[Cite as *State v. Preston*, 2021-Ohio-2278.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 109572
v.	:	
MICHAEL PRESTON,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 1, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-634913-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kristin M. Karkutt, Assistant Prosecuting Attorney, *for appellee*.

Joseph V. Pagano, *for appellant*.

EILEEN T. GALLAGHER, J.:

{¶ 1} Defendant-appellant, Michael Preston ("Preston"), appeals from his convictions and sentence. He raises the following assignments of error for review:

> 1. The trial court erred when it denied appellant's motion for acquittal under Crim.R. 29 because the state failed to present sufficient evidence

to establish beyond a reasonable doubt the elements necessary to support the convictions.

2. Appellant's convictions are against the manifest weight of the evidence.

3. The trial court erred by denying appellant's request for the lesser-included offense jury instruction on Count 4.

4. The trial court erred by admitting exhibits over defense [counsel's] objection and in violation of Evid.R. 410, 402, and 403 and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

5. Appellant was deprived of a fair trial and due process when a detective improperly commented on the credibility of the pretrial identification.

6. Appellant's sentence is contrary to law because the record does not support the imposition of consecutive sentences.

{¶ 2} After careful review of the record and relevant case law, we affirm Preston's convictions and sentence.

I. Procedural and Factual History

{¶ 3} In December 2018, Preston was named in a six-count indictment, charging him with aggravated murder in violation of R.C. 2903.01(B) (Count 1); aggravated robbery in violation of R.C. 2911.01(A)(3) (Count 2); murder in violation of R.C. 2903.02(B) (Count 3); felonious assault in violation of R.C. 2903.11(A)(1) (Count 4); attempted murder in violation of R.C. 2923.02 and 2903.01(B) (Count 5); and aggravated robbery in violation of R.C. 2911.01(A)(3) (Count 6). The matter proceeded to a jury trial, where the following facts were adduced.

{¶ 4} On November 15, 2018, Jesus Omar Cruz Maldonado ("Jesus") and his wife, Lesley Cruz DeJesus ("Lesley"), drove to their local church with their children,

L.C. and J.C., to prepare for an upcoming birthday party that the family was hosting. They arrived at the church at approximately 1:00 or 2:00 p.m. While the family was inside the church hall, L.C. looked out a window and noticed that there was someone near the family minivan. When Jesus went outside to assess the situation, he confronted two individuals who had entered his vehicle without permission. Jesus testified that he opened the passenger's-side door of his vehicle and attempted to pull one of the occupants out of the vehicle. Ultimately, the individual who was in the passenger's side of the vehicle fled the scene and Jesus turned his attention to the individual located in the front-passenger's seat, later identified as Preston.

{¶ 5} Jesus testified that when he confronted Preston in the front seat, Preston was attempting to start the vehicle with a screwdriver. During the altercation, Lesley was standing behind Jesus and was trying to get him out of the vehicle in order to avoid a dangerous situation. Within seconds, however, Preston successfully started the vehicle and began driving in reverse. Jesus testified that he managed to hold on to the seat while the vehicle traveled in reverse. However, Lesley was unable to hold on to the passenger's-side door. Her body was dragged by the vehicle, leaving her unconscious on the ground. When Preston stopped driving in reverse, Jesus fell out of the vehicle and sustained injuries to his hands, legs, and feet. Preston then put the vehicle in drive and drove over Lesley's body while fleeing the scene. Jesus explained that his wife's body was not blocking the parking lot exit and that there was room for the vehicle to pass by without hitting her. The force of the vehicle caused Lesley to die within seconds.

{¶ 6} When police arrived at the scene, they secured the area, spoke with witnesses, and confirmed that Lesley had succumbed to her injuries. Officer Michael Tracy ("Officer Tracy") of the Cleveland Police Department testified that he was provided a vague description of the two suspects, which was broadcasted to patrol vehicles that were assisting in the area.

{¶ 7} Officer Trevor Majid ("Officer Majid") of the Cleveland Police Department testified that he received the broadcasted description while patrolling the area where the suspects were last seen. Within 15 minutes of the incident, Officer Majid observed a male matching one of the suspect's description. The male, later identified as Devontae Smith ("Smith"), was walking northbound on a roadway located approximately one block south of the church parking lot. He was detained and transported to the homicide unit for further questioning.

{¶ 8} Similarly, Officer Joseph Maund ("Officer Maund") of the Cleveland Police Department testified that he was patrolling the area when he observed a male matching one of the suspect's description. The male, later identified as Kason Robertson ("Robertson"), attempted to flee on foot before he was apprehended in a backyard that was located approximately one quarter mile from the church parking lot. Robertson, who attempted to discard a firearm as he fled, was arrested within minutes of the incident.

{¶ 9} Detective Troy Edge ("Det. Edge") of the Cleveland Police Department testified that he was assigned to document the crime scene. In the course of his investigation, Det. Edge photographed and collected items of evidentiary value that

were located at the church parking lot and at the location where Jesus's family vehicle was eventually abandoned by Preston. The evidence was sealed and delivered to a property room before being transported to the medical examiner's office for forensic testing.

{¶ 10} Detective Arthur Echols ("Det. Echols") of the Cleveland Police Department, Homicide Unit, testified that he and his partner, Detective Morris Bruce Vowell ("Det. Vowell"), were assigned to investigate Lesley's death. Det. Echols explained that in the course of the investigation, the homicide detectives "received investigational leads that [identified] Preston as a very strong person of interest." (Tr. 1024.) As a result of this information, Det. Echols created a computer-generated photo array using a law enforcement database. The photo array contained photographs of six men, including Preston, who shared similar physical features and characteristics.

{¶ 11} On November 24, 2018, Det. Echols and a uniformed officer, who was intended to serve as a blind administrator, presented the photo array to Jesus for identification purposes. Upon arriving at the residence where Jesus was staying, however, Det. Echols encountered language barriers that required Jesus's family member to serve as a translator. Thereafter, Jesus identified Preston, marked No. 4, as the assailant in the driver's seat of his vehicle. He also identified a second individual, A.B., as the individual he removed from the passenger's seat of his vehicle. Det. Echols confirmed that his department had no investigational leads to tie A.B. to the crime. Based on Jesus's photo identification and the investigational

leads implicating Preston in the crime, a warrant was issued for Preston's arrest on November 26, 2018.

