[Cite as *State v. Clark*, 2009-Ohio-3328.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 15
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
DAMON CLARK,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 07CR635A.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 29, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Damon Clark appeals from his convictions of felony murder and discharging a firearm into or at a habitation. Initially, he argues that a declaration he made in the police department stairwell should have been suppressed on the grounds that it was the fruit of an arrest made without probable cause and on the grounds that it was the fruit of the *Miranda* violation which had caused the trial court to suppress statements appellant made during a police interview. He also argues that the convictions were allied offenses of similar import and thus the sentences should have been merged. He then presents sufficiency and weight of the evidence arguments. Finally, he argues that his indictment was defective for failing to recite the mental state for felony murder. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} On May 5, 2007, appellant left a party to visit his cousin, Joseph Moreland, at his house on Stewart Street in Youngstown, Ohio. Due to a conflict between appellant and another guest, Joseph Moreland told appellant to leave his home. Joseph pushed appellant causing him to fall and land in a children's power vehicle. Joseph Moreland and appellant then argued.

¶{3} Appellant then left driving a blue Buick that belonged to the mother of his children but that he often drove. Appellant dropped his brother, Kevon Moreland, and his cousin, Lewon Bell, back off at the party they had previously attended. Rather than reentering the party as intended, appellant left with Stoney Williams, who had approached the Buick. (Kevon Moreland and Lewon Bell had both witnessed Stoney Williams carrying a gun at the party earlier.) Appellant then picked up Stoney Williams' friend, Darryl Mason, who thought he was being transported to the party. However, appellant drove toward Stewart Street instead.

¶{4} At the time, Joseph Moreland was standing on his front porch speaking to his cousin, Jean Madison, and his aunt, Angela Moreland, who was holding the hand of her three-year-old niece, Cherish Moreland. They had walked over to his house when they heard him arguing with someone on the telephone. Joseph Moreland was concerned because, from statements appellant made when he left the

house and additional statements he made over the telephone, it seemed appellant was threatening to come back shooting.

¶{5} Appellant soon drove down Stewart Street. As the car passed the house, Stoney Williams sat on the door frame of the passenger window and fired two shots across the roof of appellant's vehicle towards Joseph Moreland's house. A bullet grazed Angela Moreland and passed through Cherish's head. Notwithstanding the bullet hole through the back of her head, she awoke crying at the scene. Regrettably, Cherish died less than two days later.

¶{6} On May 17, 2007, appellant was indicted on four counts: (1) aggravated murder with prior calculation and design in violation of R.C. 2903.01(A); (2) aggravated murder with purpose which caused the death of a child under thirteen in violation of R.C. 2903.01(C); (3) murder by causing a death as a proximate result of committing a first or second degree felony of violence in violation of R.C. 2903.02(B); and (4) knowingly discharging a firearm into or at a habitation in violation of R.C. 2923.161(A)(1). He was also charged with four firearm specifications pursuant to R.C. 2941.146(A).

¶{7} Appellant filed a motion to suppress, arguing that his arrest was illegal and that he was not properly *Mirandized*. After the suppression hearing, the court released a December 18, 2007 judgment entry which found probable cause for the arrest. The court agreed, however, that appellant did not waive his *Miranda* rights as he refused to sign the form and wrote "no waiver" on the form. Thus, the trial court suppressed his videotaped statement. The court refused to suppress a spontaneous declaration appellant made in the stairwell as he was being led to jail, wherein appellant stated, "It was fucking Stoney, Stoney did it, I'm sorry."

¶{8} On January 14, 2008, a jury found appellant not guilty of counts one and two but guilty of complicity regarding counts three and four and the attendant firearm specifications. At sentencing, appellant unsuccessfully sought merger of counts three and four. In a January 16, 2008 sentencing entry, the trial court sentenced appellant to fifteen years to life on count three and five years on count four to run consecutively. The court also imposed a five-year consecutive sentence for one firearm specification, which was merged with the other firearm specification, for a total sentence of twenty-five years to life. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

¶{9} Appellant's first assignment of error provides:

¶{10} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S PRETRIAL MOTION TO SUPPRESS EVIDENCE AND DENIED APPELLANT LIBERTIES PROTECTED BY U.S. CONST., AMEND. XIV AND OHIO CONST., ART. I §14."

¶{11} Appellant argues that he was arrested without probable cause and thus the statement he made in the stairwell at the police station should be suppressed as the fruits of an unlawful arrest. He also states that technically the gunshot residue test should be suppressed on this basis, while acknowledging that the results of the test were favorable to his case.

¶{12} Contrary to appellant's argument, incriminating statements given after an arrest made without probable cause need not always and automatically be suppressed. See *Brown v. Illinois* (1975), 422 U.S. 590, 599. This is because the person arrested illegally may decide to confess freely, unaffected by the initial illegality. Id. at 603. In other words, a voluntary statement made with free will purges any primary taint. Id. at 603-604. However, this test is irrelevant here because there was probable cause to arrest appellant before he made the statement.

