[Cite as *State v. Wilson*, 2018-Ohio-2700.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	Case No. 16CA12
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
JUSTIN A. WILSON	:	**RELEASED: 06/04/2018**
Defendant-Appellant.	:	

APPEARANCES:

Angela Wilson Miller, Jupiter, Florida, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and W. Mack Anderson, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

Harsha, J.

{¶1} After a jury found Justin A. Wilson guilty of aggravated murder with a firearm specification, and tampering with evidence, the trial court sentenced Wilson to life in prison without parole and other sanctions. Wilson contends that his convictions for aggravated murder and tampering with evidence were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶2} However, the trial record refutes those contentions. Two eyewitnesses who knew Wilson saw him shoot the victim, Wilson's girlfriend testified that immediately after the incident he came home and told her he had shot a man, and Wilson's own statements to investigators placed him at the scene where he assaulted and attempted to rob the victim, before shooting him. Wilson's tampering with evidence conviction was supported by his statements to investigators that immediately after the shooting, he "field stripped" his gun and discarded it piecemeal along the road as he fled the murder

scene. Based on this evidence the jury reasonably concluded that the state had established the elements of these offenses beyond a reasonable doubt; it did not clearly lose its way or create a manifest miscarriage of justice. We overrule Wilson's first assignment of error.

{¶3} Next Wilson asserts that the trial court committed plain error by not giving the jury an instruction on murder, or involuntary manslaughter, both of which involve a homicide. Alternatively, he claims that his trial counsel provided ineffective assistance in failing to request jury instructions on these lesser included offenses. In order to require an instruction on a lesser included offense, the evidence must reasonably support both an acquittal on the charged offense and a conviction on the lesser included crime. Here the predicate offense for aggravated murder was robbery, and based on the evidence no reasonable jury could have found that Wilson was not guilty of robbery. Thus, a reasonable jury could not have found him guilty only of murder, which lacks the aggravating element of causing the death of another while committing robbery. And, there was no evidence from which a reasonable jury could find that the shooting was accidental. Wilson pointed his gun at the victim, threatened to kill the victim if he did not give Wilson money, and then fired it at the victim at point blank range. A lesser-included -offense instruction on involuntary manslaughter was not supported by the evidence. We overrule Wilson's second assignment of error.

{¶4} Wilson also argues that the sentencing statute that precludes appellate review of his aggravated murder sentence violates his federal Equal Protection right, subjecting him to illegal disparate treatment. He contends that criminal defendants receiving lesser sentences, and death penalty defendants, each receive full appellate

review of their sentences, yet he does not under the state's sentencing scheme. However, because of the severity of these offenses, the legislature has a valid state interest in treating aggravated murder and murder sentences differently than general felony crimes. Furthermore, there is nothing irrational or arbitrary in the legislature's decision to create a separate statutory scheme for unclassified and classified felonies. And, although capital murder, aggravated murder, and murder are all severe offenses, it is the severity of capital punishment that warrants a separate statutory scheme for capital murder. Thus there is nothing irrational or arbitrary about the legislature's decision to create a separate statutory scheme for death penalty sentences. We adopt the rationale of the Second District Court of Appeals in *Burke, infra,* which recently addressed this issue and found that the statutory sentencing scheme does not violate the Equal Protection Clause. We overrule Wilson's third assignment of error.

{¶5} Last Wilson argues that the trial court erred by failing to properly notify him at his sentencing hearing and in its sentencing entry that he was subject to a discretionary term of up to three years of post-release control as it relates to the tampering with evidence count. However, because he has already served his prison term for tampering with evidence, the trial court can no longer correct any error in post-release control notification through a resentencing hearing on that count. Because this error cannot be corrected, we can grant no relief and the error is moot. We overrule Wilson's fourth assignment of error.

{¶6} We affirm his convictions and sentence.

I. FACTS

{¶7} The Lawrence County Grand Jury returned an indictment charging Justin A. Wilson with one count of aggravated murder for purposely causing the death of Justin Adams during an aggravated robbery, a firearm specification, and one count of tampering with evidence. Wilson pleaded not guilty to the offenses, and the matter proceeded to a jury trial, which produced the following evidence.

{¶8} Lawrence County Deputy Sheriff Brad Layman testified he responded to a call for help, where he was met at the residence door by Nicole Eller. She told Layman that an unknown black male had come in, shot her friend Justin Adams, and fled. Deputy Sheriff Layman entered the residence where he found Justin Adams slumped on the couch. An emergency medical services worker later confirmed that Adams was dead. Deputy Sheriff Layman searched the residence and found no guns or knives.

{¶9} Investigator Shane Hanshaw with the Ohio Bureau of Criminal Investigation (BCI) testified he arrived at the scene later that same evening, took photographs of the scene, and collected DNA swabs. Hanshaw testified that a bullet entered Adams's left eye and, based on the stippling, i.e. deformed crevices in Adams's skin, and the presence of soot from gun powder, the gun was fired within a foot of Adams's body. Hanshaw also photographed bruising around Adams's neck, the position of his shirt and sweater, which indicated it had been held very tightly around Adams's neck, and contusions from blunt force trauma on the top of Adams's skull. Hanshaw identified a 9-millimeter Winchester Luger cartridge case that was found on Adams's clothing.

{¶10} Nicole Eller testified that she conspired with a friend, Derrick Rice, to rob Adams. Earlier in the day, Eller and Adams went to a pawn shop where Adams

obtained $400. Then they purchased Xanax and heroin, which they used throughout the day. Eller testified that Adams owed her $100 out of the $400 but refused to give it to her. So at some point during the day she contacted her friend, Rice, and set up a plan to rob Adams of his drugs and money. Rice agreed and brought Justin Wilson with him. Eller said that she was standing near the kitchen when Rice and Wilson entered the residence. Wilson demanded money but Adams refused. Wilson wrestled with Adams and struck him on the top of the head with the gun at least four times, causing Adams to fall back onto the couch. Eller testified that Wilson then "points the gun at him and says pay me or pay God mf'er [sic]. And then the gun went off." Eller said Rice took Adams's drugs and money and gave her $100. After Wilson and Rice ran out of the house, Eller went to a neighbor's house and called 9-1-1. Eller testified that she initially lied about the shooter being an unknown person because she did not want to implicate her friend Rice, but later she told police the truth. Eller testified that she had pled guilty to aggravated robbery and obstruction of justice in the incident and was currently serving a 14-year prison term.

