[Cite as *State v. Twiley*, 2022-Ohio-4751.]

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JASON CORTEZ TWILEY,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**
**Case No. 21 JE 0007**

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Criminal Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 19-CR-133

**BEFORE:**
Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

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**JUDGMENT:**
Affirmed.

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*Atty. Jane M. Hanlin*, Jefferson County Prosecutor, 16001 State Route 7, Steubenville, Ohio 43952, for Plaintiff-Appellee and

*Atty. Eric M. Reszke*, 100 North 4th Street, Suite 810, Sinclair Building, Steubenville, Ohio 43952, for Defendant-Appellant.

Dated:
December 21, 2022

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**Donofrio, P. J.**

**{¶1}** Defendant-Appellant, Jason Cortez Twiley, appeals from a Jefferson County Common Pleas Court judgment convicting him of murder with a firearm specification and aggravated arson, following a jury trial.

**{¶2}** In the early morning hours of August 12, 2019, Brittany Littlejohn-Brown's house on Maxwell Avenue in Steubenville was on fire. A few hours later, Brittany's body was found stuffed into a neighbor's garbage can. She had been shot and killed.

**{¶3}** On the evening of August 11, shortly before 9:00 p.m., Brittany's next-door neighbor saw appellant at Brittany's house and briefly spoke with him. Appellant and Brittany were in a relationship at the time.

**{¶4}** At approximately 3:00 a.m. on August 12, the neighbor's son heard a "dragging" noise outside of Brittany's house and looked to see what was happening. He saw a man that looked like appellant. Approximately 20 to 30 minutes later, the neighbor noticed smoke coming out of Brittany's house and called for help.

**{¶5}** Steubenville Police and Fire Departments responded. No people were located in the house but a large amount of blood was found throughout the house. Fire officials determined that three separate fires had been lit inside the house with gasoline. When no one was found in the house, a search for Brittany ensued.

**{¶6}** Police searched the alley behind Brittany's house where all of the detached garages for the houses on that street were located. One neighbor reported to police that her garage had just recently been cleaned out but now it contained garbage and other items that did not belong to her. Among those items were a cigarette butt and a receipt. Also, the neighbor's city-issued garbage can was missing.

**{¶7}** Police next found a partially-open garage a few houses down from Brittany's house. In that garage, they found a mattress on top of a city-issued garbage can. Police found Brittany's naked body inside the garbage can.

**{¶8}** An investigation revealed that the receipt found in the neighbor's garage was from a gas station in Weirton, West Virginia, where a woman who had lent her car to appellant had purchased gas. Appellant had borrowed the woman's car the night before

Brittany was murdered. Appellant later told the woman that his girlfriend had been in a fire and he had to rush to the hospital. The woman never saw appellant again. Her car was eventually located in Chicago with a different license plate on it. DNA testing on the cigarette butt found in the neighbor's garage with the receipt revealed that the likelihood of the DNA belonging to anyone other than appellant was more than one in one trillion.

**{¶9}** Police searched for appellant. With the help of the U.S. Marshals, they traced his cell phone first to Chicago. In Chicago, the marshals found the car appellant had borrowed bearing different license plates. They also found a cigarette butt inside the car that also contained appellant's DNA. The marshals eventually located appellant in Louisville, Kentucky.

**{¶10}** On November 6, 2019, a Jefferson County Grand Jury indicted appellant on one count of murder, an unspecified felony in violation of R.C. 2903.02(A) with a firearm specification, and one count of aggravated arson, a second-degree felony in violation of R.C. 2909.02(A)(2). Appellant entered a not guilty plea.

**{¶11}** The matter proceeded to a jury trial. The jury found appellant guilty as charged.

**{¶12}** The trial court subsequently sentenced appellant to life in prison without the possibility of parole for 15 years on the murder count, three years on the firearm specification, and 8 to 12 years on the aggravated arson count. The court ordered appellant to serve the sentences consecutive to one another for a total sentence of three mandatory years followed by life in prison without the possibility of parole for 15 years, followed by 8 years minimum to 12 years maximum in prison.

**{¶13}** Appellant filed a timely notice of appeal on April 1, 2021. He now raises four assignments of error.

**{¶14}** Appellant's first assignment of error states:

> THE VERDICTS OF GUILTY TO THE OFFENSES OF MURDER AND AGGRAVATED ARSON WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

**{¶15}** Appellant first argues that his convictions are not supported by sufficient evidence. He claims there was no evidence linking him to the murder or to the arson. He notes that there were no eyewitnesses and he did not admit to any crimes. Additionally, appellant states that the DNA evidence from Brittany's fingernails, arms, and legs did not show him as a contributor. Next, he points out his fingerprints were not recovered from the gasoline can.

