[Cite as *State v. Williams*, 2021-Ohio-1285.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JESSE B. WILLIAMS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0135

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2018 CR 634

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

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Ronald D. Yarwood, DeGenova & Yarwood, Ltd., 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: March 8, 2021

WAITE, J.

{¶1} Appellant Jesse B. Williams appeals an October 28, 2019 Mahoning County Common Pleas Court judgment entry convicting him of aggravated murder, murder, and having weapons while under a disability. Appellant argues that the trial court erroneously denied his request to instruct the jury on voluntary manslaughter and reckless homicide. Appellant also argues that his aggravated murder conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. Appellant additionally argues that Detective Michael Lambert improperly bolstered a key witnesses' testimony by corroborating it with a statement given by another witness who did not testify at trial. Appellant contends that his trial counsel was ineffective for failing to object to Det. Lambert's testimony. Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On June 9, 2018, Appellant planned a fishing trip to Mosquito Lake. Before he left, he received a phone call from his ex-girlfriend, Rebecca Perez. (Trial Tr., p. 380.) Appellant testified that he was surprised by the call because he had not spoken to Perez since they broke up the previous year. However, according to Perez, the two remained friendly after their breakup and occasionally spoke on the phone or through text messages. Regardless, Appellant informed Perez about his trip and she asked to join him. He picked her up at her house and the two went fishing. At some point during the

trip, Perez received a phone call from her daughter. Apparently, another ex-boyfriend of Perez, Anttwon Dent, had arrived at her house and was attempting to gain entry.

{¶3} The police were called to Perez's house, presumably by the daughter, and Perez spoke to an officer over the phone. She informed the officer that she did not want Dent at the house and the officer ordered him to leave. Dent walked out of sight but apparently did not leave the area. According to Dent, he and Perez were still in a relationship and he typically spent the night at her house.

{¶4} Perez asked Appellant to take her home to check on her children. After they arrived, Dent approached a group of people near the property that included Perez, Appellant, and a neighbor. (Trial Tr., p. 147.) Appellant was talking to the neighbor when he felt something hit him in the face. He did not know he had been punched until the neighbor yelled at Dent. (Trial Tr., p. 389.) Dent's testimony was that Appellant approached him and he became nervous because he did not know Appellant. When Appellant came too close for Dent's comfort level, he punched Appellant in the face. (Trial Tr., p. 294.) Appellant and Dent began wrestling in the front lawn and throwing punches at one another. The police were called back to the house and Dent was arrested for criminal trespass. It appears that Dent was released from custody shortly after his arrest.

{¶5} According to Dent, Appellant bit him during the scuffle and the bite mark became infected overnight, so he went to the hospital the following day for treatment. Appellant ended up staying overnight at Perez's house. In the morning, he repeatedly told her that he was "going to get" Dent. (Trial Tr., p. 207.) He continued his rant, saying he intended to get revenge, as Perez accompanied him on the drive to his mother's house

to return her car. Once there, Appellant's mother unsuccessfully tried to calm down Appellant.

{¶6} According to Perez, Appellant then asked her to take him to Dent's house. She did not want to, but he told her that if she did not take him, "kids, mothers, it doesn't matter." (Trial Tr., p. 211.) Perez construed this as a threat against her family and reluctantly accompanied Appellant. During the drive, she noticed he had a gun on his lap. He continued to issue threats if she did not take him to Dent's house.

{¶7} Appellant's version is that he and Perez stopped at his mother's house to return her car. However, while at the house he thought about the fight he had with Dent the previous night, and grew increasingly unhappy that he had been attacked. He asked Perez where Dent lived because he wanted to engage in a fair fight. (Trial Tr., p. 403.) Perez willingly left the house with him and showed him where Dent lived.

{¶8} Dent resided with his mother and brother. All parties agree that when Appellant and Perez got to the Dents', Appellant exited his mother's red car, which was parked on the street, and knocked on the front door. No one answered, so he got back inside the car and waited with Perez. Dent's mother, the victim, heard the knocking and called her friend, G.H., who was supposed to stop at the house. She asked G.H. to stop pounding on the door. G.H. was confused, as she was still in her car driving to the house, and told Mrs. Dent that it was not her at the door.