{¶11} Derrick Rice testified that he lived at the residence where Wilson shot Adams. Rice testified that Eller had contacted him earlier that day about robbing Adams and that he talked to Wilson, who offered to come along. Rice testified that Adams had the money out and he tried to yank it from Adams but failed. At that point Wilson pulled out a gun and struck Adams three or four times with it. Rice testified that Wilson told Adams to "pay me or pay God." Rice indicated that the clip fell out of the gun while Wilson was hitting Adams and at some point Wilson put the clip back into the gun, threw Adams on the couch, hit Adams with the gun three more times and shot him. Rice

stated that "When he shot him he knew he fucked up, messed up, Justin Wilson said he didn't mean to do it but the gun went off. He ran." Rice testified that Wilson ran out with Adams's wallet. Rice took the drugs and money, gave Eller $100 and kept the remaining $50. Rice told Eller "to call the cops" and then went to his mother's house. He spoke to investigators that evening and the next day retained counsel, then turned himself in. Rice testified that he did not have a gun at his residence that night and he did not see Adams with either a gun or a knife that night. Rice testified that he pled guilty to aggravated robbery in the incident and was currently serving an 11-year prison term.

{¶12} Angela Bailey testified that she had a relationship with Wilson and the two had a child together. She testified that Wilson was at her house earlier in the evening when he received a phone call from a person she assumed was Rice based on the statements Wilson made to the caller. Wilson left immediately after the call. When Wilson came back about 15 minutes later acting a little jittery, Bailey asked him what was wrong and "he says he just shot somebody in the face." Bailey testified that she was not certain, but she thought she saw Wilson walk into her kitchen with a gun. Wilson stayed at Bailey's home for about 20 to 25 minutes, changed clothes, and then left by cab. After Wilson left Bailey called the Lawrence County Sheriff's Department, deputies came to her house and she told them what Wilson had said to her. Bailey testified that she feared for her safety because before Wilson left her house, he threatened her by saying, "if you say anything you'll be next." Bailey claimed that Wilson had been physically abusive to her in the past. Bailey said after Wilson left, he continued to contact her through Snapchat, a social media platform, and she shared the Snapchat information with authorities.

{¶13} Donna Thompson, who is a cab driver, testified she picked up a male at Bailey's address and drove him to Huntington, West Virginia. During the trip Thompson overheard the passenger tell someone that "he had done something really, really bad but he didn't want to talk about it on the phone." Thompson's trip log recorded Wilson's cell phone number as the caller who requested transportation to Huntington, West Virginia.

{¶14} A forensic scientist firearm examiner for BCI testified that he examined the bullet used to kill Adams and found that it was most consistent with a 9-millimeter Luger metal jacketed bullet. Another criminal intelligence analyst for BCI testified that he analyzed cellular phone records that showed numerous phone calls and text messages between Rice, Eller, and Wilson during the four-hour time period surrounding Adams murder. Those records helped corroborate Eller, Rice and Bailey's version of the events of that evening.

{¶15} Deputy coroner Dr. Kenneth Gerston, testified that he performed the autopsy on Adams and determined the cause of death was a single gunshot wound to the head and chest. Dr. Gerston examined the gunshot, which entered Adams's left eye near the nose where he found little dots called stippling, a "tattooing from gun powder" or partially burned gun powder particles. Dr. Gerston indicated that to cause stippling, the muzzle of the gun must be at least 3 inches from the wound site and no farther than about 18 inches. Dr. Gerston testified that the bullet entered Adams's left eye socket and travelled downward through his body and lodged into his upper back. Dr. Gerston testified that Adams's scalp had a one-inch laceration caused by a blunt object, consistent with being hit with a firearm. Adams also had linear abrasions on the right

and middle of his neck, consistent with a shirt collar being rubbed or pressed against his neck.

{¶16} Lawrence County Sheriff Detective Jason Newman testified that 2 weeks after the murder, the United States Marshals Service apprehended Wilson in Huntington, West Virginia and brought him back to Ohio. Newman testified that Wilson gave three different voluntary statements during the course of the investigation. The jury heard the audio recordings of Wilson's statements.

{¶17} In Wilson's first statement he professed to shooting Adams in self-defense. Wilson stated that he was at the residence to sell Adams a video gaming device when Adams suddenly pulled a knife on him and Rice pulled out a gun. Wilson claimed that he pulled out his gun and fired a shot at Adams from about 8 to 10 feet away from Adams to give himself an opportunity to flee. Wilson indicated that he was not even sure the bullet hit anyone. Wilson stated that he took the gun apart or "field stripped it" and tossed pieces of it away as he fled. Detective Newman testified that authorities never located the gun.

{¶18} In a second statement Wilson changed his story and claimed that Rice asked him for help getting Adams to pay money owed to Rice. Wilson said that he brought his gun with him but removed the ammunition before meeting Rice at the residence. Wilson stated that he gave his empty 9-millimeter Luger to Rice, who used Rice's own ammunition to load the gun. When asked to confirm that none of Wilson's DNA would be found on the bullet that killed Adams because it was loaded by Rice, Wilson backtracked. He said that he actually took the bullet Rice was going to load and held it in his hand to look at it before handing it back to Rice, so the bullet could have

his DNA. Wilson stated that he scuffled with Adams in the living room and he roughed Adams up a bit, grabbed him by the shirt collar and tossed him around and then left. Wilson stated that after he was out the door, he heard a gunshot. Wilson said that Rice told him that the gun just went off.

{¶19} In a third statement Wilson recanted his prior statements. When asked which of the two prior versions he was recanting, Wilson responded that he wanted to recant all of his statements, clarifying that, "I want to recant my statement 'cause it's pretty much total bullshit. All of them, all of them."

