[Cite as *State v. Jones*, 2018-Ohio-2332.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee/Cross-Appellant	:	Appellate Case No. 27354
	:	
	:	Trial Court Case No. 2013-CR-294
v.	:	
	:	(Criminal Appeal from
HARVEY L. JONES	:	Common Pleas Court)
	:	
Defendant-Appellant/Cross-Appellee	:	

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O P I N I O N

Rendered on the 15th day of June, 2018.

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WELBAUM, P.J.

{¶ 1} Defendant-appellant, Harvey L. Jones, appeals from his conviction and sentence for multiple counts of aggravated murder, aggravated robbery, aggravated burglary, and having weapons under disability following a jury trial in the Montgomery County Court of Common Pleas. In support of his appeal, Jones contends that the trial court prohibited him from effectively cross-examining the sole eyewitness to the offenses. Jones also contends that he was not afforded a meaningful opportunity to present a complete defense due to the trial court's prohibiting him from introducing evidence of an alternate suspect. Jones further contends that the trial court should have excluded prejudicial autopsy photographs as evidence and that the State made racially discriminatory preemptory challenges during voir dire. Lastly, Jones contends that the trial court erred in failing to expand the jury venire to include licensed drivers as well as registered voters.

{¶ 2} The State cross-appeals contending that the trial court erred in dismissing two counts of kidnapping, two counts of aggravated murder based on kidnapping, and multiple kidnapping-related death penalty specifications. The State also contends that the trial court erred in merging Jones's aggravated murder offenses at the penalty phase of trial instead of waiting to merge the offenses at sentencing, as well as in merging an aggravated-robbery death penalty specification with an aggravated-burglary death penalty specification. Lastly, the State contends that the trial court erred in allowing Jones to argue residual doubt during the penalty phase of trial.

{¶ 3} For the reasons outlined below, we find no merit to any of Jones's claims on appeal. With regard to the State's cross-appeal, we find that the trial court erred as a

matter of law with respect to each of the State's claims. However, because the trial court's errors do not affect the validity of Jones's conviction and because the protections afforded by the Double Jeopardy Clause prohibit a retrial of the erroneously dismissed charges and specifications and of the penalty phase of trial, the judgment of the trial court will be affirmed.

Facts and Course of Proceedings

{¶ 4} On April 11, 2013, Jones was charged in a fourteen-count indictment with two counts of aggravated burglary, two counts of kidnapping, two counts of aggravated robbery, two counts of having weapons under disability, and six counts of aggravated murder. The six counts of aggravated murder were charged under R.C. 2903.01(B) and were based on the two aggravated burglaries, two kidnappings, and two aggravated robberies. Each of the aggravated murder counts included a firearm specification, a repeat violent offender specification, and four death penalty specifications. Each of the aggravated burglary, kidnapping, and aggravated robbery counts also included a firearm specification and a repeat violent offender specification. All the charges and specifications stemmed from the murders of Jones's ex-girlfriend, Carley Hughley, and her friend, Demetrius Beckwith.

{¶ 5} Hughley's son, A.U., who was ten years old at the time of the murders, witnessed the murders and testified against Jones at trial. A.U. testified that Jones is his mother's ex-boyfriend who had lived with him and his mother for a few months at their apartment in Dayton, Ohio. A.U. indicated that his mother and Jones got into arguments approximately two times a week and that he specifically recalled an argument that turned

physical when Jones attempted to bring a gun into their apartment. During that incident, A.U. testified that his mother pushed Jones, who then pushed her back and jumped on top of her. A.U. testified that he went to the neighbor for help and that the neighbor called 9-1-1.

{¶ 6} The State admitted evidence of the neighbor's 9-1-1 call as well as two other 9-1-1 calls made by Hughley a week prior to the murders in response to conduct by Jones. The State also had Hughley's mother and several of Hughley's friends and coworkers testify regarding Hughley's fear of Jones. A.U. testified that he and his mother had to live with his grandmother for a period of time because Jones would not leave their apartment and was sending threatening messages to his mother. A.U. testified that they were eventually able to move back into their home when Jones left the apartment.

{¶ 7} With regard to the murders, A.U. testified that on the night of January 23, 2013, he was upstairs in his bedroom watching television while his mother and her friend, Beckwith, were downstairs. A.U. testified that he decided to go downstairs to say goodbye to Beckwith when he heard that Beckwith was leaving the apartment. However, just as he began to turn the corner down the stairs, A.U. observed Jones barge through the apartment door. A.U. claimed that Jones forced his way into the apartment and then shoved Beckwith to the ground while waiving a gun in his hand.

{¶ 8} Once inside the apartment, A.U. testified that Jones told Beckwith to "shut the F up." Trans. Vol. XIII (Sept. 19, 2016), p. 2382. A.U. claimed that Beckwith pled with Jones not to hurt him and offered Jones his keys, money, and wallet. A.U. testified that his mother was on the ground with Beckwith and that she told Jones "please don't hurt my baby." *Id.* According to A.U., Jones continued waiving the gun around and

repeatedly said "shut the F up." *Id*. at 2383.

{¶ 9} Continuing, A.U. testified that Jones made his mother and Beckwith lay on their stomachs before firing several shots at them from a standing position. After Jones fired the shots, A.U. observed Jones go through his mother's pockets and remove her cell phone. A.U. then saw Jones go through Beckwith's pockets and remove his keys and cash. After Jones took those items, A.U. observed Jones run out the apartment door. During the entire incident, A.U. claimed that he was hiding at the corner of the stairway, peeking around the wall where he was able to observe everything.

{¶ 10} After Jones left the apartment, A.U. testified that he went to check on his mother who was still breathing but gagging up blood. A.U. said his mother was able to tell him to call his grandma and to tell the family she loved them. A.U. then checked on Beckwith, who A.U. testified was not moving at all. After checking on his mother and Beckwith, A.U. ran to his neighbor's apartment and told the neighbor, Roberta, and her two adult sons, Shawn and Gemayel, that his mother had been shot. It is undisputed that Roberta, who died prior to trial, called 9-1-1 for help.

{¶ 11} When the police arrived at the scene, A.U. told the officers that Jones had shot his mother and Beckwith. Beckwith was pronounced dead at the scene and A.U.'s mother was taken to the hospital where she later died from multiple gunshot wounds. The next morning, the police arrested Jones at the home of his girlfriend, Vivian Jones ("Vivian"), with whom he had been residing.

{¶ 12} Vivian testified that on the night of the murders, Jones left her residence around 10:30 or 11:00 p.m. and returned sometime after 1:48 a.m. Vivian testified that when Jones returned, he gave her $100 in cash and then went to sleep without telling her

where he had been. Later that morning, Vivian testified that the police came to her house and picked up Jones, who told her "Baby, tell them I was asleep." Trans. Vol. XIV (Sept. 20, 2016), p. 2653.

