[Cite as *State v. Gibson*, 2023-Ohio-2481.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 111440
v.	:	
KODII GIBSON,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 20, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-642539-B

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Katherine E. Mullin, Assistant Prosecuting Attorney, *for appellee*.

Joseph V. Pagano and Kevin Cafferkey, *for appellant*.

MARY J. BOYLE, J.:

{¶ 1} This appeal arises from the deaths of Paul B. and his daughter, P.B., who were kidnapped from their home with their bodies eventually discovered in a burning vehicle. Following a jury trial, defendant-appellant, Kodii Gibson ("Gibson"), was convicted of one count each of aggravated burglary and having a

weapon while under disability, and two counts each of aggravated murder, kidnapping, aggravated arson, murder, and felonious assault.[1] Gibson asks us to review the trial court's rulings on his motion to suppress, *Batson* challenge, motions for mistrial, the admissibility of evidence, jury instructions, and Crim.R. 29 motion for acquittal. Gibson also challenges his life sentence in prison and contends that he was deprived of the effective assistance of counsel. For the reasons set forth below, we affirm.

I. Facts and Procedural History

{¶ 2} In October 2018, East Cleveland Police discovered the remains of Paul B. and P.B. (d.o.b. 01/19/04) in Paul B.'s rental vehicle, which was set on fire. Gibson and codefendant, Ronald Newberry ("Newberry"), were initially charged in November 2018 in *State v. Gibson*, Cuyahoga C.P. No. CR-18-634623, which was dismissed without prejudice in January 2019, at the request of plaintiff-appellee, the state of Ohio. In December 2018, Gibson, along with Newberry, Quentin Palmer, and Demarcus Sheeley ("Sheeley"), were then charged in a 15-count indictment. *State v. Gibson*, Cuyahoga C.P. No. CR-18-634754. In August 2019, this case was dismissed without prejudice at the request of plaintiff-appellee, the state of Ohio.

{¶ 3} Gibson, Newberry, and Sheeley were ultimately reindicted in July 2019, regarding the matter before us, in a 15-count indictment carrying the death penalty.[2]

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[1] This appeal is a companion appeal to codefendant, Ronald Newberry, in *State v. Newberry*, 8th Dist. Cuyahoga No. 111431.

[2] We note that Sheeley entered into a guilty plea with the state in March 2022, and has not filed an appeal to date.

Counts 1-4 charged each of them with aggravated murder. Counts 5-6 charged them with kidnapping. Count 7 charged them with aggravated burglary. Counts 8-9 charged them with aggravated arson. Counts 10 and 12 charged them with murder. Counts 11 and 13 charged them with felonious assault. Count 14 charged Gibson with having a weapon while under disability ("HWWUD"). Count 15 charged Newberry with HWWUD.

{¶ 4} Each of Counts 1-3, 5-6, 7, and 10-11 contained a one- and three-year firearm specification. Each of Counts 1-4 contained a course of conduct specification alleging that the aggravated murders were part of a course of conduct involving the purposeful killing of two or more persons. Each of Counts 1-4 contained felony murder specifications, alleging that the aggravated murders were committed while the codefendants were committing or fleeing immediately after committing aggravated burglary, kidnapping, and aggravated arson. Count 13 contained an accelerant specification alleging that the offender used an accelerant in committing the offense.

{¶ 5} Trial was initially set for January 2020, but was continued several times due to ongoing discovery and the pandemic. On November 18, 2020, Gibson filed a motion to suppress. In his motion, Gibson alleged that on November 10, 2018, the day he was arrested, his attorney visited him at the East Cleveland Police Department. His attorney at that time advised the police that Gibson would not be making a statement. Two days later, East Cleveland police detectives reported Patrolman Michael Woodside ("Ptl. Woodside") gave them a Form-M, which is an

interdepartmental memo. The Form-M indicated that Gibson wanted to speak with the police. Gibson was then re-mirandized and interrogated by East Cleveland Police Detective Commander Joseph Marche ("Det. Marche") and Detective Kenneth Lundy ("Det. Lundy"). This interaction and the interrogation was recorded on video tape.

{¶ 6} Gibson alleged that his statement to police should be suppressed because the police reinitiated a custodial interrogation after his attorney advised that he would not be making a statement and his statement to the police was involuntary. The state opposed, arguing that Gibson voluntarily initiated contact with the detectives and waived his *Miranda* rights.

{¶ 7} The matter was set for a hearing that was continued until September 9, 2021. On September 8, 2021, Gibson entered into a plea agreement with the state to a 30-year prison sentence for pleading guilty to amended counts of involuntary manslaughter with a three-year firearm specification (Counts 1 and 2) and felonious assault (Count 11 and 13). The one-year firearm specification, course of conduct specification, and felony murder specifications on Counts 1 and 2 were deleted. The one- and three-year firearm specification on Count 11 and the accelerant specification on Count 13 were also deleted. In exchange, Counts 3, 4, 5, 6, 7, 8, 9, 10, 12, and 14 were nolled, and Gibson agreed to testify against his codefendants.

{¶ 8} On October 18, 2021, the state filed an unopposed motion to withdraw the plea and advance to trial because Gibson refused to testify. The trial court granted the motion on October 20, 2021, and set the matter for trial on November

12, 2021. On November 9, 2021, the court held a hearing on Gibson's motion to suppress. Gibson's attorney at the time of the arrest testified that he was retained by Gibson's mother to represent Gibson. The first time he met Gibson was at the East Cleveland jail on November 10, 2018, which was the date of Gibson's arrest. He spoke with officers there and advised that Gibson would not be making a statement. He then spoke with Gibson and advised him to not make a statement. This interaction was captured on video and played for the court during the suppression hearing.

{¶ 9} On November 12, 2018, East Cleveland Ptl. Woodside completed a Form-M, which was addressed to Det. Lundy, Ptl. Woodside, and stated that on November 12, 2018, at approximately 1450 hours, Gibson requested to speak with detectives while he was doing a jail check. As a result, Gibson was brought to the detective bureau to speak with Det. Lundy and Det. Marche. Gibson's statement was also played for the court.

{¶ 10} In the video, Gibson can be observed telling Det. Lundy and Det. Marche that he did advise Ptl. Woodside that he wanted to speak with them and he was aware that Attorney Grant had previously advised him not to do so, but that he wanted to waive his rights and speak to the detectives without his attorney present. Gibson's *Miranda* rights were then read and Gibson signed a *Miranda* form waiving those rights. During this interview, Gibson never asked for an attorney nor did he ask to stop the interview.

{¶ 11} Gibson advised the detectives that he, Newberry, Sheeley, and a fourth male, were involved in the incident. Newberry told him that he had a "play," which is a robbery. On the evening of October 10, 2018, Gibson, Newberry, Sheeley, and the unidentified male, drove to Paul B.'s house in Bedford, Ohio intending to rob Paul B. The unidentified male was driving them in Newberry's Ford. The first time they drove by the house, they observed someone give P.B. a bag in the driveway. They left Bedford and returned to East Cleveland. When they returned to Paul B.'s house for a second time, they observed a car in the driveway. They parked the car further down the street. Eventually, Gibson, Newberry, and Sheeley exited the Ford and approached the house, while the driver remained in the vehicle. At that time, a Buick was the only vehicle in the driveway.

{¶ 12} Gibson stated that once inside, they ordered Paul B. and P.B. out of their respective bedrooms. Newberry and Sheeley had guns and were ordering Paul B. by gunpoint. They were looking for money or drugs. Paul B. told them that he did not have anything. Gibson believed Paul B. and told Newberry that there was nothing at the house and they should leave it alone. The three of them did not find any money at the house, but left with a duffle bag containing a PlayStation 4, a Gucci watch, and a Ferragamo belt.

{¶ 13} Paul B. told them that he had money at another house. They ordered Paul B. and P.B. out of the house. Paul B. was tied up and his face was covered with a t-shirt. He was placed in the backseat of the Buick, which was driven by Newberry. P.B. was placed in the backseat of Newberry's car, which was driven by the fourth

male. P.B. was not tied up. Gibson rode in Newberry's Ford. They never drove to the other house that Paul B. mentioned, instead they drove to a house on Wadena Street in East Cleveland.

{¶ 14} At Wadena, there was a discussion about killing Paul B. and P.B. Gibson stated that he did not want to kill anyone. Gibson called Quiana Gilbert ("Gilbert"), who was his girlfriend at the time, and instructed her to bring him a gas can. She brought him the gas can with her friend. At some point, he walked to the store with Sheeley while the unidentified male stayed in the vehicle with P.B.

{¶ 15} Eventually they end up at a field near Savannah Avenue in East Cleveland where the plan was to set the car on fire. Prior to arriving at the field, they took P.B. out of Newberry's vehicle and placed her in the Buick with her father, Paul B. Gibson stated that Paul B. and P.B. were both shot prior to arriving to the field. Once at the field, Newberry and Sheeley set the car on fire. Gibson and the unidentified male were waiting in Newberry's car, which was parked down the street from the field. When Newberry and Sheeley returned, the four of them went to Sheeley's house.

{¶ 16} Gibson was then interviewed again on November 13, 2018. He again completed a *Miranda* waiver form. This interview was also video recorded. Det. Marche described this interview as "a Q and A," which is a follow up to the initial interview. (Tr. 99.) During the "Q and A," the officers "have the defendant tell [them] again what happened and then ask [the defendant] specific questions about

certain events that may have took place." (Tr. 99.) A portion of this video was also played for the court.

{¶ 17} During this interview, Det. Lundy can be observed asking Gibson personal information and typing the responses on a laptop. At approximately 12 minutes and 45 seconds into this interview, Gibson asked if he could have his attorney there. Det. Lundy advised Gibson that he could if he wanted one, but he could not type up the interview. Gibson continued to participate in the interview and answer Det. Lundy's questions regarding the events surrounding the incident.

{¶ 18} Both Det. Marche and Det. Lundy testified that after the November 10, 2018 meeting with Attorney Grant, they did not speak with Gibson until they received the Form-M on November 12, 2018.