{¶20} Wilson did not testify at trial.

{¶21} The jury returned verdicts finding Wilson guilty of aggravated murder with a firearm specification, and tampering with evidence. The trial court sentenced him to term of life without the possibility of parole for aggravated murder, a consecutive sentence on the gun specification, and a concurrent 18-month sentence for tampering with evidence.

II. ASSIGNMENTS OF ERROR

{¶22} Wilson asserts four assignments of error[1]:

I. APPELLANT WHITE'S [SIC] CONVICTIONS FOR: (A) AGGRAVATED MURDER; AND (B) TAMPERING WITH EVIDENCE WERE BASED ON INSUFFICIENT EVIDENCE AND WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. U.S. CONST. AMENDS. V, VI, AND XIV; ARTICLE I, §§ 5, 9, AND 16 OF THE OHIO CONSTITUTION.

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[1] Wilson's first appointed counsel filed a motion to withdraw with an *Anders* brief that contended he could discern no meritorious claim for appeal. After considering the ethical and constitutional requirements of appellate counsel in a criminal appeal, we concluded that this Court will no longer accept motions to withdraw under *Anders.* We discharged Wilson's counsel and appointed his current counsel to prepare an amended merit brief that complies with the procedures outlined in that decision. *See State v. Wilson*, 2017-Ohio-5772, 83 N.E.3d 942 (4th Dist.).

II. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE LESSER-INCLUDED OFFENSES OF MURDER AND INVOLUNTARY MANSLAUGHTER. U.S. CONST. AMENDS. V, XIV, AND ARTICLE I, § 16 OF THE OHIO CONSTITUTION.

III. THE SENTENCE IMPOSED BY THE TRIAL COURT FOR AGGRAVATED MURDER SHOULD BE REVIEWED, REVERSED, AND REMANDED. THE REFUSAL TO REVIEW WILSON'S SENTENCE OF LIFE WITHOUT PAROLE (LWOP) IS A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

IV. THE TRIAL COURT ERRED BY FAILING TO PROPERLY NOTIFY APPELLANT WILSON THAT HE WAS SUBJECT TO A DISCRETIONARY TERM OF UP TO THREE YEARS OF POST-RELEASE CONTROL AT THE SENTENCING HEARING. ADDTIONALLY, ANY NOTIFICATION REGARDING POST-RELEASE CONTROL WAS OMITTED FROM THE SENTENCING ENTRY. THESE FAILURES VIOLATED WILSON'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 10 OF THE OHIO CONSTITUTION.

III. LAW AND ANALYSIS

A. Sufficiency and Manifest Weight of the Evidence

1. Standard of Review

{¶23} In his first assignment of error Wilson asserts that his convictions for aggravated murder and tampering with evidence were based upon insufficient evidence and were against the manifest weight of the evidence.

{¶24} "When a court reviews the record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 9 N.E.3d 930, ¶ 146, 2014-Ohio-1019, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991),

paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A sufficiency assignment of error challenges the legal adequacy of the state's prima facie case, not its rational persuasiveness. *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 17. "That limited review does not intrude on the jury's role 'to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Musacchio v. United States*, ––– U.S. ––––, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016), quoting *Jackson* at 319, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶25} By contrast in determining whether a criminal conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that we must reverse the conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119. If the state presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *State v. Adams*, 2016-Ohio-7772, 84 N.E.3d 155, ¶ 22 (4th Dist.) citing *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus, (superseded by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997)).

{¶26} Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *Thompkins* at 387, 678 N.E.2d 541. However, we are reminded that generally, it is the role of the jury to determine the weight and credibility of evidence. *See Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, at ¶ 132. " 'A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it.' " *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 17, quoting *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id.*; *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 18.

{¶27} Moreover, "[w]hen an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily also includes a finding that sufficient evidence supports the conviction."[2] *State v. Adkins,* 4th Dist. Lawrence No. 13CA17, 2014-Ohio-3389, ¶ 27. "Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *State v. Puckett*, 191 Ohio App.3d 747, 2010-Ohio-6597, 947 N.E.2d 730, ¶ 34 (4th Dist.).

2. The Manifest Weight of the Evidence

a. Aggravated Murder

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[2] The inverse proposition is not always true. *See Thompkins*, 78 Ohio St.3d at 387–388, 678 N.E.2d 541.

{¶28} R.C. 2903.01(B) defines aggravated murder:

> (B) No person shall purposely cause the death of another * * * while committing or attempting to commit, * * * aggravated robbery, * * *.

R.C. 2901.22(A) states that "a person acts purposely when it is the person's specific intention to cause a certain result * * * ." Commonly, there is no direct evidence of a defendant's state of mind, so the state must rely on circumstantial evidence to satisfy this element of its case. *In re Horton*, 4th Dist. Adams No. 04CA794, 2005-Ohio-3502, ¶ 23.

{¶29} Wilson claims that there was insufficient evidence to support his conviction for aggravated murder because the state failed to show that Wilson acted purposely. He claims that the judgment was against the manifest weight of the evidence because Eller and Rice were the state's "star witnesses," Eller initially lied to the police, Eller and Rice were responsible for planning the robbery, Eller and Rice took Adams's drugs and money, and Eller and Rice received "substantial deals" in exchange for their testimony. Wilson also claims the judgment is against the manifest weight of the evidence because there was no physical evidence linking him to Adams's murder.

{¶30} To satisfy its burden to prove the element of purpose beyond a reasonable doubt the state refers to Eller's testimony that Wilson pointed the gun at Adams and said, "Pay me or pay God mf'er" and then shot Adams. Rice also testified that Wilson threatened Adams to "Pay me or pay God." Bailey testified that Wilson told her he had shot a man in the face and then threatened her by stating, "if you say anything you'll be next."

{¶31} Wilson argues that it was "ever-changing statements" from Eller and Rice that eventually linked him to the scene. But Wilson ignores his own ever-changing

statements that were consistent on one key fact: he was at the scene with a gun. The jury was free to believe all, part or none of the testimony that the state relied upon. *Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, at ¶ 132; *Reyes-Rosales*, 2016-Ohio-3338, at ¶ 17.