¶{13} In determining whether the police had probable cause to arrest a suspect, a court must ascertain whether the police had sufficient information, derived from a reasonably trustworthy source, sufficient to cause a prudent person to believe that the suspect committed the crime for which he is being arrested. *State v. Timson* (1974), 38 Ohio St.2d 122, 127. The court must view the totality of the facts and circumstances along with the reasonable inferences that can be drawn therefrom. See *State v. Homan* (2000), 89 Ohio St.3d 421, 427. The weight of the evidence and the credibility of witnesses at the suppression hearing are issues primarily for the province of the trial court. *State v. DePew* (1988), 38 Ohio St.3d 275, 277.

¶{14} Here, the first responding officer saw a bleeding and crying child lying in the driveway with a gunshot wound to the head. (Supp.Tr. 8). He also encountered two very distraught witnesses. (Supp. Tr. 9). Thus, he possessed direct evidence that a crime had just been committed.

¶{15} As to who committed that crime, Angela Moreland, who was hysterical, kept repeating that it was appellant who shot the child. (Supp.Tr. 9, 11, 27). After the ambulance arrived and the officer could relinquish his care over the child to the

paramedics, the officer was able to question Joseph Moreland. He specifically advised the officer that he had ejected appellant, his cousin, from the house because appellant was on drugs, he had been drinking, and he got in a fight with another guest. He told the officer that appellant drove by and someone shot at the house from appellant's vehicle. (Supp.Tr. 10-11, 27).

¶{16} When appellant later approached the scene, a large, irate crowd started yelling that appellant was coming. (Supp.Tr. 13). Angela Moreland confronted appellant, asking why he would shoot Cherish to which he responded, "I didn't shoot her. You know I wouldn't do this". (Supp.Tr. 14). After consulting with his sergeant who was reinterviewing the witnesses, the officer placed appellant in his vehicle for transport to the police station for interview. (Supp.Tr. 13, 15, 33-34). Assuming that was the point of arrest, probable cause existed to arrest appellant at that time.

¶{17} Appellant's argument here focuses on the statements of the bystanders in the crowd and claims that there is no evidence that they had first-hand knowledge of the incident or that they imparted reliable information upon which a prudent person would rely. *However, it was not the claims of the crowd that caused the police to believe that appellant was a complicitor in the shooting*. Rather, it was the specific statements of Angela Moreland, who had been grazed by a bullet and who was holding the child's hand at the time she was shot, and Joseph Moreland, who had problems with appellant earlier and who claimed to have witnessed appellant driving by while a passenger fired upon the house.

¶{18} The informants here were expressly identified. See *State v. Otte* (1996), 74 Ohio St.3d 555, 559. They were not anonymous tipsters or criminal informants. See *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 300 (noting the three main types of informants and explaining their varying levels of trustworthiness). There was no reason for the officers to disbelieve these witnesses. See, e.g., *State v. Neeley*, 2d Dist. No. 20842, 2006-Ohio-418, ¶22 (an eyewitness identification will constitute probable cause unless at the time of the arrest there is some apparent reason for the officer to disbelieve the eyewitness). The informants were related to the victim and to the defendant. See *State v. Woodards* (1966), 6 Ohio St.2d 14, 20-21. They were eyewitnesses to the offense, and Joseph Moreland was also an eyewitness to the situation that had established motive and to the fact that appellant was driving the same car just prior to the shooting. See *State v. Elmore*, 111 Ohio St.3d 515, 2006-

Ohio-6207, ¶40 (probable cause for murder where defendant is identified leaving victim's house in victim's car and person driving car leads police to defendant).

¶{19} Finally, prior to appellant's interview, the spent shell casing was found on the windshield of his girlfriend's Buick. (Tr. 34-36). Under the totality of the circumstances, the police possessed sufficient information derived from a reasonably trustworthy source that would cause a prudent person to believe that appellant was complicit in the shooting. As such, this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

¶{20} Appellant's second assignment of error contends:

¶{21} "THE TRIAL COURT ERRED IN NOT SUPPRESSING APPELLANT'S STATEMENT MADE IN THE STAIRWELL AS THE FRUIT OF THE ILLEGAL GOVERNMENT CONDUCT, VIZ.: THE *MIRANDA* VIOLATION."

¶{22} The alternative suppression argument presented is that even if the statement in the stairwell need not be suppressed as the fruit of an unlawful arrest, it must be suppressed as the fruit of a *Miranda* violation. Appellant states that it is irrelevant that the trial court found the stairwell statement to be voluntary as a *Miranda* violation is distinct from this concept of voluntariness. Appellant concludes that after the trial court granted suppression of appellant's videotaped statement on the grounds that he did not waive his rights under *Miranda*, the stairwell statement, which occurred as they were transporting him from the interview room to jail, should likewise have been suppressed. However, assuming the trial court was correct in suppressing the statements made during interrogation due to appellant's statement that he did not wish to waive his rights, this did not taint the stairwell statement.