{¶9} Shortly thereafter, G.H. pulled her truck into the driveway and parked. According to G.H., Appellant exited his car and approached her, asking if she lived at the house. She responded that she did not, and he went back to his car. Mrs. Dent opened the front door and motioned for G.H. to come inside the house, but G.H. was confused

and frightened and remained inside her vehicle. Appellant again exited his car and approached Mrs. Dent at the front door.

{¶10} Appellant testified that he asked to see Dent. He and Mrs. Dent conversed for a few moments. She told Appellant that she did not know where her son was and did not know how to reach him. (Trial Tr., p. 399.) As Appellant turned to leave, he heard a noise that sounded like a door opening behind him. He became concerned that Dent was initiating another "sneak" attack. Appellant waited about six seconds and then removed a gun from his coat pocket and shot blindly, striking Mrs. Dent two or three times. (Trial Tr., p. 401.) As Mrs. Dent fell to the ground, Appellant walked back to his car and drove away. He claims that he was in a state of shock.

{¶11} Perez testified that Appellant exited the car and approached Mrs. Dent. (Trial Tr., p. 224.) He demanded to know where Dent was and shouted expletives. Perez did not witness the shooting, but she heard two to three gunshots. She looked at the front porch and no longer saw Mrs. Dent standing in the doorway. Appellant returned to the car and drove them away.

{¶12} According to G.H., Appellant approached Mrs. Dent, who asked if she could help him. G.H. then heard two shots and saw Mrs. Dent fall to the ground. As Appellant walked by G.H.'s truck, he told her, "[y]ou didn't see anything." (Trial Tr., p. 182.) G.H. exited her truck. When she looked at the neighbor's house she saw K. K., a friend of Mrs. Dent, standing by a window and asked her to call 911.

{¶13} According to K.K., she heard two or three "pops" outside. (Trial Tr., p. 147.) She looked out her window and saw G.H., who had a terrified look on her face. She then saw Appellant speaking to G.H. While she could not remember his exact words, she

heard him say something along the lines of "[y]ou better not say[,] you saw nothing." (Trial Tr., p. 152.) K.K. saw only the side of Appellant's face.

{¶14} Mrs. Dent died in the ambulance on the way to the hospital. She had three gunshot wounds: one to the left side of her head, one to her temple, and one to her abdomen.

{¶15} Appellant drove to Pennsylvania after the shooting. Perez testified that he disposed of the gun in a wooded area. (Trial Tr., p. 227.) Appellant said he did not dispose of the weapon, but hid it in a location away from his house, as he feared his home would be the subject of a search. (Trial Tr., p. 408.) He claims he later gave the gun to someone on the streets.

{¶16} G.H. was able to obtain the license plate number of the car Appellant was driving. During the investigation, police learned of the previous altercation between Appellant and Dent. Appellant turned himself in several days later, after police began pursuing him.

{¶17} On June 21, 2018, Appellant was indicted on one count of aggravated murder, an unclassified felony in violation of R.C. 2903.01(A)(F); one count of murder, an unclassified felony in violation of R.C. 2903.02(A), (D); and one count of having weapons while under a disability. The murder charge included a firearm specification.

{¶18} Perez was charged with obstruction of justice in the same indictment. At some point before the trial, she pleaded guilty. It is unclear whether she pleaded to obstruction of justice or an amended charge of tampering with the evidence. However, it is clear she entered her plea in exchange for her testimony against Appellant.

{¶19} Following a jury trial, Appellant was convicted on all counts as charged in the indictment. On October 28, 2019, the trial court sentenced Appellant to life in prison without the possibility of parole on the aggravated murder conviction. The court determined that this offense merged with the murder conviction. The court sentenced Appellant to three years on the firearm specification and thirty-six months for having weapons while under a disability. Those sentences were ordered to run concurrently to the sentence for aggravated murder. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

> The trial court denied Appellant due process of law and a fair trial by refusing to give requested jury instructions as to voluntary manslaughter and/or reckless homicide. (Trial Transcript at 422-423).