{¶ 12} At trial, Jesus reiterated that the person depicted in photograph No. 4 of the photo array was the person he encountered in the driver's side of his vehicle and the person who ran Lesley over with the vehicle while fleeing the scene. (Tr. 457.) Jesus further identified Preston in court as the assailant. When asked how he was able to recognize Preston, Jesus stated, "[b]ecause the day of the incident, I struggled with him. I saw him." (Tr. 459.)

{¶ 13} During cross-examination, Det. Echols confirmed that Jesus did not conclusively identify Preston as the driver, but "merely stated that [Preston's] photo looked the closest to the person that was driving the van that day." (Tr. 1034.) Thus, Jesus did not express his level of confidence in his identification on the photo array sheet. Det. Echols further admitted that he remained in the room during the identification process and used Jesus's family friend to translate the instructions for the administration of the photo array. Det. Echols, and not the uniformed officer, continued to provide Jesus instructions via the translator throughout the process. Although Det. Echols maintained that he complied with the statutory procedures for photo identifications, the trial court provided the jury with the following instruction regarding the reliability of the eyewitness identification:

> Under Ohio law, all law enforcement agencies that conduct photo lineups must adopt specific procedures for conducting photo lineups that meet certain basic requirements.

In considering the surrounding circumstances under which a witness has identified the defendant in the photo lineup, you must consider whether the lineup procedures used met these requirements.

You may consider evidence of noncompliance with these requirements in determining the reliability of the eyewitness identification resulting from or related to this lineup.

These basic requirements include at a minimum the following:

> Unless it was not practical, a blind or blinded administrator conducted the lineup.
>
> If it was not practical for a blind or blinded administrator to conduct the lineup, the lineup administrator stated in writing the reason for that impracticability.

The lineup administrator made a written record that included all the following information:

> All identification and non-identification results obtained during the lineup, signed by the eyewitness including the eyewitness' confidence statements made immediately at the time of the identification.
>
> The names of all persons present at the lineup.
>
> The date and time of the lineup.
>
> Any eyewitness identification of one or more fillers in the lineup, and the names of the lineup members, other relevant identifying information, and the sources of all photographs used in the lineup.
>
> The blind administrator who conducted the lineup informed the eyewitness that the suspect may or may not have been in the lineup.
>
> Photo lineup means the identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the

> eyewitness identifies the suspect as the perpetrator of the offense.
>
> Administrator is the person conducting the photo lineup.
>
> Blind administrator or blinded administrator means an administrator who does not know the identity of the suspect.

(Tr. 1422-1425.) *See* R.C. 2933.83(C)(3).

{¶ 14} Det. Vowell testified that he was assigned to investigate Lesley's death. While assessing the crime scene, Det. Vowell learned that two individuals matching the suspects' descriptions were detained by patrolling officers and transported to the homicide unit. Det. Vowell then returned to the homicide unit, where he interviewed Smith and Robertson and collected buccal swabs for DNA forensic testing. Ultimately, the decision was made to release Smith from custody. Robertson, however, was arrested and booked for carrying a concealed weapon. Subsequently, Det. Vowell assisted detectives in collecting evidence from the scene where Jesus's family vehicle was abandoned. The evidence was sealed in separate envelopes and transported to the Cuyahoga County forensic lab. In addition, Det. Vowell submitted a buccal swab that was taken from Preston at the time of his arrest.

{¶ 15} Laura Evans ("Evans"), a forensic DNA analyst with the Cuyahoga County Medical Examiner's Office, testified that she conducted an analysis of the DNA evidence obtained in this matter. Relevant to this appeal, Evans explained that her office uses a computer software program known as TrueAllele to analyze samples that contain mixtures of DNA. According to Evans, swabs taken from the surface of the screwdriver used to start Jesus's vehicle revealed that it contained a

mixture of DNA from five contributors. Evans testified that one of the mixtures was consistent with Preston's DNA. The probability of finding another individual with the same DNA profile was one in 9.21 quintillion unrelated African-Americans, one in 16.9 quintillion unrelated Caucasians, and one in 5.31 quintillion unrelated Hispanics. Evans testified that Preston's DNA also matched DNA profiles found on (1) the surface of a pry tool discovered on the driver's side floor of the vehicle; (2) swabs from the vehicle's steering wheel, gear shift, and interior driver's side door handle; (3) a disposable lighter found on the front driver's seat; and (4) a brick found in the vicinity of the vehicle's center console. Smith's and Robertson's DNA was not discovered on any of the items submitted for forensic testing.

{¶ 16} Forensic pathologist and medical examiner, Dr. Dan Galita ("Dr. Galita"), of the Cuyahoga County Medical Examiner's Office testified that he performed the autopsy of Lesley. Dr. Galita testified that Lesley sustained significant internal injuries as a result of the tremendous pressure applied to her chest and upper abdomen when the wheels of the vehicle passed over her body. Lesley's ribs were crushed, causing her lungs to separate from their vascular connection with her heart and airway. She also sustained significant lacerations to her kidney and liver. Accordingly, Dr. Galita testified, to a reasonable degree of medical certainty, that Lesley's cause of death was "blunt force injuries of head, trunk and extremities with skeletal, visceral and soft tissue injuries." (Tr. 1008.) Furthermore, he stated that her manner of death was a homicide.

{¶ 17} At the conclusion of the state's case, defense counsel made an oral motion for acquittal on all counts pursuant to Crim.R. 29. Following a brief recess, the trial court denied the motion for acquittal, finding "there was sufficient evidence presented to go to the jury to make a determination as to each of these counts." (Tr. 1252.)

{¶ 18} On behalf of the defense, Preston's girlfriend, Lydia John ("Lydia"), testified that on the day of the incident, she and Preston donated blood at the CSL Plasma bank located at West 25th Street in Cleveland, Ohio. Lydia explained that after she finished her shift as a nursing assistant, she met Preston at the plasma bank at approximately 3:45 p.m. Lydia testified that Preston rode his bicycle to the plasma bank and was already in the process of having his vitals checked at the time she had arrived to make her donation. According to Lydia, Preston finished his donation at approximately 6:30 p.m. Thereafter, Lydia and Preston stopped for dinner and were home by 8:00 p.m.