¶{23} As aforementioned, incriminating statements made after an illegal arrest need not always be suppressed as fruits of the poisonous tree. *Brown*, 422 U.S. at 599. In such cases, the court is to determine whether the statement was an act of free will. Id. at 603. In making that determination, voluntariness is the threshold requirement which can purge the primary taint. Id. 603-604.

¶{24} However, the fruit of the poisonous tree doctrine does not apply to *Miranda* violations. *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, ¶22, 25, 27. See, also, *Missouri v. Seibert* (2004), 542 U.S. 600; *Oregon v. Elstad* (1985), 470 U.S. 298. A *Miranda* violation requires suppression of statements elicited during custodial interrogation. Where there is such a violation for statement number one, statement

number two is not excluded as the fruit of the poisonous tree; rather, the test is whether the second statement is actually a continuation of the first statement. *Farris*, 109 Ohio St.3d 519 at ¶27, 36. In determining whether one statement is a continuation of the next statement, the court is to consider factors such as whether there is overlapping content in the statements, the timing and setting of each statement, and the continuity of personnel. Id. at ¶28.

¶{25} The suspect's state of mind, i.e. voluntariness, is key. Id. at ¶26, 34-35. "Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Elstad*, 470 U.S. at 309. Thus, appellant incorrectly argues that whether his statement was voluntary is irrelevant. The trial court's finding of voluntariness is the key here, and the correctness of that finding is uncontested.

¶{26} In any event, we shall proceed to consider the totality of the circumstances here. The fact that the above cases dealt with subsequent valid *Miranda* warnings prior to the subsequent statements would not appear to make those statements more voluntary than the one at issue here. The statement here was not made during interrogation or even during conversation. The interrogation was over, and appellant was in a stairwell on his way to jail when he spontaneously grabbed a stair rail and made his statement. Thus, there was no place for the readministration of *Miranda* warnings as this is not a "question first - *Mirandize* later" scenario.

¶{27} *Miranda* is applicable only when the officer elicited the statement during interrogation by express questioning or its functional equivalent. *Rhode Island v. Innis* (1980), 446 U.S. 291, 300-301. See, also, *State v. Tucker* (1998), 81 Ohio St.3d 431, 436. Interrogation is a measure of compulsion over and beyond that which is inherent in custody itself. *Innis*, 446 U.S. at 300. Transportation to jail is not compulsion over and beyond that inherent in custody itself. Thus, the admittedly voluntary statement can be viewed as an unsolicited, gratuitously made declaration that was not the product of the interrogation.

¶{28} Furthermore, the relevant factors do not support a conclusion that the stairwell statement was a continuation of the suppressed interview. Although the second statement was not made all that long after (within a half hour of) the suppressed statement, a new law enforcement officer was involved. That is, the

original arresting officer, who was not involved in the interrogation, had returned to help with transport. Moreover, the stairwell setting was different than the interrogation room. As reviewed above, there was no interrogation atmosphere as the interrogation had been formally terminated. In addition, the contents of the statements did not overlap. That is, his suppressed statement did not say that he was just the driver. Nor did it disclose that Stoney Williams was the shooter. Yet, this was the sole claim in the stairwell statement. (Supp. Tr. 23).

¶{29} Finally, even if suppression of the stairwell statement should have occurred, the admission of the statement could be seen as harmless because there was overwhelming evidence that appellant was driving the car from which Stoney Williams fired the shots. See *State v. Issa* (2001), 93 Ohio St.3d 49, 68. The car involved was the car appellant had driven to the target house hours earlier. Appellant's cousin identified him as driving the car at the time the shots were fired and as threatening to return with a gun just minutes prior to the shooting. Appellant's brother and other cousin both testified that appellant told them that Stoney shot into the air. For all of these reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

¶{30} Appellant's third assignment of error provides:

¶{31} "THE TRIAL COURT ERRED AND DENIED APPELLANT LIBERTIES PROTECTED BY U.S. CONST., AMEND. V AND XIV AND BY OHIO CONST., ART. I §§2, 10, AND 16 WHEN IT SENTENCED APPELLANT TO CONSECUTIVE SENTENCES ON COMPLICITY TO MURDER AND COMPLICITY TO DISCHARGING A FIREARM INTO A HABITATION OR SCHOOL."

¶{32} At sentencing, appellant urged that counts three and four were allied offenses of similar import and that conviction should not be entered on both offenses. Thus, we must determine whether the offense of improper discharge of a firearm at or into a habitation should be merged with the offense of felony murder where the former offense was the underlying offense for felony murder. We begin by reciting the relevant statute:

¶{33} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

¶{34} "(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." R.C. 2941.25.

¶{35} This presents a two-tiered test. *State v. Rance* (1999), 85 Ohio St.3d 632, 636. First, it must be determined if the offenses are allied offenses of similar import. If they are not, then the defendant may be convicted of both offenses. Only if the two offenses are allied offenses of similar import, must we proceed to the second tier, which asks whether the defendant committed the offenses separately or with a separate animus. If so, he may be convicted of both. If he did not commit the offenses separately or with a separate animus, then he may not be convicted of both. Id.

