

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 27365

Appellee

v.

TONY D. GRAY

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 13 09 2503 (B)

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 31, 2015

HENSAL, Presiding Judge.

{¶1} Appellant, Tony D. Gray, appeals his convictions in the Summit County Court of Common Pleas. For the following reasons, this Court affirms.

I.

{¶2} On the afternoon of August 29, 2013, Branson Price and his best friend, Paris Wicks, II, planned to go to the mall. Mr. Wicks asked Mr. Price to stop at the Lovers Lane Market on the way there so that he could buy a new t-shirt. Mr. Gray was also at the Lovers Lane Market that afternoon with a group of people, including 15-year-old Ramous Lewis.

{¶3} While Mr. Wicks was in the store, Mr. Price waited in the car. Mr. Lewis approached the car carrying a revolver and attempted to rob Mr. Price. Mr. Lewis reached through the open driver's side window and took a 9 mm handgun belonging to Mr. Wicks from Mr. Price's lap. Mr. Price exited the car in an effort to defuse the situation. Mr. Price then heard Mr. Wicks ask from behind him what was happening. Mr. Price attempted to take the revolver

from Mr. Lewis. According to Mr. Price, as he grabbed for the gun, Mr. Lewis tried to shoot him and missed. As Mr. Price continued grabbing for the gun, Mr. Lewis shot him striking him in the abdomen. Mr. Lewis then shot Mr. Wicks as he rushed in from behind Mr. Price, who proceeded to run away. According to a witness, despite being shot, Mr. Wicks wrestled with Mr. Lewis and seized the revolver from him. Eventually, Mr. Lewis succeeded in flipping Mr. Wicks off of him. Several men, including Mr. Gray, rushed in and started kicking Mr. Wicks who was lying on the ground. One man, David Phillips, “[s]ucker punched” Mr. Wicks rendering him unconscious and making him drop the gun from his hand. Mr. Lewis picked up the gun and shot Mr. Wicks with it from less than one foot away. Mr. Lewis reached in Mr. Wicks’ pocket to take an unidentified item, and both he and Mr. Gray ran away from scene. Mr. Wicks died at the scene from his injuries.

{¶4} Witnesses described two men matching the descriptions of Mr. Lewis and Mr. Gray running down the street away from the scene. Island Barnes, who lived a few streets away from the Lovers Lane Market, stated she had just arrived home from school when Mr. Lewis and Mr. Gray came to her house asking for a ride. They told her that Mr. Lewis was shot and that they needed to get away from the area. Ms. Barnes and her mother drove the men down the street before they exited the car and went on their way to an unidentified location.

{¶5} Mr. Gray was indicted on one count of felonious assault, two counts of aggravated robbery, one count of murder, one count of felony murder, and one count of complicity to commit aggravated robbery. All of the counts, with the exception of the complicity offense, also included a firearm specification. A supplemental indictment charged Mr. Gray with participating in a criminal gang and added criminal gang activity specifications to his original charges. The trial court later dismissed the criminal gang activity specifications and

severed the participating in a criminal gang count from his original charges. After a jury trial, Mr. Gray was convicted of felonious assault, felony murder, and complicity to commit aggravated robbery. The jury further found that he was complicit with the co-defendant who had a firearm on or about his person or under his control while committing the offense. Mr. Gray was acquitted of both the aggravated robbery and murder counts. The trial court subsequently dismissed the participating in a criminal gang charge without prejudice. Mr. Gray was sentenced to a total of 26 years to life in prison. He appeals, raising seven assignments of error for this court's review. We have rearranged several of Mr. Gray's assignments of error to facilitate our analysis.

II.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ERRED IN ALLOWING AMENDMENT OF THE GRAND JURY'S INDICTMENT.

{¶6} In his fifth assignment of error, Mr. Gray argues that it was improper for the trial court to allow the State to amend the indictment three times. According to him, the cumulative effect of the amendments prejudiced his defense and constituted reversible error. We do not agree.

{¶7} A trial court's decision to allow the amendment of an indictment is reviewed under an abuse-of-discretion standard. *State v. Sauto*, 9th Dist. Summit No. 26404, 2013-Ohio-1320, ¶ 10. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). In addition to demonstrating that the trial court abused its discretion, the defendant must also show that the amendment prejudiced his defense in order

to prove that the trial court committed reversible error. *State v. Dudukovich*, 9th Dist. Lorain No. 05CA008729, 2006-Ohio-1309, ¶ 16.

{¶8} Criminal Rule 7(B) provides that an indictment may state the charged offense using either words found in the applicable statute or language that is sufficient to notify the defendant of all the elements of the offense with which he is charged. Each count of the indictment must also state the numerical statute that forms the basis of the charge. Crim.R. 7(B). “The court may at any time * * * amend the indictment * * * in respect to any defect, imperfection, or omission in form or substance * * * provided no change is made in the name or identity of the crime charged.” Crim.R. 7(D).

The rule “embodies the protections guaranteed by Section 10, Article I, of the Ohio Constitution, which[] guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury. Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury. An amendment that changes the name or identity of the offense charged constitutes reversible error, regardless of whether the defendant can show prejudice.”