{¶ 13} The State also presented testimony from various cell phone records custodians and a representative from the FBI's Cellular Analysis Survey Team ("CAST"). Their testimony indicated that Jones's cell phone was receiving service from the cellular tower that served the location of the murders within an hour before the neighbor called 9-1-1 to report the shootings.

{¶ 14} After the State called several other witnesses and rested its case, Jones moved the trial court to dismiss all the charges against him pursuant to Crim.R. 29. The trial court granted the motion, in part, dismissing the two kidnapping charges, the two charges of aggravated murder that were based on kidnapping, and the death penalty specifications that were based on kidnapping. Without calling any witnesses, Jones then rested his case.

{¶ 15} Following deliberation, the jury found Jones guilty of all the remaining charges and specifications with the exception of the two weapons under disability charges and the repeat violent offender specifications, which were tried before the bench. After considering the evidence admitted during trial and the parties' stipulations regarding Jones's criminal record,[1] the trial court found Jones guilty of both weapons under disability charges and the repeat violent offender specifications.

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[1] The parties stipulated that Jones had previously been convicted of aggravated burglary and attempted rape in Montgomery County Court of Common Pleas Case No. 2002-CR-1272 and possession of cocaine in Montgomery County Court of Common Pleas Case No. 1999-CR-1487.

{¶ 16} The matter then proceeded to the penalty phase of trial, during which the jury was charged with determining whether Jones should receive the death penalty or whether any mitigating factors weighed against imposing a death sentence. Prior to this phase of trial, the trial court decided, over the State's objection, to merge the two counts of aggravated murder related to Hughley (one count committed through aggravated burglary and one count committed through aggravated robbery) and the two counts of aggravated murder related to Beckwith (one count committed through aggravated burglary and one count committed through aggravated robbery), so that the jury only had to consider one count of aggravated murder for each victim. In doing so, the trial court ordered the State to select which counts of aggravated murder to submit to the jury. The State chose the aggravated-burglary-related count for Hughley and the aggravated-robbery-related count for Beckwith. The trial court indicated that it decided to merge the aggravated murder offenses at the penalty phase as opposed to at sentencing in order to prevent the jury from getting "the impression that because there's two counts [for] each [victim] that somehow it's worse." Trans. Vol. XIX (Sept. 27, 2016), p. 3519.

{¶ 17} During the penalty phase of trial, the trial court also merged the aggravated-robbery and aggravated-burglary death penalty specifications related to the murder of Hughley. The trial court explained that it decided to merge these specifications because it found that Jones's act of taking Hughley's cell phone was more akin to tampering with evidence than robbery. The trial court reached this conclusion based on its assumption that Jones took Hughley's cell phone to conceal evidence. Since there is no death penalty specification related to tampering with evidence under R.C. 2929.04, the trial court found it was appropriate to merge the aggravated-robbery death penalty

specification into the aggravated-burglary death penalty specification.

{¶ 18} At the close of the penalty phase of trial, the jury deliberated and recommended a sentence of life in prison without parole for each count of aggravated murder. Upon the jury's recommendation, the trial court sentenced Jones to two terms of life in prison without parole for the aggravated murders of Hughley and Beckwith. In addition to imposing two life terms, the trial court merged the two aggravated burglary counts into one conviction and imposed an 11-year prison sentence for that offense. The trial court also merged the two weapons under disability counts into one conviction and imposed a 36-month prison sentence for that offense. The trial court further imposed an additional 11-year prison sentence for each of the two aggravated robbery offenses, which the trial court did not merge. The trial court then merged all the repeat violent offender specifications under the aggravated burglary charge and imposed a 10-year prison sentence for that specification. The trial court also imposed two three-year firearm specifications for each of the aggravated murders. All of the prison terms were ordered to run consecutively, thereby resulting in Jones being sentenced to a total of two consecutive life terms without parole plus 52 additional years in prison.

{¶ 19} Jones now appeals from his conviction and sentence, raising five assignments of error for review. Jones also attaches an appendix to his appellate brief listing seven additional assignments of error. In response, the State filed a cross-appeal raising three assignments of error. For ease of discussion, we will first address the assignments of error raised by Jones and then address the State's assignments of error raised on cross-appeal.

First Assignment of Error

{¶ 20} Jones's First Assignment of Error is as follows:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. JONES WHEN IT PROHIBITED MR. JONES FROM INVESTIGATING AND INQUIRING INTO THE MEDICAL HISTORY OF THE ONLY WITNESS TO THE KILLINGS.

{¶ 21} Under his First Assignment of Error, Jones contends that he was denied the right to effectively cross-examine A.U. at trial. Specifically, Jones claims that the trial court erred in prohibiting Jones from questioning A.U. regarding the medications he was taking and from presenting expert testimony regarding the potential side effects of those medications and whether the side effects could have affected A.U.'s ability to accurately perceive what happened on the night of the murders. Jones's argument stems from the trial court's decision not to allow the defense to review A.U.'s confidential mental health and school records, which Jones wanted to access in order to challenge A.U.'s credibility.

{¶ 22} The record indicates that the trial court properly conducted an in camera review of A.U.'s mental health and school records for purposes of determining whether the records contained any information material to Jones's defense. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57-61, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (resolving the conflict between a defendant's right to access information that is material to his defense and the confidentiality afforded children services records by holding that a defendant's right to due process and a fair trial entitles him to an in camera review by the trial court of the records to determine whether the records contain any evidence material the defendant's defense); *In re J.W.*, 9th Dist. Lorain No. 10CA009939, 2011-Ohio-3744, ¶ 14-15

(applying the holding in *Ritchie* to a minor's confidential mental health records).

{¶ 23} A trial court conducts an in camera inspection to determine: "(1) whether the records are necessary and relevant to the pending action; (2) whether good cause has been shown by the person seeking the disclosure; and (3) whether their admission outweighs the confidentiality considerations." *J.W*. at ¶ 7, citing *State v. McGovern*, 6th Dist. Erie No. E-08-066, 2010-Ohio-1361, ¶ 28; *In re C.A.*, 8th Dist. Cuyahoga No. 102675, 2015-Ohio-4768, ¶ 80.