**{¶16}** Secondly, appellant argues his convictions were against the manifest weight of the evidence. He attacks the credibility of several witnesses. He states Caitlyn Hinkle is an admitted "crack" user, Jalin Beads admitted to selling "crack", Symone Madison and Helen Terry had never met him, and Brandy Ross's testimony was inconsistent.

**{¶17}** Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Dickson*, 7th Dist. Columbiana No. 12 CO 50, 2013-Ohio-5293, ¶ 10 *citing State v. Thompkins*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). Sufficiency is a test of adequacy. *Id.* Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements proven beyond a reasonable doubt. *Id.*, citing *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). When evaluating the sufficiency of the evidence to prove the elements, it must be remembered that circumstantial evidence has the same probative value as direct evidence. *Id.*, citing *State v. Jenks*, 61 Ohio St.3d 259, 272-273, 574 N.E.2d 492 (1991) (superseded by state constitutional amendment on other grounds).

**{¶18}** A sufficiency of the evidence challenge tests the burden of production while a manifest weight challenge tests the burden of persuasion. *Thompkins* at 390 (Cook, J., concurring). Therefore, when reviewing a sufficiency challenge, the court does not evaluate witness credibility. *State v. Yarbough*, 95 Ohio St.3d 516, 543, 2002-Ohio-2126, 747 N.E.2d 216, ¶ 79. Instead, the court looks at whether the evidence is sufficient if believed. *Id.* at ¶ 82.

**{¶19}** The jury convicted appellant of murder in violation of R.C. 2903.02(A), which provides: "No person shall purposely cause the death of another * * *." The jury also convicted appellant of aggravated arson in violation of R.C. 2909.02(A)(2), which provides: "No person, by means of fire or explosion, shall knowingly do any of the following * * * [c]ause physical harm to any occupied structure[.]"

**{¶20}** In determining whether there was sufficient evidence to support appellant's convictions, we must examine the evidence put forth by the state and consider whether it went to each of the elements of the offenses.

**{¶21}** Steubenville Police Sergeant Ryan Lulla was the first witness. Sgt. Lulla testified that between 3:00 a.m. and 4:00 a.m. on August 12, 2019, he was called to 417 Maxwell Avenue. (Tr. 251, 253). When he arrived, he found smoke coming from the house and was informed by a neighbor that a woman and a child lived there. (Tr. 252). Sgt. Lulla kicked open the back door and found a dog in the kitchen. (Tr. 252-253). He rescued the dog but was unable to go further into the house due to smoke. (Tr. 252-253). The fire department then arrived. (Tr. 254). Sgt. Lulla evacuated the houses on either side of the subject house because the fire was spreading to the outside. (Tr. 254).

**{¶22}** Steubenville Police Captain John Lemal testified next. Cpt. Lemal stated that he was also called to the scene on Maxwell Avenue. (Tr. 257). He testified that a neighbor had reported a missing garbage can and he was looking for it because he believed it might be evidence. (Tr. 257-258). Upon further information from another neighbor, Cpt. Lemal and other officers opened the garage of a neighboring house. (Tr. 259). Inside the garage, the officers found a garbage can with a woman's body in it. (Tr. 259-260). Brittany was identified as the victim. (Tr. 260).

**{¶23}** Steubenville Fire Captain Inspector Thomas Burchfield was the next witness. Cpt. Burchfield responded to the fire at Brittany's house. He found that the fire had three points of origin – one inside the front door, one on the stairwell to the basement, and one in the upstairs bathroom. (Tr. 265). Cpt. Burchfield, along with forensic testing, determined that these fires were intentionally set using gasoline as an accelerant. (Tr. 269-270). He additionally testified that he found blood on the basement floor near a mattress and a gas can on a chair under a jacket. (Tr. 279-280).

**{¶24}** Ohio Bureau of Criminal Identification and Investigation (BCI) Special Agent Edward Lulla was called to help with the investigation. Upon arriving at the scene, Agent Lulla tested a basket found in the house and determined it had human blood on it. (Tr. 301-302). He also found bloodstains in the dining room, the kitchen, the basement stairs, and the basement. (Tr. 325-332). And he located a box of .380 caliber ammunition and a bag of 9 mm ammunition in the dining room. (Tr. 325, 338). He also found a wallet with appellant's identification card in it. (Tr. 337). Agent Lulla additionally went to the garage of the house next door, 427 Maxwell, and located a "fresh" cigarette butt that he collected. (Tr. 305-306). He also found a receipt from a gas station in Weirton, West Virginia. (Tr. 310).

**{¶25}** Brittany's mother, Cheryl Reid, testified next. Reid testified that Brittany and appellant had been in a relationship for approximately six months and lived together at Brittany's Maxwell Avenue house. (Tr. 386-387, 392). Two days before Brittany was murdered, Reid stated, she was at home with family when Brittany came over. (Tr. 389-390). Brittany was distraught and told Reid that she wanted appellant to leave her house and that he would not leave her alone. (Tr. 390-391). Appellant arrived shortly thereafter. (Tr. 391). The two argued about money. (Tr. 391-392). Reid then watched as appellant slashed the tires on Brittany's car. (Tr. 394). Reid also testified that she lived with Brittany and appellant for a period of time. (Tr. 397). During that time, she heard appellant threaten Brittany. (Tr. 397-398).

**{¶26}** During the day leading up to Brittany's murder, Reid and appellant spoke. Reid testified that she asked appellant where Brittany was and he told Reid that he paid Brittany's friend, Unique, twenty dollars to give her a ride to work. (Tr. 404-405).

**{¶27}** Brittany's sister, Brandy Ross, was the next witness. Ross also witnessed appellant slash Brittany's tires two days before her murder. (Tr. 418). Additionally, Ross witnessed Brittany and appellant fight that day about paying a bill. (Tr. 419). Afterwards, while she was trying to calm appellant down, appellant told Ross that he wanted to kill Brittany. (Tr. 419). Finally, Ross testified that several months prior, she had witnessed appellant choke Brittany when Brittany was trying to break up a fight between appellant and someone else. (Tr. 423).

**{¶28}** James Elder was Brittany's next-door neighbor. James testified that on the evening of August 11, 2019, at approximately 8:25 p.m., he was on his porch and saw Brittany's son Gavin knock on Brittany's front door. (Tr. 441-442). When no one answered, Gavin went to the back door and knocked but again no one answered. (Tr. 441). Gavin then left. (Tr. 442). Approximately ten minutes later, James saw appellant come out of Brittany's front door onto her porch. (Tr. 442-443). James and appellant said "hey, man" to each other and appellant went back inside Brittany's house. (Tr. 443-444). Later that night into the early morning hours around 3:30 a.m., James was awoken by his son alerting him to a fire next door. (Tr. 445-446). James also testified that a lot of smoke from the fire went into his house. (Tr. 446-447).

**{¶29}** Jeffrey Elder is James' son. He was living with James in August 2019. Jeffrey testified that on the night in question he heard noises outside but did not see anything at first. (Tr. 459-460). He then heard what sounded like "something heavy rolling" like a trash can or wheelbarrow. (Tr. 460, 462). He went and looked out the back door and saw someone's head pop up. (Tr. 461). The person was tall and had "spike-type" hair. (Tr. 465). Jeffrey stated that this was the type of hair appellant had. (Tr. 466). Jeffrey asked the person if he was all right, and the person responded: "Ha-ha-ha. Yeah." (Tr. 461). Jeffrey then went back to bed. (Tr. 461). About 20 minutes later, Jeffrey saw a flashing light and smoke out of the bathroom window. (Tr. 461). Jeffrey also testified that the week prior to Brittany's murder, he heard appellant and Brittany arguing and appellant said to Brittany that one day she was going to make him "put his hands on her." (Tr. 475-476).

**{¶30}** Patrick Sinclair lived behind Brittany in August 2019. Sinclair and his daughter babysat appellant's son, who was two or three, during that time. (Tr. 481). Sinclair testified that in the evening on August 11, 2019, appellant dropped his son off for Sinclair to babysit. (Tr. 483-484). Appellant then returned at approximately 3:00 a.m. to pick his son up and Sinclair never saw them again. (Tr. 485).

**{¶31}** Brandi Boyd was Brittany's next-door neighbor on the other side. Boyd testified that due to the proximity of her house to Brittany's, she heard appellant and Brittany argue. (Tr. 500). She also testified that Brittany told her that appellant had threatened to kill her. (Tr. 512).

**{¶32}** Boyd also testified that in August 2019, she had a city-issued garbage can that she typically kept behind her garage. (Tr. 500-501). The weekend before Brittany was murdered; Boyd had paid someone to clean everything out of her garage so that it was completely empty. (Tr. 502-503). Boyd testified that at approximately 3:30 a.m. on the day in question, her son called her at work to tell her the neighbor's house was on fire and the police told him and his siblings to vacate their house. (Tr. 504).

**{¶33}** When she returned home from work at 7:56 a.m., Boyd noticed that her regular garbage can, not the city-issued one, was full of items that were not there when she had left for work. (Tr. 506). She stated the items included diapers, clothes, and slippers. (Tr. 506). None of the items belonged to Boyd or her children. (Tr. 508). Boyd also noticed that her city-issued garbage can was missing. (Tr. 510).

**{¶34}** Caitlyn Hinkle testified next. Hinkle testified that she loaned her Toyota Camry to appellant on August 11, 2019. (Tr. 522, 528). She brought the car to appellant, meeting him at a garage on Maxwell Avenue, and handed him the keys. (Tr. 523). The car had numerous children's items in it at the time including diapers and blocks. (Tr. 527). Hinkle identified the items in the photographs taken by police of these same items that were discarded in Boyd's garbage can. (Tr. 527). The next morning, August 12, Hinkle contacted appellant to try to get her car back. (Tr. 529). Appellant told her he was at the hospital with his girlfriend. (Tr. 529). Appellant did not return the car, so Hinkle reported it stolen. (Tr. 530). Months later, Hinkle stated, the car was recovered in Chicago. (Tr. 531). And when it was recovered, the car had different license plates on it. (Tr. 531).

**{¶35}** Jalin Beads is Brittany's sister's fiancé. Beads testified that he witnessed appellant slash the tires on Brittany's car on August 10, 2019. (Tr. 542). He also witnessed appellant and Brittany argue during their relationship. (Tr. 546). Beads went on to testify that on the morning of August 12, he called appellant and told him that Brittany was dead. (Tr. 544). Appellant told Beads that he was going to come back and turn himself in. (Tr. 544-545). But appellant never did. (Tr. 545). Beads also testified that in the month leading up to Brittany's death, he saw appellant with a 9 mm firearm. (Tr. 545).

**{¶36}** Symone Madison, who goes by the name of "Unique," worked with Brittany. Madison testified that appellant never contacted her to drive Brittany to work in

exchange for 20 dollars. (Tr. 555). She stated that she has never spoken to appellant and only knew who he was because Brittany had spoken of him. (Tr. 554-555).

**{¶37}** Helen Terry was a close friend of Brittany's. Terry testified that during the first week of August 2019, Brittany stayed at her house. (Tr. 562). During that time, she listened while Brittany spoke to appellant on speakerphone and told him that she was unsure when she would return home because she was not sure if appellant was going to harm her. (Tr. 563). Terry also observed bruises on Brittany's arms and legs. (Tr. 566). Brittany told Terry that appellant had caused the bruises. (Tr. 566).

**{¶38}** Christina Rajendram is the forensic lab supervisor at the Ohio State Fire Marshal Lab. She testified that the lab received three pieces of evidence from the Steubenville Fire Department for testing: carpet from the living room; floorboard pieces; and flooring material. (Tr. 579-580). Rajendram was able to test these items and determined that all three contained gasoline. (Tr. 583-584).

**{¶39}** Heather Bizub is a forensic scientist at BCI working in the biological DNA section. Bizub tested the cigarette butt found on Boyd's garage floor. (Tr. 600). She testified that the cigarette butt contained DNA consistent with appellant's DNA so that the chance of the DNA belonging to anyone other than appellant was more than one in one trillion. (Tr. 603). Bizub also tested the cigarette butt found in Hinkle's car and reached the same conclusion. (Tr. 618-619).

**{¶40}** Andrew McClelland works in the firearm and tool mark section at BCI. He examined the bullet fragment recovered from Brittany's body. (Tr. 648). McClelland determined that the bullet fragment was consistent with being fired from a 9 mm firearm. (Tr. 649-650).

**{¶41}** Dr. Todd Barr works for the Cuyahoga County Medical Examiner's Office. Dr. Barr stated that an individual named Allison Krywanczyk had previously worked for his office and had performed the autopsy on Brittany's body. (Tr. 665). Krywanczyk had prepared a report. (Tr. 665). During Dr. Barr's testimony, the parties stipulated that Brittany's cause of death was a single gunshot wound to the torso. (Tr. 665-666).

**{¶42}** Charles Thomas works in the criminal intelligence unit at BCI. He analyzed appellant's cell phone records. Thomas was able to determine that appellant's cell phone was in Steubenville at 2:00 a.m. on August 12, 2019. (Tr. 701). By 5:36 a.m.

that day, appellant's cell phone was somewhere west of Steubenville. (Tr. 701). By 6:17 a.m., it was near Columbus, Ohio. (Tr. 701). At 9:15 a.m., appellant's cell phone was northwest of Indianapolis, Indiana. (Tr. 701). And by 10:25 a.m., his cell phone was near Chicago, Illinois. (Tr. 702).

**{¶43}** Steubenville Police Detective Regis Holzworth was called to the scene of the fire. Det. Holzworth recovered Brittany's body from the garbage can. (Tr. 750). He was also on hand to locate appellant's wallet and identification in Brittany's dining room and the 9 mm ammunition. (Tr. 759-760).

**{¶44}** Based on the above, the state provided sufficient evidence to convict appellant of aggravated arson and murder. Appellant claims there was no evidence linking him to the crimes. But this is untrue.

**{¶45}** Brittany's next-door neighbor, James Elder, saw appellant on Brittany's porch at approximately 9:00 p.m. on August 11, 2019, and watched appellant go back into Brittany's house. In the early morning hours of August 12, 2019, Jeffrey Elder heard what sounded like "something heavy rolling" like a trash can or wheelbarrow so he looked out the back door and saw someone's head pop up with appellant's hair style. Twenty minutes later, Brittany's house was on fire. The investigation revealed the fire was intentionally started in three spots in Brittany's house using gasoline as an accelerant.

**{¶46}** Brandi Boyd, Brittany's other next-door neighbor came home from work early in the morning of August 12, 2019, and found that her city-issued garbage can was missing. She also found items in her other garbage can that did not belong to her and were not there when she had left for work. One of the items located in Boyd's garage was a cigarette butt containing appellant's DNA. The other items belonged to Caitlyn Hinkle. Hinkle had lent appellant her car the previous day. Appellant never returned the car, which was eventually recovered in Chicago bearing different license plates and containing another cigarette butt with appellant's DNA on it.

**{¶47}** Appellant's cell phone was located in Steubenville at 2:00 a.m. on August 12, 2019, but by 6:17 a.m., it was near Columbus, Ohio and by 10:25 a.m. it was in Chicago, Illinois. Jalin Beads called appellant in the morning hours of August 12 to tell him Brittany was dead. Appellant told Beads he was coming back to turn himself in. But appellant did not come back. Appellant told Brittany's family that he had paid Unique to

drive Brittany to work on the evening of August 11, 2019. But Unique testified this never happened and she has never spoken to appellant.

**{¶48}** Brittany's body was recovered in a city-issued garbage can in another neighbor's garage. Her body had a gunshot wound to the torso. The bullet fragment recovered from Brittany's body was consistent with being fired from a 9 mm firearm. Beads testified that he had seen appellant carrying a 9 mm firearm in the month preceding the murder.

**{¶49}** Appellant claims no evidence directly connected him to the crimes. But sufficient circumstantial evidence exists to support appellant's convictions. Circumstantial evidence and direct evidence have the same probative value. *State v. Dodds*, 7th Dist. Mahoning No. 05 MA 236, 2007-Ohio-3403, ¶ 88, citing *Jenks*, 61 Ohio St.3d at 272. "A conviction based on purely circumstantial evidence is no less sound than a conviction based on direct evidence." *State v. Begley*, 12th Dist. Butler No. CA92-05-076, 1992 WL 379379, *2 (Dec. 21, 1992), citing *State v. Apanovitch*, 33 Ohio St.3d 19, 27, 514 N.E.2d 394 (1987).

**{¶50}** The evidence, taken as a whole, could lead a reasonable person to find each of the elements of aggravated arson and murder proven beyond a reasonable doubt. Thus, appellant's convictions are supported by sufficient evidence.

**{¶51}** In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d 380. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" *Id.* (Emphasis sic.). In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.* at 390.

**{¶52}** Only when "it is patently apparent that the factfinder lost its way," should an appellate court overturn the jury verdict. *Id.* citing *State v. Woullard*, 158 Ohio App.3d 31, 2001-Ohio-3395, 813 N.E.2d 964 (2d Dist.). If a conviction is against the manifest

weight of the evidence, a new trial is to be ordered. *Thompkins* at 387. "No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause." *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, 775 N.E.2d 498, ¶ 36 quoting Ohio Constitution, Article IV, Section 3(B)(3).

**{¶53}** In arguing his convictions are against the manifest weight of the evidence, appellant attacks the witnesses' credibility. He states Caitlyn Hinkle is an admitted crack cocaine user, Jalin Beads admitted to selling crack cocaine, Symone Madison and Helen Terry had never met him, and Brandy Ross's testimony was inconsistent.

**{¶54}** While there may be truth to appellant's allegations, it was up to the jury to decide how much weight to give to each witnesses' testimony. Although the appellate court acts as the proverbial "thirteenth" juror under the manifest weight of the evidence standard, it rarely substitutes its own judgment for that of the jury's. *Thompkins*, 78 Ohio St.3d at 387. This is because the trier of fact is in the best position to determine the credibility of the witnesses and the weight to be given to the evidence. *Id.* The jury here was able to listen to each witness, consider their shortcomings, and consider whether each witness knew appellant or not. The jury was then free to give the testimony as much or as little weight as they deemed fit. We will not second-guess their credibility determinations. Thus, we cannot conclude the jury verdict is against the manifest weight of the evidence.

**{¶55}** Accordingly, appellant's first assignment of error is without merit and is overruled.

**{¶56}** Appellant's second assignment of error states:

> THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE STATE OF OHIO TO INTRODUCE OTHER-ACTS EVIDENCE.

**{¶57}** Here appellant contends the trial court committed reversible error by permitting the state to introduce other-acts evidence. Specifically, he asserts the court should not have allowed the state to introduce evidence regarding: (1) a tire-slashing incident; (2) bruising observed on Brittany; and (3) a statement by Brittany that appellant would kill her.

**{¶58}** Pursuant to Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

**{¶59}** We review the admission of other-acts evidence under a mixed standard of review. The Ohio Supreme Court has stated that the admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law. *State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700, 172 N.E.3d 841, ¶ 72, citing *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 22. But a trial court has discretion to allow other-acts evidence that is admissible for a permissible purpose. *Id.*

**{¶60}** The Ohio Supreme Court has set out a three-step analysis for courts to use when determining whether other acts evidence is admissible. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278. First, the court must consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Id.* at ¶ 20; Evid.R. 401. Second, the court must consider whether the other acts evidence is presented to prove the character of the accused in order to show activity in conformity therewith or whether it is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). *Id.* Finally, the court must consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *Id.*; Evid.R 403.

**{¶61}** First, appellant takes issue with testimony that he slashed Brittany's tires on August 10, 2019. Reid testified that on that date, appellant and Brittany were arguing and she watched as appellant slashed the tires on Brittany's car. (Tr. 392-394). Reid even took a video of the incident on her cell phone. (State Ex. 3). Defense counsel did not object to the testimony but did object to the video. (Tr. 411-413). Ross and Beads also witnessed the tire slashing and corroborated Reid's testimony. (Tr. 418, 542). Defense counsel did not object to their testimony.

**{¶62}** Second, appellant takes issue with testimony regarding bruises on Brittany. Terry testified that during the first week of August 2019, Brittany stayed at her

house. During this time, Brittany told Terry that appellant had punched her in the side of the face and ruptured her eardrum. (Tr. 565). And when Terry questioned Brittany about bruises on her arms and legs, Brittany told her that appellant had left those bruises. (Tr. 566). Defense counsel did not object to these statements.

**{¶63}** Third, appellant takes issue with a statement by Brittany to Boyd that appellant said he would kill her. Boyd testified that in the months that appellant was living with Brittany, Brittany relayed to her that appellant said he would kill her. (Tr. 512). Defense counsel moved to strike this testimony. (Tr. 514). The trial court gave the jury a limiting instruction as to Boyd's testimony:

> You heard the testimony of Brandi Boyd, who testified that the victim told her of threats. You may consider this testimony only as it relates to the victim's state of mind and whether she wanted to end her relationship with the Defendant, as this may or may not be relevant to motive, as you determine.

(Tr. 854).

***{¶64}*** Under the first step of the test set out in *Williams*, 134 Ohio St.3d 521, the others acts evidence here is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

**{¶65}** All of this testimony goes to show appellant's motive and intent as is permissible by Evid.R. 404(B). The state's theory of the case was that Brittany had had enough of appellant and was preparing to end their relationship. In the state's closing argument, the prosecutor emphasized this point when discussing the tire-slashing incident that occurred two days prior to the murder. (Tr. 813). The prosecutor discussed how appellant was so mad at Brittany for wanting to end their relationship that he slashed her tires in front of her mother, sister, and sister's fiancé. (Tr. 813). This court has previously found that when the state establishes a prior bad act as evidence of motive, the argument that such evidence is inadmissible under Evid.R. 404(B) is without merit. *State v. Moore*, 7th Dist. Mahoning No. 02CA152, 2004-Ohio-2320, ¶ 45.

**{¶66}** Moreover, there was testimony that in the week prior to the murder, appellant threatened Brittany by saying that one of these days she would make him "put

his hands on her." (Tr. 475). Terry's testimony regarding the bruises she saw on Brittany further corroborated this intent.

***{¶67}*** This takes us into the next step in the *Williams* test, the state presented the above evidence for a legitimate purpose set out in Evid.R. 404(B), that being motive.

**{¶68}** Finally, the probative value of the other-acts evidence is not substantially outweighed by the danger of unfair prejudice. While the evidence was clearly prejudicial against appellant, it was not *unfairly* prejudicial. The evidence complied with Evid.R. 404(B) and, when defense counsel requested a limiting instruction as to Boyd's testimony, the court granted this request. We are to presume that the jury followed the trial court's instructions. *State v. Sibert*, 98 Ohio App.3d 412, 425, 648 N.E.2d 861 (4th Dist.1994), citing *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990), paragraph four of the syllabus.

**{¶69}** In sum, we cannot conclude that the trial court abused its discretion in allowing the admission of the other-acts evidence.

**{¶70}** Accordingly, appellant's second assignment of error is without merit and is overruled.

**{¶71}** Appellant's third assignment of error states:

> THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

**{¶72}** In this assignment of error, appellant asserts his trial counsel was ineffective. First, he claims his counsel should have, and failed to, cross-examine Brittany's mother, Cheryl Reid. Next, he claims his counsel elicited a response from Brandy Ross, Brittany's sister, that he had threatened to kill Brittany. Finally, appellant asserts counsel should have objected to Dr. Barr's testimony regarding the autopsy and autopsy report because Dr. Barr was not the person who performed the autopsy or completed the report.

**{¶73}** To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*,

42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. *Id.* To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, at paragraph three of the syllabus.

**{¶74}** Appellant bears the burden of proof on the issue of counsel's ineffectiveness. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). In Ohio, a licensed attorney is presumed competent. *Id.*

**{¶75}** First, appellant argues his counsel was ineffective for failing to cross-examine Reid. Reid was Brittany's mother. The jury listened to her testimony regarding the last time she saw her daughter and how her daughter's body was found. At the end of her testimony, defense counsel stated he had no questions for her and offered her his condolences for her loss. (Tr. 414).

**{¶76}** The decision not to cross-examine Reid was likely a matter of trial strategy. Defense counsel may not have wanted to appear to badger the victim's mother after she just testified to her daughter's murder. He perhaps thought the better strategy was to simply offer his condolences. Defense counsel cross-examined the other witnesses, so the decision not to cross-examine Reid was likely a calculated strategical move. An appellate court will not second-guess decisions of counsel which can be considered matters of trial strategy. *State v. Rogers*, 7th Dist. Jefferson No. 14 JE 26, 2015-Ohio-2093, 34 N.E.3d 521, ¶ 24, citing *State v. Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985).

**{¶77}** Second, appellant argues his counsel was ineffective for eliciting a response from Brittany's sister that he had threatened to kill Brittany.

**{¶78}** During Ross's direct examination, she testified that appellant had told her that he wanted to kill Brittany. (Tr. 419). On cross-examination, defense counsel examined that issue further by inquiring of Ross whether she included that in her statement to police and why she did not tell her mother about this statement. (Tr. 428-429). Defense counsel's strategy was likely to control the damage from Ross's statement on direct examination. Again, we will not second-guess matters of trial strategy.

**{¶79}** Finally, appellant argues his counsel should have objected to Dr. Barr's testimony regarding the autopsy and autopsy report because Dr. Barr was not the person who performed the autopsy or completed the report.

**{¶80}** Dr. Barr testified that Allison Krywanczyk was a forensic pathology fellow with the Cuyahoga County medical Examiner's Officer the previous year and she had performed the autopsy on Brittany's body. (Tr. 665). At this point, the parties stipulated that Brittany's cause of death was a gunshot wound to the torso. (Tr. 665-666). Dr. Barr did not elaborate on Krywanczyk's autopsy report during direct examination. (State Ex. 18). On cross-examination, however, defense counsel spent a considerable time questing Dr. Barr regarding the contents of the report and Krywanczyk's findings. (Tr. 671-686).

**{¶81}** Once again, this was a matter of trial strategy. Defense counsel thoroughly cross-examined Dr. Barr regarding the autopsy report and various possibilities that could be gleaned from it. As was the case above, we will not second-guess matters of trial strategy.

**{¶82}** In sum, appellant has not demonstrated that his counsel's performance fell below an objective standard of reasonable representation.

**{¶83}** Accordingly, appellant's third assignment of error is without merit and is overruled.

**{¶84}** Appellant's fourth assignment of error states:

> THE TRIAL COURT ABUSED ITS DISCRETION IN THE SENTENCING THE APPELLANT TO CONSECUTIVE SENTENCES AND THE MAXIMUM SENTENCE FOR AGGRAVATED ARSON.

**{¶85}** Appellant claims here that the trial court erred in sentencing him to consecutive sentences because the crimes were part of a continuing course of conduct. Additionally, appellant argues the court erred in sentencing him to a maximum sentence for aggravated arson because he had led a mostly law-abiding life before this conviction.

**{¶86}** When reviewing a felony sentence, an appellate court must uphold the sentence unless the evidence clearly and convincingly does not support the trial court's findings under the applicable sentencing statutes or the sentence is otherwise contrary to

law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. This court discussed the Ohio Supreme Court's most recent comments on felony sentencing review and *Marcum*:

> The Ohio Supreme Court recently addressed review of felony sentences in *State v. Jones*, —– Ohio St.3d ——, 2020-Ohio-6729, —– N.E.3d ——. The *Jones* Court clarified the standard of review for felony sentences that was previously announced in *Marcum*. *Marcum* held "that R.C. 2953.08(G)(2)(a) compels appellate courts to modify or vacate sentences if they find by clear and convincing evidence that the record does not support any relevant findings under 'division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code.' " *Marcum*, supra, ¶ 22. The *Jones* Court did not overrule *Marcum* but clarified dicta to reflect that "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *Jones*, supra, at ¶ 42.

*State v. McGarry*, 7th Dist. Belmont No. 19 BE 0049, 2021-Ohio-1281, ¶ 18.

**{¶87}** In this case, the trial court sentenced appellant to a mandatory sentence of life in prison without the possibility of parole for 15 years on the murder count. It also sentenced him to three mandatory years on the firearm specification. On the aggravated arson count the court sentenced appellant to a maximum sentence of 8 to 12 years. The court ordered appellant to serve the sentences consecutively to one another.

**{¶88}** As to the issue of consecutive sentences, R.C. 2929.14(C)(4) requires a trial court to make specific findings:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness

> of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

**{¶89}** It has been held that although the trial court is not required to recite the statute verbatim or utter "magic" or "talismanic" words, there must be an indication that the court found (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public, and (3) one of the findings described in R.C. 2929.14(C)(4)(a), (b), or (c). *State v. Bellard*, 7th Dist. Mahoning No. 12-MA-97, 2013-Ohio-2956, ¶ 17. The court need not give its reasons for making those findings however. *State v. Power*, 7th Dist. Columbiana No. 12 CO 14, 2013-Ohio-4254, ¶ 38. A trial court must make the consecutive sentence findings at the sentencing hearing and must additionally incorporate the findings into the sentencing entry. *State v. Williams*, 7th Dist. Mahoning No. 13-MA-125, 2015-Ohio-4100, ¶ 33-34, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37.

**{¶90}** In sentencing appellant to consecutive sentences, the trial court made each of the required statutory findings. It found that consecutive sentences were

necessary to protect the public from future crime and to punish appellant. (Tr. 889). It found consecutive sentences were not disproportionate to appellant's conduct. (Tr. 889). And it found the harm caused by the two offenses was so great and unusual that a single prison term would not "do it for these offenses" that were committed as a part of a course of conduct. (Tr. 889). Finally, the court found no single sentence would reflect the seriousness of appellant's conduct. (Tr. 889).

**{¶91}** Appellant argues that the trial court erred in sentencing him to consecutive sentences because the crimes were part of a continuing course of conduct. But that is one of the R.C. 2929.14(C)(4) factors. R.C. 2929.14(C)(4)(b) specifically provides one of the consecutive sentencing findings the court can make is that: "At least two of the multiple offenses *were committed as part of one or more courses of conduct*, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct." (Emphasis added). Thus, the fact that appellant may have committed murder and aggravated arson as part of a single course of conduct does not mean that the court could not sentence him to consecutive sentences.

**{¶92}** Appellant also takes issue with his maximum sentence for aggravated arson. Unlike when sentencing an offender to consecutive sentences, when sentencing an offender to a maximum sentence the court is not required to make any specific findings before imposing a maximum sentence. *State v. Riley*, 7th Dist. Mahoning No. 13 MA 180, 2015-Ohio-94, ¶ 34.

**{¶93}** The basis for appellant's argument against the maximum sentence is that he did not have an extensive criminal history. Prior to the instant offenses, appellant had convictions for interference with official acts causing bodily injury and for falsification. (Tr. 879-880). While the trial court was not required to make any findings prior to imposing the maximum sentence, it did make several findings. It found that when appellant started the fire in Brittany's house he put the whole block in jeopardy because the houses on this street are very close together. (Tr. 889). He caused the neighbors to evacuate their homes because they too were in danger of the fire. (Tr. 890). And he left the dog in Brittany's house. (Tr. 890).

**{¶94}** The fact that appellant led a relatively law-abiding life prior to the instant offenses does not mean that the trial court could not sentence him to a maximum sentence. The sentence was in accordance with applicable sentencing statutes and the evidence supported the trial court's findings.

**{¶95}** Accordingly, appellant's fourth assignment of error is without merit and is overruled.

**{¶96}** For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, J., concurs.

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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 Jefferson County, Ohio, is affirmed. Costs to be taxed against the Appellant.

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.**