{¶ 19} East Cleveland Police Sergeant Larry McDonald, Jr. ("Sgt. McDonald") testified that he was working at the jail on November 12, 2018. At that time that he was working, he would tell the inmates, all at once, that they need to speak to the detectives to get processed to go to court. He testified that his advisement was procedural matter and "has nothing to do with the *Miranda* rights." (Tr. 205.)

{¶ 20} Prior to arguments, the trial court addressed the outstanding request for a trial continuance. The court went through the history of the case, including the reindictment. Trial was reset five times from July 2019 through September 2021. Gibson then pled guilty prior to the September trial date. The plea was withdrawn and the matter was then set for trial on November 12, 2021. Since the plea was

withdrawn, several motions for continuance were filed. In denying the motion, the court recognized that this is a death penalty case and the aftermath of the pandemic. The court looked at the totality of the circumstances, including: the fact that Gibson has been in county jail for 1,090 days; "that memories fade over time; that no case, even a death penalty case, can be fully prepared; the victim's family has a right to closure in this case; and the Court does not feel that continuing this case into January, that somehow over Thanksgiving and Christmas, that the parties will suddenly be prepared." (Tr. 249-250.)

{¶ 21} Defense counsel objected to the court's ruling, advising the court that the defense was not prepared to go forward with trial due to ongoing discovery issues. The parties then presented their respective closing arguments to the court and the suppression hearing concluded on November 10, 2021. Following the conclusion of the hearing, the court took a break and the matter reconvened in the afternoon, at which the court addressed various motions. One of the motions the court addressed was Gibson's motion to seal the docket during the pendency of the trial through the full mitigation phase. The trial court denied the motion at that time based on the Ohio Rules of Superintendence. The trial court granted Gibson's motion for a copy of the prosecutor's file to be placed under seal at the conclusion of the case and, also, granted the state's motion for Gibson's file to be copied and preserved for appellate review.

{¶ 22} The court reconvened on November 12, 2021. At that time, 173 prospective jurors were brought in to fill out questionnaires about their views on the

death penalty. The court noted that it reversed a ruling regarding the online access to the docket. The court stated, "As of right now, I did check the docket. Right now it is showing up as expunged, so actually no one is going to have access to the docket right now." (Tr. 393-394.) The court also reversed its ruling regarding Gibson's file. (Tr. 467.) At that point in time, defense counsel indicated to the court that an attorney from defense counsel's office filed a notice of appeal that morning (November 12, 2021), regarding the court's ruling to turn over the Gibson's file as well as the denial of Gibson's trial continuance in *State v. Gibson*, 8th Dist. Cuyahoga No. 111002. Defense counsel then indicated that, based on the court's ruling, the defense would withdraw the notice of appeal. The state expressed concern that the appeal divested the trial court of jurisdiction. The trial court then had a recess.

{¶ 23} Upon reconvening, defense counsel stated to the court that the appeal was filed sometime around 12:30 p.m. and has been withdrawn. Defense counsel stated that the time that was lost was "maybe between 12:30 and maybe 3:45." (Tr. 477.) The court granted the state's request for time to look into the jurisdictional issue. The trial court then addressed Gibson's motion to suppress. The court granted the motion to suppress, in part, excluding the portion of the November 13, 2018 interview after the point that Gibson asked if he could have an attorney and excluded the written portion of the interview from that day. The court denied the motion to suppress with regard to Gibson's November 12, 2018 statement to the police, finding that it was admissible.

{¶ 24} The matter reconvened on November 15, 2021 regarding the jurisdictional issue. The court noted on the record that "defense counsel did not inform this Court until late afternoon on Friday [November 12, 2021] that they did file this notice of appeal. It was only after arguments were made." (Tr. 483.) Defense counsel apologized for the improvident filing of the notice of appeal and stated, "[he] will do everything that [he] can to ameliorate it, stipulate and recreate the record in any fashion." (Tr. 486.) Defense counsel indicated that the appeal had not yet been dismissed because they were waiting on an order from this court granting the dismissal. The state asked the court to wait until we ruled on the dismissal before proceeding with the jury questioning. The court then took a recess and when the matter resumed, the court noted that the dismissal was granted.

{¶ 25} Out of an abundance of caution, the state moved for a mistrial because of the previously unknown appeal. The state indicated:

> In speaking with defense counsel more today, we may be able to establish that the notice of appeal was not, in fact, filed in the morning. It was filed closer to noon, like noon or 12:30, but that unfortunately doesn't continue to alleviate the entire concern, because the jurors were still filling out their questionnaire.
>
> There were court personnel, including at least for a period of time, Your Honor, who was downstairs and dealing with issues that popped up with the jurors filling out their questionnaires. Then, of course, there was the motion practice that happened later, closer to 3:00 or 3:30 on Friday.
>
> Again, after doing research including applicable case law as recently from the Eighth District as [of] 2018, where a similar circumstance happened and the Court of Appeals found that a new trial should be held, because of the jurisdictional issue, the State believes at this time the best course of action is to grant essentially a mistrial and start again

> with a new panel — with a new jury panel who is properly sworn and filled out their questionnaires when there is no question of jurisdiction.
>
> It is irrelevant that defense counsel is willing to waive this issue. It is not a waiveable issue. Jurisdiction is not a waiveable issue.
>
> * * *
>
> I would note for this Court that we * * * still not have been served with a copy of the notice of appeal. We only found out about it around 3:45 p.m. on Friday. Had * * * the State been made aware of this issue or the Court been made aware of this issue earlier on Friday when there was ample opportunity to do so, we certainly would have raised this issue then, but we were precluded from doing so.
>
> So unfortunately, Your Honor, that's the State's motion at this time. Jeopardy obviously has not attached yet in this case, so there is * * * no concerns with double jeopardy.

(Tr. 494-96.)

{¶ 26} Gibson joined the state's request, stating:

> At this point in time, we would join the State in this request. It was never our intention, and I know that that may be hard for some to believe, but it was never our intention to do this, to blow this up or create this level of kind of drama, if you will, Judge, but I will say that we will join in their motion.

(Tr. 497.)

{¶ 27} The trial court denied the mistrial motion and stated that the record for the events that occurred while the appeal was pending would be recreated. The court advised:

> At this point in time the Court does have jurisdiction.
>
> So what I am going to do is [each juror] filled out their questionnaire. When they come in for their Witherspooning, I'm going to have them swear and take the oath again and then swear that their statements are true and accurate as to each question.

> Then at a later point in time we are going to go over all of the motions on the record and essentially recreate the record. At this time we are going to proceed with Witherspooning, because we do have jurors waiting in the jury room.
>
> I'll note your objections for the record.

(Tr. 498.)[3]

{¶ 28} The court then proceeded with the jury voir dire process and, upon completion, the matter proceeded to trial on November 30, 2021. The following relevant evidence was adduced at trial.[4]

{¶ 29} East Cleveland Police Officer John Hartman ("Officer Hartman") testified that on the morning of October 10, 2018, East Cleveland police and firefighters responded to a call for a burning car at a vacant lot on Savannah Avenue. Upon arrival, Officer Hartman observed a silver Buick fully engulfed in flames. Once the fire was extinguished, firefighters located two bodies in the back seat of the car. Both bodies were badly burned and both appeared to have their hands and feet bound. Officer Hartman described it as "some like black charred fabric-looking stuff wrapped around their wrists and around both of their ankles." (Tr. 3366-3367.) He also noticed a "red-in-color liquid that was running down the side and back of the car" and recalled "the smell of burning flesh" as he approached the car. (Tr. 3371.)

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[3] We note that the "procedure in capital cases by which prospective jurors are asked if they will follow a court's instructions regarding the death penalty" is commonly referred to as "Witherspooning" a jury. *State v. Lee*, 4th Dist. Washington No. 85 CA 34, 1987 Ohio App. LEXIS 6440, 24 (Apr. 15, 1987), citing *Witherspoon v. Illinois*, 391 U.S. 510, 512, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[4] Count 14 (HWWUD) was tried before the bench.

The victims were ultimately identified as Paul B., who was 39 years old at the time, and his 14-year-old daughter, P.B.

{¶ 30} Investigators found shell casings and bullet fragments in the rear seating area of the vehicle. Investigators determined that the cartridge casings were all fired from the same Glock 9 mm pistol. The fire investigator determined that the origin of the fire was the interior passenger compartment and that it was an "arson fire." (Tr. 3708.) This was determined due to the "use of ignitable liquid * * * as an accelerant" in the fire. (Tr. 3708.) The fire investigator testified that nine pieces of evidence were submitted to the lab to be tested for ignitable liquid. The evidence consisted of soil debris from the ground outside the driver's door, clothing from the victims, and different portions of the vehicle. All the items revealed the presence of gasoline except for the soil debris.

{¶ 31} Det. Lundy testified that he responded to the scene on Savannah Avenue.[5] A license plate check on the silver Buick revealed that the car was rented to Paul B. at 68 Gould Avenue in Bedford. Bedford Police's welfare check at the home revealed that the back door was opened and that "there was a strong odor of some sort of accelerant coming from the home." (Tr. 4330.) Investigators observed gasoline on the floor with a "red drops in it." (Tr. 3740.) Initially, they thought it was blood, but it was later determined that the liquid was a mixture of gasoline, medium-to-heavy-petroleum distillate, and petroleum-based oil. (Tr. 3793.) State

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[5] At the time of trial, Det. Lundy testified that he is a captain with the East Cleveland Police Department. (Tr. 4323.)

of Ohio Fire Marshal, Joseph Stevens, determined that an ignitable liquid was poured throughout the home, making it an "incendiary/intentional" cause. (Tr. 3751.) Investigators also observed bloodstains in other portions of the home. (Tr. 3551-3552.)

{¶ 32} Investigators found a portion of a latex glove on the living room floor of Paul B.'s home. (Tr. 3551-3552.) The DNA on this glove was a match with Gibson and Newberry. Gibson was identified as the major DNA contributor and Newberry was ultimately identified as a minor contributor. The Cuyahoga County Forensic Science Lab had Cybergenetics DNA complete further testing to conclusively confirm Newberry's DNA on the glove.

{¶ 33} East Cleveland Police collected video surveillance from a house on Savannah Avenue. The video from the house on Savannah captured a dark colored Ford Edge behind P.B.'s Buick. The investigation into this vehicle revealed that it was a 2010 Ford Edge that was purchased by Newberry's mother and returned by Newberry about a month later, in October 2018. Prior to accepting the return of the Ford, the dealership required Newberry to "detail" the vehicle and remove window tint. Investigators were unable to process the vehicle for gunshot residue because it had been detailed at least two times after the incident.

{¶ 34} Det. Lundy testified that an arrest warrant was issued for Gibson following his DNA match and Gibson was taken into custody on November 10, 2018. He was with Gilbert at the time. Gilbert testified that the day before the incident, Gibson drove her to work in her car. Newberry and Sheeley were also in the car.

Gibson was supposed to pick Gilbert up from work at 11:00 p.m., but sent her a text message around 7:00 p.m. to find another way home. Gilbert also had to work on the morning of October 10th.

{¶ 35} At approximately 8:00 a.m. on October 10, Gibson contacted Gilbert, asking her to bring him a gas can because her car ran out of gas. Gibson instructed her to bring the gas can to an abandoned house on Wadena, which is the same street where Gibson's grandmother lives. Gilbert testified this house was "like two houses down" from Gibson's grandmother. (Tr. 4249.) Gilbert's friend drove her there, and when they pulled into the driveway, Gilbert observed Gibson standing in front of the house by the porch stairs. Gilbert also observed Newberry's SUV parked further back in the driveway. Gibson approached Gilbert in the front passenger seat. She gave him the empty gas can, and he gave her the keys to her car. Gibson texted her the address to Sheeley's house, which was where her car was located, so she could pick up her car. At some point between the evening of October 9 and the morning of October 10, Gibson told Gilbert that "he was hitting a lick," which Gilbert testified could mean "selling drugs," "breaking into someone's home," or "robbing someone." (Tr. 4255, 4310.)

{¶ 36} Gilbert further testified that she was with Gibson the next day and observed him with a Jack's Casino bag, which contained a game system. She also observed Gibson wearing an expensive belt. A couple of days later, Gilbert went with Gibson to a repair shop on Mayfield Road to repair the PlayStation. East Cleveland Police searched Gilbert's home on the date of Gibson's arrest. Police located a

Ferragamo belt on a pair of jeans. Police also found a photograph posted on Gibson's Instagram account on November 6, 2018, where he was wearing jeans with the Ferragamo belt. The police also recovered the PlayStation from the repair shop where the person who brought it for service used the name Kodii Ray.

{¶ 37} East Cleveland Police also collected video surveillance from a gas station on Euclid Avenue in East Cleveland. The video revealed that Newberry, Gibson, and Sheeley each visited the gas station on October 10, 2018. At one point, Sheeley and Gibson were observed walking to the gas station from Wadena and were standing in line to pay, with a gas can in Gibson's hand. Gilbert testified that the video depicts Gibson with the gas can she gave him, walking towards Wadena with Sheeley.

{¶ 38} Jennifer Heard ("Heard") testified that she has three children with Paul B. and was living with him at Gould Avenue in October 2018. P.B. also lived at Gould Avenue at that time. Heard testified that Paul B. had a criminal history and served prison time for selling drugs. Heard also testified that Paul B. frequently gambled. She testified that in June 2018, Paul B. called her and asked her to meet him at a hotel in Richfield, Ohio. Upon her arrival at the hotel, Paul B. put a duffle bag in the trunk of her vehicle. On her way back home, the Ohio State Highway Patrol pulled her over for speeding. The troopers put her in the back of their car because they smelled marijuana. The troopers recovered the duffle bag, which contained over $300,000, from Heard's trunk. She thought Paul B. won the money at the casino.

{¶ 39} Heard testified that she slept over Paul B.'s sister's home on the night of the incident. On the evening of the next day, she was allowed in the house. Heard described it as ransacked and smelled of gasoline. Heard discovered that both PlayStation game systems and controllers were missing, and a Ferragamo belt, a pair of designer shoes, a diamond earring, a Louis Vuitton hat, and a basketball duffle bag were also missing.

{¶ 40} Paul B.'s brother, Jonathan Colvin ("Colvin"), testified that around 1:00 a.m. on October 10, 2018, Paul B. texted him asking to borrow money. Colvin drove to Paul B.'s house. Paul B. met him outside when Colvin pulled in the driveway. Colvin was parked behind Paul B.'s car. Colvin exited his car and got into the passenger's seat of Paul B.'s car, where they discussed Paul's gambling and how Paul B. was low on money. They were in Paul B.'s car for about an hour. At one point, Colvin observed a Ford Edge drive by that applied its brake lights around "2:00 or 3:00 in the morning." (Tr. 4442.) When Colvin left the house, he drove the same way the Ford Edge went to see if it went into any of the driveways because the car gave him an odd feeling.

{¶ 41} Following the conclusion of a nine-day trial, the jury found Gibson guilty of aggravated murder with course of conduct specifications (Counts 3 and 4), kidnapping (Counts 5 and 6), aggravated burglary (Count 7), aggravated arson (Counts 8 and 9), murder (Counts 10 and 12), and felonious assault (Count 11 and 13). The jury also found in Count 13 that Gibson was guilty of the specification that

he used an accelerant during the offense. The jury found him not guilty of the remaining counts and specifications.

{¶ 42} The mitigation phase began in February 2022. The jury recommended a sentence of life in prison with the possibility of parole after 30 years for both Counts 3 and 4, finding that the aggravating circumstances do not outweigh the mitigating factors beyond a reasonable doubt. In March 2022, the court held the sentencing hearing. At the hearing, the court denied Gibson's motion to suppress and strike an exhibit to the sentencing memorandum and his motion to declare R.C. 2929.03 unconstitutional, which were both filed the day before the sentencing hearing. The court found Gibson guilty of HWWUD (Count 14) and imposed the following sentence:

> The court imposes a prison sentence at the Lorain Correctional Institution of life.
>
> State of Ohio and defense agree that Count 9, Count 10, and Count 11 merge into Count 3.
>
> State elects [Gibson] to be sentenced on Count 3.
>
> Both parties agree that Count 8, Count 12 and Count 13 merge into Count 4, and state elects [Gibson] to be sentenced on Count 4.
>
> [Gibson] is sentenced in Count 3 to life in prison with the possibility of parole after 30 full years[.]
>
> In Count 4, [Gibson] is sentenced to life in prison with the possibility of parole after 30 full years.
>
> [Gibson] is sentenced to 10 years on Count 5, 10 years on Count 6, 10 years on Count 7, and 2 years on Count 14.
>
> Counts 3, 4, 7 and 14 are to run concurrent to each other, but consecutive to Count 5 and consecutive to Count 6, for a total term of

> incarceration of life in prison with the possibility of parole after 50 full years.
>
> The court imposes prison terms consecutively finding that consecutive service of the prison term is necessary to protect the public from future crime or to punish [Gibson]; that the consecutive sentences are not disproportionate to the seriousness of [Gibson]'s conduct and to the danger [Gibson] poses to the public; and that, at least two of the multiple offenses were committed in this case as part of one or more courses of conduct, and the harm caused by said multiple offenses 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 [Gibson]'s conduct.
>
> [Gibson] to receive jail time credit for 1228 day(s), to date.
>
> [Gibson] declared indigent.
>
> Costs waived[.]

(Judgment Entry, Mar. 24, 2022.)

{¶ 43} It is from this order that Gibson now appeals, raising the following 12 assignments of error for review, which shall be discussed together where appropriate:

> **Assignment of Error I:** The trial court erred by overruling [Gibson]'s motion to suppress statements made by [Gibson] after he was taken into custody and after he invoked his rights to counsel and to remain silent where the statements were used as evidence against [Gibson] at his trial in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under the Constitution of Ohio, Article I, Section 10.
>
> **Assignment of Error II:** The trial court erred in allowing the state to use a preemptory challenge in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and by denying the defense motion to dismiss an impaneled juror who disclosed mid-trial that he had violated the court's order and conducted an internet search in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

Assignment of Error III: The court erred by denying the joint request for mistrial where the court had continued proceedings without jurisdiction after an appeal had been filed.

Assignment of Error IV: The trial court erred by denying the motions for mistrial due to discovery violations or to continue the trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

Assignment of Error V: The trial court erred by admitting video and photo evidence over defense objection and limiting the testimony of [Gilbert] which contrary to Evid.R. 401, 402, 403, 803 and 901, and in violation of [Gibson]'s state and federal constitutional rights to due process and a fair trial.

Assignment of Error VI: The court erred by including jury instructions over defense objection on natural consequences language on causation, including consciousness of guilt for concealing crime language, and by denying a jury instruction on unanimity requested by the defense.

Assignment of Error VII: The court erred by denying [Gibson]'s motion to declare R.C. 2929.03 unconstitutional.

Assignment of Error VIII: The sentence recommended by the jury and imposed by the trial court were not proportional and failure to conduct a proportionality analysis when imposing a criminal sentence violates the Eighth and Fourteenth Amendments to the United States Constitution.

Assignment of Error IX: The trial court erred when it denied [Gibson]'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.

Assignment of Error X: [Gibson]'s convictions are against the manifest weight of the evidence.

Assignment of Error XI: [Gibson]'s sentence is contrary to law because consecutive sentences are not supported by the record.

Assignment of Error XII: [Gibson] was deprived of his constitutional rights to due process, a fair trial, and the effective

assistance of counsel where Agent Kunkle was allowed to offer opinion testimony without objection.

II. Law and Analysis

A. Motion to Suppress

{¶ 44} In the first assignment of error, Gibson argues that the trial court should have suppressed his confession to the police because he invoked his constitutional rights. Alternatively, Gibson argues that even he did initiate the conversation with the police, he did not knowingly, intelligently, and voluntarily waive his rights to counsel and to remain silent.

