[Cite as *State v. Sheets*, 2023-Ohio-2591.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 21CA6
	:	
v.	:	
	:	DECISION AND
LONNIE SHEETS,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Angela Miller, Jupiter, Florida, for Appellant.

Dave Yost, Ohio Attorney General, and Andrea K. Boyd, Special Prosecuting Attorney/Assistant Attorney General, Columbus, Ohio, for Appellee.

Smith, P.J.

{¶1} Appellant, Lonnie Sheets, appeals his convictions in the Jackson County Court of Common Pleas after a jury found him guilty of multiple felony counts and firearm specifications. Sheets was found guilty of the following: 1) one count of complicity to aggravated murder (count one), an unspecified felony in violation of R.C. 2903.01(A) and 2923.03(A); 2) one count of aggravated murder (count two), an unspecified felony in violation of R.C. 2903.01(A); 3) one count of attempted murder (count three), a first-degree felony in violation of R.C. 2903.02(A) and 2923.02(A); 4) one count of felonious assault (count four), a

second-degree felony in violation of R.C. 2903.11(A)(2); and 5) tampering with evidence (count five), a third-degree felony in violation of R.C. 2921.12(A). Additionally, Sheets was found guilty of R.C. 2941.145 firearm specifications on counts one through four.

{¶2} On appeal, Sheets contends 1) that the trial court erred in refusing to admit his Exhibits "B" and "C" and thus denied him his constitutional right to present a complete defense; 2) that the verdicts for complicity to aggravated murder, aggravated murder, and tampering with evidence are supported by insufficient evidence; 3) that the trial court erred in denying his motion to suppress as the statements gathered were in violation of his constitutional rights; 4) that the trial court erred when it sentenced him to consecutive sentences for attempted murder and felonious assault and that the failure to merge these sentences violated his constitutional rights; and 5) that the trial court erred when it imposed consecutive sentences.

{¶3} Because we find no merit to Sheets' first, third, and fourth assignments of error, they are overruled. However, because we find that Sheets' conviction for tampering with evidence is not supported by sufficient evidence, his second assignment of error is sustained in part. However, the portion of Sheets' second assignment of error challenging the sufficiency of the evidence as to his convictions for complicity to aggravated murder and aggravated murder is without

merit and is overruled. Further, to the extent his fifth assignment of error challenges the consecutive sentences imposed for his complicity to aggravated murder, aggravated murder, attempted murder, and felonious assault convictions, it is overruled. But, in light of the fact that we have found that Sheets' conviction for tampering with evidence is not supported by sufficient evidence, the sentence corresponding with that charge must be vacated. Thus, Sheets' fifth and final assignment of error is sustained in part and overruled in part.

{¶4} Accordingly, because we have found that Sheets' conviction for tampering with evidence is not supported by sufficient evidence, that conviction is hereby reversed and vacated and the 36-month prison term imposed on that conviction is vacated as well. The remainder of Sheets' convictions are affirmed.

FACTS

{¶5} This matter stems from an event that occurred in the early morning hours of October 30, 2020, in Jackson County, Ohio, which resulted in the attempted murder of Paul Sheets (hereinafter "Paul"), the aggravated murder of Paul's wife, Tabitha Sheets (hereinafter "Tabitha"), and the aggravated murder of David Yeley (hereinafter "Yeley"). Paul and Tabitha are the brother and sister-in-law of Appellant, Lonnie Sheets (hereinafter "Sheets"), and Yeley is Sheets' friend. Sheets along with his wife, Lisa Sheets (hereinafter "Lisa"), were arrested at their home in Wheelersburg, Ohio, shortly after law enforcement responded to

Paul and Tabitha's residence in Oak Hill, Ohio, as a result of Paul's report that his brother had shot him in the head and had gotten away in a car driven by Lisa.

{¶6} A multicount felony indictment was subsequently filed on December 23, 2020, charging Sheets with the following offenses:

Count One:	Aggravated Murder (of Yeley), an unspecified felony in violation of R.C. 2903.01(A), along with a firearm specification in violation of R.C. 2941.145;
Count Two:	Aggravated Murder (of Tabitha), an unspecified felony in violation of R.C. 2903.01(A), along with a firearm specification in violation of R.C. 2941.145;
Count Three:	Attempted Aggravated Murder, a first-degree felony in violation of R.C. 2903.01 and 2923.02(A), along with a firearm specification in violation of R.C. 2941.145;
Count Four:	Attempted Aggravated Murder, a first-degree felony in violation of R.C. 2903.01 and 2923.02(A), along with a firearm specification in violation of R.C. 2941.145;
Count Five:	Felonious Assault (of Paul), a second-degree felony in violation of R.C. 2903.11(A)(2), along with a firearm specification in violation of R.C. 2941.145; and
Count Six:	Tampering with Evidence, a third-degree felony in violation of R.C. 2921.12(A)(1).

{¶7} Sheets pled not guilty to the charges and the matter moved forward with the filing of a bill of particulars and then motions to suppress. The bill of

particulars specified that counts one and two were alleged to have been committed with prior calculation and design by virtue of the fact that Sheets purchased both a firearm and ammunition in the days prior to the murder and that he drove to the victims' residences to commit the crimes. The bill of particulars specified, with respect to counts three and four, that both attempted aggravated murder counts involved Paul Sheets and were also committed with prior calculation and design. The bill specified that although Sheets attempted to shoot Paul, the gun misfired, leading to Sheets using the firearm as a "blunt weapon" to strike Paul in the head. As to count five, the bill specified that Sheets shot Paul with a firearm and then struck him in the head using the firearm as a "blunt weapon." Finally, as to count six, the bill specified that both Sheets and Lisa fled the scene in a vehicle, washed their clothes and disposed of the murder weapon.

{¶8} Thereafter, Sheets filed two motions to suppress. The first motion related to the statements made by Sheets when he was being interrogated by law enforcement at the Jackson County Sheriff's Office the night of his arrest. The second motion sought suppression of evidence obtained as result of the execution of search warrants of Sheets' Wheelersburg residence and vehicle. In the first motion, Sheets argued that he was not read his *Miranda* rights[1] in a proper manner and thus that he did not knowingly, intelligently, and voluntarily waive his

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

constitutional rights. Sheets also argued that his statements were "made under coercive police interrogation tactics and procedures." Sheets raises no arguments on appeal regarding the denial of his motion to suppress the search of his residence and vehicle.

{¶9} A suppression hearing was held on April 1, 2021. The State presented three witnesses, which included 1) Detective Sergeant Jodi Conkel, from the Scioto County Sheriff's Office; 2) Chief Deputy Scott Conley, from the Jackson County Sheriff's Office; and 3) Detective Sergeant Rick Zinn, also from the Jackson County Sheriff's Office. Conkel primarily testified regarding the initial search of Sheets' residence and the search warrant that was subsequently issued by a Scioto County Judge. Because Sheets raises no arguments regarding the search of his residence or vehicle on appeal, Conkel's testimony is irrelevant to our analysis. Conley, however, offered testimony regarding the interrogation of Sheets after he was arrested on October 30, 2020. Conley testified regarding the manner in which he *Mirandized* Sheets prior to questioning him and explained that Oak Hill Police Chief Davey Ward was also present when Sheets was questioned. A five-minute video recording of the interrogation was played for the court. During this interview, Sheets stated he had not shot a gun in years, but then when Conley asked him to submit to a gunshot residue test, Sheets stated he had gone shooting with his son the prior weekend. When asked to clarify his prior statement, he

explained that he had forgotten he had been shooting with his son. The gunshot residue test that was performed on Sheets was ultimately negative.

{¶10} Zinn also testified that after the interview between Conley, Ward and Sheets was concluded at Sheets' request, he conducted a follow-up interview with Sheets which began about ten minutes after the initial interview had been concluded. He testified on cross examination that he did not provide Sheets any additional *Miranda* warnings before he started asking him questions. He further stated that he did not get to finish questioning Sheets because the interview was interrupted and he was redirected to an investigation that was being conducted at a residence on Dark Hollow Road, where Yeley's body had just been found.

{¶11} At the conclusion of the hearing, the trial court narrowed and clarified the issues and ordered that post-hearing briefs be filed. Prior to the hearing being concluded, defense counsel abandoned the argument that coercive police measures were taken, but raised a new argument, claiming that Sheets had invoked his Fifth Amendment right to remain silent at the conclusion of the interview conducted by Conley and Ward, and that Zinn violated that right when he resumed questioning Sheets without re-warning him about his *Miranda* rights. The trial court, however, ultimately denied both of Sheets' motions.

{¶12} The matter thereafter proceeded to a seven-day jury trial beginning on May 3, 2021. The State introduced 24 witnesses at trial, ranging from law

enforcement who responded to the scenes of the crimes and who were involved in the investigation to first responders, employees from the Ohio Bureau of Criminal Investigation (hereinafter "BCI"), Sheets' three sons, Sheets' friends, Paul's neighbors who witnessed part of the events, and Paul himself. Relevant portions of the witnesses' testimony will be set forth here and also below as part of our analysis of Sheets' assignments of error.

{¶13} The first witness introduced by the State was Paul Sheets. Paul generally testified that Sheets was his brother and that when Sheets and Lisa would argue, Sheets would stay at either Paul's house or Yeley's house. He testified that when Sheets would stay with him, he often met up with a woman named Andrea Brown and that when Sheets would stay with Yeley, he often met up with a woman named Narketta Lucas. Paul testified that on the night in question, he had been at home with his wife, Tabitha, when Sheets and Lisa showed up just before 1:00 a.m. wanting "ice." Paul testified that ice is a name for meth, or methamphetamine, and that he uses and sells ice. He testified that Tabitha's friend, Rebecca Montgomery, showed up shortly thereafter and that an individual named John McCoy, who is the boyfriend of Paul's niece, Tara Yeley, was also there.[2] Paul testified that he, Tabitha, and Rebecca then left to drive Rebecca to the bank so she could withdraw money to pay him for drugs that he had "fronted" her

[2] The Yeleys and the Sheets are related by marriage.

earlier in the day. Camera footage of Paul, Tabitha, and Rebecca going through the bank drive thru that night was consistent with Paul's testimony. Paul testified that as the three were pulling back into Paul's residence between 1:15 a.m. and 1:30 a.m., Sheets, who had left, called him asking for power steering fluid, stating he was coming from Dark Hollow. Sheets then returned to Paul's house, at which point Paul left to go obtain more drugs for Rebecca Montgomery, and also to buy Tabitha a "pop."

{¶14} When Paul returned home a short time later, Lisa was sitting in the driver's seat of the couple's white Chevy Impala in Paul's driveway. Paul testified that Lisa stated that they needed "to get home," and she told Paul that Sheets was in the house. He testified that when he walked into his trailer, the dog didn't bark as usual, that he could see lights on in the bathroom, and then he saw Sheets standing at the end of the hallway, which was right in front of the bathroom. Paul asked what Tabitha was doing, to which Sheets responded that she was using the bathroom. When Paul told Sheets there was no need to rush off, Sheets said he needed to leave, and when Paul turned to open the door, Sheets shot him. Paul testified that when the gun went off, he realized that his wife was dead because she didn't come out to help him.

{¶15} Paul further testified that after the initial gunshot, Sheets spun him around and the gun jammed. Paul explained that the two men then fought and

wrestled, and that he was unable to get ahold of the gun because it was slippery with blood. He testified that the gun looked greenish-black and looked like it was an automatic. He testified that Sheets then kicked him in the leg, pinned him down, stomped on him, and started "pistol whipping" him. He testified that as Sheets was sitting on him, he bit Sheets "on the dick" and was then able to run out the door. He further testified that while he was running he heard Lisa telling Sheets to get into the car and he saw Sheets get into the passenger seat. At that time, Paul's cousins, Shelly and Johnny Blizzard, carried him to his aunt's house next door. Once there, Paul asked Shelly to go check on Tabitha and when she did, Paul heard screaming and knew that Tabitha was "gone." Paul testified that Sheets had been staying with him until just prior to this event, that Sheets and Yeley were friends, and that Tabitha was placed on life support after she was transported to a Columbus, Ohio hospital, and later died. Paul explained that he was transported to a hospital in Huntington, West Virginia, where he was treated and released.

{¶16} Dave Ward, Oak Hill Chief of Police, was the State's second witness. He was involved in the investigation at issue. He testified after being called out at approximately 2:19 a.m. on October 30, 2020, he met with Paul, who told him that he had been shot by his brother and Lisa. Chief Ward also participated in the interview of Sheets at the Jackson County Sheriff's Office after he was arrested. He testified that Sheets initially denied ever shooting a gun and stated that he

hadn't owned a gun since the age of 17 because he wasn't allowed to possess them. However, after being asked about submitting to a gunshot residue test, Sheets changed his story and stated he had shot a gun the prior weekend with his son Cody. Ward also testified that Sheets admitted he and his wife had been at Paul's house, but he denied shooting Paul. Ward testified that although oral swabs and touch DNA swabs were taken from Sheets, Sheets was negative for gunshot residue. During his testimony, Ward identified several photographs that were admitted into evidence depicting Paul's injuries, which included a gunshot wound near his ear as well as a black eye.

{¶17} Chief Deputy Scott Conley from the Jackson County Sheriff's Office was the third witness that testified for the State. He testified that he initially responded to the scene in Oak Hill and obtained a description of Sheets' vehicle, which was described as a white Chevy Impala. He testified that both the vehicle and Sheets were later located at 8404 State Route 140, Wheelersburg, Ohio. He testified that he assisted in getting DNA swabs from Sheets, which was done at the direction and request of BCI, and that he also participated in the interview of Sheets at the Jackson County Sheriff's Office after his arrest. He explained that the interview began at approximately 6:30 a.m. and that before questioning Sheets, he first advised him of his constitutional rights according to a standard form used by the Sheriff's Office. He then informed Sheets that his brother had been shot

and had named him as the shooter. Chief Conley testified that Sheets did not seem troubled by that news, that he denied shooting Paul, and that he had no emotional response to a report that Tabitha had been shot and was in bad shape. Conley testified that Sheets admitted he had been at Paul's house twice the prior night, but that he claimed there had been no argument or altercation. Conley testified, consistent with Ward, that although Sheets initially stated that he hadn't shot a firearm in several years, when asked about a gunshot residue test Sheets then stated that he had shot a shotgun the prior Saturday with his son, Cody. He also testified that Sheets informed them that he had just washed his hair prior to law enforcement arriving at the Wheelersburg residence. Conley testified that after the interview, he responded to Yeley's residence at 1475 Dark Hollow Road due to a report that Yeley had been shot and was found lying on the floor. He testified that he went to Yeley's residence, along with other members of law enforcement, where Yeley was found having been shot in the head, with no pulse and cold to the touch. He testified that he observed a small caliber casing right above Yeley's head, which he left alone for BCI to collect. He further testified that an individual named Glen Davis showed up at Yeley's residence during the investigation and provided information that was "germane" to the case. Conley also assisted in obtaining a search warrant for BCI to process the scene and he remained at the scene until BCI Agent Holcomb arrived. Finally, Chief Conley testified that as

part of the investigation he went to Porter's Firearms in Wheelersburg, Ohio, where he collected a surveillance video.