{¶ 24} In this case, following its in camera review, the trial court advised the parties that A.U.'s mental health records revealed that A.U. had been diagnosed with certain mental disorders prior to the murders for which he had been taking medication. The trial court indicated that it had researched the possible side effects of A.U.'s medication and found that the only potential side effect relevant to trial was "possible hallucinations, i.e., seeing and/or hearing things that are not based in reality." [2] Trans. Vol. III (Apr. 27, 2016), p. 449. The trial court noted that although there was a possible risk of hallucinations associated with A.U.'s medication, A.U.'s mental health records indicated that no such risk materialized while A.U. was on the medication either before or after the murders. Accordingly, the trial court found that:

> [T]he fact that the boy was on medication with certain known side effects would have been inadmissible, because no evidence indicates the boy suffered from those side effects. Thus, such general information regarding

[2] The trial court advised the parties that it had researched information about the medications in the Physicians' Desk Reference and "elsewhere." Trans. Vol. III (Apr. 27, 2016), p. 449. The record indicates that the trial court also contacted Dr. Kara Marciani, a licensed psychologist at the Forensic Psychiatry Center for Western Ohio.

> possible drug side effects would be irrelevant and would be excluded pursuant to Evidence Rule 402. Even if the information had some marginal relevance, which the court believes it does not, it would be outweighed by the danger of unfair prejudice per Evidence Rule 403(a), which mandates its exclusion.

Trans. Vol. III (Apr. 27, 2016), p. 450-451.

{¶ 25} Having reviewed all the records at issue, we conclude that the trial court correctly determined that A.U.'s mental health and school records did not contain any information material to Jones's defense. We further agree that the medication A.U. was taking and the possible side effects associated with that medication were irrelevant, since A.U.'s mental health records indicate that he never experienced any hallucinations, illusions, or psychosis, but instead exhibited logical, linear thought processes at all times.

{¶ 26} Nevertheless, Jones argues that his right to effective cross-examination under the Confrontation Clause of the Sixth Amendment to the United States Constitution should have permitted him to ask A.U. what medication he was taking and to present expert testimony regarding the medication's side effects. The Confrontation Clause, however, "only guarantees 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (Emphasis sic.) *Ritchie*, 480 U.S. 39 at 53, 107 S.Ct. 989, 94 L.Ed.2d 40, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985). " '[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on * * * cross-examination [of a prosecution witness] based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'

safety, or interrogation that is repetitive or only marginally relevant.' " *State v. Abbasov*, 2d Dist. Montgomery No. 26470, 2015-Ohio-5379, ¶ 17, quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Therefore, the " 'extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court.' " *State v. Green*, 66 Ohio St.3d 141, 147, 609 N.E.2d 1253 (1993), quoting *Alford v. United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

{¶ 27} In this case, it was not an abuse of discretion for the trial court to prohibit Jones from cross-examining A.U. on an issue that was irrelevant to trial. As previously discussed, there is nothing in A.U.'s mental health or school records indicating that A.U.'s medications affected his ability to perceive reality. Accordingly, there was no basis for allowing Jones to cross-examine A.U. regarding his medication or to present evidence of possible side effects.

{¶ 28} While we find no error with regard to the limitations placed on Jones's cross-examination of A.U., we do find that the trial court erred in failing to disclose a certain communication it had with Dr. Kara Marciani, a licensed psychologist at the Forensic Psychiatry Center for Western Ohio. In reviewing A.U.'s records, this court came across a short memorandum prepared by the trial court indicating that on April 15, 2016, at 9:50 a.m., the trial court judge had a telecom conference with Dr. Marciani regarding A.U.'s mental health records and his medication. According to the memorandum, Dr. Marciani advised the trial court that A.U.'s medication would not affect his ability to accurately perceive and testify regarding the murders.

{¶ 29} There is nothing in the record indicating whether the trial court ever

disclosed its communication with Dr. Marciani and her opinion to the parties. We find this troubling, as the trial court essentially sought out an expert opinion without giving Jones a chance to present his own expert opinion. However, even if Jones had been given an opportunity to rebut Dr. Marciani's opinion with his own expert, the fact remains that the mental health records at issue indicate that A.U. never experienced any side effects from his medication that would have affected his ability to perceive the murders. In other words, a contrary expert opinion would not have changed the fact that A.U. did not hallucinate or misperceive reality. Therefore, the trial court's error in failing to advise the parties of its communication with Dr. Marciani and her opinion was harmless.

{¶ 30} Jones's First Assignment of Error is overruled.

Second Assignment of Error

{¶ 31} Jones's Second Assignment of Error is as follows:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. JONES WHEN IT PROHIBITED MR. JONES FROM INTRODUCING EVIDENCE OF AN ALTERNATIVE SUSPECT WHO HAD THREATENED VIA E-MAIL TO KILL ONE OF THE VICTIMS.

{¶ 32} Under his Second Assignment of Error, Jones contends that he was not afforded a meaningful opportunity to present a complete defense at trial because the trial court prohibited him from introducing evidence of an alternative suspect. Specifically, Jones claims that the trial court improperly excluded evidence of certain text messages received and sent by Beckwith on his cell phone that, according to Jones, show that Beckwith associated with unscrupulous individuals who threatened his life. Jones claims

that these text messages establish the existence of an alternative suspect who had the motivation to kill Beckwith.

{¶ 33} While there is no question that all criminal defendants are constitutionally guaranteed a meaningful opportunity to a complete defense, criminal defendants do not necessarily have a right to present *all* evidence of third-party guilt. *State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837, 895 N.E.2d 821, ¶ 19; *State v. Gillispie*, 2d Dist. Montgomery Nos. 22877, 22912, 2009-Ohio-3640, ¶ 120, citing *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (“ ‘A complete defense’ *may* include evidence of third-party guilt.” (Emphasis added.)).

{¶ 34} The United States Supreme Court has indicated that it is widely accepted that evidence introduced to prove that another person may have committed the crime with which the defendant is charged “ ‘may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant’s trial[.]’ ” *Holmes,* 547 U.S. at 327, quoting 40A American Jurisprudence 2d, Homicide, Section 286 (1999). *Accord State v. Walker,* 5th Dist. Stark No. 2005-CA-00286, 2006-Ohio-6240, ¶ 49, quoting *Smithart v. Alaska*, 988 P.2d 583, 586 (1999), quoting *Marrone v. State*, 359 P.2d 969, 984-985, fn. 19 (1961) (“ ‘when a defendant wishes to implicate a specific individual, evidence of the third party’s guilt is admissible only if the defense can produce evidence that “tend[s] to directly connect such other person with the actual commission of the crime charged.” ’ ”). “ ‘[F]requently matters offered in evidence for [the purpose of showing third-party guilt] are so remote and lack such connection with the crime that they are excluded.’ ” *Holmes*, 547 U.S. at 327, quoting 41 Corpus Juris

Secundum., Homicide, Section 216 (1991).