{¶ 45} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). On appeal, we "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). Accepting these facts as true, we must then "independently determine as a matter of law, without deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard." *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶ 46} The Fifth Amendment to the Constitution of the United States 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. In interpreting the Fifth Amendment, the United States Supreme Court has found that criminal suspects in the custody of the police have certain rights during an interrogation. *Miranda v. Arizona*, 384 U.S. 436, 478-479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). These rights include the right to remain silent and the right to have counsel present during the interrogation. *Id.* at 467-468.

{¶ 47} Once an accused invokes their right to counsel, "all further custodial interrogation must cease and may not be resumed in the absence of counsel unless the accused thereafter effects a valid waiver or himself renews communication with the police." *State v. Knuckles*, 65 Ohio St.3d 494, 605 N.E.2d 54 (1992), paragraph one of the syllabus, following *State v. Williams*, 6 Ohio St.3d 281, 452 N.E.2d 1323 (1983), paragraph four of the syllabus. As the Ohio Supreme Court in *Knuckles* stated:

> "This 'rigid' prophylactic rule [set forth in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)] * * * embodies two distinct inquires. First, courts must determine whether the accused actually invoked his right to counsel. * * * Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on the finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." (Citations omitted.) *Smith v. Illinois* (1984), 469 U.S. 91, 95, 105 S.Ct. 490, 492-493, 83 L.Ed.2d 488, 493-494.

Id. at 496.

{¶ 48} In the instant case, Gibson was arrested on November 10, 2018, and was transported to the East Cleveland Police Department. Attorney David Grant visited Gibson in jail. He spoke with officers and advised them that Gibson would

not be making a statement. He also spoke with Gibson and advised him to not make a statement. On November 12, 2018, Ptl. Woodside completed a Form-M, which stated that on November 12, 2018, at approximately 1450 hours, Gibson requested to speak with detectives while he was doing a jail check. Gibson was then brought to the detective bureau to speak with Det. Lundy and Det. Marche. Gibson's statement was recorded.

{¶ 49} In the video, Gibson told Det. Lundy and Det. Marche that he did advise Ptl. Woodside that he wanted to speak with them and he was aware that Attorney Grant had previously advised him not to do so, but that he wanted to waive his rights and speak to the detectives without his attorney present. Gibson's *Miranda* rights were then read and Gibson signed a *Miranda* form waiving those rights. Gibson confessed to the police and described his participation, including the events in Bedford and East Cleveland. During this interview, Gibson never asked for an attorney nor did he ask to stop the interview.[6]

{¶ 50} A review of the record in the instant case reflects that Gibson initiated further conversation with the police. In the video, he stated that he wanted to do the right thing and no one was supposed to die. Based on the foregoing, we find that while Gibson initially invoked his right to counsel, he later initiated discussions with

[6] Our discussion focuses on the November 12, 2018 interview where Gibson confessed because the trial granted Gibson's motion to suppress with respect to the November 13, 2018 interview, excluding the portions after the point that Gibson asked if he could have an attorney and excluded the written portion of the interview from that day.

the police where he waived his right to counsel and spoke with the detectives, who recorded his statement.

{¶ 51} Having found that Gibson initiated further discussions with the police, we must now consider whether Gibson voluntarily made his statements. In order to determine if Gibson voluntarily spoke with the police, we must examine the totality of the circumstances of the confession. *State v. Garcia-Rodriguez*, 2022-Ohio-4283, 202 N.E.3d 729, ¶ 51 (8th Dist.); *State v. Hudson*, 2018-Ohio-981, 107 N.E.3d 1, ¶ 23 (4th Dist.), citing *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). Factors include "the age, mentality and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus.

{¶ 52} Under the totality of the circumstances, we find that Gibson's statement was voluntarily given. Gibson was nearly 22 years old at the time of his arrest and had a prior criminal history dating back to 2015, including attempted drug possession, burglary, and domestic violence. After Gibson initiated contact, he told the detectives that he advised Ptl. Woodside that he wanted to speak with them and he was aware that Attorney Grant had previously advised him not to do so, but that he wanted to waive his rights and speak to the detectives without his attorney present. Gibson's *Miranda* rights were then read and Gibson signed a *Miranda* form waiving those rights. During the interview, Gibson never asked for an attorney

nor did he ask to stop the interview. Gibson appeared emotional throughout the interview, crying on separate occasions and stating that he did not want anyone to die and he has a sister of his own.

{¶ 53} Gibson suggests that his waiver was invalid because Det. Marche was one of the detectives who signed the waiver as a witness but that he was not present for a portion of the process. A review of the record, however, reveals that the *Miranda* form in question involves the November 13, 2018 interview, which was suppressed by the trial court.

{¶ 54} After our review of the record, and based upon the totality of the circumstances, we conclude that Gibson voluntarily waived his *Miranda* rights, that his statement on November 12, 2018 was voluntary given, and it was properly deemed admissible into evidence. We find no evidence in the record to suggest that the officers mistreated Gibson or that Gibson was subjected to coercive or abusive tactics. Therefore, we find that the trial court properly denied Gibson's motion to suppress with regard to his November 12, 2018 statement.

{¶ 55} Accordingly, the first assignment of error is overruled.

B. Juror Challenges

{¶ 56} In his second assignment of error, Gibson argues that the trial court erred when it permitted the removal of one prospective juror under a *Batson* challenge and refused to excuse a second juror.

1. *Batson* Challenge

{¶ 57} In *Batson*, the United States Supreme Court recognized that the Equal Protection Clause of the United States Constitution prohibits the use of peremptory challenges in a discriminatory manner to exclude potential jurors solely on account of their race. *Id.*, 476 U.S. at 89, 106 S.Ct. 1712, 90 L.Ed.2d 69; *see also State v. Hernandez*, 63 Ohio St.3d 577, 581, 589 N.E.2d 1310 (1992).

{¶ 58} There are three steps involved when adjudicating a *Batson* claim. As the Ohio Supreme Court in *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, stated:

> First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge. *Batson*, 476 U.S. at 96-98, 106 S.Ct. 1712, 90 L.Ed. 2d 69. However, the "explanation need not rise to the level justifying exercise of a challenge for cause." *Id.* at 97, 106 S.Ct. 1712, 90 L.Ed. 2d 69. Finally, the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination. *Id.* at 98, 106 S.Ct. 1712, 90 L.Ed.2d 69. *See, also, Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed. 2d 834. A trial court's findings of no discriminatory intent will not be reversed on appeal unless clearly erroneous. *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, 589 N.E.2d 1310, following *Hernandez v. New York* (1991), 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed. 2d 395.

Id. at ¶ 106.

{¶ 59} Gibson argues that the state violated his constitutional rights when it used a peremptory challenge to exclude an African-American juror, Juror 8. Defense counsel objected to the exclusion of this juror under *Batson*, and then the state placed the following reasons on the record:

Your Honor, the reason that the state is removing [Juror 8] is in her juror questionnaire she said: "God forgave me and spared me. How could I not offer the same grace?"

She called the death penalty topic heavy. She said remorse is very important. She said: "I believe in redemption." She is a very religious person.

At one point * * * I think [one of the prosecuting attorneys] was talking about not coming into jury service to use this as like some type of an agenda or to come in with any kind of a preconceived background, and at that point [another prosecuting attorney] and I both observed Juror 8 roll her eyes in response to [the prosecuting attorney's] question.

She has also obviously talked about her experience with the criminal justice system and her concerns with the criminal justice system. I think for all of those reasons the state would move to exclude her.

I would note that this is very similar to the Ohio Supreme Court case *State v. Murphy*, 91 Ohio St.3d 516, where the state excused a juror who stated that they would vote for life even in the absence of mitigation, which, again, our concerns here are about her: "God forgave me and spared me. How could I not offer the same type of grace?"

The second reason in *Murphy* was that the juror had a feeling that the system wasn't fair and felt fine with the OJ verdict, which the defense again made a *Batson* challenge there, which the Ohio Supreme Court denied in *State v. Murphy*.

I would note in *State v. Esparza*, 39 Ohio St.3d 8, the State may use its peremptory challenges to eliminate jurors based on their opposition to the death penalty.

In reference to the eye-roll comment that I made and that [another prosecuting attorney] and I observed, the Sixth Circuit, the Federal Sixth Circuit, has noted that body language is a race-neutral reason, as has the United States Supreme Court, but the case that I'm specifically mentioning is *Braxton v. Gansheimer*. The citation is 561 F.3d 453.

Then in reference to the state's concerns about her discussions about the criminal justice system, I have numerous cases that I can cite for that. One most recently again is a Sixth Circuit case, which is *Akins v. Easterling*. That is 648 F.3d 380.

> The Sixth Circuit has also help up more recently in Quisi Bryan's federal habeas, which was *Bryan v. Bobby*. I think that was a 2017 decision, 2018.
>
> So for all of those reasons, Your Honor, we think it is proper to exclude her at this time. Thank you.

(Tr. 3072-3075.)

{¶ 60} In response, defense counsel noted that Juror 8 rated her support for the death penalty as a 7, which is leaning towards "strongly support." Defense counsel did not observe any poor body language, nor did counsel observe Juror 8 engage in eye rolling. Defense counsel was concerned that there were very few African-American jurors on the panel. The state then pointed out that in removing Juror 8 another African-American juror would be included into the panel of 12. The state also noted that Juror 5 is a minority juror, who is also on the panel. The trial court found that the state provided a race-neutral reason and denied Gibson's objection.

