[Cite as *State v. Williamson*, 2021-Ohio-3328.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

BRIAN LEWIS WILLIAMSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 BE 0023

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 20 CR 88

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. J. Kevin Flanagan, Belmont County Prosecutor, and *Atty. Daniel P. Fry,* 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee and

Atty. Felice L. Harris, Harris Law Firm, LLC, 923 East Broad Street, Columbus, Ohio 43205, for Defendant-Appellant.

Dated: September 15, 2021

D'Apolito, J.

{¶1} Appellant, Brian Lewis Williamson appeals his convictions for two counts of felonious assault, in violation of R.C. 2903.11(A)(1)(D)(1)(A), felonies of the second degree, following a jury trial in the Belmont County Court of Common Pleas. He was convicted of assaulting his former girlfriend, Alysa Van Dyne and her friend, David Duvall.

{¶2} Appellant advances four assignments of error. In his first assignment of error, Appellant contends that his trial counsel provided ineffective assistance based upon his failure to object to the admission of certain evidence at trial. In his second assignment of error, he contends that the trial court committed plain error when it admitted the same evidence. In his first two assignments of error, Appellant advances challenges to the admission of: (1) the deposition testimony of a witness to the crimes, Courtney Stiltner ("Stiltner") in its entirety, because the reason for her unavailability at trial was not made a part of the record; (2) testimony from Van Dyne, in which she alleged that Stiltner planned to report to law enforcement that Appellant had raped her; and (3) medical records offered during the testimony of Andrew Allison, D.O., because the records were not properly authenticated. In his third assignment of error, Appellant contends that there was insufficient evidence that Appellant knowingly fractured Van Dyne's arm. In his fourth assignment of error, Appellant contends that cumulative error requires the reversal of his convictions. For the following reasons, Appellant's convictions are affirmed.

FACTS AND PROCEDURAL HISTORY

{¶3} In March of 2020, Van Dyne and her infant son were living with Duvall and Samantha Hans ("Hans"). On March 29, 2020, Stiltner, a former neighbor and current friend of Van Dyne, and Stiltner's three children retrieved Van Dyne and her infant son from the Duvall residence with the intention of spending the day together. At Van Dyne's request, they stopped to retrieve Appellant, Van Dyne's ex-boyfriend, then purchased pizza and a 12-pack of Bud Light seltzers before travelling to Stiltner's home.

{¶4} Van Dyne testified that she and Appellant met in the psychiatric ward of a Bellaire hospital. The two were homeless together for a time, then lived together in an

apartment. They had previously ended their relationship, but reconnected socially a week or two before the incident giving rise to Appellant's convictions.

{¶5} Van Dyne and Stiltner are the only witnesses to Appellant's assault on Van Dyne. However, their accounts of the events leading to the assault are in large measure contradictory, with the significant exception of their testimony regarding the assault.

{¶6} According to Van Dyne, she had discussed with Stiltner and Appellant individually the idea of engaging in a "threesome," prior to the gathering at Stiltner's house. Van Dyne testified about the proposed "threesome" for the first time at trial, having omitted any mention of it during her testimony at the preliminary hearing.

{¶7} When the day arrived, Van Dyne became insecure and concerned about the negative impact that the proposed sexual encounter might have on her relationships with Appellant and Stiltner. On the way to retrieve Appellant, Van Dyne and Stiltner decided against the proposed act.

{¶8} At Stiltner's home, Appellant began the day drinking seltzers, then switched to vodka. As a consequence, he became more inebriated as the hours passed.

{¶9} Eventually, the trio went to Stiltner's bedroom on the second floor. In an apparent effort to set the mood, Appellant displayed photographs of his penis on his mobile phone.

{¶10} Appellant and Stiltner were lying on the bed together when Van Dyne returned to the first floor, where the children were located. Appellant and Stiltner called downstairs for Van Dyne to return to the bedroom, and Stiltner asked, "Is it okay if we have sex?" Stiltner and Appellant were alone in the upstairs bedroom for roughly an hour and a half.

{¶11} When Van Dyne went upstairs to announce that she had to return to Duvall's house in order to administer her son's medication, she saw Appellant "on top of [Stiltner]." (*Id.* at 322.) Van Dyne became upset and called Hans to ask Hans to retrieve Van Dyne from Stiltner's home.