{¶18} Cody Sheets, Ryan Horner, and Dustin Sheets were the State's fourth, fifth, and sixth witnesses. Cody Sheets and Dustin Sheets are Sheets' biological sons and Ryan Horner is Sheets' stepson. Cody testified that he had not been shooting with Sheets the prior weekend and that he hadn't been shooting since hunting season the prior November. Ryan and Dustin likewise testified that they had not been shooting with Sheets the prior weekend either.

{¶19} The State's seventh witness was Glen Davis, an Oak Hill resident who had known Sheets for 35 years and was Yeley's cousin. He testified that he "junks cars" for a living and that he found a .32 caliber gun in an old junk car. He described the gun as having a clip in it, rather than being a revolver, and that it was black, faded out on one side, and was rusty. He testified that Sheets would work for him from time to time if Sheets and Lisa were broken up and that Sheets had told him he was looking for a gun. Davis testified that he sold the gun to Sheets for $40.00 approximately two to four days prior to the date at issue and when Sheets picked the gun up, Lisa was with him. He testified that he didn't have any ammunition for the gun and that he told Sheets that he didn't even know if the gun worked. He further testified that Sheets asked him to find some ammunition for the gun and as a result, Davis called Mike French Jr., the owner of a gun shop in

Oak Hill, looking for ammunition for the gun, which French's shop didn't carry. Davis testified that although he had no knowledge of Sheets and Yeley ever fighting, Lisa did not like Yeley because Sheets stayed with him sometimes. He also testified that he was aware that Sheets and Paul argued sometimes. Finally, he testified that he had overheard arguments between Sheets and Lisa in the past and that Lisa called "the law" on him all the time.

{¶20} Several other witnesses testified on behalf of the State, whose testimony we include at this juncture, though out of order. Mike French Jr., the owner of a gun shop in Oak Hill, Ohio, testified that Davis left a message on his machine looking for a certain ammunition of a type which he could not remember, but that it was out of stock. He further testified that although he keeps a large stock, the type of ammunition Davis was seeking was not a common item. Harold Wayne Porter, III, the owner of Porter Firearms, also testified. He testified that his gun shop is located in Wheelersburg, Ohio, and that an officer from the Jackson County Sheriff's Office had come to his shop and asked him when the last time was that he had sold a certain type of ammunition, but he couldn't remember the specific type of ammunition when he testified. He testified that he looked it up in his system and saw that a sale was made on October 29, 2020, at 3:58 p.m., so he printed off a copy of the receipt and also allowed the officer to view surveillance video from the time of the sale. A copy of that receipt was admitted into evidence

and Porter verified that the type of ammunition sold was .32 caliber hollow point ammunition, manufactured by PMC. Dale Dickerson also testified. He explained that although he doesn't work at Porter Firearms, he "loafs" there and helps out. He testified that he was present on the date in question and is the person that sold the .32 caliber ammunition. He testified that that particular ammunition is rarely sold. Diane Porter also testified, simply adding that she works at the gun shop as well and runs the register.

{¶21} Melba Bailey, Paul's aunt and neighbor, also testified. She testified that she was in bed on the night at issue, but was awake, sitting up and smoking a cigarette when she heard a "big bang" and then it got quiet. She testified that she had heard Paul's car leave prior to that time. She later heard another gunshot, describing the gunshots she heard as occurring "far apart." She testified that upon looking out her window, she saw Paul come out of his house trying to run, but that he fell down. She testified that Sheets was following behind him trying to shoot him again. She testified that she could see the gun, that it was dripping with blood, and that the gun was never fired outside. She further testified that Lisa was sitting in her car, which was parked right beside Melba's bedroom window, and that Lisa told Sheets they needed to get out of there right now. She testified that Lisa was driving and Sheets got into the passenger seat.

{¶22} Tara Shoemaker also testified about the events that occurred in the area of Paul's residence on the night in question. She testified that her maiden name is Yeley and that Sheets is her uncle. She testified that she lives in a trailer located close to Paul's trailer and that because her room has a broken window that is only covered by plastic, she could hear what transpired really well. She testified that when she heard Paul yelling that he had been shot, she ran to her aunt Melba's trailer and found Paul laying on the floor. She further testified that she had seen Sheets' and Lisa's vehicle at Paul's residence and had also seen it going down "Cozy Glen" right after "all of it."[3] She explained that when she heard Paul yell, she saw Sheets and Lisa leaving. She testified that she had known Sheets for 41 years and that Sheets' relationship with Paul was not good. She testified that although Sheets acted as though he liked Paul to Paul's face, he always talked about him and called him a "narc" and stated "I'll get him."

{¶23} James R. Baker, III, a paramedic for the Jackson County EMS also testified. He testified that he responded to a call on the night in question and treated Paul upon his arrival. He stated that Paul was alert and oriented and was able to relay the events of the night in an understandable manner. He further stated that Paul informed him that he had been shot in the left ear and that the shooter attempted to shoot him again but the gun jammed. He testified that Paul said the

[3] She explained that Cozy Glen is a nearby street.

shooter then repeatedly pistol whipped him. He further testified that Paul was placed in a c-collar and had lacerations, abrasions, bruises and cuts consistent with what Paul described as being pistol whipped.

{¶24} Dallas Yeley also testified for the State regarding the murder of Yeley. He testified that he and Yeley were brothers and that Sheets and Paul are both his brothers-in-law. He testified that he went to see Yeley on the morning of October 30, 2020, because the two men were scheduled to go get a load of firewood. He testified that when he arrived between 7:15 and 7:30 a.m., the door was open a little bit. He testified that he knocked and hollered and then finally went in and found Yeley laying there. He said he touched him and told him he loved him, and then he went and called the sheriff. He explained that Sheets and Yeley's relationship was "not well" and that "they rubbed each other the wrong way." He further explained that Sheets and Lisa "had troubles" and that Sheets was staying at Yeley's house on the night in question as he and Lisa were "off" at the time. He testified that Sheets had been staying with Yeley for two to three months leading up to that date and had actually also stayed with him at times. Finally, he testified that Lisa had always hated Yeley and that he had heard that Sheets and Lisa were back together in the two weeks leading up to the murder and also that he had seen the two together the prior Saturday in the McDonald's drive thru.

{¶25} Detective Sergeant Rick Zinn from the Jackson County Sheriff's Office was the last member of local law enforcement to testify. He testified that he responded to the scene in Oak Hill where Paul was located on the night in question and that upon arrival, he spoke with Melba Bailey and Shelly Blizzard, Paul's cousin, while EMS was working on Tabitha. He explained that he then received information that led him to Dark Hollow Road, but that when he was on the way there, he got a call advising him that Sheets and Lisa and their vehicle had been located. So, he was again redirected to Scioto County. He testified that he arrived at the Wheelersburg address along with Scioto County deputies roughly between 3:00 and 4:00 a.m. and that he called Sheets and Lisa out of the residence with a speaker. He testified that Sheets was wearing boxer briefs, that Lisa was dressed, that they were both placed in cruisers, and that consents to search were obtained from both individuals. Although Lisa provided law enforcement with the clothes Sheets was allegedly wearing that night, Lisa's clothes were in the washing machine. Zinn testified that the search yielded a shotgun, but the firearm at issue was not located. Zinn further testified that after Sheets and Lisa were transported for questioning, he returned to the Wheelersburg residence with BCI in order to conduct a search and he had the vehicle towed to a secure location.

{¶26} Zinn explained that while he was involved in the questioning of Sheets at the Jackson County Sheriff's Office, he was called to Dark Hollow Road

where Yeley's body had been found. He testified that BCI searched both Yeley's residence and Sheets' residence and that shell casings recovered from both crime scenes and Sheets' residence were from .32 caliber ammunition and, as a result, he called the local gun shops to see who sold that ammunition. He testified that Porter Firearms ended up being the only gun shop that sold that particular ammunition, which was PMC brand .32 auto, and which matched the shell casings that had been recovered. He was advised by Porter Firearms that they had sold that particular ammunition to Lisa Sheets and they further provided him a copy of the surveillance video showing Lisa in the store. The video shows Lisa in the store and then shows her walking out to her car, presumably to be sure she was buying the correct ammunition, and then walking back into the store and making the purchase. The vehicle on the video was a white Chevrolet Impala. Zinn also testified that BCI analyzed cell phones owned by Sheets, Lisa, Paul and Tabitha, and executed Facebook search warrants on all four individuals' accounts.

{¶27} In addition to the foregoing witnesses, the State introduced several medical and forensic experts and other witnesses from BCI. BCI Special Agent Matthew Austin assisted with the crime scene at Paul's residence and testified as the State's twelfth witness. He testified that upon his arrival at Paul's residence, Tabitha was already gone. He testified that he observed a suspected bullet hole behind the washer on the western wall of the trailer, blood stains on the wall and

floor, wall trim missing and laying on the floor, and cotton gauze and first aid supplies on the floor. He testified that he found a fired handgun casing on the eastern wall of the living room with a headstamp of "PMC .32 auto." He stated that it appeared the bullet associated with that casing exited the eastern wall from inside to outside based upon the fact that the metal was pulled backward on the outside wall. The bullet that exited there was never recovered. He further observed a pair of glasses covered in blood in the bathroom, blood on the floor, a trash can with suspected blood stains in the bathtub, a pink rug with blood, and inside the bathroom door he observed "another fired casing" with a headstamp of "PMC .32 auto" that "matched" the one found in the living room.

{¶28} Agent Austin testified that he also investigated Sheets' residence and vehicle. He testified that he used a sledge hammer to enter Sheets' residence and when he entered he photographed the washing machine that had a bottle of bleach sitting on it. He observed fresh water with reddish brown stains in the bathtub. He also testified that after moving the couch in the living room, he collected an "unfired .32 cartridge," which he explained was "ready to put into a gun and go bang." A photo of the cartridge was shown to the jury. During the search of Sheets' car, he observed reddish brown stains suspected to be blood on the front passenger interior door handle, a pair of gloves in the front passenger seat floor, as

well as multiple cleaning wipes. He collected samples from that area and also from the front passenger seat headrest.

{¶29} BCI Special Agent Chad Holcomb also testified. He testified that he performed the crime scene investigation at Yeley's residence on Dark Hollow Road. He stated that when he arrived, he found Yeley's body lying on the floor and that he located a "fired cartridge case" with headstamp "PMC .32 auto" on the carpet near the victim's head, a "fired cartridge case" with headstamp "PMC .32 auto" underneath Yeley's body, another "fired cartridge case" with headstamp "PMC .32 auto" underneath Yeley's body, and a "live ammunition" cartridge marked as "PMC .32 auto" also under Yeley's body. He explained that a "fired cartridge casing" is what is left of the bullet after the gun is fired. Photographs from Holcomb's investigation were shown to the jury and admitted as exhibits.

{¶30} Dr. Elaine Amoresano, Deputy Coroner at the Franklin County Coroner's Office, testified regarding the autopsy she performed on Tabitha. She testified that she observed an entrance wound to Tabitha's right posterior parietal scalp and that she recovered a bullet located in a blood clot that was associated with that entrance wound. She testified that she also observed an entrance wound to Tabitha's right temporal scalp and recovered a partially exited bullet on the right side of Tabitha's scalp. She testified that both shots caused bleeding on the brain and scalp, as well as skull fractures, and that either shot would have been fatal.

She testified that Tabitha's official cause of death was determined to be two gunshot wounds to the head. She further testified that she provided the recovered bullets to law enforcement. Finally, she testified upon cross examination that her findings did not reveal who shot Tabitha and that a toxicology report that was performed showed there was methamphetamine and fentanyl in Tabitha's system.

{¶31} Dr. Elaine Goolsby, Deputy Coroner and forensic pathologist at the Montgomery County Coroner's Office, testified regarding the autopsy she performed on Yeley. She testified that she observed abrasions and contusions on the back of Yeley's left hand, purple and red bruises on Yeley's right hand, as well as lacerations above Yeley's right eye and soft tissue injuries of the anterior strap muscles of his neck. She stated that Yeley had also sustained blunt force trauma to his forehead, nose, and lip. Yeley also had hemorrhages where the pharynx meets the laryngopharynx as well as a fractured thyroid cartilage, which she explained is the Adam's apple. She testified that he also had sustained an injury to his ankle and a blunt force injury to the frenulum, which is inside his mouth. Goolsby testified that she also observed a gunshot wound to Yeley's front left shoulder with bruising around the wound that had occurred as a result of post-mortem drying. She observed a second gunshot wound to the front of Yeley's right ear. The gunshot wound to the right ear had bruising and abrasions from gun powder stippling, which Goolsby explained indicated that the firearm used was only a

couple of inches away from his head. She testified that both bullets were recovered and there were no exit wounds. She testified that the bullet that entered the right side of Yeley's head crossed the midline and then went slightly to the left side into what is called the left parietal lobe, and that the bullet was recovered from Yeley's left parietal brain. She testified that Yeley could have survived the gunshot to his shoulder, but that the gunshot to the ear that passed through Yeley's head officially caused his death. Goolsby conceded on cross examination that her findings did not reveal who shot Yeley.

{¶32} Finally, the forensic experts and analysts that testified for the State from BCI included the following: forensic scientist examiner Andrew McClelland; criminal intelligence analyst Jennifer Lester; forensic scientist Ted Manassan; and forensic scientist Lindsay Koenig. Andrew McClelland was qualified as an expert in the area of firearms and testified that the analysis he performs involves looking for characteristics that are transferred from a firearm onto the fired component during the firing of a cartridge. He explained that a cartridge is an "unspent round" or an "unspent shell" that contains a bullet. He testified that he analyzed the following in this case: 1) a fired .32 auto PMC casing that was found on the floor near the front door at Paul and Tabitha's residence; 2) a fired PMC .32 auto casing found on the floor behind the bathroom door at Paul and Tabitha's residence; 3) a PMC .32 auto unfired cartridge found on the floor by the couch at Sheets'

residence; 4) a PMC .32 auto fired cartridge casing that was found on the carpet near Yeley's head at the Dark Hollow residence; 5) a fired cartridge casing with the headstamp of PMC .32 auto that was found under the body of Yeley; 6) an unfired cartridge, or live round, that was found under Yeley's body; and 7) a fired cartridge casing with a headstamp of PMC .32 auto that was found under Yeley's body. Regarding the two unfired cartridge casings that were found, McClelland testified that because the bullets were still intact and had not been fired, neither of them had any individual characteristics, which he explained was to be expected with unfired bullets. However, he stated that these two unfired bullets were both PMC .32 auto cartridges with brass primer and copper jackets, and were hollow point bullets. Thus, he testified that the unspent bullets from Sheets' residence and the unspent bullets found underneath Yeley's body were from the same manufacturer. However, he also testified that PMC, which stands for Precision Machine Cartridge, is a common ammunition manufacturer.