{¶ 61} Gibson argues that this court has noted that a juror's facial expressions or body language is not always a neutral basis for a peremptory exclusion. The facial expression, however, is not dispositive because Juror 8's eye-roll was only one of the race-neutral reasons the state provided to the trial court. The state also relied on the following reasons: Juror 8's beliefs in redemption, grace, and remorse, and Juror 8's concerns with the criminal justice system. Because the state voluntarily explained why wanted to excuse Juror 8, the trial court did not, and we need not, determine whether Gibson made the requisite prima facie case. *State v. Murphy*,

91 Ohio St.3d 516, 528, 747 N.E.2d 765 (2001), citing *Hernandez v. New York*; *State v. Hernandez*. Our analysis therefore proceeds to steps two and three.

{¶ 62} Gibson cites to *State v. Kirk*, 8th Dist. Cuyahoga Nos. 107527 and 107553, 2019-Ohio-3887, for the "all relevant circumstances" assessment set forth in *Flowers v. Mississippi*, ___U.S.___, 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019).[7] Here, the state explained it wanted to excuse Juror 8 because of her beliefs in redemption, grace, and remorse, and her concerns with the criminal justice system. The state also noted that Juror 8 would be replaced with a minority juror. The trial court considered the state's and Gibson's arguments and found that the state provided a race-neutral reason. Given that Gibson provided a tearful confession and relied on the theme of remorse and Juror 8 was replaced with a minority juror, we find that these circumstances taken together demonstrate that a *Batson* violation did not occur.

2. Juror Removal

{¶ 63} Second, Gibson argues that Juror 7 should have been removed because Juror 7 admittedly violated the court's order by conducting an internet search about the case prior to trial. During trial, Juror 7 gave the court a letter dated December 2, 2021, advising the court that on November 28, 2021, which was before he was sworn in as a juror, he did an internet search about a man and a daughter

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[7] Gibson also relies on *Kirk* for the proposition that "an important step in the analysis is to compare the prospective jurors who were struck and those who were not in resolving whether a *Batson* violation occurred." Gibson, however, did not present any comparative evidence to the trial court, nor does he present any evidence on appeal.

killed in Bedford. He did not read the article, but did see Gibson's name mentioned. Juror 7 stated that he has lost sleep over this but was certain that he could continue as a fair and impartial juror. He felt that he should be forthcoming regarding this and regretted any inconvenience that he may have caused the court. After making an inquiry of the juror and hearing the parties' arguments, the court denied Gibson's motion to have the juror excused. The court based its decision on the following: (1) Juror 7 did not view the contents of the article; (2) he said that the search did not impact his ability to be fair and impartial; and (3) he went through the effort of writing to the court.

{¶ 64} "Under Ohio law, 'a trial judge is empowered to exercise "sound discretion to remove a juror and replace him with an alternate juror whenever facts are presented which convince the trial judge that the juror's ability to perform his duty is impaired.'" *State v. Brown*, 2d Dist. Montgomery No. 24541, 2012-Ohio-1848, ¶ 46, quoting *State v. Hopkins*, 27 Ohio App.3d 196, 198, 500 N.E.2d 323 (11th Dist.1985). (Other citations omitted.)" *State v. Jennings*, 2017-Ohio-8224, 100 N.E.3d 93, ¶ 10 (8th Dist.)

{¶ 65} While Juror 7 violated the court's policy, there is nothing in the record to suggest that Juror 7's ability to perform his duty is impaired. The trial court and both parties' counsel had the opportunity to question Juror 7. Their questioning revealed that that once he read Gibson's name on the article, he closed it without viewing any content at all. Juror 7 also stated that he could still be fair and impartial.

Based on the foregoing, we cannot say the trial court abused its discretion when it denied Gibson's motion to have the juror excused.

{¶ 66} Therefore, the second assignment of error is overruled.

C. Mistrial Request and Interlocutory Appeal

{¶ 67} In the third assignment of error, Gibson argues that the trial court erred when it failed to declare a mistrial after discovering that Gibson filed an interlocutory appeal on the first day of trial.

{¶ 68} The decision to grant or deny "a motion for mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001), citing Crim.R. 33; *State v. Sage*, 31 Ohio St.3d 173, 382, 510 N.E.2d 343 (1987). An abuse of discretion occurs when a court exercises "its judgment, in an unwarranted way, in regard to a matter over which it has discretionary authority." *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 35. "The granting of a mistrial is necessary only when a fair trial is no longer possible." *Id.*, citing *State v. Franklin*, 62 Ohio St. 3d 118, 580 N.E.2d 1 (1991).

{¶ 69} In the instant case, on the morning of Friday, November 12, 2021, over 100 prospective jurors were brought into court and given jury questionnaires. The court admonished the jurors, and the jurors completed questionnaires regarding their views on the death penalty. At approximately 12:30 p.m. that day, an attorney from the defense counsel's office filed an interlocutory appeal. The court and the attorneys present were not aware of the appeal at that time. As a result, the court

proceedings continued into the afternoon. When the court resumed session in the afternoon, it entered rulings on numerous motions, including its decision on the motion to suppress, and other procedural issues. It was at that time that defense counsel first disclosed that a notice of appeal was filed earlier in the day. Once the appeal was brought to the court's attention, the court did make any rulings and recessed for the day to allow the parties to research the matter.

{¶ 70} When the parties reconvened on Monday, November 15, 2021, defense counsel advised that the appeal was dismissed that morning at 9:58 a.m. The parties then both requested a mistrial based on the lack of jurisdiction while the appeal was pending. The trial court denied the motion, finding that it had jurisdiction at that point in time and the court would recreate the record to cure the jurisdictional defect. On November 30, 2021, the trial court granted the state's motion to recreate the record by adopting the transcripts as to what transpired those days and times.

{¶ 71} Gibson contends that the foregoing was insufficient to cure the jurisdictional defect and the court at the very least should have reconducted the proceedings on the record once jurisdiction was regained by the trial court. However, this is essentially what the court did when it granted the state's motion to recreate the record. Although it may not be the best practice, by adopting the transcripts as to what transpired those days and times, the court "reconducted the proceedings" after it regained jurisdiction. Even if "not all jurors were asked to reaffirm their answers on the questionnaire" as Gibson claims, each juror was

subject to individual voir dire where they were extensively questioned about the same topics, and the trial court regained jurisdiction before any jurors were individually questioned.

{¶ 72} Based on the foregoing, we find that the recreation of the record was sufficient basis to deny the mistrial and we note that Gibson did indicate that he objected to this process.

{¶ 73} Therefore, the third assignment of error is overruled.

D. Discovery Violations and Trial Continuances

{¶ 74} In the fourth assignment of error, Gibson argues that the trial court erred by denying his motion for mistrial due to alleged discovery violations. He further argues that the trial court also erred by denying the parties' motions to continue trial.

{¶ 75} Gibson refers to four instances where either he requested a continuance or both parties requested a trial continuance. In these instances, the continuance was requested because either the state recently turned over evidence or provided newly discovered and the defense was not prepared; COVID caused a delay in the completion of mitigation reports; or the parties needed additional time to review juror questionnaires. Gibson argues that the court's failure to grant a continuance in all these instances deprived him of his constitutional rights.

{¶ 76} We note that "[t]he grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has also been an abuse of

discretion." *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981), citing *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *State v. Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976). As the United States Supreme Court stated in *Ungar*, "'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" *Unger* at 67, quoting *Ungar* at 589.

{¶ 77} When evaluating a motion for a continuance, a court should note:

> *inter alia*: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

(Emphasis sic.) *Id.* at 67-68, citing *United States v. Burton*, 584 F.2d 485 (D.C. Cir. 1978); *Giacalone v. Lucas*, 445 F.2d 1238 (6th Cir.1971).

{¶ 78} A review of the record in the instant case reveals that the court provided its explanation to deny the continuance. The court went through the history of the case, including the reindictment. The court noted that trial was reset five times from July 2019 through September 2021 and that Gibson pled guilty prior to the September trial date. The plea was withdrawn and the matter was set then for trial on November 12, 2021. In denying the continuance, the court recognized that this is a death penalty case and the aftermath of the pandemic. The court looked

at the totality of the circumstances, including the fact that Gibson has been in county jail for 1,090 days; "that memories fade over time; that no case, even a death penalty case, can be fully prepared; the victim's family has a right to closure in this case; and the Court does not feel that continuing this case into January, that somehow over Thanksgiving and Christmas, that the parties will suddenly be prepared." (Tr. 249-250.) In light of the foregoing, we cannot say the trial court abused its discretion when it declined to continue Gibson's trial.

{¶ 79} Gibson's basis for the mistrial stems from a police report the defense received from the state during trial on December 1, 2021. This report included information about a 2017 controlled drug buy involving Paul B. and the Bedford Police Department. Defense counsel moved for a mistrial because the disclosure was made after opening statements and impacted the defense trial strategy. The state opposed the mistrial, arguing the Bedford police report was not exculpatory. The state noted that the information that Paul B. was an alleged drug dealer was consistent with the state's theory of the case and the state's opening statements. The state further noted that "[t]he parties have discussed prior to going on the record, and with the Court, that instead of calling the two Bedford officers that we intended to call today, * * * we would call them at a later date, so that defense counsel would have additional time to follow up on the information in this Bedford police report." (Tr. 3340.) The trial court denied the motion, stating, "[A]t this time I'm not going to grant a mistrial, but I do think that it is fair and proper to move these witnesses

to a later time, giving sufficient time for the defense to investigate the report in more detail." (Tr. 3344.)

{¶ 80} The Ohio Supreme Court has found that "[s]anctions for a Crim.R. 16 discovery violation are within the discretion of the trial court and should be imposed equally, without regard to the status of the offending party." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 20. When a discovery violation is committed, the "trial court must inquire into the circumstances surrounding a discovery violation, must balance the competing interests, and '*must impose the least severe sanction that is consistent with the purpose of the rules of discovery*.' (Emphasis added.)" *Id.* at ¶ 21, quoting *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 5, 511 N.E.2d 1138 (1987), paragraph two of the syllabus.

{¶ 81} We find that this delayed discovery did not warrant a mistrial. Here, the trial court imposed the least restrictive sanction to cure the violation. The state proposed that the Bedford police officers be called to testify later as a less restrictive sanction, which the court agreed and ordered. As a result, the trial court did not abuse its discretion when it denied Gibson's motion for a mistrial on this basis.