{¶20} Appellant argues that the trial court erroneously denied his request to instruct the jury on voluntary manslaughter and reckless homicide. Regarding voluntary manslaughter, Appellant admits his rage was directed towards Dent and not the victim, however, he argues that the trial court ignored his transferred intent argument. Appellant explains that there is no law prohibiting the application of the transferred intent doctrine to voluntary manslaughter. As to reckless homicide, Appellant urges that he did not intend to shoot Mrs. Dent, but that he recklessly shot, blindly, towards the area where he heard a noise.

{¶21} The state responds that Appellant never testified he acted under the influence of a sudden passion or a sudden fit of rage. Instead, Appellant testified that the shooting "was totally an accident." (Appellee's Brf., p. 9.) In order for an action to be

deemed accidental, the state explains that it must be both unintentional and lawful. Here, the act was intentional; Appellant admitted he intended to fire the gun. The act of firing a weapon under these circumstances is not lawful. Hence, a voluntary manslaughter instruction was not appropriate. As to reckless homicide, the state replies that Appellant purposefully discharged his gun with the intent to strike someone, so the crime does not meet the necessary requirements for this instruction. The state does not address Appellant's arguments regarding transferred intent.

{¶22} To find a defendant guilty of voluntary manslaughter, the jury must find by a preponderance of the evidence that the defendant was provoked by a sudden fit of passion or rage, that the provocation was sufficient to arouse the passions of an ordinary person, and that this particular defendant's passions were aroused. *State v. Shane*, 63 Ohio St.3d 630, 634, 590 N.E.2d 272 (1992). As such, it includes both an objective and a subjective component. *Id*.

{¶23} In order to satisfy the subjective aspect, "the emotional and mental state of the defendant, as well as the conditions and circumstances that surrounded the incident in question, must be considered." *State v. Perdue*, 153 Ohio App.3d 213, 2003-Ohio-3481, 792 N.E.2d 747, ¶ 11 (7th Dist.). An instruction on voluntary manslaughter is inappropriate where insufficient evidence of provocation is presented and no reasonable jury could decide that the defendant was reasonably provoked by the victim. *Shane, supra*, at 638.

{¶24} An appellate court reviews a trial court's decision whether to give a particular jury instruction under an abuse of discretion standard. *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, 931 N.E.2d 143, ¶ 103. "An abuse of discretion

connotes more than an error of judgment; it implies an attitude on the part of the court that is unreasonable, arbitrary, or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶25} Although not addressed by the parties, we recently reviewed a similar issue in *State v. Hodges,* 7th Dist. Mahoning No. 18 MA 0091, 2019-Ohio-5043. In *Hodges,* the appellant was convicted of aggravated murder following a fatal shooting. *Id.* at ¶ 6. The appellant and the victim were both romantically involved with the same woman at various times leading up to the shooting. At some point, the two men were engaged in a verbal confrontation on the street when the situation escalated and the victim indicated that he wanted to fight the appellant. The appellant then fired several shots, killing the victim. *Id*. at ¶ 27.

{¶26} On appeal, the appellant argued that the trial court erroneously failed to instruct the jury on voluntary manslaughter. According to the appellant, he acted under a sudden fit of passion and rage as the victim had "provoked [Appellant] to *protect* himself." *Id*. at ¶ 36. We rejected the argument and held that the trial court did not err in denying the request for a voluntary manslaughter instruction. Preliminarily, we noted that voluntary manslaughter is not a lesser included offense of murder. It is an inferior degree offense. *Id*. at ¶ 33. We explained that "[w]hile self-defense requires a showing of fear, voluntary manslaughter requires a showing of rage, with emotions of 'anger, hatred, jealousy, and/or furious resentment.' " *Id.* at ¶ 38. Thus, "voluntary manslaughter is generally incompatible with and contradictory to a defense of self-defense." *Id.* at ¶ 36.

{¶27} Appellant's testimony in this matter was consistent with self-defense, although he did not request an instruction on self-defense. He testified that he turned to

leave the porch after Mrs. Dent informed him that her son was not home. As he turned, he heard a noise behind him that sounded like a door opening. This caused him to fear Dent was in the process of launching an attack. Appellant testified:

> I heard a door open behind me. I'm all the way off the porch. The door opens behind me. And I'm, like, this guy [Dent] attacked me from behind once. What's the chance of him saying that -- telling his mother to say he's not there and he come out behind her. So I just turned around and in an impulse action, and I'm like, oh, my goodness. What's -- once I fired my weapon I'm like, oh, my goodness.