{¶33} With respect to his analysis of the characteristics of the five fired cartridge casings, McClelland testified that "there was an agreement in the class characteristics and some level of agreement in the individual characteristics for me to feel comfortable that they were fired by the . . . the same firearm." McClelland further explained that his analysis fell into the category of "support for same source," meaning that "there is information on these that support the conclusion

that they were fired by the same firearm but not enough for me to conclusively determine that for certain." He explained that there are five categories, with category one being the ability to determine for certain that the casings had come from the same gun, with category two being that there was "support for the same source," with category three being that the analysis was inconclusive, with category four being that there was "support for a different source," and with category five being that the source had been excluded. Thus, McClelland's analysis of the fired cartridge casings here fell into category two, "support for same source."

{¶34} McClelland also analyzed the bullets recovered from Tabitha and Yeley's autopsies. He testified that his analysis resulted in the bullets being "identified as having been fired by the firearm." Thus, he testified that the bullets recovered from Tabitha's body and Yeley's body came from the same gun. In summary, he concluded that both the fired and unfired cartridges were all .32 caliber and were jacketed, hollow point bullets. It should be noted that because the bullet that was shot into Paul's ear was never recovered, it could not be submitted to McClelland for analysis.

{¶35} Jennifer Lester also testified, explaining that her role at BCI involves analyzing data in investigations and that she specializes in phone records. She testified that she analyzed the phone and Facebook records of Sheets, Lisa, Paul,

and Tabitha, and performed "cell sight [sic] mapping," which matches up cell phone activity with nearby cell towers to determine longitude and latitude. She testified that on October 29, 2020, at 3:26 p.m. and 4:10 p.m., Sheets' cell phone connected with a tower located within 1.7 miles of Porter Firearms in Wheelersburg. She further testified that the sector data she reviewed indicated that the specific sector Sheets' phone connected with faced Porter Firearms and not Sheets' residence. Lester further testified that data from Lisa's phone placed her in the vicinity of Paul and Tabitha's residence at 11:45 p.m. on October 29, 2020, and again at 12:10 a.m. on October 30, 2020. She testified that Lisa's phone records also showed that Lisa called Tabitha from 1.5 miles away from Tabitha's house at 1:20 a.m. on October 30, 2020 and after that, all of Lisa's calls forwarded to voicemail.

{¶36} Ted Manassan testified that he works in the trace evidence unit for BCI, specifically gunshot residue trace evidence. He testified that he issued a report finding that gunshot residue testing that was performed on Sheets was negative. He also testified that particles from a gunshot are microscopic, are easily transferred, and can be easily removed by hand washing.

{¶37} Finally, Lindsay Koenig testified for the State as an expert in the field of DNA analysis. She testified that a swab of suspected blood from the bathtub drain at Sheets' residence matched the DNA of Sheets. She further testified that a

swab of the stain on the front passenger interior door panel of Sheets' vehicle was presumptive positive for blood and that the DNA profile was consistent with Paul. She also testified that a swab of suspected blood from the front passenger head rest of Sheets' vehicle yielded a DNA profile consistent with Sheets.

{¶38} The State rested after its presentation of these 24 witnesses and the majority of its 234 exhibits were admitted into evidence. At that point, the defense made a Crim.R. 29(A) motion for acquittal of all the charges. The trial court ultimately denied the motion.

{¶39} Prior to the defense presenting its case, a lengthy hearing was held regarding evidence and witnesses sought to be introduced by the defense, to which the State had objected. In fact, during the presentation of the State's case, the parties went on the record, outside the presence of the jury, in order for the defense to remotely call Lisa Sheets to testify on Sheets' behalf. However, Lisa's counsel advised that Lisa was formally invoking her Fifth Amendment right against self-incrimination and was refusing to testify. Thus, because Lisa was unavailable as a witness, the defense wanted to introduce evidence and witness testimony indicating that Lisa had prior issues with Yeley and Paul and that she was actually the person who murdered Yeley and Tabitha. The defense further sought to introduce evidence demonstrating that Lisa had been violent towards Sheets in the past and had threatened to kill him. At the close of the State's case, a hearing was held on

the record but outside the presence of the jury which resulted in the defense making a proffer of evidence. The contents of the proffer will be discussed at length below as part of our analysis of the arguments raised under Sheets' first assignment of error.

{¶40} Thereafter, the defense presented its first witness, which was John Evans. Evans testified that he lived in Wheelersburg and had known Lisa for 15-20 years. He testified that in the late summer/early fall of 2020, Lisa had offered him $1500.00 to $2000.00 "to come up to Oak Hill and whoop [Sheets] and bring . . . bring him back to her down on . . . at her residence." He testified that Lisa had never asked him to do anything to Paul, David, or Tabitha. He further testified that he had declined Lisa's offer.

{¶41} Kay Bashum was the defense's second and final witness. She testified that Lisa is her cousin, but that she doesn't claim her because she's crazy. She testified that she had known Yeley for several years and that prior to the murders, Lisa had asked her to stab Yeley. She also testified regarding a prior incident where she, Lisa, and an individual named Danny Carter had gone to Yeley's house with baseball bats and were banging on his trailer. She further testified regarding another incident that occurred on September 19, 2020, while she was driving around with Lisa in Oak Hill near Paul and Tabitha's house. Bashum was prevented from testifying in more detail regarding these events because most

of her testimony would have related to the evidence contained in the proffer. The defense rested its case at the conclusion of Bashum's testimony.

{¶42} After the defense rested, the State requested a complicity instruction as to Count One, which charged Sheets with the aggravated murder of Yeley, arguing that the evidence indicated that Sheets acted in complicity with Lisa in committing the aggravated murder. In response, the defense argued that if a complicity instruction were to be given to the jury, then Lisa's statements that were contained in the proffer should also be permitted into evidence as "co-conspirator" statements. The judge pointed out that Lisa's statements were not in furtherance of a conspiracy and ultimately determined that a complicity instruction was appropriate over the objection of the defense. The State additionally requested a lesser included offense instruction as to Count One, asking the jury be instructed not only on complicity to aggravated murder with prior calculation and design, but also on complicity to murder (eliminating the prior calculation and design element). As to Count Two, which charged Sheets with the aggravated murder of Tabitha, the State also requested a lesser included offense instruction of murder. As to Count Three, which originally charged Sheets with attempted aggravated murder, the State requested that it be able to proceed only on the lesser included offense of attempted murder, and that the jury only be instructed on that lesser included offense. The State noted that Count Four, which also charged Sheets with

attempted aggravated murder, had been previously eliminated and that Count Five, which originally charged Sheets with the felonious assault of Paul should be renumbered as Count Four.[4] There was no discussion regarding the instruction for tampering with evidence, which was originally identified as Count Six in the indictment, and now identified as Count Five as a result of eliminating one of the attempted aggravated murder charges.

{¶43} The jury was subsequently instructed accordingly, over the objection of the defense, and ultimately found Sheets guilty of complicity to aggravated murder, aggravated murder, attempted murder, felonious assault, and tampering with evidence. A sentencing hearing was held on May 28, 2021, where the trial court imposed maximum and consecutive sentences and refused Sheets' request that all offenses be merged for purposes of sentencing. After the sentencing hearing was held, but before the sentencing entry was filed, the trial court held another hearing on June 8, 2021, in order to additionally sentence Sheets to a mandatory five-year term of postrelease control, impose a no-contact order, and notify him that he was required to register as a violent offender. The sentencing entry was filed on June 8, 2021, and it is from that order that Sheets now brings his timely appeal, setting forth five assignments of error for our review.

[4] There had apparently been some previous discussion about dismissing Count Four of the indictment, however, at the time the jury instructions were being sorted out the charge remained pending. The trial court issued a subsequent order on May 24, 2021, formally dismissing the original Count Four and renumbering the remaining counts of the indictment.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN REFUSING TO ADMIT APPELLANT SHEETS' EXHIBITS "B" AND "C" AND THUS DENIED SHEETS HIS CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

II. THE VERDICTS FOR COMPLICITY TO AGGRAVATED MURDER, AGGRAVATED MURDER, AND TAMPERING WITH EVIDENCE, WHICH ARE SUPPORTED BY INSUFFICIENT EVIDENCE, VIOLATED APPELLANT SHEETS' RIGHTS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT SHEETS' MOTION TO SUPPRESS AS THE STATEMENTS GATHERED WERE IN VIOLATION OF SHEETS' CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

IV. THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT SHEETS TO CONSECUTIVE SENTENCES FOR ATTEMPTED MURDER AND FELONIOUS ASSAULT. THE FAILURE TO MERGE THE SENTENCES FOR ATTEMPTED MURDER AND FELONIOUS ASSAULT VIOLATED SHEETS' RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION; AND R.C. 2941.25.

V. THE TRIAL COURT ERRED WHEN IT IMPOSED CONSECUTIVE SENTENCES ON APPELLANT SHEETS.

ASSIGNMENT OF ERROR III

{¶44} We address Sheets' third assignment of error first, out of order, for ease of analysis. In his third assignment of error, Sheets contends that the trial court erred in denying his motion to suppress, arguing that his statements gathered were in violation of his constitutional rights. The record before us indicates that Sheets filed two motions to suppress. One sought suppression of the statements he made to law enforcement the night he was arrested and the other challenged the search of his residence. On appeal, Sheets only challenges the trial court's denial of his motion to suppress his statements, arguing that he was subjected to coercive police conduct. He argues that because he was subjected to coercive police conduct, his statements were involuntary and were obtained in violation of his due process rights. The State responds by arguing that all of the statements made by Sheets were made voluntarily and that there is no evidence in the record of coercive police activity.

Standard of Review

{¶45} Appellate review of a motion to suppress presents a mixed question of law and fact. *See State v. Leonard*, 2017-Ohio-1541, 89 N.E.3d 58, ¶ 15 (4th Dist.), citing *State v. Gurley*, 2015-Ohio-5361, 54 N.E.3d 768, ¶ 16 (4th Dist.), in

turn citing *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100. At a suppression hearing, the trial court acts as the trier of fact and is in the best position to resolve factual questions and evaluate witness credibility. *Id.*; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. Thus, when reviewing a ruling on a motion to suppress, we defer to the trial court's findings of fact if they are supported by competent, credible evidence. *Gurley* at ¶ 16, citing *State v. Landrum*, 137 Ohio App.3d 718, 722, 739 N.E.2d 1159 (4th Dist. 2000). However, "[a]ccepting those facts as true, we must independently determine whether the trial court reached the correct legal conclusion in analyzing the facts of the case." *Id.*, citing *Roberts*, *supra*, at ¶ 100.

Legal Analysis

{¶46} The Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee that no person in any criminal case shall be compelled to be a witness against himself. The Fifth Amendment, as well as the Due Process Clause of the Fourteenth Amendment, protects against the concern that coerced confessions are inherently untrustworthy. *See Dickerson v. United States*, 530 U.S. 428, 433, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). As explained in *Dickerson*:

> A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt * * * but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a

> shape * * * that no credit ought to be given to it; and therefore it is rejected.

Id., quoting *King v. Warickshall*, 1 Leach 262, 263-264, 168 Eng. Rep. 234, 235 (K.B.1783).[5]

{¶47} " 'Voluntariness of a confession is determined based on the totality of the circumstances.' " *State v. Leonard*, *supra*, at ¶ 18, quoting *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 71, in turn citing *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus (1976), vacated on other grounds, 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155 (1978). " 'However, the use of an inherently coercive tactic by police is a prerequisite to a finding of involuntariness. ' " *Leonard* at ¶ 18, quoting *Perez* at ¶ 71, citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Thus, we need not consider the totality of the circumstances unless we first find that the tactics used by law enforcement were coercive. *Leonard* at ¶ 18.

{¶48} Further, in order for a court to determine that a confession was coerced, the record must contain evidence demonstrating that: "(1) the police activity was objectively coercive; (2) the coercion in question was sufficient to overbear defendant's will; and (3) defendant's will was, in fact, overborne as a result of the coercive police activity.' " *State v. Humphrey*, 4th Dist. Ross No.

[5] *Dickerson* further explained that the roots of the common law in the United States regarding confessions are found in the common law developed by the courts of England.

10CA3150, 2010-Ohio-5950, ¶ 18, vacated on other grounds, 128 Ohio St.3d 397, 2011-Ohio-1426, 944 N.E.2d 1172, citing *United States v. Rigsby*, 943 F.2d 631, 635 (6th Cir.1991).

{¶49} In the case presently before us, although the statement made by Sheets did not constitute a confession, it was nevertheless incriminatory as it gave the perception that he had initially lied to police when he was asked how long it had been since he had last shot a gun. As explained above, Sheets initially stated it had been years since he had shot a gun, but when he was asked to submit to a gunshot residue test, he suddenly remembered he had shot a gun the prior weekend when he had gone shooting with his son. Although the gunshot residue test was ultimately negative, the statement made during questioning was inculpatory.

{¶50} Despite Sheets' arguments that his statement was involuntary and was coerced, the record before us fails to demonstrate any type of coercive conduct by law enforcement that led to Sheets making the statement at issue. Although Sheets argues that he is elderly and has serious medical problems which include heart problems and head injuries, as noted by the State, there is no evidence in the record to support these allegations, nor does Sheets explain how these alleged health conditions impacted the voluntariness of his statement. What the record does show is that Sheets was only 58 years old at the time he made his statement, which can hardly be described as being elderly.

{¶51} Sheets also argues that he has limited intelligence and education, which he suggests affected the voluntariness of his statement; however, there is no evidence in the record to support these allegations. Contrary to this argument, the record demonstrates that because Sheets did not have his reading glasses with him, Deputy Scott Conley, the chief deputy from the Jackson County Sheriff's Office, *Mirandized* Sheets by reading him the contents of a standard form entitled "Your Constitutional Rights." Not only did Deputy Conley read him the form, he went over each item, line by line, and asked if Sheets understood the rights he was waiving, to which Sheets responded that he did and initialed each line item.

{¶52} Sheets further argues that his statement was involuntary and coerced because: 1) "he was incarcerated for some time prior to the interview at 6:30 a.m. in the morning"; 2) [h]e had not slept prior to the interview; 3) "he was interviewed in his underwear with a blanket, and he complained about it being cold"; 4) he was in handcuffs for the entire interview; and 5) he was interrogated by three officers. With respect to the claim that Sheets had been "incarcerated for some time prior to the interview at 6:30 a.m.," the record indicates that law enforcement didn't arrive at Sheets' residence until between 3:00 a.m. and 4:00 a.m. and that Sheets was transported to the Jackson County Sheriff's Office just before 5:00 a.m. The waiver of constitutional rights form signed at the sheriff's office states it was

signed at 6:19 a.m. Thus, we cannot agree that Sheets was "incarcerated for some time prior to the interview."

{¶53} Further, although Sheets may not have slept prior to the interview, the record indicates that when law enforcement arrived at his house in the middle of the night, Sheets was wide awake, had just gotten out of the shower, and his wife was awake and doing laundry. There is no indication that Sheets was woken up and taken in for questioning, or that he appeared to be sleep deprived. Regarding the argument that Sheets was wearing only his underwear, was covered with a blanket, and was cold, despite Sheets' argument the record demonstrates Sheets was wearing pants and simply had a blanket around his shoulders. Deputy Conley testified that Sheets was wearing pants and that although Sheets made a comment that it was cold when they had just entered the interrogation room, the interrogation room was heated. A review of the video shows that very soon after questioning began, Sheets allowed the blanket to drop off of his shoulders and down to his waist. Thus, there is no indication that he was suffering from being cold during the interview. Finally, although Sheets was handcuffed and interviewed by three officers, a review of the video demonstrates that Sheets appeared to be comfortable and calm, did not appear to be stressed, and the interview lasted less than one hour and was conducted in a non-threatening manner. We simply find no evidence of police coercion based upon our review of

the record and as such, we cannot find that Sheets' statements were involuntary or obtained in violation of his constitutional rights.

{¶54} Moreover, at the conclusion of the suppression hearing when the trial judge was clarifying with counsel the specific issues to be determined by the court, defense counsel represented to the court as follows regarding the issue of police coercion:

JUDGE:	* * * Um . . . is the defense arguing that there was coercion in obtaining the consent or the waiver of the *Miranda* rights?
ATTORNEY TOY:	You saw it Judge. (laughs)
JUDGE:	Well, I . . . I . . . I know I saw it. I have opinion but I'm asking you if you're… if you're going to argue that?
ATTORNEY:	Quite frankly, no. It's . . . it's I can't argue that there was coercion other than he was cold and all of that . . . that's it. You've hit the issues that we have. I think there should have been a reaffirmation of the *Miranda*. Second, does the warrant stand based on double hearsay? And you hit the issue, does good faith then apply? That's where we're at.
JUDGE:	So . . .
ATTORNEY TOY:	I don't want to waive anything, Your Honor, but; it is what it is.

JUDGE: But, I'm, you know, I'm going to give both sides the opportunity to fully brief. Do we have any issue that this waiver initially with Officer Conley was . . . um . . . any aspect with that would defense [sic] wasn't knowing or intelligent?

ATTORNEY TOY: Your Honor, I can't show that. Not without calling my client. I'm not going to call him to the stand.

JUDGE: Okay.

ATTORNEY TOY: Even on that limited basis.

JUDGE: Okay, so, beside the issues that I've identified, does the defense see any other issues that need to be briefed in this?

ATTORNEY TOY: No, that's it.

JUDGE: Okay.

ATTORNEY TOY: You hit the issues.

SPA KINSLER: So, I have three (3) things, the . . . what are the . . . whether there's an unequivocal invocation of his right to remain silent prior to any interview with Zinn . . .

JUDGE: . . . Zinn . . .

SPA KINSLER: . . . and then the affidavit, you know, for law enforcement officers permitted to rely on statements from other law enforcement officers and their

affidavits and if their issue being in good faith [sic] and that's it?

JUDGE: Yeah.

{¶55} Sheets filed his post-hearing brief seven days later and mentioned nothing about police coercion or the voluntariness of his statements made to Deputy Conley. The only issue raised regarding his interrogation related to the fact that Zinn resumed interviewing Sheets without re-warning him about his *Miranda* rights, considering that the first interview was concluded because Sheets stated he didn't want to answer anymore questions. However, no incriminatory statements were made during the second portion of the interview that was conducted by Zinn and Sheets raises no argument about the second portion of the interview on appeal. Thus, as noted by the State in its brief, it appears any argument that police coercion occurred has been waived, as Sheets' "trial counsel conceded at the suppression hearing that there was no evidence of any police coercion 'other than he was cold * * *.' "

{¶56} In light of the foregoing, we find no merit to the arguments raised under Sheets' third assignment of error and it is therefore overruled.

ASSIGNMENT OF ERROR II

{¶57} We address Sheets' second assignment of error out of order as well, for ease of analysis. In his second assignment of error, Sheets contends that the verdicts for complicity to aggravated murder, aggravated murder, and tampering

with evidence were not supported by sufficient evidence and therefore violate his rights as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. The State responds by arguing that viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found all the essential elements of complicity to aggravated murder, aggravated murder, and tampering with evidence were proven beyond a reasonable doubt. As set forth above, Sheets made a Crim.R. 29(A) motion for judgment of acquittal at the conclusion of the State's case, which was denied by the trial court, and a jury found him guilty of each of these charges. Sheets now argues that these convictions were not supported by sufficient evidence.

Standard of Review

{¶58} A claim of insufficient evidence invokes a due process concern and raises a question of whether the evidence is legally sufficient to support the verdict as a matter of law. *See State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), superseded by statute on other grounds, as stated in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997) (as noted by *State v. Chute*, 3d Dist. Union No. 14-22-02, 2022-Ohio-2722). "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Id.* "Therefore, our review is de novo." *State v. Groce*, 163 Ohio St.3d 387, 2020-Ohio-6671, 170 N.E.3d 813, ¶ 7, citing *In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203, ¶ 3.

{¶59} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *Thompkins* at syllabus. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991), superseded by constitutional amendment on other grounds as stated in *State v. Smith*, *supra*, at 102 (as noted by *State v. Worley*, 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶ 57). Furthermore, a reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins* at 390 (Cook, J., concurring).

{¶60} Thus, when reviewing a sufficiency-of-the-evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. *See State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant*, 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency-of-the-evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. *See State*

v. Tibbetts, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001). Here, after our review of the record and in light of the following, we conclude that the State presented sufficient evidence to support Sheets' convictions for complicity to aggravated murder and aggravated murder, including the finding that these offenses were committed with prior calculation and design. However, we conclude that Sheets' conviction for tampering with evidence was not supported by sufficient evidence.

Legal Analysis

{¶61} As set forth above, the record before us indicates that Sheets was found guilty of the following counts contained in the indictment, which were amended and renumbered as follows:

Count One:	Complicity to Aggravated Murder (of Yeley), an unspecified felony in violation of R.C. 2903.01(A), along with a firearm specification in violation of R.C. 2941.145;
Count Two:	Aggravated Murder (of Tabitha), an unspecified felony in violation of R.C. 2903.01(A), along with a firearm specification in violation of R.C. 2941.145;
Count Three:	Attempted Murder (of Paul), a first-degree felony in violation of R.C. 2903.01 and 2923.02(A), along with a firearm specification in violation of R.C. 2941.145;
Count Four:	Felonious Assault (of Paul), a second-degree felony in violation of R.C. 2903.11(A)(2),

along with a firearm specification in violation of R.C. 2941.145; and

Count Five: Tampering with Evidence, a third-degree felony in violation of R.C. 2921.12(A)(1).

{¶62} On appeal, Sheets argues that the guilty verdicts for Counts One, Two, and Five are not supported by sufficient evidence. He does not challenge his convictions for the attempted murder or felonious assault of Paul.

Complicity to Aggravated Murder and Aggravated Murder

{¶63} R.C. 2903.01 defines the offense of aggravated murder and provides in section (A) that "[n]o person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy." This Court has explained as follows regarding the meaning of the phrase "prior calculation and design":

> "The phrase 'prior calculation and design' by its own terms suggests advance reasoning to formulate the purpose to kill. Evidence of an act committed on the spur of the moment or after momentary consideration is not evidence of a premeditated decision or a studied consideration of the method and the means to cause a death."

State v. Blevins, 2019-Ohio-2744, 140 N.E.3d 27, ¶ 21 (4th Dist.), quoting *State v. Walker*, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.2d 1124, ¶ 18. *See also State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 151.

{¶64} R.C. 2923.03(A)(2) defines complicity and states 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 statute 'does not specify any culpable mental state, but requires the person to act with the kind of culpability required for the commission of an offense when aiding or abetting others in committing the offense.' " *State v. Miller*, 4th Dist. Lawrence No. 18CA9, 2019-Ohio-4239, ¶ 11, quoting *State v. Brown*, 2d Dist. Greene No. 10CA0044, 2011-Ohio-1124, ¶ 20. Because the aggravated murder statute, R.C. 2903.01(A), states: "[n]o person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy[,]" the "kind of culpability required for the commission of an offense" for purposes of the complicity statute was also "purposely." Further, "[a] charge of complicity may be stated in terms of * * * [the complicity statute], or in terms of the principal offense." 2923.03(F). As set forth above, Sheets was indicted as the principal offender; however, the State requested a complicity instruction be provided to the jury at the close of evidence.

{¶65} Here, the evidence introduced at trial demonstrated that Sheets purchased a .32 caliber automatic gun just days prior to the murders of Tabitha and Yeley. Further, Sheets' wife, Lisa, purchased .32 caliber ammunition from Porter Firearms in Wheelersburg, Ohio, just hours before the murders took place. Trial testimony demonstrated that Lisa was with Sheets when he bought the gun.

Cell phone records and expert testimony admitted at trial demonstrated that Sheets' cell phone communicated with a cell tower within 1.7 miles of Porter Firearms near the time that Lisa purchased the ammunition. Importantly, Sheets admitted that he and Lisa were at the home of Paul and Tabitha twice on the night in question and there was eyewitness testimony demonstrating that he came running out of Paul and Tabitha's trailer carrying a gun after a neighbor heard two gunshots, which she described as occurring far apart. There is additional witness testimony from relatives and neighbors who saw both Sheets and Lisa driving away in a white Chevrolet Impala.

{¶66} Additionally, Paul testified that he received a call from Sheets in between Sheets' and Lisa's first and second visit that night during which Sheets stated he needed to come back to Paul's to get some power steering fluid and that he was coming from Dark Hollow, which is where Yeley lived and where his body was found the next morning. Paul further testified that when he returned home after going out to get drugs for Rebecca Montgomery and a "pop" for Tabitha, he arrived to find Lisa sitting in her car in the driveway and Sheets standing inside his trailer in the hallway right in front of the bathroom where Tabitha was later found with gunshot wounds. Paul testified that when Sheets shot him in the ear and Tabitha did not come out of the bathroom to help him, he knew that she was gone, meaning something had happened to her, not that she had left.

{¶67} As set forth above, law enforcement testimony established that fired cartridge casings from a .32 caliber automatic gun were found near the bodies of both Yeley and Tabitha, and also near the doorway where Paul was shot. Further, expert testimony established that on a scale of one to five, with category one being the strongest measure of certainty, the forensic analysis resulted in a category two finding that there was "support for same source," meaning that there was more evidence than not that the casings had all been fired from the same gun. Importantly, forensic analysis of the bullets recovered during the autopsies of Tabitha and Yeley determined that the bullets definitely came from the same source or were fired by the same gun.

{¶68} Thus, although there was no eyewitness testimony establishing who shot Tabitha or Yeley, the record contains voluminous circumstantial and forensic evidence from which the jury could infer that Sheets worked with Lisa to commit the aggravated murder of Yeley and that he committed the aggravated murder of Tabitha. In particular, there was expert and forensic testimony and evidence tying the crimes together, including the fact that the bullets recovered from the bodies of both Yeley and Tabitha were definitively fired by the same gun, and that the fired cartridge casings found near the bodies of Yeley and Tabitha, as well as the location where Paul was shot, were very likely from the same source.

{¶69} We further conclude that there was sufficient evidence presented by the State to establish that both murders were committed with prior calculation and design. In *State v. Blevins*, *supra*, we observed as follows:

> "[t]here are three factors courts generally consider to determine whether a defendant acted with prior calculation and design: (1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or an almost instantaneous eruption of events?["]

Blevins at ¶ 21, quoting *State v. Phillips*, 4th Dist. Scioto No. 18CA3832, 2018-Ohio-5432, ¶ 28, in turn citing *State v. Walker*, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.2d 1124, ¶ 20.

{¶70} "Although these factors provide guidelines, there is no bright-line test for prior calculation and design, and each case instead turns upon the particular evidence introduced at trial. " *Blevins* at ¶ 21, citing *Walker* at ¶ 19. *See also State v. McWay*, 3d Dist. Allen No. 1-17-42, 2018-Ohio-3618, ¶ 16.

{¶71} Here, regarding the first factor, the State presented evidence that established Sheets not only knew the victims, but that he was related to one of the victims and the other victim was his friend. The State also introduced evidence that Sheets had had issues in the past with his brother, Paul, whose wife was Tabitha, and that Lisa seemed to have issues with everyone, including Paul, Tabitha, and Yeley because her husband frequently stayed with them and met up

with various women during times when they were broken up. Additionally, Kay Bashum testified that Lisa had previously asked her to stab Yeley, which supports the defense theory that Lisa apparently had an issue with him. There was also testimony in the record from Yeley's brother stating that although Yeley and Sheets were friends, they sometimes "rubbed each other the wrong way."

{¶72} Regarding the second factor, the State introduced evidence that Sheets worked with Lisa to obtain a gun and ammunition and the two of them, by Sheets' own admission, were at the location where Tabitha was murdered just before she was discovered lying on the bathroom floor with gunshot wounds. Other evidence that was presented by the State indicated that Sheets had gone to Dark Hollow in between his visits to Paul and Tabitha's house, and there is evidence in the record demonstrating that Lisa was with him during both visits. Thus, the jury could infer that if Sheets had gone to Dark Hollow that night in between visits to Paul's residence, Lisa was with him.

{¶73} Finally, with respect to the final factor, which considers the duration of the events at issue, the State demonstrated that Sheets and Lisa acquired a firearm and ammunition in the days and hours leading up to the murders and they drove together from their home in Wheelersburg, Ohio, to Oak Hill, Ohio, which is located in another county. The State also presented evidence establishing that Sheets and Lisa visited with Paul and Tabitha and then drove to Dark Hollow,

where Yeley's trailer was located and where Yeley's body was found hours later. Further, evidence was presented demonstrating that Sheets and Lisa then drove back to Paul and Tabitha's, where Sheets was found in the trailer with Tabitha and where Sheets attempted to murder Paul by shooting him in the ear and then beating him about the head with a firearm. Thus, the duration of these events actually took place over the course of days, counting obtaining a gun as the first step in the process.

{¶74} We believe that after considering these factors, based upon the evidence before it, the jury could have justifiably concluded that Sheets and Lisa were determined to complete a specific course of conduct with respect to Yeley, and that Sheets acted alone with respect to Tabitha. This is especially true considering that the victims were both shot in the head, with Yeley appearing to have been shot execution style at close range. Although Sheets argues that "none of the state's witnesses could provide a reason for Sheets to murder his good friend, David Yeley[,]" and that "no witness described a strained relationship between" Sheets and Tabitha, motive is not an element of the offense of aggravated murder that must be proven. *See State v. Fambro*, 11th Dist. Trumbull No. 2016-T-0063, 2017-Ohio-5646, ¶ 69, citing *State v. Zaffino*, 9th Dist. Summit No. 21514, 2003-Ohio-7202, ¶ 46 and *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578, ¶ 15 ("The state is not required to prove motive to support a

murder conviction"). *See also State v. Curry*, 43 Ohio St.2d 66, 70-71, 330 N.E.2d 720 (1975).

{¶75} As set forth above, when reviewing whether a conviction is supported by sufficient evidence, it is not this Court's role to question whether the evidence is to be believed, but rather, we must consider whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. Furthermore, in our consideration we must view the evidence in a light most favorable to the prosecution. We conclude that here, the evidence presented by the State at trial, if believed, could support a finding of guilt beyond a reasonable doubt as to the complicity to aggravated murder charge and the aggravated murder charge, including the findings that the crimes were committed with prior calculation and design. Accordingly, we find no merit to this portion of Sheets' second assignment of error and it is therefore overruled.

Tampering with Evidence

{¶76} The jury also found Sheets guilty of tampering with evidence. R.C. 2921.12 defines the offense of tampering with evidence and states in section (A)(1) as follows:

> [n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]

This Court has previously observed that there are three elements to this offense, which are as follows:

> (1) the knowledge of an official proceeding or investigation in progress or likely to be instituted, (2) the alteration, destruction, concealment, or removal of the potential evidence, (3) the purpose of impairing the potential evidence's availability or value in such proceeding or investigation.

State v. Wilson, 4th Dist. Lawrence No. 16CA12, 2018-Ohio-2700, ¶ 37, citing *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 11. Sheets contends on appeal that the State failed to demonstrate that he removed the gun from the crime scene.

{¶78} A review of the record reveals that Sheets was indicted for a single count of tampering with evidence and the wording of the indictment simply tracked the language of the statute and did not include a "to wit:" section detailing the conduct alleged to have constituted the offense. Sheets later requested a bill of particulars, which the State provided. The bill of particulars stated as follows regarding the tampering with evidence charge:

> On October 30, 2020, after committed [sic] counts one through [four], Lonnie and Lisa Sheets fled the scene in Lisa's motor vehicle. They then washed their clothes and disposed of the murder weapon. Defendant's [sic] did so with the purpose of impairing the value of those items as evidence in the investigations of counts one through [four].

{¶79} After the State rested its case during the jury trial, Sheets moved for a Crim.R. 29 acquittal as to all charges, but specifically argued as follows regarding the tampering with evidence charge:

> The tampering, your Honor . . . we're not sure exactly what they're alleging here and I'm looking at the . . . um . . . Bill of Particulars and it says they washed their clothes and disposed of the murder weapon and with a purpose impairing [sic] the value so I do want to speak to that. The clothes were never taken. Uh . . . they were never analyzed. Um . . . and there's no evidence whatsoever that my client . . . uh . . . put those clothes in the machine or had anything to do with * * * washing them and there was a bottle of bleach beside the washing machine nobody [sic] ever said bleach was used in that washing machine. So, there's no evidence that my client did that whatsoever. Nor is there any evidence that he impaired the value of the alleged weapon . . . uh . . . and because from the testimony I heard today nobody ever asked him where the weapon was. They searched the trailer. They searched the car and nobody ever asked 'm where's the weapon? What'd you do with it? What happened to it? They had asked him might [sic] have been able to tell 'em at the statement he gave but nobody bothered to do that so the tampering count, I think, should be dismissed.

In response, the State argued as follows:

> Your Honor, as to the tampering with evidence, the Bill of Particulars does indicate that the . . . uh . . . the defense washed their clothes and disposed of the murder weapon. In particularly, the murder weapon the [sic] only evidence we have putting the gun in anyone's hand in this incident . . . uh . . . is that it was the Defendant that had the gun in his hand. * * * [Investigators] searched the home twice. They searched the vehicle and located no firearm. * * * Now, defense posits that . . . that had they asked the Defendant where the gun was he would have told them. I . . . suspect that's not the case. Officer's [sic] . . . we didn't receive testimony that officers asked him if he . . . you know, that basically confronted him with the news that, you know, Tabby

> and Pual [sic] had both been shot. They didn't know about David at that time . . . um . . . and upon confronting him with that he denied it so there would be no point to ask him . . . uh . . . where the gun was at that point . . .um . . . because he denied knowing anything about it. But, more importantly, the tampering with evidence as to the gun would have been completed once he disposed of the gun however he disposed of it. Um . . . a jury .. . or a reasonable finder of fact can interpret from the evidence that the gun . . . the gun wasn't present in the car, the gun wasn't present in the house and it's neither of those . . . or on the person of the Defendant or Lisa Sheets because they disposed of the gun when they fled from . . . uh . . . Oak Hill to their home in Wheelersburg.

{¶81} The trial court ultimately denied the Crim.R. 29 motion and the defense proceeded to present its case.

{¶82} Importantly, although it was never alleged in the indictment, the bill of particulars, or during the argument in opposition to the Crim.R. 29 motion, the State, during its closing arguments, seemed to argue that Sheets' act of washing his hair, and by association his hands, just before he was arrested constituted the crime of tampering with evidence. For example, after arguing that Sheets removed the murder weapon from the scene of the crime and disposed of it, the State remarked as follows:

> And what was his conduct that night? Number one, he fled the scene. Number two . . . uh . . . he admitted to officer's [sic] that when he got home, he was washing his hair. Uh . . . that's another . . . another example of him trying to conceal or . . . hide evidence.

{¶83} Although closing arguments do not constitute evidence, and although Sheets does not specifically argue this point in his brief on appeal, we have some concerns that the jury may have mistakenly understood one of the bases of the tampering with evidence charges to be Sheets' act of washing his hair, which according to the expert testimony would have destroyed any evidence of gunshot residue that may have been present on his hands.

{¶84} Further, although the State appears to have abandoned any argument regarding the alleged washing of Sheets' clothes, and even the washing of Sheets' hair, in its appellate brief, the State raised the argument again during oral argument. Specifically, the State orally argued not only that witnesses saw Sheets run out of Paul's trailer and get into his car with the gun, it also argued that there was clear evidence that Sheets had washed his hair, and it made this argument in support of upholding the tampering with evidence conviction. However, as will be discussed in more detail below, the record does not support the State's argument that Sheets had the gun in his possession when he fled the scene in his vehicle.

{¶85} Crim.R. 7(E) states that upon a timely request made by the defendant, the "prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charged and of the *conduct* of the defendant alleged to constitute the offense." (Emphasis added). Here, the bill of particulars did not allege that Sheets' act of washing his hair constituted tampering

with evidence. "The purpose of a bill of particulars is 'to elucidate or particularize the conduct of the accused alleged to constitute the charged offense[,]' " and to " 'inform an accused of the exact nature of the charges against him so that he can prepare his defense thereto.' " *State v. Brumback*, 109 Ohio App.3d 65, 81, 671 N.E.2d 1064 (1996), quoting *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985) and *State v. Fowler*, 174 Ohio St. 362, 364, 189 N.E.2d 133 (1963). Thus, to the extent the State relies in any manner on Sheets' act of washing his hair as conduct constituting the crime of tampering with evidence, we find the State failed to properly allege or preserve this argument. As such, we limit our analysis to the argument preserved below and raised in the State's appellate brief, which relates to the question of whether or not there was sufficient evidence that Sheets committed the crime of tampering with evidence based upon the fact that the murder weapon was unable to be located.

{¶86} In *State v. Beard*, the court was faced with a challenge to the sufficiency of the evidence supporting a tampering with evidence conviction, the basis of which was a missing weapon. *State v. Beard*, 6th Dist. Wood No. WD-08-037, 2009-Ohio-4412, ¶ 9. In *Beard*, the State argued that because "[the defendant] was seen by multiple witnesses with a gun in his hand, and a gun was never found after searching [the defendant's] car, [the defendant] must have

disposed of it." *Id*. The *Beard* court reversed the defendant's conviction, stating as follows before reaching its decision:

> The inability of law enforcement to find the gun used in a shooting, by itself, does not show that the defendant "altered, destroyed, concealed, or removed" it. *State v. Wooden* (1993), 86 Ohio App.3d 23, 27, 619 N.E.2d 1132. For instance, in *State v. Spears*, 178 Ohio App.3d 580, 899 N.E.2d 188, 2008-Ohio-5181 [6th Dist.], the defendant's conviction for tampering with evidence was recognized as plain error because it was unsupported by sufficient evidence and was, therefore, against the manifest weight of the evidence. In *Spears*, the only evidence to support the charge was the lack of the weapon used and the defendant's alleged statement to a third party that the defendant had thrown it away. *Id.* at ¶ 23, 899 N.E.2d 188. Similarly, in *State v. Like*, 2d Dist. [Montgomery] No. 21991, 2008-Ohio-1873, the fact that the gun was missing was insufficient evidence of tampering to allow statements about the disposal of the gun. *Id*. at ¶ 24. In the same case, the fact that no fingerprints were found in the victim's apartment was also insufficient to support a tampering with evidence conviction because it did not prove the defendant wiped the apartment down to remove them. *Id*. at ¶ 25. These cases all stand for the proposition that more than a missing weapon is required to prove "tampering."

Beard at ¶ 18.

{¶87} Applying the foregoing to the facts before it, the *Beard* court reasoned as follows in reaching its decision:

> In the case at hand, the state provided no evidence that Beard actually altered, destroyed, concealed, or removed the gun. The gun used in the shooting was not found, but that fact alone cannot lead to an inference that Beard tampered with it. *See Wooden, supra*. The state relied on a faulty syllogism: Witnesses saw Beard fire a gun. The gun was never found. Therefore, Beard must have tampered with the gun in order to make it unavailable as evidence against him. This was the extent of the evidence used

> to prove tampering. It is clearly insufficient to meet the standard applied by *Wooden, Spears, and Like*. Since the evidence was insufficient to support a tampering conviction, the conviction must be vacated. [*Spears*], 2008-Ohio-5181, [¶ 24-26], 178 Ohio App.3d 580, 899 N.E.2d 188.

Id. at ¶ 20.

{¶88} Here, we conclude that the State's entire legal argument regarding the tampering with evidence conviction is flawed because it is based upon a mistaken premise. More specifically, the State's argument is based upon the idea that there was eyewitness testimony in the record establishing that Sheets was seen getting into the getaway car with the gun in his hand. However, contrary to the State's argument, there is nothing in the record that establishes that Sheets was holding the gun when he got into the car. Paul testified that Sheets ran out of the trailer holding the gun and chasing him. Melba testified that she saw Sheets run out of the trailer holding a gun and trying to shoot Paul. Melba testified she saw Paul get into the passenger side of the car and leave the scene. She said nothing about seeing Sheets having the gun while he was getting into the car. Other witnesses testified regarding seeing Sheets and Lisa drive away in their car, but not one of them testified that they saw Paul get into the car with the gun or get rid of the gun after he got into the car. Further, Sheets made no incriminating statements or confessions about possessing the gun. He denied owning a gun, having a gun, or firing a gun. Unlike some of the cases relied upon by the State, he made no

statements to law enforcement or anyone else that he dropped the gun or otherwise disposed of the gun.

{¶89} Thus, the key facts in *Beard* are essentially identical to the facts presently before us. Although *Beard* is not binding authority upon this Court, we nevertheless find it persuasive and applicable authority. Applying the reasoning set forth in *Beard, Wooden*, and *Like*, *supra*, evidence that Sheets was seen with a gun at the scene of the crime, coupled with the fact that law enforcement never recovered the gun, does not constitute sufficient evidence to support a conviction for tampering with evidence. Here, as in *Beard*, the State presented no evidence that Sheets actually altered, destroyed, concealed, or removed the gun. Although the gun used in the shootings was not found, that fact alone is insufficient to support an inference that Sheets tampered with it. *See Beard*, *supra*, at ¶ 20. Therefore, because we find merit to this portion of Sheets' argument, his second assignment of error is partially sustained. Accordingly, because the evidence was insufficient to support a tampering conviction, Sheet's conviction and sentence for tampering with evidence must be reversed and vacated. *See Beard* at ¶ 20, citing *Spears*, *supra*, at ¶ 24-26.

ASSIGNMENT OF ERROR I

{¶90} In his first assignment of error, Sheets contends that the trial court erred in refusing to admit his Exhibits "B" and "C" that were proffered to the court

during trial and that such refusal resulted in a denial of his constitutional right to present a complete defense and also deprived him of a fair trial.[6] The proffer related to prior statements made by Lisa to law enforcement during a traffic stop and by Yeley during a 911 call. The proffer was essentially based upon the declarants' unavailability as a result of the fact that Yeley was deceased and therefore unavailable, as well as the fact that Lisa refused to testify at Sheets' trial. Sheets argues that both of the incidents described in exhibits "B" and "D" "reflected Lisa Sheets' hatred and obsession with Paul Sheets, David Yeley and Lonnie Sheets." Sheets further seems to argue that because the State requested that the jury be instructed on complicity regarding the aggravated murder of Yeley, that Lisa's prior statements should have been admitted as "co-conspirator" statements. The State responds by arguing that the exhibits were irrelevant and inadmissible under Evid.R. 401, 403(A), and 404(A), and that even if there was some relevance to the statements, the danger of confusing the issues should the statements have been admitted was significant. The State further argues that the statements constituted inadmissible hearsay and that no exceptions to the prohibition against hearsay were present to justify their admission.

[6] Sheets' brief refers to the exhibits as "B" and "C" but it appears from the record that the exhibits at issue were actually marked as "B" and "D."

Proffer: Part One

{¶91} Sheets first sought to introduce prior statements of Lisa made to law enforcement during a traffic stop after Paul called police to report that Lisa had been sitting in her car near his trailer for about ten minutes. The traffic stop occurred on September 19, 2020, over a month before the murders took place. Sheets would have introduced a dashcam video of the traffic stop that was about seven minutes in length. The video was marked as defense exhibit "B." The contents of the video consist of Lisa denying that she had been sitting outside Paul's house, stating that Paul had tried to sell drugs to her underage son, and stating that she wanted law enforcement to accompany her to Paul's door so she could tell him to leave her son alone. Although she made statements indicating that there was going to be a problem, when informed by law enforcement that she would be taken to jail if she caused a problem, she clarified that she only wanted to tell Paul to leave her son alone. She also made statements during the stop indicating that she and Sheets were divorced; that Sheets and Paul both "mess" with children; that Paul makes, uses, and sells methamphetamine; that Paul sells drugs to minors; and that Paul had tried to rape her in the past. Sheets intended to call "Officer Ratliff," the officer involved in the stop, to corroborate Lisa's statements. Sheets also intended to call Lisa's friend, Kay Bashum, who was in the car with Lisa during the stop.

Proffer: Part Two

{¶92} Sheets next sought to introduce two written reports documenting an event that occurred on July 29, 2020 (three months prior to the murders), that involved a call from Yeley to 911 reporting that Lisa, Kay, and another individual named Danny Carter had arrived on Yeley's doorstep with clubs or baseball bats looking for Sheets. Exhibit "D" contains two documents. The first is a Jackson County Sheriff's Office "Incident Report" authored by Officer Robert Copas. Copas states in his report that dispatch received a call from Yeley reporting that Lisa, Danny Carter, and an unknown female were at his residence making threats to Sheets. The report further states that upon Copas' arrival to Yeley's residence, he spoke to both Sheets and Yeley, who stated that Lisa woke Yeley up, had some sort of club in her hand, and was demanding she be let in to get to Sheets. Yeley stated that he heard Lisa tell her friends that if they saw Sheets come out the door, to shoot him. However, Yeley did not see a firearm. The report further stated that when Lisa entered the trailer she did not find Sheets because he had run out the back door into the woods.

{¶93} The second document is a Jackson County Sheriff's Office "Call Record Report" which appears to have been created by an individual named Angela Young. This report stated that a call was received from Yeley just before midnight stating he had been sleeping in his living room when Lisa showed up

with Danny Carter and an unknown female. The report states that Yeley advised that Lisa and company searched every room looking for Sheets, who had fled out the back door. The report further states that Yeley reported that the unknown female had a gun, Lisa and Danny had clubs, and they were making threats to kill Sheets. Sheets intended to call both Copas and Young to testify regarding the contents of the reports.

{¶94} The State ultimately stipulated to the contents of the video and the reports comprising exhibits "B" and "D." Although Sheets' written motion referenced these exhibits as "B" and "C" and the trial transcript referenced these exhibits as "B," "C," and "D," the exhibits actually admitted and made part of the record for purposes of appeal are marked as exhibits "B" and "D," with "D" containing both the incident report and the call report.

Standard of Review

{¶95} "The admission or exclusion of evidence generally rests within a trial court's sound discretion." *State v. McCoy,* 4th Dist. Pickaway No. 19CA1, 2020-Ohio-1083, ¶ 20. "Thus, absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence." *Id.* An abuse of discretion is "an unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken." *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23.

{¶96} As stated in *McCoy*, *supra*, "[a]s a general rule, all relevant evidence is admissible." *McCoy* at ¶ 20, citing Evid.R. 402. For example, Evid.R. 402 provides as follows regarding the general admissibility of relevant evidence:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.

{¶97} Evid.R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, Evid.R. 403 requires trial courts to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." "A trial court has broad discretion to determine whether to exclude evidence under Evid.R. 403(A), and ' "an appellate court should not interfere absent a clear abuse of that discretion." ' " *McCoy* at ¶ 20, quoting *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 40, in turn quoting *State v. Allen*, 73 Ohio St.3d 626, 633, 653 N.E.2d 675 (1995).

{¶98} This Court has previously observed that "Evid.R. 403(A) 'manifests a definite bias in favor of the admission of relevant evidence, as the dangers associated with the potentially inflammatory nature of the evidence must

substantially outweigh its probative value before the court should reject its admission.' " *McCoy* at ¶ 21, quoting *State v. White*, 4th Dist. Scioto No. 03CA2926, 2004-Ohio-6005, ¶ 50. We further explained in *McCoy* as follows:

> We also emphasize that, to some degree, all relevant evidence may be prejudicial in the sense that it "tends to disprove a party's rendition of the facts" and, thus, "necessarily harms that party's case." [*State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 23]. Evid.R. 403(A) does not, however, "attempt to bar all prejudicial evidence." *Id.* Instead, the rules provide that only unfairly prejudicial evidence is excludable. *Id*. " 'Evid.R. 403(A) speaks in terms of unfair prejudice. Logically, all evidence presented by a prosecutor is prejudicial, but not all evidence unfairly prejudices a defendant. It is only the latter that Evid.R. 403 prohibits.' " *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 107, quoting *State v. Wright*, 48 Ohio St.3d 5, 8, 548 N.E.2d 923 (1990). [" 'Unfair prejudice " 'does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.' " ' " *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 89, quoting *United States v. Bonds*, 12 F.3d 540 (6th Cir.1993), quoting *United States v. Schrock* (C.A. 6, 1988), 855 F.2d 327, 335, in turn quoting *United States v. Mendez-Ortiz* (C.A. 6, 1986), 810 F.2d 76, 79.] Unfairly prejudicial evidence is evidence that "might result in an improper basis for a jury decision." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001), quoting Weissenberger's Ohio Evidence (2000) 85-87, Section 403.3. It is evidence that arouses the jury's emotions, that " 'evokes a sense of horror,' " or that " 'appeals to an instinct to punish.' " *Id*. " 'Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect.' " *Id*. Thus, "[u]nfavorable evidence is not equivalent to unfairly prejudicial evidence." *State v. Bowman*, 144 Ohio App.3d 179, 185, 759 N.E.2d 856 (12th Dist.2001).

McCoy at ¶ 22.

{¶99} In *McCoy*, it was the State that sought introduction of objectionable evidence against the defendant whereas here, it is Sheets who sought admission of evidence which the State argues was not relevant, and even if it was relevant, that the danger of confusing the issues far outweighed any probative value the evidence may have.

Legal Analysis

{¶100} The defense attempted to introduce prior statements of both Lisa and Yeley at trial in support of its theory that Lisa was the person with both the motivation and the means to commit the murders at issue in this case, and also in support of the theory that Lisa had even threatened Sheets himself on previous occasions. The defense argued that these statements were admissible due to the fact that both individuals were "unavailable" to testify at trial. Lisa was deemed unavailable due to her assertion of her Fifth Amendment privilege against self-incrimination and her concordant refusal to testify when called by the defense as a witness outside the presence of the jury at trial. Sheets argued Yeley was unavailable because he was deceased at the time of trial. The State objected to the introduction of the statements as being irrelevant and prejudicial, but also argued that the statements constituted inadmissible hearsay to which none of the hearsay exceptions applied.

Right to Present a Complete Defense

{¶101} Further, as set forth above, Sheets argues that the trial court's exclusion of the prior statements of Lisa and Yeley prevented him from presenting a complete defense. The Supreme Court of Ohio has explained as follows regarding a defendant's right to present a complete defense:

> "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). However, "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restriction." *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). And states have a legitimate interest in ensuring that triers of fact are presented with reliable evidence and have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials" to further that goal. *Scheffer* at 308, 309, 118 S.Ct. 1261, 140 L.Ed.2d 413. Such "rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve' " and if they do not "infringe[ ] upon a weighty interest of the accused." *Id.* at 308, 118 S.Ct. 1261, 140 L.Ed.2d 413, quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 58, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).
>
> Ohio's rule excluding hearsay statements offered by a party to advance that party's own interests is neither arbitrary nor disproportionate. The general rule excluding hearsay, "which has long been recognized and respected by virtually every State," traditionally excludes "[o]ut-of-court statements * * * because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed" by the trier of fact. *Chambers v. Mississippi*, 410 U.S. 284, 298, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), citing *California v. Green*,

> 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). This rule is "based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact," *id.*, and therefore, excluding self-serving hearsay statements that are not subject to cross-examination or made under circumstances ensuring their reliability is neither arbitrary nor disproportionate to the purposes the rule is designed to serve.

State v. Wesson, 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶ 59-60. *See also State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837, 895 N.E.2d 821, ¶ 14 (stating that in exercising the constitutional right to present a complete defense " 'the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt or innocence' "), quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297.

Definition of Hearsay

{¶102} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). " 'To constitute hearsay, two elements are needed. First, there must be an out-of-court statement. Second, the statement must be offered to prove the truth of the matter asserted. If either element is not present, the statement is not "hearsay." ' " *State v. Burton*, 2017-Ohio-322, 77 N.E.3d 449, ¶ 20 (4th Dist.), quoting *State v. Maurer*, 15 Ohio St.3d 239, 262, 473 N.E.2d 768 (1984). Hearsay is not admissible at trial unless it falls

within an exception to the Rules of Evidence. *See State v. Stapleton*, 4th Dist. Pickaway No. 19CA7, 2020-Ohio-4479, ¶ 22. There are several exceptions to the rule against hearsay and Sheets argues that several of these exceptions apply to allow the admission of the statements at issue herein.

Claimed exceptions to the Hearsay Rule

{¶103} Sheets argues that the prior statements of Lisa and Yeley fell under multiple exceptions, which we will address individually.

1. Evid.R. 804(B)(3) "Statement Against Interest"

Evid.R. 804(B)(3) states as follows:

> (B) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) Statement Against Interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

{¶104} Sheets argues that Lisa's statements in exhibit "B" met the requirements to be admitted as statements against interest because she was unavailable as a witness and her statements exposed her to criminal liability. He

claims that Lisa's statements indicating that "there was going to be a problem" indicated that she was willing to go to jail and thus constituted threats to Paul and Tabitha which exposed her to criminal liability. He further argues that exhibit "D" met the requirements to be admitted as a statement against interest because Yeley, who was deceased at the time of trial, reported to law enforcement that Lisa was on his property stating she was going to shoot Sheets. Sheets argues this statement by Lisa exposed her to criminal liability and thus was admissible as a statement against interest.[7]

{¶105} After listening to the arguments of counsel below, the trial court stated on the record that it was concerned that the statements at issue not only constituted hearsay, but that they also violated Evid.R. 404(A) to the extent they were being offered as evidence of Lisa's character to show action in conformity therewith, i.e., that because Lisa was a violent person with regard to Sheets, that she also killed Yeley and Tabitha. The trial court also determined that there was a concern regarding relevance, i.e., the fact that Lisa threatened to kill Sheets is not relevant to the crimes committed against Tabitha and Yeley. The trial court also stated that it was concerned that any relevance was outweighed by the danger of

[7] The defense seems to be arguing that Lisa's statements were against interest and therefore should have been admissible through Yeley's statements made during the 911 call and that Yeley's statements were admissible through other hearsay exceptions, which will be addressed below.

confusion of the issues, misleading the jury, and unfair prejudice under Evid.R. 403(A).

{¶106} The trial court ultimately determined that Evid.R. 804(B)(3) did not apply to Lisa's statement during the traffic stop because she did not ever state that she intended to commit a crime and thus, the statement was not against her interest. The trial court also found Evid.R. 804(B)(3) inapplicable to the statements made by Lisa referenced in the police reports summarizing the 911 call made by Yeley. The trial court reasoned that although Lisa's statement that she was going to shoot or harm Sheets was "conceivably" a statement against interest, there was still a problem with admitting the statement under Evid.R. 401, 403, and 404(A). Thus, the court refused to admit the statements under this exception to the hearsay rule.

{¶107} We cannot conclude that the trial court's reasoning in ruling as it did with respect to the exclusion of these statements constituted an abuse of discretion. Instead, the trial court considered the matter and explained its reasoning in reaching its determination. There is no evidence that the trial court's decision was arbitrary, unconscionable, or unreasonable. Further, we agree with the trial court's concerns regarding not only the relevancy of this evidence, but we also share in the trial court's concerns that even if the statements at issue were relevant, the risk of confusion and prejudice was substantial, especially with respect to the statements Lisa made during the traffic stop.

2. Evid.R. 801(D)(2)(e) "Admission by Party-Opponent"

Evid.R. 801(D)(2)(e) states as follows:

> (D) Statements That Are Not Hearsay. A statement is not hearsay if:
>
> * * *
>
> (2) Admission by Party-Opponent. The statement is offered against a party and is * * * (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

{¶108} Sheets argues that a statement made by a co-conspirator of a party during and in furtherance of the conspiracy is admissible as substantive evidence if offered against that party. Sheets argued that there was enough evidence presented to raise the inference of a conspiracy because the State requested and received an instruction on complicity to aggravated murder based upon its theory that Sheets and Lisa acted in concert throughout the evening of the shootings. Sheets further argues that exhibits "B" and "D" were both highly relevant to his defense that it was Lisa that had the motive and the ability to kill Yeley and Tabitha.

{¶109} However, the trial court found that Evid.R. 801(D)(2)(e) was inapplicable to both statements. The trial court found that Lisa was not a party-opponent and that she was not a co-conspirator. The trial court noted that despite the fact that Sheets and Lisa worked together, there was no conspiracy count in the indictment.

{¶110} Again, we cannot conclude that the trial court's reasoning in ruling as it did with respect to the exclusion of these statements constituted an abuse of discretion. Further, we note that Sheets seems to conflate the evidence of complicity with the requirements for proving a conspiracy. The Supreme Court of Ohio has held that "[a]lthough the substantive offense of conspiracy was not charged, the state could prove a conspiracy in order to introduce out-of-court statements by conspirators in accordance with Evid.R. 801(D)(2)(e)." *State v. Robb*, 88 Ohio St.3d 59, 68, 723 N.E.2d 1019, citing *State v. Duerr*, 8 Ohio App.3d 396, 457 N.E.2d 834 (1982) and *State v. Milo*, 6 Ohio App.3d 19, 451 N.E.2d 1253 (1982). However, in *State v. Carter*, 72 Ohio St.3d 545, 651 N.E.2d 965, paragraph three of the syllabus (1995), the Supreme Court of Ohio also recognized that "[t]he statement of a co-conspirator is not admissible pursuant to Evid.R. 801(D)(2)(e) until the proponent of the statement has made a prima facie showing of the existence of the conspiracy by independent proof." Here, Sheets disclaimed any involvement whatsoever in the aggravated murders and attempted murder. Thus, Sheets, as the proponent of the evidence, failed to make a prima facie showing of the existence of a conspiracy by independent proof. As such, there is no evidence that the trial court's decision was arbitrary, unreasonable, or capricious.

3. Evid.R. 803(1) "Present Sense Impression"

{¶111} Evid.R. 803(1) states as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

{¶112} Sheets argues that Yeley's statements to law enforcement, as documented in exhibit "D" constituted present sense impressions because he made the call as the events were happening and reported that three individuals had shown up on his doorstep in the middle of the night with weapons.

{¶113} The trial court disagreed, finding that Evid.R. 803(1) was inapplicable to the statements made by Lisa during the traffic stop and also as relayed to 911 by Yeley. The trial court reasoned that the statements made by Lisa during the traffic stop were not describing an event while she was perceiving it and thus did not constitute a present sense impression. The court further reasoned that Lisa's statements made during the incident at Yeley's trailer in July of 2020 did not qualify as present sense impressions and that even if they did, they would be excluded under Evid.R. 401, 403(A) and 404.[8]

[8] The trial court seems to have limited its analysis under this argument to Lisa's statements and did not consider the statements made by Yeley to 911.

{¶114} We agree with the trial court's reasoning and its ultimate determination that Lisa's statements during the traffic stop did not constitute present sense impressions. However, whether Yeley's statements made during his 911 call constitute present sense impressions presents a more difficult issue, which the trial court apparently failed to address. However, even assuming that Yeley's statements were admissible as present sense impressions, we agree with the trial court's ultimate conclusion that the statements were irrelevant, as the threats made by Lisa were directed toward Sheets, not Yeley. Whether Sheets was a victim of Lisa was simply not a material issue at trial. It had no bearing on whether Sheets was complicit with Lisa in the aggravated murder of Yeley or whether he murdered Tabitha and attempted to murder Paul. Thus, we can discern no abuse of discretion on the part of the trial court in refusing to admit these statements as present sense impressions.

