[Cite as *State v. Hulbert,* 2023-Ohio-4502.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

AARON M. HULBERT,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MO 0022

Criminal Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2021-348

BEFORE:
Carol Ann Robb, David A. D'Apolito, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. James L. Peters, Monroe County Prosecutor*,* for Plaintiff-Appellee and

Atty. Peter Galyardt, Asst. Ohio Public Defender, for Defendant-Appellant.

Dated: December 8, 2023

Robb, J.

{¶1} Defendant-Appellant Aaron M. Hulbert appeals after being convicted in the Monroe County Common Pleas Court of felonious assault and a minor misdemeanor trespass. He contests the admission of other acts evidence, the sufficiency of the evidence, and the jury instructions on attempt. He also contests the constitutionality of the statutory indefinite sentencing scheme and contends trial counsel was ineffective for failing to raise this issue to the trial court. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} While police were searching for a naked man who was pounding on the doors of homes in a rural area near Woodsfield in the middle of the night, Appellant jumped out of his hiding place unclothed and charged at an officer while brandishing a spear. He was indicted for attempted murder under R.C. 2903.02(A) through R.C. 2923.02 (purposely attempting to cause death) and R.C. 2923.02 (attempt) and for felonious assault under R.C. 2903.11(A)(2) (knowingly causing or attempting to cause physical harm with a deadly weapon). Based on his conduct that precipitated the search, he was charged with two attempts under R.C. 2911.12(B), which prohibits using force, stealth, or deception to trespass in a habitation when a person is present or likely to be present.

{¶3} At the jury trial, the state presented the testimony of various homeowners and police officers along with video footage, still shots from the video, maps, and the spear. Homeowner 1 testified it was just after midnight on October 6, 2021 when a naked man entered the mudroom on the side of her house through a screen door. He then pounded on her kitchen door while yelling, "let me in. I've been stabbed. They're after me." (Tr. 443). She looked through the door's glass top half but did not see signs of an injury or blood. She told him to get down (in case someone was actually after him) and said she would get help. (Tr. 444, 446). He left while she called 911. As the side portion of her yard was fenced in, the man would have been required to climb over the fence or open a gate from her driveway to reach the mudroom. (Tr. 445). After the police left, she noticed urine on a bag and the cement floor of her detached garage. (Tr. 448).

{¶4} Deputy Miller from the Monroe County Sheriff's Office was called from the property of homeowner 1 to a neighboring property where homeowner 2 reported someone tried to break into his house. (Tr. 459). (Tr. 293). Homeowner 2 testified he was startled out of sleep by noises that sounded like someone was trying to tear his house down. (Tr. 457-458, 465). He let his dog run through the house to ensure no one was present. He then heard the sound of a "ripping screen" in the locked window above his bed followed by beating on the window. (Tr. 458). Although his barking dog blocked much of his view through the window, the homeowner noticed the person seemed to be jabbing at the window with an object as if trying to smash the window out. (Tr. 458-460).

{¶5} Deputy Miller observed the ripped screen while taking the report; the homeowner estimated the tear was 12 inches long. (Tr. 295, 461). The deputy started patrolling the area, as did a second deputy. They were soon joined by Officers Cline and Love from the Woodsfield Police Department. (Tr. 357-359). The officers learned the previous shift investigated a structure fire in the same area. (Tr. 295). Homeowner 3 testified about the fire and issues experienced earlier at her property.

{¶6} While Officer Love was patrolling on foot not far from these properties, he heard a camper door close. (Tr.491-492). His investigation was interrupted by a request to assist the deputies as they approached another address, but they subsequently returned to the house with the camper. Around 2:42 a.m., Deputy Miller began to walk to the house (to ask permission to search the camper) while the two Woodsfield officers waited in the driveway by the camper. (Tr. 495-496).

{¶7} As Officer Love started walking in front of the police vehicle toward the camper, a naked man (Appellant) armed with what appeared to be a long spear jumped up from the grass. Appellant had been lying on his stomach behind a truck tire next to the camper, approximately 26 feet from the patrol car. (Tr. 414). While yelling, Appellant raised the spear "from a low carry to a high carry" as he charged at Officer Love. (Tr. 510).

{¶8} Officer Love viewed the situation as a lethal "laying-in-wait/ambush attack" and began to draw his firearm. (Tr. 499, 507). The officer dropped or fell to the ground (toward his side because the patrol vehicle was behind him). (Tr. 496-498, 522-523). Appellant then angled the spear downward toward Officer Love's head. (Tr. 510). Upon

realizing he lacked sufficient time to aim his firearm, the officer rolled. At this point on video, the spear appeared to be three feet from the officer. The officer believed he was about to be stabbed and hoped the spear ended up hitting his bulletproof vest. (Tr. 511, 514, 523).

{¶9} Deputy Miller turned from his approach to the house to see Appellant charging Officer Love, who was on the ground. Before noticing Appellant's weapon, the deputy deployed his taser at Appellant. However, the taser had no effect on Appellant, who continued toward Officer Love with the spear. (Tr. 298-300). The deputy testified he then realized Appellant was going to stab Officer Love, noting the spear reached within one foot of the officer's head. (Tr. 315, 351).

{¶10} At that point, Officer Cline shot Appellant with his firearm. He testified he too believed the stick Appellant brandished was a spear. (Tr. 364). He saw Appellant aggressively charge at them "as fast as he possible could" and watched Officer Love fall and roll. (Tr. 366, 367). Believing Officer Love's life was in danger, Officer Cline fired while Appellant was bringing the spear down toward the fallen officer, noting there was no time for commands. (Tr. 365-366, 371).

{¶11} The first shot did not appear to stop Appellant, and the officer fired three more times. (Tr. 365, 372). Appellant suffered gunshot wounds to the arm, chest, legs, and scrotum. (Tr. 433, 437). He survived due to the life-saving measures employed by the officers as they awaited an ambulance. (Tr. 525-526, 625). His medical records showed he had methamphetamine in his system. (Tr. 427).

{¶12} The spear-like stick was introduced at trial. The end aimed at the officer tapered into a sharp point; the other end appeared pointed as well. (St.Ex. 37, 39). The investigating agent from the Bureau of Criminal Investigation (BCI) estimated the spear measured 6 foot 10 inches in length. (Tr. 418).

{¶13} This BCI agent interviewed Appellant in the hospital two days after the incident. According to Appellant, he was driving through the area with his girlfriend when he experienced paranoia about her and the local police. He stopped the vehicle near the house where the shooting eventually took place, decided to walk cross-country through the woods, and told his girlfriend to pick him up later. (Tr. 421).

{¶14} After some time passed and night fell, Appellant claimed he decided to knock at the house of homeowner 1 after hearing gunshots and asked the homeowner to call the U.S. Marshal's Office (stating this was the only agency he trusted). (Tr. 422). He acknowledged knocking at the window of another house where no one answered. Appellant claimed to the BCI agent that he obtained the large stick to defend himself against coyotes. Yet, he also told the agent: he cut his chest when he considered impaling himself with his knife earlier that night in the woods; he believed the police would torture him if they took him alive; and he tried to provoke the police into shooting him by poking the stick at them. (Tr. 423-424, 430-431).

{¶15} The jury found Appellant guilty of felonious assault, a second-degree felony. He was found not guilty of attempted murder but guilty of attempted reckless homicide, a fourth-degree felony that was merged into felonious assault before sentencing. On the property offense involving homeowner 1, the jury found Appellant not guilty of the indicted count but guilty of a lesser offense of attempted criminal trespass (a minor misdemeanor). Regarding homeowner 2, Appellant was acquitted of both the indicted charge and the lesser charge. After ordering a pre-sentence investigation, the court imposed a prison sentence of six to nine years on the felonious assault. The within timely appeal followed.

ASSIGNMENT OF ERROR ONE

{¶16} Appellant sets forth five assignments of error, the first of which provides:

"The trial court erred and violated due process when it admitted prejudicial, unindicted criminal conduct against Aaron Hulbert."

{¶17} As mentioned above, the deputy testified that after responding to the second homeowner, the officers learned the prior shift investigated a fire in the same area. (Tr. 295). There was no objection to this statement. At the beginning of trial, the defense unsuccessfully filed a motion in limine, seeking to exclude other acts evidence related to homeowner 3, including the burning of her shed, because he was not indicted with offenses regarding homeowner 3; the motion was renewed at the start of her testimony. (Tr. 4-10, 468). Pointing out Appellant dropped his identification and other items at the property of homeowner 3, the state argued the evidence regarding his conduct there was part of the chain of events and showed his criminal intent at the other two residences. (Tr. 8). The court ruled the evidence was admissible, noting it was part

of the course of conduct and provided a timeline of where Appellant went after being dropped off in the area. (Tr. 10, 468).

{¶18} Homeowner 3 then testified that she lived a half mile from the residence of homeowner 1. On the night of October 5, 2021, she arrived home to find her shed on fire. As there was no electricity in the shed, the fire was considered suspicious. (Tr. 471). The next day, she noticed two tires on her car had been slashed, the hood was slightly ajar, and the fuse panel had been opened. (Tr. 474-475). Her brother testified he later found a pair of shorts while mowing his sister's property and watched a deputy recover a knife sheath. (Tr. 477-478). His coworker testified he found Appellant's driver's license and two credit cards on homeowner 3's property (sixty yards from her house) in December of 2021. (Tr. 481-482).

{¶19} A trial court is precluded as a matter of law from admitting improper character evidence under Evid.R. 404(B) but has discretion to admit other acts evidence which has a permissible purpose. *State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700, ¶ 72, citing *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 22 ("the admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law"), citing *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 17 (the rule bars evidence to prove character in order to demonstrate conforming conduct, but it gives the trial court discretion to admit other acts evidence for a permissible other purpose). The rule provides:

> Evidence 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.

Evid.R. 404(B). "Thus, while evidence showing the defendant's character or propensity to commit crimes or acts is forbidden, evidence of other acts is admissible when the evidence is probative of a separate, nonpropensity-based issue." *Hartman*, 161 Ohio St.3d 214 at ¶ 22. To admit other-acts evidence, there are three requirements:

> (1) the evidence must be relevant, Evid.R. 401, (2) the evidence cannot be presented to prove a person's character to show conduct in conformity

> therewith but must instead be presented for a legitimate other purpose, Evid.R. 404(B), and (3) the probative value of the evidence cannot be substantially outweighed by the danger of unfair prejudice, Evid.R. 403.

Graham, 164 Ohio St.3d 187 at ¶ 72.

{¶20} In general, evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination * * * more probable or less probable than it would be without the evidence." Evid.R. 401. *See also* Evid.R. 402 ("Evidence which is not relevant is not admissible."). In the context of Evid.R. 404(B), the relevancy determination asks "whether the evidence is relevant to the particular purpose for which it is offered" which must be a proper purpose other than to show character or propensity. *Hartman*, 161 Ohio St.3d 214 at ¶ 26.

{¶21} Evid.R. 404(B) contains a "nonexhaustive list of the permissible nonpropensity purposes for which other-acts evidence may be introduced." *Id*. "The nonpropensity purpose for which the evidence is offered must go to a 'material' issue that is actually in dispute between the parties." *Id.* at ¶ 27. Evidence of similar acts "is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.* at ¶ 28.

{¶22} If the evidence is not presented to show character and is relevant to a permissible purpose in Evid.R. 404(B), then the trial court uses its discretion to determine whether the probative value "is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." *Id.* at ¶ 29-30, citing Evid.R. 403(A). "Weighing the probative value of the evidence against its prejudicial effect is a highly fact-specific and context-driven analysis." *Id.* at ¶ 30. The court considers the degree to which the fact is truly in dispute or can be shown with alternative evidence. *Id.* at ¶ 31-32.

{¶23} Appellant argues that because he was not charged with an offense related to homeowner 3, the evidence regarding the fire at her shed and the damage to her car was inadmissible other acts evidence. He disputes the argument that the evidence was relevant to his intent on the charges of attempting to trespass into the habitations of homeowners 1 and 2, claiming his intent for these offenses was not genuinely disputed. He also alleges the probative value was outweighed by the prejudice to his defense.

{¶24} As to his conduct at the residences of homeowners 1 and 2, Appellant was charged under R.C. 2911.12(B), which provides: "No person, by force, stealth, or deception, shall trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present." These acts were charged as attempts under R.C. 2923.02(A), which refers to purposely or knowingly engaging in conduct that, if successful, would constitute or result in the offense.

{¶25} Homeowner 1 said a naked man pounded at her side door from inside her screened room after midnight while yelling to be let in and claiming he had a stab wound and people were after him. In moving for acquittal, defense counsel argued there was no testimony Appellant rattled the doorknob while the state pointed out he attempted to gain access by deception, noting he left when she said she would get help. (Tr. 531-533). Appellant told the BCI agent investigating the case that he merely knocked, asked homeowner 1 to call the U.S. Marshals, and left.

{¶26} A defendant's pretrial statements to witnesses can show the existence of a material issue in the case regarding one of the non-propensity uses of other acts evidence. *State v. Hymes*, 7th Dist. Mahoning No. 19 MA 0130, 2021-Ohio-3439, ¶ 44. In addition, the state's closing argument emphasized Appellant's intent when he was being deceitful to homeowner 1. (Tr. 612-613). Moreover, defense counsel specifically observed, "you will have to decide whether or not the state has proven beyond a reasonable doubt that Mr. Hulbert was trying to fool anyone * * * trying to trick [homeowner 1] to get in there with these stories * * *." (Tr. 629-630). Clearly, it was in dispute whether Appellant intended to attempt to trespass into the house by deceiving homeowner 1.

{¶27} Homeowner 2 testified a person pounded at his house, ripped his screen, and then started beating his window with an object. In moving for acquittal, the defense suggested Appellant's knocking was just a way to get the homeowner's attention and the screen was accidentally ripped during the knocking. The state pointed out the homeowner testified that it appeared to him Appellant was attempting to gain entry, noting the attempt probably failed due to the dog. (Tr. 536-537). The defense argued to the trial court that Appellant's stick would have broken the glass "if that was his intent." (Tr. 537). Appellant told the BCI agent he merely knocked at the window and left. (Tr. 422).

{¶28} Again, the defendant's pretrial claims can demonstrate there is a material issue on a non-propensity use of other acts evidence. *Hymes*, 7th Dist. No. 19 MA 0130 at ¶ 44. In closing, the defense argued although a torn screen would typically show a person had intent to force entry, homeowner 2's additional observation that the window was being jabbed with an object showed the screen just happened to rip due to mere knocking. (Tr. 632-633). Counsel asked the jury to consider whether the testimony was consistent with Appellant "trying to get attention" or with him "actually trying to * * * break in with that stick"; it was claimed if the latter were true, then the stick would have broken through the window. (Tr. 633-634). Clearly, it was in dispute whether Appellant intended to trespass into the habitation when he used force to pound on the house, tear a screen, and then pound on the glass.

{¶29} The acts at the property of homeowner 3 were part of Appellant's course of conduct, which occurred in the hours after Appellant was dropped off to wander the neighborhood on foot while allegedly in a methamphetamine-induced paranoid state. *See Hartman*, 161 Ohio St.3d 214 at ¶ 58 (other acts evidence is probative of intent if it is "so related to the crime charged in time or circumstances" that it is "significantly useful in showing the defendant's intent in connection with the crime charged"). And, Appellant's official identification, credit cards, pants, and a knife sheath were found on this property; this identity evidence connected homeowner 3 to the other properties.

{¶30} Furthermore, as argued by the state, the other acts were relevant for the permissible purpose of establishing intent under Evid.R. 404(B). Other permissible purposes existed as well, including absence of mistake or accident, which Appellant asserted when he argued he only requested to be let into homeowner 1's house (because he mistakenly believed he was in danger) or when he suggested he ripped the screen at homeowner 2's house on accident.

{¶31} Next, we do not merely ask if the probative value was outweighed by prejudice; the prejudice must be "unfair" and it must "substantially" outweigh the probative value. Evid.R. 403(A). "All state's evidence is meant to be prejudicial." *State v. Rupp*, 7th Dist. Mahoning No. 05 MA 166, 2007-Ohio-1561, ¶ 67, citing *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302. "Because fairness is subjective, the determination of whether evidence is unfairly prejudicial is left to the sound discretion of

the trial court and will be overturned only if the discretion is abused." *Crotts*, 104 Ohio St.3d 432 at ¶ 25. Limiting instructions can serve to temper any prejudice. *See Graham*, 164 Ohio St.3d 187 at ¶ 91.

{¶32} On this topic, Appellant observes the trial court's limiting instruction did not state the other acts evidence could only be considered for the purpose of *intent.* Instead, the court's limiting instruction on this topic said the other acts evidence could only be considered for the purpose of identity. (Tr. 652). However, there was no objection to this jury instruction when the instructions were reviewed on the record or when they were read to the jury.

{¶33} "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). The instruction or lack thereof is thus reviewed only for plain error. *See Graham*, 164 Ohio St.3d 187 at ¶ 93 (finding the improper other acts evidence and the lack of a limiting instruction was not plain error). The instruction that the other acts evidence could only be used to show identity without saying it could also be used to show intent (or another permissible purpose) would favor Appellant more than it would prejudice him. The instruction is not reversible plain error.

{¶34} In sum, the court did not legally err and acted within its discretion to admit the other acts evidence upon finding it was relevant to a permissible purpose in material dispute, was not used to show propensity, and had probative value that was not substantially outweighed by unfair prejudice.

{¶35} Alternatively, the state points out an "improper evidentiary admission under Evid.R. 404(B) may be deemed harmless error on review when, after the tainted evidence is removed, the remaining evidence is overwhelming." *State v. Tench*, 156 Ohio St.3d 85, 2018-Ohio-5205, 123 N.E.3d 955 ¶ 177 (finding harmless error in capital case where the state presented other acts evidence that the defendant was a suspect in a prior robbery), quoting *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 32. Removing consideration of the acts related to homeowner 3, the evidence against Appellant was overwhelming. This assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

{¶36} Appellant's second assignment of error alleges:

"Aaron Hulbert's convictions are not supported by sufficient evidence, and the trial court erred when it denied his Crim.R. 29 motion."

{¶37} The standard for reviewing the sufficiency of the evidence to support a criminal conviction on appeal is the same as the standard used to review the denial of a motion for acquittal. *See State v. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996); Crim.R. 29(A) (motion for judgment of acquittal based on insufficient evidence). 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).

{¶38} 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).

{¶39} In reviewing the sufficiency of the evidence, the court views the evidence, including reasonable inferences, in the light most favorable to the prosecution to ascertain whether a 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). *See also State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999) (reasonable inferences are viewed in favor of the state); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (consider all evidence in the light most favorable to the prosecution, including reasonable inferences). Circumstantial evidence inherently possesses the same probative value as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001).

{¶40} The elements of the charged felonious assault were knowingly causing or attempting to cause physical harm by means of a deadly weapon or dangerous ordnance. R.C. 2903.11(A)(2). An attempt occurs when a person purposely or knowingly engages in conduct that, if successful, would constitute or result in the offense. R.C. 2923.02(A).

Physical harm is defined as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

{¶41} "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). A finder of fact may infer a defendant's intent to cause physical harm from his actions and the surrounding circumstances. *See State v. Seiber*, 56 Ohio St.3d 4, 15, 564 N.E.2d 408 (1990). Because a defendant's intent dwells in his mind, the surrounding facts, circumstances, and resulting inferences are the traditional indicators of a defendant's intent. *Treesh*, 90 Ohio St.3d at 485.

{¶42} Appellant contends the evidence of felonious assault was not sufficient because the state failed to prove he knew his conduct would probably cause physical harm to the officer, claiming he lacked intent to cause physical harm. He points to his statement to the BCI agent wherein he claimed he was suicidal and merely intended to provoke the officers into killing him.

{¶43} Incorporating our review of the evidence in our Statement of the Case above, we also reiterate that Deputy Miller testified he believed Appellant was not going to stop before attacking Officer Love, who was on the ground. He said there was no indication Appellant wanted to be shot. (Tr. 315). Officer Cline, who witnessed even more of the attack, confirmed Officer Love's life was in danger, pointing out Appellant charged as fast as he possibly could toward Officer Love with no hesitation until he was shot as the spear was heading down within a foot of the officer's head. (Tr. 367). Officer Love attributed Appellant's failed attempt to his own elevation change combined with his lateral rolling movement and then to his fellow officer's use of lethal force to stop the oncoming spear. (Tr. 507-511, 522-523). The threat Appellant posed was additionally confirmed by the body cam videos viewed by the jury (and by this court).

{¶44} Notably, Appellant's statement to an investigator two days after he perpetrated the attack need not be believed. In fact, the surrounding circumstances and his course of conduct leading up to the incident do not indicate he was hoping to be killed. Moreover, a person who charges directly at another person at full speed from a close distance does not per se lack intent to cause physical harm merely because they are

hoping for "suicide by cop." One can reasonably infer even a person who truly wishes to be killed by the police has intent to injure someone until lethal force is finally used on him.

{¶45} In any event, the evidence indicates Appellant intended to inflict physical harm on the officer in this case. As pointed out above, reasonable inferences are evaluated in the light most favorable to the prosecution, and circumstantial evidence is no less important than direct evidence. *Goff*, 82 Ohio St.3d at 138; *Filiaggi*, 86 Ohio St.3d at 247; *Treesh*, 90 Ohio St.3d at 485. For a sufficiency review, the question is merely whether "any" rational trier of fact could have found the contested element satisfied beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998), quoting *Jackson*, 443 U.S. at 319. Appellant ran directly at the officer full speed brandishing a nearly seven-foot long spear, the point of which came within inches of the officer's head and was stopped before hitting its target only because he was shot multiple times after being unsuccessfully tased. Contrary to Appellant's argument, a rational juror could conclude beyond a reasonable doubt that Appellant knowingly attempted to cause the officer physical harm. Accordingly, the trial court did not err in denying his motion for acquittal and finding there existed sufficient evidence to support the offense. This assignment of error is overruled.

ASSIGNMENT OF ERROR THREE

{¶46} Appellant's third assignment of error contends:

"The trial court made an error of law and abused its discretion when it gave a partial, incomplete jury instruction on attempt."

{¶47} As set forth above, attempting to cause physical harm was one of the elements within the statutory definition of felonious assault. R.C. 2903.11 (A)(2) (knowingly cause or attempt to cause physical harm with a deadly weapon). In comparison, we note how the attempted murder count was charged through the murder statute (R.C. 2903.02) combined with the separate attempt statute (R.C. 2923.02).

{¶48} In instructing on the definitions to be used when considering the felonious assault offense, the court said, "An attempt occurs when a person knowingly engages in conduct that, if successful, would result in physical harm." (Tr. 665-666) (hereinafter called the "if successful" instruction). The trial court repeated the "if successful" instruction in providing the definition of attempt for other offenses as well. (Tr. 656, 659-

660, 667, 671, 680). This instruction corresponds to the definition contained in the attempt statute, R.C. 2923.03(A), and to the first definition for a general attempt in the model Ohio Jury Instructions, O.J.I. 523.02.

{¶49} Defense counsel asked the court to include the additional or second definition in O.J.I. 523.02 in order to explain an attempt is a substantial step and a substantial step is conduct strongly corroborative of the actor's intent. (Tr. 552-559, 565-571, 597-599) (hereinafter called the "substantial step" instruction). The trial court decided the broad statutory definition would be sufficient to define attempt. Appellant argues this was a legal error or an abuse of discretion, arguing he was entitled to the additional "substantial step" jury instruction.

{¶50} A trial court has broad discretion in collecting the jury instructions but must "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 46. Generally, in reviewing the jury instructions provided by the trial court, the appellate court applies an abuse of discretion standard of review, considering the facts and circumstances of the case. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989). An abuse of discretion occurs if the court's decision was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). "Whether the jury instructions correctly state the law is a question that is reviewed de novo." *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 135.

{¶51} Appellant points out the Ohio Supreme Court has elaborated on the statutory ("if successful") definition of attempt. In doing so, the Court explained a criminal attempt includes an act or omission constituting a substantial step in a course of conduct planned to culminate in the commission of the crime and a substantial step involves conduct that is strongly corroborative of the criminal intent. *Id.* at ¶ 175, quoting *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, ¶ 101, quoting *State v. Woods*, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976), paragraph one of the syllabus. The state points out this case law providing a more detailed definition of criminal attempt did not arise in the context of determining the extent of the required jury instructions; rather, it arose in the context of evaluating the sufficiency of the evidence to prove attempt. *See Id.*

{¶52} The state cites this district's rejection of a defendant's plain error argument that a jury instruction was insufficient where the trial court said an attempt was "simply an unsuccessful try" or the defendant "wasn't able to do it, but he tried." *State v. James*, 7th Dist. Mahoning No. 18 MA 0064, 2020-Ohio-4289, ¶ 105. In that case, the appellant argued he was entitled to the "if successful" instruction, the statutory definition used here. *Id.* at ¶ 104 (without arguing entitlement to an additional "substantial step" instruction). We concluded the court's instruction was not a misleading oversimplification of the statutory definition. *Id.* at ¶ 105.

{¶53} In a case where the "if successful" instruction was provided and the appellant argued a "substantial step" instruction should have been provided as well, this court concluded the "substantial step" instruction would have been accurate and acceptable but was not required. *State v. Fellows*, 7th Dist. Jefferson No. 09 JE 36, 2010-Ohio-2699, ¶ 51, citing, *e.g.*, *State v. Martin*, 2d Dist. Montgomery No. 15615 (Dec. 6, 1996). We recognize we were reviewing for plain error in that case, as the defense did not challenge the attempt instruction in the trial court; still, we held the instruction was not required. *Id.*

{¶54} In the case we cited, the Second District concluded the trial court's failure to add the "substantial step" instruction to the "if successful" instruction was not erroneous. *Martin*, 2d Dist. No. 15615. "Such an instruction would not have been incorrect, but we cannot find that it was essential to the jury's deliberative processes or that the trial court erred when the words were omitted from the instruction that it gave." *Id.*

{¶55} The Twelfth District likewise found that "[w]hile it would have been accurate and acceptable" to include the "substantial step" instruction in defining attempt, the additional instruction was not required or essential to the deliberative process. *State v. Agostini*, 2017-Ohio-4042, 91 N.E.3d 44, ¶ 18 (12th Dist.). The court concluded the "if successful" instruction was accurate and sufficient to instruct on attempt. *Id.* (finding no plain error).

{¶56} Here, the jury was instructed on the legally correct statutory definition of attempt. We additionally note the "if successful" instruction corresponds to the definition of attempt within the model jury instruction for felonious assault, an offense with attempt

as an element (for cases where there was not actual physical harm). O.J.I. 503.11 (the charge in subsection 6 states an attempt "occurs when a person knowingly engages in conduct that, if successful, would result in physical harm" with no mention of the additional definition in the general attempt model jury instruction).

{¶57} As the above-reviewed appellate cases indicate, the failure to add a substantial step instruction after providing the statutory definition of attempt is not necessarily reversible error. *See also United States v. Crawford*, 805 Fed.Appx. 652, 657 (11th Cir.2020) (after finding any error would have been invited by the submission of proposed instructions lacking the substantial step instruction, the court concluded the instruction complied with the law and thus "even if we reviewed on the merits, we would affirm because no error occurred"). On the offenses related to his attack on the officer, the dispute centered on Appellant's intent, rather than on whether his acts constituted a substantial step.

{¶58} As the state alternatively argues, any error would have been harmless in this case. Appellant's actions, as set forth in testimony and confirmed by video, went well past a substantial step toward the course of conduct intended to physically harm the officer. The evidence of showing his many steps charging full speed toward the officer while armed with a spear in a stabbing position was overwhelming. As for the sole minor misdemeanor (related to homeowner 1), Appellant was fortunate to have the lesser offense instructed as attempt rather than actual criminal trespass. This assignment of error is overruled.

ASSIGNMENT OF ERROR FOUR

{¶59} Appellant's fourth assignment of error contends:

"Ohio's sentencing scheme of potentially enhanced penalties for qualifying first- and second-degree felonies as administratively determined by the Department of Rehabilitation and Correction, which was applied to Aaron Hulbert, is unconstitutional."

{¶60} The Reagan Tokes Law went into effect on March 22, 2019. Under this law, the court imposes an indefinite sentence for a qualifying felony of the first or second degree, determining the maximum term of imprisonment based on a formula applied to the minimum term chosen by the court from those available (or required) under R.C. 2929.14(A)(1)(a) and (A)(2)(a). R.C. 2929.144(B)(1). The court must impose both the

minimum and maximum term. R.C. 2929.144(C). The end of the minimum term is the presumptive release date. R.C. 2967.271(B) (unless "earned early release" occurs[1]).

{¶61} The propriety of releasing the offender on this presumptive date is rebuttable at a hearing if the DRC determines the prisoner's institutional conduct meets one of the criteria in R.C. 2967.271(C)(1)-(3), in which case the DRC can "maintain" incarceration for an additional period not to exceed the maximum sentence. R.C. 2967.271(D)(1). The prisoner will receive notice of the hearing in the same manner applicable to hearings regarding possible release on parole. R.C. 2967.271(E).

{¶62} Appellant was sentenced to a minimum sentence of six years and a maximum sentence of nine years for second-degree felony felonious assault. Appellant raises three constitutional challenges to the indefinite sentencing scheme. Acknowledging the lack of objection in the trial court, he suggests sentencing under unconstitutional statutes would constitute plain error. As the state points out, this district overruled these constitutional challenges to the Reagan Tokes sentencing provisions, including an ineffective assistance of counsel contention (discussed in the next assignment of error), and our opinion was released prior to Appellant's sentencing. *See State v. Rose*, 2022-Ohio-3529, 202 N.E.3d 1, ¶ 49-78 (7th Dist.).

{¶63} During briefing in the case at bar, these constitutional challenges were pending in the Ohio Supreme Court, and Appellant's briefs point out those opinions would govern his three constitutional arguments. The Supreme Court has since released the opinion in a case Appellant acknowledges would apply to his case and resolve his sentencing assignments of error. *State v. Hacker*, __ Ohio St.3d __, 2023-Ohio-2535, __ N.E.3d __ (consolidated with *Simmons*). We apply the case to Appellant's arguments.

{¶64} First, Appellant argues the sentencing scheme violates the right to a trial by jury, citing various cases involving sentencing enhancements imposed without factual determinations made by a jury. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). However, the Ohio

[1] The DRC director may also recommend to the sentencing court a prisoner's early release from the minimum, giving rise to a rebuttable presumption of early release. R.C. 2967.271(A)(2),(F).

Supreme Court pointed out the prescribed range of penalties is determined upon the guilty verdict and the trial court is left with discretion to impose any minimum sentence within the appropriate range with a maximum sentence merely being calculated based on the minimum. *Hacker*, __ Ohio St.3d __, 2023-Ohio-2535 at ¶ 28, citing R.C. 2929.14(A)(1)(a),(2)(a),(B)(1). "Because no determination by the DRC regarding Simmons's behavior while in prison will change the range of penalties prescribed by the legislature and imposed by the trial court, the right to a jury trial is not implicated." *Id.*

{¶65} Second, Appellant raises a separation of powers argument, citing cases prohibiting the legislative transfer of judicial power to the executive branch. *See, e.g., State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 136, 729 N.E.2d 359 (2000) (bad time statute unconstitutionally allowed the executive branch to try, convict, and sentence inmates for the commission of crimes in prison). Appellant seeks to distinguish a subsequent case upholding the post-release control statute, R.C. 2967.28. *See Woods v. Telb*, 89 Ohio St.3d 504, 733 N.E.2d 1103 (2000) (no separation of powers violation as the trial court is the entity imposing the conditions of post-release control, including the length and the violations that could lead to "time and a half"). However, the Supreme Court recently concluded: "The statutory scheme established in the Reagan Tokes Law is analogous to that in R.C. 2967.28. Should the DRC determine that the presumption of release is rebutted as the result of an offender's behavior during his incarceration, the additional time that the offender may have to serve is limited by the sentence that has already been imposed by the trial court." *Hacker*, __ Ohio St.3d __, 2023-Ohio-2535 at ¶ 23. In holding the indefinite sentencing provisions do not violate the separation of powers, the Court concluded "allowing the DRC to rebut the presumption of release for disciplinary reasons does not exceed the power given to the executive branch and does not interfere with the trial court's discretion when sentencing an offender." *Id.* at ¶ 25.

{¶66} Third, Appellant claims the sentencing scheme violates due process because it provides for unfettered administrative discretion to enhance his sentence after a hearing with no expressed right to an attorney, jury, or appellate review, citing a former Eighth District holding. *See State v. Delvallie*, 8th Dist. Cuyahoga No. 109315, 2021-Ohio-1809, ¶ 57-86 (opining the statute violates the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution due to vagueness and inadequate parameters on

executive branch discretion or a fair hearing). Appellant acknowledges the Eighth District vacated this opinion on rehearing en banc. *State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536, ¶ 57 (8th Dist.), *appeal allowed*, 166 Ohio St.3d 1496, 2022-Ohio-1485, 186 N.E.3d 830 (held for *Hacker*). In the case recognized by Appellant as dispositive, the Supreme Court recently rejected due process arguments that claimed the new sentencing provisions were void for vagueness, provided inadequate notice of what would trigger continued incarceration, or provided "unfettered discretion" to DRC. *Hacker*, __ Ohio St.3d __, 2023-Ohio-2535 at ¶ 30-34. The Supreme Court also rejected the argument that the new sentencing provisions were insufficient to protect procedural due process rights. *Id.* at ¶ 35-40.

{¶67} Finally, we note Appellant says his arguments include as-applied challenges as well as facial challenges. However, there is no argument on his specific situation or prison policies. Notably, although Appellant does not even make predictions, hypotheticals do not satisfy an as-applied challenge. *Id.* at ¶ 11, 34, 39. This assignment of error is overruled.

ASSIGNMENT OF ERROR FIVE

{¶68} Appellant's final assignment of error alleges:

"Aaron Hulbert's trial counsel rendered ineffective assistance of counsel in violation of his constitutional rights."

{¶69} In conjunction with arguing plain error in the prior assignment of error, Appellant argues trial counsel was ineffective in failing to argue the Reagan Tokes sentencing scheme is unconstitutional. Ineffective assistance of counsel arguments require the defendant to meet his burden of showing both deficient performance and resulting prejudice; there must be a reasonable probability the result of the proceedings would have been different but for a serious error committed by counsel. *State v. Carter*, 72 Ohio St.3d 545, 557-558, 651 N.E.2d 965 (1995), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If there was no prejudice, then there is no need to review whether the performance was deficient and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶70} For deficiency and prejudice, Appellant relies on the contentions outlined in the prior assignment of error. Again, he acknowledges his argument would be governed

by *Hacker*, __ Ohio St.3d __, 2023-Ohio-2535. Due to the holdings in *Hacker* and for the reasons set forth in the prior assignment of error, Appellant's ineffective assistance of counsel argument fails. This assignment of error is therefore without merit.

{¶71} For the foregoing reasons, the trial court's judgment is affirmed, and Appellant's convictions are upheld.

D'Apolito, P.J., concurs.

Hanni, 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 Monroe County, Ohio, is affirmed. Costs 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.