(Trial Tr., p. 401.)

{¶28} While Appellant never mentioned self-defense, if believed, his testimony suggests that he acted out of fear of an attack. However, "fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." *Hodges, supra,* at 38, quoting *State v. Mack,* 82 Ohio St.3d 198, 201, 694 N.E.2d 1328 (1998).

{¶29} Appellant also argues that the fight the previous day caused him to act with sudden passion and rage. However, "[p]ast incidents do not satisfy the test for reasonably sufficient provocation when there is sufficient time for cooling off." *State v. Bickerstaff,* 7th Dist. Jefferson No. 09 JE 33, 2011-Ohio-1345, ¶ 17.

{¶30} In *Bickerstaff,* the appellant and victim had engaged in a fight at a convenience store before both men went their separate ways. *Id.* at ¶ 18. The appellant then obtained a gun, changed vehicles, and located the victim. These events occurred

over the span of approximately fifteen minutes. We held that sufficient time had passed to allow the appellant to cool down after the fight, thus he did not act under sudden passion or rage. *Id.* at ¶ 21. Additionally, we held that the original incident constituted a "minor and short lived" event that involved a physical scuffle which, although punches were thrown, would not "incite an ordinary person to use deadly force." *Id.* at ¶ 19.

{¶31} The fist-fight in this case occurred on a Saturday night in June. While the record does not contain the exact time, Perez testified that it occurred fairly late in the evening and that it was dark outside. The shooting occurred the next day around 1:30 p.m. (Trial Tr., p. 273.) At the least, over thirteen hours had passed from the fight to the shooting. In accordance with *Bickerstaff,* Appellant had ample time to cool down after the fight.

{¶32} In addition to the cooling period, while the police were called to the scene the record reflects this fight was not a major or prolonged event that could be expected to incite an ordinary person to use the deadly force described by *Bickerstaff*. Appellant himself testified that the entire previous incident lasted "thirty, forty - seemed long but thirty-forty seconds." (Trial Tr., p. 389.)

{¶33} Importantly, Appellant also testified "I did not mean to do what I had done, but I don't want to be looking over my shoulders being attacked from anybody. Wouldn't nobody want to look over their shoulders being attacked. I did not mean for that to happen." (Trial Tr., p. 412.) This testimony suggests that Appellant acted with intent.

{¶34} In summation, Appellant alternatively characterized the shooting as an action arising out of fear, an impulse reaction, an accident, and an intentional act. No

version of Appellant's testimony supports a finding that he acted under a sudden fit of passion and rage, which are required elements of voluntary manslaughter.

{¶35} We note that Appellant urges the trial court erred by not considering his transferred intent argument. However, because Appellant cannot satisfy the elements of voluntary manslaughter, his actual target is irrelevant. Based on Appellant's own testimony, the evidence does not support a jury instruction on voluntary manslaughter no matter that his victim was Mrs. Dent and not her son.

{¶36} Appellant also argues that the trial court should have instructed the jury on reckless homicide. Pursuant to R.C. 2903.041, "[n]o person shall recklessly cause the death of another or the unlawful termination of another's pregnancy."

{¶37} We have previously discussed the difference between reckless and knowing conduct. See *State v. Lewis,* 7th Dist. Mahoning No. 01-CA-59, 2002-Ohio-5025. Pursuant to R.C. 2901.22(B), "a person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." In contrast, R.C. 2901.22(C) defines recklessness as "a heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature."

{¶38} This was clearly not an instance where Appellant mishandled his weapon or acted carelessly. Appellant testified that he deliberately fired his gun six seconds after he heard a noise from behind him. During that six seconds, he admits his actions were based on Dent's attack the night before and that he feared a second attack had commenced. He also testified that he did not intend to continue to look over his shoulder

in anticipation of another attack. Thus, he essentially testified that he fired his gun with an intent to strike Dent. His actions were calculated and intended to cause a certain result. Appellant intended to shoot someone. His only mistake was in shooting the wrong victim.