{¶ 35} However, there is " ' "no requirement that the proffered evidence [of a third party's guilt] must prove or even raise a strong probability that someone other than the defendant committed the offense. Rather, the evidence need only tend to create reasonable doubt that the defendant committed the offense." ' " (Emphasis omitted.) *State v. Gillispie*, 2d Dist. Montgomery No. 24456, 2012-Ohio-1656, ¶ 40, quoting *Walker* at ¶ 50, quoting *Johnson v. United States*, 552 A.2d 513, 516 (D.C.Cir.1989).

{¶ 36} In this case, a review of the record indicates that Jones did not offer the text messages at issue as evidence of an alternative suspect. Rather the record indicates that Jones offered the text messages to establish how the police had failed to investigate the existence of an alternative suspect. *See* Trans. Vol. XV (Sept. 21, 2016), p. 2796. In fact, Jones told the trial court that while he believed there was an alternative suspect, he did not know for sure given that an investigation was never performed. *Id*. Accordingly, since Jones never identified or offered evidence of an alternative suspect, it cannot be said the trial court erred in excluding the text messages for that purpose.

{¶ 37} Although Jones specifically advised the trial court that he was not offering the aforementioned text messages as evidence of an alternative suspect, the trial court found otherwise and proceeded to analyze whether the text messages could properly be used for that purpose. *See Id.* at 2803. The text messages at issue include four separate conversations that occurred between September 2012 and January 2013. The contents of the text messages are as follows:[3]

[3] We have removed some offensive words from the following quotations; the full text is in the trial court record.

Conversation 1:

Unidentified Individual: Juan asked if you took money up there.

Beckwith: Not yet.

Unidentified Individual: Stop playing.

Beckwith: Okay.

Unidentified Individual: He said he is going to kill you.

Conversation 2:

Hipman: Did you find out who called the police on me?

Beckwith: Working on it.

Hipman: They made me miss the money, and I want to f*** them up.

Beckwith: I feel you, plus that cop shit, I'm not on.

Hipman: I needed that money, and I can't f*** with him no more.

Conversation 3:

Unidentified Individual: Word. Question, how do you feel about the weapons ban?

Beckwith: Not for it.

Beckwith: I will have them, legal or not.

Conversation 4:

Unidentified Individual: You done f***ed up nice and good now bro. It's okay man, everybody make

> mistakes. I hope you so much happier my n****, I'm going to wear my colors proudly for you man, untouchables for life, family for life, my brother for life. I love you bro.

Trans. Vol. XV (Sept. 21, 2016), p. 2793-2795.

{¶ 38} In conducting its analysis, the trial court determined that the text messages could not be used as evidence of an alternative suspect because there was no nexus between the unidentified individual named "Juan" and the murders at issue. In other words, the information in the text messages was too speculative or remote to connect "Juan" to the murder of Beckwith and Hughley. As a further matter, Jones admittedly could not identify "Juan." Therefore, based on the contents of the text messages, the trial court's decision excluding the text messages as evidence of an alternative suspect was not an abuse of discretion.

{¶ 39} Jones's Second Assignment of Error is overruled.

Third Assignment of Error

{¶ 40} Jones's Third Assignment of Error is as follows:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. JONES WHEN IT PERMITTED THE INTRODUCTION OF AUTOPSY PHOTOGRAPHS DESPITE A CONCESSION BY MR. JONES AS TO THE MANNER OF DEATH OF THE VICTIMS.

{¶ 41} Under his Third Assignment of Error, Jones contends that the trial court's

failure to exclude all the autopsy photographs as evidence prejudiced him and prevented him from receiving a fair trial. Specifically, Jones argues that the autopsy photographs were unnecessary since he stipulated that the victims' deaths were caused by multiple gunshot wounds. Jones claims that the stipulation rendered the photographs unnecessary because the photographs no longer advanced the State's burden of proof in any way. As a result, Jones contends that the probative value of the photographs was minimal compared to the risk of unfair prejudice due to their gruesome content.

{¶ 42} The admission or exclusion of photographic evidence is left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Whitfield*, 2d Dist. Montgomery No. 22432, 2009-Ohio-293, ¶122, citing *State v. Morales*, 32 Ohio St.3d 252, 257, 513 N.E.2d 267 (1987). "A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary." (Citation omitted.) *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971 ¶ 34. "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶ 43} Evid.R. 403 provides that:

> (A) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
>
> (B) Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

{¶ 44} Under Evid.R. 403(A), "a trial court may reject an otherwise admissible photograph which, because of its inflammatory nature, creates a danger of prejudicial impact that substantially outweighs the probative value of the photograph as evidence." *Morales* at 259. However, " 'the mere fact that a photograph is gruesome or horrendous is not sufficient to render it *per se* inadmissible.' " (Emphasis sic.) *Id*. at 260, citing *State v. Maurer*, 15 Ohio St. 3d 239, 265, 473 N.E.2d 768 (1984). (Other citation omitted.) "Nonrepetitive photographs in capital cases, even if gruesome, are admissible if the probative value of each photograph outweighs the danger of material prejudice to the accused." *State v. Jalowiec*, 91 Ohio St.3d 220, 229, 744 N.E.2d 163 (2001), citing *Maurer* at paragraph seven of the syllabus. "[E]ven where there are stipulations, Evid.R. 403 requires a balancing analysis to determine their probative value." *State v. Tatum*, 10th Dist. Franklin No. 04AP-561, 2005-Ohio-1527, ¶ 11. Therefore, " '[t]he fact that appellant stipulated the cause of death does not automatically render the photographs inadmissible.' " *Jalowiec* at 229, quoting *Maurer* at 265.

{¶ 45} In this case, the State sought to present 9 out of 52 autopsy photographs taken during Hughley's autopsy and 8 out of 44 autopsy photographs taken during Beckwith's autopsy. Following an objection by Jones, the trial court excluded three photographs which depicted Beckwith's opened skull and his brain. The trial court excluded the three photographs on grounds that they were duplicative and that their probative value was outweighed by the risk of unfair prejudice. Accordingly, a total of 14 autopsy photographs were published to the jury.

{¶ 46} Upon review, we find the published photographs were relevant in that they corroborated and illustrated the testimony of the coroner who performed the autopsies at

issue. Simply because the coroner used the photographs to explain the victims' causes of death, to which Jones stipulated, does not mean that the photographs were automatically inadmissible. In addition to cause of death, the photographs were probative of how the shootings took place. For example, the photographs were used to show the trajectory of the bullets into the victims' bodies, which the coroner testified was consistent with the victim's lying face down when they were shot. This corroborates A.U.'s eyewitness testimony as to how the shootings took place, as well as the testimony of Deputy Brian Crowe, paramedic Sean McNeil, and A.U.'s neighbor Shawn, who all testified to observing the victims lying face down on the ground.