{¶ 19} Lydia's mother, Jennifer John ("Jennifer"), testified that on the day of the incident she was with Preston in Lydia's home after Lydia had left for work. Jennifer testified that Preston stayed inside the home until he left to meet Lydia at the plasma bank. Jennifer estimated that Preston left the home, on his bicycle, between 2:30 and 2:45 p.m.

{¶ 20} Sara Moss ("Moss") is employed as a center manager at CSL Plasma. As reflected in state's exhibit No. 222, CSL Plasma is located 1.1 miles from the church parking lot where Lesley was killed. Relevant to this case, Moss confirmed

that Preston made a plasma donation on November 15, 2018. CSL Plasma records reflect that Preston checked into the plasma bank at 3:20 p.m. and began the screening process at 3:57 p.m. Moss testified that the donation process for return donors, such as Preston, "can take anywhere from probably 45 minutes to two hours depending on how many people show up [and] how many staff members are called off." (Tr. 1303.) In this instance, Preston's plasma was withdrawn at 5:42 p.m., at which time Preston was free to leave the building.

{¶ 21} At the conclusion of trial, Preston was found guilty of reckless homicide, a lesser-included offense of the aggravated murder charged in Count 1 of the indictment; aggravated robbery as charged in Count 2 of the indictment; murder as charged in Count 3 of the indictment; felonious assault as charged in Count 4 of the indictment; and aggravated robbery as charged in Count 6 of the indictment. He was found not guilty of attempted aggravated murder as charged in Count 5 of the indictment.

{¶ 22} At sentencing, the trial court determined that Counts 1, 2, 3, and 4 were allied offenses of similar import. The state elected to proceed with sentencing on the murder offense, and the trial court imposed a prison sentence of 15 years to life. The prison term imposed on the murder offense was ordered to be served consecutively to an eight-year prison term imposed on the aggravated robbery offense charged in Count 6 of the indictment. Thus, Preston was sentenced to an aggregate prison term of 23 years to life.

{¶ 23} Preston now appeals from his conviction and sentence.

II. Law and Analysis

A. Sufficiency of the Evidence

{¶ 24} In his first assignment of error, Preston argues the trial court erred by denying his motion for acquittal pursuant to Crim.R. 29 because the state failed to present sufficient evidence in support of his convictions.

{¶ 25} Crim.R. 29(A) provides for an acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses." "[T]he test for sufficiency requires a determination of whether the prosecution met its burden of production at trial." *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The state may use direct evidence, circumstantial evidence, or both, in order to establish the elements of a crime. *See State v. Durr*, 58 Ohio St.3d 86, 568 N.E.2d 674 (1991). Circumstantial evidence is "proof of facts or circumstances by direct evidence from which the trier of fact may reasonably infer other related or connected facts that naturally or logically follow." *State v. Seals*, 8th Dist. Cuyahoga No. 101081, 2015-Ohio-517, ¶ 32.

{¶ 26} In challenging the sufficiency of the evidence supporting each of his convictions, Preston initially argues that there is insufficient evidence of identity. Preston reiterates his claims of innocence and contends that his convictions were

the product of vague identification testimony, questionable DNA evidence, and an unreliable photo-array identification.

{¶ 27} "[I]dentity of the perpetrator is an essential element that must be proved beyond a reasonable doubt." *State v. Johnson*, 9th Dist. Lorain No. 13CA010496, 2015-Ohio-1689, ¶ 13. As with any other element, "[t]he identity of a perpetrator may be established by the use of direct or circumstantial evidence." *State v. Deal*, 8th Dist. Cuyahoga No. 92642, 2010-Ohio-153, ¶ 11, citing *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315; *State v. Reed*, 10th Dist. Franklin No. 08AP-20, 2008-Ohio-6082.

{¶ 28} Relevant to this appeal, this court has found that "even where discrepancies exist, eyewitness identification testimony alone is sufficient to support a conviction so long as a reasonable juror could find the eyewitness testimony to be credible." *State v. Johnson*, 8th Dist. Cuyahoga No. 99822, 2014-Ohio-494, ¶ 52, citing *State v. Bryson*, 8th Dist. Cuyahoga No. 98298, 2013-Ohio-934. Similarly, DNA evidence identifying a defendant as a major contributor to the DNA profile found on an object linked to a crime is sufficient evidence to sustain a conviction. *State v. Brown*, 8th Dist. Cuyahoga No. 98881, 2013-Ohio-2690, ¶ 31, 35 (the evidence was sufficient where the defendant's DNA profile was the major contributor to a sample collected from a shirt connected to the crime, notwithstanding the existence of unidentified minor contributors). *See also State v. Martin*, 11th Dist. Lake No. 2017-L-005, 2019-Ohio-22, ¶ 93, quoting *State v. Eckard*, 3d Dist. Marion No. 9-15-45, 2016-Ohio-5174, ¶ 33 (where the homeowner

found a strange crowbar after the police left and the defendant was a major contributor to the DNA found on the crowbar, this was sufficient circumstantial evidence of his identity).

{¶ 29} Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational jury could have determined, beyond a reasonable doubt, that Preston was the perpetrator of the crimes committed against Jesus and Lesley. In this case, Jesus testified that he was able to observe the face of the person who was sitting in the driver's seat of his vehicle. Jesus later identified Preston in a photo array as the person he observed in the driver's seat of his vehicle on the day of the incident. Jesus also identified Preston in court as the person who perpetrated the crimes against himself and his wife, Lesley. When asked how he could be certain it was Preston in the driver's seat of his vehicle, Jesus stated "because the day of the incident, I struggled with him. I saw him." (Tr. 459.)

{¶ 30} In addition, Evans confirmed that Preston's DNA matched DNA profiles obtained from the screwdriver, pry tool, and brick used during the commission of the crimes. Preston's DNA was also discovered on various items located inside the vehicle, including a disposable lighter, the steering wheel, the gear shift, and the interior driver's-side door handle. This evidence, introduced through expert testimony, was sufficient to identify Preston as the person who was in the driver's seat of Jesus's vehicle during the incident. Accordingly, we find the state presented sufficient evidence to satisfy the essential element of identity.