{¶32} And even though the state presented no physical evidence of DNA or fingerprints to link Wilson to the murder, the state presented direct evidence through the testimony of Eller, Rice, and Bailey and Wilson's own statements. Additionally, BCI testimony about the bullet used to kill Adams and the phone calls and text messages between Rice, Eller, and Wilson during the four-hour time period surrounding Adams's murder corroborated Eller, Rice and Bailey's version of the events of that evening.

{¶33} Dr. Gerson's testimony that Adams had bruising around his neck corroborated Wilson's statement that he had grabbed Adams by the collar and tossed him around. Dr. Gerson's findings that Adams had been struck hard with a blunt object and shot at a downward angle inches from his left eye also corroborated Eller and Rice's testimony that Wilson had tossed Adams onto the couch, struck him with the gun, pointed it at Adams, threatened to kill him if he did not pay Wilson ("Pay me or pay God"), and then shot Adams.

{¶34} Bailey's testimony that Wilson threatened her not to say anything or "you'll be next" implies that Wilson knew what he was doing when he shot Adams and she would suffer the same purposeful fate if she talked.

{¶35} Finally, neither of Wilson's statements to the investigators asserted that Adams's death was accidental.

{¶36} Based on the testimony and the evidence noted above, the jury did not clearly lose its way or create a manifest miscarriage of justice warranting the reversal of Wilson's aggravated murder conviction. Having already determined that Wilson's aggravated murder conviction is not against the manifest weight of the evidence, we necessarily reject Wilson's additional claim that the conviction is not supported by sufficient evidence. *See Adkins, supra; Puckett, supra.*

b. Tampering with Evidence

{¶37} R.C. 2921.12(A) prohibits tampering with evidence:

> No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following: (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation. * * *.

Thus there are three elements of this offense: (1) the knowledge of an official proceeding or investigation in progress or likely to be instituted, (2) the alteration, destruction, concealment, or removal of the potential evidence, (3) the purpose of impairing the potential evidence's availability or value in such proceeding or investigation. *State v. Straley,* 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 11. Wilson contends that the state failed to prove that he knew that an official proceeding or investigation was in progress or likely to be instituted. Instead, he contends that as a felon he was prohibited from carrying a gun and he "did not want to get five years if he was caught with a gun."

{¶38} The state must show that Wilson disposed of the gun "knowing that an official proceeding or investigation is in progress or is about to be or likely to be instituted." The likelihood of an investigation is measured at the time of the alleged act

of tampering. *State v. Barry*, 145 Ohio St.3d 354, 2015-Ohio-5449, 49 N.E.3d 1248, ¶ 21. For Wilson to have acted knowingly, "the statute requires the accused to be *aware* that conduct will probably cause a certain result * * *." (Emphasis sic.) *Barry* at ¶ 24.

{¶39} The state presented evidence that Wilson shot Adams inches from his face in front of two witnesses, ran from the residence, immediately fled the state, and was eventually apprehended by the U.S. Marshals Service in West Virginia. Wilson knew that two acquaintances saw him shoot Adams. Thus, Wilson was aware that his conduct would probably result in a murder investigation. In his recorded statements Wilson confessed that he "field stripped" the gun and randomly threw gun parts while fleeing on foot from the murder scene. No doubt Wilson was afraid of being "caught with a gun" – he knew the authorities were likely going to investigate Adams's murder and pursue him. *See State v. Crocker*, 2015-Ohio-2528, 38 N.E.3d 369, ¶ 36 (4th Dist.) (a person is aware a crime will likely be investigated where it "involves crimes with persons likely to complain or where discovery and investigation is almost certain to occur due to the death of or severe injury to the victim").

{¶40} The Supreme Court of Ohio recently addressed this issue and found that homicides are highly likely to be discovered and investigated, so a jury may reasonably believe that a murderer knows this:

> As a matter of common sense, we can infer that a person who had shot two people and left them for dead in a residential neighborhood would know that an investigation was likely. Nevertheless, we recognize that "Ohio law does not impute constructive knowledge of an impending investigation based solely on the commission of an offense." *Barry*, 145 Ohio St.3d 354, 2015-Ohio-5449, 49 N.E.3d 1248, at ¶ 2.
>
> We find *Barry* distinguishable. The underlying offense in *Barry* was heroin possession, and the tampering alleged in that case was the defendant's concealment of the heroin in a body cavity. But when the defendant

> concealed the heroin, she had no reason to believe that the police would investigate her, for "only her coconspirators were present * * * and nothing in the record shows that she thought it likely that she would be stopped by law enforcement." *Id.* at ¶ 27. On those facts, the issue before us was "whether knowledge that an official proceeding or investigation is pending or likely to be instituted can be imputed to one who commits a crime, regardless of whether that crime is likely to be reported to law enforcement." *Id.* at ¶ 17.
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> But *Barry* does not foreclose the possibility that knowledge of a likely investigation may be inferred when the defendant commits a crime that is likely to be reported. *Here, the crime was not a possessory offense; it was homicide. Homicides are highly likely to be discovered and investigated. Certainly, a jury may reasonably believe that a murderer knows this*. (Emphasis added.)

State v. Martin, 151 Ohio St.3d 470, 2017-Ohio-7556, 90 N.E.3d 857, ¶ 116-118.

{¶41} Based on the testimony and the evidence noted above, the jury did not clearly lose its way or create a manifest miscarriage of justice warranting reversal of Wilson's tampering with evidence conviction. Having already determined that Wilson's tampering with evidence is not against the manifest weight of the evidence, we necessarily reject Wilson's additional claim that the conviction is not supported by sufficient evidence. *See Adkins, Puckett, supra.*

{¶42} We overrule Wilson's first assignment of error.

B. Jury Instruction on Lesser Included Offenses

{¶43} In his second assignment of error Wilson contends that the trial court committed plain error by failing to instruct the jury on the lesser included offenses of murder under R.C. 2903.02(A) and involuntary manslaughter under R.C. 2903.04.

Alternatively, he argues that his trial counsel was ineffective for failing to request these instructions.[3]

1. Plain Error and Standard of Review

{¶44} "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Crim.R. 30(A). Wilson did not object to any omission in the court's instructions. "A party's failure to object to jury instructions before the jury retires constitutes a waiver forfeiture of any claim of error regarding the instructions, absent plain error." *State v. Cooper,* 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶ 30 (4th Dist.).

{¶45} We apply the doctrine of plain error cautiously and only under exceptional circumstances to prevent a manifest miscarriage of justice*. Id. See State v. Schwendeman,* 4th Dist. Athens No. 17CA7, 2018-Ohio-240, ¶ 14-16; *State v. Fouts*, 4th Dist. Washington No. 15CA25, 2016-Ohio-1104, ¶ 59, citing *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. In that regard, "[T]he test for plain error is stringent." *State v. Ellison*, 2017-Ohio-284, 81 N.E.3d 853, ¶ 27 (4th Dist.). "To prevail under this standard, the defendant must establish that an error occurred, it was obvious, and it affected his or her substantial rights." *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 64. An error affects

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[3] Both Wilson and the state contend that the parties "stipulated" that the trial court would not give lesser included offense instructions and use this purported stipulation to bolster certain aspects of their arguments. However, "although litigants may stipulate to facts, they may not stipulate as to what the law requires." *Jeffers, v. Bd. of Athens Cty. Commrs.,* 4th Dist. Athens No. 06CA39, 2007-Ohio-2458, ¶ 15. A party has no right to determine whether a lesser included offense will be given. *State v. Wine,* 140 Ohio St.3d 409, 2014-Ohio-3928, 18 N.E.3d 1207 (a criminal defendant does not have the right to control whether a jury receives instructions on a lesser included offense; the law, the evidence and the discretion of the trial judge determines this).

substantial rights only if it changes the outcome of the trial. *Id*. The defendant carries the burden to establish the existence of plain error, unlike the situation in a claim of harmless error, where the burden lies with the state. *Schwendeman* at ¶ 16.

{¶46} Our review of whether a jury instruction is warranted is de novo*. State v. Depew*, 4th Dist. Ross App. No. 00CA2562, 2002-Ohio-6158, ¶ 24 ("While a trial court has some discretion in the actual wording of an instruction, the issue of whether an instruction is required presents a question of law for de novo review.") In determining whether to give a requested jury instruction, a trial court reviews the sufficiency of the evidence to support the requested instruction. *See State v. Hively,* 4th Dist. Gallia No. 13CA15, 2015-Ohio-2297, 2015 WL 3745609, ¶ 20 (Harsha, J. dissenting on other grounds). A trial court has no obligation to give an instruction if the evidence does not warrant it. *State v. Hamilton,* 4th Dist. Scioto No. 09CA3330, 2011-Ohio-2783, ¶ 70; *see generally State v. Schwendeman*, 4th Dist. Athens No. 17CA7, 2018-Ohio-240, ¶¶ 14-18

2. Necessity for an Instruction

{¶47} Determining whether a lesser included offense instruction is warranted involves a two-part test. *State v. Deanda*, 136 Ohio St.3d 18, 2013–Ohio–1722, 989 N.E.2d 986, ¶ 6; *State v. Wilson*, 4th Dist. Scioto App. No. 13CA3542, 2015–Ohio–2016, ¶ 42–44. First, a trial court must determine if the requested charge is a lesser included offense of the charged crime*. Id.; State v. Kidder*, 32 Ohio St.3d 279, 281, 513 N.E.2d 311 (1987). Second, the court must consider the evidence and give an instruction on a lesser included offense "if under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and

guilty of the lesser offense." *State v. Wine*, 140 Ohio St.3d 409, 2014–Ohio–3948, 18 N.E.3d 1207, ¶ 34.

{¶48} However, "[t]he mere fact that an offense can be a lesser included offense of another offense does not mean that a court must instruct on both offenses where the greater offense is charged." *Id.* at ¶ 22. Instead, "the quality of the evidence offered * * * determines whether a lesser-included-offense charge should be given to a jury." *Id.* at ¶ 26. A lesser included offense instruction requires more than "some evidence" that a defendant may have acted in such a way as to satisfy the elements of the lesser offense. *State v. Shane*, 63 Ohio St.3d 630, 633, 590 N.E.2d 272 (1992). "To require an instruction * * * every time 'some evidence,' however minute, is presented going to a lesser included (or inferior-degree) offense would mean that no trial judge could ever refuse to give an instruction on a lesser included (or inferior-degree) offense." *Id.* at 633. Furthermore, a court must not allow a jury to consider " 'compromise offenses which could not possibly be sustained by the adduced facts.' " *Wine* at ¶ 22, quoting *Wilkins*, 64 Ohio St.2d 382, 387, 415 N.E.2d 303 (1980).

{¶49} When a court reviews the quality of the evidence offered, the court must consider "[t]he whole of the state's case." *State v. Bethel*, 110 Ohio St.3d 416, 2006–Ohio–4853, 854 N.E.2d 150, ¶ 141, citing *State v. Goodwin*, 84 Ohio St.3d 331, 345, 703 N.E.2d 1251 (1999). "An instruction on a lesser-included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense." *State v. Carter,* 89 Ohio St.3d 593, 600, 734 N.E.2d 345 (2000); *State v. Fouts*, 4th Dist. Washington No. 15CA25, 2016-Ohio-1104, ¶ 76-77.

3. Jury Instruction on Murder

{¶50} Wilson correctly contends that, in the abstract, both murder under R.C. 2903.02(A) and involuntary manslaughter can be lesser included offenses of aggravated felony murder under R.C. 2903.01(B). Murder is prohibited by R.C. 2903.02(A): "No person shall purposely cause the death of another * * *." Aggravated murder is prohibited by R.C. 2903.01(B), the relevant portion states: "No person shall purposely cause the death of another * * * while committing * * * aggravated robbery, * * *." Wilson claims he was entitled to the murder instruction because there was evidence that would have allowed the jury to find he did not participate in the robbery, i.e. he was only there to sell the victim a video gaming device and a fight broke out; but also find he "acted purposely in bringing a firearm to the situation, [Wilson's euphemism for shooting Adams] this would support an acquittal on aggravated (felony) murder and a conviction for murder." In other words, Wilson contends that there was a reasonable view of the evidence by which a jury could find that he "purposely caused the death" of Adams when he shot him during the fight, but not "while committing aggravated robbery" because Wilson was there to sell a gaming device, not rob Adams.

{¶51} We reject Wilson's contention that a reasonable jury could acquit on the aggravated felony murder charge because they could find Wilson not guilty of robbery, the predicate offense. The only potential evidentiary basis for Wilson's claim that he was not there to rob Adams is found in his first statement to the detectives, which the jury did hear. But in his third statement to the detectives, which the jury also heard, he recanted both his prior statements claiming both of them were "pretty much total bullshit. All of them, all of them." Accordingly there is no reasonable view of the evidence that would

allow the jury to find Wilson not guilty of robbery. And without such a finding he was not entitled to an instruction on murder.

4. Jury Instruction on Involuntary Manslaughter

{¶52} Involuntary manslaughter, R.C. 2903.04, is also a lesser included offense of aggravated murder, R.C. 2903.01(B). *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 79. "The primary difference" between the two is that aggravated murder requires purpose to kill, while involuntary manslaughter requires only a killing as a proximate result of a felony. *State v. Campbell*, 69 Ohio St.3d 38, 47, 1994-Ohio-492, 630 N.E.2d 339 quoting *State v. Jenkins*, 15 Ohio St.3d 164, 218, 15 OBR 311, 357, 473 N.E.2d 264, 310 (1984); R.C. 2903.04(A) ("No person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony.").

{¶53} Thus, an involuntary manslaughter instruction is justified "only when, on the evidence presented, the jury could reasonably find against the state on the element of purposefulness and still find for the state on the defendant's act of killing another." *State v. Thomas*, 40 Ohio St.3d 213, 216, 533 N.E.2d 286, 289 (1988).

{¶54} Wilson asserts that the testimony of Rice and Eller that described the gun as "going off" after a struggle, and Rice's testimony that Wilson said "he didn't mean to do it" support an involuntary manslaughter instruction. However, there is no evidence in the record that the shooting was accidental. There was no evidence that the gun malfunctioned or "went off" for reasons other than Wilson pulling the trigger. Rice's testimony that Wilson expressed immediate remorse for murdering Adams ("didn't mean to") likewise does not negate the purposeful nature of the act. Wilson brought a loaded

gun with him, beat Adams's skull in with it, pointed it at him, said, "Pay me or pay God," and then fired it at Adams at point blank range. And in neither of his inculpatory statements to the investigators did Wilson claim he fired the gun accidentally. We also reiterate that his statement to Bailey that she would be next if she talked is hardly the thought of a person who claims a killing was an accident. No reasonable juror could find that Wilson acted without purpose when he shot Adams. *State v. Goodwin,* 84 Ohio St.3d 331, 347, 1999-Ohio-356, 703 N.E.2d 1251 (defendant's statement that he "didn't mean to" shoot the victim, the "gun just went off" and defendant had been drinking gin the morning of the robbery did not warrant an instruction on involuntary manslaughter where under any reasonable view, the killing was done with purpose).

{¶55} An instruction on the lesser included offense of involuntary manslaughter was not required here – the evidence did not reasonably support an acquittal on aggravated murder and a conviction on involuntary manslaughter. We find no error in the trial court's decision not to give a lesser-included-offense instruction based on the record.

3. Ineffective Assistance of Counsel

{¶56} Alternatively, Wilson argues that his trial counsel was ineffective for failing to request instructions on the lesser-included offense of murder and involuntary manslaughter. However, trial counsel's failure to request instructions on lesser included offenses is often a matter of trial strategy and does not per se establish ineffective assistance of counsel. *State v. Griffie*, 74 Ohio St.3d 332, 333, 658 N.E.2d 764 (1996), citing *State v. Clayton,* 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980), cert. denied, 449 U.S. 879, 101 S.Ct. 227, 66 L.Ed.2d 102 (1980). Where a defendant wishes to pursue

an "all or nothing" defense strategy, counsel may decide not to request the lesser offense instruction. "[D]efendant's counsel's decision not to request an instruction on lesser included offenses—seeking acquittal rather than inviting conviction on a lesser offense—was a matter of trial strategy." *Wine*, 140 Ohio St.3d 409, 2014–Ohio–3948, 18 N.E.3d 1207, ¶ 30; *Fouts*, 4th Dist. Washington No. 15CA25, 2016-Ohio-1104, ¶ 73. The record shows that Wilson's trial counsel's strategy was to argue that Wilson had left the scene by the time Adams was shot, to accuse Rice as the murderer and to raise doubt in the jury's mind about the veracity of Rice and Eller's testimony rather than pursue an accidental shooting defense strategy.

{¶57} More importantly, counsel is not required to pursue a vain act. *Fouts* at ¶ 75, citing *State v. Sowards*, 4th Dist. Gallia App. No. 09CA8, 2011–Ohio–1660, ¶ 20. Under the evidence presented at trial, Wilson was not entitled to an instruction on murder or involuntary manslaughter thus his trial counsel cannot be found ineffective for failing to request it.

{¶58} We overrule Wilson's second assignment of error.

C. Statutory Preclusion of Appellate Review of Aggravated Murder Sentence

{¶59} For his third assignment of error Wilson argues that R.C. 2953.08 violates the Equal Protection Clause of the United States Constitution. Under R.C. 2953.08(D)(3) a sentence for aggravated murder is not subject to appellate review. *See State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690. Wilson argues that other criminal defendants with much lesser sentences are allowed appellate review and death penalty defendants also receive full appellate review. However, criminal

defendants like Wilson, who receive a sentence of life without parole, have no appellate review of their sentence.

{¶60} The state notes this very challenge was considered and rejected by the Second District Court of Appeals in *State v. Burke*, 2016-Ohio-8185, 69 N.E.3d 774 (2nd Dist.). There Burke was sentenced to life without parole for aggravated murder in the stabbing death of an 82-year old woman. In his sole assignment of error Burke claimed R.C. 2953.08(D) violates the Equal Protection Clause and is therefore unconstitutional because it precludes review of his aggravated murder sentence. He argued that the statute was unconstitutional under the Equal Protection Clause because, " 'the effect [of the statute] (and in all likelihood the purpose) is to flatly treat those who receive sentences for aggravated murder differently than virtually the entirety of all other criminal offenders,' namely those who can seek appellate review of their sentences." (Correction sic.) *Burke* at ¶ 15, quoting Burke's brief.

{¶61} The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The Second District held that the limitation to appellate review of aggravated murder and murder sentences in R.C. 2953.08(D)(3) does not violate the Equal Protection Clause. *Burke* at ¶ 27. In reaching its decision the court explained that Burke had the burden to prove that the statute is unconstitutional beyond a reasonable doubt. *Burke* at ¶ 17, quoting *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923, 812 NE.2d 963, ¶ 5 and *State v. Brownfield*, 12th Dist. Butler No. CA2012-03-065, 2013-Ohio-1947, ¶ 8 (because equal protection analysis begins " 'with the rebuttable presumption that statutes are constitutional, * * * the burden is on the

party asserting that the statute is unconstitutional to prove that the statute is unconstitutional beyond a reasonable doubt.' ").

{¶62} Burke, like Wilson here, challenged R.C. 2953.08(D)(3) as unconstitutional on its face, which means "the challenger must establish that there are no circumstances under which the statute would be valid." *Burke* at ¶ 18, citing *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37.

{¶63} Next, the Second District identified the three different levels of statutory scrutiny applicable to constitutional challenges: strict, heightened or intermediate (for statutes that make classifications based on sex or illegitimacy), and rational basis. *Id.* at ¶ 19, citing *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 13. The court determined that an equal protection challenge to R.C. 2953.08(D)(3) should be analyzed under the rational basis standard:

> R.C. 2953.08(D)(3) is not subject to strict scrutiny. Aggravated murder defendants who receive a life sentence without parole upon conviction are not members of a suspect class. "[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), quoting *San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).
>
> Nor does R.C. 2953.08(D)(3) implicate a fundamental constitutional right. Some rights which have been recognized as fundamental include the right to vote, the right of interstate travel, rights guaranteed by the First Amendment to the United States Constitution, and the right to procreate. *Murgia*, at 312, 96 S.Ct. 2562, fn. 3. *See also Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). Here, Burke argues that he has been deprived of his fundamental right of liberty. "Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. [Citation omitted.] But a person who has been so convicted is eligible for, and the court may impose, whatever

> punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, [citations omitted], and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." *Chapman v. U.S.*, 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).
>
> Moreover, R.C. 2953.08(D)(3) does not govern conviction or imprisonment. Rather, R.C. 2953.08(D)(3) acts to limit the jurisdiction of an appellate court to review sentences for aggravated murder or murder. All that R.C. 2953.08(D)(3) does is bar a right of appeal conferred by R.C. 2953.08(A) when the requirements of R.C. 2953.08(D)(3) are satisfied. *State v. Lentz*, 2d Dist. Miami No. 01CA31, 2003-Ohio-911, 2003 WL 576646, ¶ 16. The rights conferred by R.C. 2953.08(A) are not constitutional, but statutory. *Id.* Thus, Burke's equal protection challenge to R.C. 2953.08(D)(3) is properly analyzed under the rational basis standard.

Burke at ¶ 20-22.

{¶64} The Second District applied the two-step rational-basis test to: (1) "identify a valid state interest" and (2) "determine whether the method or means by which the state has chosen to advance that interest is rational." *Burke* at ¶ 24, quoting *McCrone v. Bank One Corp.,* 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 9. "The party challenging the constitutionality of a law 'bears the burden to negate every conceivable basis that might support the legislation.' " *Id.* quoting *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray,* 127 Ohio St.3d 104, 2010-Ohio-4908, 936 N.E.2d 944, ¶ 20. The opinion explained that courts give "substantial deference" to the legislature when applying the rational-basis test and that the legislature has had a longstanding practice of treating sentencing for aggravated murder and murder differently than other general felony crimes because of the severity of these two offenses. *Id.* at 25-26.

{¶65} The court concluded that R.C. 2953.08(D)(3) was not unconstitutional:

> Ohio's General Assembly certainly may differentiate between criminal offenders on the basis of the perceived seriousness of their crimes. Additionally, we find nothing irrational or arbitrary in the legislature's decision to view aggravated murder or murder as a more serious offense

> such that it warrants a separate statutory scheme from classified felonies. A statute withstands rational-basis scrutiny if it is neither irrational nor arbitrary under any set of facts that reasonably might be conceived to justify it. Therefore, in light of the foregoing, we conclude that Burke has not demonstrated a lack of any rational basis for R.C. 2953.08(D)(3). Accordingly, R.C. 2953.08(D)(3) does not violate the Equal Protection Clause. (Citations omitted.)

Id. at 27.

{¶66} We adopt the analysis of the Second District in *Burke,* finding it both thorough and persuasive. The legislature has a valid interest in imposing a separate statutory scheme for aggravated murder and murder from other general felony crimes because of the seriousness of those two crimes. And R.C. 2953.08(D)(3) provides a rational scheme to advance that interest.

{¶67} Wilson raises a second argument, which was not raised by Burke or directly addressed by the Second District, that contends that the separate statutory scheme is unconstitutional because it treats aggravated murder offenders sentenced to life without parole different from capital aggravated murder offenders. Offenders given the death penalty receive appellate review of their sentence and he does not. In contrast, Burke's argument focused broadly on "virtually the entirety of all other criminal offenders," and was interpreted by the court as those criminal offenders "who can seek appellate review of their sentences." *Burke* at ¶ 14. Thus, while *Burke*'s analysis implicitly includes those given the death penalty, the court's analysis focused on the statutory scheme as it related to less serious offenses, not more serious penalties.

{¶68} Using the two-step rational basis test to compare R.C. 2953.08(D)(3) against the statutory scheme for the imposition of the death penalty, we conclude that the legislature has a valid interest in differentiating on the basis of the serious nature of

the death penalty and a rational means to advance that interest through the death penalty statutory scheme. The legislature may differentiate between criminal offenders on the basis of the perceived seriousness of the criminal penalty imposed. There is nothing irrational or arbitrary in the legislature's decision to view the imposition of the death penalty as a more serious penalty than a life sentence without parole such that the two sentences warrant separate statutory schemes. *See* R.C. 2929.05; *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 184, citing *State v. Jenkins*, 15 Ohio St.3d 164, 169-170, 209, 473 N.E.2d 264 (1984) (rejecting the contention that the statutory death penalty scheme serves no rational state interest and finding no constitutional requirement to compare sentences in non-capital murder cases with capital murder cases) and *State v. Steffen*, 31 Ohio St.3d 111, 124-125, 509 N.E.2d 383 (1987) (in reviewing proportionality there is no need to consider any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not); *State v. Reynolds*, 80 Ohio St.3d 670, 687 N.E.2d 1358 (1998).

{¶69} Wilson has not demonstrated a lack of any rational basis for R.C. 2953.08(D)(3). The statute provides a rational means by which the state can impose a statutory scheme that differentiates: (1) his offense as more serious than other general felony offenders and (2) his sentence as less serious than capital murder offenders. R.C. 2953.08(D)(3) does not violate the Equal Protection Clause. We overrule Wilson's third assignment of error.

D. Notification of Post-Release Control on Tampering with Evidence Sentence

{¶70} Wilson contends that the trial court erred by failing to notify him that he could be subject to up to three years of post-release control on his sentence for tampering with evidence. However, he concedes that he has now fully served the sentence he was given for tampering with evidence so that a resentencing hearing is not available. Instead, Wilson seeks a correcting entry noting the recognition of the sentencing error. The state does not dispute that the trial court did not address post-release control at the sentencing hearing or in its entry, but contends that because Wilson was not subject to post-release control on his aggravated murder sentence, and his tampering with evidence sentence ran concurrently with his aggravated murder sentence, the trial court did not need to explain post-release control because Wilson would never be subject to it.

{¶71} Wilson cites *State v. Brown,* 8th Dist. Cuyahoga No. 95086, 2011-Ohio-345 where the relevant facts and procedural posture are very similar. Brown received a sentence of life without parole for aggravated murder as well as a 3-year term for carrying a concealed weapon and a 3-year term for aggravated robbery. The trial court's sentencing entry did not include the post-release control terms for the concealed weapon and aggravated robbery sentences. However, because seven years had passed, the prison terms for those convictions had expired and Brown was then serving his life term for aggravated murder. *Brown* at ¶ 14.

{¶72} The court determined that when a life or indefinite sentence is imposed, the trial court must still inform a defendant of the applicable post-release control regarding the definite sentence. *Brown* at ¶ 8; *see also State v. Wilcox*, 10th Dist. Franklin No. 13AP-402, 2013-Ohio-4347, ¶ 10 ("When a defendant has been convicted

of both an offense that carries mandatory post-release control and an unclassified felony to which post-release control is inapplicable, the trial court's duty to notify of post-release control is not negated. *State v. Brown*, 8th Dist. No. 95086, 2011–Ohio–345, ¶ 8, citing *State v. Taylor*, 2d Dist. No. 20944, 2006–Ohio–843; *State v. Seals*, 2d Dist. No.2009 CA 4, 2010–Ohio–2843."). However, because Brown had served the sentences for the offenses that carried post-release control, the court could no longer correct sentencing errors and impose post-release control at resentencing. *Brown* at ¶ 11, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. "It is the expiration of the sentence for which post-release control is applicable that determines whether a court may correct a sentencing error and impose post-release control at resentencing." *Brown* at ¶ 12, citing *State v. Cobb*, 8th Dist. Cuyahoga No. 93404, 2010-Ohio-5118, ¶ 15.

{¶73} In *Bezak* because the appellant had already served the prison term and therefore could not be subject to resentencing to correct the trial court's failure to impose postrelease control, the Supreme Court directed the trial court "to note on the record of Bezak's sentence that because he has completed his sentence, Bezak will not be subject to resentencing pursuant to our decision." *Bezak* at ¶ 18. The court in *Brown* instructed the trial court to do the same. *Brown* at ¶ 15 ("[I]n order that its record may be complete, the trial court is instructed to note on the record of defendant's sentence that because he has completed the prison term for the aggravated robbery charge, he will not be subject to resentencing pursuant to our decision."); *see also State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 73 ("the trial court is instructed to note on the record that because Barnes has completed his prison

sentence, he will not be subject to resentencing pursuant to law”); *State v. Pullen*, 7th Dist. Mahoning No. 11MA10, 2012-Ohio-1498, ¶ 31 (“remand with instructions for the trial court to note this on its record and to note that appellant is not subject to resentencing”).

{¶74} In *Bezak* and *Bloomer*, the defendants had been sentenced to a 6-month and a 4-year prison term, respectively, and were not subject to a life without parole sentence. Although some courts remand the case with instructions for the trial court to note on the record that appellant is not subject to resentencing, not all courts require such a correction. *See State v. Melhado*, 10th Dist. Franklin No. 13AP-114, 2013-Ohio-3547, ¶ 14-18 (appellate court acknowledged that although defendant remained incarcerated on his life without parole sentence for aggravated murder, because his sentence for aggravated robbery had been served, resentencing to impose proper post-release control on this conviction is not available; thus the appellate court overruled the assignment of error as moot and affirmed the trial court judgment without remand for a notation to the record).

{¶75} Likewise, we find the error moot and, because Wilson is serving a life sentence without parole, decline Wilson’s request to remand for a notation on the record that he is not subject to resentencing. We overrule Wilson’s fourth assignment of error.

IV. CONCLUSION

{¶76} Wilson has not established any prejudicial error by the trial court in convicting and sentencing him. Having overruled his assignments of error, we affirm his convictions and sentence.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: ________________________
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.