{¶ 47} Based on the foregoing, we find no merit to Jones's claim that the autopsy photographs had minimal probative value as a result of Jones stipulating to the victims' causes of death. In addition to proving cause of death, the photographs provided insight into how the shootings took place and corroborated the testimony of multiple witnesses. Accordingly, it was not an abuse of discretion for the trial court to find that the probative value of the photographs outweighed the danger of unfair prejudice. The trial court also did not abuse its discretion when it decided to exclude only 3 of the 17 photographs offered by the State. Upon review, the photographs published to the jury were not cumulative in nature, as each one served a specific purpose in illustrating the testimony of the coroner who performed the autopsy.

{¶ 48} Jones's Third Assignment of Error is overruled.

Fourth Assignment of Error

{¶ 49} Jones's Fourth Assignment of Error is as follows:

THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. JONES WHEN IT PERMITTED PEREMPTORY CHALLENGES BY THE STATE OF AFRICAN-AMERICAN FEMALES IN VIOLATION OF *BATSON*.

{¶ 50} Under his Fourth Assignment of Error, Jones contends that during voir dire, the State made improper peremptory challenges against three African-American women based on their race. Jones claims that this is a prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

{¶ 51} In *Batson,* the United States Supreme Court held that the Equal Protection Clause forbids the State from exercising a peremptory challenge to excuse a juror solely because of that juror's race. *Id*. at paragraph 1(b) of the syllabus. "[T]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors[.]" *Id.* at paragraph 1(a) of the syllabus.

{¶ 52} "A court adjudicates a *Batson* claim in three steps. In step one, the opponent of the peremptory challenge at issue must make a prima facie case that the proponent was engaging in racial discrimination. In step two, the proponent must come forward with a race-neutral explanation for the strike. In step three, the trial court must decide, on the basis of all the circumstances, whether the opponent has proved racial discrimination." (Citations omitted.) *State v. Murphy*, 91 Ohio St.3d 516, 528, 747 N.E.2d 765 (2001). "A trial court's finding of no discriminatory intent will not be reversed on appeal unless clearly erroneous." (Citations omitted.) *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 64.

{¶ 53} Under the first step of *Batson*, to establish a prima facie case of discrimination "the defendant must point to facts and other relevant circumstances that are sufficient to raise an inference that the prosecutor used its peremptory challenge specifically to exclude the prospective juror on account of his race." *State v. Carver*, 2d Dist. Montgomery No. 21328, 2008-Ohio-4631, ¶ 48, citing *Batson*, 476 U.S. at 95, 106 S.Ct. 1712, 90 L.Ed.2d 69. (Other citation omitted.) "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Batson* at 97.

{¶ 54} In this case, the first step of the *Batson* analysis concerning whether Jones made a prima facie case of discrimination is moot because the State offered an explanation for its peremptory challenges and the trial court ruled on it. *See State v. White*, 85 Ohio St.3d 433, 437, 709 N.E.2d 140 (1999) ("Once the proponent explains the challenge and the trial court rules on the ultimate issue of discrimination, whether or not a prima facie case was established becomes moot.") As a result, only the second and third steps of the *Batson* analysis are at issue.

{¶ 55} Under the second step of *Batson*, "the burden shifts to the prosecutor to articulate a race-neutral explanation for the peremptory challenge 'related to the particular case to be tried.' " *Carver* at ¶ 49, quoting *Batson* at 98. "Although a simple affirmation of general good faith will not suffice, the prosecutor's explanation 'need not rise to the level justifying exercise of a challenge for cause.' " *Id.*, quoting *Batson* at 97. " ' "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason

offered will be deemed race neutral." ' " *Id*., quoting *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), quoting *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *State v. Gowdy*, 88 Ohio St.3d 387, 392, 727 N.E.2d 579 (2000).

{¶ 56} It is well established that "[u]ncertainty about how a prospective juror perceives the death penalty is a 'race-neutral reason' for exercising a peremptory challenge against her." *State v. Were*, 118 Ohio St.3d 488, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 65, citing *White* at 437; *Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, at ¶ 73. The Supreme Court of Ohio has specifically held that a peremptory challenge based on a prospective juror's opposition to the death penalty is race neutral. *White* at 437.

{¶ 57} In this case, the State explained that its peremptory challenges for each of the three African-American women at issue were due to their views on the death penalty, as each woman indicated that she did not believe in the death penalty and was opposed to it. The specific explanations given by the State for each of the three prospective jurors were as follows:

{¶ 58} *Prospective Juror* [*Ri.*]

> Judge, we are challenging Ms. [Ri.] for her views on the death penalty. Specifically, in her questionnaire. Her answer to question 117. Please state any opinion you have in favor of the death penalty and any opinion you have opposed to the death penalty and why. Her answer is, quote, don't believe in the death penalty.
>
> Question 119. Which of the following statements best reflects your

view of using the death penalty? She checked next to, opposed in all cases. It also appears as if—and I spoke with her about this in small group—she started to check next to, my beliefs would prevent me or substantially impair me in my ability to vote for the death penalty. * * *

And then in 121, she checked, she strongly agrees with the statement that the death penalty should never be used as punishment for any murder. And I would note that in my questioning of her, she waivered as to whether her personal beliefs would preclude her from following the law and signing a death verdict.

Trans. Vol. XI (Sept. 15, 2016), 2053-2054.

{¶ 59} *Prospective Juror* [*J.*]

Judge, as it relates to Ms. [J.] the State's challenge is, again, based on her views as it relates to the death penalty. I would note in her questionnaire, question 117, which asks her to state her opinion in either favor or opposition of the death penalty. She wrote, I believe as a Christian that it's the Lord's decision. Which I would argue indicates that she is opposed to it and she believes that's a decision left to a higher power. * * *

Question 118, Your Honor, she was asked have you ever held a different view on the death penalty? She indicated that she had not. And Question 119. Which of the following statements best describes your view of using the death penalty? She checked that my beliefs would prevent me or substantially impair my ability to vote for the death penalty.

I did note during small group that when asked, she said that she

would be substantially impaired during deliberations in phase 2. She indicated that her beliefs regarding the death penalty, albeit religious, would weigh on her and would affect her ability to fairly consider the death penalty as a—as an option. She was later, I believe, rehabilitated to some extent by the Court. The State had made a challenge for cause, which was overruled at that time.

And I would note again, Your Honor, the case law that is clear from the Supreme Court of Ohio, as well as the Second District, as this being a race neutral reason. I would also note for the record that there are three African-Americans in the first 12. With, I believe, answers that are different from those given by Ms. [J.]

Trans. Vol. XI (Sept. 15, 2016), 2061-2062.