{¶12} Van Dyne told Hans that she "just caught [her] best friend sleeping with the guy that [she] possibly could be with, after discussing not doing it." (*Id.* at 322.) Van Dyne testified that she was angry with Stiltner, not Appellant.

{¶13} After Stiltner and Appellant returned to the first floor and exited the residence, Appellant could not locate his phone. He accused Van Dyne of taking the phone and he and Van Dyne re-entered the house and the upstairs bedroom in search of the phone.

{¶14} Unable to locate the phone in the bedroom, Van Dyne and Appellant walked downstairs to the kitchen. Appellant blocked Van Dyne's entry through the doorway. Van Dyne said, "move," and when she tried to force her way through the doorway, Appellant pushed her, so Van Dyne pushed him back, and "an altercation began." (*Id.* at 323, 333.)

{¶15} Van Dyne testified that Appellant is a mixed martial arts fighter, who previously told her that "he knows the difference between knocking someone out and killing them." At some point during the shoving match, Appellant put Van Dyne in a headlock, that is, her neck was in the curvature of his arm. (*Id.* at 329.)

{¶16} Van Dyne, remembering Appellant's prior statement and determined that she was "not dying today[,] * * * grabbed [Appellant's] privates * * * [a]nd the next thing [she knew she was] grabbing [her] arm from behind [her] back and [Stiltner was] picking [her] up off the ground and carrying [her] outside." (*Id.* at 323-324.) Unable to specifically account for the events leading to her fractured arm, Van Dyne testified that the headlock "knocked [her] out." (*Id.* at 329.) On cross-examination, she testified, "I just know that my arm was snapped and it was right after I grabbed his stuff." (*Id.* at 379.)

{¶17} After Appellant fractured Van Dyne's arm, she stood up, flipped her arm around, and fell to the floor. Stiltner helped Van Dyne outside, then Van Dyne placed a second call to Hans to inform her that Appellant had fractured her arm. At the scene, Appellant denied fracturing Van Dyne's arm.

{¶18} Shortly after Hans and Duvall arrived, Duvall asked Van Dyne about the location of her son. Stiltner had seated all of the children in the van believing that Van Dyne expected Stiltner to drive Van Dyne and her son back to the Duvall residence. As Duvall approached Stiltner's van, Appellant punched Duvall in the jaw, then walked down the road. Hans called emergency services from Stiltner's mobile phone.

{¶19} Van Dyne testified that Stiltner's husband "wants a divorce because of this whole thing." (*Id.* at 326.) Van Dyne continued, "[Stiltner] was trying to say that [Appellant] raped her." According to Van Dyne, Stiltner called the sheriff, however, Van

Dyne dissuaded her from pressing charges by explaining, "this is real. You're not going to sit there and have someone else go to prison for something that you did, because you felt guilty." (*Id.*)

{¶20} Stiltner, who appeared by deposition one day prior to trial, testified that she, Van Dyne, and Appellant arrived at Stiltner's home around 1:00 p.m. and sat outside with Stiltner's children eating pizza and playing cornhole. According to Stiltner, she did not consume any alcohol, but Van Dyne and Appellant were both imbibing.

{¶21} Stiltner denied any discussion or agreement to engage in a "threesome." Stiltner also denied engaging in sexual intercourse with Appellant. According to Stiltner, she invited Van Dyne and Appellant to her bedroom to see furniture handmade by Stiltner's father-in-law.

{¶22} Stiltner conceded that she and Appellant remained upstairs speaking after Van Dyne returned downstairs. However, she testified that she and Appellant discussed a potential rekindling of the romantic relationship between him and Van Dyne, because it was obvious to Stiltner that Van Dyne was still infatuated with Appellant. At some point when Appellant and Stiltner were in the bedroom, Appellant tried to kiss Stiltner but she rejected his advances.

{¶23} When Stiltner returned downstairs, Van Dyne was angry and wanted to leave. (*Id.* at 23.) Van Dyne refused to speak to Appellant or Stiltner. Stiltner was unaware that Van Dyne had called Hans and Duvall to ask that they retrieve her from Stiltner's home.

{¶24} As a consequence, Stiltner seated the children (including Van Dyne's son) in Stiltner's van, but they did not depart because Appellant believed Van Dyne had taken his phone. Appellant and Van Dyne began to argue. Van Dyne and Appellant went back into Stiltner's house to look for the phone, but Stiltner remained outside.