¶{36} Here, it seems clear that the offenses were not committed separately or with a separate animus. However, as aforementioned, this is irrelevant if the offenses are not allied offenses of similar import. Id.

¶{37} The test for allied offenses of similar import requires a determination of whether the elements of the offenses correspond to such a degree that commission of one will result in commission of the other. Id. The statutory elements must be viewed in the abstract and the particular facts of the case are not to be considered. Id.

¶{38} Notably, part of the rationale in formulating the *Rance* standard was a Justice Rehnquist dissent about compound and predicate offenses, specifically the offense of felony murder (during a rape) and the offense of rape itself. Id. at 636-637, citing *Whalen v. United States* (1980), 445 U.S. 684, 709-711 (Rehnquist, J., dissenting). The Ohio Supreme Court pointed to Justice Rehnquist's statement that viewed in the abstract, which means solely based upon the wording of the statutes, sentences will always be permitted on both the compound and the predicate offense; that is because one can commit rape without felony murder and one can commit felony murder without rape. Id. It is only if one viewed the particular facts in the indictment that one would find that the compound offense necessarily entails proof of the predicate offense. Id. The Ohio Supreme Court expressly used these statements in *Rance* to support their decision to forbid viewing the particulars of the case in

determining if the commission of one offense will result in the commission of the other offense. Id.

¶{39} *Rance*'s bar on considering the evidence of the case and its mandate of comparing the elements in the abstract was recently reaffirmed. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶27 (clarifying that correspondence of elements need not be an exact alignment). See, also, *State v. Winn,* 121 Ohio St.3d 413, 2009-Ohio-1059, ¶11-12. The *Cabrales* Court noted that theft and receiving stolen property are allied even though their elements do not exactly align because one who commits theft ends up committing the offense of receiving stolen property as well. The Court concluded that drug possession and trafficking by preparing for shipment are allied offenses of similar import because one necessarily commits possession when they commit this type of trafficking. Id. at ¶30. However, possession and trafficking by selling or offering to sell are not allied offenses of similar import because one need not possess the drugs in order to offer to sell drugs and because one possessing is not necessarily selling the drugs. Id. at ¶29.

¶{40} Furthermore, the Ohio Supreme Court has addressed this type of issue, post-*Rance*, in the context of the aggravated felony murder statute. This statute turns murder into aggravated murder if the offender purposely causes a death while committing, attempting to commit or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism or escape. R.C. 2903.01(B). This statute is thus even more specific than the felony murder statute in the case before us, which does not specifically list all of the offenses of violence which can constitute the underlying offense. See R.C. 2903.02(B).

¶{41} Nevertheless, the Supreme Court found that the offense of aggravated felony murder (during a kidnapping) and the offense of kidnapping itself are not allied offenses of similar import. *State v. Campbell* (2000), 90 Ohio St.3d 320, 347. The Court declared that it is well-established that aggravated felony murder in violation of R.C. 2903.01(B) is not an allied offense of similar import to the underlying felony upon which the felony murder is based. Id., citing *State v. Keene* (1998), 81 Ohio St.3d 646, 668. See, also, *State v. Moss* (1982), 69 Ohio St.2d 515, 520.

¶{42} Appellant presents no reason why, when judging the import of underlying predicate offenses, there would be a distinction between aggravated felony murder

and felony murder. In fact, various appellate districts have more specifically held that the offense of felony murder under R.C. 2903.02(B) and the predicate offense are not allied offenses of similar import. See *State v. Marshall*, 8th Dist. No. 87334, 2006-Ohio-6271, ¶35 (felony murder and aggravated robbery); *State v. Henry*, 10th Dist. No. 04AP-1061, 2005-Ohio-3931, ¶59-60 (felony murder and felonious assault); *State v. Hoover-Moore*, 10th Dist. No. 03AP-1186, 2004-Ohio-5541, ¶50 (felony murder and child endangering); *State v. Brown* (Jan. 25, 2002), 2d Dist. No. 18643 (felony murder and aggravated arson); *State v. Gomez-Silva* (Dec. 3, 2001), 12th Dist. No. CA2000-11-230, (felony murder and felonious assault).

¶{43} Even without resort to this case law, upon viewing the statutory elements of felony murder and improper discharge in the abstract without resort to the facts in the indictment or presented at trial, we conclude that the elements do not correspond to such a degree that the commission of one would result in commission of the other. See *Rance*, 85 Ohio St.3d at 636. That is, one can commit felony murder under R.C. 2903.02(B) without committing improper discharge of a firearm at or into a habitation. Conversely, one can improperly discharge a firearm at or into a habitation without causing a death and thus without committing felony murder.