{¶ 60} *Prospective Juror* [*Ra.*]

I would note in Ms. [Ra.]'s questionnaire, to question 117, her opinion in favor or in opposition to the death penalty, she indicated that she does not believe in the death penalty. "I believe a person should spend the rest of their life in jail." Have you ever held a different view on the death penalty? Question 118. "No." Which of the following statements best reflects your view of using the death penalty? She checked next to, "My beliefs would prevent me or substantially impair my ability to vote for the death penalty."

I also noted in the small group questioning of Ms. [Ra.], she indicated, again, she didn't believe in the death penalty. That she—if she

had to vote for the death penalty, she didn't know if I—I don't know if I could follow the law and sign a verdict form. There are two sides to it. I think she was later rehabilitated to a degree by the Court. We challenged her for cause. The Court overruled that for cause challenge.

I would note we have two African-American females in the—in the 12 jurors. One African-American male in the 12 jurors. And we have one African-American male amongst the current alternates, all of whom gave different answers as it relates to the death penalty. * * *

And, again, Judge, my assertion would be as the—the case law that I have cited to you indicates, the State's challenge does not have to rise to the level of for cause if the State has a concern as to how her feelings are and I believe that she's indicated equivocal answers in her questionnaire and in her—in her in person questioning, that that's a race neutral reason.

Trans. Vol. XI (Sept. 15, 2016), 2066-2068.

{¶ 61} We find the State's explanations for each peremptory challenge at issue bear no discriminatory intent and provide a race-neutral reason for making the challenge, i.e., the jurors' views on the death penalty. Therefore, the second step of the *Batson* analysis is satisfied.

{¶ 62} Under the third step of *Batson*, "the trial court must determine 'whether the defendant has carried his burden of proving purposeful discrimination.' " *Carver*, 2d Dist. Montgomery No. 21328, 2008-Ohio-4631, at ¶ 50, quoting *Batson*, 476 U.S. 79, 82, 106 S.Ct. 1712, 90 L.Ed.2d 69. "In making such a determination, the trial court must decide whether the prosecutor's race-neutral explanation is credible, or instead is a 'pretext' for

unconstitutional discrimination." (Citations omitted.) *Id*. "Because this third stage of the analysis rests largely on the trial court's evaluation of the prosecutor's credibility, an appellate court is required to give the trial court's findings great deference." (Citations omitted.) *Id*.

{¶ 63} In this case, the record establishes that the State did not challenge every African-American prospective juror. In fact, three African-Americans served as jurors and a fourth was empaneled as an alternate juror. "The presence of one or more black persons on a jury certainly does not *preclude* a finding of discrimination, but 'the fact may be taken into account * * * as one that suggests that the government did not seek to rid the jury of persons [of a particular] race.' " (Emphasis sic.) *State v. White*, 85 Ohio St.3d 433, 438, 709 N.E.2d 140 (1999), quoting *United States v. Young-Bey*, 893 F.2d 178, 180 (8th Cir.1990). *Accord State v. Stargell*, 2016-Ohio-5653, 70 N.E.3d 1126, ¶ 30 (2d Dist.). Considering all of the evidence, we do not find that the trial court's conclusion that the prosecutor's statements were credible and not a pretext for discrimination were clearly erroneous. Accordingly, the trial court did not err in overruling Jones's *Batson* challenge.

{¶ 64} Jones's Fourth Assignment of Error is overruled.

Fifth Assignment of Error

{¶ 65} Jones's Fifth Assignment of Error is as follows:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. JONES WHEN IT SEATED A JURY CULLED FROM VOTER REGISTRATION ROLLS INSTEAD OF DRIVER'S LICENSES.

{¶ 66} Under his Fifth Assignment of Error, Jones contends that the trial court erred in overruling his motion to expand the jury venire to include not only registered voters, but licensed drivers as well. According to Jones, this deprived him of the right to have a jury selected from a fair cross-section of the population.

{¶ 67} Contrary to Jones's claim otherwise, "the great weight of authority supports the validity of voter registration lists as the sole source of prospective jurors." *State v. Hill*, 64 Ohio St.3d 313, 326, 595 N.E.2d 884 (1992), citing *State v. Johnson*, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972), paragraph two of the syllabus. (Other citation omitted.) "The use of voter registration rolls as exclusive sources for jury selection is constitutional and 'does not systematically, [or] intentionally, exclude any [economic, social, religious, racial, political and geographical group of the community].' " *State v. Moore*, 81 Ohio St.3d 22, 28, 689 N.E.2d 1 (1998), citing *Johnson* at 114. (Other citation omitted.)

{¶ 68} In *State v. Davie,* 80 Ohio St.3d 311, 686 N.E.2d 245 (1997), the Supreme Court of Ohio held that a trial court's failure to grant a defendant's motion to supplement the list of potential jurors with a list of licensed drivers did not deprive the defendant of an impartial jury that represented a fair cross-section of the community. *Id*. at 316-317. In so holding, the Supreme Court confirmed that "utilization of voter rolls alone to choose prospective jurors is constitutional." *Id*., citing *Johnson* at paragraph two of the syllabus and *Hill* at 325-326.

{¶ 69} Based on the foregoing precedent, Jones's claim lacks merit, as it was appropriate for the trial court to cull jurors only from the pool of registered voters.

{¶ 70} Jones's Fifth Assignment of Error is overruled.

Assignments of Error Six through Twelve

{¶ 71} Jones listed the following seven assignments of error in an appendix attached to his appellate brief, noting that he wanted to preserve these issues for further appeal to the Supreme Court of Ohio, if necessary.

VI. MR. JONES'S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE.

VII. MR. JONES'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

VIII. MR. JONES'S SENTENCE WAS CONTRARY TO LAW, IMPROPER, AND UNJUST.

IX. THE TRIAL COURT ERRED BY DENYING MR. JONES'S MOTION FOR CHANGE OF VENUE.

X. THE STATE IMPROPERLY SOUGHT IMPOSITION OF THE DEATH PENALTY AS THE DEATH PENALTY IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

XI. MR. JONES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

XII. THE TRIAL COURT ERRONEOUS[LY] FOUND MR. JONES COMPETENT TO STAND TRIAL.

{¶ 72} Pursuant to App.R. 12(A)(2), an appellate court may disregard an assignment of error presented for review if the party raising it " 'fails to argue the assignment separately in the brief, as required under App.R. 16(A).' " *State v. Watson*,

126 Ohio App.3d 316, 321, 710 N.E.2d 340 (12th Dist.1998), quoting App.R. 12(A)(2). *Accord Rose v. Cochran*, 2d Dist. Montgomery No. 25498, 2013-Ohio-3755, ¶ 38. Under App.R. 16(A)(7), appellants are required to present "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies."