{¶39} Appellant also testified, in somewhat of an alternative theory, that the shooting was an accident. Again, however, by his own admission Appellant intended to fire his gun, just not at Mrs. Dent. There was no accident that occurred, here. Regardless, Appellant's own testimony shows that he cannot meet the elements necessary for an instruction on voluntary manslaughter or reckless homicide and thus, his "transferred intent" argument is irrelevant.

{¶40} Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> The conviction for aggravated murder was based on insufficient evidence and/or was against the manifest weight of the evidence as there was no proof of prior calculation and design in the killing of Ms. Dent. (Verdict Form).

{¶41} Appellant argues that his aggravated murder conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. Appellant limits his arguments to an attack on the jury's finding that he acted with prior calculation and design. Appellant argues that the shooting was an instant reaction to a noise he heard behind him, and not the result of prior calculation and design. Appellant also repeats his argument that Mrs. Dent was not his intended target.

{¶42} The state responds by noting that prior calculation and design can occur within minutes. The state argues that the evidence demonstrates Appellant canvassed the house waiting for someone who lived there to come outside. Appellant approached both people he saw at the house; G.H. and Mrs. Dent. Appellant had a gun on his lap while he drove to Dent's house and repeatedly stated his intent to "get" Dent. The state also cites to Appellant's behavior after the shooting, in particular his threatening comment to G.H.

{¶43} Appellant was convicted of R.C. 2903.01(A), which provides that: "[n]o person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy." As previously noted, Appellant challenges only whether the state presented sufficient evidence that he acted with prior calculation and design.

{¶44} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. Jefferson No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955), reversed on other grounds.

{¶45} When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*,

7th Dist. Mahoning No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. Jefferson No. 09 JE 26, 2011-Ohio-1468, ¶ 34.

{¶46} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id*.

{¶47} 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." (Emphasis deleted.) *Thompkins*, *supra* at 387. It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id*. Weight of the evidence involves the state's burden of persuasion. *Id*. at 390 (Cook, J. concurring). The appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, *supra,* at 387. This discretionary power of the appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶48} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh

the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. Jefferson No. 09 JE 15, 2010-Ohio-3282, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 N.E.2d 650 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶49} The legislature intended the element of "prior calculation and design" to require more than mere instantaneous or momentary deliberation. *State v. Kerr*, 7th Dist. Mahoning No. 15 MA 0083, 2016-Ohio-8479, ¶ 20. Prior calculation requires evidence "of 'a scheme designed to implement the calculated design to kill' and 'more than the few moments of deliberation permitted in common law interpretations of the former murder statute.' " *Id*.

{¶50} When evidence presented at trial "reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." *Id*., citing *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 61.

{¶51} On review, a finding of prior calculation and design is evaluated by looking at the totality of the circumstances on a case-by-case basis. *Id.* at ¶ 21. Prior calculation

and design can be found where a defendant "quickly conceived and executed the plan to kill within a few minutes." *State v. Coley*, 93 Ohio St.3d 253, 264, 754 N.E.2d 1129 (2001), citing *State v. Palmer*, 80 Ohio St.3d 543, 567-568, 687 N.E.2d 685 (1997).

{¶52} When reviewing whether prior calculation and design has been established, Ohio courts analyze several factors. *State v. Carosiello*, 7th Dist. Columbiana No. 15 CO 0017, 2017-Ohio-8160, ¶ 33. These factors include whether the defendant and victim knew each other, if the relationship was strained, whether the defendant gave thought in choosing the murder weapon or site, and whether the act was drawn out or sprung from an instantaneous eruption of events. *Id*., citing *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 56-60.

{¶53} Appellant and Dent met for the first time the night before the shooting. The facts clearly show that the meeting was contentious and resulted in a fight that apparently resulted in Dent's arrest. As to the relationship between Appellant and Mrs. Dent, the record demonstrates that they had never met one another prior to the incident.

{¶54} Regarding the remaining factors, Appellant testified that he thought about the attack overnight and asked Perez to take him to Dent's house in the morning. He testified that he "got to thinking. I said, you know what, I need to know who this guy is. I can't have him attacking me. I said, can you show me where he stay at?" (Trial Tr., p. 394.) When asked if he had planned to use his gun, he testified "I was going to get him out that house and say, yeah, you want to fight? We can fight fair. If you go to somebody's house -- I'm assuming he might have a weapon, too, since I showed up at this house." (Trial Tr., p. 402.)

{¶55} In addition to Appellant's admission that his intent was to provoke a fight and that he understood that showing up at Dent's house might escalate the situation to involve weapons, Perez testified that Appellant repeatedly stated his intent to "get" Dent. (Trial Tr., p. 207.) She testified that she was reluctant to tell Appellant where Dent lived but he looked over in her son's direction and said "kids, mothers, it doesn't matter." (Trial Tr., p. 211.) She construed that to mean that he would harm her children or her mother if she did not tell him where Dent lived. She testified that they stopped at Appellant's mother's house and that his mother tried to calm him down. On the drive to Dent's house Appellant had a gun on his lap. While Perez admitted that she lied to police about some of these facts during her first interview, she testified that she told the truth once she was sure Appellant had been arrested and could not hurt her or her family.

{¶56} G.H. testified that she was driving to Mrs. Dent's house when Mrs. Dent called and asked her not to pound on the door. G.H. informed Mrs. Dent that she was still driving and had not yet arrived at the house. On arrival, she noticed a red car parked in the street. After she pulled into the driveway, Appellant exited his car and approached her vehicle and asked if she lived there. When she said she did not, he walked back to his car and waited.

{¶57} Mrs. Dent opened the front door and motioned for G.H. to come inside but she remained in her vehicle because she was afraid. She saw Appellant exit his car and approach Mrs. Dent. She heard Mrs. Dent ask Appellant if she could help him and then heard shots. (Trial Tr., p. 181.) As Appellant walked by her vehicle, he threatened her. (Trial Tr., p. 182.)

{¶58} K.K. testified that when she heard two to three shots she went to a window to look outside. She saw G.H. and noticed that she had a "terrified look on her face." (Trial Tr., p. 149.) Although she could not remember his exact words, Appellant told G.H. something like "[y]ou better not say[,] you saw nothing." (Trial Tr., p. 152.)

{¶59} Appellant admits he did not attempt to help Mrs. Dent after shooting her nor did he call for help. Instead, he walked back to his car and drove away. He testified that he continued to go to work the next several days and did not mention the incident to anyone. He hid the gun away from his house because he suspected it would be searched. (Trial Tr., p. 409.) When asked what he later did with the gun, he stated "[w]ell, it came from the streets; I gave it back to the streets." (Trial Tr., p. 408.)

{¶60} Based on this record, there is ample evidence to support a finding of prior calculation and design. As such, Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

> Appellant was denied a fair trial, and his right to confront his accuser as contained in the Sixth Amendment, when the state used the testimony of an out-of-court witness to bolster Perez's testimony. (Trial Transcript at 366-367).

ASSIGNMENT OF ERROR NO. 4

> Appellant was denied his right to effective counsel, pursuant to the Sixth Amendment, as trial counsel failed to object to the detective relaying Johnson's testimony. (Trial. Transcript at 366-367).

{¶61} Appellant contends Det. Lambert impermissibly bolstered Perez's testimony by stating that her story was consistent with statements made by K.J., a friend of Perez who did not testify at trial. Appellant argues that the statement made by K.J. is testimonial in nature because it originated during a police interrogation consistent with *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). There is no evidence within the record that K.J. was unavailable to testify or that Appellant had a prior opportunity to cross examine her. As such, Appellant argues that the testimony violated the Confrontation Clause. Appellant concedes that no objection was made at trial, thus the statements are reviewed for plain error. In his fourth assignment of error, Appellant argues that counsel's failure to object amounts to ineffective assistance.

{¶62} In response, the state argues that Det. Lambert did not testify as to what K.J. said in her statement, but merely that this statement made him confident that Perez was telling the truth when Perez gave a second statement to police.

{¶63} The Confrontation Clause affords a criminal defendant the right "to be confronted with the witnesses against him." U.S. Constitution, Sixth Amendment. Pursuant to the United States Supreme Court, the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford, supra*, at 53-54.