¶{44} In final support of our conclusion, we conduct a comparing and contrasting review to other cases. The situation at bar does not equate with the allied offenses of aggravated robbery and theft as every robbery contains a theft. See *State v. Johnson* (1983), 6 Ohio St.3d 420, 423. Nor does the situation equate with trafficking by preparing for shipment and possession as every trafficking by preparing offense contains a possession offense. See *Cabrales*, 118 Ohio St.3d 54 at ¶30. Rather, the situation is more aligned with trafficking by selling or offering to sell and possession, which are offenses of dissimilar import. Although the selling offense is usually committed by possession, this is not always the case, and thus, the offenses are not allied. Id. at ¶29. Here, although felony murder can sometimes be committed by the improper discharge offense and although the improper discharge offense can sometimes result in a death, this is not always the case. For all of these reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{45} Appellant's fourth assignment of error alleges:

¶{46} "APPELLANT'S CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE, AND THE TRIAL COURT ERRED IN OVERRULING THE MOTIONS FOR ACQUITTAL PURSUANT TO OHIO CRIM.R. 29."

¶{47} Sufficiency of the evidence is a legal test dealing with adequacy, as opposed to weight of the evidence. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. It is the standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. Thus, an appellate court reviews the denial of a Crim.R. 29 motion for acquittal using the same standard that an appellate court uses to review a sufficiency of the evidence claim. *State v. Carter* (1995), 72 Ohio St.3d 545, 553; *State v. Mayas* (Dec. 6, 2000), 7th Dist. No. 98JE14.

¶{48} In viewing a sufficiency of the evidence argument, a conviction will not be reversed unless the reviewing court determines, after viewing the evidence in the light most favorable to the prosecution, that no rational trier of fact could find that the elements of the offense were proven beyond a reasonable doubt. *State v. Goff* (1998), 82 Ohio St.3d 123, 138. In other words, the evidence is sufficient if, after viewing the evidence in the light most favorable to the state, reasonable minds can reach different conclusions as to whether each element has been proven beyond a reasonable doubt. *Carter*, 72 Ohio St.3d at 553; *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263.

¶{49} Appellant focuses his argument here on the complicity element as he was convicted of felony murder and improper discharge as an aider and abettor. He presents the argument that mere presence is insufficient and thus the fact that he was driving the car from which the passenger fired is not enough for complicity.

¶{50} To uphold a conviction for complicity by aiding and abetting, the evidence must show that with shared criminal intent, the defendant supported, assisted, encouraged, cooperated with, advised or incited the principal in the commission of the crime. *State v. Johnson* (2001), 93 Ohio St.3d 240, 245-246. Although an innocent bystander who is merely along for the ride is not complicit, complicity may be demonstrated by circumstantial as well as direct evidence. See id. *Participation in criminal intent can be inferred from circumstances surrounding the offense including presence, companionship and conduct before and after the offense is committed*. Id. at 243, 245-246. Actual participation in the act is not required. Id.

¶{51} The mental state here is knowingly, specifically knowingly discharging a firearm at or into a habitation. R.C. 2923.161(A)(1). Considering all of the evidence in the light most favorable to the state, a rational fact-finder could believe that appellant was a complicitor to Stoney Williams, the principal offender.

¶{52} Notably, it was appellant, not Stoney Williams, who had argued with Joseph Moreland a short time earlier that night. Stoney Williams was not even present during the altercation. The argument was confirmed by appellant's brother, Kevon Moreland, and another cousin, Lewon Bell, who is Cherish's brother. (Tr. 335, 384). Specifically, Joseph Moreland, who is appellant's cousin, had told appellant to leave his house on Stewart Street because he was drunk and seemed on the verge of starting a fight with another of Joseph Moreland's guests. (Tr. 230, 246). Appellant was under the impression that his cousin had taken the side of a non-relative over him. (Tr. 233). He was likely humiliated by the fact that he fell into a child's power car when Joseph Moreland pushed him, all in front of the person with whom appellant had a problem. (Tr.247). According to Joseph Moreland, just before he left, appellant made a threatening statement that implied that he would return with a gun. (Tr. 231, 250-251).

¶{53} After leaving Joseph Moreland's house, appellant dropped off his brother and cousin at a party. Instead of going in with them, appellant drove away with Stoney Williams. Both appellant and Stoney Williams had been at this party earlier, and appellant's brother and cousin both saw Stoney Williams with a gun at that time. (Tr. 338, 343, 386-387).

¶{54} Joseph Moreland testified that appellant called him and said he would be arriving shortly, which caused Joseph Moreland to argue loudly with appellant over the telephone, pointing out to appellant that he had children at the house. (Tr. 231, 232, 234). Others heard Joseph Moreland arguing on the telephone minutes before the shooting. (Tr. 262, 357).

¶{55} In the meantime, appellant picked up a friend of Stoney Williams, Darryl Mason, who had never met appellant. Darryl Mason testified that appellant was acting mad and wild and was rocking back and forth and listening to loud music. (Tr. 306, 309). Appellant drove straight to Stewart Street instead of back to the party. (Tr. 306). Darryl Mason heard appellant say that someone was "trying to play him" and heard appellant ask Stoney Williams if he was ready. (Tr. 307, 316). Appellant then yelled

something, which Darryl Mason could not understand, at which point Stoney Williams fired two shots at the house. (Tr. 309-310).

