[Cite as *State v. Drummond,* 2015-Ohio-939.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-A-0055**
- vs -	:	
JOHN E. DRUMMOND,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2013 CR 68.

Judgment: Affirmed.

Mike DeWine, Ohio Attorney General, State Office Tower, 30 East Broad Street, 25th Floor, Columbus, OH 43215, *Paul L. Scarsella,* Special Assistant Prosecutor, Ohio Attorney General's Office, 150 E. Gay Street, 16th Floor, Columbus, OH 43215, and *Brian S. Deckert,* Special Assistant Prosecutor, Ohio Attorney General's Office, 615 West Superior Avenue, 11th Floor, Cleveland, OH 44113 (For Plaintiff-Appellee).

David L. Doughten, 4403 St. Clair Avenue, Cleveland, OH 44103-1125 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, John E. Drummond, appeals from the judgment of the Ashtabula County Court of Common Pleas, convicting him of aggravated murder for the fatal shooting of Ronald Maceo Hull ("the victim"). The victim was targeted due to his suspected involvement in the theft of $10,000 from appellant's friend, Troy Jones. Appellant traveled with Jones from Youngstown to Ashtabula to retrieve Jones' money

from the victim. Appellant had a 9mm handgun in his possession. The evidence presented placed appellant, along with various others, at the scene of the crime. The victim was beaten and ultimately killed by a 9mm handgun. Appellant was observed standing nearest to and leaning over the victim when the fatal shots were fired. For the reasons that follow, we affirm.

{¶2} This incident occurred in February 1997. It remained a cold case for almost 16 years. Appellant was ultimately indicted by the Ashtabula County Grand Jury on January 31, 2013 on four counts: count one, aggravated murder, an unclassified felony, in violation of R.C. 2903.01(A); count two, aggravated murder, an unclassified felony, in violation of R.C. 2903.01(B); count three, kidnapping, a felony of the first degree, in violation of R.C. 2905.01(A)(3); and count four, felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2). All four counts contained firearm specifications. Appellant pleaded not guilty to all charges.

{¶3} Appellant filed a motion to dismiss count four, felonious assault, because it exceeded the six year statute of limitations under R.C. 2901.13(A)(1)(a). Appellee, the state of Ohio, agreed. The trial court granted appellant's motion and dismissed count four. Appellant later filed another motion to dismiss based upon pre-indictment delay. The state disagreed maintaining that appellant did not suffer actual prejudice. Following a hearing, the trial court denied appellant's motion.

{¶4} A jury trial commenced on August 21, 2013. The main crux of the case centered around the following question: Who was responsible for firing the fatal shots on the night at issue? The answer to this question was based upon testimony which was not available to the state at the time the crime was committed. The main witnesses

against appellant were his co-defendants. Their testimony did not become available until years later.

{¶5} Thirteen witnesses testified for the state. They collectively established that appellant travelled from Youngstown to Ashtabula with Jones, Jawann Evans, and Eric Weaver after learning that $10,000 was stolen from Jones. The men suspected that either the victim or Damon Young committed the theft.

{¶6} After locating the victim at the West 38th Street apartments, the victim was beaten, pistol-whipped, shot in the buttocks, and fatally shot with a 9mm handgun. The evidence presented included a total of four weapons: (1) a .40 caliber handgun (possessed by Young); (2) a .357 caliber handgun, which was broken (possessed by George "Lenny" Church); (3) a 9mm handgun, which was different than the one that killed the victim (possessed by Evans and shot into the victim's buttocks by Evans); and (4) a 9mm handgun, which killed the victim (possessed by appellant). Appellant was standing over the victim when the victim was fatally shot. The following additional details were adduced at trial:

{¶7} On the night of the incident, Lisa Harris was at the West 38th Street apartments babysitting for the children of her niece, Saudi Payne. Payne was dating Jones at the time. Jones had left $10,000 in Payne's apartment. Harris testified she saw Jones, Evans, Church, Stephen Boles, and the victim inside Payne's apartment. Harris stated the victim walked past her with his head down and did not speak to her even though she was friendly with him.

{¶8} Monique Robinson lived next door to Payne and was first cousins with the victim. Robinson testified that on the night in question, Payne told her that someone

had stolen Jones' money from Payne's apartment. And Payne believed the victim committed the theft. Robinson attempted to call the victim after Church and Boles asked her if she knew his whereabouts. She was unable to reach him. Payne later informed Boles and Church that $10,000 of Jones' money was stolen; she also informed the men of her suspicion that the victim took the money. Boles and Church began searching for the victim. After no success, the two men returned to Payne's apartment.