{¶ 31} We recognize that Preston contests the reliability of Jesus's identification and the TrueAllele technology. However, "'while identity is an element that must be proven by the state beyond a reasonable doubt, the credibility of witnesses and their degree of certainty in identification are matters affecting the weight of the evidence.'" *Deal*, 8th Dist. Cuyahoga No. 92642, 2010-Ohio-153, at ¶ 11, quoting *State v. Reed*, 10th Dist. Franklin No. 08AP-20, 2008-Ohio-6082, ¶ 48. Thus, Preston's insinuation that the state's identification evidence was not reliable does not raise a proper argument regarding the sufficiency of the evidence supporting his convictions.

{¶ 32} Finally, Preston contends that the state failed to prove the necessary elements of felony murder, aggravated robbery, and felonious assault as charged in in Counts 2, 3, 4, and 6.

{¶ 33} As stated, Preston was convicted of felony murder in violation of R.C. 2903.02(B). The statute states, in relevant part, that "[n]o person shall cause the death of another as a proximate result of the offender's committing * * * an offense of violence that is a felony of the first or second degree * * *." In this case, Count 3 of the indictment alleged that the felony offense underlying the felony murder charge was aggravated robbery and/or felonious assault.

{¶ 34} In turn, Preston was also convicted of two counts of aggravated robbery in violation of R.C. 2911.01(A)(3). Count 2 of the indictment pertained to the conduct committed against Lesley, while Count 6 of the indictment pertained to conduct committed against Jesus. The statute provides that "[n]o person, in

attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, or attempt to inflict, serious physical harm on another." A "theft offense," pursuant to R.C. 2913.01(K), includes violations of R.C. 2911.02, robbery, and R.C. 2913.02, theft. Theft requires the state to prove beyond a reasonable doubt that Preston, with the purpose to deprive the owner of property, knowingly obtained control over the property without the consent of the owner or through deception, threat, or intimidation. R.C. 2913.02. A person acts with a particular purpose when "it is [her] specific intention to cause a certain result." R.C. 2901.22(A).

{¶ 35} Lastly, Preston was convicted of felonious assault in violation of R.C. 2903.11(A)(1). A person commits felonious assault when one "knowingly" causes "serious physical harm to another or to another's unborn." R.C. 2903.11(A)(1). Count 4 of the indictment alleged that Preston did knowingly cause serious physical harm to Lesley.

{¶ 36} To have acted "knowingly," a person need not have specifically intended to cause a particular result. "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). In other words, a defendant acts knowingly when, although not necessarily intending a particular result, he or she is aware that the result will probably occur.

{¶ 37} If a result is a probable consequence of a voluntary act, the actor "'will be held to have acted knowingly to achieve it'" because a person "'is charged by the

law with knowledge of the reasonable and probable consequences of his [or her] own acts.'" *State v. Dixon*, 8th Dist. Cuyahoga No. 82951, 2004-Ohio-2406, ¶ 16, quoting *State v. McDaniel*, 2d Dist. Montgomery No. 16221, 1998 Ohio App. LEXIS 2039, 16 (May 1, 1998); *see also State v. McCurdy*, 10th Dist. Franklin No. 13AP-321, 2013-Ohio-5710, ¶ 16 ("'[F]elonious assault under R.C. 2903.11, combined with the definition of "knowingly" found in R.C. 2901.22(B), does not require that a defendant intended to cause "serious physical harm," but rather, that the defendant acted with an awareness that the conduct probably would cause such harm.'") (emphasis deleted), quoting *State v. Smith*, 10th Dist. Franklin No. 04Ap-726, 2005-Ohio-1765, ¶ 28. "Stated another way, when a defendant voluntarily acts in a manner that is likely to cause serious physical injury, the factfinder can infer that the defendant was aware that his actions would cause whatever injury results from his actions, or, in other words, that he acted knowingly." *State v. Reed*, 8th Dist. Cuyahoga No. 89137, 2008-Ohio-312, ¶ 10. "'To be actionable it is only necessary that the result is within the natural and logical scope of risk created by the conduct.'" *State v. Hampton*, 8th Dist. Cuyahoga No. 103373, 2016-Ohio-5321, ¶ 13, quoting *State v. Smith*, 4th Dist. Ross No. 06CA2893, 2007-Ohio-1884, ¶ 29. The defendant need not have known that his or her actions would cause the precise injury sustained by the victim. *See, e.g., State v. Perez*, 8th Dist. Cuyahoga No. 91227, 2009-Ohio-959, ¶ 42. Absent an admission, whether a defendant acted "knowingly" must be determined "from all the surrounding facts and circumstances, including the doing

of the act itself." *Dixon* at ¶ 16, quoting *State v. Huff*, 145 Ohio App.3d 555, 563, 763 N.E.2d 695 (1st Dist.2001).

{¶ 38} "Serious physical harm," as defined in R.C. 2901.01(A)(5), is very broad and includes any of the following:

> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

Loss of consciousness, "'irrespective of its duration,'" has been found to constitute severe physical harm under R.C. 2901.01(A)(5)(c). *State v. Watson*, 10th Dist. Franklin No. 17AP-834, 2018-Ohio-4964, ¶ 11, quoting *State v. Sales*, 9th Dist. Summit No. 25036, 2011-Ohio-2505, ¶ 19.

{¶ 39} On appeal, Preston asserts that although this was a "tragic incident," the "facts do not reflect that [he] knowingly * * * tried to injure Lesley or Jesus." We disagree. As previously discussed, the testimony and forensic evidence introduced at trial demonstrated that Preston was the individual attempting to start Jesus's family vehicle with a screwdriver at the time he was confronted by Jesus and Lesley in a church parking lot. Preston did not have permission to obtain control of the

victims' family vehicle, and there is no dispute that he entered the vehicle with the intent to deprive the owners of their property. While attempting to flee from the scene of his theft, Preston engaged in conduct that resulted in Jesus and Lesley suffering serious physical harm. The testimony reflects that Preston placed the vehicle in reverse and drove backwards at a high rate of speed. Jesus was dragged by the vehicle for approximately 30 feet, resulting in injuries to his hands, legs, and feet. Photographs of the injuries, marked state's exhibit Nos. 146-154, reveal that Jesus sustained significant cuts to his hands, legs, and feet. Jesus received medical treatment from emergency personnel and was required to see a specialist for his leg injuries.

{¶ 40} Similarly, the record reflects that Lesley was dragged under the vehicle, causing her to fall to the ground. Thereafter, Preston put the vehicle in drive, turned the vehicle in the direction where Lesley was located, and "drove over" Lesley's body as she lay unconscious on the pavement. (Tr. 428-433.) Jesus explained that Preston had room to exit the parking lot without striking his wife. As a proximate result of Preston's conduct, Lesley died from blunt force trauma within "seconds." A reasonable juror could conclude that Lesley's serious physical harm and eventual death was a result within the natural and logical scope of risk created by the conduct of Preston. (Tr. 1003.)

{¶ 41} Viewing the foregoing evidence in a light most favorable to the state, we find any rational trier of fact could have found the essential elements of felony

murder, aggravated robbery, and felonious assault proven beyond a reasonable doubt. Preston's convictions are supported by sufficient evidence.

{¶ 42} The first assignment of error is overruled.

B. Manifest Weight of the Evidence

{¶ 43} In his second assignment of error, Preston argues his convictions are against the manifest weight of the evidence.

{¶ 44} A manifest weight challenge questions whether the state met its burden of persuasion. *Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, at ¶ 12. A reviewing court "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "A conviction should be reversed as against the manifest weight of the evidence only in the most 'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Burks*, 8th Dist. Cuyahoga No. 106639, 2018-Ohio-4777, ¶ 47, quoting *Thompkins* at 387.

{¶ 45} In challenging the weight of the evidence supporting his convictions, Preston contends that his alibi evidence "confirmed that he was not present at the church parking lot when the incident occurred." With respect to the state's evidence, Preston reiterates his position that Jesus's pretrial identification was unreliable, stating:

> The pretrial identification is uncertain because (1) several other suspects matched the generic description, evidenced by two other men being arrested and released on November 15, 2018; (2) Jesus identified [A.B.] first and there was no follow up on that identification by the police; (3) Jesus was mistaken about who administered the array, suggesting his recollection was not reliable; (4) Jesus was not wearing his glasses during part of the incident and not at the time he made his identification; (5) the police could not communicate directly with Jesus; (6) the requirements of R.C. 2933.83 for administering a photo array were not followed; and (7) the whole incident took only seconds to transpire.

Preston further suggests that the DNA testimony should be equally disregarded because the results were computer generated and were not manually verified by the forensic expert.

{¶ 46} Based on our review of the entire record in this case, weighing the strength and credibility of the evidence presented and the inferences to be reasonably drawn therefrom, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that Preston's convictions must be reversed.

{¶ 47} In this case, defense counsel thoroughly cross-examined the state witnesses regarding the reliability of the identification evidence and the TrueAllele computer program used to analyze DNA profiles containing multiple contributors. Throughout the proceedings, however, Jesus continuously and consistently identified Preston as the perpetrator of the crimes against him and his wife. While Preston correctly states that Det. Echols failed to strictly comply with the requirements for administering a photo array, the trial court provided an instruction pursuant to R.C. 2933.83(C)(3), advising the jury that it "may consider credible

evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to that lineup." Under these circumstances, we find the jury was presented with all relevant information and was free to find the identification testimony to be credible.

{¶ 48} Similarly, the record reflects that Evans engaged in a comprehensive discussion regarding the benefits of the TrueAllele computer program, explaining that the software allows forensic scientists to interpret profiles "without bias." (Tr. 749.) Contrary to Preston's position on appeal, Evans testified that TrueAllele "is a better system than before because it's more reliable then when we tested it originally when we looked at an eye level." (Tr. *id*.) This court has previously acknowledged the general acceptance of the TrueAllele technology. *See State v. Blevins*, 8th Dist. Cuyahoga No. 106115, 2018-Ohio-3583, ¶ 32, citing *State v. Mathis*, Cuyahoga C.P. No. CR-16-611539-A (Apr. 13, 2018); *People v. Wakefield*, 47 Misc.3d 850, 9 N.Y.S.3d 540, 2015 NY Misc. LEXIS 306 (Sup. Ct. Schenectady, Feb. 9, 2015) (compilation of cases accepting True Allele).

{¶ 49} Collectively, we find the reliable identification testimony, when viewed in conjunction with the plethora of DNA evidence, was consistent, competent, credible evidence upon which the trier of fact could have reasonably found, beyond a reasonable doubt, that Preston was the perpetrator. Accordingly, Preston's convictions are not against the weight of the evidence.

{¶ 50} Preston's second assignment of error is overruled.

C. Lesser-Included Offense

{¶ 51} In his third assignment of error, Preston argues the trial court erred by denying his request for a jury instruction on the lesser-included offense of simple assault.

{¶ 52} The lesser-included-offense doctrine is codified in Ohio law in R.C. 2945.74 and Crim.R. 31(C), which are substantially similar. R.C. 2945.74 provides, in relevant part:

> When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense.

See also Crim.R. 31(C).

{¶ 53} A lesser-included offense is one in which

> (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense.

State v. Deem, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), paragraph three of the syllabus.

{¶ 54} Generally, "a charge on a lesser included or inferior offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included or inferior offense." *State v. Carter*, 2018-Ohio-3671, 119 N.E.3d 896, ¶ 59 (8th Dist.), citing *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph two of the

syllabus. In determining whether a lesser included or inferior offense instruction is appropriate, the trial court must view the evidence in the light most favorable to the defendant. *Id*. at ¶ 59, citing *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 37. An instruction is not warranted, however, every time "some evidence" is presented on a lesser included or inferior offense. *State v. Smith*, 8th Dist. Cuyahoga No. 90478, 2009-Ohio-2244, ¶ 12, citing *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992).

> To require an instruction * * * every time some evidence, however minute, is presented going to a lesser included (or inferior-degree) offense would mean that no trial judge could ever refuse to give an instruction on a lesser included (or inferior-degree) offense.

