[Cite as *State v. Riley*, 2023-Ohio-2588.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 112302
v.	:	
MICHAEL RILEY,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 27, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-16-608045-A

Appearances:

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

Patituce & Associates, LLC, Megan M. Patituce and Joseph C. Patituce, *for appellant*.

EILEEN A. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant Michael Riley appeals the common pleas court's denial of his application for postconviction DNA testing. For the reasons that follow, we affirm.

I. Factual Background and Procedural History

{¶ 2} In March 2018, Riley was found guilty after a bench trial of murder, attempted murder, felonious assault, discharging a firearm on or near prohibited premises, improperly handling firearms in a motor vehicle and having a weapon while under disability along with several firearm specifications.

{¶ 3} The facts of the case are set forth in detail in this court's opinion from Riley's direct appeal. The opinion summarized the facts, in relevant part, as follows:

> On June 5, 2016, at just before 2:30 a.m., Juan Mitchell and Tarez Steele were shot as they exited the Iron City Café on W. 14th Street and Jennings Avenue in Cleveland. Mitchell died on the scene, and Steele required surgery to repair damage the bullet caused to his foot. According to witnesses and video footage from surveillance cameras, the gunfire came from the driver's side rear window of a Nissan Altima that was pulling out of the bar's parking lot.
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> Melanie Edwards testified that she has known Riley, whose nickname is "Wilikgan," for seven or eight years and that she used to buy heroin from him. Melanie also testified that she used to buy heroin from Riley's friends, Matthew and Marcus Burgess. * * *
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> Sometime in the summer of 2016, she was driving the Burgess brothers to an undisclosed location near downtown Cleveland. Matthew, who was in the backseat, was talking to Riley on his phone. Melanie testified that she heard their conversation, including what Riley said through the cell phone. Matthew and Riley "were talking and laughing and joking about who shot who." Asked to explain, Edwards testified that "they wanted to be the person that shot the guy. They were arguing about which one shot him." According to Melanie, both Riley and Matthew took credit for the shooting. Melanie also heard them say that this shooting was a murder outside the Iron City Café. * * * Subsequently, Melanie reported this conversation to the Cleveland police and identified Riley and the Burgess brothers through photographs the police showed her. Melanie also identified Riley, who was wearing a red shirt, white pants, and earrings, in Instagram photos he posted of himself o[n] June 5, 2016, which is the day of the murder

> at issue. Furthermore, she identified Riley wearing the same outfit from video surveillance footage taken outside of the Iron City Café at the time of the shooting. * * * She also testified that, after she spoke with detectives, someone shot at the windows of her house, Riley's girlfriend threatened her, and her husband was "jumped" while he was at work. * * *
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> Raymond Edwards testified that he is Melanie's husband and they used to buy heroin from Riley and the Burgess brothers. * * * Soon after [the shooting,] Marcus asked Raymond to drive him to Edgewater Park to dispose of a gun. Raymond said no.
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> * * *
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> [A detective] testified that there was no direct evidence of who fired the gun that killed Mitchell and wounded Steele. The video footage shows Riley and two other men get in the car. Riley entered through the rear driver's side of the car. However, there is no DNA, fingerprint, or other forensic evidence linking Riley, or anyone else for that matter, to this crime. No gun was recovered and no witnesses saw anyone with a gun. * * * [The detective] further testified that there was no direct evidence that Riley was acting in complicity with the other people in the car.

State v. Riley, 8th Dist. Cuyahoga No. 107073, 2019-Ohio-981, at ¶ 3, 13–37.

{¶ 4} The trial court found that Riley was not guilty of aggravated murder but guilty of complicity in the other charged offenses, reasoning as follows:

> Despite the video and the testimony of all of the witnesses, it was impossible to determine who among the three or more individuals in that vehicle actually shot the fatal and injuring shots, and whether there was more than one person shooting out of that vehicle.
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> It appears that the shots were fired from the rear driver's side * * * window, which would suggest that it was Mr. Riley doing the shooting. However, it is impossible to determine beyond a reasonable doubt the specific individual doing the shooting. All of the individuals in that vehicle are equally and legally responsible for these crimes, but only Mr. Riley is before this Court. * * *
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> Due to the inability to specifically identify the person shooting the gun or guns in this instance, the Court is unable to determine beyond a reasonable doubt the elements of Count 1, aggravated murder, and

> finds Mr. Riley not guilty of that count. For the remaining counts, the Court finds Mr. Riley was complicit in the actions that led to the death of Juan Mitchell and the injuries to Tarez Steele.

Id. at ¶ 38.

{¶ 5} The trial court sentenced Riley to 15 years to life in prison for murder, consecutive to 11 years in prison for the firearm specifications. The court ordered the remainder of Riley's sentences to be served concurrent to this 26-years-to-life prison term.

{¶ 6} This court affirmed his convictions on direct appeal, reasoning as follows:

> Taking into consideration the complicity statute, we find that the state presented sufficient evidence to convict Riley of the shooting * * *. Riley is seen talking to and walking with the other men who got in the car. Additionally, Riley gets out of the car, talks to two people and possibly takes something from one of them, and gets back in the car. Immediately after this, shots are fired from the rear driver's side of the vehicle, which is where Riley got into the car.
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> Furthermore, we cannot say that Riley's convictions are against the manifest weight of the evidence. Eyewitness testimony from [a witness at the bar] corroborates what is shown in the video. Testimony from Melanie and Raymond shows that Riley and the Burgess brothers were talking about the murder and each claiming to have been the shooter shortly after the incident. Additionally, Riley's Instagram posts show him wearing the exact same clothing as the person captured on the surveillance video getting into the car immediately prior to when the shots were fired. These photographs are dated June 5, 2016, which is the same day as the offense. * * *
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> None of the evidence suggests that Riley was a mere bystander to this drive-by shooting or that he abandoned his criminal purpose before the shots were fired. Prior to the shooting, someone from the group of men who were in the car said, "F*** them westsiders." Riley was the only person to exit and reenter the vehicle before the shots were fired. Riley was sitting in the seat of the car from which the shots were fired. Riley and the Burgess brothers bragged about the shooting the day after it

> occurred. Thus, a rational trier of fact could infer from this evidence that Riley had a role in the shooting based on his actions, before, during, and after the incident. *See State v. Cartellone*, 3 Ohio App.3d 145, 150, 444 N.E.2d 68 (8th Dist.1981) ("Evidence of aiding and abetting another in the commission of crime may be demonstrated by both direct and circumstantial evidence.").

State v. Riley, 8th Dist. Cuyahoga No. 107073, 2019-Ohio-981, ¶ 51–53.

{¶ 7} The Ohio Supreme Court denied Riley's motion for a delayed appeal from this court's judgment. *3/16/2021 Case Announcements*, 161 Ohio St.3d 1473, 2021-Ohio-717, 164 N.E.3d 474.[1]

{¶ 8} On October 28, 2022, Riley filed an application in the trial court for postconviction DNA testing, requesting that six .40-caliber cartridge cases that police collected on the night of the shooting be tested for DNA. The Cuyahoga County Regional Forensic Science Laboratory had found human DNA on the cartridge cases prior to trial but an insufficient quantity of DNA was detected to create a full DNA profile.

{¶ 9} On December 13, 2022, the trial court summarily denied the application without explanation.

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[1] Three justices dissented from this denial without publishing a dissenting opinion. *Id.*

{¶ 10} Riley appealed,[2] raising the following assignment of error:

> The trial court abused its discretion in denying Mr. Riley's application for DNA testing where it failed to provide reasons for the denial as required by R.C. 2953.73(D).

{¶ 11} On the same day that Riley filed his appeal, the state filed proposed findings of fact and conclusions of law in the trial court. Two days later, the trial court filed an order adopting — seemingly verbatim — the state's proposed findings and conclusions. In doing so, the trial court stated that it rejected Riley's application because the prior DNA test conducted on the cartridge cases was definitive and because an exclusion result would not be outcome determinative.

{¶ 12} We allowed Riley to supplement the record in this appeal by transferring the transcripts filed in his direct appeal into the record. We allowed the state to supplement the record with the trial court's findings of fact and conclusions of law.

II. Law and Analysis

{¶ 13} R.C. 2953.71 through 2953.81 govern postconviction DNA testing for eligible inmates. R.C. 2953.73(A) provides that an eligible inmate who seeks DNA

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[2] This is Riley's fourth filed matter in this court related to his criminal case. We discussed the direct appeal above. In August 2019, Riley filed a petition for a writ of mandamus, seeking an order compelling the trial court to issue rulings on several motions he had filed in the trial court. *State ex rel. Riley v. McClelland*, 8th Dist. Cuyahoga No. 108921, 2019-Ohio-4358, ¶ 1. This court construed Riley's petition as one for a writ of procedendo and granted summary judgment against him. *Id.* at ¶ 2–4. In June 2021, Riley filed a notice of appeal with this court but failed to identify what judgment he was appealing. *State v. Riley*, 8th Dist. Cuyahoga No. 110627. This court allowed Riley to voluntarily dismiss that appeal. *Id.*, Motion No. 548088 (July 22, 2021).

testing pursuant to R.C. 2953.71 to 2953.81 must submit an application for DNA testing to the common pleas court that sentenced the inmate for the relevant offense.

{¶ 14} Riley was eligible to apply for postconviction DNA testing because he was convicted by a judge for a felony offense, was sentenced to a prison term for that offense and was in prison serving that prison term. *See* R.C. 2953.71(C).

{¶ 15} The circumstances under which a trial court may accept an application for postconviction DNA testing are described in R.C. 2953.74. "A court's decision to accept an application for postconviction DNA testing or to order a comparison of DNA test results with [the Combined DNA Index System ("CODIS")] is within the court's discretion." *State v. Scott*, Slip Opinion No. 2022-Ohio-4277, ¶ 10. "That discretion is to be exercised on a case-by-case basis, based on the unique facts of each case." *Id.*, citing *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, ¶ 43 (8th Dist.).

{¶ 16} Once the trial court "make[s] a determination as to whether the application should be accepted or rejected," it is required to "enter a judgment and order that either accepts or rejects the application and that includes within the judgment and order the reasons for the acceptance or rejection as applied to the criteria and procedures set forth in [R.C. 2953.71 to 2953.81]." R.C. 2953.73(D).

{¶ 17} Riley's first argument is that the trial court failed to comply with R.C. 2953.73(D) by not initially providing the reasons for the rejection of his application and then by "adopting, verbatim," the state's proposed findings of fact and conclusions of law after Riley filed his notice of appeal. Riley next says that the trial

court erred in finding that the prior testing was definitive and that an exculpatory DNA result would not be outcome determinative. We address these arguments in order.

A. While the trial court initially failed to comply with R.C. 2953.73(D), it corrected that failure by issuing findings of fact and conclusions of law supporting its denial of Riley's application

{¶ 18} The trial court clearly failed to enter a sufficient order when it denied Riley's application. Its order summarily denied the application, offering nothing by way of reasoning for the rejection as applied to the statutory criteria and procedures.

{¶ 19} This court "has repeatedly held that the failure to provide an explanation for rejecting a defendant's application under R.C. 2953.73(D) is contrary to law and an abuse of discretion." *State v. Connor*, 2020-Ohio-4310, 158 N.E.3d 162, ¶ 14 (8th Dist.); *see also State v. Gilcrease*, 8th Dist. Cuyahoga No. 111893, 2023-Ohio-14, ¶ 12–13; *State v. Williamson*, 8th Dist. Cuyahoga No. 105320, 2017-Ohio-4192, ¶ 5 (calling an unsupported order "insufficient"); *State v. Rawls*, 2016-Ohio-7962, 76 N.E.3d 674, ¶ 25 (8th Dist.); *State v. Richard*, 8th Dist. Cuyahoga No. 99449, 2013-Ohio-3918, ¶ 5.

{¶ 20} Because the trial court's initial order failed to comply with R.C. 2953.73(D), it would, in the absence of any further explanation in the record, justify a remand. *See, e.g.*, *Connor* at ¶ 16–17. The question presented by this appeal, though, is whether the trial court's later adoption of the state's proposed factual findings and legal conclusions provides an adequate basis for us to review the trial court's denial. It does.

{¶ 21} The trial court issued its findings of fact and conclusions of law after Riley filed this appeal but this court has previously said that

> "the trial court retains such jurisdiction over the case as is not inconsistent with review by the appellate court, [and therefore had] * * * the power to take action in aid of the appeal * * * [because] a court's [issuing] findings and conclusions * * * does not disrupt the judgment of the court, but explains it."

State v. McGraw, 8th Dist. Cuyahoga No. 97839, 2012-Ohio-3692, ¶ 18, quoting *State v. Greer*, 9th Dist. Summit No. 152717, 1992 Ohio App. LEXIS 5477, at 6 (Oct. 28, 1992).

{¶ 22} This court penned that language while addressing a petition for postconviction relief based upon R.C. 2953.21, *McGraw* at ¶ 7, but the reasoning applies equally to postconviction applications for DNA testing.[3] While the trial court's initial order denying Riley's application was clearly insufficient, the trial court later issued findings and conclusions in compliance with R.C. 2953.73(D); that action was in aid of this appeal and explained the original judgment rather than disrupting it. The findings and conclusions were filed on January 12, 2023, two weeks before Riley's appeal brief was due, providing an opportunity for Riley to

[3] This court has previously relied on precedent in the postconviction-relief context to decide questions raised about procedure in the postconviction-DNA-testing context. In *Conner*, for example, we held that a trial court's failure to include the required reasoning in an order denying an application for postconviction DNA testing did not affect our jurisdiction to review that denial, based on the Supreme Court's reasoning in a case addressing R.C. 2953.21 petitions for postconviction relief. *Conner* at ¶ 3–5, citing *State ex rel. Penland v. Dinkelacker*, 162 Ohio St.3d 59, 2020-Ohio-3774, 164 N.E.3d 336.

address the trial court's reasoning in this appeal.[4] Therefore, we reject Riley's argument regarding the trial court's failure to comply with R.C. 2953.73(D) because the issue is moot.

{¶ 23} Riley next contends that the trial court erred by adopting the state's proposed findings of fact and conclusions of law. He argues that the verbatim adoption of the state's findings and conclusions, several days after those proposed findings were submitted, "casts doubt" on the trial court's order. He says that the circumstances of the trial court's issuance of findings and conclusions show that the court did not adequately consider Riley's application but rather rubber-stamped the denial.

{¶ 24} The Ohio Supreme Court recently said the following:

> The trial court's verbatim adoption of the state's proposed findings of fact and conclusions of law, in an entry journalized the next business day after the state's filing, is not in and of itself erroneous. The timing and form of the entry does, however, make it appear less likely that the court actually considered the entirety of the trial record and the matters filed by the parties pursuant to R.C. 2953.21(D). The United States Supreme Court has criticized the practice of adopting a prevailing party's proposed findings of fact and conclusions of law verbatim, and it has implied that the practice might be suspect in certain postconviction scenarios. *Jefferson v. Upton*, 560 U.S. 284, 294, 130 S.Ct. 2217, 176 L.Ed.2d 1032 (2010).

State v. Bunch, Slip Opinion No. 2022-Ohio-4723, ¶ 28 fn. 2.

{¶ 25} Riley does not specifically argue that this case presents one of those "certain postconviction scenarios," but we nevertheless note that there is no reason

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[4] Riley could also have moved for additional time to file his appellate brief if he needed more time to address the trial court's findings and conclusions.

to conclude that the judge "solicit[ed] the proposed findings *ex parte*" or "adopt[ed] findings that contain internal evidence suggesting that the judge may not have read them." *See Upton* at 294. The trial court's findings are also not "conclusory statements unsupported by citation to the record." *See Anderson v. Bessemer City*, 470 U.S. 564, 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). While the trial court did not give Riley much time to file a formal response to the state's proposed findings before adopting them, we note that Riley's application had been fully briefed and the trial court was thus aware of Riley's arguments against the state's position.

{¶ 26} The trial court should have complied with R.C. 2953.73(D) in the first place and the better practice would have been for it draft its own findings and conclusions. But the trial court's adoption of the state's proposed findings and conclusions is "not in and of itself erroneous," *see Bunch* at ¶ 28 fn.2, and there is no contention that the trial court failed to consider the materials it was required to consider under R.C. 2953.73(C) in determining whether to grant Riley's application. In the absence of any indication that the trial court failed to consider the record before denying Riley's application or failed to read the state's proposed findings before adopting them, it is appropriate to consider the court's adoption of the state's proposed findings as the court's own findings. *See Upton* at 293–294; *also State v. Bell*, 2d Dist. Montgomery No. 29361, 2022-Ohio-3453, ¶ 11 ("[A]lthough the better practice would be for the trial court to set forth its own basis for judgment, we conclude that the decision [of the trial court to refer to and adopt the state's

reasoning as set forth in its memorandum opposing the application] does not require us to remand * * *.").

{¶ 27} Having concluded that the trial court complied with R.C. 2953.73(D) and finding no reason to remand based on the court's adoption of the state's proposed findings of fact and conclusions of law while this appeal was pending, we turn to Riley's substantive challenge to the trial court's denial of his application.

B. The trial court's denial of Riley's application was not an abuse of discretion because an exclusionary DNA result would not have been outcome determinative

{¶ 28} Riley asked the trial court to order new testing of the six .40-caliber cartridge cases recovered by police from the crime scene on the night of the shooting. The parties disagree about whether (1) the prior test performed on these cartridge cases prior to trial was a "prior definitive DNA test" and (2) whether an exclusion result would be "outcome determinative."

{¶ 29} The trial court considered the parties' arguments and held that the cartridge cases were subject to a prior definitive DNA test and "Riley has failed to show that there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover." The trial court further held that even "if the prior testing was 'inconclusive' rather than 'definitive' that Riley's application should still be rejected * * * because the additional testing would not be 'outcome determinative.'" Our consideration of the latter finding is dispositive of this appeal.

{¶ 30} A trial court may only accept an offender's application for postconviction DNA testing if "the offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject offender's case * * * would have been outcome determinative" at trial. R.C. 2953.74(B)(1)–(2). The court must determine that "the identity of the person who committed the offense was an issue" at trial, "one or more defense theories asserted by the offender at the trial * * * was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative" and an exclusion result "will be outcome determinative regarding that offender." R.C. 2953.74(C)(3)–(5).

{¶ 31} The Ohio Supreme Court recently described how courts should go about considering whether an exclusion result would be outcome determinative. *State v. Scott*, Slip Opinion No. 2022-Ohio-4277, ¶ 11. First, a court must presume that the additional testing the offender requested will provide an "exclusion result." R.C. 2953.74(C)(4); *Scott* at ¶ 11. In other words, the trial court must presume that the additional testing would "scientifically preclude[] or foreclose[]" the offender as a contributor of the DNA found on an object. *See* R.C. 2953.71(G); *Scott* at ¶ 11. Then,

> [w]ith that presumed result in mind, the trial court must determine whether such a result would be outcome determinative for the offender. R.C. 2953.74(C)(5). To determine whether postconviction DNA testing would be outcome determinative, the presumed exclusion result must be analyzed in the context of and upon consideration of "all available admissible evidence related to the subject offender's case." R.C. 2953.74(D).

Scott at ¶ 11.

{¶ 32} "Outcome determinative" means that had the results of DNA testing been presented as evidence at trial, there is a strong probability that no reasonable factfinder would have found the offender guilty. *See* R.C. 2953.71(L).

{¶ 33} Here, the trial court held that an exclusion result would not be outcome determinative because the trial judge "was aware that the DNA results did not provide evidence to support Riley's guilt and found Riley guilty regardless." The trial court further reasoned that "[e]ven if Riley was not the one that fired the shots, he was legally responsible for the shooting."

{¶ 34} We review a decision to deny postconviction DNA testing on the basis that an exclusion result would not be outcome determinative for an abuse of discretion. *Scott* at ¶ 12, citing *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124, paragraph one of the syllabus; *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 45.

{¶ 35} A court abuses its discretion when it exercises its judgment in an unwarranted way with respect 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. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *See, e.g.*, *State v. Musleh*, 8th Dist. Cuyahoga No. 105305, 2017-Ohio-8166, ¶ 36, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "An abuse of discretion also occurs when a court '"applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous

findings of fact."'" *Cleveland v. Wanton*, 8th Dist. Cuyahoga No. 109828, 2021-Ohio-1951, ¶ 8, quoting *S. Euclid v. Datillo*, 2020-Ohio-4999, 160 N.E.3d 813, ¶ 8 (8th Dist.), quoting *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.).

{¶ 36} In reviewing the trial court's denial of Riley's application, we are mindful that "the relevant question is not whether the available admissible evidence was enough to convict [the offender]" at trial. *See Scott* at ¶ 14. The relevant question is whether there is a strong probability that no reasonable factfinder would have found Riley guilty of the offenses if a DNA test result excluding Riley as a contributor of the DNA found on the cartridge cases recovered from the crime scene had been presented at trial. *See id.* We analyze this presumptive exclusion result "in the context of and upon consideration of all available admissible evidence." *Id.*, citing R.C. 2953.71(L).

{¶ 37} Among other things, we consider whether an exclusion result "would create sufficient doubt about key pieces of evidence" or "reduce the weight of other evidence." *Scott* at ¶ 14, 16. "[T]he existence of evidence that also supports a defense theory involving an alternative suspect who could be the contributor is highly relevant to the outcome-determinative standard * * *." *Scott* at ¶ 11, citing *State v. Gavin*, 2022-Ohio-3027, 195 N.E.3d 226, ¶ 42 (4th Dist.), and *State v. Reynolds*, 186 Ohio App.3d 1, 2009-Ohio-5532, 926 N.E.2d 315, ¶ 10 (2d Dist.).

{¶ 38} With these considerations in mind, and after a careful review of the record, we agree with the trial court that an exclusion result would not have been outcome determinative under the facts of this case.

{¶ 39} Riley's argument focuses on who, besides himself, may have fired the shots that killed Juan Mitchell and injured Tarez Steele. He posits that another person who was in the Nissan Altima that night fired the shots. He says that if Riley were excluded as a contributor of DNA on the cartridge cases, then Riley was not the shooter. He says that conclusion would be even more clear if the DNA from one of the other individuals in the car matched the DNA found on the cases.

{¶ 40} We disagree. Even assuming Riley did not contribute any DNA to the cartridge cases, and even if some other person's DNA is on them, Riley still may have fired the gun. Under some circumstances, an exclusion result on cartridge cases may be powerful evidence that the offender was not the person who fired the gun. This is not such a case. In our view, an exclusion result would not create sufficient doubt about the other evidence in the case tending to show that Riley could very well have been the shooter. Among other things, there is video evidence that Riley was at the scene of the crime and entered the vehicle on the driver's side, where moments later gunshots erupted. Riley interacted with other individuals in the parking lot before the shooting and may have taken some object from one of them (the bar had a pat-down policy and the state's theory was that Riley may have received a gun during the exchange). Melanie Edwards testified that Riley and the Burgesses, who all sold heroin to the Edwardses, later bragged about being the shooter, with Riley

trying to claim credit for the shooting. Under the facts of this case, evidence tending to show that someone other than Riley touched the bullets or loaded them into the gun would not strongly discredit the other evidence tending to show that Riley may have been the shooter.

{¶ 41} That said, our primary disagreement with Riley's argument is that the argument all but ignores that the trial court found him guilty not because it found him to be the shooter but because it found him to be complicit in these offenses. The trial court specifically acknowledged that "it was impossible to determine who among the three or more individuals in that vehicle actually shot the fatal and injuring shots." *See Riley*, 2019-Ohio-981, at ¶ 38. The trial court found Riley guilty because it found him to be "complicit in the actions that led to the death of Juan Mitchell and the injuries to Tarez Steele" and thus "equally and legally responsible for these crimes * * *." *Id.* This court, in affirming those convictions, also acknowledged testimony that "there was no direct evidence of who fired the gun," "there is no DNA, fingerprint, or other forensic evidence linking Riley * * * to this crime" and "there was no direct evidence that Riley was acting in complicity with the other people in the car." *Id.* at ¶ 37. This court upheld the convictions after "[t]aking into consideration the complicity statute" because the evidence was sufficient for a reasonable factfinder to find complicity and "[n]one of the evidence suggests that Riley was a mere bystander to this drive-by shooting or that he abandoned his criminal purpose before the shots were fired." *Id.* at ¶ 51, 53.

{¶ 42} An exclusion result on the cartridge cases, even combined with a positive match to someone else who was in the car that night, would not diminish the evidence of Riley's "actions[] before, during, and after the incident" from which a rational trier of fact could infer and from which the trial court did, in fact, infer that Riley was complicit in these offenses. *See Riley*, 2019-Ohio-981, at ¶ 53. Stated differently, if an exclusion result would not confirm that someone else was the shooter, it certainly would not show that Riley was less than complicit in these offenses. *See State v. Smith*, 8th Dist. Cuyahoga No. 90749, 2008-Ohio-5581, ¶ 11 (where the defendant was complicit in the rapes of two victims, an exclusion result from a semen sample would not be outcome determinative).

{¶ 43} Riley's appellate argument regarding complicity focuses not on how an exclusion result would somehow cast doubt on the evidence of complicity, but rather on the claim that he was not "tried under a complicity theory" and therefore focused his arguments at trial on disputing that he was the actual shooter. He says that if the defense had had an exclusion result on the cartridge cases before trial, it "would have led to different case theories and arguments at trial" and may have even led Riley to insist upon a trial by jury. There are several problems with this argument, some factual and some legal.

{¶ 44} First, it is not necessary for the state to specifically pursue a complicity theory at trial for a defendant to be found guilty of complicity. A charge of complicity may be stated in terms of the complicity statute or in terms of the principal offense, R.C. 2923.03(F), and an offender can be found guilty of complicity

even if the state indicted and prosecuted the offender for the principal offense. *See, e.g.*, *State v. Singleton*, 8th Dist. Cuyahoga No. 98301, 2013-Ohio-1440, ¶ 38. Moreover, "a defendant can engage in complicity while acting as the principal offender." *Id.* at ¶ 37.

{¶ 45} Second, the record shows that Riley *was* tried on a complicity theory and that his defense counsel was prepared for and defended against that theory at trial. The state obviously believed that Riley was the shooter and it argued as much to the trial court. But it also argued that Riley was complicit in the crimes. During the state's opening statement, for instance, the prosecutor stated that the evidence would show that Riley "was the shooter and/or was in complicity with other shooters during this event." During closing argument, the state argued that "the State's theory is that the defendant is the shooter in this case. * * * And if he's not the shooter, he was complicit with the murder in this case, being that he got in that car right as the shots were fired." Defense counsel, for their part, stated on the record that they had discussed with Riley, prior to trial, the possibility of pleading guilty to a homicide offense under a complicity theory. They asked questions throughout the trial that seemed designed to cut against a finding of complicity. And while they argued during closing argument that Riley was not in the vehicle from which the injurious bullets were fired, they also argued that even if the court found that he was in the car, it should not find that he was complicit in the shooting.

{¶ 46} Finally, the argument focuses on the wrong questions — whether the defense would have made alternative arguments or elected a jury trial if it had had

an exclusion result on the cartridge cases at the time of trial. The answers to these questions inform a court's analysis, of course. But answering them in the affirmative is not, in and of itself, a reason to find that an exclusion result would be outcome determinative. The trial court's inquiry, when determining whether an exclusion result would be outcome determinative, analyzes whether — in the context of and upon consideration of all available admissible evidence related to the subject offender's case — there is a strong probability that no reasonable factfinder would have found the applicant guilty if the exclusion result had been presented to the factfinder at trial.

{¶ 47} Here, for the reasons discussed above at paragraph 42, and after a careful review of the record, we agree with the trial court that there is not a strong probability that no reasonable factfinder would have found Riley guilty of complicity to these offenses if an exclusion result on the cartridge cases had been presented at trial.

{¶ 48} We are mindful that "the spectre of a wrongful conviction in light of available but untested DNA evidence is something the legislature has sought to prevent by making postconviction testing possible." *State v. Scott*, Slip Opinion No. 2022-Ohio-4277, ¶ 22. But because postconviction DNA testing would not be outcome determinative under the facts of this case, we cannot say that the denial of Riley's application to retest the evidence was an abuse of discretion.

{¶ 49} We, therefore, overrule Riley's assignment of error.

III. Conclusion

{¶ 50} Having overruled Riley's sole assignment of error for the reasons stated above, we affirm.

It is ordered that the appellee recover from the 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

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EILEEN A. GALLAGHER, PRESIDING JUDGE

EMANUELLA D. GROVES, J., and
SEAN C. GALLAGHER, J., CONCUR