{¶9} The victim ultimately showed up at the apartment on his own and denied taking Jones' money. When Robinson looked inside Payne's apartment, she saw Payne and Boles. Robinson additionally observed Jones standing over the victim demanding to know where his money was. Robinson further witnessed appellant and Evans arrive at the apartment. Both men were holding guns. She also observed Church, who was brandishing a firearm, as well as the victim, who was sitting in a chair. At that time, the door closed and Robinson heard a gunshot.

{¶10} Inside the apartment, Jones confronted the victim, demanded his money, hit the victim, and shot a gun into the floor. Church testified that Jones was screaming at the victim about the stolen money and a shot was fired inside the apartment. Church saw Jones with a gun after he heard the shot ring out. Church also saw Jones fire a shot into the ground inside the apartment. The victim claimed he did not steal Jones' money and that, instead, the men should look for Young.

{¶11} Boles and Church subsequently went looking for Young while the others stayed with the victim. The two men found Young and brought him back to the apartment. An argument ensued between Young and the victim regarding who had stolen the money. During the argument, a shot was fired and the victim was shot in the

buttocks. Boles observed Evans brandishing his firearm. The men then took the victim and Young outside where they argued with each other over who had stolen the money. Young and Church struck the victim. Church, Evans, Weaver, Jones, and appellant then proceeded to beat the victim. During the fight, Church struck the victim with a revolver. The blow broke the gun open.

{¶12} After the beating, everyone, with the exception of appellant, walked away from the victim. Church heard a shot. He turned around and observed the victim on the ground with his arm raised and appellant standing over him. Church then heard two more shots. Church stated appellant was in possession of a 9mm handgun. Church stated the last person he saw near the victim was appellant.

{¶13} Boles, who was a friend of the victim, subsequently disguised his voice and called the police. Boles did not want any of the men, including appellant, to know he had made the call because he feared that they might kill him. Boles stated that their group of friends had rules, which included severe repercussions for "snitching," including death. Also, Church indicated that one of the rules of "the group" was that no one was allowed to steal from any other member or cooperate in any manner with the police.

{¶14} Renee Powell was the victim's girlfriend. Powell testified she had plans to meet the victim at Sardi's Bar, a local establishment. Powell was waiting for the victim at the bar when she heard the news that he had been killed. She later found him lying dead in front of the apartment building. Powell stated she saw Boles, who appeared visibly upset.

{¶15} Young testified he was home with his girlfriend when Boles and Church located him. Boles and Church advised Young that he had to go with them. Young felt like he had no choice but to comply. At Payne's apartment, Young saw appellant with a 9mm handgun. Young said some other men also had guns and they were all accusing him and the victim of taking Jones' money. Young testified that all of the co-defendants, including appellant, were working as a group. According to Young, Church informed the group that they would take Young and the victim to the freeway and kill them. Young was afraid of all the men, including appellant, and believed he was going to be killed.

{¶16} According to Young, as the men exited the apartment, the victim accused Young of committing a different robbery and the two men began fighting. During the altercation, Young heard Evans say something about the stolen money and then a gunshot went off. Young saw that the victim had been shot. Young indicated that Weaver and Church began to pistol whip him as well as the victim. Church's gun broke during the pistol whipping.

{¶17} Young stated that Church pulled him to a car while the victim remained on the ground. Young then heard multiple gunshots. Young saw Church, Evans, and appellant run towards the front of the apartment building. Young testified appellant was in closest proximity to the victim. Young ran away from the scene and returned to his home. Young talked with the police two weeks after the murder and again in 2003 and 2006.

{¶18} Following the incident, Patrolman William Parkomaki and Sergeant Rick Featsent with the Ashtabula City Police Department ("ACPD") received a dispatch that shots had been fired in the West 38th Street area. Patrolman Parkomaki found the

victim outside the apartment building near some bushes. He then radioed for back-up assistance.

{¶19} Detective James Oatman, of the ACPD, executed a search warrant at the apartment where the victim was taken and held prior to his murder. Various items were collected, including a piece of carpet with a blood spot, a stocking cap, a shell casing, and a bullet slug fired into the floor. Detective Oatman videotaped and photographed a walkthrough of the apartment. David Clemens was the evidence officer with the ACPD. Clemens testified that when he retired in 2003, all the evidence in the case, which included the foregoing items, was stored in an evidence room.

{¶20} Detective George Taylor Cleveland joined the ACPD two years after this incident occurred. He took over the cold case investigation after the lead detective, Robert Pouska retired.[1] Detective Cleveland re-interviewed witnesses and tried to locate new ones. He later joined the Ashtabula County Sheriff's Department ("ACSD"), but kept working on this case. Detective Cleveland testified that all blood evidence collected had been tested by the Cuyahoga County Coroner's Office ("CCCO"). In the early 2000s, he was unsuccessful in uncovering any new evidence.