{¶64} "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Crawford, supra*, at 52. Here, it is uncontroverted that K.J.'s statement occurred during an interrogation. Thus, in accordance with *Crawford,* her statement would be testimonial.

{¶65} The state does not appear to challenge the testimonial nature of K.J.'s statement. Instead, the state argues that Det. Lambert did not at any time discuss the substance of what Perez told K.J. (and K.J. told police) regarding the incident. Perez admitted she lied to police about pertinent facts during her first interview. After that interview concluded, Det. Lambert interviewed K.J., a friend of Perez. According to Det. Lambert's testimony, K.J. told him that Perez "wants to cooperate with us but is afraid. She fears retaliation. She gave us a story that she said [Perez] gave her." (Trial Tr., p. 361.) After he spoke with K.J., Det. Lambert reinterviewed Perez. When asked if he believed Perez during her second interview, Det. Lambert testified that he did because "[t]he interview [Perez] gave us the second time matched very closely to what [K.J.] told us." (Trial Tr., p. 362.) Again, the record shows that K.J. was not a witness to any of the events in this case. Instead, K.J. was told by her friend, Perez, what happened. K.J. repeated to Det. Lambert the story she was told by Perez. Det. Lambert essentially testified that because the story given him by Perez after Appellant's incarceration "matched very closely" with the story Perez had told K.J., he tended to believe that Perez was now telling him the truth.

{¶66} The state contends that this matter is analogous to *State v. James,* 7th Dist. Mahoning No. 18 MA 0064, 2020-Ohio-4289. In *James,* a detective testified that a witness informed him the appellant had made comments about the victim to the witness. However, the detective testified that the witness could not recall the content of those comments.

{¶67} While *James* contains some factual similarities to the instant matter, there are significant differences. In *James,* we emphasized that as the witness could not

remember the contents of the appellant's comments, the detective's testimony merely established that he spoke to the witness as the next step in his investigation. Importantly, the witness testified at trial, thus the jury heard about these comments directly from the witness.

{¶68} The "next step" exception discussed in *James* is more fully described within *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181. "Law-enforcement officers may testify to out-of-court statements for the nonhearsay purpose of explaining the next investigatory step." *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 172, citing *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 186. "Testimony to explain police conduct is admissible as nonhearsay if it satisfies three criteria: (1) the conduct to be explained is relevant, equivocal, and contemporaneous with the statements, (2) the probative value of the statements is not substantially outweighed by the danger of unfair prejudice, and (3) the statements do not connect the accused with the crime charged." *Ricks*, *supra*, at ¶ 27.

{¶69} Again, Appellant concedes that he did not object to Det. Lambert's testimony, thus is limited to a plain error review. A three-part test is employed to determine whether plain error exists. *State v. Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 25, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

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

> aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

Billman at ¶ 25.

{¶70} Here, Det. Lambert's testimony appears to detail the steps he took during the investigation. He testified that Perez provided him with an initial statement. He then interviewed K.J., who repeated to him the story Perez had told her. That story did not match Perez's initial statement. Det. Lambert then reinterviewed Perez. By this time, Appellant had been incarcerated. Perez gave Det. Lambert a somewhat different version of the facts during her second interview. This story was apparently very similar to the story Perez told K.J. and K.J. related to Det. Lambert. While Det. Lambert provided no details of the story K.J. was told by Perez, when asked if he believed Perez's second interview statement, the detective responded that he did, because her second statement "matched very closely" the version Perez told K.J. Importantly, this is not analogous to the typical witness situation, where the witness relays some first-hand knowledge to the officer and the officer discusses this information in his testimony. This current situation is one step removed: the witness (who testified) also told the same story to another person who did not witness any of the incident, and did not testify. Appellant characterizes Det. Lambert's testimony in this matter as an attempt to bolster the witness' credibility. However, the state argues that the testimony was merely an explanation of the steps in the investigation and to show the reason Perez was reinterviewed.