4. Evid.R. 803(2) "Excited Utterance"

{¶115} Evid.R. 803(2) states as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

{116} Sheets argues that exhibits "B" and "D" both contained excited utterances and should have been admitted into evidence. Sheets argues the Lisa's threats to cause problems with Paul that were made during the traffic stop were excited utterances because she was "alarmed and taken off guard when stopped by law enforcement outside Paul Sheets' home." Sheets further argues that the statements made by Yeley during the 911 call stating that three individuals were demanding to come into his house and that they had "guns and weapons" qualified as excited utterances.

{¶117} The trial court determined, however, that the none of the statements at issue qualified as excited utterances under Evid.R. 803(2). The trial court found that the statements made by Lisa were not made under nervous excitement as she was primarily making statements from memory about things Paul had previously done. The trial court further found that the statements made by Lisa, as referenced by Yeley in the 911 call, were not made under nervous excitement and it further found the reports themselves were not admissible as public records.[9]

{¶118} We agree with the trial court's conclusions as to the statements made by Lisa during the traffic stop. Again, the statements made by Yeley to 911 present a more difficult question. However, regardless of whether they were

[9] Again, the trial court appears to have focused on the statements made by Lisa while at Yeley's residence, rather than the actual statements made by Yeley to the 911 operator.

admissible as excited utterances or whether they may have been admissible as a police report offered by the defense, they were irrelevant to the material issues at trial and they were properly excluded by the trial court.

5. Evid.R. 803(3) "Then Existing Mental, Emotional, or Physical Condition"

{119} Evid.R. 803(3) states as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (3) Then Existing, Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

{¶120} Sheets argues that exhibits "B" and "D" both "reflect Lisa Sheets' state of mind and her erratic emotional state." The trial court rejected this argument, finding that Lisa's state of mind at those times was not relevant to the case and that even if it was, Evid.R. 401, 403(A), and 404(A) prevented their admission. Once again, we find no abuse of discretion on the part of the trial in reaching this conclusion. Moreover, we find no merit to any argument that statements made by Lisa in July and September of 2020 would constitute statements of her "then existing state of mind" on October 30, 2020.

Summary and Conclusion

{¶121} Here, the record demonstrates that the statements made by Lisa during the traffic stop were made a month prior to the murders and thus they were removed in time. Although Sheets sought to call the deputy who stopped Lisa, as well as Lisa's friend, Kay Bashum, who was present with her in the car, to corroborate the statements made by Lisa, our review of the video of the traffic stop demonstrates that when pressed about her intentions by law enforcement, Lisa stated that she did not plan to start a fight and that she just wanted to ask Paul to leave her son alone. We fail to see how Lisa's statements, taken as a whole, constitute a statement against interest. Further, we agree with the reasoning of the trial court to the extent that it concluded that even if one or more exceptions to the hearsay rule applied to Lisa's statements, the statements sought to be admitted were ultimately not relevant to the issues before the jury. Nonetheless, even assuming arguendo that they were relevant and also that they qualified for admission under one or more of the of the exceptions to the rule against hearsay, other comments made by Lisa during the traffic stop were highly prejudicial in that she accused Paul of making, using and selling methamphetamine, of trying to sell drugs to a minor, of being a "snitch," and of trying to rape her in the past. As argued by the State, these statements were highly prejudicial and presented a

danger of confusing the issues. Thus, we cannot conclude that the trial court erred or abused its discretion in ultimately excluding them.

{¶122} We conclude the statements made by Yeley contained in the two written reports that summarized a call Yeley made to 911 on July 29, 2020 were also properly excluded. Although Sheets sought to call the authors of the reports to "corroborate [the] trustworthiness" of the statements, these statements made by Yeley were related to an incident that occurred nearly three months prior to the murders. First of all, we note that Sheets did not attempt to introduce the actual recordings of the 911 call. Instead, he sought to introduce two written police reports which summarized the contents of the call, which the State argues constituted double hearsay. However, assuming arguendo that these statements should have been admitted as excited utterances, present sense impressions, or as then existing statements of mental, emotional, or physical condition describing to law enforcement that Lisa was at Yeley's door with some sort of club, the statements ultimately would have demonstrated that Lisa was there looking for Sheets, not that she was making threats against Yeley. Although Sheets has attempted to paint himself as a victim of Lisa and seems to be trying to further that perception through the introduction of these statements, the question of whether Lisa posed a threat to Sheets was not a fact of consequence in the determination of

the action. Thus, Sheets has failed to demonstrate how these statements were relevant to any of the issues during trial.

{¶123} Further, despite the fact that the foregoing statements were excluded, Sheets was permitted to call Kay Bashum as a witness. Although Bashum was restricted from testifying to any substantive details regarding the September traffic stop or the July incident at Yeley's house, she testified that she was present with Lisa both of those nights. She also testified that Lisa had asked her to stab Yeley prior to the murders. Additionally, John Evans, a neighbor and friend of Lisa, also testified for the defense stating that Lisa had offered to pay him to essentially beat Sheets up and bring him back home to Lisa. Thus, despite the exclusion of the statements at issue under this assignment of error, Sheets demonstrated to the jury through Basham's and Evans' testimony that Lisa had threatened violence to him in the past and had tried to have Yeley killed.

{¶124} As explained in *State v. Nurein*, although a complete defense may include evidence of " 'third-party guilt,' " in making such a defense the accused " 'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " *State v. Nurein*, 3d Dist. Union No. 14-21-18, 2022-Ohio-1711, ¶ 38, quoting *State v. Gillispie*, 2d Dist. Montgomery Nos. 22877 and 22912, 2009-Ohio-3640, ¶ 120, in turn citing *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164

L.Ed.2d 503 (2006) and *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038 (1973). Thus, " 'criminal defendants do not necessarily have a right to present *all* evidence of third-party guilt.' " *Nurein* at ¶ 38, quoting *State v. Jones*, 2d Dist. Montgomery No. 27354, 2018-Ohio-2332, ¶ 33. *See also State v. Swann*, *supra*, at ¶ 19 ("*Holmes* did not hold that every rule that excluded evidence of third-party guilt is necessarily unconstitutional or that a criminal defendant has a right to present *all* evidence of third-party guilt"). *Nurein* further explained as follows:

> "[I]t is widely accepted that evidence introduced to prove that another person may have committed the crime with which the defendant is charged ' "may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial[.]" ' " [*Jones, supra*, at ¶ 34], quoting *Holmes* at 327, quoting 40A American Jurisprudence 2d, Homicide, Section 286 (1999). " ' "[F]requently matters offered in evidence for [the purpose of showing third-party guilt] are so remote and lack such connection with the crime that they are excluded." ' " *Id*., quoting *Holmes* at 327, quoting 41 Corpus Juris Secundum, Homicide, Section 216 (1991).

Nurein at ¶ 39.

{¶125} As we have already stated, Lisa's statements about wanting to confront Paul about allegedly selling drugs to her son a month prior to the murders did not tend to prove or disprove any material fact at issue in the aggravated murders of Tabitha Sheets or David Yeley. Likewise, to the extent the statements made by Yeley during the 911 call indicated Lisa was at his door with a club

wanting to harm Sheets, those statements did not tend to prove or disprove any material fact at issue in the aggravated murders of Tabitha or Yeley. There was certainly plenty of other evidence connecting Lisa to the crimes and as we discussed above, the evidence at trial sufficiently proved that Sheets was complicit with Lisa in the aggravated murder of Yeley. Moreover, as argued by the State, demonstrating that Lisa may have had a motive to murder Yeley and Tabitha and therefore implicating her in these crimes does not negate Sheets' involvement in the crimes. We agree with the State's argument that the two are not "mutually exclusive."

{¶126} After reviewing the proffered evidence and based upon the foregoing reasoning, we cannot conclude that the trial court abused its discretion in excluding the evidence at issue. Because the statements at issue did not tend to prove or disprove a material fact in issue, they did not sufficiently connect Lisa to the crimes and thus, they were not relevant. Moreover, assuming arguendo that some of the evidence was excluded in error, we conclude any such error constituted harmless error, did not affect the outcome of the proceedings, and did not prevent Sheets from presenting a complete defense.

{¶127} Crim.R. 52(A) defines harmless error and provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." This Court has previously explained that when determining whether

substantial rights have been affected, "a court must evaluate prejudice to the defendant." *State v. Blanton*, 4th Dist. Adams No. 16CA1031, 2018-Ohio-1275, ¶ 32, citing *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 23, 27. "Courts are to focus on the impact the error had on the verdict and the strength of the remaining evidence." *Blanton* at ¶ 32, citing *Morris* at ¶ 25.

{¶128} Again, although Sheets was not permitted to introduce statements made by Lisa during a traffic stop or a summary of statements made by Yeley during a 911 call, he was permitted to present evidence and testimony in support of his claim that Lisa was actually the aggressor and that he himself had been victimized by Lisa in the past through the testimony of Kay Bashum and John Evans. The jury heard this testimony, along with substantial and voluminous testimony from law enforcement and experts at BCI that connected both Lisa and Sheets to the crimes. Further, we have rejected Sheets' claim that his convictions for complicity to aggravated murder and aggravated murder were supported by insufficient evidence. Thus, we conclude that any error in the exclusion of the statements at issue constituted harmless error and did not prevent Sheets from presenting a complete defense. Accordingly, we find no merit to Sheet's first assignment of error and it is overruled.

ASSIGNMENT OF ERROR IV

{¶129} In his fourth assignment of error, Sheets contends that the trial court erred when it sentenced him to consecutive sentences for attempted murder and felonious assault and that the failure to merge these two sentences violated R.C. 2941.25, as well as his constitutional rights. Thus, Sheets essentially argues that the trial court erred when it failed to merge allied offenses of similar import at sentencing. The State contends the trial court committed no error in failing to merge the two sentences because the crimes were committed separately and with different conduct, and they resulted in separate harm.

Standard of Review

{¶130} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." "This protection applies to Ohio citizens through the Fourteenth Amendment to the United States Constitution * * * and is additionally guaranteed by the Ohio Constitution, Article I, Section 10." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 10. "Regarding multiple punishments for the same offense, the Double Jeopardy Clause prohibits 'the sentencing court from prescribing greater punishment than the legislature intended.' " *State v. Pendleton*, 163 Ohio St.3d 114, 2020-Ohio-6833, 168 N.E.3d 458, ¶ 8, quoting *Missouri v. Hunter*, 459 U.S. 359, 366, 103

S.Ct. 673, 74 L.Ed.2d 535 (1983). "When determining whether multiple punishments may be imposed for the same offense, our focus is on legislative intent." *Pendleton* at ¶ 8, citing *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 10.

{131} "The General Assembly enacted R.C. 2941.25 to identify when a court may impose multiple punishments[.]" *State v. Fannon*, 2018-Ohio-5242, 117 N.E.3d 10, ¶ 130 (4th Dist.). R.C. 2941.25 states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶132} The sentencing court has a mandatory duty to merge allied offenses of similar import. *State v. Stapleton*, 4th Dist. Pickaway No. 19CA7, 2020-Ohio-4479, ¶ 50. However, the defendant has the burden to establish that R.C. 2941.25 prohibits multiple punishments. *Id*. at ¶ 52. "We apply a de novo standard to review a trial court's determination of whether offenses constitute allied offenses of similar import requiring merger under R.C. 2941.25." *Fannon* at ¶ 131, citing *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28.

{¶133} "In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors—the conduct, the animus, and the import." *State v. Ruff, supra,* at paragraph one of the syllabus. "Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id*. at paragraph two of the syllabus. "Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus." *Id*. at paragraph three of the syllabus.

Legal Analysis

{¶134} Sheets contends that the trial court should have merged Count Three, attempted murder, with Count Four, felonious assault. In response, the State initially contends that the record demonstrates that Sheets failed to prove he was entitled to merger of the offenses at issue. More specifically, the State argues that Sheets failed to properly preserve a merger argument because he failed to argue with specificity his particular theory for merger. The State points out that at the sentencing hearing, defense counsel summarily stated that based upon Sheets' age,

he would never get out of prison if the convictions were to stand and thus, counsel simply asked that minimum sentences be imposed and that all counts be merged. Sheets has responded by arguing that courts have employed a plain error standard of review in cases where merger was not mentioned at all below and, therefore, that this Court's review is not "limited by the trial counsel's argument at sentencing." *State v. Johnson*, 7th Dist. Mahoning No. 12MA137, 2014-Ohio-4253, in support. *See also State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 53.

{¶135} The record before us reveals that the State placed the issue of merger squarely before the trial court during the sentencing hearing by arguing against the merger of the felonious assault and attempted murder charges. The State argued as follows during the sentencing hearing:

> Um . . . I think there's at least a question or issue of merger as to the Attempted Murder of Paul Sheets and the Felonious Assault of Paul Sheets. The State's position I believe it's . . . uh . . . the [*Ruff*] case, Your Honor, there are three factors, of course, to consider if anyone [sic] of those is present than [sic] it's not appropriate to merge the penalties. It's the State's position is the one sort of stands out in my mind is the separateness of the offenses. When the Defendant shot Paul Sheets in the head and then attempted to shoot him a second time and the gun jammed . . . uh . . . I think that's separate and distinct from the harm caused by . . . after the gun is jammed, he used it as a bludgeon or a black jack to strike him in the head. Um . . . ultimately I think that's the Court's decision whether those things merge but I believe if you look at that [*Ruff*] case . . . um . . . the separateness of the fact and here we're talking about being used as a firearm as opposed to the gun being used as a bludgeon that's one separator

> but also the . . . the harm caused are [sic] separate and distinct being shot in the head as opposed to being bludgeoned in the head . . . uh . . . by that weapon. I could see that that [sic] I think probably the same or similar animist [sic] was present . . . uh . . . and . . . and the other factors may be leaning in the favor of merger but the law is clear that all three of them have to be present for the . . . for those offenses to merge.

{¶136} In response, defense counsel argued that "what the State is arguing is really a distinction without a difference," and then went on to simply ask that all offenses merge for purposes of sentencing in light of his client's age and the length of the sentences if the convictions were to stand. After reviewing the record, we conclude the issue of merger was raised below and ruled upon by the trial court and thus, we will apply a de novo standard of review rather than a plain error standard of review.

