When Zander arrived at Wilson's apartment prior to 2:00 a.m., he had two women with him who remained at Graham's apartment once he left. He learned that Zander drove his Iowa Steak Company truck to the Knotty Pine Saloon, and that Fitzgerald drove a second car, taking Wilson and Ware. Zander parked adjacent to the doorway of the Knotty Pine Saloon, while Fitzgerald parked the second car in the bar's parking lot. Zander went into the bar alone and came out shortly thereafter accompanied by Reid. Wilson and Ware were standing at the corner of the building, approximately 20 feet away. When Reid saw them, he ran in the opposite direction. At that point, Zander went to see Fitzgerald in the other car while Wilson and Ware chased Reid.

While Zander was standing near Fitzgerald's car, there were two gunshots fired. Zander then ran to his truck and drove to Wilson's apartment.

{¶39} According to Detective Antenucci, the gun recovered from "the grudge" was a Sig Sauer P226. Based on his use of the same make and model gun for the past 13 years as a police officer, he testified that a Sig Sauer P226 is known to experience "jam[s]" or have "some stoppage" when fired. Based on the gun's serial number, Detective Antenucci learned that it was reported stolen in a burglary in Elyria and that Wilson bought it from his cousin who lived in the Cleveland area.

{¶40} On re-direct, Detective Antenucci confirmed that, when exiting the bar with Reid, Zander would have had to pass his car in order to go talk to Fitzgerald based on where the two men had parked their cars.

{¶41} Stacy Violi from the Bureau of Criminal Identification and Investigation ("BCI") testified that Zander did not contribute DNA to the gun used to kill Reid and that Wilson was the major contributor of DNA found on the gun. Zander's DNA did not appear on any other evidence taken from the scene. Martin Lewis from BCI testified that Wilson tested positive for having gun shot residue on his hands, but Zander did not.

{¶42} Andrew Chappel from BCI testified that the shell casings found at the scene were fired from the same gun police recovered from Wilson's apartment. Chappel testified that he compared a test bullet fired from Wilson's gun to characteristics found on the recovered bullet to determine if they matched. Chappel testified that the bullet recovered from Reid's body had characteristics consistent with having been fired from the same gun, but there were not enough individual characteristics on the bullet to conclude with certainty that it was fired from Wilson's

gun. He further testified that the characteristics on the bullet can be compromised as it passes through things or comes in contact with other objects, such as bone in a body.

{¶43} Dorothy Dean, the Summit County Medical Examiner, testified that Reid was shot in the back and fell face down into the gravel. She testified that the bullet first hit his spine and then his spinal cord, causing immediate paralysis, then travelled through his aorta, esophagus, right lung, third rib, sternum and lodged in his skin. She stated there was evidence of scratches on his forearm, legs and shins, consistent with running through thorns or woods. According to Dean, Reid had evidence of cocaine and heroin in his blood as well as injection marks on his arms.

{¶44} Zander presented two witnesses who testified about the events the night of Reid's death. Fitzgerald, who drove the other car to the Knotty Pine Saloon, testified that he was in his Kenmore apartment when he received a call around 11:00 p.m. from Ware asking him to pick Ware up in Cuyahoga Falls "to go on a dope run" to Wilson's apartment in Barberton. Fitzgerald knew Wilson, but had never bought heroin from him because Wilson refused to sell it to him.

{¶45} Fitzgerald testified he did not leave his apartment until shortly before 1:00 a.m. He drove to get Ware and then to Wilson's apartment where he arrived shortly before 2:00 a.m. According to Fitzgerald, he saw Zander waiting in his truck behind the apartment when he arrived, but Fitzgerald had not met Zander before that night. Fitzgerald testified that neither he nor Ware went into the apartment, but that Wilson came out and got into the back seat of Fitzgerald's car. The three men headed to the Knotty Pine Saloon with Zander in front of them, driving alone.