Id., quoting *Shane* at 633. Thus, a court must find there is sufficient evidence to allow a jury to reasonably reject the greater offense and find the defendant guilty on the lesser included or inferior offense. *Shane* at 632-633.

{¶ 55} Relevant to this case, the parties do not dispute that the misdemeanor offense of assault in violation of R.C. 2903.13(A) is a lesser-included offense of felonious assault. *See State v. Addison*, 8th Dist. Cuyahoga No. 96514, 2012-Ohio-260, ¶ 34, citing *State v. Caster*, 8th Dist. Cuyahoga No. 87783, 2006-Ohio-6594. The charge of simple assault requires a person to knowingly cause physical harm as opposed to the element of serious physical harm required for felonious assault. However, "when the victim suffers serious physical harm, a misdemeanor assault under R.C. 2903.13(A) should not be considered as a lesser-included offense of felonious assault." *State v. Koch*, 2d Dist. Montgomery No. 28000, 2019-Ohio-

4099, ¶ 84, citing *State v. Thornton*, 2d Dist. Montgomery No. 20652, 2005-Ohio-3744, ¶ 48; *see also State v. Brisbon*, 8th Dist. Cuyahoga No. 105591, 2018-Ohio-2303, ¶ 27. Consistent with our discussion of the evidence supporting Preston's convictions, we find the evidence presented at trial demonstrated that Preston knowingly caused Lesley serious physical harm. Thus, an acquittal on the felonious assault charge was not reasonable, and an instruction for the offense of assault was not warranted.

{¶ 56} Preston's third assignment of error is overruled.

D. Admission of Evidence

{¶ 57} In his fourth assignment of error, Preston argues the trial court erred by admitting certain autopsy photographs over defense counsel's objections. Preston contends the photographs were "grossly inflammatory" and were "were not relevant or probative of any fact in issue."

{¶ 58} "The prosecution is entitled to present evidence showing the cause of death, even if the cause is uncontested, to give the jury an 'appreciation of the nature and circumstances of the crimes.'" *State v. Catron*, 8th Dist. Cuyahoga No. 101789, 2015-Ohio-2697, ¶ 25 quoting *State v. Chatmon*, 8th Dist. Cuyahoga No. 99508, 2013-Ohio-5245, ¶ 41. Moreover, the state has latitude in constructing its case and determining the manner by which it meets its burden of proof. *See State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 99, 103 ("[T]he state bears the burden of proof and it has no obligation to meet that burden in the least gruesome way."); *see also State v. Kirkland*, Slip Opinion No. 2020-Ohio-

4079, quoting *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984) ("'[T]he mere fact that a photograph is gruesome or horrendous is not sufficient to render it per se inadmissible.'").

{¶ 59} Thus, "[a]utopsy photographs are generally admissible to help the jury appreciate the nature of the crimes, to illustrate the coroner's or other witnesses' testimony by portraying the wounds, to help prove the defendant's intent, and to show the lack of accident or mistake.'" *State v. Costell*, 3d Dist. Union No. 14-15-11, 2016-Ohio-3386, ¶ 142, citing *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 52. Consequently, autopsy photographs — even if gruesome — are not per se inadmissible. *Maurer* at 265.

{¶ 60} The admissibility of gruesome photographs in a noncapital case is considered with reference to Evid.R. 403. *See, Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, at ¶ 95-96, quoting *State v. Morales*, 32 Ohio St.3d 252, 257-258, 513 N.E.2d 267 (1987). Under Evid.R. 403(A), otherwise relevant evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." The exclusion of relevant evidence under Evid.R. 403(A) rests within the discretion of the trial court. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 107, citing *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. "A court abuses its discretion when a legal rule entrusts a decision to a judge's discretion, and the judge's exercise of that discretion is outside of the legally permissible range of choices." *State v. Hackett*, Slip Opinion No. 2020-

Ohio-6699, ¶ 19, citing *U.S. v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 372, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961) (Frankfurter, J., dissenting). Abuse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

{¶ 61} In this case, the disputed autopsy photographs, marked state's exhibit Nos. 195 and 196, are of Lesley's liver and kidney. The photographs show that Lesley's internal organs sustained extensive lacerations as a result of the pressure caused by the weight of the vehicle. Preston opposed the admission of the photographs at trial, arguing they were "grossly inflammatory" and "unfairly prejudicial under Evidence Rule 403." (Tr. 602-606.) The trial court disagreed, stating:

> I [do] find that the photographs are necessary to help the jury understand the medical examiner's testimony, and they're offered based upon the State's position that these photos are offered to prove elements of the offenses that they are required to, and that they have the burden of proving.
>
> So I do find that the photographs are necessary, and that the probative value of the photos is not outweighed by the danger of unfair prejudice, so I am going to allow them, and they are only these two photos, so they are not cumulative or repetitive, so I will find that the photos are admissible.

(Tr. 932.)

{¶ 62} After careful review, we are unable to conclude that the trial court abused its discretion by permitting the state to introduce the disputed autopsy photographs. At trial, Dr. Galita testified that Lesley's cause of death was blunt force

injuries that included significant visceral injuries. In fact, Dr. Galita testified that the injuries caused to Lesley's liver, standing alone, would have been fatal. (Tr. 1002.) The photographs were probative and showed the full extent of Lesley's blunt force injuries. Each photograph identified a specific injury and were not prejudicially duplicative or cumulative in nature.

{¶ 63} Preston's fourth assignment of error is overruled.