{¶137} As set forth above, Sheets was found guilty of attempted murder, a first-degree felony in violation of R.C. 2923.02(A) and 2903.02. R.C. 2903.02 states in section (A) that "[n]o person shall purposely cause the death of another or the unlawful termination of another's pregnancy." Further, R.C. 2923.02 provides in section (A) that "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." Sheets was also found guilty of felonious assault in violation of R.C. 2903.11(A)(2), a second-degree felony. R.C. 2903.11 states in section (A)(2) as follows: "[n]o person shall

knowingly do either of the following: * * * [c]ause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶138} On appeal, Sheets argues that merger of the offenses of felonious assault and attempted murder was required because this case involved one victim, one location, one weapon, a single continuous attack, and a single animus. More specifically, Sheets contends that these offenses were committed as part of "a single continuous attack in a single location[]" and that the harm caused by the use of the gun to commit felonious assault was not separate and identifiable from the harm caused by the attempted murder. Sheets further argues that because a struggle immediately ensued after he shot Paul in the head with the gun, "[t]he injuries caused by the gun were in one discrete act that simultaneously resulted in the commission of both felonious assault and attempted murder." Sheets also contends that the offenses were not committed separately or with a separate animus because "the events happened very quickly with no break in the continuum."

{¶139} Sheets cites several cases in support of his argument including the following: *State v. Dixon*, 4th Dist. Scioto No. 09CA3312, 2010-Ohio-5032 (finding felonious assault and attempted murder to be allied offenses of similar import requiring merger where the state argued the defendant's initial blow to the victim constituted felonious assault and that the subsequent 16 blows constituted

attempted murder); *State v. Anthony*, 2015-Ohio-2267, 37 N.E.3d 751 (where the court of appeals rejected an argument that four stab wounds resulting in the victim's death resulted in separate and identifiable harm, where there was no evidence in the record indicating there were fatal and non-fatal stab wounds, or that the offenses were committed separately or with a separate animus); and *State v. Craig*, 4th Dist. Athens No. 15CA22, 2017-Ohio-4342 (finding the offenses of felonious assault merged where the victim was stabbed in different areas of her body and her thumb was severed). Sheets contrasts the facts of the present case from the facts in *State v. Roberts*, 180 Ohio App.3d 666, 2009-Ohio-298, 906 N.E.2d 1177, in which the court found that a separate animus existed and that there was a break in the continuum where the defendant stabbed the victim multiple times with a steak knife and then when the blade broke, he left, went into the kitchen, and returned with a butcher knife to continue stabbing the victim.

{¶140} The State concedes that in many cases attempted murder and felonious assault may be allied offenses of similar import, however, it argues that the question of merger is a very "fact-specific inquiry." As indicated above, the State contends that Sheets' conduct when using the firearm as a bludgeon was separate from the conduct used when using the firearm to inflict a gunshot wound. The State further argues that the harm that resulted from Sheets' use of the firearm as a bludgeon was separate and distinct from the harm that resulted from the

gunshot wound. The State also argues that the facts sub judice are distinguishable from the facts in *State v. Dixon*, *State v. Anthony*, and *State v. Craig*, as relied upon by Sheets, and that the facts are more in line with the facts in *State v. Roberts*, *supra*. For the following reasons, we agree with the State.

{¶141} In *State v. Craig*, this Court observed as follows regarding the general view that the offenses of attempted murder and felonious are allied offenses:

> Generally speaking, the Supreme Court of Ohio has held that attempted murder and felonious assault, R.C. 2903.11(A)(2), are allied offenses. *See State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶ 25. In order to commit the offense of attempted murder as defined in R.C. 2903.02(A), one must engage in conduct that, if successful, would result in purposely causing the death of another; to commit felonious assault as defined in R.C. 2903.11(A)(2), one must cause or attempt to cause physical harm to another by means of a deadly weapon.

(Footnote omitted). *State v Craig*, *supra*, at ¶ 19.

{¶142} We further observed in *Craig* as follows regarding the factors to be considered when determining whether a separate animus exists when committing the crimes of attempted murder and felonious assault:

> In determining whether a separate animus exists for both felonious assault and attempted murder, courts have examined case-specific factors such as whether the defendant at some point broke "a temporal continuum started by his initial act"; whether facts appear in the record that "distinguish the circumstances or draw a line of distinction that enables a trier of fact to reasonably conclude separate and distinct crimes were committed"; whether, at some point, the defendant created a "substantial independent

> risk of harm"; and, whether a significant amount of time passed between the beginning of the felonious assault and the end of the attack. *State v. Williams*, 8th Dist. Cuyahoga No. 89726, 2008-Ohio-5286, 2008 WL 4531946, ¶ 37; *State v. Hines*, 8th Dist. Cuyahoga No. 90125, 2008-Ohio-4236, 2008 WL 3870669, ¶ 48; *State v. Chaney*, 5th Dist. Stark No. 2007CA00332, 2008-Ohio-5559, 2008 WL 4712753, ¶ 33.

Id. at ¶ 22.

{¶143} Paul Sheets testified regarding his recollection of the events on the night in question. He testified that after the defendant shot him in the head, the defendant spun him around and tried to shoot him again, but the gun jammed. Paul testified that at that point, the two men fought and wrestled around, and that although he tried to get the gun away from the defendant, the gun was slippery because it was covered in blood. Paul testified that after the two men fought and wrestled, the defendant kicked him in the leg, pinned him down, stomped on him, and then started "pistol whipping" him. James R. Baker, III, a paramedic with the Jackson County EMS, also testified at trial. He testified that he responded to the scene on the night in question and that he treated Paul Sheets. He described Paul as having been shot in the ear, and also as having lacerations, abrasions, bruises, and cuts consistent with his report that he had been pistol whipped. He testified that Paul was placed into a C-collar and was transported to the hospital. Photographs of the injuries to Paul's face and head were introduced into evidence and admitted as exhibits.

{¶144} We believe that although this is not an exact comparison, the facts presently before us can be likened to the facts in *Roberts* where when the defendant's knife blade broke, he retrieved another knife from the kitchen to continue stabbing the victim. Here, once the gun jammed, Sheets could no longer inflict another gunshot wound, and after struggling with the victim Sheets decided to use the gun as a bludgeon to inflict blunt force injuries to Paul's scalp and face. These injuries were separate and distinct from the gunshot wound initially inflicted by the same weapon. Moreover, we conclude this switch in Sheets' strategy constituted a break in the "temporal continuum started by his initial act," which further resulted in "a line of distinction that enables a trier of fact to reasonably conclude separate and distinct crimes were committed." *Craig*, *supra*, at ¶ 22, quoting *State v. Williams*, *supra*, at ¶ 37.

{¶145} Based on the foregoing application of the *Ruff* test to the facts herein, as well as the reasoning set forth in *State v. Craig* and *State v. Williams*, *supra*, we cannot find that the trial court erred in refusing to merge the offenses of attempted murder and felonious assault for purposes of sentencing . As such, we find no merit to Sheets' fourth assignment of error and it is hereby overruled.

ASSIGNMENT OF ERROR V

{¶146} In his fifth assignment of error, Sheets contends that the trial court erred when it imposed consecutive sentences and he claims that the matter must be

reversed and remanded for a new sentencing hearing. More specifically, Sheets argues that the trial court failed to engage in the required analysis or make the specific findings required to support the imposition of consecutive sentences, either at the sentencing hearing or in the sentencing entry. The State responds by arguing that the imposition of consecutive sentences was supported by the record, that the trial court engaged in the analysis required by R.C. 2929.14(C), and that it "specified which of the given bases warranted its decision."

Standard of Review

{¶147} A defendant bears the burden to establish, by clear and convincing evidence, that a sentence is either contrary to law or that the record does not support the specified findings. *See State v. Behrle*, 4th Dist. Adams No. 20CA1110, 2021-Ohio-1386, ¶ 48.

> [C]lear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus (1954); *State v. Whitehead*, 4th Dist. Scioto No. 20CA3931, 2022-Ohio-479, ¶ 107.

{¶148} R.C. 2953.08(G)(2) provides as follows:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶149} R.C. 2929.14(C)(4) governs the imposition of consecutive sentences and allows the trial court to require the offender to serve consecutive prison terms if "the consecutive service is necessary to protect the public from future crime or to punish the offender," they "are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public," and if the court makes any one of the following findings:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two

> or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶150} The Supreme Court of Ohio has explained that a word-for-word recitation of the statutory language in R.C. 2929.14(C) is not required as long as the reviewing court can discern that the trial court engaged in the proper analysis:

> When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing, and by doing so it affords notice to the offender and to defense counsel. *See* Crim.R. 32(A)(4). And because a court speaks through its journal, *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶ 47, the court should also incorporate its statutory findings into the sentencing entry. However, a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.

State v. Bonnell, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29.

{¶151} In analyzing the trial court's statements at the sentencing hearing in *Bonnell*, the Supreme Court of Ohio found that the trial court made only two of the three findings:

> We can discern from the trial court's statement that Bonnell had "shown very little respect for society and the rules of society" that it found a need to protect the public from future crime or to punish Bonnell. We also can conclude that the court found that

> Bonnell's "atrocious" record related to a history of criminal conduct that demonstrated the need for consecutive sentences to protect the public from future crime. But it never addressed the proportionality of consecutive sentences to the seriousness of Bonnell's conduct and the danger he posed to the public, which in this case involved an aggregate sentence of eight years and five months in prison for taking $117 in change from vending machines.
>
> Thus, the court's description of Bonnell's criminal record as atrocious and its notation of his lack of respect for society do not permit us to conclude that the trial court had made the mandated statutory findings in accordance with R.C. 2929.14(C)(4).

Id. at ¶ 33-34.

{¶152} However, faced with a similar argument as the one sub judice, this Court recently held that a trial court made the required findings to properly impose consecutive sentences, reasoning as follows:

> The trial court stated at the sentencing hearing that in considering the sentence to impose it was considering the need to protect the public and punish the offender. The trial court acknowledged Helterbridle's problem with recidivism and his long criminal history and we can conclude that this demonstrated the need for consecutive sentences to protect the public from his future crimes and to punish him. Additionally, the court reviewed Helterbridle's lack of remorse, repeated failures to abide by drug and gun laws, and the problematic mix of drugs, alcohol, and firearms and admonished him, "we're lucky yet you're not sitting here and we're talking about a murder case." We can discern from this that the trial court found that consecutive sentences were not disproportionate to the seriousness of the offender's conduct and the danger he posed to the public. Finally, based on the trial court's finding that Helterbridle was under community control sanctions at the time he committed the offense of having weapons under disability, the record clearly supports the finding in R.C. 2929.14(E)(4)(a). Any one of the three alternative findings in

> R.C. 2929.14(E)(4)(a)-(c) is sufficient for consecutive sentences. Thus, we find the trial court complied with R.C. 2929.14(C)(4) at the sentencing hearing.

State v. Helterbridle, 4th Dist. Adams Nos. 21CA1149, 21CA1150, 2022-Ohio-2756, ¶ 13.

{¶153} In *Helterbridle*, we further found that the sentencing entry likewise complied with R.C. 2929.14(C)(4), observing as follows:

> [The entry] states that the trial court may require consecutive sentences where it is necessary to protect the public from future crime or to punish the offender and that the sentence is not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Then, the trial judge initialed all three of the findings under R.C. 2929.14(C)(4)(a)-(c), showing that he considered all three and found them to be applicable.

Id. at ¶ 14.

{¶154} Here, in imposing consecutive sentences for complicity to aggravated murder, aggravated murder, attempted murder, felonious assault and tampering with evidence, the trial stated that it had considered all of the sentencing factors contained in R.C. 2929.11 and 2929.12. The trial court thereafter stated as follows:

> * * * Mr. Sheets, you killed your family. You killed your friend. The evidence I've heard is these are people who've only ever tried to help you. You did it with prior calculation and design. What some people would refer to you is maybe a stone-cold killer. Because you executed Tabitha, tried to kill your own brother and you were complicit in the death of your friend David. Um. . . I. . . I. . . I don't know how this could be any worse. Uh.

> . . this is about the worse [sic] thing a person can do. Um. . . so, the Court is going to issue the following sentence: * * *."

{¶155} The court then proceeded to impose consecutive sentences for each of the foregoing offenses, as well as consecutive three-year gun specifications on Counts One through Four. The court then found that the sentences "were necessary to protect the public punishment is not disproportionate given the factors that have already been outlined and the Court finds that his crime cannot. . . these crimes cannot be adequately be punished by a single sentence." [sic].

{¶156} We conclude that it can be gleaned from the trial court's statements that the trial court found that consecutive sentences were necessary to protect the public from future crime or to punish the offender and that consecutive sentences were not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Whether or not the trial court found that at least one of the R.C. 2929.14(E)(4)(a)-(c) factors applied is a close call. However, after reviewing the sentencing transcript as a whole, especially taking into consideration the trial court's statements describing the fact that Sheets executed his sister-in-law, tried to kill his own brother, was complicit in the aggravated murder of his friend, and coupled with the trial court's finding that Sheets' crimes cannot be punished with a single sentence, we conclude that the trial court found that R.C. 2929.14(E)(4)(b) applied. As stated, "[a]ny one of the three alternative findings in R.C. 2929.14(E)(4)(a)-(c) is sufficient for consecutive sentences."

Helterbridle at ¶ 13. Thus, we conclude the trial court made the necessary findings during the sentencing hearing to support the imposition of consecutive sentences.

{¶157} We further find that the sentencing entry likewise complies with R.C. 2929.14(C)(4). Although the sentencing entry can be described as a sort of fill-in-the blank, or check-the-box, type of form, the trial court checked all of the appropriate boxes required to impose consecutive sentences. More specifically, the sentencing entry states as follows:

> Pursuant to R.C. 2929.14(C)(4) the Court orders that consecutive sentences are made necessary to protect the public from future crime or to punish the defendant, and the at [sic] consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger the defendant poses to the public, and because:
>
> * * *
>
> At least two of the multiple offenses were committed as part of one or more courses of conduct and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the defendant's conduct.

{¶158} Thus, Sheets has failed to establish, by clear and convincing evidence, that the trial court's imposition of consecutive sentences is contrary to law or that the record does not support the specified findings.

{¶159} However, as set forth above, we have found merit to Sheets' argument that his conviction for tampering with evidence was not supported by

sufficient evidence and have therefore determined that that particular conviction must be reversed and vacated. As a result, the sentence imposed for Sheets' conviction of that offense must also be vacated. Thus, we find merit to the portion of Sheets' fifth assignment of error to the extent it argues that the trial court erred in imposing a consecutive sentence for tampering with evidence. Accordingly, Sheets' fifth assignment of error is sustained in part and overruled in part, and the 36-month prison term imposed for tampering with evidence is hereby vacated.

{¶160} Accordingly, having found merit to Sheet's second and fifth assignments of error, in part, and having found no merit to the remainder of Sheets' second and fifth assignments of error, nor his first, third, and fourth assignments of error, the judgment of the trial court is affirmed in part, reversed in part, and vacated in part. Specifically, Sheets' convictions for tampering with evidence is hereby reversed and vacated and the corresponding sentence for tampering with evidence is also vacated.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND VACATED IN PART.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART AND VACATED IN PART and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J. and Wilkin, J. concur in Judgment and Opinion.

For the Court,

_____

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.