{¶46} Once they arrived, Zander went inside while Wilson and Ware stood at the corner of the building. Fitzgerald testified that a minute later he saw Wilson and Ware chasing someone down an alleyway. Zander approached Fitzgerald's car, but once he heard two gunshots, Zander ran to his truck and left. Wilson and Ware returned to Fitzgerald's car "a good minute" after he heard the shots. Fitzgerald testified he was unaware Wilson had a gun with him. Fitzgerald took Wilson back to his apartment, where he saw Zander leaving with two women. Fitzgerald said Ware went into the apartment with Wilson when they returned, but he remained in the car. Before leaving the car, Wilson gave Fitzgerald his phone number and let him know he could buy heroin directly from Wilson now. Fitzgerald testified that he took Ware home and then returned to his Kenmore apartment. He testified he went to Wilson's apartment at approximately 11:30 a.m. that same day to buy heroin and cocaine from him and that Wilson "was just acting like nothing happened, like it was business as usual[.]"

{¶47} On cross examination, Fitzgerald confirmed that he had been incarcerated in the Lorain Correctional Institute for the past three months based on a parole violation. He admitted that when he talked to police in August 2008, he told them when Ware called him that night, Ware said to come get him because he "had to take care of something" not because he was going to make a "dope run." Fitzgerald clarified that he also knew the trip with Ware would involve drugs, too.

{¶48} Fitzgerald further admitted that, while recently in the Summit County Jail waiting to testify in Zander's trial, he was able to see Ware, who gave him a "narrative of [] Graham's interview." Ware indicated that he and Fitzgerald were later separated in jail, but that they had a chance to talk to one another about Zander's case for about an hour and a half before that occurred.

{¶49} The State also questioned Fitzgerald about what Zander said to him when he approached his car outside the Knotty Pine Saloon. Fitzgerald responded that Zander asked him "[a]re you going to help chase [Reid]?" The State then played a portion of the video recording of Fitzgerald's interview with police, where he was asked the same question, but instead, had responded to police that Zander was waving him out of the car while yelling to him "Come on! Come on!"

{¶50} Michelle Pfouts, Zander's girlfriend, testified she and another friend were with Zander when he made his turn-in at the end of the day on August 19, 2008. After the turn-in, they went to Zander's grandmother's house in Canton for the night. At approximately 1:00 a.m., Reid called Zander. Following Reid's call, they headed to Graham's apartment to buy heroin from her. Pfouts waited in the truck while Zander went inside for "three, four minutes, tops." When he returned, he had two bags of heroin. According to Pfouts, she and her friend went up to Graham's apartment and Zander left. Pfouts testified she never saw Zander talk to Wilson or go into Wilson's apartment while she was there, nor did she ever see Wilson, Ware, and Zander talking. Furthermore, she never saw Wilson with a gun or Ware pounding his fists.

{¶51} Zander left the apartment and returned 20 minutes later. She testified he did not appear upset when he returned to the apartment or at any point later in the night. Pfouts and Zander first learned that Reid was dead after Zander spoke to Barberton Police later in the day on August 20, 2008. Pfouts stated that Reid was their friend and that she and Zander were both "hysterical" when they learned from police that Reid was dead. During cross examination, Pfouts confirmed that she did not know Reid was dead when they left Wilson's that night.

{¶52} Based on the foregoing testimony, it does not appear that the jury lost its way in convicting Zander of aggravated murder. *Thompkins*, 78 Ohio St.3d at 387. The evidence

adduced at trial demonstrated that Reid was found shot in the back with his pockets pulled out from his pants. He had no cash or identification on him, despite unrebutted evidence that he had taken at least $560 in cash from Zander, Graham, and some people in Canton earlier that night. Moreover, the State adduced testimony that Zander traded Wilson information on Reid's location in exchange for heroin and that he was subsequently involved in the discussion with Wilson and Ware, as to how the men were going to "take care of [Reid]." Even Zander's witness corroborated the State's evidence that he led Wilson and Ware to Reid and lured Reid out of the Knotty Pine Saloon, knowing that Reid had just taken Graham's drugs and money and that Wilson and Ware were waiting for him outside. While there was conflicting testimony as to whether Zander was in the apartment with Wilson and Ware when the men discussed what they would do to Reid or whether he was aware Wilson had a gun, this Court will not reverse a conviction based on the fact that the jury chose to believe one version of the facts over another. *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶79. Therefore, Zander's claim that his conviction is against the manifest weight of the evidence is without merit.