E. Identification Testimony

{¶ 64} In his fifth assignment of error, Preston argues he was deprived a fair trial and due process when Det. Vowell improperly commented on the credibility of the pretrial identification.[1]

{¶ 65} "On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967), paragraph one of the syllabus. "In our system of justice it is the fact finder, not the so-called expert or lay witnesses, who bears the burden of assessing the credibility and veracity of witnesses." *State v. Eastham*, 39 Ohio St.3d 307, 312, 530 N.E.2d 409 (1988). Opinion testimony regarding another witness's credibility "infringe[s] upon the role of the fact finder, who is charged with making determinations of veracity and credibility." *Id*. Thus, "the opinion of a witness as to whether another witness

[1] In his appellate brief, Preston continuously refers to Det. Echols. However, because Preston cites to the testimony of Det. Vowell in the transcript, we interpret his argument as a claim that Det. Vowell improperly commented on the credibility of the pretrial identification.

is being truthful is inadmissible." *State v. Potter*, 8th Dist. Cuyahoga No. 81037, 2003-Ohio-1338, ¶ 38, citing *State v. Miller*, 2d Dist. Montgomery No. 18102, 2001 Ohio App. LEXIS 230 (Jan. 26, 2001). *See also State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 113, citing *State v. Kovac*, 150 Ohio App.3d 676, 2002-Ohio-6784, 782 N.E.2d 1185, ¶ 32 (2d Dist.) (noting that "lay witnesses are prohibited from testifying as to another witness's veracity"). When such testimony is admitted, it is subject to a harmless error analysis on review. *State v. Roush*, 10th Dist. Franklin No. 12AP-201, 2013-Ohio-3162, ¶ 61-62; *State v. Bush*, 10th Dist. Franklin No. 90AP-1190, 1991 Ohio App. LEXIS 4746 (Oct. 3, 1991). Under harmless error analysis, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A).

{¶ 66} During the cross-examination of Det. Vowell, defense counsel questioned Det. Vowell extensively about his decision to seriously pursue a case against Preston while simultaneously discounting Jesus's identification of a second individual, A.B. On appeal, Preston's position that Det. Vowell improperly commented on the credibility of Jesus's identification relies on the following line of questions posed during the cross-examination:

DEFENSE COUNSEL: Have you ever gone out and interviewed [A.B.]?

DET. VOWELL: No.

DEFENSE COUNSEL: Has anybody in the Homicide Unit –

DET. VOWELL: Not that I know of.

DEFENSE COUNSEL: Let me finish the question. Any police officer anywhere go out and interview [A.B.]?

DET. VOWELL: Not that I know of.

DEFENSE COUNSEL: So you're just discounting a witness' eyewitness identification of [A.B.] as being involved, you're discounting that; aren't you?

DET. VOWELL: No.

DEFENSE COUNSEL: Then why didn't you go out and interview [A.B.]?

DET. VOWELL: We are still checking everything out to make sure that -- we were not sure [A.B.] was in there. If I remember right, I said he thinks that's the guy. I think that's what he said. He said that's the passenger.

DEFENSE COUNSEL: The jury will have the video here, and they've already seen what the reaction of Jesus Cruz was when he was having that photo spread shown to him. So the video kind of speaks for itself as to his certainty, but you had no problem believing that Michael Preston was picked out by him; correct?

DET. VOWELL: Correct.

DEFENSE COUNSEL: You believed that was a valid pick of Michael Preston, don't you?

DET. VOWELL: Yes, because we knew him as –

DEFENSE COUNSEL: That it wasn't suggestive or anything like that, correct?

DET. VOWELL: Correct.

(Tr. 1185-1186.)

{¶ 67} Having reviewed Det. Vowell's testimony in its entirety, we find no error in the admission of the foregoing testimony. From this exchange, it is evident

that defense counsel was attempting to discredit the breadth of Det. Vowell's investigation based on his failure to adequately consider A.B. as a suspect. The line of questioning was not intended to induce a response concerning the veracity of Jesus's identification. Det. Vowell's response to the posed question attempted to explain the factors that caused the investigating detectives to obtain a warrant for Preston's arrest. Det. Vowell did not specifically offer an opinion as to Jesus's truthfulness. Rather, Det. Vowell stated that he believed the identification was "valid" based on the procedure implemented by Det. Echols and warranted further action in light of the corroborating information that was provided to the detectives during the course of their investigation.

{¶ 68} Moreover, even if this court were to interpret Det. Vowell's testimony as being improper, we are unable to conclude that Det. Vowell's response to a direct question posed by defense counsel affected a substantial right of the accused. As discussed, the record contains ample forensic evidence and eyewitness testimony placing Preston in the driver's seat of the vehicle that ran over the body of Lesley as she laid unconscious on the ground. And, beyond Det. Vowell's brief reference to the validity of the photo array procedure, the jury was presented with extensive evidence from which it could properly assess the reliability of Jesus's identification. Ultimately, the jury found Jesus's identification to be credible despite Preston's challenges to Det. Echols's compliance with the procedural requirements of R.C. 2933.83. We find Det. Vowell's response during his cross-examination was harmless error and did not change the outcome of the case. *See State v. Allen*, 8th

Dist. Cuyahoga No. 92482, 2010-Ohio-9, ¶ 51 ("Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal.").

{¶ 69} Preston's fifth assignment of error is overruled.

F. Consecutive Sentences

{¶ 70} In his sixth assignment of error, Preston argues the record does not support the trial court's imposition of consecutive sentences.

{¶ 71} For felony sentences, an "appellate court's standard for review is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2). Instead, R.C. 2953.08(G)(2) provides that appellate courts "may increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing" if the reviewing court "clearly and convincingly" finds that (a) "the record does not support the sentencing court's findings under [R.C. 2929.14(C)(4)]," or that (b) "the sentence is otherwise contrary to law."

{¶ 72} As the Ohio Supreme Court has explained, when reviewing consecutive sentences, "R.C. 2953.08(G)(2)(a) directs the appellate court 'to review the record, including the findings underlying the sentence' and to modify or vacate the sentence 'if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court's findings under'" R.C. 2929.14(C)(4). *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 28, quoting R.C. 2953.08(G)(2)(a).

{¶ 73} A defendant can challenge consecutive sentences on appeal in two ways. First, the defendant can argue that consecutive sentences are contrary to law because the court failed to make the necessary findings required by R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(b); *State v. Nia*, 2014-Ohio-2527, 15 N.E.3d 892, ¶ 16 (8th Dist.). Second, the defendant can argue that the record does not support the court's findings made pursuant to R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(a); *Nia* at ¶ 16.

{¶ 74} "In Ohio, sentences are presumed to run concurrent to one another unless the trial court makes the required findings under R.C. 2929.14(C)(4)." *State v. Gohagan*, 8th Dist. Cuyahoga No. 107948, 2019-Ohio-4070, ¶ 28. Trial courts must therefore engage in the three-tier analysis of R.C. 2929.14(C)(4) before imposing consecutive sentences. *Id.* First, the trial court must find that "consecutive service is necessary to protect the public from future crime or to punish the offender." Second, the trial court must find that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* Third, the trial court must find that at least one of the following applies:

> (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.