{¶25} While she was standing outside of the residence, Stiltner heard Van Dyne scream. When Stiltner walked into the kitchen, she saw Appellant pinning Van Dyne's arm behind her back. Van Dyne exclaimed, "He broke my arm," and she ran out of the house. (Depo. at 28.) Stiltner went outside to call emergency services while Appellant remained inside the house.

{¶26} When Hans and Duvall arrived, Duvall exited Hans' vehicle. Appellant then exited Stiltner's house and punched Duvall in the face. Duvall indicated that he believed his jaw was fractured. In addition to the testimony of Van Dyne and Stiltner, both Hans and Duvall testified to the unprovoked attack on Duvall by Appellant.

{¶27} After Appellant left the premises, Hans, Duvall, Van Dyne, and Stiltner waited for law enforcement and emergency personnel to arrive. Van Dyne and Duvall were eventually transported to Wheeling Hospital in separate emergency vehicles.

{¶28} X-rays taken in the emergency room confirmed a fracture in Van Dyne's right arm, which was wrapped in an Ace bandage before she was released. Van Dyne returned for surgery to repair the fracture three days later. The repair required internal stiches, staples, a plate, and screws.

{¶29} A C.T. scan and x-rays confirmed that Duvall's jaw was fractured. Duvall was subsequently transferred to Allegheny General and, four days later, underwent surgery to repair his jawbone. The repair required the insertion of a plate along Duvall's chin, stiches on the inside of his lip, and the removal of a broken tooth.

{¶30} Dr. Allison treated Van Dyne and Duvall in the emergency department. Dr. Allison reviewed Van Dyne's records before trial and testified Van Dyne was diagnosed with a significant break in the humerus. Specifically, the humerus of Van Dyne's right arm was comminuted, displaced and angulated. Dr. Allison opined it would take a great deal of force to break a humerus in such a manner. Dr. Allison further opined Van Dyne's injury displayed elements of a spiral fracture.

{¶31} On June 5, 2020, Appellant was indicted for two counts of felonious assault, in violation of R.C. 2903.11(A)(1)(D)(1)(A). The state issued a subpoena for Stiltner on August 5, 2020 and the subpoena was served on August 11, 2020.

{¶32} However, on August 12, 2020, the state deposed Stiltner. Prior to the commencement of the deposition, the state made the following a part of the record: "The witness was issued a subpoena. Had indicated that – her inability to make the two days that the [s]tate has put on the subpoena." (Depo. at 2.)

{¶33} The deposition was left open in the event that defense counsel wanted to reconvene to ask additional questions based on the then yet-to-be-produced body camera footage. The state observed, "Ms. Stiltner has kept us apprised of her schedule

and we had indicated if the Court does want to call her back that we would do what we can to work around it. She has some very pressing matters to attend to." (Depo. at 54.) The foregoing statement is unsworn and the only statement in the record regarding Stiltner's unavailability for trial.

{¶34} Defense counsel did not object to the deposition, and was present with Appellant at the deposition, where defense counsel cross-examined Stiltner. Defense counsel did not seek to reconvene the deposition or object to the admission of Stiltner's deposition testimony at trial.

{¶35} Appellant was convicted on both counts in the indictment and sentenced to consecutive terms of eight to twelve years on each conviction, for an aggregate term of sixteen to twenty years. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

[APPELLANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN ADMITTING INADMISSIBLE TESTIMONY IN VIOLATION OF [APPELLANT'S] RIGHTS TO DUE PROCESS, CONFRONTATION, AND A FAIR TRIAL GUARANTEED BY THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶36} Appellant's first two assignments of error challenge the admission of certain evidence by the trial court as plain error, and further assert that defense counsel's failure to object to the admission of the evidence constitutes ineffective assistance of counsel. As a consequence, they are addressed together.

{¶37} A three-part test is employed to determine whether plain error exists. *State v. Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 25, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

> First, there must be an error, i.e. a deviation from a legal rule. Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. Third, the error must have affected "substantial rights."

Billman at ¶ 25. In order to demonstrate that a defendant's substantial rights have been affected he must show that, but for the error, the trial outcome would have been different. *State v. Issa*, 93 Ohio St.3d 49, 56, 752 N.E.2d 904 (2001).

{¶38} Plain error "is a wholly discretionary doctrine whereby the appellate court may, but need not, take notice of errors which are obvious and which affect substantial rights that are outcome determinative. * * * This elective tool is to be used with the utmost of care by the appellate court in only the most exceptional circumstances where it is necessary to avoid a manifest miscarriage of justice." (Internal citations omitted.) *State v. Jones*, 7th Dist. No. 06 MA 109, 2008-Ohio-1541, ¶ 65.

{¶39} To prevail on a claim of ineffective assistance of counsel, Appellant must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness, and that Appellant suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When reviewing counsel's performance, this court "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. To establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id.*

Unavailability of a Witness

{¶40} The Confrontation Clause affords a criminal defendant the right "to be confronted with the witnesses against him." U.S. Constitution, Sixth Amendment. According to the United States Supreme Court, the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

{¶41} In Ohio, where a prospective witness will be unable to attend or will be prevented from attending the trial, her testimony is material, and it is necessary to take her deposition in order to prevent a failure of justice, the trial court at any time after the filing of an indictment shall upon motion of the defense attorney or the prosecuting attorney and notice to all the parties, order that her testimony be taken by deposition. Crim R. 15(A). Crim.R. 15(F) allows for the use of deposition testimony at trial if it is admissible under the rules of evidence and the witness is unavailable, as that term is defined in Evid. R. 804.

{¶42} Neither the parties nor the trial court complied with the requirements of Crim.R. 15(A). There is no written motion from the state in the record, nor any order of the trial court authorizing Stiltner's deposition. However, the record does include an order of the Court directing the Belmont County Sheriff to transport Appellant to the trial court on August 12, 2020 at 2:15 p.m. "to be present for the deposition of a witness." The order is dated August 12, 2020 and was faxed to the sheriff's office at 11:26 a.m. that same day.

{¶43} Evid.R. 804(B)(1) indicates that former testimony is not hearsay if the declarant is unavailable to testify. Former testimony includes "testimony * * * given in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, * * *, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." *Id.*

{¶44} Evid.R. 804(A) defines "unavailability of a witness." According to Evid.R. 804(A)(5), a declarant is unavailable when she "is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance * * * by process or other reasonable means."

{¶45} A witness is not considered unavailable unless the prosecution has made reasonable, good faith efforts to secure the presence of the witness at trial. *State v. Oliver*, 7th Dist. Mahoning No. 07 MA 169, 2008-Ohio-6371, ¶ 46. The evidence of unavailability must be based on the personal knowledge of witnesses rather than upon hearsay not under oath, when unavailability has not been clearly conceded by defendant. *State v. Keairns*, 9 Ohio St.3d 228, 232, 460 N.E.2d 245 (1984). The proponent of the evidence has the burden of establishing that such efforts have been made. *Id.*

{¶46} A constitutional error can be held harmless if the reviewing court determines that it was harmless beyond a reasonable doubt. *State v. Ricks*, 136 Ohio St.3d 356, 361, 2013-Ohio-3712, 995 N.E.2d 1181, ¶ 47, citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Whether a Sixth Amendment error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Ricks* at ¶ 46, citing *Chapman* at 24.

{¶47} Appellant cites *State v. Workman*, 3d Dist. No. 15-06-09, 171 Ohio App.3d 89, 2007-Ohio-1360, 869 N.E.2d 713, for the proposition that his conviction should be reversed. However, in *Workman,* the state relied on the issuance of a single subpoena to establish the unavailability of the victim of an aggravated burglary. As a consequence, the victim's testimony from the preliminary hearing was read into the record. The Third District rejected the argument that a single subpoena, marked "Returning Unex. Could not locate in time for court" was evidence of unavailability. The Third District further predicated its holding on the fact that defense counsel objected to the admission of the victim's preliminary hearing testimony at trial.

{¶48} *Workman* is distinguishable from the case sub judice for several reasons. First, Stiltner is not one of the victims in this case. Second, Appellant and defense counsel were present for the deposition, which was taken one day before the trial commenced, and Stiltner was subject to cross-examination. Further, the record reflects that Appellant's trial counsel conceded to Stiltner's unavailability. Finally, defense counsel did not object to the admission of Stiltner's deposition testimony or argue that she was available for trial.

{¶49} In S*tate v. Melton*, 11th Dist. Lake No. 2009-L-078, 2010-Ohio-1278, Melton was convicted of felonious assault and firearms charges. Melton argued that the trial court erred in admitting videotaped testimony of owner of the handgun used in Appellant's crimes. The Eleventh District conceded that the state failed to adequately establish the witness's unavailability to testify.