Sauto at ¶ 11, quoting *State v. Guenther*, 9th Dist. Lorain No. 05CA008663, 2006-Ohio-767, ¶ 50.

{¶9} In the first instance, prior to jury selection, the State sought to amend count six of the indictment to correct what it described as a typographical error. Mr. Gray was charged in that count with felonious assault under Revised Code Section 2903.11(A)(1) for causing “physical harm to Paris Wicks II,” a second-degree felony. The State requested to add the word “serious” to describe the physical harm to Mr. Wicks. Mr. Gray objected arguing that the substance of the charge suggested that he was indicted only for misdemeanor assault. According

to him, the proposed amendment would change the identity and nature of the charge. The trial court permitted the amendment over Mr. Gray's objection.

{¶10} The Ohio Supreme Court was presented with a similar argument in *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045. The defendant in *Pepka* was indicted for child endangering under Revised Code Section 2919.22(A) as a third-degree felony. The prosecution moved to amend the indictment to add language that the victim suffered serious physical harm, which is the element necessary to elevate child endangering to a third-degree felony. The defendant argued that the indictment failed to allege an essential element of his charge and that it was sufficient only to charge him with a misdemeanor offense. The Supreme Court held that the defendant was adequately informed of the charge against him and that the amendment did not change the name or identity of the offense. *Pepka* at ¶ 1-2.

{¶11} In the present case, Mr. Gray was on notice from the time he was indicted that he was charged with felonious assault under Section 2903.11(A)(1), a felony of the second degree. This statute provides that “[n]o person shall knowingly * * * [c]ause serious physical harm to another * * *.” We conclude that the amendment to count six did not change the name or the identity of the offense. Accordingly, the trial court did not abuse its discretion in permitting the amendment.

{¶12} In the second instance, after the jury was selected but prior to the presentation of evidence, Mr. Gray moved to dismiss counts 7, 10, and 11 of the indictment for failure to state an offense. Count seven charged him with aggravated robbery but incorrectly cited to Section 2911.11, which concerns aggravated burglary. Count 10 charged Mr. Gray with aggravated robbery and count 11 charged him with complicity to commit aggravated robbery. Both counts cited to “Section 2911.11(A)(3).” Section 2911.11 pertains to aggravated burglary and does not

have a subsection (A)(3). The State argued in response that each count contained a typographical error in that the citation to Section 2911.11 should actually be 2911.01, the statute that concerns aggravated robbery. The trial court denied Mr. Gray's motion to dismiss and the State moved to amend each count to reflect the correct citation to the aggravated robbery statute. The trial court granted the State's request to amend counts 7, 10, and 11 over Mr. Gray's objection.

{¶13} The indictment reflects that, while the incorrect statute was cited, the language used in each count charged Mr. Gray with the stated offence (i.e. aggravated robbery in counts 7 and 10 and complicity in count 11). "Error in the numerical designation * * * shall not be ground[s] for dismissal of the indictment * * *, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant." Crim.R. 7(B). We note that count 10 was amended to reflect the correct citation to Section 2911.01(A) (3) when Mr. Gray was arraigned on October 11, 2013. He has failed to demonstrate, either to the trial court or on appeal, how he was prejudicially misled by the original incorrect statutory citation. He did not suggest that he prepared his defense for aggravated burglary charges, rather than aggravated robbery charges. Since the amendments to the counts did not change the name or the identity of the offense, and Mr. Gray did not explain how he was materially prejudiced, the trial court did not abuse its discretion in permitting the amendment.

{¶14} Mr. Gray also asserts that the trial court incorrectly allowed the State to amend the indictment to add the names of the victims. He has not developed an argument, however, as to why the amendment should not have been permitted. *See* App.R. 16(A)(7). In addition, we note that "[t]he name of the victim is not required in the indictment when the identity of the victim is not an essential element of the crime." *State v. Thomas*, 1st Dist. Hamilton No. C-

120561, 2013-Ohio-5386, ¶ 43. *See also State v. Barbuto*, 9th Dist. Summit No. 9835, 1981 WL 4071, *3 (Jul. 15, 1981).

{¶15} “Under the cumulative error doctrine, a conviction may be reversed when the cumulative effect of errors deprives a defendant of the constitutional right to a fair trial even though none of the errors, in isolation, was prejudicial.” *State v. Boone*, 9th Dist. Summit No. 26104, 2013-Ohio-2664, ¶ 38, citing *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus. The cumulative error doctrine does not apply, however, in the absence of multiple errors. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 132. Because this Court did not find any instances wherein the trial court erred in amending the indictment, the cumulative error doctrine does not apply. *State v. Wilson*, 9th Dist. Summit No. 26683, 2014-Ohio-376, ¶ 60. Mr. Gray’s fifth assignment of error is overruled.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT’S
MOTION FOR ACQUITTAL.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON THE VERDICT
BECAUSE IT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶16} Mr. Gray argues in his first and second assignments of error that his convictions were not supported by sufficient evidence. This Court disagrees.

{¶17} “We review a denial of a defendant’s Crim.R. 29 motion for acquittal by assessing the sufficiency of the State’s evidence.” *State v. Glunt*, 9th Dist. Medina No. 13CA0050-M, 2014-Ohio-3533, ¶ 5, quoting *State v. Slevin*, 9th Dist. Summit No. 25956, 2012-Ohio-2043, ¶ 15. The question of whether the evidence is legally sufficient to sustain a verdict is

a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

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 reviewing 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 (1991), paragraph two of the syllabus. The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *Thompkins* at 390 (Cook, J. concurring).

Felonious Assault

{¶18} Mr. Gray was convicted of felonious assault in violation of Revised Code Section 2903.11(A)(1). This section provides that “[n]o person shall knowingly * * * cause serious physical harm to another * * *.” Mr. Gray argues that the State failed to set forth any evidence identifying him as one of the men who struck Mr. Wicks causing serious physical harm.

{¶19} The State presented the testimony of numerous witnesses who each offered varying accounts of what he or she observed during different time frames and from different vantage points. Mr. Lawrence Glenn testified that he was traveling east on Lovers Lane towards the Lovers Lane Market when he heard three gunshots. He placed a phone call to his brother to let him know there was gunfire while he slowed his car to a stop. Mr. Glenn observed a “helpless” man being “kicked” and “stomped” by two men in the parking lot. When he blew his car horn, the two assailants looked up and ran. According to Mr. Glenn, he noticed other people in the area at the time, but only the victim and his two attackers were in the parking lot. Mr.

Glenn pulled his car into the parking lot and called 911. He did not recognize anyone he saw at the scene that day and did not identify Mr. Gray in court.

{¶20} Mr. Ronald Moore testified that he was visiting a car repair business across the street from Lovers Lane Market. According to Mr. Moore, David Phillips, known also as “Man Man,” and Mr. Phillips’ father were also at the repair shop during the time he was there. Mr. Moore stated that he observed many people in the area near the Lovers Lane Market and its parking lot just prior to the shooting. After hearing the first gun shot, Mr. Moore turned and saw Mr. Wicks run after “a little kid with * * * black shorts on [and] no shirt.” He observed Mr. Wicks wrestle with the boy over control of the gun and eventually get on top of him once he obtained the weapon. After the boy flipped Mr. Wicks off of him, three or four men ran in and started kicking Mr. Wicks. According to Mr. Moore, Mr. Phillips punched Mr. Wicks so hard that it left him unconscious. “The little guy” then picked up the gun from the ground where it had dropped from Mr. Wick’s hand when he lost consciousness and shot him “pointblank.” Mr. Moore testified that the boy took something from Mr. Wicks’ pocket and ran from the scene. He identified Mr. Phillips from a photo array shown to him by the investigators but never picked Mr. Gray out from an array.

{¶21} Cynthia Carroll testified that she lives at the corner of Lovers Lane and Talbot Avenue diagonal from the Lovers Lane Market. She was on the porch placing a telephone call when she heard three gunshots. She saw some people with “hands going up * * * fist motion down” and assumed that a fight was in progress. Ms. Carroll saw a “[c]haotic scene” of two crowds of people coming together. She noticed an African-American male with a dark complexion who held a silver gun in his left hand. A group of approximately five individuals, including the gunman, fled south on Talbot Avenue.

{¶22} Branson Price testified that, after he was shot, he ran away from the scene but that he looked back as he fled. He saw people surrounding Mr. Wicks who were scuffling and fighting. The only person he could identify was David Phillips, who he knew as “Manny,” and Mr. Lewis. Mr. Price was unable to identify Mr. Gray as being present at the scene.

{¶23} Jennifer Tanner testified that she observed two men running south on Talbot Avenue toward Pardee Avenue. One man wore a pair of blue shorts with no shirt while the other wore red jogging pants with a white stripe and a tank top t-shirt. The male wearing the shirt kept coaxing the other man to get moving.

{¶24} Tommy Taylor testified that he was sitting on his front porch on Pardee Avenue when he saw two African American males run across a church’s parking lot located across the street from his home toward a neighbor’s house. One male, who he estimated was 14 or 15-years-old, was running behind another male who looked older than him. The teenager was not wearing a shirt and had on red shorts. The older male was wearing dark jeans and kept telling the teenager following behind him to hurry up. Mr. Taylor was unable to identify Mr. Gray as one of the males running past his home that day.

{¶25} Island Barnes testified that both Mr. Gray and Mr. Lewis arrived at her Pardee Street home that day. Mr. Lewis asked her for a ride as he was just shot and needed to get away from the area. She knew both men as acquaintances from the neighborhood. According to Miss Barnes, Mr. Gray was wearing red pants and a white shirt while Mr. Lewis wore a black t-shirt and dark jean shorts. Miss Barnes and her mother drove the men a few blocks away to the intersection of Concord and Sylvan Avenues. During the drive, Mr. Gray received a telephone call. Miss Barnes overheard him tell the caller that he “just got away from there.” She picked

both men out of a photo array, although she did not identify Mr. Gray until she was shown the array a second time.

{¶26} The State also presented surveillance video from the Lovers Lane Market that showed Mr. Gray at the store with several men, including Mr. Lewis, in the hour preceding the shooting. In the video, Mr. Gray is wearing red pants and a white shirt while Mr. Lewis wears dark shorts and no shirt. At approximately 3:21 p.m., Mr. Gray walked across the street headed in the direction of the auto repair shop. Mr. Price and Mr. Wicks pulled into the store's parking lot two minutes later. As soon as Mr. Wicks walked into the store, a group of men approached Mr. Price's car. One of the men crossed the street coming from the same area as the auto repair shop. Mr. Price testified that he knew these men who engaged in "small talk" with him. While Mr. Wicks was inside the store, Mr. Gray and another man crossed the street from the auto repair shop. Mr. Gray returned to stand in front of the store with several other men. The man who crossed the street with him walked over to Mr. Price's car.

{¶27} The video reveals that, as the men leave Mr. Price's car, Mr. Wicks walked out of the store and toward the car. Mr. Gray and the rest of the men in the group outside of the store looked in the direction of Mr. Price's car where Mr. Wicks was standing on the passenger side. The video reveals that Mr. Gray and a few other men walked toward the car. Mr. Gray walked toward Mr. Wicks and stood near him. After a few seconds, Mr. Wicks ran behind the car and out of the camera's view. Mr. Gray remained on the rear passenger side of the car, within the view of the camera, for approximately ten seconds. He stepped forward, hesitated, and then ran behind the car and out of the camera's view. A few seconds later, the video shows Mr. Gray running west on Lovers Lane. Mr. Lewis flees in the same direction five seconds later.

{¶28} Detective Jeff Leslie testified that he obtained and reviewed the surveillance video from 16 different cameras that monitored the Lover's Lane Market premises. By monitoring the movement of the individuals present at the store, he determined that six people were in the "blind area" outside of the camera's view when the incident occurred: (1) Mr. Lewis; (2) Mr. Price; (3) Mr. Wicks; (4) David Phillips; (5) a man wearing tan pants and a white shirt; and (6) a man matching Mr. Gray's description wearing red pants and a white shirt.

{¶29} Detective Leslie participated in the police interview with Mr. Gray who denied having seen or known about the shootings. According to him, when Mr. Gray was shown still photographs taken from the video, he identified himself as being on the premises prior to the incident. In the photographs shown to Mr. Gray, he was wearing red pants and a white shirt.

{¶30} Viewing this evidence in a light most favorable to the State, a trier of fact could reasonably conclude that Mr. Gray was one of the men who struck Mr. Wicks causing serious physical harm. The testimony at trial along with the video surveillance suggested that a man fitting Mr. Gray's description was in the same vicinity as Mr. Wicks when he lay on the ground. There was no evidence produced at trial that anyone else at the scene was wearing red pants. Indeed, Mr. Gray identified himself in photographs taken of the scene shortly before the incident wherein he was wearing red pants. According to Mr. Glenn, the only people in the parking lot when he arrived were the victim and his attackers who were kicking him. Testimony from the witnesses in the neighborhood described a man fitting Mr. Gray's description fleeing from the scene with the shooter, Mr. Lewis. While there was no direct testimony that a man in red pants was one Mr. Wicks' attackers, a rational jury could infer from the evidence presented that was the case.

{¶31} Mr. Gray also argues there was no evidence that he possessed the requisite mens rea to commit the offense. The culpable mental state for felonious assault is “knowingly.” *See* R.C. 2903.11(A). “A person acts knowingly, regardless of his purpose, when [he] is aware that [his] conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B). “[F]or the law to hold him to have acted ‘knowingly,’ it is only necessary that the serious physical harm [was] a ‘reasonable and probable’ result of his action.” *State v. Higgins*, 9th Dist. Summit No. 26120, 2012-Ohio-5650, ¶ 19, quoting *State v. Murphy*, 9th Dist. Summit No. 24753, 2010-Ohio-1038, ¶ 20.

{¶32} Mr. Moore testified that, after Mr. Lewis flipped Mr. Wicks off of him, three men ran in and kicked the victim who lay in a fetal position. The kicking attack lasted five or six seconds. According to Mr. Moore, the men kicked Mr. Wicks from his back all the way down his body. He testified that he did not want to get involved in the investigation, but that he felt bad for the victim. Mr. Moore testified that this is why he called the police and gave a statement the following day. Mr. Glenn testified that he observed a “helpless” man being “kicked” and “stomped” by two men. Dr. Dorothy Dean, a forensic pathologist deputy medical examiner, testified that Mr. Wicks sustained numerous abrasions to his face, elbow, knees, hip and hand in addition to a swollen eyelid all of which were inflicted while he was still alive. The jury viewed autopsy photographs of the various injuries. This Court concludes that, based on the foregoing, there was sufficient evidence from which a rational trier of fact could conclude that Mr. Gray acted knowingly in assaulting Mr. Wicks.

Gun Specification

{¶33} Next, Mr. Gray argues that the State presented insufficient evidence that he was complicit in committing the gun specification. Mr. Gray was charged under Revised Code Section 2941.145 with acting in complicity with a co-defendant who had a firearm on or about his person or under his control while committing the offense. “To support a conviction for a firearm specification, a factfinder must have found that the defendant had a firearm on or about his person or under his control while committing the offense and displayed, brandished, or indicated possession of the firearm or used it to facilitate the offense.” *State v. Clayton*, 9th Dist. Summit No. 26910, 2014-Ohio-2165, ¶ 19, citing R.C. 2941.145.

{¶34} It is not, however, necessary for the defendant to be the principal offender in order to be convicted of a crime, nor suffer enhancement of sentence by the specification. *State v. Hughes*, 9th Dist. Summit No. 27061, 2014-Ohio-4039, ¶ 26. Section 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 Ohio Supreme Court has said that

To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant, supported, assisted, encouraged, cooperated with, advised or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances.

State v. Johnson, 93 Ohio St.3d 240 (2001), syllabus. The defendant’s presence, companionship, and conduct both before and after the offense can lead to an inference as to his criminal intent as an aider and abettor. *Hughes* at ¶ 26. “A person who violates R.C. 2923.03(A)(2) is guilty of complicity and ‘shall be prosecuted and punished as if he were a principal offender.’” *Id.*, quoting *State v. Davis*, 9th Dist. Summit No. 26660, 2013-Ohio-5226, ¶ 11. *But see State v.*

Shabazz, 8th Dist. Cuyahoga No. 100021, 2014-Ohio-1828, ¶ 13, ¶ 45 (concluding that there was insufficient evidence the defendant was complicit in murder or had a weapon while under disability when there was no evidence presented that he knew co-defendant had a gun until a shot was fired), *appeal accepted*, 140 Ohio St.3d 1438, 2014-Ohio-4160.

{¶35} Mr. Gray contends that, while he was present at the scene and associated with Mr. Lewis, there was no evidence he participated in the offense. According to Mr. Gray, the only reasonable inference from the evidence was that, at most, he was an “accessory after the fact.”

{¶36} As stated in *Johnson*, Mr. Gray’s intent may be inferred from the circumstances. There is no dispute that Mr. Lewis had a firearm during the offenses. The video revealed that Mr. Gray and Mr. Lewis were at the store together for a period of time prior to the incident. The video also revealed that Mr. Gray walked back to the Lovers Lane Market from across the street soon after Mr. Price parked his car. When Mr. Wicks returned to the car after exiting the store, Mr. Gray walked over and stood close to him while Mr. Lewis robbed Mr. Price. There was no evidence presented at trial that Mr. Wicks and Mr. Gray knew each other which could explain why Mr. Gray walked over to the car. Further, the testimony established that Mr. Wicks gained an advantage over Mr. Lewis at one point and obtained possession of one of the guns before Mr. Lewis was able to get out from underneath him. This corresponds to the video which demonstrates that Mr. Gray did not immediately rush into the fight seemingly until Mr. Lewis was successful in getting out from underneath Mr. Wicks. By joining in on the fight after Mr. Lewis extricated himself from Mr. Wicks, Mr. Gray showed his support, assistance and encouragement of Mr. Lewis’s actions. In addition, both the video and numerous witnesses revealed that Mr. Gray fled the scene accompanied by Mr. Lewis. During their flight, more than one witness observed Mr. Gray encourage Mr. Lewis to hurry as they left the scene. Viewing the

evidence in a light most favorable to the State, a jury could reasonably conclude that Mr. Gray aided and abetted Mr. Lewis in the crimes and possessed the requisite criminal intent to be convicted under a theory of complicity.

Felony Murder

{¶37} Mr. Gray was convicted of felony murder under Revised Code Section 2903.02(B). This provision states that “[n]o person shall cause the death of another as a proximate result of the offender’s committing or attempting to commit an offense of violence that is a felony of the first or second degree * * *.” The predicate felony crime for this charge was the felonious assault offense. Mr. Gray argues that, if this Court finds that there was insufficient evidence to convict him of felonious assault, his felony murder conviction would necessarily fail. Since we determined that there was sufficient evidence to convict him of felonious assault, his argument fails.

{¶38} Mr. Gray also argues that there was insufficient evidence to convict him of felony murder as Mr. Lewis was the shooter. “The very purpose of the felony murder doctrine is to utilize the underlying felony as a substitute for the defendant’s murderous intent and thereby raise an unintentional killing to the level of murder.” *State v. Colvin*, 9th Dist. Summit No. 26063, 2012-Ohio-4914, ¶ 13, quoting *State v. Mays*, 2d Dist. Montgomery No. 24168, 2012-Ohio-838, ¶ 6.

Under the “proximate cause theory,” it is irrelevant whether the killer was the defendant, an accomplice or some third party * * *. [A] [d]efendant can be held criminally responsible for the killing regardless of * * * the identity of the person whose act directly caused the death, so long as the death is the “proximate result” of Defendant’s conduct in committing the underlying felony offense[.]

Id., quoting *State v. Mills*, 5th Dist. Richland No. 10CA119, 2011-Ohio-5793, ¶ 36. “[D]eath is the proximate result of [a] [d]efendant’s conduct in committing the underlying felony offense *

* * [if it is] a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience.” *Id.*, quoting *State v. Rodrigues*, 9th Dist. Lorain No. 11CA009971, 2012-Ohio-535, ¶ 10.

{¶39} Mr. Gray maintains that, assuming *arguendo* he did kick or punch Mr. Wicks, his actions were not the proximate cause of the victim’s death. Dr. Dean testified that the victim sustained two gunshot wounds to his torso. She opined that one wound in particular was fatal as the bullet went through his lung, heart, liver and kidney. The second wound struck soft tissue and could have been life-threatening if he had not received proper medical attention. Dr. Dean could not, however, determine if the fatal wound resulted from the first or second gunshot.

{¶40} Mr. Gray argues that the fatal wound must have resulted from the first gunshot and, therefore, his felonious assault could not be the proximate cause of Mr. Wick’s death. A person, however, “need not be the principal offender to be convicted of a crime.” *State v. Davis*, 9th Dist. Summit No. 26660, 2013-Ohio-5226, ¶ 11. Under Section 2923.03(F), an accomplice “shall be prosecuted and punished as if he were a principal offender.” The State presented sufficient evidence that Mr. Gray was an active participant in the robbery and felonious assault in conjunction with Mr. Lewis who used a firearm during the commission of the offenses. Mr. Lewis used that firearm to shoot Mr. Wicks twice, and one of those shots was fatal. Viewing the evidence in a light most favorable to the State, the jury could reasonable find that Mr. Gray, while aiding and abetting Mr. Lewis, caused Mr. Wicks’ death.

Complicity to Commit Aggravated Robbery

{¶41} Mr. Gray argues that there was insufficient evidence to convict him of complicity to commit the aggravated robbery of Mr. Price. He reiterates his argument that there was no evidence that he aided or abetted Mr. Lewis in commission of the offense.

{¶42} Mr. Gray further maintains that Mr. Lewis initiated the robbery before he crossed the street from the auto repair shop. Mr. Price testified, however, that as soon as the men who were talking to him left, he turned and saw that Mr. Lewis was pointing a gun at him. The video demonstrates that Mr. Gray had already crossed back to the Lovers Lane Market before the men left Mr. Price's car.

{¶43} Mr. Gray also points out that Mr. Price fled the scene prior to Mr. Wicks' shooting and that Mr. Price could not identify him as one of the men who was present that day. His arguments, however, question the witness' credibility and the weight of the evidence rather than its sufficiency. *See State v. Roper*, 9th Dist. Summit No. 27025, 2014-Ohio-4786, ¶ 13.

{¶44} Viewing this evidence in a light most favorable to the State, this Court concludes that there was sufficient evidence to convict Mr. Gray of complicity to commit the aggravated robbery of Mr. Price. His first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON THE VERDICT THAT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶45} In his third assignment of error, Mr. Gray argues that his convictions are against the manifest weight of the evidence. We disagree.

{¶46} "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." *Glunt*, 2014-Ohio-3533 at ¶ 18, quoting *State v. Carr*, 9th Dist. Summit No. 26661, 2014-Ohio-806, ¶ 28. To determine whether a conviction is against the manifest weight of the evidence, this Court

must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in 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, 33 Ohio App.3d 339, 340 (9th Dist.1986). Weight of the evidence pertains to the greater amount of credible evidence produced in a trial to support one side over the other side. *Thompkins*, 78 Ohio St.3d at 387. The appellate court should only exercise its power to reverse a judgment as against the manifest weight of the evidence in exceptional cases. *Otten* at 340.

{¶47} Mr. Gray reiterates the same argument he made in both his first and second assignments of error that there was no evidence he aided and abetted Mr. Lewis in commission of the offenses. He disputes any direct involvement in the crimes and maintains that the State's theory of the case relied on the jury making inferences from conflicting eye witness accounts. According to Mr. Gray, the jury was not presented with enough evidence to make a determination as to what actions he took while outside the view of the surveillance video.

{¶48} Regarding Mr. Gray's argument that there was no evidence he was complicit with Mr. Lewis, the video demonstrated that approximately one minute after Mr. Wicks and Mr. Price pulled into the store's parking lot, Mr. Gray proceeded back across the street to the Lovers Lane Market. After Mr. Wicks exited the store, walked to the car, and stood outside the passenger's side, Mr. Gray walked toward Mr. Wicks and stood close to him before moving toward the front of the car. There was no evidence presented at trial that either Mr. Wicks or Mr. Price knew Mr. Gray.

{¶49} Regarding Mr. Gray's identity as one of the men who assaulted Mr. Wicks, Detective Leslie testified that, based on his review of the surveillance video, he determined that a man wearing red pants and a white shirt was one of the individuals in the blind area of the camera when Mr. Wicks was shot. Mr. Gray identified himself in the video as one of the men at the store prior to the incident. He was wearing red pants and a white shirt. There was no

evidence that another individual wearing the same outfit was present at the scene. Mr. Glenn testified that the only people he observed in the parking lot at the time he arrived were the victim and the men who were kicking Mr. Wicks. Mr. Moore testified that several men ran in and started kicking Mr. Wicks as soon as Mr. Lewis succeeded in flipping Mr. Wicks off of him. According to Mr. Moore, after Mr. Phillips punched Mr. Wicks, Mr. Lewis picked up the gun that fell from Mr. Wicks' hand and shot him.

{¶50} Several witnesses testified that two males ran from the vicinity of the Lovers Lane Market. While the witnesses' testimony conflicted on the color of the men's pants or shorts and the number of men who were kicking Mr. Wicks, these issues required the jury to make a determination as to the witnesses' credibility and the weight to assign to their testimony. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶51} Island Barnes testified that both Mr. Gray and Mr. Lewis arrived at her home shortly after the incident. She described Mr. Gray as wearing red pants and a white shirt. Miss Barnes identified Mr. Gray after being shown a photo array two times. She indicated she was 95 percent certain that the photo was of Mr. Gray who was one of the individuals who approached her home for a ride that day.

{¶52} "It is well-settled that 'the identity of a perpetrator may be established using direct or circumstantial evidence,' as both types of evidence are accorded equal probative value." *State v. Mount*, 9th Dist. Summit No. 26941, 2014-Ohio-5334, ¶ 38, quoting *State v. Liggins*, 9th Dist. Summit No. 24220, 2009-Ohio-1764, ¶ 11. Further, "in reaching its verdict, the jury is free to believe all, part, or none of the testimony of each witness." *Prince v. Jordan*, 9th Dist. Lorain No. 04CA008423, 2004-Ohio-7184, ¶ 35.

{¶53} The jury was able to view the surveillance video in conjunction with the various witnesses' testimony. The evidence was circumstantial in nature and required the jury to make an inference from Mr. Gray's conduct on the video as to his actions outside the eye of the camera. "[A] conviction is not against the manifest weight because the jury chose to credit the State's version of the events." *Mount*, 2014-Ohio-5334, ¶ 39, quoting *State v. Minor*, 9th Dist. Summit No. 26362, 2013-Ohio-558, ¶ 28. After a careful review of the record, this Court cannot conclude that this is the exceptional case where the jury clearly lost its way and created a manifest miscarriage of justice. *See Otten*, 33 Ohio App.3d. at 340. Mr. Gray's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF PHOTOGRAPHIC EVIDENCE DEPICTING GRAY AS A VIOLENT INDIVIDUAL WITH POSSIBLE GANG TIES.

{¶54} Mr. Gray argues in his fourth assignment of error that the trial court abused its discretion in permitting the State to introduce two photographs that depict him tugging down a shirt someone was wearing that read "Free Lil Doobie" so that a video camera could capture a clear view of it. He maintains that this evidence constituted "other acts" evidence prohibited by Evidence Rule 404(B). We disagree.

{¶55} The trial court possesses broad discretion in determining the admission of evidence. *State v. Maurer*, 15 Ohio St.3d 239, 265 (1984). "Absent an issue of law, this Court, therefore, reviews the trial court's decision regarding evidentiary matters under an abuse of discretion standard of review." *State v. Ellis*, 9th Dist. Summit No. 27013, 2014-Ohio-4186, ¶ 25. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore*, 5 Ohio St.3d at 219, quoting *Adams*, 62 Ohio St.2d at 157.

{¶56} Mr. Gray argues on appeal that the trial court should have excluded the photographs as impermissible “other acts” evidence under Evidence Rule 404(B). Rule 404(B) prohibits evidence of other crimes, wrongs or acts when offered to prove the character of the defendant in order to show that he acted in conformity therewith. The substance of Mr. Gray’s objection at trial, however, was that his actions after the shooting were not relevant to establishing a common plan as the crime was already complete. He further argued that the prejudicial effect of the photographs significantly outweighed any relevance. “This Court has long held 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.” *Ellis* at ¶ 27, quoting *State v. Dent*, 9th Dist. Summit No. 20907, 2002-Ohio-4522, ¶ 6. Forfeiture is a failure to preserve an objection. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 23. “[A] mere forfeiture does not extinguish a claim of plain error under Crim.R. 52(B).” *Id.* quoting *State v. McKee*, 91 Ohio St.3d 292, 299 (2001) (Cook, J., dissenting). Since Mr. Gray failed to raise the issue below, he has forfeited any objection to the admission of other acts evidence. *Ellis* at ¶ 27. Further, as he has failed to argue plain error on appeal, we will not consider whether the trial court plainly erred by admitting photographs that Mr. Gray argues were “other acts” evidence within the context of Rule 404(B). Mr. Gray’s fourth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY ON THE ELEMENTS OF THE OFFENSES WITH WHICH GRAY WAS CHARGED, SUBMITTING INSTRUCTIONS PREJUDICIALLY BIASED AGAINST GRAY.

{¶57} In his sixth assignment of error, Mr. Gray argues that the trial court’s jury instructions unfairly prejudiced the jury against him by highlighting the State’s complicity theory

and “downplaying the possibility of an independent intervening cause” of Mr. Wicks’ death. We disagree.

{¶58} Mr. Gray fails to develop his argument with citations to the jury instructions. *See* App.R. 16(A)(7). Furthermore, he failed to object to the jury instructions despite the trial court giving the parties numerous opportunities to do so. The record reflects that Mr. Gray did object to the State’s attempt to change the independent intervening cause instruction by adding language that the jury should view that section in light of the complicity instruction. The trial court proposed a change to the instructions which did not include the State’s suggestion. Mr. Gray neither objected to the change at that time nor when the court asked if either of the parties wished to put anything on the record concerning the instructions.

{¶59} The failure to object to jury instructions forfeits all but plain error. *State v. Edwards*, 9th Dist. Lorain No. 12CA010274, 2013-Ohio-3068, ¶ 22, citing *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 52. Mr. Gray, however, has not argued plain error on appeal. Accordingly, this Court will not address the merits of his arguments because he has not argued plain error. *State v. Meadows*, 9th Dist. Summit No. 26549, 2013-Ohio-4271, ¶ 13. Mr. Gray’s sixth assignment of error is overruled.

ASSIGNMENT OF ERROR VII

THE TRIAL COURT ERRED IN DENYING DEFENDANT’S REQUEST TO ADD NARRATIVE INTERROGATORIES ON THE VERDICT FORMS.

{¶60} Mr. Gray argues in his seventh assignment of error that the trial court erred in denying his request to add jury interrogatories to the verdict forms. We disagree.

{¶61} This Court reviews a trial court’s determination on the submission of interrogatories to the jury under an abuse-of-discretion standard. *Freeman v. Norfolk & W. Ry. Co.*, 69 Ohio St.3d 611, 614 (1994). An abuse of discretion “implies that the court’s attitude is

unreasonable, arbitrary or unconscionable.” *Blakemore*, 5 Ohio St.3d at 219, quoting *Adams*, 62 Ohio St.2d at 157.

{¶62} Mr. Gray requested that the jury receive interrogatories to answer on each charge due to his belief that the case was convoluted and confusing. He argued that, because the Criminal Section of the *Ohio Jury Instructions* contains a subsection addressing interrogatories, the trial court should grant his request. The State opposed Mr. Gray’s request arguing that it would invite error and possibly violate the aliunde rule. The trial court denied the request based on the First District’s decision in *State v. Majko*, 1st Dist. Warren No. 152, 1977 WL 199599 (June 1, 1977).

{¶63} Just like Mr. Gray, the defendant in *Majko* requested the inclusion of interrogatories in his criminal case which the trial court refused to submit to the jury. The First District relied on the Ohio Supreme Court case of *Smith v. State*, 59 Ohio St. 350 (1898) to conclude that “there is no legal basis in this state for submitting interrogatories to a jury in a criminal case.” *Majko* at *1.

{¶64} Mr. Gray argues that, because the Ohio Rules of Criminal Procedure are silent on the issue of jury interrogatories, Criminal Rule 57(B) operates to direct the court to look to the civil procedure rules for guidance. Civil Rule 49(B) directs the trial court to submit written interrogatories to the jury upon the request of any party prior to commencement of argument. Assuming *arguendo* that Rule 49(B) is applicable in a criminal case, it further provides that the proposed interrogatories “shall” be submitted to the court and opposing counsel at that time. We note that the record does not reflect that Mr. Gray submitted his proposed interrogatories to the trial court. He also did not request any specific language other than “it’s a phrasing to the extent

that if you have found the defendant guilty of this count, please describe how, and then it's open-ended for a narrative interrogatory."

{¶65} In denying Mr. Gray's request for jury interrogatories, the trial court also considered on the record the applicability of the Ohio Supreme Court cases of *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656 and *State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722. *Moretz* involved a civil action for medical malpractice. The court held that "[w]hen both the content and the form of a proposed interrogatory are proper, Civ.R. 49 imposes a mandatory duty upon the trial court to submit the interrogatory to the jury." *Moretz* at paragraph two of the syllabus. In *Lynn*, a criminal case, the court addressed the question of whether a defendant's due process rights are violated when the indictment incorrectly states the underlying offense and the trial court instructs the jury on the correct underlying offense in order to conform to the evidence produced at trial. *Lynn* at ¶ 8. The court mentioned that the trial court provided interrogatories to the jury but that the defendant did not object to them. The *Lynn* court did not, however, address the issue of whether it was error for the trial court to provide the jury with interrogatories in a criminal case.

{¶66} The trial court in the present case determined that neither *Moretz* nor *Lynn* applied to require the jury to receive interrogatories in a criminal case. Our research does not indicate any cases where the holding in *Moretz* was applied to a criminal case or where the holding in *Lynn* was expanded to condone interrogatories in a criminal case. We note further that it is unclear from the *Moretz* and *Lynn* cases whether the proposed interrogatories in those cases were as broad and open-ended as those proposed by Mr. Gray. Under the facts in this case, we cannot conclude that the trial court abused its discretion in denying Mr. Gray's request to add an interrogatory to the verdict forms. His seventh assignment of error is overruled.

III.

{¶67} Mr. Gray's 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(C). 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.

JENNIFER HENSAL
FOR THE COURT

MOORE, J.
CARR, J.
CONCUR.

APPEARANCES:

DONALD J. MALARCIK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.