¶{56} Angela Moreland and Jean Madison confirmed that the shots came from a car which they identified as being the one appellant drives. (Tr. 266, 364). Joseph Moreland specifically testified that at the time of the shooting, he saw appellant driving that car. He stated that the shots were fired over the hood by the front seat passenger. (Tr. 234, 240).

¶{57} After the shooting, appellant approached his brother, Kevon Moreland, and his cousin, Lewon Bell, as they were responding to a call that Cherish had been shot. However, appellant was now a passenger in a different car. (Tr. 400). When they refused to get in the car with him, appellant walked along side them to the crime scene. (Tr. 345). Lewon Bell testified that he asked appellant if he shot Cherish, who was Lewon's sister, and appellant responded, "I think Stoney shot in the air." (Tr. 346). Kevon Moreland confirmed that appellant, his brother, made this statement. (Tr. 391).

¶{58} The police quickly found the car appellant was driving; it was located at the house of its owner, the mother of appellant's children. A spent shell casing was found between the windshield and the hood on the passenger side of the car. (Tr. 406). Later, Stoney Williams was apprehended, and his hands tested positive for gunshot residue. (Tr. 471).

¶{59} Since Cherish was standing right next to the porch when she was shot and Joseph Moreland saw the other bullet hit the ground in front of the porch, the firing at the habitation was established. (Tr. 237). Viewed in the light most favorable to the prosecution, the facts discussed above establish sufficient evidence for finding that appellant aided and abetted Stoney Williams in firing those shots at the habitation, which shots proximately resulted in the death of Cherish Moreland.

¶{60} That is, appellant implied to the person who angered and humiliated him that he would return with a gun. He immediately picked up an armed person. This armed person was seen to have a gun a short time earlier at the same party attended by appellant. Appellant called the intended target, still threatening to come over and asking the target to exit his house. Appellant was angry. He drove to the target's house while complaining about someone "trying to play him." He asked the shooter if

he was ready and yelled something just before the shooting. The shooter leaned over the hood of appellant's car and fired two shots.

¶{61} The evidence and the reasonable inferences to be drawn therefrom sufficiently established more than mere presence. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FIVE

¶{62} Appellant's fifth assignment of error argues:

¶{63} "APPELLANT'S CONVICTIONS AND PRISON SENTENCES VIOLATE U.S. CONST. AMEND. VIII AND XIV AND OHIO CONST. ART. I, §§2, 9, AND 16 AS THE CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

¶{64} Weight of the evidence concerns the greater amount of credible evidence to support one side over the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Weight is not a question of mathematics but depends on its effect in inducing belief. Id. The reviewing court examines the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether the trier of fact clearly lost its way in resolving conflicts in the evidence and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. The appellate court's discretionary power to sit as the thirteenth juror and grant a new trial on these grounds should be exercised only in the exceptional case where the evidence weighs heavily against the conviction. Id. at 387-388. In fact, after a criminal jury trial, reversal on weight cannot occur without a unanimous appellate court. Id. at 389, citing Section 3(B)(3), Article IV of the Ohio Constitution.

¶{65} This strict test acknowledges that credibility is generally the province of the trier of fact, who sits in the best position to assess the weight of the evidence and credibility of the witnesses, whose gestures, voice inflections and demeanor the trier of fact can personally observe. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. See, also, *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Where there are two fairly reasonable views or explanations, we do not choose which one we prefer. *State v. Gore* (1999), 131 Ohio App.3d 197, 201. Rather, we defer to the trier of fact unless the evidence weighs so heavily against conviction that we are compelled to intervene.

¶{66} Appellant first points to his own testimony that Joseph Moreland had a firearm as he was coming off the porch to show that Stoney Williams' act of firing two shots was the result of this startling event, not the result of complicity to shoot at the house. (Tr. 553). The defense had also presented the testimony of a jail inmate who said that he heard Joseph Moreland admit to appellant while in jail that he was armed with a mini-14 at the time. (Tr.527-528). Appellant also points out that when asked on cross-examination if she had seen Joseph Moreland with any type of a weapon that night, Jean Madison, who was standing in the driveway near Cherish, responded that she could not recall. (Tr. 287).

¶{67} On the other hand, Joseph Moreland testified on cross-examination that he did not have a weapon when he went outside in response to appellant's phone call. (Tr. 252). Angela Moreland, who was also standing in the driveway holding Cherish's hand, was not asked if Joseph Moreland had a weapon.

¶{68} The jury was within its rights to conclude that the testimony of Joseph Moreland was more credible on the matter of whether he had a firearm. The jury had a first-hand opportunity to compare the various credibility indicators in comparing the testimony of Joseph Moreland to appellant's own testimony.

¶{69} Appellant suggests that he would not have ducked if Joseph Moreland did not have a gun. However, it is not unreasonable for the driver to duck when their passenger is about to shoot over their car. In any event, it was only appellant who testified that he ducked, and the jury could rationally disbelieve this testimony.

¶{70} Regardless, the jury could have reasonably concluded that appellant drove Stoney Williams to Joseph Moreland's house knowing that Stoney Williams would fire at the house. In such case, the fact that Joseph Moreland armed himself in response to the threat would be irrelevant. The jury could believe that appellant implied to Joseph Moreland that he would return shooting and that he repeated this threat over the telephone when asking Joseph Moreland to wait outside.

¶{71} The jury could conclude that appellant knew Stoney Williams had a gun since his two companions saw Stoney Williams with the gun at a party earlier and said that appellant was with them at that party. The jury can infer that appellant also knew of the gun based upon his leaving with Stoney rather than attending the party with his brother and based upon his driving past Joseph Moreland's house after making veiled and not-so-veiled threats. Darryl Mason testified that appellant was mad, that he was

talking about someone "trying to play him", that he asked Stoney Williams if he was ready as he turned on Stewart Street, and that he yelled something, which could have been the signal to fire, just prior to the shots being fired. This testimony is not incredible or unworthy of belief.

¶{72} Contrary to appellant's suggestion, the fact that Darryl Mason said appellant yelled out the window but that Joseph Moreland testified that appellant's window was rolled up does not mean that appellant did not yell just prior to the shots. Obviously, the passenger window was down just prior to the shots as Stoney Williams sat on the door frame in order to fire over the roof. Alternatively, the fact that Darryl attributed appellant's yell as being focused out of the window does not mean that it was not in fact a signal to Stoney Williams and just seemed to be an attempt to yell out the window because appellant's face was turned toward the target house.

¶{73} In conclusion, the jury found that appellant had no purpose to shoot a person and thus found him not guilty of aggravated murder. However, they believed that he knew that shots would be fired at or into the house on Stewart Street. Thus, they found that he was aware his conduct would probably cause shots to be fired at the house. See R.C. 2901.22(B). The jury's resolution of conflicting testimony on this matter did not create a manifest miscarriage of justice. As such, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SIX

¶{74} Appellant's sixth and final assignment of error contends:

¶{75} "THE TRIAL COURT LACKED AUTHORITY TO TRY APPELLANT ON COUNT THREE OF THE INDICTMENT AS THE COUNT FAILED TO STATE AN OFFENSE AND VIOLATED OHIO CONST., ART. I, §10."

¶{76} Appellant cites the Supreme Court's *Colon I* and *II* holdings and urges that the indictment failed to charge a mens rea for felony murder. See *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (finding recklessness was mental state for aggravated robbery's physical harm element, finding indictment defective for failing to state this mental state, and finding structural error where defect permeated trial); 119 Ohio St.3d 204, 2008-Ohio-3749 (applying *Colon* to cases pending on announcement date). Appellant cites R.C. 2901.21(B), which provides:

¶{77} "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the

conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

¶{78} Regarding count three, the indictment charged that appellant:

¶{79} "did cause the death of Cherish Moreland as a proximate result of committing or attempting to commit an offense of violence, to wit: Improperly Discharging a Firearm at or Into a Habitation, in violation of O.R.C. 2923.161 * * *."

¶{80} There are various corresponding reasons why this is sufficient announcement of the mental state of felony murder. First, the Supreme Court has held that "an indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment." *State v. Buehner*, 110 Ohio St. 3d 403, 2006-Ohio-4707, ¶11. It is the predicate or underlying offense itself, not the elements of that underlying offense, that is an essential element of the charged offense. Id. at ¶12 (holding that an indictment for ethnic intimidation, which did not list the elements of the underlying offense of aggravated menacing, was not deficient). Here, the indictment tracked the language of the felony murder statute and disclosed the underlying offense by statute number and by name as well.

¶{81} We have the additional fact here in that appellant was also indicted for that underlying offense. After outlining the elements of the felony murder, count four then charged that without privilege to do so, appellant knowingly discharged a firearm at or into an occupied structure that is a permanent or temporary habitation of an individual in violation R.C. 2923.161(A)(1). Thus, the indictment clearly informed him that the mens rea for felony murder's underlying offense was knowingly.

¶{82} Next, we move on to appellant's suggestion that the mental state of recklessly applies to the cause of death element of felony murder. First, we again set forth the elements of felony murder: "No 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 * * *." R.C. 2903.02(B). It can be said that this section "plainly indicates a purpose to impose strict criminal liability for the conduct described". See R.C. 2901.21(B). That is, if you commit a certain offense

of violence and a death proximately results, you are guilty of felony murder regardless of your actual level of intent regarding the death.

¶{83} Besides the plain indication in the section, there is another reason that the section should be read as imposing strict liability for the death. The Supreme Court has stated that the legislature has plainly indicated its intent to impose strict liability where a mental state is imposed in one portion but not in another portion of a statute. *State v. Wac* (1981), 68 Ohio St.2d 84, 86-87. The first statute the Court reviewed provided:

¶{84} ""(A) No person shall: (1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking." R.C. 2915.02.