{¶ 82} Therefore, the fourth assignment is overruled.

E. Evidentiary Issues

{¶ 83} In the fifth assignment of error, Gibson challenges the trial court's evidentiary rulings on the admission of the surveillance videos, the photos of Paul B. and P.B.'s bodies, and the exclusion of Gibson's statements to Gilbert on the morning of November 10, 2018.

{¶ 84} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Taylor*, 8th Dist. Cuyahoga No. 98107, 2012-Ohio-5421, ¶ 22, citing *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. Furthermore, abuse of this discretion must have materially prejudiced the defendant. *State v. Lowe*, 69 Ohio St.3d 527, 532, 634 N.E.2d 616 (1994), citing *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984), citing *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

1. Surveillance Videos

{¶ 85} Gibson first argues that the gas station and the residence surveillance videos were improperly admitted because neither the homeowner nor anyone from the gas station testified to the authenticity of the videos as required by Evid.R. 901.[8]

{¶ 86} Evid.R. 901 provides for the authentication or identification of evidence prior to its admissibility. The rule states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). By way of illustration, Evid.R. 901(B)(1) provides that evidence may be properly authenticated by testimony of witness with knowledge that "a matter is what it is claimed to be." Additionally, "[t]he authentication requirement of Evid.R. 901(A) is a low threshold that does not

[8] Gibson also raises a hearsay challenge to the video surveillance. This argument, however, was not raised below, and Gibson does not argue plain error on appeal. Gibson's specific objections to the video surveillance at trial were based on Evid.R. 901 and chain of custody. Because Gibson only challenges Evid.R. 901, our discussion will focus on authenticity.

require conclusive proof of authenticity, but only sufficient foundation evidence for the trier of fact to conclude that the evidence is what its proponent claims it to be." *State v. Toudle*, 8th Dist. Cuyahoga No. 98609, 2013-Ohio-1548, ¶ 21, citing *Yasinow v. Yasinow*, 8th Dist. Cuyahoga No. 86467, 2006-Ohio-1355, ¶ 81, citing *State v. Easter*, 75 Ohio App.3d 22, 598 N.E.2d 845 (4th Dist.1991); Evid.R. 901(B)(1). The state only needs to demonstrate a "'reasonable likelihood'" that the evidence is authentic. *State v. Roseberry*, 197 Ohio App.3d 256, 2011-Ohio-5921, 967 N.E.2d 233, ¶ 65 (8th Dist.), citing Evid.R. 901(B); *State v. Bell*, 12th Dist. Clermont No. CA2008-05-044, 2009-Ohio-2335.

{¶ 87} Photographic and video evidence can be authenticated in two ways. Relevant to the instant case, "'photographic evidence may be admissible is the "silent witness" theory. Under that theory, the photographic evidence is a "silent witness" which speaks for itself, and is substantive evidence of what it portrays independent of a sponsoring witness.'" *Midland Steel Prods. Co. v. Internatl. Union, United Auto., Aero. & Agric. Implement Workers, Local* 486, 61 Ohio St.3d 121, 573 N.E.2d 98 (1991), quoting *Fisher v. State*, 7 Ark.App. 1, 5-6, 643 S.W.2d 571 (1982); *see also State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 150.

{¶ 88} Gibson argues that none of the witnesses had personal knowledge of the videos, no one indicated that the videos were accurate depictions of the event, no one testified about the equipment that recorded the videos, and there was no testimony from the gas station owner or homeowner that the videos were not altered or that they accurately depict what was recorded.

{¶ 89} A review of the record reveals that East Cleveland Police Detective Phillip Howell testified that he personally obtained and reviewed the surveillance footage from the homeowner and the gas station. Det. Lundy testified that he reviewed the homeowner's video and observed Paul B.'s Buick going past Savannah with a dark-colored Ford Edge right behind it. He also reviewed the footage from the gas station and observed Gibson, Sheeley, and Newberry on the video. Det. Lundy further testified that during the course of his career in East Cleveland, he has obtained video from this gas station "at least fifteen, twenty times." (Tr. 4388.) Moreover, Gilbert's testimony also identified the gas station and Gibson with the gas can she gave him, standing in line with Sheeley. We find this testimony sufficient to satisfy the low threshold for authentication. *State v. Ladson*, 8th Dist. Cuyahoga No. 111211, 2022-Ohio-3670, ¶ 22, citing *State v. Freeze*, 12th Dist. Butler No. CA2011-11-209, 2012-Ohio-5840, ¶ 68.

{¶ 90} Because the video evidence in question was properly authenticated pursuant to Evid.R. 901, we cannot conclude that the trial court abused its discretion in admitting this evidence over defense objection. But even if these videos had been admitted in error, Gibson cannot demonstrate that the outcome of the trial would have differed had the error not occurred, given the other overwhelming evidence of guilt in Gibson's confession. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 106, fn. 5, citing *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Lundgren*, 73 Ohio St.3d 474, 486, 653 N.E.2d 304 (1995).

2. Gruesome Photos

{¶ 91} Gibson next argues that the court erred by allowing the admission of photos depicting Paul B. and P.B.'s burnt bodies. Gibson claims that the photographs were not probative and were unnecessary because he did not contest the manner of death.

{¶ 92} Evid.R. 403(A) provides that a trial court must exclude evidence when its "probative value is substantially outweighed by the danger of unfair prejudice[.]" Here, Gibson was charged with the aggravated murder of Paul B. and P.B., aggravated burglary, kidnapping, arson, and other offenses. These photographs are relevant evidence of the crimes, and their probative value outweighs the danger of any unfair prejudice. Furthermore, "neither the Rules of Evidence nor this court's precedents make 'necessity' a prerequisite for admissibility." *State v. Whitaker*, 169 Ohio St.3d 647, 2022-Ohio-2840, 207 N.E.3d 677, ¶ 89, citing *Mammone* at ¶115. And even if any of these photos had been improperly admitted by the court, any such error would not have affected the outcome of the trial in light of Gibson's confession. *Whitaker* at ¶ 92, citing *Mammone* at ¶ 106.

3. Cross-examination of Gilbert

{¶ 93} Lastly, Gibson argues that the trial court erred by limiting his cross-examination of Gilbert regarding statements he made to her. In the instant case, the state objected to defense counsel eliciting testimony from Gilbert regarding Gibson's statements to her on the morning of October 10, 2018, leading up to the deaths of Paul B. and P.B. The state indicated that it is not aware of any "rule of law that allows

the defense to basically backdoor the defendant's statement through another witness." (Tr. 4273.) Gibson argued that these statements were either present-sense impressions or excited utterances.

{¶ 94} The court prohibited defense counsel from eliciting the statements and they were proffered for the record. Gilbert told police that Gibson told her he was not free to leave on October 10, 2018; he feared for his life, her life, and their child's life; he would rather go to jail than to put her in harm's way; and if he left, they would have killed him. He also told Gilbert that they tricked him and they were tripping.

{¶ 95} As discussed above, the trial court's admission or exclusion of evidence will not be overturned on appeal unless the defendant can demonstrate material prejudice. *Lowe*, 69 Ohio St.3d 527 at 532, 634 N.E.2d 616. Here, Gibson fails to demonstrate material prejudice and, therefore, we will not disturb the trial court's ruling. *State v. Board*, 8th Dist. Cuyahoga No. 83832, 2004-Ohio-5215, ¶ 15. Furthermore, we fail to see how Gibson was prejudiced because Gibson questioned Gilbert on cross-examination about exchanging text messages and her fear for herself, Gibson, and their child. Gibson was essentially able to question Gilbert without using his statement to get across the same point he wanted to make with the statement.

{¶ 96} Therefore, the fifth assignment of error is overruled.

F. Jury Instructions

{¶ 97} In the sixth assignment of error, Gibson challenges the inclusion of jury instructions on natural consequences, including consciousness of guilt for concealing crime language, and the exclusion of jury instructions on unanimity.

{¶ 98} "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Sims*, 8th Dist. Cuyahoga No. 85608, 2005-Ohio-5846, ¶ 12, citing *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989); *see also State v. Williams*, 8th Dist. Cuyahoga No. 101121, 2015-Ohio-172, ¶ 35.

{¶ 99} Gibson argues that the jury instructions regarding consciousness of guilt or natural consequences and concealing a crime were unwarranted because he did not share the criminal intent of his codefendants — he did not anticipate or intend for anyone to get killed — and the car fire was the cause of death, not the concealment of the crimes.

{¶ 100} It is not error for a trial court to give a jury instruction when there is such evidence. *Williams* at ¶ 36, citing *State v. Spraggins*, 8th Dist. Cuyahoga No. 99004, 2013-Ohio-2537 (where the defendant challenged the court's jury instruction on flight and this court found it was not error for a trial court to give a flight instruction when there is such evidence). In this case, while Gibson may not have intended for anyone to get killed, the evidence at trial revealed that he continued to participate in the events with Newberry and Sheeley and he asked Gilbert for a gas can, for which he purchased gas and used to conceal the crime.

{¶ 101} Gibson also claims that the trial court improperly denied his request for an instruction that jurors must be unanimous "not only on the crime charged, but also on the underlying offenses that support the convictions on various counts." Gibson, however, fails to cite to any authority supporting his contention. Rather, in *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, the Ohio Supreme Court noted that it

> rejected a similar argument in *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, in which we stated that "when the jury unanimously reaches a verdict, the individual jurors need not agree on which of the alternatives bases support their individual findings." *Id.* at ¶ 64; *see Schad v. Arizona*, 501 U.S. at 643-644, 111 S.Ct. 2491, 115 L.Ed.2d 555 (plurality opinion). As long as the jury unanimously convicts the defendant of aggravated murder, the jurors need not be unanimous as to the predicate offense or offenses the defendant committed. *Johnson* at ¶ 65; *State v. Davis*, 116 Ohio St. 3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 187-188.

Id. at ¶ 263.

{¶ 102} Based on the foregoing, we find that the trial court did not abuse its discretion when denied Gibson's request to include the unanimity jury instruction.

{¶ 103} Accordingly, the sixth assignment of error is overruled.

G. R.C. 2929.03

{¶ 104} In the seventh assignment of error, Gibson argues R.C. 2929.03(D)(2)(c) violates his constitutional rights. R.C. 2929.03 sets forth the procedures for sentencing a defendant for aggravated murder. Because Gibson's case was tried before a jury, R.C. 2929.03(C)(2)(b)(ii) requires that his aggravated-murder sentence to also be determined by the jury. To recommend the death

penalty, the jury must unanimously find "by proof beyond a reasonable doubt, that the aggravating circumstances * * * outweigh the mitigating factors." R.C. 2929.03(D)(2). "Absent such a finding, the jury must recommend that the defendant be sentenced to one of the following life sentences: (1) life imprisonment without parole, (2) life imprisonment with parole eligibility after serving 25 years, or (3) life imprisonment with parole eligibility after serving 30 years." *State v. Grevious*, Slip Opinion No. 2022-Ohio-4361, ¶ 3, citing R.C. 2929.03(D)(2)(a). R.C. 2929.03(D)(2)(c) provides that "the court shall impose the sentence recommended by the jury upon the offender."

{¶ 105} Gibson argues that his constitutional right to equal protection was violated because R.C. 2929.03(D)(2)(c) mandates a more severe punishment be imposed upon capital defendants for whom the jury finds death is inappropriate than many of those for whom the jury finds death is appropriate. This court, however, has previously found that

> [t]he statutory framework for imposition of capital punishment has been held constitutionally valid by the Ohio Supreme Court. *State v. Jenkins* (1984), 15 Ohio St.3d 164, paragraph one of the syllabus. The court in *Jenkins* held that Ohio's statutory framework pursuant to R.C. 2929.03 for imposition of capital punishment does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution. *Id.*

State v. Culver, 8th Dist. Cuyahoga No. 55895, 1989 Ohio App. LEXIS 5214, 18 (Sept. 21, 1989).

{¶ 106} Moreover, *State v. Melhado*, 10th Dist. Franklin No. 02AP-458, 2003-Ohio-4763, a case Gibson relies on in support of a rational basis review,

addressed the constitutionality of R.C. 2929.03(D)(2)(c) and found that a rational basis exists to support the statute. *Id.* at ¶ 36. In *Melhado*, the Tenth District Court of Appeals acknowledged that "statutes enacted in Ohio are presumed to be constitutional." *Id.* at ¶24, citing *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342 (2000). The court then applied the rational basis standard because "[c]apital murder defendants for whom a jury recommends a life sentence are not members of a suspect class" and R.C. 2929.03 does not implicate a fundamental constitutional right. *Id.* at ¶27-28. In finding a rational basis for the statute, the *Melhado* Court noted:

> In order to safeguard against arbitrary and capricious levying of the death penalty in Ohio, the General Assembly chose to require that both a judge and a jury of twelve independently examine the circumstances of each individual homicide and each individual defendant in deciding whether the death penalty will be imposed in any given case. Ohio's aggravated murder sentencing scheme gives defendants convicted of a capital offense one additional individualized examination of the relevant facts and circumstances involved in their crime before death can be imposed. This is rationally related to the legitimate state purpose of ensuring that the ultimate punishment is assigned only to the worst offenses and offenders. Because death is so unlike any of the life options (even life without possibility of parole), the jury's decision to impose death is a "recommendation" while its decision to impose a life sentence is essentially in the nature of a verdict. The General Assembly could rationally conclude that although aggravated murder defendants faced with death need a second decision-maker to scrutinize the appropriateness of their punishment, those faced only with life imprisonment need no such added scrutiny because they do not face the ultimate penalty.

Id. at ¶ 36.

{¶ 107} Based on the foregoing, we do not find that R.C. 2929.03(D)(2)(c) is unconstitutional.

{¶ 108} Therefore, the seventh assignment of error is overruled.

H. Sentence

{¶ 109} In the eighth and eleventh assignments of error, Gibson challenges his sentence, contending that his sentence was disproportionate and his consecutive sentence is not supported by the record.

1. Proportionality of Sentence

{¶ 110} In support of his proportionality argument, Gibson asks this court, pursuant to R.C. 2929.05, to independently weigh all the facts and evidence disclosed in the record and consider the offense and the offender to determine whether the aggravating circumstances outweigh the mitigating factors. R.C. 2929.05, however, pertains to death sentences only, and not life imprisonment. Gibson was sentenced to life in prison. Therefore, R.C. 2929.05 is inapplicable to the instant case. *State v. Clark*, 8th Dist. Cuyahoga No. 89371, 2008-Ohio-1404, ¶ 53.

{¶ 111} Accordingly, the eighth assignment of error is overruled

2. Consecutive Sentences

{¶ 112} In the eleventh assignment of error, Gibson contends that his sentence is contrary to law because consecutive sentences are not supported by the record.

{¶ 113} Our review of consecutive sentences is authorized by R.C. 2953.08(G)(2), which provides in relevant part:

> 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.

{¶ 114} We note that when a person is sentenced for having committed multiple offenses, the presumption is that those sentences will be imposed concurrently, unless certain exceptions apply. *State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607, ¶ 10, citing R.C. 2929.41(A); *State v. Polus*, 145 Ohio St.3d 266, 2016-Ohio-655, 48 N.E.3d 553. Relevant to the instant case is the exception under R.C. 2929.14(C)(4), which provides that, when imposing consecutive sentences, a sentencing court must find that consecutive sentences are necessary to protect the public from future crime or to punish the offender, that the sentences are not disproportionate to the seriousness of the conduct and to the danger the offender poses to the public, and that one of the following:

> (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.

{¶ 115} In *Gwynne*, Slip Opinion No. 2022-Ohio-4607, the Ohio Supreme Court stated that appellate review of consecutive sentences is a two-step process. *Id.* at ¶ 25. First, the reviewing court is to determine whether the findings under R.C. 2929.14(C)(4) were made — "i.e., the first and second findings regarding necessity and proportionality, as well as the third required finding under R.C. 2929.14(C)(4)(a), (b), or (c)." *Id.* Gibson concedes that these statutory findings were made.

{¶ 116} Our focus then turns to the next step, which requires the appellate court to "determine whether the record clearly and convincingly supports those findings." *Id.* at ¶ 26. In reviewing the record, the appellate court is to examine "both the quantity and quality of the evidence in the record that either supports or contradicts the consecutive-sentence findings." *Id.* at ¶ 29. If after reviewing the record, the appellate court finds that "even one of the consecutive-sentence findings is found not to be supported by the record under the clear-and-convincing standard provided by R.C. 2953.08(G)(2)," the *Gwynne* Court directs us to either modify or vacate the trial court's order of consecutive sentences. *Id.* at ¶ 26, citing R.C. 2953.08(G)(2).

{¶ 117} Gibson argues that the record in this case does not clearly and convincingly support the imposition of consecutive sentences because the trial court did not adequately explain why his conduct required the imposition of consecutive sentences and the court did not discuss the proportionality or explain why that much time is needed or why a concurrent sentence would not satisfy the principles and purposes of Ohio's felony sentencing laws.

{¶ 118} The Ohio Supreme Court has held, however, that when making the consecutive-sentence findings, a trial court is not required to give reasons supporting its decision to impose consecutive sentences. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 27. Rather, "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." *Id.* at ¶ 29.

{¶ 119} Here, Gibson could have received the death penalty for his actions. Instead, the jury recommended a sentence of 30 years to life in prison for each murder count and the trial court ran those counts concurrently. The record is clear that the trial court was familiar with Gibson's criminal history behavior and his actions in this case. Gibson participated with three other men in the kidnapping and murder of Paul B. and his 14 year-old daughter, P.B. While Gibson expressed remorse during his confession, during the events he continued to participate and even asked Gilbert to bring him a gas can so they could set the Buick on fire with

Paul B. and P.B. inside. These actions demonstrate a complete disregard for human life.

{¶ 120} Therefore, we clearly and convincingly find that the record supports the trial court's findings and the imposition of consecutive sentences under R.C. 2929.14(C)(4).

{¶ 121} Accordingly, the eleventh assignment is overruled.

I. Sufficiency of the Evidence

{¶ 122} In the ninth assignment of error, Gibson argues the trial court erred when it denied his Crim.R. 29(A) motion on all charges because the state produced insufficient evidence as a matter of law.

{¶ 123} We note that "[a] motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37, citing *State v. Carter*, 72 Ohio St.3d 545, 553, 651 N.E.2d 965 (1995); *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The 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, ¶ 12. An appellate court's function when reviewing the sufficiency is to determine "'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. Leonard*, 104 Ohio St.3d 54,

2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 124} With a sufficiency inquiry, an appellate court does not review whether the state's evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction. *State v. Starks*, 8th Dist. Cuyahoga No. 91682, 2009-Ohio-3375, ¶ 25, citing *Thompkins* at 387. A sufficiency of the evidence argument is not a factual determination, but a question of law. *Thompkins* at 386.

{¶ 125} In *State v. Jones*, 166 Ohio St.3d 85, 2021-Ohio-3311, 182 N.E.3d 1161, the Ohio Supreme Court cautioned:

> But it is worth remembering what is not part of the court's role when conducting a sufficiency review. It falls to the trier of fact to "'resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" [*State v. McFarland*, 162 Ohio St.3d 36, 2020-Ohio-3343, 164 N.E.3d 316, ¶ 24], quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Thus, an appellate court's role is limited. It does not ask whether the evidence should be believed or assess the evidence's "credibility or effect in inducing belief." *State v. Richardson*, 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, ¶ 13, citing *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541. Instead, it asks whether the evidence against a defendant, if believed, supports the conviction. *Thompkins* at 390 (Cook, J., concurring).

Id. at ¶ 16.

{¶ 126} In the instant case, Gibson was acquitted of aggravated murder as charged in Counts 1 and 2. Regarding the remaining counts, Gibson contends that (1) the evidence does not establish that he acted purposely with regard to Counts 3 and 4; (2) he did not commit kidnapping because the evidence fails to demonstrate

that he had any intent to purposely remove Paul B. and P.B. from their location to commit a crime; (3) the evidence does not demonstrate that he knowingly committed arson; (4) there is no evidence that he assaulted anyone and he did not share the criminal intent of anyone who did, which precludes a conviction for felonious assault; and (5) there is no evidence that he had a gun and should not have been found guilty of HWWUD.

{¶ 127} A review of the record reveals that the evidence supports the convictions. In his confession, which was played for the jury, Gibson admitted to going to Gould Avenue to commit a crime. Newberry and Sheeley had guns and were ordering Paul B. by gunpoint. They were looking for money or drugs in the home. Gibson took a designer belt and PlayStation from the residence. Gibson and the codefendants drove Paul B. and P.B. to a house on Wadena Street where it was decided that they were going to have to murder Paul B. and P.B. Gibson called Gilbert to bring him a gas can to the house on Wadena and then went to the gas station to get the gas used by Newberry and Sheeley to light the car on fire with Paul B. and P.B. inside. Gibson waited down the street while Newberry and Sheeley set the car on fire. These actions demonstrate Gibson's active participation as well as complicity in the offenses. "In order to constitute aiding and abetting, the accused must have taken some role in causing the commission of the offense." *State v. Worley*, 8th Dist. Cuyahoga No. 85791, 2005-Ohio-6356, ¶ 20, citing *State v. Sims*, 10 Ohio App.3d 56, 460 N.E.2d 672 (8th Dist.1983); *see also State v. Adams*, 8th Dist. Cuyahoga No. 93513, 2010-Ohio-4478, ¶ 15.

{¶ 128} With regard to the HWWUD count, it was unnecessary for Gibson to have personal possession of the firearm in order to be convicted of HWWUD. In *State v. Howard*, 8th Dist. Cuyahoga No. 97695, 2012-Ohio-3459, this court stated:

> "It is well settled that an unarmed accomplice can be convicted of an underlying felony, together with a firearm specification, based on an aider and abettor status." *State v. Porch*, 8th Dist. No. 65348, 1994 Ohio App. LEXIS 1936, *11 (May 5, 1994), citing *State v. Chapman*, 21 Ohio St.3d 41, 487 N.E.2d 566 (1986); *State v. Moore*, 16 Ohio St.3d 30, 476 N.E.2d 355 (1985); *see also State v. Drane*, 2d Dist. No. 23862, 2010 Ohio 5898, ¶ 18 ("an aider and abetter can be found guilty of a firearm specification"); *In re J.H.*, 8th Dist. No. 85753, 2005-Ohio-5694, ¶ 33. Moreover, "[a]n accomplice to a crime * * * is subject to the same prosecution and punishment, including sentencing enhancements, as the principal offender." *State v. Fulton*, 8th Dist. No. 96156, 2011-Ohio-4259, ¶ 42.

Id. at ¶ 24.

{¶ 129} While the evidence demonstrated that Newberry and Sheeley possessed guns, the evidence also demonstrated that Gibson actively participated in the offenses. Therefore, a reasonable factfinder could conclude beyond a reasonable doubt that Gibson was an accomplice of his codefendants who actually possessed the guns and find Gibson guilty of HWWUD. *Adams* at ¶ 21 (where this court affirmed defendant's HWWUD conviction because defendant, as an aider and abetter, was convicted of having a weapon, which he constructively possessed through his codefendant, while under a disability — his own disability, which was his previous conviction for drug possession.).

{¶ 130} Based on the foregoing, when viewing the evidence in a light most favorable to the state, we find any rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt.

{¶ 131} Accordingly, the ninth assignment of error is overruled.

J. Manifest Weight of the Evidence

{¶ 132} In the tenth assignment of error, Gibson argues that his convictions are against the manifest weight of the evidence because the quality of evidence against him was poor and unreliable.

{¶ 133} When reviewing a manifest weight challenge, an appellate 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.'" *State v. Virostek*, 8th Dist. Cuyahoga No. 110592, 2022-Ohio-1397, ¶ 54, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A reversal on the basis that a verdict is against the manifest weight of the evidence is granted "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins,* 78 Ohio St.3d at 387, 678 N.E.2d 541 (1997), quoting *Martin* at 175.

{¶ 134} As this court has previously stated:

> The criminal manifest weight of-the-evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541 (1997). Under the manifest weight-of-the-evidence standard, a reviewing court must ask the following question:

> whose evidence is more persuasive — the state's or the defendant's? *Wilson* at *id.* Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276, 723 N.E.2d 1054 (2000).
>
> When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the fact finder's resolution of the conflicting testimony. *Wilson* at *id.*, quoting *Thompkins* at *id.*

State v. Williams, 8th Dist. Cuyahoga No. 108275, 2020-Ohio-269, ¶ 86-87.

{¶ 135} Gibson argues that the evidence established that Paul B. was a drug dealer who lost significant amounts of money gambling. While Gibson attacks the victim as "a high-level heroin dealer, known to police and under investigation since 2015," he does not demonstrate how the jury clearly lost its way and created such a manifest miscarriage of justice. The evidence was clear through Gibson's confession that Gibson and codefendants wanted to rob Paul B. of either money or drugs. Gibson's confession is corroborated with the evidence found by investigators, placing him at Paul B.'s residence, the house on Wadena, and at the gas station with the gas can Gilbert gave him. After reviewing the entire record, weighing the inferences and examining the credibility of witnesses, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice. Gibson's convictions are not against the manifest weight of the evidence.

{¶ 136} Therefore, the tenth assignment of error is overruled.

K. Effective Assistance of Counsel

{¶ 137} In his twelfth and final assignment of error, Gibson argues that he was deprived of effective assistance of counsel when FBI Agent Jacob Kunkle ("Agent Kunkle") testified to his opinion regarding the data and alleged location from multiple cell phones without objection by defense counsel.

{¶ 138} To establish ineffective assistance of counsel, Gibson must demonstrate that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 98, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The failure to prove either prong of this two-part test makes it unnecessary for a court to consider the other prong. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000), citing *Strickland* at 697.

{¶ 139} Here, Agent Kunkle testified that he looked at the records of two cell phone numbers, which were previously identified as associated with Gibson and Newberry. On October 10, 2018, these cell phone numbers pinged off certain towers in East Cleveland, Shaker Heights, and the Bedford area, involving locations at 68 Gould Avenue in Bedford, 14615 Savannah Avenue in East Cleveland, and 1851 Wadena Street in East Cleveland, Ohio. The two phones had overlapping sectors between 7:23 and 7:58 a.m. in East Cleveland in the general area of Wadena Street. On cross-examination, Agent Kunkle testified that the records he examined are not intended for law enforcement purposes, but for cell phone companies to optimize

coverage areas for costumers. He further testified that he knows "where these phones were at these dates and times, and not who held them." (Tr. 4546.)

{¶ 140} Gibson argues that "[i]t is very likely the jury relied on [Agent] Kunkle's opinion testimony" and "counsel was ineffective for failing to challenge the admission of this opinion testimony or to request a hearing to determine the reliability of the cellular analysis used to support the alleged data." In support of his argument, Gibson relies on *State v. Wilson*, 8th Dist. Cuyahoga No. 104333, 2017-Ohio-2980. Gibson contends that in *Wilson* this court has addressed issues concerning the admission of Agent Kunkle's testimony, as expert testimony, and held that Agent Kunkle's testimony that exceeds simply detailing phone records and which cell towers were used, merits an analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

{¶ 141} In *Wilson*, however, we found that such testimony, specifically Agent Kunkle's testimony regarding the whereabouts of defendant's cell phone on the night in question, satisfied the *Daubert* standard. We noted that "this court has previously held that testimony concerning a defendant's cell phone records and the location of the cellular towers used by a defendant's phone in relation to locations relevant to the crime constitutes lay opinion testimony that does not require 'specialized knowledge, skill, experience, training, or education' regarding cellular networks.'" *Wilson* at ¶ 30, citing *State v. Daniel*, 2016-Ohio-5231, 57 N.E.3d 1203, ¶ 69 (8th Dist.), citing *State v. Dunn*, 8th Dist. Cuyahoga No. 101648, 2015-Ohio-3138; *United States v. Evans*, 892 F.Supp.2d 949, 950 (N.D.Ill.2012); Evid.R. 702.

We further noted that a *Daubert* analysis would be appropriate to the extent that Agent Kunkle's testimony exceeded simply detailing the defendant's phone records and which cellular towers were used. *Id.* at ¶ 31.

{¶ 142} In the instant case, Agent Kunkle testified to Gibson's cell phone records and the location of the cellular towers used by his in relation to locations relevant to the crime. Therefore, Agent Kunkle's testimony is admissible as lay testimony and Gibson has failed to demonstrate prejudice.

{¶ 143} Therefore, the twelfth assignment of error is overruled.

III. Conclusion

{¶ 144} For the reasons stated above, we find that Gibson's confession to the police was admissible; the state's preemptory challenge to remove Juror 8 did not violate *Batson*; there is sufficient evidence to sustain Gibson's convictions, and his convictions are not against the manifest weight of the evidence; Gibson's sentence was proper; R.C. 2929.03 is constitutional; and defense counsel was not ineffective because the testimony regarding the cell phone records is admissible lay testimony. We further find the trial court did not abuse its discretion by denying Gibson's request to remove Juror 7; denying the joint motion for mistrial due Gibson's interlocutory appeal or denying the motions for continuance; allowing video and photo evidence and limiting Gilbert's testimony; including jury instructions on natural consequences of causation, including consciousness of guilt for concealing a crime; and excluding jury instructions on unanimity.

{¶ 145} Accordingly, the judgment is affirmed.

It is ordered that appellee recover from appellant the 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.

MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, P.J., and
SEAN C. GALLAGHER, J., CONCUR