{¶ 73} In this case, the appendix to Jones's appellate brief does not include any supporting arguments or citations to authorities, statutes, or parts of the record on which Jones relies. Rather, the appendix merely lists the assignments of error, which is in violation of App.R. 16(A)(7). " 'It is not the duty of an appellate court to search the record for evidence to support an appellant's argument as to any alleged error.' " *State v. Montgomery*, 2d Dist. Montgomery No. 25277, 2013-Ohio-4509, ¶ 69, quoting *Watson* at 321; *Barry v. Barry*, 2d Dist. Montgomery No. 25387, 2013-Ohio-181, ¶ 8-9. As a result, this court will disregard all seven assignments of error raised in the appendix.

{¶ 74} Assignments of error Six through Twelve are overruled.

First Assignment of Error on Cross-Appeal

{¶ 75} The State's First Assignment of Error on cross-appeal is as follows:

> THE TRIAL COURT ERRED BY GRANTING IN PART JONES'S CRIM.R. 29 MOTION FOR ACQUITTAL AND DISMISSING THE KIDNAPPING COUNTS AND RELATED AGGRAVATED MURDER COUNTS.

{¶ 76} Under its First Assignment of Error, the State contends that the trial court erred by dismissing the two counts of kidnapping, the two kidnapping-related aggravated

murder counts, and the kidnapping-related death penalty specifications.

{¶ 77} An appellate court reviews a trial court's ruling on a motion under Crim.R. 29 using "the same standard as is used to review a claim based on the sufficiency of the evidence." *State v. Bailey*, 2d Dist. Montgomery No. 27177, 2017-Ohio-2679, ¶ 17, citing *State v. Page*, 2d Dist. Montgomery No. 26670, 2017-Ohio-568, ¶ 7. (Other citation omitted.) The standard of review for sufficiency of the evidence is if, while 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. *Id*., citing *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997). "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." (Citation omitted.) *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶ 78} The statute governing the offense of kidnapping provides: "No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * * (2) To facilitate the commission of any felony or flight thereafter[.]" R.C. 2905.01(A)(2).

{¶ 79} In this case, the trial court dismissed the kidnapping and the kidnapping-related aggravated murder counts and specifications after finding "there is virtually no evidence to conclude kidnapping was truly afoot." *Order Granting in Part and Overruling in Part Defendant's Rule 29 Motion* (Sept. 29, 2016), Montgomery County Court of Common Pleas Case No. 2013-CR-0294, Docket No. 770. The trial court reached this conclusion because "the evidence showe[d] that the encounter between [Jones] and the

victims lasted a matter of seconds and the victims were displaced no more than ten to fifteen feet." *Id*.

{¶ 80} " 'It is clear from the plain language of [R.C. 2905.01(A)] that no movement is required to constitute the offense of kidnapping; restraint of the victim by force, threat, or deception is sufficient.' " *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, ¶ 23, quoting *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979). Furthermore, "[t]he restraint need not be for any specific duration or in any specific manner." *State v. Taylor*, 10th Dist. Franklin No. 14AP-254, 2015-Ohio-2490, ¶ 18, citing 2 Ohio Jury Instructions, CR Section 505.01(A); *State v. Reed*, 9th Dist. Wayne No. 2643, 1991 WL 260227, *2 (Nov. 27, 1991) (finding no merit to defendant's argument that there was insufficient evidence of kidnapping since the restraints imposed lasted only a "few seconds").

{¶ 81} By considering the length of time in which the restraint took place and the asportation of the victims, the trial court appears to have engaged in an allied-offense analysis as opposed to a sufficiency-of-the-evidence analysis. This is supported by the fact that the trial court relied on the Supreme Court of Ohio's decision in *Logan*, which analyzes whether kidnapping should merge with other offenses, such as rape and robbery. In *Logan*, the Supreme Court held that when kidnapping is committed during another crime, no separate animus exists for kidnapping when the restraint or movement of the victim is merely incidental to the other crime. *Logan* at 136. This is a completely separate issue from sufficiency of the evidence.

{¶ 82} Upon review, we find that A.U.'s trial testimony established all elements of kidnapping under R.C. 2905.01(A)(2). Specifically, A.U. testified that Jones barged into

his apartment and forced Beckwith and his mother to the ground on their stomachs while Jones waived a gun in his hand and yelled for them to "shut the F up." Once his mother and Beckwith were on the ground, A.U. testified that Jones fired shots at them and took items from their pockets before leaving the scene. From this testimony, a rational trier of fact could have found that Jones, by force and threat, restrained the liberty of A.U.'s mother and Beckwith to facilitate the commission of aggravated robbery and aggravated murder. The fact that the restraint may have lasted only a few seconds and that A.U.'s mother and Beckwith were only displaced a few feet was immaterial.

{¶ 83} For the foregoing reasons, we agree that the trial court erred in dismissing the kidnapping and kidnapping-related aggravated murder counts and specifications. However, even if the trial court had not dismissed those counts and specifications, and if the jury had found Jones guilty of each of them, the dismissed counts and specifications would have nevertheless merged into other offenses at sentencing. The count of kidnapping Hughley would have merged with the aggravated robbery of Hughley and the count of kidnapping Beckwith would have merged with the aggravated robbery of Beckwith. Likewise, the kidnapping-related aggravated murder counts would have merged with the other two aggravated murder counts for which Jones was sentenced. The kidnapping death penalty specifications would also have merged into the aggravated-robbery death penalty specifications. In other words, Jones would have been sentenced for the same number of convictions and specifications even if the trial court had not improperly dismissed the counts and specifications in question.

{¶ 84} Other than depriving the State of its right to elect the kidnapping and kidnapping-related aggravated murder counts and specifications as the counts and

specifications that survive merger for purposes of sentencing, the trial court's errors had no effect on the judgment. In any event, "the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.' " *Evans v. Michigan*, 568 U.S. 313, 318, 133 S.Ct. 1069, 185 L.Ed.2d 124 (2013), quoting *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). "A mistaken acquittal is an acquittal nonetheless, and [the United States Supreme Court] ha[s] long held that '[a] verdict of acquittal * * * could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.' " *Id*., quoting *United States v. Ball,* 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).

{¶ 85} The State's First Assignment of Error on cross-appeal is sustained.

Second Assignment of Error on Cross-Appeal

{¶ 86} The State's Second Assignment of Error on cross-appeal is as follows:

THE TRIAL COURT IMPROPERLY MERGED COUNTS OF AGGRAVATED MURDER PRIOR TO THE MITIGATION PHASE OF TRIAL, RATHER THAN AT THE TIME OF SENTENCING.