{¶53} Having found that Zander's conviction is not against the manifest weight of the evidence, we also conclude that there is sufficient evidence to support his conviction. See *Roberts*, supra, at *2. Accordingly, Zander's first assignment of error is overruled.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN ITS DENIAL OF THE APPELLANT'S REQUEST FOR MISTRIAL AND ITS FAILURE TO FIND THAT THE JURY'S VERDICT WAS INCONSISTENT AS A MATTER OF LAW."

{¶54} In his second assignment of error, Zander asserts that the inconsistent jury verdicts demonstrate that the trial court erred as a matter of law in denying his motion for acquittal or, in the alternative, for a new trial. Akin to the assertion set forth in his first

assignment of error, Zander asserts that the trial court should have granted him a new trial because the jury verdict of guilty on aggravated murder is internally inconsistent, given that he was acquitted of the predicate offense of aggravated robbery. Zander argues that, because the jury acquitted him of the separately charged offense of aggravated robbery, the jury likewise did not use that offense as the predicate offense to his aggravated murder charge. Instead, Zander maintains that the jury must have found him guilty of robbery as the predicate offense to his aggravated murder conviction. In turn, he argues that the trial court erred by not defining the elements for a robbery offense as part of the jury instructions, which is the offense upon which the jury based its conviction.

{¶55} In the alternative, Zander argues that the inconsistent verdicts were the result of the jury being confused by the stipulation that was read into the record shortly before jury deliberations. The stipulation between the parties indicated that Zander had been previously convicted in 1998 on three counts of aggravated robbery. He alleges that the contemporaneous nature of the stipulation being read to the jury shortly before the jury instructions on aggravated robbery left the jury confused and led them to reach inconsistent verdicts by acquitting him of aggravated robbery but convicting him of aggravated murder based on the stipulation. We disagree.

{¶56} This Court reviews the denial of a motion for mistrial for an abuse of discretion. *State v. Patel*, 9th Dist. No. 24024, 2008-Ohio-4692, at ¶46. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶57} This Court has previously held that consistency between verdicts on separate counts of an indictment is unnecessary. *State v. Thomas*, 9th Dist. Nos. 22990 & 22991, 2006-Ohio-4241, at ¶15. The United States Supreme Court has explained that:

> "[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 to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *United States v. Powell* (1984), 469 U.S. 57, 65.

The Ohio Supreme Court has reiterated this principle, explaining 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, at ¶81. Therefore, a "conviction will generally be upheld irrespective of its rational incompatibility with [an] acquittal [on a separate count]." *State v. Whitlock* (Aug. 30, 1995), 9th Dist. No. 16997, at *1. See, also, *Dunn v. United States* (1932), 284 U.S. 390, 393; *Powell*, 469 U.S. at 65. Because there is no requirement that a jury reach consistent verdicts between separate counts, Zander's argument is without merit. *Gardner* at ¶81; *Thomas* at ¶15.

{¶58} To the extent that the jury instructions stated that Zander caused Reid's death during or while fleeing after committing or attempting to commit "aggravated robbery and/or robbery," the record reveals that Zander's counsel discussed edits to the jury instructions both in chambers and on the record before they were read to the jury. It is equally clear, that at no point during that process did Zander object to the inclusion of the term "robbery" about which he now complains. Furthermore, when the court specifically inquired whether there were any objections to the instructions once counsel had received a "final version," Zander's counsel stated that he

had none. Accordingly, he has affirmatively waived this argument, which concludes our analysis on appeal. *State v. Arnold*, 9th Dist. No. 24400, 2009-Ohio-2108, at ¶8.

{¶59} With respect to Zander's argument that the jury was confused by the stipulation the trial court read into the record, we consider this assertion mere speculation, as there is nothing in the record to support it. For the foregoing reasons, Zander's second assignment of error is overruled.

Assignment of Error Number Three

"THE APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW BY THE STRUCTURAL DEFECT CONTAINED IN THE INDICTMENT WHEREIN AN ESSENTIAL ELEMENT OF THE OFFENSE WAS OMITTED AND THAT DEFECT WAS NOT CURED BY EITHER THE PROSECUTOR OR THE COURT."

Assignment of Error Number Four

"THE TRIAL COURT COMMITTED ERROR BY IMPROPERLY CHARGING THE JURY."

{¶60} In his third assignment of error, Zander argues that his indictment did not charge the requisite mental state of recklessness for the aggravated robbery offense charged as the predicate offense for his aggravated murder conviction. He further asserts that the State failed to prove the mens rea of the underlying aggravated robbery offense and likewise, that the jury was not instructed on the requisite mental state for that offense. Consequently, Zander argues that his indictment and trial were permeated with structural error which mandate reversal under the Supreme Court's decisions in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749. In his fourth assignment of error, Zander argues that it was plain error for the trial court not to instruct the jury on the requisite mental state of recklessness for the predicate offense of aggravated robbery. We disagree.

{¶61} Here, Zander was charged with and the jury was instructed on the predicate offense of aggravated robbery in violation of R.C. 2911.01(A)(1) to support his aggravated murder charge. The Supreme Court has recently held that "the [S]tate is not required to charge a mens rea for this element of the crime of aggravated robbery under R.C. 2911.01(A)(1)." *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, at ¶33. Instead, the Supreme Court opined that aggravated robbery as set forth in R.C. 2911.01(A)(1) is a strict-liability offense, which eliminates the need for any mens rea for the crime. Id. at ¶32. See, also, *State v. Singfield*, 9th Dist. No. 24576, 2009-Ohio-5945, at ¶10. Consequently, it was not error for the indictment and jury instruction to omit a mens rea for the predicate offense of aggravated robbery. Accordingly, Zander's third and fourth assignments of error lack merit and are overruled.

Assignment of Error Number Five

"THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES BECAUSE OF THE IRREGULARITIES IN CROSS EXAMINING THE STATE'S KEY WITNESS."

{¶62} In his fifth assignment of error, Zander asserts that his Sixth Amendment rights were violated due to a ten day delay between the time the State called Graham to testify on direct and the time Zander was able to subsequently cross examine her about her testimony. Zander alleges that he was prejudiced by the delay because Graham's testimony went unchallenged for the duration of the trial and because of the lengthy delay, he was required to have Graham repeat her original testimony before he could question her on inconsistencies or inaccuracies on the same. Zander further asserts that his Sixth Amendment rights were violated "because of the contact that [Graham] had with the prosecution before she was subjected to cross examination" and that she "was informed by the State how she was to testify." We disagree.

{¶63} The Ohio Supreme Court has held that the trial judge has broad discretion in the admitting of evidence out of order, and there is no prejudicial error absent a patent abuse of this discretion. *State v. Graven* (1978), 54 Ohio St.2d 114, 115, reversed on other grounds, *Jenks*, 61 Ohio St.3d at 264-65. While R.C. 2945.10 sets forth the order of proceedings in a criminal trial, it specifically provides that "the court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order." R.C. 2945.10(D). Additionally, the code expressly permits "[t]he court [to] deviate from the order of proceedings listed in this section." R.C. 2945.10.

{¶64} Graham testified as a witness for the State on Friday, February 13, 2008. The record reflects Zander's counsel began his cross examination of Graham later that same afternoon, but he was unable to finish, so Graham was scheduled to return for further cross examination when the trial resumed on Wednesday, February 18, 2008. In the interim, she was admitted to the hospital and remained there for several days for emergency gallbladder treatment. Consequently, Graham was unable to return to testify on cross examination until Monday, February 23, 2008. While Graham's cross examination was indefinitely suspended, the trial court permitted the State to continue and complete its case-in-chief, and Zander presented witnesses in his defense. Graham was re-called once she was released from the hospital and testified on cross examination following the presentation of Zander's defense witnesses. After Graham's testimony, both sides rested.

{¶65} The record reveals that while Graham was hospitalized, the trial court attempted to arrange for a videotaped cross examination of Graham from the hospital. In doing so, Zander was instructed that "if [] Graham's further testimony give reason why you should have the opportunity to do supplemental cross-examination of the State's further witnesses, [] on a very

light showing [the court] will permit that." Furthermore, once Graham's cross examination was complete, the trial court once again asked Zander's counsel if he wished to recall any earlier witnesses, and specifically asked counsel if he had "consulted with [Zander] as to whether you wish to recall any of the previous witnesses on cross examination." Zander's counsel responded that he had consulted with Zander and that they did not wish to recall any witnesses. Thus, the record reflects that the trial court had "good reason" to deviate from the prescribed order for taking evidence at trial and did not abuse its discretion in doing so. R.C. 2945.10(D).

{¶66} To the extent that Zander also complains that the prosecutor had improper conversations with Graham before she completed her testimony on cross examination, he does not cite to any point in the record to evidence his allegations and makes nothing more than a blanket assertion that such conversations occurred. See App.R. 16(A)(7). The record does not reveal any point at which Zander raised a concern of this nature to the trial court and he has not argued plain error on appeal. We have recently re-iterated that "'an appellate court will not consider as error any issue a party was aware of but failed to bring to the trial court's attention[]' at a time when the trial court might have corrected the error." *State v. Nieves*, 9th Dist. No. 08CA009500, 2009-Ohio-6374, at ¶29, quoting *State v. Dent*, 9th Dist. No. 20907, 2002-Ohio-4522, at ¶6. "[F]orfeiture is a failure to preserve an objection [however,] mere forfeiture does not extinguish a claim of plain error under Crim.R. 52(B)." (Internal citations omitted.) *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23. Given that Zander failed to raise his concerns about conversations between the prosecutor and Graham to the trial court, he has forfeited this issue for appeal. *Nieves* at ¶29. Furthermore, he has not argued plain error. Id. Accordingly, Zander's fifth assignment of error is overruled.

Assignment of Error Number Six

"THE APPELLANT WAS DEPRIVED OF DUE PROCESS OF (sic) BY THE MISCONDUCT OF THE PROSECUTOR."

{¶67} In his sixth assignment of error, Zander alleges that he was deprived of a fair trial because the prosecutor instructed Graham how to testify on cross examination and failed to provide exculpatory statements made by a co-defendant. We disagree.

{¶68} In deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a reviewing court determines if the prosecutor's actions were improper, and, if so, whether the substantial rights of the defendant were actually prejudiced. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. "[An appellant] must demonstrate that there is a reasonable probability that but for the prosecutor's misconduct, the result of the proceeding would have been different." *State v. Overholt*, 9th Dist. No. 02CA0108-M, 2003-Ohio-3500, at ¶47.

{¶69} As a preliminary matter, we note that the statement about which Zander complains was not made during cross examination, but while Graham was being questioned by the State on further re-direct examination, which was done ten days after she had testified on direct at the start of the trial. Additionally, the transcript reveals that a significant portion of time was spent refreshing her recollection about the testimony she had previously given on direct examination ten days earlier. The statement about which Zander complains was made in the following context:

"[PROSECUTOR]: Miss Graham, let me just make sure we are clear here. You understand just because Mr. Hicks tells you something, you don't have to agree with that, you understand that?"

"[GRAHAM]: Well --

"[ZANDER'S COUNSEL]: Objection, Your Honor.

"***

"[COURT]: [] Overruled.

"[PROSECUTOR]: Do you understand that?

"[GRAHAM]: I was told that I have to answer questions yes or no, so I am not allowed to finish –

"[PROSECUTOR]: All right.

"[GRAHAM]: -- or to explain myself."

Based on the foregoing exchange, it does not appear that the prosecutor was instructing Graham substantively as to how to testify. Rather, it is apparent that the prosecutor was attempting to clarify to Graham that she need not necessarily agree with all the questions posed to her by Zander's counsel. Furthermore, we note that throughout her testimony, Graham was repeatedly instructed by both counsel and the trial court that she had to respond "yes or no" to questions and could not gesture or reply "uh-huh" as she had often done. When considering Graham's testimony in context, we do not consider the prosecutor's remarks improper. *Smith*, 14 Ohio St.3d at 14. Consequently, we need not engage in a prejudice analysis. Id.

{¶70} Zander further alleges that the State violated Crim.R. 16(B)(1)(f) by failing to provide him with exculpatory statements made by co-defendant Joshua Fitzgerald during his police interview. He further argues that the State violated the discovery rules promulgated in *Brady v. Maryland* (1963), 373 U.S. 83, when it failed to turn over exculpatory evidence it had in its possession. Zander alleges that the written police report that he was provided did not accurately reflect the nature of Fitzgerald's statement to police, as compared to the video recording of the same. Zander complains that he requested the video recording at the start of trial, but was not provided with it until after he had called Fitzgerald to testify on his behalf.

{¶71} Crim.R. 16(B)(1)(f) provides that "[u]pon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence,

known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment." The Ohio Supreme Court has held that "the key issue in a case where exculpatory evidence is alleged to have been withheld is whether the evidence is material." *State v. Johnston* (1988), 39 Ohio St.3d 48, 60. Such evidence will be deemed material only if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Id. at 61, quoting *United States v. Bagley* (1985), 473 U.S. 667, 682.

{¶72} We note, however, that despite Zander's assertion to the contrary, Fitzgerald was not a co-defendant in his case. Fitzgerald was called by Zander to testify in his defense and, at the time of Zander's trial, Fitzgerald had not been charged with an offense in relation to Reid's death. Furthermore, Zander admits to having received a written copy of the statement Fitzgerald provided to police as required by Crim.R. 16(B)(1)(c). Moreover, Zander points to no specific statements made by Fitzgerald in the video recording of his police interview which he asks this Court to consider in reviewing his claim of prosecutorial misconduct. Instead, he makes the generic assertion that the video recording contains "exculpatory evidence" and "four [] differing versions of what occurred on the night in question[,]" without articulating what might be favorable to his defense or material to his guilt or punishment. See Crim.R. 16(B)(1)(f).

{¶73} Moreover, our review of the record reveals that the trial court reviewed the video and concluded, not only that were there no exculpatory statements in the recording, but "there were additional materials which *** were inculpatory [and] were not used" by the State. The trial court gave Zander the option to play the video recording, in toto or in isolated portions, in order to present whatever exculpatory evidence he wanted the jury to see. Zander, however, declined to do so, arguing at trial and again on appeal that, had he known that Fitzgerald

provided inconsistent statements to police, alleging different versions of what had happened that night, he would not have called him to testify in his defense. This argument, however, belies his assertion that the video recording contains exculpatory evidence of his guilt, particularly in light of the court's willingness to permit Zander to play any and all portions of the recording to cure any perceived harm. We are not persuaded by Zander's argument that there is a "reasonable probability" the outcome of his trial would have been different had he received a copy of the video recording of Fitzgerald's police interview. *Johnston*, 39 Ohio St.3d at 61. Accordingly, Zander's sixth assignment of error is overruled.

Assignment of Error Number Seven

"THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO MAINTAIN THE APPEARANCE OF IMPARTIALITY[.]"

{¶74} In his seventh assignment of error, Zander alleges the trial court abused its discretion by failing to further question a juror who the State's witness, Graham, had identified as a customer who frequented the nightclub where she worked. Zander further alleges that the trial court made comments about him which were improper and prejudicial. We disagree.

{¶75} The Supreme Court has stated that "[t]here is no *per se* rule requiring an inquiry in every instance of alleged [juror] misconduct." (Emphasis and alteration in original.) *State v. Sanders* (2001), 92 Ohio St.3d 245, 253, quoting *United States v. Hernandez* (C.A.11, 1991), 921 F.2d 1569, 1577. Furthermore, we have previously held that it is the burden of the party alleging the misconduct to request the court hold a hearing and inquire further into the alleged misconduct. *State v. Mills*, 9th Dist. No. 21751, 2004-Ohio-1750, at ¶6. Additionally, this Court and others have rejected the argument that a trial court should hold a hearing sua sponte to investigate allegations of juror misconduct. *Mills* at ¶6. See, also, *State v. Curtis*, 7th Dist. No. 01-JE-16, 2002-Ohio-3054, at ¶26-27; *State v. Sapp* (Aug. 15, 1995), 10th Dist. No. 94APA10-

1524, at *8. We have also cautioned that "a defendant must bring an alleged error to the attention of the trial court at a time when the error can be corrected" and "may not sit idly while hoping for a favorable jury verdict and only assert an issue, capable of being remedied at the time of its occurrence, upon receiving an unfavorable jury verdict." *Mills* at ¶4.

{¶76} Following Graham's testimony, she informed counsel for the State that she thought she recognized one of the jurors as a patron that frequented the nightclub where she danced and bartended. The court held a discussion with counsel on the record out of the presence of the jury where the matter was addressed, including the question of whether the parties wanted the court to voir dire the juror on the matter. The State indicated it did not think such an examination was necessary. In turn, Zander's counsel responded that:

> "Juror Number 3 has not expressed any indication to the Court that he was aware of Miss Graham, had knowledge of her, or anything of that nature, and he had been forthright concerning another issue relating to another witness. So I do not believe we need to even explore this further."

Moreover, the trial court specifically inquired of Zander as follows:

> "COURT: Mr. Zander, have you heard and do you agree with what [your counsel] has said on this matter?
>
> "[ZANDER]: Yes, sir, I do."

Consequently, Zander cannot now complain of an alleged error that he affirmatively waived at trial. *State v. Fitzgerald*, 9th Dist. No. 23072, 2007-Ohio-701, at ¶8.

{¶77} Zander further asserts that the judge made prejudicial remarks about him during the trial and became angry with his trial counsel, both of which were improper. The Ohio Supreme Court established the following factors for a reviewing court to consider when determining whether a trial judge's remarks were sufficiently prejudicial as to require a mistrial:

> "(1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks

> are to be considered in light of the circumstances under which they were made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel." *State v. Wade* (1978), 53 Ohio St.2d 182, 188. See, also, *State v. McCorley*, 9th Dist. No. 22562, 2006-Ohio-1176 at ¶10.

Zander points to the conversation the judge conducted with hospital representatives in an attempt to coordinate the videotaped cross examination of Graham while she was hospitalized. Though that conversation was held off the record, Zander's counsel later made a record of the conversation. In doing so, counsel noted that the judge had informed the hospital staff that, due to "a potential delay in this trial [if Graham could not be timely cross examined], there [is] a danger of having to declare a mistrial, [which] could result in the turning out of a murderer on the streets." Additionally, Zander's counsel stated on the record that the judge was "obviously very angry with [the hospital staff]" during the call. The judge explained, at length, that he was not angry, but was "speaking firmly with [the hospital staff]" because he did not think the staff was being reasonable, given his past experience in similar situations where videotaped testimony was taken from hospitalized witnesses. All of the foregoing statements were put on the record outside the presence of the jury.

{¶78} On appeal, Zander has done nothing more than point to the statement made by the judge and his counsel's impression of the judge's temperament. It is clear that the statement made by the judge was not heard by the jury, and furthermore, the second statement about which Zander complains was merely his counsel's impression of the judge's disposition, which the judge went to great lengths on the record to dispel. *State v. Boyd* (1989), 63 Ohio App.3d 790, 794. Zander has not demonstrated how he was prejudiced by this discussion, nor has he alleged his counsel was impaired by the exchange. Id. Accordingly, his seventh assignment of error is without merit.

III

{¶79} Zander's seven assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

ANTHONY KOUKOUTAS, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.