{¶50} The Eleventh District recognized that a videotaped preservation deposition alleviates many of the concerns underlying the Confrontation Clause as the witness testifies under oath; the defendant is present and represented by counsel; the defense

can cross-examine the witness in a manner similar to cross-examination at trial; and the judge is present to rule on objections. *Id.* at ¶ 51. The Eleventh District cautioned that "[t]hese factors, however, support the [ ] conclusion that the videotaped deposition was reliable, they do not address the Confrontation Clause's 'preference for face-to-face confrontation at trial.'" *Id.* "This particular concern requires that deposition testimony be admitted only when the witness is unavailable." *Id.* Nonetheless, the Eleventh District affirmed Melton's convictions on the basis that the admission of deposition testimony was harmless error, based on the remaining evidence in the record.

{¶51} However, the proper inquiry when applying harmless error to a constitutional violation is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Ricks, supra.* Having reviewed the trial testimony, we find that Stiltner's testimony played no role in Appellant's conviction for the felonious assault of Duvall. Stiltner's testimony as it related to Appellant's assault on Duvall was cumulative to the testimony of three other witnesses, including Duvall.

{¶52} The same is true with respect to the felonious assault on Van Dyne. Van Dyne's testimony alone was sufficient, if believed, to support the jury's verdict on the felonious assault committed on Van Dyne. In addition to Van Dyne's testimony regarding her own assault, Van Dyne's testimony and the testimony of the other witnesses to the unprovoked Duvall assault corroborates Van Dyne's testimony that Appellant was angry and violent following the loss of his phone.

{¶53} Of equal import, although the reason for Stiltner's unavailability cannot be discerned from the record, the record establishes nonetheless that both defense counsel and the trial court conceded that Stiltner was unavailable for trial. Pursuant to *Keairns, supra,* the evidentiary requirement of sworn testimony regarding a witness's unavailability is relieved where his or her unavailability is clearly conceded by defendant. *Keairns*, 9 Ohio St.3d at 232.

{¶54} In summary, we find that the admission of Stiltner's deposition testimony did not contribute to Appellant's conviction for felonious assault on Duvall, as Stiltner's testimony with respect to Duvall was cumulative. We reach the same conclusion with respect to the felonious assault on Van Dyne, as Van Dyne's testimony, coupled with Appellant's unprovoked attack on Duvall was sufficient to support the jury's verdict on the

Van Dyne assault. Likewise, we find that Appellant suffered no prejudice as a result of defense counsel's failure to object to the admission of the deposition testimony. Accordingly, we find that Appellant's first and second assignments of error, as they relate to the admission of the Stiltner deposition, in its entirety, have no merit.

Rape Allegations

{¶55} Next, Appellant argues that he suffered prejudice as a result of the admission of Van Dyne's testimony that he had sexual intercourse with a married woman. He further argues that Stiltner was prejudiced by Van Dyne's testimony that Stiltner intended to formally accuse Appellant of rape, in order to forestall divorce proceedings by her husband.

{¶56} Relevant evidence, according to Evid.R. 401, is that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. However, even relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

{¶57} In formulating the standard of review for improperly-admitted evidence in the criminal context, the Ohio Supreme Court has observed that "while courts may determine prejudice in a number of ways and use language that may differ, they focus on both the impact that the offending evidence had on the verdict and the strength of the remaining evidence." *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 25. The *Morris* Court continued, "[b]oth the error's impact on the verdict and the weight of the remaining evidence must be considered on appellate review." *Id.*

Because we agree that Van Dyne's testimony regarding Stiltner's false accusations of rape had no tendency to make the felonious assault charges more or less probable, we must consider the impact of the improperly-admitted evidence, as well as the weight of the remainder of the evidence offered at trial.

{¶58} Stiltner was a witness for the state. As a consequence, any prejudice caused by Van Dyne's accusation would affect the credibility of a state's witness, not a

defense witness. Accordingly, we find that Appellant suffered no prejudice as a result of Van Dyne's testimony about the false rape charges.

{¶59} We further find that the accusation that Appellant engaged in sexual intercourse with a married woman, although it had no tendency to make the felonious assault charges more or less probable, did not alter the outcome of the trial. Infidelity is hardly scandalous in American society today.

{¶60} Having reviewed the trial testimony, we find that the outcome of the trial would not have been different but for the admission of Stiltner's deposition testimony, Van Dyne's testimony about Stiltner's infidelity, and Stiltner's plan to accuse Appellant of rape. As a consequence, we find that Appellant's first and second assignments of error, to the extent that they apply to Van Dyne's testimony regarding the false rape accusations, are without merit.

Authentication of Exhibits

{¶61} "Generally, authenticated medical records are admissible at trial." *State v. Schultz*, 8th Dist. Cuyahoga Nos. 102306 and 102307, 2015-Ohio-3909, 2015 WL 5608528, ¶ 28, citing *Hunt v. Mayfield*, 65 Ohio App.3d 349, 352, 583 N.E.2d 1349 (2nd Dist.1989). "Although potentially replete with hearsay problems, medical records are admissible under the exception to the hearsay rule for records of regularly conducted activity set forth in Evid.R. 803(6)." *Id.,* citing *State v. Humphries*, 79 Ohio App.3d 589, 595, 607 N.E.2d 921 (12th Dist.1992).

{¶62} Under the business records exception to the hearsay rule, the witness providing the foundation need not have firsthand knowledge of the transaction. Rather, it must be demonstrated that the witness is sufficiently familiar with the operation of the business and with the circumstances of the record's preparation, maintenance and retrieval, that he can reasonably testify on the basis of this knowledge that the record is what it purports to be, and that it was made in the ordinary course of business consistent with the elements of Evid.R. 803(6). *Bishop v. Munson Transp., Inc.*, 109 Ohio App.3d 573, 579, 672 N.E.2d 749, 753 (7th Dist.1996).

{¶63} Appellant challenges Dr. Allison's authentication of Van Dyne's emergency room treatment notes (State's Exhibit 10), Dr. Aashish Jog's post-surgery notes (State's

Exhibit 11), and x-rays of Van Dyne's arm (State's Exhibit 9). With respect to the emergency room notes and the notes of Dr. Jog, Appellant contends that Dr. Allison could not authenticate the medical records because he did not create them. However, Dr. Allison's testimony related in large measure to his examination of both Van Dyne and Duvall in the emergency room. Therefore, Dr. Allison participated directly in the preparation of the emergency room notes on Van Dyne. Further, although Dr. Allison played no role in Van Dyne's surgery, and, therefore, did not participate in the preparation of Dr. Jog's post-surgery notes, Dr. Allison was a physician at the same medical facility as Dr. Jog, and his testimony established that he was sufficiently familiar with the preparation, maintenance and retrieval of the medical notes. Dr. Allison described the relevance of "documentation work," that is, the notes are maintained by the hospital staff from a patient's arrival to his or her discharge, designed to document symptoms, physical examinations, diagnoses, and treatment. (*Id.* at 437-438.)

{¶64} Finally, Appellant challenges Dr. Allison's authentication of the x-rays of Van Dyne's arm on Dr. Allison's statement that he was "not entirely familiar with the way radiology categorizes their films." (Trial Tr., p. 451). Although Dr. Allison conceded to a lack of awareness regarding the administration of the radiology department, he capably explained that the exhibits at issue were "three different views of the bone that they take when they take the x-ray." (*Id.* at 451.)

{¶65} Even assuming arguendo that the authentication of the medical records by Dr. Allison was improper, Appellant has failed to demonstrate that he suffered any prejudice as a result of the admission of the medical records. Van Dyne and Stiltner both testified that Appellant twisted Van Dyne's arm behind her back. Moreover, in the absence of the x-ray, Dr. Allison was Van Dyne's treating physician in the emergency room and his testimony established that Van Dyne arrived there with a fractured arm.

{¶66} Accordingly, we find that the medical records offered at trial were properly authenticated, based upon Dr. Allison's familiarity with the notes maintained by the hospital staff, as well as his participation in the treatment of Van Dyne and Duvall in the emergency room, or, in the alternative, that Appellant has failed to demonstrate any prejudice resulting from the admission of the records. As a consequence, we find that

Appellant's first and second assignments of error, as they relate to the authentication of the medical records by Dr. Allison, have no merit.

ASSIGNMENT OF ERROR NO. 3

THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE EACH AND EVERY ELEMENT OF THE OFFENSE OF FELONIOUS ASSAULT.

{¶67} Appellant's sufficiency challenge relates solely to his conviction for the felonious assault of Van Dyne. He contends that there was a mutual struggle and there exists no evidence in the record that shows he knowingly fractured Van Dyne's arm. Appellant relies on Van Dyne's testimony that her arm was broken when she was using her right hand to grab Appellant's genitals. Appellant argues that the foregoing evidence supports the conclusion that he took hold of her arm to free himself from her grasp, rather than with the intention to fracture her arm.

{¶68} Whether the evidence is legally sufficient to sustain a conviction is a question of law dealing with adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). In reviewing the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution to ascertain whether any rational juror could have found the elements of the offense proven beyond a reasonable doubt. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). The rational inferences to be drawn from the evidence are also evaluated in the light most favorable to the state. See *State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999).

{¶69} An evaluation of witness credibility is not involved in a sufficiency review as the question is whether the evidence is sufficient if it is believed. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79, 82; *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001). In other words, sufficiency involves the state's burden of production rather than its burden of persuasion. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). If the court finds insufficient evidence to support a conviction, then a retrial is barred. However, evidence presented by the state that was erroneously admitted by the trial court can be considered in the sufficiency evaluation because the

remedy for the erroneous admission of prejudicial evidence is a new trial. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 16-20.

{¶70} A person acts knowingly, regardless of purpose, when the person is aware that his conduct will probably cause a certain result. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. R.C. 2901.22(B). Because a defendant's intent dwells in his mind, the surrounding facts, circumstances, and resulting inferences are all used to demonstrate intent. *Goff*, 82 Ohio St.3d at 138; *Filiaggi*, 86 Ohio St.3d at 247.

{¶71} The uncontroverted evidence offered at trial establishes that Appellant was angry when he could not find his phone, specifically that he was angry with Van Dyne, who he believed had intentionally taken the phone. Van Dyne testified that a shoving match began between the parties, but the shoving match escalated and Appellant held Van Dyne is a headlock. Van Dyne testified that she feared for her life because Appellant was an amateur mixed martial arts fighter. In order to free herself from the headlock, Van Dyne "grabbed [Appellant's] privates." When Stiltner entered the kitchen, Appellant had Van Dyne's arm pinned behind her. Finally, after the altercation with Van Dyne, Appellant, without provocation, punched Duvall in the jaw.

{¶72} Based on the foregoing facts, we find that there was sufficient evidence in the record, if believed, to demonstrate that Appellant acted knowingly when he fractured Van Dyne's arm. He was angry with Van Dyne, and he acted violently that day, later fracturing Duvall's jaw without provocation. Accordingly, we find that Appellant's third assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 4

DUE TO CUMULATIVE ERRORS, [APPELLANT] WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

{¶73} Cumulative error exists only where the harmless errors during a trial actually "deprive[d] a defendant of the constitutional right to a fair trial." *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. There is no such thing "as an error-free, perfect trial, and * * * the Constitution does not guarantee such a trial."

State v. Hill, 75 Ohio St.3d 195, 212, 661 N.E.2d 1068 (1996), quoting *United States v. Hasting*, 461 U.S. 499, 508–509, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). To support a claim of cumulative error, there must be multiple instances of harmless error. *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). Insofar as we have found no error, Appellant's fourth assignment of error has no merit.

CONCLUSION

{¶74} In summary, we find that the trial court did not abuse its discretion in admitting Stiltner's deposition testimony, Van Dyne's testimony about Stiltner's infidelity and alleged rape allegations, and the medical records. Although the reason for Stiltner's unavailability is not stated in the record, the error is harmless, because her testimony regarding the assaults on Van Dyne and Duvall was cumulative and Stiltner's unavailability was clearly conceded by the defendant. Further, Van Dyne's testimony regarding infidelity and accusations of rape against Appellant affected the credibility of a state's witness, not a witness for the defense. With respect to the authentication of the medical records, Dr. Allison treated both Van Dyne and Duvall in the emergency room and he testified to the significance of medical notes in properly treating a patient. Further, he was a physician at the same facility where Van Dyne's x-rays were taken, and Dr. Jog performed Van Dyne's surgery, consequently we find that he was sufficiently familiar with the medical records that he authenticated. Even assuming arguendo that the challenged evidence was improperly admitted, Appellant has failed to demonstrate any prejudice. Next, we find that there was sufficient evidence in the record to show that Appellant acted knowingly when he fractured Van Dyne's arm. Finally, we find that the cumulative error doctrine does not apply in this case because no individual error was found. Accordingly, Appellant's convictions are affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.