{¶71} We recognize that Det. Lambert's testimony regarding K.J. explained why he reinterviewed Perez. We also recognize that he provided no details of K.J.'s statement. The issue revolves around the detective's answer as to why he believed Perez

was telling the truth in her second statement. Appellant contends that because K.J. did not testify, Det. Lambert's response enhanced Perez's otherwise questionable credibility. However, because the detective did not provide any of the content of the story related by Perez, and we have already recognized that K.J. had absolutely no first-hand knowledge of any relevant fact in this case but merely repeated the story told her by Perez, this does not appear to violate the confrontation clause. While the detective may have felt more comfortable believing Perez, the only bolstering that appears to have taken place is that the detective bolstered Perez's ability to tell the same story twice. The testimony (1) explained police conduct (why he reinterviewed Perez), (2) does not appear to unfairly prejudice Appellant (the jury was well aware that Perez changed her story and the attending circumstances of that change and that Perez had been charged for her role in the crime and had entered a plea in exchange for her trial testimony), and (3) does not connect Appellant with the crime (because no details of the K.J. statement were provided). Had K.J. been called to the stand, her only testimony could have been for her to repeat the story she was told by Perez about the incident, as she had no relevant first-hand knowledge of her own. Hence, this does not appear to run afoul of the proscription in *Ricks, supra*.

{¶72} That said, Det. Lambert did state that he tended to believe Perez's second statement because it "closely matched" the story she told her friend. To the extent that Det. Lambert's testimony could be construed as improper, in order to be deemed reversible error Appellant must show that the testimony was not harmless. "Whether a Confrontation Clause violation is harmless beyond a reasonable doubt involves not merely an inquiry into the sufficiency of the remaining evidence, absent the erroneously

admitted evidence, but whether there is a reasonable possibility that the violating evidence might have contributed to the resulting conviction." *State v. Paige*, 7th Dist. Mahoning No. 17 MA 0033, 2019-Ohio-1088, ¶ 35, appeal not allowed, 156 Ohio St.3d 1464, 2019-Ohio-2892, 126 N.E.3d 1164, ¶ 35 (2019), citing *Ricks* at ¶ 46, citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

{¶73} Det. Lambert's testimony regarding K.J.'s statement cannot be said to have contributed to the conviction. As earlier discussed, the jury knew Perez had changed her story to police and was testifying based on her own plea agreement. It is significant that Perez appears to have changed her story in regard to Appellant's intent to seek revenge on Dent. However, Appellant himself admitted in his testimony that he went to Dent's house to seek revenge and because he refused to continue to look over his shoulder in anticipation of another attack. He admitted he carried a gun and that he knew the situation could escalate to the point where he would need to use his gun. Even if he had not spent several hours planning to confront Dent (as he essentially admits in part of his own testimony), Appellant admitted he went to Dent's house in order to confront him. Thus, Appellant's own testimony established his intent, rendering Det. Lambert's alleged bolstering of Perez's credibility clearly harmless.

{¶74} Appellant also argues that trial counsel's failure to object to Det. Lambert's testimony amounts to ineffective assistance of counsel. The test for ineffective assistance of counsel is two-part: whether trial counsel's performance was deficient and, if so, whether the deficiency resulted in prejudice. *State v. White*, 7th Dist. Jefferson No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107.

{¶75} In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 7th Dist. Belmont No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694. The appellant must affirmatively prove the alleged prejudice occurred. *Strickland* at 693.

{¶76} Because an appellant must satisfy both Strickland prongs, if one is not met, an appellate court need not address the remaining prong. *Id*. at 697. The appellant bears the burden of proof on the issue of counsel's effectiveness, and in Ohio, a licensed attorney is presumed competent. *State v. Carter,* 7th Dist. Columbiana No. 2000-CO-32, 2001 WL 741571 (June 29, 2001), citing *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

{¶77} Even if Appellant could demonstrate that the failure to object constituted deficient performance, he cannot establish prejudice, as we have already determined.

{¶78} As such, Appellant's third and fourth assignments of error are without merit and are overruled.

Conclusion

{¶79} Appellant argues that the trial court erroneously denied his request to instruct the jury on voluntary manslaughter and reckless homicide. Appellant argues that his aggravated murder conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. Appellant also argues that Det. Lambert improperly

bolstered a key witnesses' testimony by corroborating it with the story told to another witness who did not testify at trial. Appellant additionally argues that his trial counsel was ineffective for failing to object to Det. Lambert's bolstering. Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning 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.