{¶21} In 2008, Detective Cleveland opened up the investigation again. A cigarette butt from the scene was re-tested. It had two different profiles on it. One belonged to the victim and the other to Tracey Trent, a person with no connection to the murder. The bullets from the victim's body and the shell casings from the scene were also tested. The slugs from the body were determined to be 9mm; two of the bullets

1. Pouska is now deceased.

were fired from the same weapon, and the third from a different weapon. The slug from the floor of the apartment was also tested.

{¶22} The testing revealed that four weapons of three different calibers were involved in this crime. They included the two 9mm handguns involved in shooting the victim, the .357 live round from the ground, and the .40 caliber from the apartment floor. Detective Cleveland testified, however, that the following evidence was no longer in law enforcement's custody: the piece of carpet; the .40 caliber slug; blood swabs from the grass, sidewalk, and screen door; the spent 9mm shell casings; control swabs; various photographs of the crime scene; the slugs from the victim's body; and the cigarette.

{¶23} Dr. Cristen Rolf performed the autopsy on the victim in February 1997. Dr. Rolf testified that the victim sustained injuries to his body that were consistent with a person that had been beaten in a fight. He suffered a blunt injury to the back of his head. The victim also suffered multiple gunshot wounds to his left arm/hand, neck, and both hips. The fatal wound was to the neck area.

{¶24} Appellant presented one witness. Dr. Nasir Butt was the DNA technical manager with the CCCO at the time the items were tested. Dr. Butt performed a DNA analysis of the cigarette butt which, as stated, had a major and minor contributor mixture. The major contributor was consistent with the victim. The minor contributor came back to Trent. Dr. Butt testified that the blood on the cigarette came from the victim and that Trent's DNA was found on the filter because Trent was the one that had smoked the cigarette.

{¶25} Following trial, the jury found appellant guilty on the second count of aggravated murder involving the commission of a felony, the count of kidnapping, and

the firearm specifications. The jury, however, found appellant not guilty on the first count of aggravated murder involving prior calculation and design. On August 30, 2013, the trial court sentenced appellant to life in prison with the possibility of parole after 23 years.[2] Appellant filed a timely appeal and asserts four assignments of error. His first assigned error reads:

{¶26} "The trial court erred by failing to dismiss the indictment for pre-indictment delay."

{¶27} Under his first assignment of error, appellant argues the trial court erred in failing to dismiss the indictment for pre-indictment delay. Appellant maintains that the 16-year delay between the commission of the offense and the filing of the indictment violated his due process rights and resulted in the loss of substantial evidence.

{¶28} "In reviewing a decision on a motion to dismiss for pre-indictment delay, we accord deference to the trial court's findings of fact but engage in a de novo review of the trial court's application of those facts to the law." *State v. New*, 9th Dist. Lorain No. 12CA010305, 2013-Ohio-3193, ¶13, quoting *State v. Kemp*, 8th Dist. Cuyahoga No. 97913, 2013-Ohio-167, ¶26.

{¶29} In this case, appellant was charged with and convicted of aggravated murder under R.C. 2903.01(B). We note that most minor misdemeanors, misdemeanors, and felonies must be prosecuted within a certain time frame. R.C. 2901.13(A)(1)(a), (b), and (c). There is no statute of limitations, however, to bar the

2. Appellant's co-defendants were sentenced in May 2013. Boles and Church pleaded guilty to kidnapping, felonies of the second degree. Evans and Jones also pleaded guilty to kidnapping, felonies of the second degree, which included one-year firearm specifications. The aggravated murder charges against appellant's co-defendants were dismissed.

prosecution of an aggravated murder charge. R.C. 2901.13(A)(2) ("[t]here is no period of limitation for the prosecution of a violation of section 2903.01 [aggravated murder] or 2903.02 [murder] of the Revised Code.")

{¶30} A statute of limitations, however, does not fully define a defendant's rights regarding events occurring prior to indictment. *United States v. Marion*, 404 U.S. 307, 324 (1971). Rather, "[a]n unjustifiable delay between the commission of an offense and a defendant's indictment * * * which results in actual prejudice to the defendant, is a violation of the right to due process of law * * *." *State v. Luck*, 15 Ohio St.3d 150 (1984), paragraph two of the syllabus.

{¶31} Pursuant to *Luck*, which was reaffirmed by *State v. Whiting*, 84 Ohio St.3d 215, 217 (1998), a two-prong test is used to determine whether an indictment should be dismissed due to pre-indictment delay. *Luck* at 157-158. The defendant must first establish his defense suffered actual prejudice due to the delay in indictment. *Luck* at 157; *Whiting* at 217. If the defendant produces evidence of actual prejudice, the burden then shifts to the state to establish a justifiable basis for the delay. *Luck* at 158; *Whiting* at 217. "The prejudice suffered by the defendant must be viewed in light of the state's reason for the delay." *Luck* at 154."

{¶32} Analyzing whether a defendant has experienced actual prejudice due to pre-indictment delay 'involves "a delicate judgment based on the circumstances of each case."' *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶52, quoting *Marion*, *supra,* at 325. The court must review "the evidence as it exists when the indictment is filed and the prejudice the defendant will suffer at trial due to the delay." *Walls*, *supra.* To demonstrate actual prejudice, the defendant must establish the exculpatory value of the

alleged missing evidence. *Kemp*, *supra*, at ¶28 citing *State v. Wade*, 8th Dist. Cuyahoga No. 90029, 2008-Ohio-4574, ¶45. "In other words, a defendant must show how lost witnesses and physical evidence would have proven the defendant's asserted defense." *Id.* at ¶48, quoting *State v. Robinson*, 6th Dist. Lucas No. L-06-1182, 2008-Ohio-3498, ¶121. Prejudice, consequently, is not simply a function of a lengthy delay. *State v. Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, ¶14.

{¶33} In the case at bar, appellant points out that several pieces of evidence were lost over time, including: physical evidence from the crime scene such as ballistic evidence, blood evidence, videos and photographs of the crime scene, and trace evidence, as well as video statements of witnesses Young and Boles, telephone records, 9-1-1 calls, and a cigarette butt with blood on it containing the DNA of the victim and Trent, a person with no connection to the murder. Appellant also identifies the unavailability of certain witnesses, including: Pouska, the detective that conducted the original investigation, because he died in 2006; and Nancy Bulger, a former forensic scientist who had performed the original ballistics testing, because she suffers from dementia. Further, appellant stresses a lack of new evidence since the original investigation. Based on the absence of the foregoing, appellant alleges his defense was irreparably compromised and therefore he suffered actual prejudice. We disagree.

{¶34} At the hearing on appellant's motion to dismiss for pre-indictment delay, testimony was received from Detective Cleveland, who, as stated, began working with the ACPD in 1999, two years after this matter occurred. He was not part of the initial investigation. He worked on this case with Pouska, the original detective, for a year or so. Detective Cleveland recounted a conversation with Pouska, prior to Pouska's

retirement around 2002, advising him that he just needed a couple more pieces of evidence to put the case together. Detective Cleveland testified that he interviewed Young and Boles in 2003, but that the videotapes had gone missing.

{¶35} Detective Cleveland believed the case was ready to be presented to the grand jury in 2003. He emphasized, however, that was not his decision to make; rather, that decision rested with the prosecutor. Detective Cleveland testified he was deployed to Iraq in 2004 and 2005. Upon his return to civilian life, he was laid off from the ACSD due to budget cuts. In 2008, Detective Cleveland asked the prosecutor to take the case to the grand jury. He was informed that there were monetary and staffing concerns at that time.

{¶36} In *United States v. Lovasco*, 431 U.S. 783, 791-792 (1977), the United States Supreme Court stated:

> **{¶37}** [P]rosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. * * * It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself[.]" *United States v. Ewell*, 383 U.S. 116, 120 (1966). From the

perspective of potential defendants, requiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed, and would add to the time during which defendants stand accused but untried. * * * These costs are by no means insubstantial since, as we recognized in *Marion*, [*supra*,] a formal accusation may "interfere with the defendant's liberty, * * * disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." [*Id.* at] 320. From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilt beyond a reasonable doubt impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited. * * * And from the standpoint of the courts, such a requirement is unwise because it would cause scarce resources to be consumed on cases that prove to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts. * * * Thus, no one's interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so.

{¶38} The *Lovasco* Court concluded by holding that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id.* at 796.

{¶39} In this case, the state does not dispute that certain evidence has been lost and certain witnesses have become unavailable due to the passage of time. The record, however, establishes, and the trial court correctly found, that the most compelling evidence is not the forensic evidence but rather the testimony of the witnesses to the victim's murder, who are all still alive and became available, and that the death of Pouska, the original detective, does not establish actual prejudice to appellant.

{¶40} The lost evidence involves forensic firearms or blood evidence, whose initial test results were admitted into evidence and testified to by Detective Cleveland. The main issue in this case centers upon the following question: who was responsible for firing the fatal shots upon the victim on the night at issue? This question could not be answered through analysis or use of lost items. Rather, the answer to the question required testimony that was not available to the state subsequent to the commission of the crime. In particular, the testimony of appellant's co-defendants, including Church and Boles, is new evidence which was not previously available.

{¶41} Appellant has failed to show how some unavailable witnesses and lost physical evidence would have proven his asserted defense. *See Wade, supra,* at ¶48. Appellant has consequently failed to meet his burden of showing that the pre-indictment delay caused him actual prejudice. *Luck, supra,* at 158; *Whiting, supra,* at 217. Thus,

without a showing of actual prejudice, the burden did not shift to the state to establish a justifiable reason for the delay. *Id.*

{¶42} Appellant's first assignment of error is without merit.

{¶43} We shall address appellant's second and fourth assignments of error together. They provide:

{¶44} "[2.] The evidence is insufficient to sustain a conviction for Aggravated Murder pursuant to R.C. 2903.01(B).

{¶45} "[4.] The conviction is against the weight of the evidence."

{¶46} Under his second assignment of error, appellant alleges the trial court erred in denying his motion for acquittal at the end of the state's case. Appellant contends there was insufficient evidence produced to sustain a conviction for aggravated murder, under R.C. 2903.01(B), because the underlying kidnapping charge was lacking. Appellant's fourth assignment of error argues his conviction is against the manifest weight of the evidence because the case was brought 16 years after the offense was committed; some evidence was lost; some witnesses had become unavailable; and some of the state's witnesses were not credible because they had criminal records and received plea bargains for testifying.

{¶47} A "sufficiency" argument raises a question of law as to whether the prosecution offered some evidence concerning each element of the charged offense. *State v. Windle*, 11th Dist. Lake No. 2010-L-0033, 2011-Ohio-4171, ¶25. "[T]he proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Troisi*, 179 Ohio App.3d 326, 2008-Ohio-6062 ¶9 (11th Dist.).

{¶48} In contrast, a court reviewing the manifest weight observes the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Schlee*, 11th Dist. Lake No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-*15 (Dec. 23, 1994).

{¶49} In this case, the jury found appellant guilty on two counts: count two, aggravated murder, in violation of R.C. 2903.01(B), an unclassified felony with firearm specifications; and count three, kidnapping, in violation of R.C. 2905.01(A)(3), a felony of the first degree with firearm specifications. The trial court, however, entered a final conviction and sentence only on the aggravated murder count. Specifically, in its August 30, 2013 judgment entry, the court stated the following:

{¶50} "The Court finds that Counts Two and Three merge under R.C. 2945.25 for purposes of final conviction and sentence and the Court will proceed on Count Two, and *a final conviction and sentence is entered on Count Two only*.

{¶51} "The Court further finds that the Firearm Specifications of Counts 2 and 3 merge under R.C. 2945.25, and for purposes of final conviction and sentence, the Court will proceed and *a final conviction and sentence is entered on Specification Two only*." (Emphasis added.)

{¶52} Regarding count two, R.C. 2903.01(B), states in part: "[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, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary,

trespass in a habitation when a person is present or likely to be present, terrorism, or escape."

{¶53} In the case sub judice, appellant was prosecuted under a theory of complicity.

{¶54} "'To support a conviction for complicity by aiding and abetting (* * *), 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.' *State v. Johnson*, 93 Ohio St.3d 240, * * *, syllabus (2001). 'Such intent may be inferred from the circumstances surrounding the crime.' *Id*. 'Criminal intent (* * *) can be inferred from the presence, companionship and conduct of a criminal defendant both before and after the offense is committed, *State v. Pruett* (1971), 28 Ohio App.2d 29, 34, * * *, (* * *), and may be proven by either direct or circumstantial evidence. *See State v. Mootispaw* (1996), 110 Ohio App.3d 566, 570, * * *, (* * *); *State v. Cartellone* (1981), 3 Ohio App.3d 145, 150, * * *, (* * *).' *State v. Nievas*, 121 Ohio App.3d 451, 456-457 * * * (8th Dist.1997). (Parallel citations omitted.)" *State v. Weimer*, 11th Dist. Lake No. 2013-L-005, 2014-Ohio-2882, ¶47.

{¶55} "When a person, acting individually or in concert with another, sets in motion a sequence of events, the foreseeable consequences of which were known or should have been known to him at the time, he is criminally liable for the direct,

proximate and reasonably inevitable consequences of death resulting from his original criminal act." *State v. Chambers,* 53 Ohio App.2d 266, 272 (9th Dist.1977). A defendant will be held responsible for foreseeable consequences which are known to be, or should be known to be, within the scope of the risk created by his conduct, i.e., that death reasonably could be anticipated by an ordinarily prudent person as likely to result under these or similar circumstances. *State v. Adams*, 11th Dist. Trumbull No. 2000-T-0149, 2004-Ohio-3510, ¶65.

{¶56} Appellant emphasizes that the victim voluntarily went to Payne's apartment. Appellant asserts there is no evidence that he was involved in any kidnapping. Appellant claims that the evidence only establishes his "mere presence," albeit with a gun, at the apartment. We disagree.

{¶57} The state's witnesses collectively established that appellant travelled from Youngstown to Ashtabula with Jones, Evans, and Weaver after learning that $10,000 of Jones' money was stolen. The victim was the individual suspected of the theft. Appellant brought a 9mm handgun with him to the West 38th Street apartments, where the victim was found.

{¶58} Upon his arrival at the apartment, the victim was placed in a chair while appellant and his co-defendants had their firearms out. The victim was beaten, pistol-whipped, shot in the buttocks, and murdered with a 9mm handgun. During the final beating, appellant was attacked by each co-defendant. During the attack, he was unable to remove himself from the scene. Moreover, Church testified appellant was hovering over the victim, whose hand was raised above his head, right before the victim

was fatally shot. Young testified that appellant was working in concert with the others during this crime and that Young was afraid of him.

{¶59} Given the foregoing, there was sufficient evidence that appellant aided and abetted his co-defendants in committing the kidnapping, which directly led to the murder of the victim. The evidence established that the victim was kidnapped, by virtue of having his liberty restrained by the actions of appellant and his accomplices, once he arrived at Payne's apartment. The evidence also establishes that the victim was killed, by appellant, as a proximate result of that kidnapping. Thus, the evidence demonstrates that appellant acted in concert with his co-defendants and was much more than just "merely present."

{¶60} Finally, the jury heard the background of this case and heard from those witnesses who had received plea deals. The jury found the state's witnesses credible and chose to believe them. Under the circumstances, we cannot say that the jury clearly lost its way in finding appellant guilty.

{¶61} Pursuant to the foregoing, we hold there was sufficient, credible evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements were proven.

{¶62} Appellant's second and fourth assignments of error are without merit.

{¶63} Appellant's third assignment of error provides:

{¶64} "The trial court erred by failing to properly instruct the jury as to the spoliation of the evidence."

{¶65} In his third assignment of error, appellant asserts the trial court erred in failing to properly instruct the jury as to the spoliation of the evidence. Appellant maintains the court should have given a negative inference instruction.

{¶66} "[T]he decision to issue a particular jury instruction rests within the sound discretion of the trial court." *State v. Huckabee*, 11th Dist. Geauga No. 99-G-2252, 2001 Ohio App. LEXIS 1122, *18 (Mar. 9, 2001). "Absent an abuse of discretion this court will not reverse the trial court's decision to provide the jury with a specific instruction." *Id.* Regarding this standard, we recall the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925).

{¶67} In this case, appellant's counsel requested that the trial court instruct the jury that it could take a negative inference from the spoliation of the loss of evidence. The prosecutor responded:

> **{¶68}** This is a civil instruction in our jurisdiction * * *. Spoliation is civil in a jury instruction, which a party must show a purposeful destruction of evidence. And even in our own criminal rules, defense is not allowed to comment on witnesses that aren't present to testify, that are on the - - in the discovery and things of that nature. So I think it would be improper to give this instruction. Counsel has been able to argue whatever import the jury should take from evidence not present at trial. But beyond that, I think an instruction would not be warranted.

{¶69} The court agreed with the state's reasoning and denied defense counsel's request. The instruction requested was more aligned with a civil spoliation issue and not one given in a criminal case such as this. The court reasoned that the instructions, as given to the jury, clearly outlined the state's burden of proof and that the instruction requested was not warranted because there was no showing that there was some malfeasance of behalf of the state which would justify such an instruction.

{¶70} Upon review, we find that the trial court did not abuse its discretion. *Nichols, supra,* at ¶28. "Spoliation" is defined as: "[t]he intentional destruction, mutilation, alteration, or concealment of evidence[.]" *Black's Law Dictionary* (7th Ed.2000) 1133. In this case, various evidentiary items were lost due to the passage of time. There is no indication that the state intentionally destroyed or concealed evidence. In addition, this case involves a criminal, not a civil matter. Thus, based on the facts presented, the trial court did not abuse its discretion by holding that such an instruction was not warranted. *See State v. Bealer*, 12th Dist. Butler No. CA2002-03-056, 2003-Ohio-2114, ¶39, 40; *State v. Pace*, 3rd Dist. Hancock No. 5-12-30, 2013-Ohio-2143, ¶17 (spoliation is inapplicable in a criminal case).

{¶71} Appellant's third assignment of error is without merit.

{¶72} For the reasons discussed in this opinion, the judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶73} I respectfully dissent.

{¶74} It is the majority's position that the trial court committed no error in convicting appellant for the 1997 aggravated murder of Ronald Maceo Hull. For the reasons that follow, I disagree.

{¶75} As stated, the victim was shot and killed in February 1997. The matter remained a cold case for almost 16 years. Appellant was not indicted until January 31, 2013. He was charged with two counts of aggravated murder, one count of kidnapping, and one count of felonious assault. All four counts contained firearm specifications. Appellant pleaded not guilty to all charges.

{¶76} The felonious assault count was dismissed because it exceeded the six year statute of limitations under R.C. 2901.13(A)(1)(a). Appellant filed a motion to dismiss the other charges based upon pre-indictment delay. However, the trial court denied his motion. A jury trial commenced on August 21, 2013. The jury found appellant guilty on one of the aggravated murder counts, kidnapping, and the firearm specifications. On August 30, 2013, the trial court sentenced appellant to life in prison with the possibility of parole after 23 years.

{¶77} On appeal, appellant asserts four assignments of error.

{¶78} Under his first assignment, appellant argues the trial court erred in failing to dismiss the indictment for pre-indictment delay. He asserts that the 16 year delay between the commission of the offense and the filing of the indictment violated his due process rights and resulted in the loss of substantial evidence. I agree.

{¶79} Appellate courts engage in a de novo review regarding motions to dismiss for pre-indictment delay. *State v. New*, 9th Dist. Lorain No. 12CA010305, 2013-Ohio-3193, ¶13; *State v. Kemp*, 8th Dist. Cuyahoga No. 97913, 2013-Ohio-167, ¶26.

{¶80} There is no statute of limitations to bar the prosecution of an aggravated murder charge. R.C. 2901.13(A)(2). However, "[a]n unjustifiable delay between the commission of an offense and a defendant's indictment therefor, which results in actual prejudice to the defendant, is a violation of the right to due process of law[.]" *State v. Luck*, 15 Ohio St.3d 150 (1984), paragraph two of the syllabus.

{¶81} A two-prong test is used to determine whether an indictment should be dismissed due to pre-indictment delay. *Id.* at 157-158. First, the defendant must prove that his defense suffered actual prejudice due to the delay. *Id.* at 157. Second, if the defendant can prove actual prejudice, the burden then shifts to the state to establish a justifiable reason for the delay. *Id.* at 158.

{¶82} In this case, the nearly 16-year delay prejudiced appellant. Forensic evidence was lost and appellant was unable to independently test such evidence. Specifically, Detective Cleveland testified that he was not part of the initial investigation. He did not begin working with the Ashtabula City Police Department until 1999, two years after the homicide at issue. Detective Cleveland did not even begin his involvement as an investigator until 2003.

{¶83} Detective Cleveland indicated that numerous pieces of evidence were missing from the original investigation, including, inter alia: a piece of carpeting from the location of the incident with the alleged bullet hole; a copper jacket from a bullet; a projectile remnant from a bullet; a slug believed to have been fired during the offense; a

Taurus Model 65 blue revolver; control swabs for blood spots on the sidewalk, leaves, and grass outside the apartment; spent casings from where the victim's body was found; blood from the victim on the ground collected at the scene; blood found on a brick near the apartment on West 38th Street; a blood swab from the apartment taken from a screen door; projectiles removed from the victim's body; a video and photographs of the apartment; 9-1-1 calls made on the night at issue; phone recordings made from a pay phone; and video interviews of witnesses and co-defendants, Stephen Boles and Damian Young, taken in 2003.

{¶84} Detective Cleveland attributed the loss of evidence to "sloppiness in record keeping." Detective Cleveland admitted there was no reliability in the chain of evidence logs in this case.

{¶85} Also, statements of witnesses were lost, some witnesses naturally could not remember details of this 16-year-old case, some witnesses were unavailable, and others even died in the interim period. A trace evidence expert from the Cuyahoga County Coroner's Office who had performed testing could not be located. Nancy Bulger, a former forensic scientist with BCI, performed the original ballistics testing in this case. Ms. Bulger was unavailable to testify because she was mentally incapacitated from dementia. Detective Pouska, the original investigation officer, died in 2006.

{¶86} The record reveals there was actually less evidence since the original investigation, not more. When asked for new evidence since the original investigation, Detective Cleveland could not come up with much. This incident occurred in 1997 but it was not presented to the grand jury at that time. A letter written by Detective Pouska

indicated the case was ready for presentation to the grand jury in 1998. That never happened. Detective Cleveland believed the case could have been presented to the grand jury in 2003. That too never happened. The case was again brought to the county prosecutor in 2008. However, nothing happened at that time either due to alleged staff shortages.

{¶87} Under the Supreme Court of Ohio's two-prong test in *Luck*, the indictment should have been dismissed due to pre-indictment delay as appellant proved that his defense suffered actual prejudice due to the nearly 16-year delay and the state failed to establish a justifiable reason for the delay. *Luck, supra,* at 157-158.

{¶88} I believe appellant's first assignment of error is with merit.

{¶89} Under his second assignment of error, appellant alleges the trial court erred in denying his motion for acquittal. He contends there was insufficient evidence presented to sustain a conviction for aggravated murder, under R.C. 2903.01(B), because the underlying kidnapping charge was lacking.

{¶90} Under his fourth assignment of error, appellant argues his conviction is against the manifest weight of the evidence. He stresses again that the case was brought 16 years after the offense was committed; some evidence was lost; some witnesses had become unavailable; and some of the state's witnesses were not credible because they had criminal records and received plea bargains for testifying.

{¶91} This writer agrees with appellant under both assignments. Because they are interrelated, I will address them together.

{¶92} With regard to sufficiency, in *State v. Bridgeman*, 55 Ohio St.2d 261 (1978), the Supreme Court of Ohio established the test for determining whether a

Crim.R. 29 motion for acquittal is properly denied. The Court stated that "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *Id*. at syllabus. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Trumbull Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, ¶18.

{¶93} As this court stated in *State v. Schlee*, 11th Dist. Lake No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13-14 (Dec. 23, 1994):

{¶94} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶95} "'"The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*."'

{¶96} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an

offense have been proven beyond a reasonable doubt.'" (Emphasis sic.) (Citations omitted.)

{¶97} Regarding manifest weight, this court stated in *Schlee* at *14-15:

{¶98} "'[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶99} "'In determining whether the verdict was against the manifest weight of the evidence, "(* * *) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (* * *)"' (Citations omitted.) * * *" (Emphasis sic.)

{¶100} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶101} Regarding aggravated murder, R.C. 2903.01(B), states in part: "[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, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape."

{¶102} The underlying felony in this aggravated murder case was a kidnapping. To convict appellant of the kidnapping, it must be shown he was guilty of that offense. Appellant was prosecuted under a theory of complicity, over defense objection. "'To support a conviction for complicity by aiding and abetting (* * *), 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.' *State v. Johnson*, 93 Ohio St.3d 240, * * *, syllabus (2001)." *State v. Weimer*, 11th Dist. Lake No. 2013-L-005, 2014-Ohio-2882, ¶47.

{¶103} Based on the facts presented, I believe the state failed to prove that appellant was guilty of aiding and abetting in the commission of a kidnapping. The evidence, viewed in a light most favorable to the state, established only appellant's mere presence at the apartment where the victim was confronted on the theft allegation involving Troy Jones' money.

{¶104} The record reveals that appellant did not transport the victim to the location. Rather, the victim voluntarily went to the apartment. Appellant did not speak to the victim in the apartment. Appellant did not strike the victim in the apartment. It was not appellant's money that was stolen, it was Jones'. The evidence reveals that others, i.e., Lenny Church and Troy Jones, orchestrated the confrontation.

{¶105} Monique Robinson, a resident of the West 38th Street apartments, testified that before she heard a gunshot, she peeked into the apartment. Ms. Robinson saw the victim sitting in a chair with the following men in the room: Boles, Church, Payne, and Jones. There was never any mention of appellant at that time. It was only *after* she heard a shot fired did she see appellant arrive at the apartment with a gun.

{¶106} There was also testimony that "these guys" carried guns "all the time." Thus, there is no evidence that appellant brought a gun for the purpose of committing any offense against the victim. There is also no evidence that appellant hindered the victim from leaving the apartment. Young stated he saw appellant closest to the victim before he died. However, neither Young nor anyone else ever saw appellant strike or shoot the victim. Not a single witness stated that appellant had any motivation to kill the victim. At best, appellant was merely present in the apartment when others struck and killed the victim. Appellant's mere presence is insufficient to establish his guilt for a kidnapping. As kidnapping is an element of the aggravated murder conviction, it too must fail.

{¶107} The scarcity of evidence is a problem in this case. Another problem is the credibility of some of the witnesses who testified. The deals that appellant's co-defendants received from the state were significant. They were offered substantial reductions in charges in exchange for their cooperation. They all had prior records. Taken together with the lack of evidence, I believe this is an exceptional case requiring a reversal.

{¶108} Pursuant to *Schlee, supra*, there is not sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements were proven. Thus, I believe the trial court erred in overruling appellant's Crim.R. 29 motion. Based on the evidence presented, as previously stated, I believe the jury lost its way in finding appellant guilty. *Schlee, supra*, at *14-15; *Thompkins, supra*, at 387.

{¶109} I believe appellant's second and fourth assignments of error are with merit.

{¶110} Under his third assignment of error, appellant asserts the trial court erred in failing to properly instruct the jury as to the spoliation of the evidence.

{¶111} Based on this writer's position in appellant's first, second, and fourth assignments of error, I determine his third assignment to be moot. *See* App.R. 12(A)(1)(c).

{¶112} As I believe appellant was improperly convicted for the 1997 aggravated murder of Ronald Maceo Hull, I respectfully dissent.