¶{85} The Court found that the use of knowingly in one portion meant that strict liability, not recklessness, was the mental state for the other portion. *Wac*, 68 Ohio St.2d at 86. The next statute reviewed provided:

¶{86} "(A) No person, being the owner or lessee, or having custody, control, or supervision of premises, shall:

¶{87} "(1) Use or occupy such premises for gambling in violation [R.C. 2915.02];

¶{88} "(2) Recklessly permit such premises to be used or occupied for gambling in violation of [R.C. 2915.02]." R.C. 2915.03.

¶{89} The Court concluded that the use of a mental state in subsection (2) indicated a plain intent to impose strict liability in subsection (1). *Wac*, 68 Ohio St.2d at 87. See, also, *State v. Hundley*, 1st Dist. No. C-060374, 2007-Ohio-3556, ¶11 (comparing divisions (A)(1) and (A)(2) of aggravated vehicular homicide statute and determining that (A)(1) is a strict liability offense because (A)(2) uses the mental state of recklessness).

¶{90} In anticipation of any argument that the act of making comparisons within the same division or subsection is different than the act of making comparisons between different divisions, we point to a more recent Supreme Court case that cited *Wac*. *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121. That case held that the legislature's act of ascribing the mental state of knowledge to one element (the character of the obscene material containing a child) means that strict liability rather than recklessness is the mental state for the other element (transportation of such material into the state). Id. at ¶23, 29. The Court stated that in making the *Wac*

comparisons and in searching for mental elements, the court must view the entire "section", and the Court specifically defined "section" as the statute, noting that the language of the statute called itself a "section". Id. at ¶22.

¶{91} Here, the murder statute calls the portions of the statute defining the two types of murder "divisions". R.C. 2903.02(C). The murder statute also states, "[w]hoever violates this 'section' is guilty of murder". R.C. 2903.02(D). Thus, we review the entire section or statute to perform a *Wac* comparison of elements and their stated mens rea or lack of expressly stated means rea. *Maxwell*, 95 Ohio St.3d 254 at ¶22.

¶{92} Appellant was charged with murder under R.C. 2903.02(B), (commonly known as felony murder). Division (A) of this same statute defines another type of murder as purposely causing the death of another. R.C. 2903.02(A). The use of purposely in division (A) and the absence of a mental state in division (B) is a plain indication of the legislature's intent to impose strict liability for the causing death element of felony murder. See id.

¶{93} In further support, we note that in reversing an appellate court's overturning of a felony murder conviction, the Supreme Court once mentioned that the only mens rea required to be proven in a felony murder case (where the underlying offense was felonious assault) was knowingly (as the mens rea for felonious assault is knowingly). *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, ¶23-28, 34. This establishes that, contrary to appellant's argument, recklessness cannot be the mental state for felony murder. Notably, the Court's holding did not, however, mean that knowingly is the mental state for the causing the death element as the Supreme Court stated:

¶{94} "If defendant knowingly caused physical harm to his wife by firing the gun at her through a holster at close range, he is guilty of felonious assault. The fact that she died from her injuries makes him guilty of felony murder, regardless of his purpose." Id. at ¶33.

¶{95} This statement essentially means that if all elements (including the mens rea element) of the underlying felony are established, then there is strict liability for the causing a death element of felony murder, as long as that death was a proximate result of the underlying felony.

¶{96} Finally, we note that instead of conducting an analysis on whether there is strict liability for the causing a death element, some courts merely state that any mens rea for felony murder is satisfied where the state proves intent to commit the underlying felony. See, e.g., *State v. Dubose*, 1st Dist. No. C-07-0397, 2008-Ohio-4983, ¶19, 27 (where felonious assault was underlying felony, the appellate court stated that elements of felony murder were: "directly and proximately caused the death of another while knowingly causing serious physical harm or knowingly causing or attempting to cause physical harm with a deadly weapon"); *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶26-27; *State v. Walthers*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶61 (any intent for felony murder is conclusively presumed by the intent to commit the underlying felony).

¶{97} Either way, where the mental state for the underlying offense has been stated and proven, there is not a separate mental state required to be stated or proven for the causing a death element of felony murder. For all of the foregoing reasons, appellant's argument, that the indictment erroneously failed to set forth a recklessness element, is without merit.

¶{98} We also must point out that even if appellant's erroneous argument on recklessness were correct, there would not be structural error as, contrary to the situation in *Colon*, the issue did not permeate the trial. Moreover, there would not be plain error as no prejudice resulted. Specifically, the trial court instructed the jury that appellant had to have *purposely* caused the death as a proximate result of committing the improper discharge offense, which latter offense the court correctly stated contained the knowingly element. (Tr. 656, 657, 659).

¶{99} Since purposely is the highest mental state, the court's instruction only heightened the state's burden and greatly favored appellant's defense. See *State v. Jones*, 7th Dist. No. 07MA200, 2008-Ohio-6971, ¶67 (no structural or plain error where trial court instructed knowingly was mental state not just for theft element of aggravated robbery but also for the brandishing a weapon element, which actually should have contained recklessness as its mens rea); *State v. Salaam*, 1st Dist. Nos. C-070385, C-070413, 2008-Ohio-4982, ¶23. Accordingly, this assignment of error is overruled.

¶{100} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs.