

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24CA012107

Appellee

v.

SAVION MCCALL

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 22 CR 106129

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 31, 2026

STEVENSON, Judge.

{¶1} Appellant, Savion McCall, appeals from his convictions in the Lorain County Court of Common Pleas finding him guilty of complicity to murder, complicity to felonious assault, complicity to discharge a firearm on or near a prohibited premises, all with associated firearm specifications, and sentencing him on these offenses. This Court affirms.

I.

{¶2} This appeal involves a drive-by shooting that resulted in the death of J.B. McCall and his friend, Christian, were in a car with J.B. when she was shot. J.B. was Christian’s girlfriend at the time of the shooting.

{¶3} According to the evidence the State presented at trial, McCall and Christian had “beef” with a group of individuals that included Lucas and Jeremiah. McCall and Christian fought with Lucas and Jeremiah a few weeks prior to the underlying shooting. On the day of the shooting, McCall argued with Lucas and Jeremiah at a gas station and at a Wendy’s restaurant. Lucas

testified that he had a gun at these incidents, and he is seen in the gas station surveillance video putting a gun in his front pocket as he exited the Impala. Lucas and Jeremiah were riding in a silver Chevy Impala. Witnesses testified that McCall repeatedly yelled “[l]et it blow” or “[b]low me” during the altercations, meaning “[s]hoot.” After arguing with Lucas and Jeremiah, McCall called Christian and told Christian that they “[had] to score.”

{¶4} McCall’s girlfriend, S.J., and her brother (A.G.) were with McCall at the gas station and Wendy’s restaurant altercations and they overheard McCall’s phone conversations with Christian. S.J. was driving the vehicle that they were riding in, with the brother sitting in the front passenger seat and McCall sitting in the backseat. S.J. and the brother testified that McCall became so irate when S.J. refused to pick-up Christian that he tried to strangle S.J. S.J. testified that Christian picked up McCall from her house after the incidents at the gas station and Wendy’s restaurant.

{¶5} Cellphone extracted evidence, including Snapchat messages, was admitted into evidence at trial to establish that Christian had contacted J.B. and told her to bring him his black fanny pack, which contained a 9-millimeter gun. J.B. drove her stepfather’s Jeep to pick up Christian and McCall. Christian, McCall, and J.B. then drove by Lucas’s mother’s house, with Christian driving the vehicle, J.B. riding in the front passenger seat, and McCall riding in the backseat. The silver Impala that Lucas and Jeremiah had been riding in at the gas station and Wendy’s restaurant was parked in front of the house.

{¶6} According to the State, McCall fired shots into the parked Impala as they drove by it. Lucas’s friend, H.G., and Jeremiah were inside the car when the shots were fired, but neither was struck by the bullets. Bullet casings were found on the ground next to the Impala, and a bullet was recovered from the vehicle. There was testimony at trial that the trajectory of the bullets was

going toward the occupants of the vehicle and that the bullet recovered from the Impala was from a 9-millimeter gun.

{¶7} Lucas was standing a short distance away when he heard the gunshots. Lucas testified that he “started running towards [the Jeep] shooting at it” when he heard the shots. One of the shots fired by Lucas struck J.B., who sustained a fatal gunshot wound to her back. Christian fled the scene in the Jeep.

{¶8} An anonymous 911 call was made at 11:07 p.m. reporting hearing shots fired. Evidence was introduced at trial that Christian dropped McCall off at a grandparent’s house before calling 911 at 11:11 p.m. A City of Lorain police officer pulled over the Jeep driven by Christian about a mile from McCall’s grandparent’s house and found J.B. slumped over in the passenger seat of the vehicle. Christian had no firearms on his person and subsequent testing did not find any gunshot residue on his hands.

{¶9} McCall called his girlfriend, S.J., multiple times between 11:13 p.m. and 11:15 p.m. and asked her to pick him up from a grandparent’s house. S.J. and her mother picked up McCall and drove him back to S.J.’s house where he then spent the night. S.J. testified that McCall had on different clothing from when she had seen him earlier that evening. She testified that McCall “didn’t want to talk about” what had happened during the time he was gone. S.J.’s brother testified that McCall “had like a whole different demeanor” when he came back to their house that night.

{¶10} A grand jury indicted McCall on eight counts, including a count for the murder of J.B., counts for felonious assault as to H.G. and Jeremiah, and discharge of firearm on or near prohibited premises, all with firearm specifications. McCall pleaded not guilty and the matter proceeded to a jury trial. Three of the eight counts were dismissed prior to trial.

{¶11} The State presented testimony from 20 witnesses at trial. McCall did not testify nor did he present any witnesses. After hearing the testimony and evidence, the jury found McCall guilty of the following counts:

Count One: guilty of complicity to murder in violation of R.C. 2903.02(B), an unclassified felony, along with a firearm specification;

Count Five: guilty of complicity to felonious assault against Jeremiah in violation of R.C. 2903.11(A), a felony of the second degree, along with two firearm specifications;

Count Seven: guilty of complicity to discharge a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3), a felony of the third degree, along with a firearm specification.

The trial court sentenced McCall to an aggregate prison sentence of 30 years to life.

{¶12} McCall appeals his convictions raising six assignments of error for this Court's review.

I.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED WHEN IT DENIED MR. MCCALL'S MOTION FOR ACQUITTAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. MCCALL ON THE INDICTED OFFENSES.

{¶13} McCall argues in his first assignment of error that the trial court erred when it denied his Crim.R. 29 motion for acquittal. He contends that the trial court erred because there was no evidence of an attempt to cause physical harm as to Jeremiah and there was no evidence that J.B.'s death was reasonably foreseeable. McCall further maintains that the trial court erred when it denied his motion because the State's theory required impermissible inference stacking. We disagree.

Standard of Review

{¶14} “There is no difference between the standard of review for a challenge to the sufficiency of the evidence and that for a motion for acquittal under Crim.R. 29.” *State v. Rivera*, 2023-Ohio-1788, ¶ 37 (9th Dist.), citing *State v. Doss*, 2019-Ohio-436, ¶ 18 (9th Dist.). As this Court stated in *Rivera*, “[a] sufficiency challenge questions whether the State met its burden of production at trial” and “[s]ufficiency is ‘that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.’” *Rivera* at ¶ 37, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). The issue of whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *Thompkins* at 386. “The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

Felonious Assault

{¶15} McCall was charged in count five with felonious assault in violation of R.C. 2903.11(A)(2). Jeremiah is the alleged victim in count five. R.C. 2903.11(A)(2) states that “[n]o person shall knowingly . . . [c]ause or attempt to cause physical harm to another . . . by means of a deadly weapon or dangerous ordnance.” A firearm constitutes a deadly weapon. *See* R.C. 2903.11(E)(1); R.C. 2923.11(A); R.C. 2923.11(B). Pursuant to R.C. 2901.22(B):

A person acts knowingly, regardless of purpose, when the person is aware that the person’s conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

{¶16} In addition to a felonious assault instruction, the court instructed the jury on complicity.¹ R.C. 2923.03(A)(1)-(3) provides that “[n]o person, acting with the kind of culpability required for the commission of an offense, shall . . . [s]olicit or procure another to commit the offense; [a]id or abet another in committing the offense; [or] [c]onspire with another to commit the offense” “A charge of complicity may be stated in terms of this section, or in terms of the principal offense.” R.C. 2923.03(F).

{¶17} McCall argues that the trial court erred by denying his Crim.R. 29 motion based on the State’s purported failure to present evidence that he was aware the Impala was occupied. He argues that, absent such evidence, the State failed to prove that he “was complicit in knowingly causing or attempting to cause physical harm with a deadly weapon to [Jeremiah].” The State points to testimony at trial that H.G. and Jeremiah were both inside the Impala scrolling on their phones at the time of the shooting. It maintains that H.G. and Jeremiah’s faces “would have been clearly illuminated by the light of their cell phones on the dark street” and that sufficient evidence of an attempt to cause physical harm was presented at trial.

{¶18} H.G. testified that she owned the Impala and that she and Jeremiah were “sitting in the car” when it was shot. She testified that the vehicle was parked in front of Lucas’s house and that she was in the backseat and Jeremiah was in the front passenger’s seat. According to H.G., they were scrolling on their phones, looking at Facebook. Lucas had also testified that H.G. and Jeremiah were in the car when it was shot.

¹ As set forth under this Court’s analysis of McCall’s fifth assignment of error, we conclude that the trial court did not err when it gave a complicity instruction to the jury in this case.

{¶19} H.G. clarified on cross-examination that she was “propped up in the back seat[,]” “[b]y the driver’s side door.” H.G. was “propped up” and was able to “see [out] the windows.” Looking out the vehicle’s windows, she had seen the “Jeep drive by twice.”

{¶20} There was testimony at trial that McCall and Christian were familiar with Jeremiah. Specifically, there was testimony that McCall and Christian had an “ongoing beef” with Lucas and Jeremiah, and that McCall exchanged words with both Lucas and Jeremiah at the gas station and Wendy’s restaurant on the night of the incident. Evidence was also produced at trial that McCall wanted to “score” that night; that, after being contacted by McCall, Christian had J.B. pick them up with his gun; and, that McCall and Christian sought out Jeremiah and/or Lucas that evening.

{¶21} Viewing the evidence in a light most favorable to the State, we conclude that McCall has not demonstrated that the trial court erred in denying his Crim.R. 29 motion as to the felonious assault charge. There was ample evidence that, even though it was dark outside, Jeremiah and H.G.’s faces were visible inside the Impala when it was shot and that McCall was familiar with Jeremiah and that he knew what Jeremiah looked like. We conclude that sufficient evidence was presented of an attempt to cause physical harm to Jeremiah.

J.B.’s Death

{¶22} McCall next argues that “[e]ven if there was sufficient evidence to sustain a conviction that [he] was complicit in the drive-by shooting, [Lucas’s] actions broke the chain of causation and were not a reasonably foreseeable consequence of [his] conduct.” He argues that it was not reasonably foreseeable that Lucas would return fire and cause the death of J.B. The State contends that Lucas returning fire and J.B.’s death were both reasonably foreseeable.

{¶23} Evidence was introduced at trial that Lucas had a gun in his pocket at the gas station on the night of the incident and that McCall was aware that Lucas had a gun. Witnesses testified

that McCall repeatedly yelled “[l]et it blow” or “[b]low me[,]” meaning “[s]hoot[,]” during the altercations with Lucas and Jeremiah at the gas station and Wendy’s restaurant. There was also testimony that, after arguing with Lucas and Jeremiah, McCall called Christian and told Christian that they “[had] to score.”

{¶24} There was evidence admitted at trial, including cellphone extracted evidence and Snapchat messages, that Christian contacted J.B. after talking to McCall and that Christian told J.B. to bring him his black fanny pack that contained a gun. J.B. picked-up Christian in the Jeep, and they then picked-up McCall. The Jeep drove in front of Lucas’s house and one of its occupants fired the first shot that evening.

{¶25} Viewing the evidence in the light most favorable to the State, we conclude that McCall has not demonstrated that the trial court erred in denying his Crim.R. 29 motion. The State presented evidence that McCall set into motion the events that occurred that evening and that McCall knew Lucas had a gun. Sufficient evidence was introduced to establish that, knowing Lucas had a gun, it was reasonably foreseeable that Lucas would return fire and that someone would be struck when shots were fired. *See State v. Catron*, 2015-Ohio-2697, ¶ 16 (8th Dist.) (it was reasonable for jury to conclude that, once shots were fired, shots would be fired back and cause death); *State v. Hoston*, 2015-Ohio-5422, ¶ 20 (8th Dist.) (it was reasonably foreseeable that, when shots are fired, shots will be fired in return and someone may be “struck by an errant shot”). Evidence was also introduced that J.B., who was sitting in the front passenger seat of the Jeep, had reclined her seat as far back as it would go to avoid being shot, indicating that the occupants of the Jeep believed that Lucas would return shots. We conclude that sufficient evidence was presented to establish that it was reasonably foreseeable that Lucas would return fire and cause the death of J.B.

Inference Stacking

{¶26} McCall lastly argues in his first assignment of error that the trial court erred in denying his Crim.R. 29 motion for acquittal because “the State’s theory required impermissible inference stacking for the factfinder to deduce that [he] desired a firearm to participate in a drive-by shooting.” He argues that there was no testimony or evidence at trial that he called Christian to acquire a firearm (first inference); that he was aware Christian had a firearm in the Jeep and that he desired to participate in a drive-by shooting (second inference); and/or that he was seen with a firearm that evening or that he shot from the Jeep (third inference). The State maintains that the trial court properly denied McCall’s Crim.R. 29 motion for acquittal as sufficient evidence was introduced to establish that McCall called Christian to acquire a firearm; that it was reasonable to believe that McCall knew Christian had a firearm in the Jeep; and that, even if Christian was the shooter, McCall cooperated with the commission of the crime and shared the same criminal intent as Christian.

{¶27} The evidence presented at trial was sufficient to demonstrate that McCall called Christian to obtain a firearm. Lucas testified that he and Jeremiah “got into a fight . . . over money” with McCall and Christian a couple of weeks before the incident and Detective Kurt Graupmann, the lead investigator, testified that he had learned about their “ongoing beef” during his investigation. Lucas also testified that he had “a gun in [his] pocket” at the gas station and Wendy’s on the night of the incident. Surveillance footage from the gas station was presented at trial showing Lucas putting a gun in the pocket of his hooded sweatshirt as he exited the Impala. S.J. testified that, after McCall repeatedly pounded on the roof of her car at the gas station yelling “[l]et it blow” at Lucas, he called Christian. S.J. heard McCall talking to Christian about meeting back up with those at the gas station and telling Christian that “he wanted to score.” She testified that

McCall was on the phone with Christian for over 20 minutes about needing to “score.” S.J.’s brother who, was also riding in the car, similarly testified that he heard McCall telling Christian that “we have to score.” Cellphone extracted evidence, including Snapchat messages, was admitted into evidence at trial to establish that Christian had contacted J.B. and told her to bring him his black fanny pack, which contained a 9-millimeter gun.

{¶28} S.J. testified that she sat in the car with McCall at her house while McCall waited for Christian to pick him up. S.J. testified that she “begged [McCall] not to go” and that she “cried to [her] mom” when he left with Christian. S.J.’s testimony suggested that, knowing McCall wanted to “score,” she was worried about McCall’s safety. Evidence was also admitted at trial establishing that S.J. texted McCall to “be safe” after he left with Christian and that she repeatedly called and texted to see if McCall and Christian were okay. It can reasonably be inferred from S.J.’s testimony that she was fearful that McCall would be at risk of harm as he was intending to be involved in a shooting.

{¶29} Sufficient evidence was presented that McCall told Christian to bring a gun. Even if McCall was not the shooter, sufficient evidence was presented to show that he “‘supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime[.]” *State v. Hendon*, 2016-Ohio-8137, ¶ 14 (9th Dist.), quoting *State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus. As the Ohio Supreme Court stated in *Johnson*, “intent may be inferred from the circumstances surrounding the crime” and “participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed.” *Johnson* at 245.

{¶30} For the reasons set forth above, and viewing the evidence in the light most favorable to the State, we conclude that the State presented sufficient evidence to support McCall’s

convictions for complicity to felony murder and complicity to felonious assault. Accordingly, we conclude that the trial court properly denied McCall’s Crim.R. 29 motion for acquittal. McCall’s first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED BY ADMITTING TESTIMONY FROM OFFICER CAMBARARE ABOUT [JEREMIAH’S] LOCATION AT THE TIME OF THE SHOOTING.

{¶31} McCall argues in his second assignment of error that the trial court erred by admitting testimony from Officer Cambarare about Jeremiah’s location at the time of the shooting. We disagree.

{¶32} McCall acknowledges that he did not object to the admission of Officer Cambarare’s testimony at trial and that his argument is subject to plain error review on appeal. “Plain error occurs if there has been an error, meaning a deviation from the legal rule; the error was an obvious defect; and the error affected a substantial right.” *Rivera*, 2023-Ohio-1788, at ¶ 65 (9th Dist.), citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002); Crim.R. 52(B) (“[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”). “Notice of plain error . . . is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

To correct a plain error, all of the following elements must apply: ‘First, there must be an error, i.e., a deviation from the legal rule. . . . Second, the error must be plain. To be ‘plain’ within the meaning of Crim.R. 52(B), an error must be an ‘obvious’ defect in the trial proceedings. . . . Third, the error must have affected ‘substantial rights[]’ [to the extent that it] . . . affected the outcome of the trial.’

State v. Jordan, 2014-Ohio-2857, ¶ 13 (9th Dist.), quoting *State v. Bennett*, 2014-Ohio-160, ¶ 64 (9th Dist.), citing *State v. Hardges*, 2008-Ohio-5567, ¶ 9 (9th Dist.).

Officer Cambarare's Testimony

{¶33} Officer Cambarare is a police officer for the City of Lorain and he was working patrol on the night of the incident. Officer Cambarare testified that he was in his patrol car with the windows down when he heard shots around 11:00 p.m. coming “from the area of 25th and Lexington.” He testified that he drove to the area where he heard the gunshots and that he “observed a silver or gray Impala . . . parked on West 25th Street with two individuals standing behind it.” It was later discovered that the Impala was parked in front of Lucas’s mother’s house.

{¶34} According to Officer Cambarare, he asked the individuals standing by the Impala if they “hear[d] any gunshots or [knew] of anything going on[.]” He testified that the individuals told him that “they had no idea what was going on” and that, therefore, he “kept driving . . . [to] investigate the shots fired.”

{¶35} Officer Cambarare testified that he returned to the Impala 5-10 minutes later and that he “observ[ed] some bullet holes [in] the vehicle and radiator fluid leaking from the engine area, leaking onto the pavement.” He also observed “shell casings . . . next to the . . . Impala[.]” “shell casings in the roadway[.]” and a “bullet fragment directly next to the front driver’s side fender” of the Impala. Officer Cambarare realized that the area “was potentially . . . the scene of a shooting” and he proceeded to secure the scene and investigate.

{¶36} Officer Cambarare testified that, “as [he] was observing [the] shell casings,” Lucas came out of the house and tried to enter the Impala. Officer Cambarare and Sergeant Matthewson, who had arrived at the scene, detained Lucas and placed him in a police cruiser.

{¶37} Officer Cambarare was asked on direct examination if he “encounter[ed] a person by the name of Jeremiah” after he returned to the Impala. The officer responded “[y]es.” Officer Cambarare testified that, as they were securing the scene, he saw Jeremiah “walking down the

sidewalk” and “approach[ing] from the east” The prosecutor asked Officer Cambarare what Jeremiah was doing, and he responded “[h]e approached us and I believe he stated he was sitting in that Impala when it was shot.” The prosecutor then asked the officer “what did you do . . . ?” to which the officer replied, “[w]e secured him in another police cruiser separate from Lucas . . . so he could be interviewed later.”

{¶38} Counsel for McCall asked the officer on cross-examination “[y]ou said at some point in time that [Jeremiah] said he was in the vehicle when shots were fired, correct?” Officer Cambarare responded “[y]es.” The prosecutor then asked Officer Cambarare on redirect examination:

Q. You don’t know where Jeremiah . . . was when there were shots fired at the Impala, do you?

A. No, I do not.

Q. But you later learned that Jeremiah . . . stated he was in the Impala?

A. Yes.

{¶39} Officer Cambarare’s testimony was consistent with the testimony of H.G. and Lucas. H.G. testified that she was in the Impala with Jeremiah when shots were fired at the vehicle. Lucas also testified that H.G. and Jeremiah “stayed in the car” and that he “got [H.G.] and Jeremiah out of the car” after the shots were fired. The State did not produce Jeremiah as a witness at trial.

Analysis

{¶40} McCall argues that Officer Cambarare’s testimony as to Jeremiah’s location at the time of the shooting constitutes inadmissible hearsay and that the trial court erred by admitting this testimony at trial. He further argues that the trial court admitted this testimony in violation of the Confrontation Clause.

{¶41} The State contends that Officer Cambarare’s testimony was not hearsay as the statement was not offered to prove the truth of the matter asserted, but rather to explain the officer’s conduct during the investigation. It further contends that, even if the officer’s statement was inadmissible, it was harmless error as H.G. and Lucas also testified that Jeremiah was in the Impala at the time of the shooting.

{¶42} Evid.R. 801(C) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement.” “Statements that are offered into evidence to explain an officer’s conduct while investigating a crime are not, however, hearsay.” *Jordan*, 2014-Ohio-2857, at ¶ 7 (9th Dist.), citing *State v. Blevins*, 36 Ohio App.3d 147, 149 (9th Dist. 1987). The Ohio Supreme Court has recognized that:

in order for testimony offered to explain police conduct to be admissible as nonhearsay, the conduct to be explained should be relevant, equivocal, and contemporaneous with the statements; the probative value of statements must not be substantially outweighed by the danger of unfair prejudice; and the statements cannot connect the accused with the crime charged.

State v. Ricks, 2013-Ohio-3712, ¶ 27.

{¶43} The record reflects that Officer Cambarare was conducting an investigation when he encountered Jeremiah. He testified that he was securing the scene, and that he had already placed Lucas in a police cruiser to separate the witnesses, when he encountered Jeremiah. “It is well-established that, where statements are offered into evidence to explain an officer’s conduct during the course of investigating a crime, such statements are generally not hearsay.” *State v. Quintile*, 2024-Ohio-2026, ¶ 17 (9th Dist.), quoting *State v. Brown*, 2020-Ohio-3614, ¶ 82 (3d Dist.), quoting *State v. Humphrey*, 2008-Ohio-6302, ¶ 11 (10th Dist.). Officer Cambarare’s statement about what Jeremiah told him was, therefore, properly admitted for the nonhearsay

purpose of explaining the police investigation. *See State v. Parsons*, 2019-Ohio-5021, ¶ 7 (9th Dist.) (statement to police officer that was made during course of investigation was nonhearsay and was properly admitted to explain “the progress of the police investigation.”). As there was no objection to this testimony at trial, there was no opportunity for the court to instruct the jury that Officer’s Cambarare’s statement was admissible for that purpose only.

{¶44} Further, this Court cannot say that the outcome of trial would have been different but for the admission of Officer Cambarare’s statements concerning Jeremiah’s location at the time of the shooting. The officer was not the only witness that testified Jeremiah was in the car. H.G. testified that she was in the back seat of the Impala and that Jeremiah was in the front passenger seat of the vehicle at the time of the shooting. Lucas similarly testified that H.G. and Jeremiah were in the Impala at the time of the shooting and that he got them out of the vehicle after the shooting. We conclude that Officer Cambarare’s statements did not affect McCall’s substantial rights as they did not affect the outcome of trial. *Jordan*, 2014-Ohio-2857, ¶ 13 (9th Dist.).

{¶45} McCall’s second assignment of error is, accordingly, overruled.

ASSIGNMENT OF ERROR III

THE CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE.

{¶46} McCall argues in his third assignment of error that his convictions were against the manifest weight of the evidence. We disagree.

{¶47} When considering a challenge to the manifest weight of the evidence, this Court is required to consider the entire record, “weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact 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. Otten*, 33 Ohio App.3d 339, 340 (9th Dist. 1986). A reversal on a manifest weight of the evidence challenge is reserved for exceptional cases where the evidence weighs heavily against the conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶48} In his third assignment of error, McCall focuses on the trial testimony of H.G. and Lucas that both H.G. and Jeremiah were in the Impala when it was shot. He points out that despite this testimony, he was found not guilty of felonious assault as to H.G. (count three), but guilty of complicity to felonious assault as to Jeremiah (count five). He argues that “the jury apparently found [Lucas] and [H.G.] lacked credibility[]” and that, “[s]ince Officer Cambarare’s testimony about [Jeremiah’s] location at the time of the shooting was inadmissible and unreliable, there was no credible, admissible evidence introduced at trial to result in a conviction.” As set forth under our analysis of McCall’s second assignment of error, we conclude that the trial court did not err by admitting testimony from Officer Cambarare about Jeremiah’s location at the time of the shooting. The State argues that “[t]he jury’s decision does not indicate that both [Lucas] and [H.G.] lacked credibility, rather it indicates that the jury believed there were key differences in [Jeremiah] and [H.G.’s] position in the car and involvement in the dispute with [McCall] and [Christian].”

{¶49} McCall was charged with felonious assault in violation of R.C. 2903.11(A)(2). R.C. 2903.11(A)(2) states that “[n]o person shall knowingly . . . [c]ause or attempt to cause physical harm to another . . . by means of a deadly weapon or dangerous ordnance.” A firearm constitutes a deadly weapon. *See* R.C. 2903.11(E)(1); R.C. 2923.11(A). The jury found McCall guilty of complicity to felonious assault as to Jeremiah.

{¶50} To be guilty of complicity to felonious assault, the jury had to find that McCall, “acting with the kind of culpability required for the commission of [the] offense . . . [s]olicited or

procure[d] . . . [a]id[ed] or abet[ted] . . . [or] [c]onspire[d] with another to commit the offense” R.C. 2923.03(A)(1)-(3).

{¶51} McCall argues that the felonious assault verdicts were inconsistent. His argument is based on the testimony that both Jeremiah and H.G. were in the Impala when it was shot but the jury only found him guilty of complicity to felonious assault as to Jeremiah, but not guilty as to H.G. McCall argues that this demonstrates that the jury clearly lost its way, rendering his conviction against the manifest weight of the evidence. McCall, however, “has not separately argued that the trial court erred by accepting inconsistent jury verdicts, so our consideration of this argument is limited to whether it bears on the weight of the evidence. It does not.” *State v. Phillips*, 2017-Ohio-1186, ¶ 20 (9th Dist.). “Even assuming arguendo that the issue was separately argued on appeal, ‘juries are not required to reach consistent verdicts between separate counts.’” *State v. Hamilton*, 2019-Ohio-1829, ¶ 23 (9th Dist.), quoting *State v. Singh*, 2018-Ohio-3473, ¶ 15 (9th Dist.).

{¶52} Having reviewed the record, we cannot conclude that this is an exceptional case where the jury lost its way by convicting McCall of complicity to felonious assault as to Jeremiah. *See Otten* at 340. There was evidence admitted establishing that the intended victim of the shooting was Jeremiah. The State introduced testimony at trial as to the trajectory of the bullets that were fired at the Impala. Detective Brian Denman of the Lorain Police Department testified that he recovered two bullets that had struck the Impala, with one bullet being recovered from the motor and the other bullet recovered from the passenger’s side firewall. He testified that the bullets were “[m]ost definitely” angled towards “the passenger compartment” of the Impala and that the bullet that was recovered from the firewall “was going in the direction towards the front passenger’s seat.” H.G. testified that Jeremiah was sitting in the front passenger seat of the Impala when it was

shot. There was also testimony that McCall and Christian had an “ongoing beef” with Lucas and Jeremiah, not H.G. Due to the “ongoing beef,” they knew what Jeremiah looked like.

{¶53} It is well-established that “a trier of fact enjoys the best position to assess the credibility of witnesses.” *State v. Tyus*, 2020-Ohio-4455, ¶ 57 (9th Dist.). *See also Prince v. Jordan*, 2004-Ohio-7184, ¶ 35 (9th Dist.) (“the jury is free to believe all, part, or none of the testimony of each witness.”) This Court ““will not overturn a conviction as being against the manifest weight of the evidence simply because the trier of fact chose to believe the State’s version of events over another version.”” *State v. Tolliver*, 2017-Ohio-4214, ¶ 15 (9th Dist.), quoting *State v. Barger*, 2016-Ohio-443, ¶ 29 (9th Dist.).

{¶54} We conclude that the jury, in resolving any conflicts in the evidence, did not clearly lose its way and create a manifest miscarriage of justice requiring a reversal of McCall’s complicity to felonious assault conviction. *See Otten*, 33 Ohio App.3d at 340. This is also not an exceptional case in which the evidence weighs heavily against the conviction. *See Thompkins*, 78 Ohio St.3d at 387. McCall’s manifest weight of the evidence argument, as asserted in his third assignment of error, is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED BY ADMITTING TESTIMONY ABOUT MR. MCALL’S CHARACTER IN VIOLATION OF RULES 403 AND 404.

{¶55} McCall argues in his fourth assignment of error that the trial court erred by admitting testimony about his character in violation of Evid.R. 403 and Evid.R. 404. We disagree.

{¶56} “The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.” *State v. Sage*, 31 Ohio St.3d 173, 180 (1987). Thus, an appellate court will not reverse the trial court’s decision absent an abuse of discretion. *State v. Myers*, 2002-Ohio-6658, ¶ 75. “The term ‘abuse of discretion’ connotes more than an error of judgment; it implies that the

court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying an abuse of discretion standard, a reviewing court is precluded from substituting its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶57} Although *Blakemore* is often cited as the general standard for reviewing discretionary decisions, the Ohio Supreme Court has provided additional guidance about the nature of an abuse of discretion:

Stated differently, an abuse of discretion involves more than a difference in opinion: the “term discretion itself involve the idea of choice, of an exercise of the will, of a determination made between competing considerations.” *State v. Jenkins*, 15 Ohio St.3d 164, 222 (1984), quoting *Spalding v. Spalding*, 355 Mich. 382, 384 (1959). For a court of appeals to reach an abuse-of-discretion determination, the trial court's judgment must be so profoundly and wholly violative of fact and reason that “it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Id.*, quoting *Spalding* at 384-385.

State v. Weaver, 2022-Ohio-4371, ¶ 24. Even if an appellant demonstrates that the trial court's ruling was an abuse of discretion, he does not establish reversible error unless he shows that the error prejudiced his substantial rights. *Beard v. Meridia Huron Hosp.*, 2005-Ohio-4787, ¶ 20.

{¶58} Before Christian and J.B. picked up McCall on the night of the incident, McCall had been riding in a car driven by his girlfriend, S.J. S.J.'s brother was also in the car. S.J. and her brother were present at the gas station and Wendy's restaurant when McCall exchanged words with Lucas and Jeremiah.

{¶59} The brother went back to his house with McCall and his sister after the incident at Wendy's. He testified that McCall left the house and came back that evening. According to the brother, McCall was “red-hot angry[]” when he left the house but was “all calm” when he came back.

{¶60} Defense counsel asked the brother questions on cross-examination about his relationship and feelings towards McCall. Defense counsel asked brother as follows:

Q. [DEFENSE COUNSEL] You had said that you and [McCall] - - other than his relationship with [S.J.], you didn't really know him or his friends, correct?

A. [BROTHER] Correct.

Q. [DEFENSE COUNSEL] You didn't really hang out with him?

A. [BROTHER] No.

Q. [DEFENSE COUNSEL] You didn't like him?

A. [BROTHER] No.

The following exchange then occurred on redirect examination:

Q. [THE STATE] Why don't you like the defendant?

A. [BROTHER] Just the way he is.

Q. [THE STATE]: What's "the way he is"?

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: You opened it up. You may answer.

...

A. [BROTHER] Just the way he walks, talks. Just like how he acts.

Q. [THE STATE] How does he act?

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

A. [BROTHER] Like he - - like hood.

Q. [THE STATE:] What do you mean by "hood"?

A. [BROTHER] Like gangster and - - he just has like that tone to him.

{¶61} McCall argues that the trial court improperly admitted the brother's character testimony. He contends that the State introduced this testimony "for the impermissible purpose of propensity and there was no permissible purpose to admit it, nor did Rule 404(A)(1) permit the admission of this character evidence." Even if there was a permissible purpose to admit the brother's testimony, McCall argues that the trial court erred in admitting the testimony as the danger of unfair prejudice far outweighed its probative value.

{¶62} The State points out that it did not elicit the objected to testimony on the brother's direct examination and that it did not seek to elicit any character evidence in its questioning. As set forth in the trial transcript, defense counsel asked the brother if he liked McCall on cross-examination, and the State followed up by asking the brother why he did not like McCall on redirect examination. The State maintains that the trial court did not abuse its discretion in allowing the brother's limited response. It also contends that, even if the trial court abused its discretion in allowing the brother's testimony, "it was harmless error for the jury to hear that [McCall] was 'hood,' because it also heard unobjected to testimony that [McCall] stated to law enforcement that his altercation with [Lucas] and [Jeremiah] [was] over an alleged drug debt."

{¶63} Called as a witness by the State, the brother made no mention of his personal feelings toward McCall on direct examination. Rather, it was the defense during the brother's cross-examination that chose to ask him if he liked McCall. Having opened the door, the prosecutor asked the brother on rebuttal why he did not like McCall. Based on this cross-examination, McCall opened the door to testimony about why the brother did not like him. Therefore, we conclude that the trial court did not abuse its discretion in allowing the State's follow-up line of questioning. *See State v. Morris*, 2005-Ohio-1136, ¶ 108-109 (9th Dist.) (no abuse of discretion by the trial court in allowing the prosecutor to ask follow-up questions on rebuttal about the defendant's character and

violent behavior where defense had opened the door on cross-examination); *State v. Eldridge*, 2003-Ohio-7002, ¶ 42, 49 (12th Dist.) (trial court did not abuse its discretion in allowing the prosecutor to ask follow-up questions on rebuttal where the defendant had opened the door to the line of questioning about his character).

{¶64} Assuming *arguendo* that McCall’s counsel did not open the door, we conclude that it was harmless error for the jury to hear the brother’s testimony that he did not like McCall and that he believed McCall acted like he was “hood” or “gangster[.]” Detective Christopher Colon of the Lorain Police Department testified at trial that, according to McCall, the dispute with Lucas and Jeremiah was “over a drug deal[.]” and the allegation that McCall “owed [] money for a marijuana debt.” McCall’s counsel did not object to this testimony. Further, as set forth under our analysis of McCall’s first and third assignments of error, evidence of McCall’s guilt was based on other evidence such that the admission of the challenged character evidence was harmless error, if it constituted error at all.

{¶65} For the reasons set forth above, McCall’s fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ERRED WHEN INSTRUCTING THE JURY.

{¶66} McCall argues in his fifth assignment of error that the trial court erred when instructing the jury. He argues that the trial court erred when it gave the jury instructions on flight and complicity and that it erred when it responded to juror questions during deliberation. We disagree.

{¶67} “[A] trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.” *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus, citing Crim.R. 30(A).

“This Court reviews a trial court’s decision to give or not give jury instructions for an abuse of discretion under the particular facts and circumstances of the case.” *State v. Calise*, 2012-Ohio-4797, ¶ 68 (9th Dist.). Further, the Ohio Supreme Court has held that “[a] reversal of a conviction based upon a trial court’s response [to a juror question during deliberations] requires a showing that the trial court abused its discretion.” *State v. Carter*, 72 Ohio St.3d 545, 553 (1995). As previously set forth, an abuse of discretion implies the court’s decision is arbitrary, unreasonable, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219. When applying this standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons*, 66 Ohio St.3d at 621.

Flight Instruction

{¶68} McCall does not dispute that the flight instruction that was given to the jury was a proper instruction of the law. Rather, he argues that by giving a flight instruction to the jury, the trial court “improperly permitted the jury to consider [his] absence at the scene as evidence of his consciousness of guilt.” The State argues that the trial court did not err in giving a flight instruction as evidence was introduced at trial that McCall was taken to a different location before Christian called 911 and attempted to take J.B. to the hospital.

{¶69} “[E]vidence of flight is admissible as it tends to show consciousness of guilt. . . . [A] jury instruction on flight is appropriate if there is sufficient evidence in the record to support the charge.” *State v. Deel*, 2023-Ohio-2862, ¶ 27 (9th Dist.), quoting *State v. Villa*, 2006-Ohio-4529, ¶ 29 (9th Dist.). See also *State v. Adams*, 2015-Ohio-3954, ¶ 240 (“Requested jury instructions should ordinarily be given if they are correct statements of law, if they are applicable to the facts in the case, and if reasonable minds might reach the conclusion sought by the requested instruction.”).

{¶70} Having reviewed the record, we cannot conclude that the trial court abused its discretion when it gave a flight instruction to the jury. *See Deel* at ¶ 30, citing *Calise*, 2012-Ohio-4797, at ¶ 68 (9th Dist.). Sufficient evidence was introduced at trial that Christian drove McCall to a grandparent’s house *before* calling 911 or seeking medical treatment for J.B. McCall was not present when Christian called 911 or when police stopped the vehicle. There was also testimony that McCall changed his clothes shortly after the shooting and before S.J. picked him up from his grandparent’s house. McCall did not speak to the police until the next day. Based on the foregoing, the trial court reasonably could have concluded that the State produced sufficient evidence to warrant a flight instruction. *Deel* at ¶ 30, citing *Villa* at ¶ 29. The trial court did not abuse its discretion when it gave a flight jury instruction and McCall’s argument is overruled.

Complicity Instruction

{¶71} McCall also does not dispute that the complicity instruction that was given to the jury was a proper instruction of the law. He argues, rather, that “[t]he conspiracy theory to complicity instruction was inappropriate because [he] was not indicted on the statutory crime of conspiracy.” McCall asserts that “reversal is appropriate” because he was not indicted on conspiracy and “because the trial court did not have the jury specify the theory of liability under which it convicted [him] as a complicitor.”

{¶72} The State argues that “nothing in Ohio law requires that a defendant be charged and convicted of conspiracy to have this . . . included” in the complicity jury instructions. It asserts that sufficient evidence was introduced at trial to warrant a complicity instruction. The State further cites R.C. 2923.01(G) and argues that “a defendant cannot be convicted of committing a certain offense or of complicity to the commission of an offense and also be convicted of conspiracy involving the same offense.”

{¶73} “[A] defendant charged with an offense may be convicted of that offense upon proof that he was complicit in its commission, even though the indictment is ‘stated . . . in terms of the principal offense’ and does not mention complicity.” *State v. Herring*, 94 Ohio St.3d 246, 251 (2002), quoting R.C. 2923.03(F). “A complicity instruction is proper if ‘the evidence adduced at trial could reasonably be found to have proven the defendant guilty’” of soliciting or procuring another to commit the offense, aiding or abetting another, or conspiring with another to commit the offense. *State v. Simpson*, 2013-Ohio-4276, ¶ 33 (9th Dist.), quoting *State v. Perryman*, 49 Ohio St.2d 14 (1976), paragraph five of the syllabus; R.C. 2923.03(A)(1)-(3); *State v. Ross*, 2023-Ohio-1185, ¶ 51 (9th Dist.).

{¶74} McCall did not have to be charged with conspiracy to have R.C. 2923.02(A)(2) included as an option in the jury instructions. Rather, he was convicted of complicity which includes conspiracy as a potential element of that offense. R.C. 2923.03(A)(1)/(3) defines complicity in part as: “[n]o person, acting with the kind of culpability required for commission of an offense . . . shall . . . conspire with another to commit the offense in violation of section 2923.01[.].” Thus, the court was required to define conspiracy under R.C.2923.01 to instruct the jury on complicity under R.C. 2923.03(A)(1).

{¶75} The State presented evidence at trial that McCall repeatedly yelled “[l]et it blow” at Lucas and Jeremiah during altercations that evening, that Lucas had a gun at the altercations, and that McCall told Christian, who had a gun, they “[had] to score.” Evidence was introduced establishing that McCall solicited Christian to pick him up with his gun, to drive by the location where Lucas and Jeremiah were located, and to shoot at where he believed Lucas and Jeremiah were located. We cannot say that the trial court erred in giving a complicity instruction where the evidence showed that McCall had purpose to solicit or procure another to commit the offense or

that he conspired with another to commit the offense. R.C. 2923.03(A)(1)/(3). Accordingly, McCall's argument that the trial court erred when it included the conspiracy definition within the complicity instruction it gave to the jury is overruled.

Juror Questions During Deliberations

{¶76} McCall next argues in his fifth assignment of error that the trial court erred when it responded to juror questions one, three, and four. He argues that the trial court improperly led the jury by giving answers that were more extensive than necessary and that, after responding with extensive answers, the trial court erred when it responded "yes" to juror question four. The State contends that the trial court's responses to the jurors' questions were legally accurate and that it did not err in its responses.

Juror Question One

{¶77} The first question the jury submitted to the court during deliberations was "[c]an the Defendant be found guilty of murder, Count 1, if he is found innocent of felonious assault, Counts 2 and 3?" Over the objection of defense counsel, the court responded:

The Defendant cannot be found guilty of murder under Count 1, unless he is found guilty of at least one count of felonious assault or one count of complicity to felonious assault.

{¶78} McCall argues that the "the correct response [to juror question one] would have been to simply respond 'no.'" It is his position that the trial court's response "improperly provided the roadmap for the jury to fulfill its desire[.]" The State argues that the trial court's answer was legally correct and that it did not err in its response.

{¶79} McCall was charged in count one of the indictment with felony murder in violation of R.C. 2903.02(B) with the predicate offense of felonious assault (victim Jeremiah) in violation of R.C. 2903.11(A)(2), among other counts. R.C. 2903.02(B) provides that "[n]o person shall

cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree”

{¶80} Upon review, we conclude that the trial court did not abuse its discretion when it responded to juror question one. There is no dispute that the court's response that McCall could not be guilty of count one “unless he is found guilty of at least one count of felonious assault or one count of complicity to felonious assault” was a correct statement of the law. *See State v. Moore*, 2023-Ohio-2864, ¶ 22 (9th Dist.) (trial court did not deviate “from a legal rule by instructing the jury that it could find [the defendant] guilty of felony murder based upon the predicate offense of felonious assault.”). To the extent it provided a “roadmap”, it was merely the roadmap required under Ohio law to prove felony murder. As the trial court responded with a correct statement of the law, we conclude that it did not err when it responded to juror question one.

Juror Question Three

{¶81} The third question the jury submitted to the court was:

Regarding complicity of felonious assault, does the possibility of causing physical harm, as a result of one's actions, constitute/meet the requirements for an attempt to cause physical harm?

After discussions with the prosecutor and defense counsel, the trial court responded to this question as follows:

If you find beyond a reasonable doubt that physical harm was reasonably foreseeable, and not merely a remote possibility, then this element of an attempt has been proven. If you find that physical harm was merely a remote possibility, the State has not met its burden of proof.

Counsel for McCall expressed that he was “not convinced that that's the question [the jury is] asking” and he thought the court should “ask for further clarification as to their question.”

{¶82} McCall argues that “the trial court erred when it instructed the jury that it could find that an attempt to cause physical harm can exist where physical harm was a ‘reasonably

foreseeable’ consequence of (maybe) [his] conduct.” The State contends that the trial court’s response was legally accurate and that it did not err in its response.

{¶83} McCall was charged in count five of the indictment with felonious assault in violation of R.C. 2903.11(A)(2). To be guilty of felonious assault, one must “[c]ause or attempt to cause physical harm to another . . . by means of a deadly weapon or dangerous ordnance.” The trial court had instructed the jury in its jury instructions that McCall “is . . . responsible for the natural and foreseeable consequences that follow in the ordinary course of events from the act or failure to act.” There is no dispute that this instruction is consistent with Ohio Jury Instructions and that counsel for McCall did not object to this instruction at trial.

{¶84} The trial court told the jury in its response to question three that physical harm must be “reasonably foreseeable,” and not a mere “remote possibility[.]” Ohio courts have recognized a “reasonably? foreseeable” analysis with attempt. *See State v. Johnson*, 2014-Ohio-4443, ¶ 16-20, 25 (9th Dist.) (evidence supported a felonious assault conviction where the harm was reasonably foreseeable); *State v. Sutton*, 2015-Ohio-4074, ¶ 35 (8th Dist.) (appellant’s argument that she was not complicit in another’s actions because she did not intend for the victim to be harmed was without merit where it was “foreseeable” that the victim might suffer serious physical harm).

{¶85} Despite McCall’s argument, the trial court responded to juror question three with a correct statement of the law. Accordingly, we conclude that the trial court did not abuse its discretion when it responded to juror question three.

Juror Question Four

{¶86} The fourth question the jury submitted to the trial court during deliberations was:

Count 1, murder, does the proximate cause result clause also apply to the complicity to murder charge?

Over objection from defense counsel, the trial court responded “[y]es.”

{¶87} McCall argues that, after the trial court gave a rather detailed answer to juror question three, it “should have more carefully crafted its response to the jury’s question to clearly articulate that the jury needed to find that *death* was a reasonably foreseeable consequence of [his] conduct to convict him of felony murder.” The State argues that the trial court did not err when it provided a legally correct answer to juror question four.

{¶88} The trial court instructed the jury before deliberations, without objection, that “[d]eath is the proximate result of the Defendant’s conduct in committing the underlying felony offense, if it is a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in light of ordinary experience.” It is irrelevant whether the killer was the Defendant, an accomplice, or some third party” This instruction applies to the murder charge as well as complicity to murder. 2 OJI-CR 523.03(B), Comment (“*Instructions must cover the elements of the principal offense together with the meaning of the words and phrases.*”). Complicity in this case referred back to the murder charge, and proximate cause was part of that definition. McCall does not argue that the trial court’s response to juror question four was not legally accurate. He argues that the trial court should have given a more extensive response to this question. As the court’s response was legally accurate, this Court cannot say that the trial court abused its discretion when it responded to this juror question.

{¶89} For the reasons set forth above, we conclude that the trial court did not err when it instructed the jury in this case and when it responded to juror questions during deliberations. McCall’s fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

THE TRIAL COURT ERRED WHEN SENTENCING MR. MCCALL.

{¶90} McCall argues in his sixth assignment of error that felonious assault and felony murder are allied offenses of similar import and that the trial court should have merged the convictions for sentencing purposes. He also argues that the trial court erred when it imposed consecutive sentences. We disagree.

Allied Offenses of Similar Import

{¶91} In Ohio, “R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and [Article I, Section 10,] of the Ohio Constitution, which prohibits multiple punishments for the same offense.” *State v. Underwood*, 2010-Ohio-1, ¶ 23. R.C. 2941.25 states as follows:

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

{¶92} “In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors —the conduct, the animus, and the import.” *State v. Ruff*, 2015-Ohio-995, paragraph one of the syllabus. The Court stated that offenses are not required to merge for sentencing “if the harm that results from each offense is separate and identifiable.” *Id.* at paragraph two of the syllabus. A defendant may be convicted of multiple offenses if his “conduct shows that the offenses were committed separately” *Id.* at

paragraph three of the syllabus. “At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct.” *Id.* at ¶ 26.

{¶93} McCall did not raise the issue of merger to the trial court and, “as a result, his argument is subject to plain-error review.” *State v. Scott*, 2022-Ohio-1796, ¶ 8 (9th Dist.). The Ohio Supreme Court has stated that: “[a]n accused’s failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice.” *State v. Rogers*, 2015-Ohio-2459, ¶ 3. “Accordingly, an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; absent that showing, the accused cannot demonstrate that the trial court’s failure to inquire whether the convictions merge for purposes of sentencing was plain error.” *Id.*

{¶94} McCall argues that the felonious assault and felony murder convictions are allied offenses that the trial court should have merged for sentencing, reasoning that “the felonious assault conviction was the predicate charge for the murder and the jury must have found [him] guilty of the felonious assault to consider the felony murder charge[.]” He asserts that “the trial court’s failure to merge [his] felonious assault conviction with the felony murder conviction was plain error.” The State maintains that the felonious assault and felony murder convictions are not allied offenses because they involved separate victims and the resulting harm from each offense was separate and identifiable.

{¶95} The jury found McCall guilty of complicity to murder J.B. It also found McCall guilty of complicity to feloniously assault Jeremiah. The offenses involved separate victims and the resulting harm from each offense was separate and identifiable, with J.B. unfortunately dying

as a result of her injuries. Further, the evidence at trial established that J.B. died as a result of Lucas firing his gun at the Jeep in which McCall was riding. The complicity to felonious assault conviction arose from the firing of a gun from McCall's vehicle towards the Impala that was parked in front of Lucas's home.

{¶96} McCall's convictions for complicity to felony murder and complicity felonious assault involved separate victims and resulted in separate and identifiable harm that was caused by separate and identifiable conduct. Accordingly, we cannot say that the trial court erred when it did not merge these offenses for sentencing purposes.

Consecutive Sentences

{¶97} McCall further argues in his sixth assignment of error that the trial court erred when it imposed consecutive sentences. We disagree.

{¶98} "[A]n appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *State v. Marcum*, 2016-Ohio-1002, ¶ 1. Clear and convincing evidence is that "which will produce in the mind of the trier of facts a firm believe or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶99} Under R.C. 2929.14(C)(4), a trial court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. The trial court must first find that "the consecutive service is necessary to protect the public from future crime or to punish the offender" R.C. 2929.14(C)(4). Second, the trial court must find that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public" *Id.* Third, the trial court must at least find 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.

R.C. 2929.14(C)(4)(a)-(c).

{¶100} “[A] trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings onto its sentencing entry” *State v. Bonnell*, 2014-Ohio-3177, syllabus. “A trial court is not, however, required to explain its findings before imposing consecutive sentences.” *State v. Quarterman*, 2024-Ohio-6095, ¶ 35 (9th Dist.), citing *Bonnell* at syllabus. “[T]he record must contain a basis upon which a reviewing court can determine that the trial court made the findings required by R.C. 2929.14(C)(4) before it imposed consecutive sentences[,]” but:

a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.

Bonnell at ¶ 28-29.

{¶101} McCall argues that “[t]he trial court placed undue weight on [his] juvenile adjudications in determining that his history of criminal conduct necessitated consecutive sentences for the same transaction or course of conduct.” He asserts that the trial court “merely parroted” R.C. 2929.14(C)(4) “without making any findings of fact[]” and he asks this Court to “modify his sentence accordingly.” The State argues that the record supports the required findings

under R.C. 2929.14(C)(4) and that McCall “makes no showing” that his convictions are “clearly and convincingly contrary to law[.]”

{¶102} At sentencing, the State pointed out other offenses that McCall had been charged with, including offenses that occurred after J.B. was shot and killed and after shots were fired at the occupied Impala. The State asked the trial court to impose a consecutive sentence in this case. The trial court indicated at sentencing that “consecutive sentences on Counts One [felony murder] and Five [felonious assault] are necessary to protect the public from future crimes and to punish the offender.” The court found that consecutive sentences on these counts are “not disproportionate to the seriousness of the offender’s conduct and to the danger that the offender posed to the public.” It noted that “[t]wo of the offenses caused harm so great and unusual that no single term for any offense adequately reflects the seriousness of the offender’s conduct,” and that “the defendant’s history of criminal activity supports the need for the consecutive sentences.” The trial court stated in its subsequent sentencing entry:

Consecutive sentences are necessary to protect the public from future crime or to punish the offender; are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public; and at least two of the offenses caused harm so great and unusual that no single term for any offense adequately reflects the seriousness of the offender’s conduct. Defendant’s history of criminal activity supports the need for [a] consecutive sentence.

{¶103} This Court’s review of the record indicates that the trial court made the required findings of fact under R.C. 2929.14(C)(4) prior to imposing consecutive sentences. The trial court acknowledged McCall’s criminal history and determined that consecutive sentences were necessary to protect the community. While the trial court’s findings were not a word-for-word recitation of the statute, that is not required. *Bonnell*, 2014-Ohio-3177, at ¶ 29. A review of the record indicates that the trial court engaged in the correct analysis and that the record supports its findings. *See id.*

{¶104} For the reasons set forth above, McCall's sixth assignment of error is overruled.

III.

{¶105} For the reasons stated above, McCall's first, second, third, fourth, fifth, and sixth assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

SCOT STEVENSON
FOR THE COURT

HENSAL, P. J.
SUTTON, J.
CONCUR.

APPEARANCES:

MICHAEL STEPANIK, Attorney at Law, for Appellant.

DAVE YOST, Attorney General, and ANDREA K. BOYD, Special Prosecuting Attorney, for Appellee.