{¶ 87} Under its Second Assignment of Error, the State contends that the trial court erred in merging the four aggravated murder counts into two single counts (one count for each victim) at the penalty phase of trial as opposed to waiting to merge those offenses at sentencing.

{¶ 88} The Supreme Court of Ohio has consistently rejected the practice of a trial court requiring the State to elect, during the penalty phase of trial, which count should be

submitted to the jury for each victim. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 47; *State v. Goff*, 82 Ohio St.3d 123, 135-136, 694 N.E.2d 916 (1998); *State v. Waddy*, 63 Ohio St.3d 424, 447, 588 N.E.2d 819 (1992). "The general rule is that a defendant may be charged with multiple counts based on the same conduct but may be convicted of only one, and the trial court effects the merger at sentencing." *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 135, citing R.C. 2941.25(A*), State v. Palmer*, 80 Ohio St.3d 543, 572, 687 N.E.2d 685 (1997), and *Waddy* at 447. Therefore, the trial court should have waited until sentencing to merge the aggravated murders.

{¶ 89} The State also argues that the trial court erred in merging the aggravated-robbery death penalty specification related to the murder of Hughley with the aggravated-burglary death penalty specification. As previously noted, the trial court decided to merge these two specifications because it found that Jones's act of taking Hughley's cell phone was more akin to tampering with evidence than robbery. In making that finding, the trial court assumed that Jones took the cell phone to conceal evidence.

{¶ 90} Despite the trial court's assumption, the fact remains that the jury found Jones guilty of aggravated robbery in the commission of a murder. Under circumstances similar to this case, the Supreme Court of Ohio held in *State v. Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414, that aggravated-robbery and aggravated-burglary death penalty specifications do not merge:

> The aggravated-burglary and aggravated-robbery specifications were not subject to merger. They were dissimilar in import and committed with a separate animus. The burglary was complete when Jackson entered [the

> victim's] residence with the intent to commit murder, theft, or kidnapping. Jackson committed aggravated robbery when he stole [the victim's] car after murdering him. Thus, the aggravated burglary and aggravated robbery were separate offenses, because they did not arise from the same act. *See State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 128; *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 68.

Jackson at ¶ 129.

{¶ 91} The present case is analogous to *Jackson*. The aggravated burglary was complete when Jones forced his way into Hughley's apartment with the intent to commit kidnapping, aggravated robbery, and aggravated murder. Jones thereafter committed aggravated robbery when he stole Hughley's cell phone and Beckwith's keys and money after shooting them multiple times. Thus, the aggravated burglary and aggravated robbery arose from separate acts. Accordingly, the trial court erred in merging the aggravated-robbery and aggravated-burglary death penalty specifications.

{¶ 92} The improper mergers, however, do not affect the validity of Jones's conviction, and the protections afforded by the Double Jeopardy Clause prevent a retrial of the penalty phase of trial. *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) (a jury's verdict imposing a life sentence at the penalty phase of trial constitutes an acquittal of the death penalty to which double jeopardy protections apply and bars retrial of the appropriateness of the death penalty); *Arizona v. Rumsey*, 467 U.S. 203, 211, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) (because the defendant's life sentence constituted an acquittal of the death penalty, retrial of that issue was precluded under

double jeopardy principles even though the acquittal was predicated upon a mistaken interpretation of state law); *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 67-68 (a jury's verdict imposing a life sentence is an on-the-merits acquittal of the death penalty which gives rise to double-jeopardy protections).

{¶ 93} The State's Second Assignment of Error is sustained.

Third Assignment of Error on Cross-Appeal

{¶ 94} The State's Third Assignment of Error on cross-appeal is as follows:

> THE TRIAL COURT ERRED IN ALLOWING JONES TO ARGUE RESIDUAL DOUBT TO THE JURY DURING THE MITIGATION-PHASE OF TRIAL.

{¶ 95} Under its Third Assignment of Error, the State contends that the trial court erred in allowing Jones to argue residual doubt during the penalty phase of trial. In arguing residual doubt, defense counsel made the following statement to the jury:

> And you found beyond a reasonable doubt that Harvey was guilty of the offenses that he was indicted on. You may have a lingering doubt. * * * It's often called residual doubt. That's a lingering doubt that you don't have to leave on the shelf. It's a lingering doubt that you can keep with you during this procedure; during this process; during your deliberations.

Trans. Vol. XIX (Sept. 27, 2016), p. 3530.

{¶ 96} Similar to defense counsel's statement, residual doubt is " 'a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." ' " *State v. McGuire,* 80 Ohio St.3d 390, 402,

686 N.E.2d 1112 (1997), quoting *Franklin v. Lynaugh*, 487 U.S. 164, 188, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), (O'Connor, J., concurring). It is well established that "[r]esidual doubt is not an acceptable mitigating factor under R.C. 2929.04(B), since it is irrelevant to the issue of whether the defendant should be sentenced to death." *Id.* at syllabus; *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 260; *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 80-81. "Residual or lingering doubt as to the defendant's guilt or innocence is not a factor relevant to the imposition of the death sentence because it has nothing to do with the nature and circumstances of the offense or the history, character, and background of the offender." (Citations omitted.) *McGuire* at 403. The Supreme Court of Ohio has explained that:

> Our system requires that the prosecution prove all elements of a crime beyond a reasonable doubt. Therefore, it is illogical to find that the defendant is guilty beyond a reasonable doubt, yet then doubt the certainty of the guilty verdict by recommending mercy in case a mistake has occurred. * * * Residual doubt casts a shadow over the reliability and credibility of our legal system in that it allows the jury to second-guess its verdict of guilt in the separate penalty phase of a murder trial.

(Citation omitted.) *Id*.

{¶ 97} In this case, the trial court initially issued an Order and Entry on March 1, 2016, overruling Jones's motion to argue residual doubt as a mitigating factor at the penalty phase of trial. However, just prior to the penalty phase, the trial court reconsidered its decision on the record and indicated that it was going to allow the defense to argue residual doubt. This is was an error. Nevertheless, the improper

residual doubt argument does not affect the validity of Jones's conviction and, as previously noted, the protections afforded by the Double Jeopardy Clause prohibit a retrial of the penalty phase of trial.

{¶ 98} The State's Third Assignment of Error is sustained.

Conclusion

{¶ 99} All the assignments of error raised in Jones's appeal are overruled. All the assignments of error raised in the State's cross-appeal are sustained. Because the trial court's errors do not affect the validity of Jones's conviction and the protections afforded by the Double Jeopardy Clause prohibit a retrial of the erroneously dismissed charges and specifications and of the penalty phase of trial, the judgment of the trial court is affirmed.

. . . . . .

FROELICH, J. and HALL, J., concur.

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