Id.

{¶ 75} The failure to make the above findings renders the imposition of consecutive sentences contrary to law. *Gohagan* at ¶ 29. R.C. 2929.14(C)(4) directs that for each step of this analysis, the trial court must "find" the relevant sentencing factors before imposing consecutive sentences. R.C. 2929.14(C)(4). Trial courts, however, do not need to recite the statutory language word for word. *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 29. "[A]s 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." *Id.* A trial court "has no obligation to state reasons to support its findings," but the necessary findings "must be found in the record" and "incorporated into the sentencing entry." *Id.* at ¶ 37.

{¶ 76} In this case, the trial court made the following findings when imposing consecutive sentences:

> I am ordering that the sentences be served consecutively, and that is pursuant to Revised Code Section 2929.14(C)(4) because I find that the consecutive sentences of this sentence is necessary to protect the public from future crime and to punish the offender, and that consecutive sentences are not disproportionate to the seriousness of your conduct and to the danger that you pose to the public.

> I also find that at least two of the offenses were committed as part of one or more courses of conduct, and that the harm caused by two or more of the multiple offenses were 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 your conduct.
>
> I also find that your history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by you.

(Tr. 1606-1607.)

{¶ 77} Based on the foregoing statements, we find the trial court made the necessary findings for imposing consecutive sentences pursuant to R.C. 2929.14(C)(4). Moreover, we cannot clearly and convincingly conclude that the record does not support the trial court's R.C. 2929.14(C)(4) findings. As stated by the court, Preston had ample opportunity to abandon the theft of the vehicle, yet he "expressed a sense of entitlement over the vehicle" and chose to engage in conduct that resulted in the needless death of Lesley and serious physical injuries to Jesus. (Tr. 1605.) Tragically, the crime occurred in the presence of Lesley's children, causing unmeasurable psychological and emotional harm. In addition, the record reflects that Preston had a history of vehicular thefts and, on at least one occasion, fled from the police during the commission of his crime. Preston had previously served a four-year prison term and had only been out of prison for approximately six months at the time these crimes were committed. (Tr. 1605.)

{¶ 78} Because the trial court made the requisite findings during the sentencing hearing under R.C. 2929.14(C)(4), incorporated the findings into its

sentencing journal entry, and the findings are clearly and convincingly supported by the record, the trial court did not err in imposing consecutive sentences.

{¶ 79} Finally, Preston also appears to argue that the trial court's imposition of consecutive sentences was contrary to "the felony sentencing guidelines," R.C. 2929.11 and 2929.12. Preston states that "the sentence is more than the minimum sanction that would be required to accomplish the purposes of R.C. 2929.11" and "the factors of R.C. 2929.12 do not support the imposition of an eight-year sentence to be served consecutively to a sentence of 15 years to life in prison."

{¶ 80} Pursuant to R.C. 2929.11(A), the three overriding purposes of felony sentencing are "to protect the public from future crime by the offender and others," "to punish the offender," and "to promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden of state or local government resources." Additionally, the sentence imposed shall be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B).

{¶ 81} Furthermore, in imposing a felony sentence, "the court shall consider the factors set forth in [R.C. 2929.12(B) and (C)] relating to the seriousness of the conduct [and] the factors provided in [R.C. 2929.12(D) and (E)] relating to the likelihood of the offender's recidivism * * *." R.C. 2929.12.

{¶ 82} A sentence is contrary to law if the sentence falls outside the statutory range for the particular degree of offense or the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11, and the seriousness and recidivism factors set forth in R.C. 2929.12. *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13. Unlike R.C. 2929.14(C)(4), governing consecutive sentences, R.C. 2929.11 and 2929.12 are not fact-finding statutes. *State v. Wenmoth*, 8th Dist. Cuyahoga No. 103520, 2016-Ohio-5135, ¶ 16.

{¶ 83} Although the trial court must consider the principles and purposes of sentencing, as well as any mitigating factors, the court is not required to use particular language nor make specific findings on the record regarding its consideration of those factors. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31; *State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13. In fact, unless the defendant affirmatively shows otherwise, it is presumed that the trial court considered the relevant sentencing factors under R.C. 2929.11 and 2929.12. *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234, ¶ 11. This court has held that a trial court's statement in its sentencing journal entry that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under R.C. 2929.11 and 2929.12. *State v. Paulino*, 8th Dist. Cuyahoga No. 104198, 2017-Ohio-15, ¶ 37.

{¶ 84} On appeal, Preston does not dispute that his sentences were within the permissible statutory ranges for his felony offenses and that the trial court

expressly stated that it considered R.C. 2929.11 and 2929.12 in crafting his sentence. (Tr. 1602-1603.) In this regard, Preston's individual sentences are not contrary to law. To the extent Preston argues the imposition of consecutive sentences does not comport with the purposes and principles of felony sentencing, we note that the Ohio Supreme Court held that R.C. 2929.11 and 2929.12 apply only to individual sentences; while R.C. 2953.08(G)(2)(a) and 2929.14(C) set forth the exclusive means of appellate review of consecutive sentences. *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169, ¶ 16-17. As previously discussed, the trial court complied with the requirements of R.C. 2929.14(C)(4) and made consecutive-sentence findings that are not clearly and convincingly unsupported by the record. In addition, while Preston disputes the discretion exercised by the trial court in this case, we reiterate that "a sentence is not contrary to law merely because [a defendant] disagrees with the way in which the trial court weighed the R.C. 2929.11 and 2929.12 factors and applied these factors in crafting an appropriate sentence." *State v. Solomon*, 8th Dist. Cuyahoga No. 109535, 2021-Ohio-940, ¶ 115, citing *State v. Nelson*, 8th Dist. Cuyahoga No. 106858, 2019-Ohio-530, ¶ 25, citing *State v. Mock*, 8th Dist. Cuyahoga No. 105060, 2017-Ohio-8866, ¶ 21.

{¶ 85} Preston's sixth assignment of error is overruled.

{¶ 86} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

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

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR