[Cite as *State v. Jackson*, 2023-Ohio-2193.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 1-22-27**

v.

OLIVER G. JACKSON, JR., **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Allen County Common Pleas Court
Trial Court No. CR 2020 0122

Judgment Affirmed

Date of Decision: June 29, 2023

APPEARANCES:

William T. Cramer **for Appellant**

Jana E. Emerick **for Appellee**

ZIMMERMAN, J.

{¶1} Defendant-appellant, Oliver G. Jackson, Jr. ("Jackson"), appeals the April 8, 2022 judgment entry of sentence of the Allen County Court of Common Pleas. For the reasons that follow, we affirm.

{¶2} This case stems from a February 29, 2020 altercation between Jackson and Michael Nees ("Nees") at Harry's Hideaway, a bar in Lima, Ohio. Jackson and Nees had been acquainted since 2003. The altercation originated because Jackson made advances toward Nees's wife the week before. Upset with Jackson's conduct, Nees sent Jackson several text messages demanding that he apologize. However, Jackson did not respond until the day of the incident when he sent a text message to Nees stating, "Bitch, I'm at [Lombardo's], come knock my teeth out. Don't worry to look for me now. I'm looking for you bitch boy. If you do [sic] tough drop your location." (State's Ex. 1). Jackson and Nees exchanged additional text messages and, ultimately, Nees informed Jackson that he was at Harry's Hideaway.

{¶3} Shortly thereafter, Jackson appeared at Harry's Hideaway and "waived at [Nees] then walked back outside." (Feb. 28-Mar. 1, 2022 Tr. at 119). Nees (along with Steven Snyder ("Snyder")) followed Jackson outside but Jackson continued to his vehicle. According to Nees, he and Snyder "followed halfway out [but] stopped because [they] knew by the time he got to his car he had a gun in his hand * * * ." (*Id.*). After exchanges between the three men, Jackson entered his vehicle, then shot

Snyder. According to Nees, Jackson discharged his weapon three times in Snyder's direction, shot at Nees, and then fled in his vehicle.

{¶4} On May 14, 2020, the Allen County Grand Jury indicted Jackson on four counts: Counts One, Two, and Three of felonious assault in violation of R.C. 2903.11(A)(2), (D)(1)(a), second-degree felonies, and Count Four of having weapons while under disability in violation of R.C. 2923.13(A)(3), (B), a third-degree felony. The indictment includes a firearm specification under R.C. 2941.145(A) as to Counts One, Two, and Three. On May 21, 2020, Jackson filed a written plea of not guilty to the counts and specifications in the indictment.

{¶5} On November 3, 2021 and February 25, 2022, the State filed motions to amend the indictment under Crim.R. 7(D). Specifically, the State argued that the indictment incorrectly indicates that the offenses occurred on or about March 29, 2020. Instead, the State asserted that the indictment should reflect that the offenses occurred on or about February 29, 2020. "With no objection by [Jackson]," the trial court granted the State's motions prior to the start of trial. (Doc. No. 150).

{¶6} The case proceeded to a jury trial on February 28 through March 1, 2022. On March 1, 2022, the jury found Jackson guilty of Counts One, Two, and Four, and the firearm specifications as to Counts One and Two, but not guilty of Count Three.

{¶7} On April 7, 2022, the trial court sentenced Jackson to a minimum term of 7 years to a maximum term of 10 1/2 years in prison on Count Two, to 24 months in prison on Count Four, and to 3 years in prison as to the firearm specification.[1] (Doc. No. 154). The trial court ordered Jackson to serve the prison terms consecutively for an aggregate sentence of a minimum of 12 years in prison to a maximum of 15 1/2 years in prison. Further, the trial court merged Counts One and Two for purposes of sentencing.

{¶8} Jackson filed his notice of appeal on April 18, 2022. He raises seven assignments of error for our review. For ease of our discussion, we will begin by discussing Jackson's first assignment of error; followed together by his fifth and sixth assignments of error; then together his second and third assignments of error; and finally separately his fourth and seventh assignments of error.

First Assignment of Error

> **Appellant's right under the Ohio Constitution to an indictment by a grand jury was violated by an amendment to the indictment at the start of trial that changed the date of the alleged offense.**

{¶9} In his first assignment of error, Jackson argues that the trial court erred by permitting the State to amend the indictment to change the date of offense because the amendment changed "the identity of the crime to something that was not found by the grand jury." (Appellant's Brief at 8).

[1] The trial court filed its judgment entry of sentence on April 8, 2022.

Standard of Review

{¶10} Generally, "[a]ppellate courts review a trial court's decision to permit the amendment of an indictment for an abuse of discretion." *State v. Adams*, 7th Dist. Mahoning No. 13 MA 130, 2014-Ohio-5854, ¶ 48. An abuse of discretion implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶11} However, a defendant's failure to object to the State's request to amend the indictment waives all but plain error on appeal. *State v. Crish*, 3d Dist. Allen No. 1-08-13, 2008-Ohio-5196, ¶ 24. "Under Crim.R. 52, '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'" *State v. Shockey*, 9th Dist. Summit No. 29170, 2019-Ohio-2417, ¶ 7, quoting Crim.R. 52(B). "Plain error exists only where there is a deviation from a legal rule, that is obvious, and that affected the appellant's substantial rights to the extent that it affected the outcome of the trial." *Id.* "We recognize plain error '"with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."'" *State v. Howard*, 3d Dist. Marion No. 9-10-50, 2011-Ohio-3524, ¶ 83, quoting *State v. Landrum*, 53 Ohio St.3d 107, 110 (1990), quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

Analysis

{¶12} Under Crim.R. 7(D), "[a]n indictment may be amended before, during, or after trial to correct a defect as long as no change is made in the name or identity of the crime charged." *Crish* at ¶ 24. "An amendment is impermissible if it 'changes the penalty or degree of the charged offense[ ] because such a change alters the identity of the offense.'" *Shockey* at ¶ 8, quoting *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, ¶ 1. "Conversely, '[a]mendments that change "only the date on which the offense occurred * * * [do] not charge a new or different offense, nor * * * change the substance of the offense."'" *Id.*, quoting *State v. Bennett*, 9th Dist. Lorain No. 10CA009917, 2011-Ohio-6679, ¶ 11, quoting *State v. Quivey*, 4th Dist. Meigs No. 04CA8, 2005-Ohio-5540, ¶ 28. *See also State v. Dunderman*, 3d Dist. Paulding No. 11-03-01, 2003-Ohio-3411, ¶ 7 (noting that, "in cases where time is not of the essence of the offense, an indictment is not rendered invalid by the omission of the time at which the offense was allegedly committed").

{¶13} In this case, the indictment reflected that the offenses occurred on or about March 29, 2020. However, following the exchange of discovery—and recognizing that the indictment incorrectly reflected the date of the offenses—the State filed motions in the trial court requesting that it amend the indictment to reflect that the offenses occurred on or about February 29, 2020. Realizing that it did not journalize its initial decision granting the State's first motion to amend the

indictment, the trial court granted the State's motions to amend the indictment prior to the start of trial.

{¶14} Nevertheless, the record reveals that Jackson did not object to the State's requests to amend the indictment. Consequently, Jackson waived all but plain error on appeal and he failed to demonstrate plain error in his argument. Critically, the amendment to the indictment did not change or alter the identity of the offenses. Indeed, "'precise times and dates are not ordinarily essential elements of an offense * * * ." *Bennett* at ¶ 11, quoting *State v. Ritchie*, 9th Dist. Lorain No. 95CA006211, 1997 WL 164323, *2 (Apr. 2, 1997). Here, the record reflects that the precise time and date are not essential elements of the offenses alleged in the indictment. *Compare id.* (establishing that "[t]he Revised Code does not provide that the date of the offense is an essential element of the offense of robbery").

{¶15} Likewise, Jackson cannot demonstrate that he was misled or prejudiced by the amendment. *See State v. Bevins*, 1st Dist. Hamilton No. C-050481, 2006-Ohio-5455, ¶ 34. Significantly, it is undisputed that "discovery clearly reflects facts indicating that the[] offense occurred on February 29, 2020." (Doc. No. 141). Specifically, "the initial discovery * * * provided on May 27, 2020 * * * contained a copy of the police reports which all reference the February 29, 2020 date." (*Id.*). Consequently, Jackson had notice of the offenses and applicable statutes.

{¶16} Therefore, Jackson cannot demonstrate that there was an obvious defect in the proceedings or that the outcome of his trial would have been different. Thus, it was not error, let alone plain error, for the trial court to permit the State to amend the indictment.

{¶17} Accordingly, Jackson's first assignment of error is overruled.

Fifth Assignment of Error

Appellant was deprived of his Due Process rights under the state and federal constitutions because his convictions were not supported by sufficient evidence.

Sixth Assignment of Error

Appellant's convictions are not supported by the weight of the evidence.

{¶18} In his fifth and sixth assignments of error, Jackson argues that his felonious-assault and having-weapons-while-under-disability convictions are based on insufficient evidence and are against the manifest weight of the evidence.[2] Specifically, Jackson disputes the issue of identity as to his convictions, arguing that someone else committed the offense.

[2] Jackson does not challenge his firearm-specification conviction.

Standard of Review

{¶19} Manifest "weight of the evidence and sufficiency of the evidence are clearly different legal concepts." *State v. Thompkins*, 78 Ohio St.3d 380, 389 (1997). Thus, we address each legal concept individually.

{¶20} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1981), paragraph two of the syllabus, *superseded by state constitutional amendment on other grounds*, *State v. Smith*, 80 Ohio St.3d 89 (1997). Accordingly, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* "In deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of witnesses, as both are functions reserved for the trier of fact." *State v. Jones*, 1st Dist. Hamilton Nos. C-120570 and C-120571, 2013-Ohio-4775, ¶ 33, citing *State v. Williams*, 197 Ohio App.3d 505, 2011-Ohio-6267, ¶ 25 (1st Dist.). *See also State v. Berry*, 3d Dist. Defiance No. 4-12-03, 2013-Ohio-2380, ¶ 19 ("Sufficiency of the evidence is a test of adequacy rather than credibility or weight of the evidence."), citing *Thompkins* at 386.

{¶21} On the other hand, in determining whether a conviction is against the manifest weight of the evidence, a reviewing court must examine the entire record, "'weigh[ ] the evidence and all reasonable inferences, consider[ ] the credibility of witnesses and determine[ ] whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). A reviewing court must, however, allow the trier of fact appropriate discretion on matters relating to the weight of the evidence and the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967). When applying the manifest-weight standard, "[o]nly in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Haller*, 3d Dist. Allen No. 1-11-34, 2012-Ohio-5233, ¶ 9, quoting *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 119.

Sufficiency of the Evidence

{¶22} We first review the sufficiency of the evidence supporting Jackson's felonious-assault and having-weapons-while-under-disability convictions. Jackson was convicted of felonious assault under R.C. 2903.11(A)(2) and having weapons while under disability under R.C. 2923.13(A)(3). Felonious assault is defined by R.C. 2903.11, which provides, in its relevant part, that "[n]o person shall knowingly

* * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon." R.C. 2903.11(A)(2). R.C. 2923.13 sets forth the offense of having weapons while under disability and provides, in its relevant part, that "[u]nless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm * * *, if * * * [t]he person * * * has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse * * * ."[3] R.C. 2923.13(A)(3).

{¶23} However, Jackson does not dispute the evidence concerning the underlying elements of the offenses of which he was convicted; rather, he disputes the issue of identity as to his convictions. *Compare State v. Missler*, 3d Dist. Hardin No. 6-14-06, 2015-Ohio-1076, ¶ 13. Thus, we will address only the identity element of the offense. *Accord id.* "'It is well settled that in order to support a conviction, the evidence must establish beyond a reasonable doubt the identity of the defendant as the person who actually committed the crime at issue.'" *Id.*, quoting *State v. Johnson*, 7th Dist. Jefferson No. 13 JE 5, 2014-Ohio-1226, ¶ 27.

{¶24} In support of his sufficiency-of-the-evidence challenge, Jackson argues that a rational trier of fact could not have found that he was the shooter. The record belies Jackson's argument. Importantly, the State presented direct evidence

[3] Jackson stipulated to his prior conviction. (*See* Feb. 28-Mar. 1, 2022 Tr. at 208, 294).

that Jackson was the person who committed the offenses at issue in this case. Specifically, one eyewitness—Nees—identified Jackson as the person who shot Snyder. Likewise, Patrolman Tyler Dunlap ("Patrolman Dunlap") testified that Nees identified Jackson as the shooter, and Patrolman Adrian Ramirez ("Patrolman Ramirez") and Detective Brian Snyder ("Detective Snyder") testified that Snyder identified Jackson as the shooter.

{¶25} Further, the State presented surveillance-video evidence corroborating that Jackson was the person who committed the offenses at issue in this case. Specifically, Nees identified State's Exhibit 5 as surveillance video of Harry's Hideaway from February 29, 2020. Nees testified that Jackson can be seen in the video "walking out to the side of the car" and into Harry's Hideaway, and then retreat outside followed by Nees and Snyder and Snyder falling "from being shot." (Feb. 28-Mar. 1, 2022 Tr. at 124-127). Similarly, Detective Snyder testified that law enforcement captured "a good face shot of the individual on [the surveillance] video, ran Mr. Jackson's picture in [law enforcement's] computer data base system, and * * * confirmed all of the information that it was him." (*Id.* at 223). Accordingly, contrary to Jackson's argument on appeal, the State presented direct evidence tying Jackson to the crime scene. Therefore, based on our review of the record, a rational trier of fact could have found that Jackson was the person who committed the offenses at issue in this case.

{¶26} Nevertheless, Jackson contends that there is insufficient evidence that he is the person who committed the offenses because, "[a]lthough Nees testified that he saw Jackson shoot the gun, that claim was not credible because it was dark, the gun never came outside of the car, and Nees was actually behind Snyder who was standing in front of the driver's window when the shooting happened." (Appellant's Brief at 18). Jackson's credibility argument is misplaced. The credibility and weight of the evidence is primarily the role of the trier-of-fact—in this case, the jury. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 106. In assessing the sufficiency of the evidence, we do not resolve evidentiary conflicts or assess the credibility of witnesses; rather, we determine whether any rational trier of fact could have found the essential elements of felonious assault and having weapons while under disability beyond a reasonable doubt when viewing the evidence in a light most favorable to the prosecution. *Jenks*, 61 Ohio St.3d 259, at paragraph two of the syllabus; *Jones*, 2013-Ohio-4775, at ¶ 33.

{¶27} Moreover, Jackson argues that there is insufficient evidence that he is the person who committed the offenses because "any hearsay about what Snyder said was unconstitutional and should be disregarded because he refused to testify and be subject to cross-examination." (Appellant's Brief at 18). However, based on our conclusion under Jackson's second assignment of error regarding the admissibility of the hearsay testimony, Jackson's argument is without merit.

Notwithstanding that conclusion, even if that testimony was inadmissible, its admissibility does not negate that the State presented direct evidence that Jackson was the shooter.

{¶28} Accordingly, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Jackson was the person who knowingly caused physical harm to Snyder by means of a deadly weapon and that Jackson was the person who used a firearm after being convicted of a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse. Therefore, Jackson's felonious-assault and having-weapons-while-under-disability convictions are based on sufficient evidence.

Manifest Weight of the Evidence

{¶29} Having concluded that Jackson's felonious-assault and having-weapons-while-under-disability convictions are based on sufficient evidence, we next address Jackson's argument that his felonious-assault and having-weapons-while-under-disability convictions are against the manifest weight of the evidence. However, Jackson does not make any argument under his sixth assignment of error conveying how his felonious-assault and having-weapons-while-under-disability convictions are against the manifest weight of the evidence.

{¶30} "[A] defendant has the burden of affirmatively demonstrating the error of the trial court on appeal." *State v. Stelzer*, 9th Dist. Summit No. 23174, 2006-Ohio-6912, ¶ 7. "Moreover, '[i]f an argument exists that can support this assignment of error, it is not this court's duty to root it out.'" *Id.*, quoting *State v. Cook*, 9th Dist. Summit No. 20675, 2002-Ohio-2646, ¶ 27. "App.R. 12(A)(2) provides that an appellate court 'may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).'" *State v. Jackson*, 10th Dist. Franklin No. 14AP-670, 2015-Ohio-3322, ¶ 11, quoting App.R. 12(A)(2). "Additionally, App.R. 16(A)(7) requires that an appellant's brief include '[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.'" *Id.*, quoting App.R. 16(A)(7). Importantly, Jackson failed to include an argument regarding how his felonious-assault and having-weapons-while-under-disability convictions are against the manifest weight of the evidence and failed to provide citations to the authorities, statutes, and parts of the record that support his argument.

{¶31} As we noted above, sufficiency of the evidence and manifest weight of the evidence are *different* legal concepts. *Thompkins*, 78 Ohio St.3d at 389. Here,

Jackson incorporated his arguments made "in the [fifth] assignment of error" in a conclusory paragraph under his sixth assignment of error. (Appellant's Brief at 19). Jackson's argument by incorporation does not comport with the requirements of App.R. 12(A)(2) or (16)(A)(7) since sufficiency of the evidence and manifest weight of the evidence are *different* legal concepts, which require *different* arguments. As a result, we will not develop a manifest-weight-of-the-evidence argument on Jackson's behalf and decline to address his sixth assignment of error any further. *Accord State v. Laws*, 3d Dist. Allen No. 1-20-10, 2021-Ohio-166, ¶ 32.

{¶32} Jackson's fifth and sixth assignments of error are overruled.

Second Assignment of Error

Appellant's constitutional right of confrontation under both the state and federal constitutions were violated by the admission of extensive hearsay testimony of the alleged victim.

Third Assignment of Error

The trial court abused its discretion in permitting improper character evidence.

{¶33} In his second and third assignments of error, Jackson argues that the trial court erred by admitting Snyder's out-of-court statements and improper-character evidence. Specifically, Jackson argues under his second assignment of error that the trial court erred by admitting "incriminating hearsay from" Snyder because he did not testify at trial. Jackson contends that the admission of the hearsay

evidence also violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

{¶34} Further, Jackson argues under his third assignment of error that the trial court erred by admitting improper-character evidence under Evid.R. 404(B). In particular, he contends that the trial court improperly admitted "Nees'[s] statements about Jackson being a drug dealer, being a 'shooter,' and having experience shooting at people from cars * * * ." (Appellant's Brief at 15).

Standard of Review

{¶35} Generally, the admission or exclusion of evidence lies within the trial court's discretion, and a reviewing court should not reverse absent an abuse of discretion and material prejudice. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 62. *See also State v. Wendel*, 3d Dist. Union No. 14-16-08, 2016-Ohio-7915, ¶ 23 ("Generally, '[a] trial court is given broad discretion in admitting and excluding evidence, including "other bad acts" evidence.'"), quoting *State v. Williams*, 7th Dist. Jefferson No. 11 JE 7, 2013-Ohio-2314, ¶ 7. As we previously stated, an abuse of discretion implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Adams*, 62 Ohio St.2d at 157.

{¶36} "However, we review de novo evidentiary rulings that implicate the Confrontation Clause." *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, ¶

97. "De novo review is independent, without deference to the lower court's decision." *State v. Hudson*, 3d Dist. Marion No. 9-12-38, 2013-Ohio-647, ¶ 27.

{¶37} Likewise, "[t]he admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law." *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, ¶ 22. "Accordingly, this court reviews de novo whether a trial court admitted improper character evidence and applies an abuse-of-discretion standard to evidentiary decisions regarding the admission of other-acts evidence for permissible purposes." *State v. Jackson*, 3d Dist. Allen No. 1-19-83, 2020-Ohio-5224, ¶ 28.

{¶38} Nevertheless, a defendant's failure to object to the admission of hearsay, raise a confrontation-clause issue, or object to the admission of "other acts" evidence in the trial court waives all but plain error on review. Again, "[f]or plain error to apply, the trial court must have deviated from a legal rule, the error must have been an obvious defect in the proceeding, and the error must have affected a substantial right." *State v. Bradshaw*, 3d Dist. Logan No. 8-22-09, 2023-Ohio-1244, ¶ 21. That is, "[u]nder the plain error standard, the appellant must demonstrate that there is a reasonable probability that, but for the trial court's error, the outcome of the proceeding would have been otherwise." *Id.*

Out-of-Court Statements

{¶39} Under his second assignment of error, Jackson contends that the trial court improperly allowed Nees, Patrolmen Samuel Crish ("Patrolman Crish") and Ramirez, and Detective Snyder to testify to statements made by Snyder. Specifically, Jackson disputes the trial court's admission of (1) Nees's testimony that Snyder stated that "he was hit by gunfire at the time of the event" and that "Snyder said that he did not know why he was the one who got shot when Nees was closer to the car"; (2) Patrolman Crish's testimony that a bystander reported to him "that a white male said he was shot" and that Snyder's sister reported to him that Snyder told her that he had been shot; (3) and Patrolman Ramirez's and Detective Snyder's testimony "Snyder told them that Jackson shot him." (Appellant's Brief at 10).

{¶40} We will first address whether the admission of Snyder's hearsay statements was proper under the rules of evidence. Then, we will consider whether the admission of Snyder's out-of-court statements violated Jackson's Sixth Amendment rights. *Accord State v. Little*, 3d Dist. Allen No. 1-16-29, 2016-Ohio-8398, ¶ 7, fn. 1 (asserting that it is proper to determine "the admissibility of hearsay statements under the rules of evidence prior to determining their acceptability under the Confrontation Clause").

Hearsay

{¶41} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). "Hearsay is inadmissible under Evid.R. 802, unless a particular statement fails to meet the two-part definition in Evid.R. 801(C), or fully satisfies the conditions for nonhearsay prior statements under Evid.R. 801(D)(1) or (2), or falls within one of recognized exceptions under Evid.R. 803 or 804." *State v. Richcreek*, 196 Ohio App.3d 505, 2011-Ohio-4686, ¶ 22 (6th Dist.). "[A] statement is, by definition, not hearsay when it is offered for a purpose other than to prove the truth of the matter asserted." *State v. Armour*, 3d Dist. Allen No. 1-22-05, 2022-Ohio-2717, ¶ 38.

{¶42} "Evid.R. 803 is one such rule which permits the admission of certain hearsay statements even though the declarant is available as a witness." *Dayton v. Combs*, 94 Ohio App.3d 291, 300 (2d Dist.1993). Under Evid.R. 803, the following hearsay statements are admissible: (1) present sense impression; (2) excited utterance; (3) then existing mental, emotional, or physical condition; and (4) statements for the purpose of medical diagnosis or treatment.

{¶43} Here, since Jackson failed to object to the admission of the hearsay evidence, he waived all but plain error on review. However, based on our review of the record, it was not error, let alone plain error, for the trial court to admit Nees's

testimony that Snyder stated that "he was hit by gunfire at the time of the event," or Patrolman Crish's, Patrolman Ramirez's, and Detective Snyder's testimonies regarding Snyder's out-of-court statements because those statements were admissible under the excited-utterance exception. "Evid.R. 803(2) excludes an excited utterance from the hearsay rule. An excited utterance is '[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'" *State v. Thompson-Shabazz*, 2d Dist. Montgomery No. 27155, 2017-Ohio-7434, ¶ 105, quoting Evid.R. 803(2).

{¶44} The Supreme Court of Ohio has set forth the following test for determining whether a statement qualifies as an excited utterance under Evid.R. 803(2):

> (a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement of declaration spontaneous and unreflective,
>
> (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs,
>
> (c) that the statement or declaration related to such startling occurrence or the circumstances of such starling occurrence, and

> (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.

State v. Jones, 135 Ohio St.3d 10, 2012-Ohio-5677, ¶ 166. "When evaluating statements under this test, '[t]here is no per se amount of time after which a statement can no longer be considered to be an excited utterance.'" *Little*, 2016-Ohio-8398, at ¶ 11, quoting *State v. Taylor*, 66 Ohio St.3d 295, 303 (1993). "Rather, 'each case must be decided on its own circumstances.'" *Id.*, quoting *State v. Duncan*, 53 Ohio St.2d 215, 219 (1978). "'The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may not be a result of reflective thought.'" *Id.*, quoting *Taylor* at 303.

{¶45} Nees's testimony that Snyder stated that "he was hit by gunfire at the time of the event," Patrolman Crish's, Patrolman Ramirez's, and Detective Snyder's testimonies satisfy the four elements of an excited utterance. Indeed, Snyder endured a startling experience during which he sustained a gunshot wound to his leg. *Accord State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, ¶ 179 (concluding that the victim's statements "regarding the circumstances that led to his getting shot" "were admissible as excited utterances").

{¶46} Further, the record reflects that Snyder was under the stress of having been shot when he made his statements to Nees (as heard by the bystander), to his sister, to Patrolman Ramirez, and to Detective Snyder. *See id.* at ¶ 182 ("A truly excited utterance is unlikely ever to meet this standard; certainly an objective

observer would not believe that when [the victim], scared, bleeding, and in shock, sought help from strangers, he expected his statements to be available for use at trial."). Importantly, the record reflects that Snyder had not yet received treatment for his gunshot wound at the time he made his statements to Nees (as heard by the bystander), his sister, or Patrolman Ramirez. *Compare id.* at ¶ 180 , citing *State v. Manzell*, 5th Dist. Stark No. 2006CA00258, 2007-Ohio-4076, ¶ 14 (concluding that the victim's out-of-court statement was admissible since she was still "wounded and scared" from the incident).

{¶47} Likewise, the record reflects that Snyder was receiving treatment at the hospital at the time he told Detective Snyder that Jackson shot him. Detective Snyder described that Snyder was "obviously agitated because of the entire situation" and that it was "a chaotic situation going on" since "he was being attended to by medical physicians and personnel * * * ." (Feb. 28-Mar. 1, 2022 Tr. at 235).

{¶48} In sum, it is evident that Snyder's statements were the product of reactive, not reflective, thinking. Therefore, we conclude that Snyder's statements to Nees (as heard by the bystander), to his sister, to Patrolman Ramirez, and to Detective Snyder qualified (at a minimum) as an excited utterance and that testimony was properly admitted.

{¶49} Furthermore, Jackson failed to demonstrate that it was plain error for the trial court to admit Nees's testimony that "Snyder said that he did not know why

he was the one who got shot when Nees was closer to the car" because Nees's testimony was not offered for the truth of the matter asserted. "'Out-of-court statements offered for reasons other than the truth are *not* hearsay.'" (Emphasis added.) *State v. F.R.*, 10th Dist. Franklin No. 14AP-440, 2015-Ohio-1914, ¶ 25, quoting *State v. Willis*, 8th Dist. Cuyahoga No. 97077, 2012-Ohio-2623, ¶ 11.

{¶50} Here, Nees's testimony was elicited during a line of questioning in which the State sought to establish whether Nees communicated with *Jackson* (not Snyder) after the altercation. Misunderstanding the State's question, Nees reiterated that his communication with *Snyder* about the shooting included "just the same thing that he didn't understand why he got shot when [Nees was] closer to the car in the first place." (Feb. 28-Mar. 1, 2022 Tr. at 136-137). Significantly, immediately following Nees's answer, the State corrected Nees and clarified its question.

{¶51} Importantly, the State's purpose for introducing Nees's testimony was not as substantive proof that Jackson shot Snyder. Rather, the State sought to introduce any statement made by Jackson as a statement against Jackson's own interest. "It is well-settled that pursuant to Evid.R. 801(D)(2)(a) a defendant's statement offered against him is not hearsay" and is admissible. *State v. Parker*, 7th Dist. Mahoning No. 15 MA 0174, 2017-Ohio-4382, ¶ 73.

{¶52} "Regardless, even if this statement was improperly admitted, the subject matter of this testimony was covered by other admissible evidence, and thus," Jackson cannot demonstrate that the outcome of his trial would clearly have been otherwise. *State v. Brown*, 3d Dist. Allen No. 1-19-61, 2020-Ohio-3614, ¶ 82. Consequently, we conclude that Jackson failed to demonstrate that the trial court committed plain error by admitting this testimony.

Confrontation Clause

{¶53} Having determined that the testimony to which Jackson objects was not inadmissible hearsay, we will turn to his argument that Snyder's out-of-court statements should have been excluded under the Confrontation Clause. The Confrontation Clause to the Sixth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that "'[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.'" *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354 (2004), quoting the Confrontation Clause.

> The United States Supreme Court has interpreted [the Sixth Amendment right to confrontation] to mean that admission of an out-of-court statement of a witness who does not appear at trial is prohibited by the Confrontation Clause if the statement is testimonial unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.

State v. Maxwell, 139 Ohio St.3d 12, 2014-Ohio-1019, ¶ 34.

{¶54} Consequently, "[o]nly testimonial hearsay implicates the Confrontation Clause." *McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, at ¶ 185. "Therefore, even if a statement falls under a hearsay exception it can be excluded as testimonial because such statements violate the Confrontation Clause." *State v. Hairston*, 10th Dist. Franklin No. 15AP-1013, 2016-Ohio-8495, ¶ 27. Conversely, nontestimonial statements may be admissible under a hearsay exception. *Id.* "There is also no dispute that the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, ¶ 18, quoting *Crawford* at 59, and citing *Williams v. Illinois*, 567 U.S. 50, 57-58, 132 S.Ct. 2221 (2012).

{¶55} "The key issue is what constitutes a testimonial statement: 'It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.'" *State v. Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, ¶ 33, quoting *Davis* at 821. Even though the United States Supreme Court "did not define the word 'testimonial,'" courts have distinguished statements made to law enforcement from statements communicated to non-law enforcement officials. *Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, at ¶ 34, quoting *Crawford* at 52.

{¶56} "If the questioner is a law enforcement officer or an agent of law enforcement, the court applies the primary-purpose test to determine whether the

statements are testimonial." *State v. Pettway*, 8th Dist. Cuyahoga No. 91716, 2009-Ohio-4544, ¶ 69. Such

> "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," but that [such] statements are testimonial when the circumstances indicate that there "is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Hairston at ¶ 27, quoting *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266 (2006). "In making [the] 'primary purpose' determination, courts must consider 'all of the relevant circumstances.'" *State v. Heard*, 12th Dist. Warren No. CA2016-11-095, 2017-Ohio-8796, ¶ 9, quoting *Michigan v. Bryant*, 562 U.S. 344, 369, 131 S.Ct. 1143 (2011). "Other factors to be considered in determining the 'primary purpose' of an interrogation include the formality of the situation, the standard rules of hearsay, as well as the statements and actions of both the declarant and the officer questioning the declarant." *Id.* at ¶ 10, quoting *Bryant* at 367. "Thus, the question is whether, in light of all the circumstances, the primary purpose of the conversation was to create 'an out-of-court substitute for trial testimony.'" *Id.*, quoting *Bryant* at 358.

{¶57} "While the primary purpose test applies to statements made to law enforcement, the Ohio Supreme Court has 'adopted the "objective-witness test" for out-of-court statements made to a person who is not law enforcement.'" *Little*,

2016-Ohio-8398, at ¶ 24, quoting *Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, at ¶ 161. When a statement is communicated to a non-law enforcement official, such statement is "'a testimonial statement [if it is] made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."'" *State v. Durdin*, 10th Dist. Franklin No. 14AP-249, 2014-Ohio-5759, ¶ 17, quoting *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, paragraph one of the syllabus, quoting *Crawford*, 541 U.S. at 52. "The focus is on the expectation of the declarant at the time the statement is made, and the intent of the questioner is irrelevant unless it could affect a reasonable declarant's expectations." *State v. Menton*, 7th Dist. Mahoning No. 07 MA 70, 2009-Ohio-4640, ¶ 24. Significantly, "[s]tatements to persons outside of law enforcement are 'much less likely to be testimonial than statements to law enforcement officers.'" *Little* at ¶ 24, quoting *Ohio v. Clark*, 576 U.S. 237, 246, 135 S.Ct. 2173 (2015).

{¶58} Similar to his hearsay challenge, Jackson failed to raise the Confrontation Clause issue before the trial court. As a result, he waived all but plain error on appeal. Nevertheless, based on our review of the record, we conclude that it was not error, let alone plain error, for the trial court to admit Snyder's out-of-court statements even though Snyder did not testify at trial. Importantly, Jackson failed to demonstrate that the primary purpose of any of Snyder's statements made to law enforcement to which he objects was to create an out-of-court substitute for

trial testimony. Likewise, Jackson failed to demonstrate Snyder would have reasonably believed that his statements to Nees would be available for later use at trial.

{¶59} In this case, we conclude that Snyder's statements to law enforcement—including Snyder's statements to the bystander and to his sister that were conveyed to law enforcement—are nontestimonial under the primary-purpose test. Decisively, those statements are nontestimonial because they were made during an ongoing emergency. Indeed, "[s]tatements to police officers responding to an emergency situation are generally considered nontestimonial precisely because the declarant is usually acting—under great emotional duress—to secure protection or medical care." *Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, at ¶ 183. Critically, "[a]n ongoing emergency does not necessarily end when the police arrive." *Little* at ¶ 18.

{¶60} "To determine whether an ongoing emergency exists, courts must 'objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.'" *Id.* at ¶ 19, quoting *Bryant*, 562 U.S. at 369. "'The court should consider the primary purpose of both the declarant and the interrogator.'" *Id.*, quoting *State v. Diggle*, 3d Dist. Auglaize No. 2-11-19, 2012-Ohio-1583, ¶ 24. This analysis "cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and

public may continue." *Id.*, quoting *Bryant* at 363. "Further, formal questioning may suggest the emergency situation has subsided whereas informal interrogation may suggest the police were "address[ing] what they perceived to be an ongoing emergency." *Id.*, quoting *Bryant* at 377. "Regarding the victim, any potential injuries may shed light on his or her intentions." *Id.*, quoting *Bryant* at 369. "However, this 'inquiry [regarding the victim's physical state] is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim." *Id.*, quoting *Bryant* at 369.

{¶61} Here, Jackson's argues that "Snyder's statements to [law enforcement] identifying Jackson as the shooter were for the purpose of establishing past events and not responding to an emergency" because "the identity of the shooter was not plausibility related to any ongoing medical emergency related to the injuries." (Appellant's Brief at 12). We disagree. Rather, the situation at issue in this case "had emergency implications based on *safety* and medical concerns." (Emphasis added.) *Hairston*, 2016-Ohio-8495, at ¶ 36. Indeed, law enforcement "needed to assess the level of the potential danger to the public by determining what crimes had occurred and how they occurred." *Id.* Specifically, when law enforcement arrived at the scene, Jackson and Snyder had already fled. Consequently, law enforcement had an urgent need to locate Jackson to subdue the ongoing threat and an urgent need to locate Snyder to render medical assistance. *See Little* at ¶ 21.

{¶62} Thus, the bystander's, Snyder's sister's, and Snyder's statements to law enforcement were not only made in an informal setting but were made with the primary purpose of enabling law enforcement to quell the ongoing emergency—that is, to apprehend Jackson and to locate Snyder for him obtain medical assistance. *See id.* at ¶ 22. Therefore, we conclude the bystander's, Snyder's sister's, and Snyder's statements to law enforcement were not created as an out-of-court substitute for trial testimony—that is, they are not testimonial. Accordingly, it was not error, let alone plain error, for the trial court to admit the bystander's, Snyder's sister's, and Snyder's statements to law enforcement even though Snyder did not testify at trial.

{¶63} Moreover, we conclude that Snyder's statements to Nees were not testimonial and, therefore, do not violate the Confrontation Clause. Decisively, Snyder's statement to Nees (at the time of the incident) that "he was hit by gunfire" and his later statement to Nees that "he did not know why he was the one who got shot when Nees was closer to the car" were not made under circumstances under which an objective witness would have reasonably believed that the statements would be available for later use at trial. *See Menton*, 2009-Ohio-4640, at ¶ 28. Indeed, Snyder made the statement that "he was hit by gunfire" for the purpose of alerting Nees that he had been injured during the heat of the altercation. Further, Snyder's statement to Nees that "he did not know why he was the one who got shot

when Nees was closer to the car" was made for the purpose of expressing his feelings about the incident to his friend.

{¶64} Finally, since we previously concluded that Nees's testimony that "Snyder said that he did not know why he was the one who got shot when Nees was closer to the car" was not offered for the truth of the matter asserted, its admission did not violate the Confrontation Clause. Indeed, "the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, at ¶ 18, quoting *Crawford*, 541 U.S. at 59, and citing *Williams v. Illinois*, 567 U.S. 50, 57-58, 132 S.Ct. 2221 (2012). Accordingly, there is no confrontation-clause violation under the facts presented.

Character Evidence

{¶65} Jackson further argues that the trial court erred by admitting improper-character evidence under Evid.R. 404(B). "'Evid.R. 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."'" *State v. Bagley*, 3d Dist. Allen No. 1-13-31, 2014-Ohio-1787, ¶ 56, quoting *State v. May*, 3d Dist. Logan No. 8-11-19, 2012-Ohio-5128, ¶ 69, quoting Evid.R. 404(B). "'However, there are exceptions to the general rule: "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."'" *Id.* at ¶ 56, quoting *May* at ¶ 69, quoting Evid.R. 404(B). *See also* R.C. 2945.59. "'The list of acceptable reasons for admitting testimony of prior bad acts into evidence is non-exhaustive.'" *Bagley* at ¶ 56, quoting *State v. Persohn*, 7th Dist. Columbiana No. 11 CO 37, 2012-Ohio-6091, ¶ 23. In this case, the other-acts evidence was predominately entered to prove identity.

{¶66} "Other acts can be evidence of identity in two types of situations. First are those situations where other acts 'form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment,' and which are 'inextricably related to the alleged criminal act.'" *State v. Lowe*, 69 Ohio St.3d 527, 531 (1994), quoting *State v. Curry*, 43 Ohio St.2d 66, 73 (1975).

{¶67} "Other acts may also prove identity by establishing a modus operandi applicable to the crime with which a defendant is charged." *Id.* "'Modus operandi' literally means method of working." *Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, at ¶ 37. "'"Other acts" may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense.'" *Lowe* at 531, quoting *State v. Smith*, 49 Ohio St.3d 137, 141 (1990). "Evidence of modus operandi is relevant to prove identity: 'Evidence that the defendant had committed uncharged crimes with the same peculiar modus tends to

identify the defendant as the perpetrator of the charged crime.'" *Hartman* at ¶ 37, quoting 1 Imwinkelried, Giannelli, Gilligan, Lederer & Richter, *Courtroom Criminal Evidence*, Section 907 (6th Ed.2016). "To be admissible to prove identity through a certain modus operandi, other-acts evidence must be related to and share common features with the crime in question." *Lowe* at 531. *See also Hartman* at ¶ 37.

{¶68} The Supreme Court of Ohio has set forth the three-step analysis trial courts should conduct in determining whether "other acts" evidence is admissible under Evid.R. 404(B). *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, ¶ 19-20. "The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Id.*, citing Evid.R. 401. "The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B)." *Id.* "The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice." *Id.*, citing Evid.R. 403.

{¶69} In this case, Jackson contends that Nees's testimony that (1) "Jackson used to sell him cocaine"; (2) he "expected Jackson to have a gun in his hand once

he got to his car"; (3) "he brought Snyder along because he was afraid that Jackson would shoot him"; and (4) "Jackson did not stick the gun outside the car because he always said you should keep the gun inside the car to contain the shells" runs afoul of Evid.R. 404(B). (Appellant's Brief at 13). Jackson further takes issue with Patrolman Dunlap's testimony that Nees "told him that Jackson tried to get him to come to the car, but [Nees] refused because Jackson was a 'shooter.'" (*Id.*, quoting Feb. 28-Mar. 1, 2022 Tr. at 153). In sum, Jackson argues that "[w]hen combined, this testimony has the effect of painting Jackson as a dangerous person, raising a clear character inference." (*Id.*).

{¶70} However, because Jackson failed to object to the other-acts evidence, we review the admission of the other acts evidence for plain error. *Accord Bradshaw*, 2023-Ohio-1244, at ¶ 21. Importantly, "[a] finding of plain error cannot be based on a mere speculation that the testimony at issue was misused by the jury." *State v. Rodgers*, 2d Dist. Montgomery No. 29403, 2023-Ohio-734, ¶ 80. Therefore, based on our review of the record, we conclude that Jackson cannot meet his burden of demonstrating that he was prejudiced by the admission of the other-acts evidence to which he objects. *Accord State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700, ¶ 93.

{¶71} Typically, "[g]eneralized statements and testimony that a defendant is known to carry a gun are generally inadmissible because they are meant to portray

the defendant as a violent person who regularly carried guns." *Id.* at ¶ 76. However, based on the specific facts and circumstances of this case, we conclude that Nees's and Patrolman Dunlap's testimonies were not offered to disparage Jackson's character or show that he was likely to commit criminal acts. Instead, Nees's and Patrolman Dunlap's testimonies were relevant to proving the identity of the shooter through a certain modus operandi. *See State v. Leigh*, 2d Dist. Montgomery No. 28821, 2023-Ohio-91, ¶ 59 (considering that the "testimony was relevant to the issue of the identity of the shooter"). Critically, Nees's and Patrolman Dunlap's testimonies related to, and shared common features with, the crimes in question. In addition, Nees's testimony that he "expected Jackson to have a gun in his hand once he got to his car" and that "he brought Snyder along because he was afraid that Jackson would shoot him" as well as Patrolman Dunlap's testimony that Nees "told him that Jackson tried to get him to come to the car, but [Nees] refused because Jackson was a 'shooter'" was offered to describe Nees's actions and the reasons he took such actions.

{¶72} Furthermore, Jackson not only failed to object to the purported other-acts evidence, but it was Jackson—not the State—who elicited Nees's testimony that "Jackson used to sell him cocaine" and that "Jackson did not stick the gun outside the car because he always said you should keep the gun inside the car to contain the shells" as part of his defense strategy. That is, Jackson elicited Nees's

testimony on cross-examination in an attempt to undermine Nees's credibility. *See id.* at ¶ 25-26. "It is well established that a party cannot complain on appeal that the trial court erred [by] permitting the admission of prejudicial testimony that the party elicited from a witness." *Rodgers* at ¶ 77. "Under the doctrine of invited error, '[a] party will not be permitted to take advantage of an error [that] he himself invited or induced.'" *State v. Breneman*, 2d Dist. Champaign No. 2019-CA-23, 2020-Ohio-4151, ¶ 48, quoting *State v. Fair*, 2d Dist. Montgomery No. 24388, 2011-Ohio-4454, ¶ 69. Consequently, Jackson cannot complain that the trial court improperly admitted Nees's testimony that "Jackson used to sell him cocaine" and that "Jackson did not stick the gun outside the car because he always said you should keep the gun inside the car to contain the shells."

{¶73} Notwithstanding such invited error, the trial court instructed the jury to disregard Nees's testimony that "Jackson used to sell him cocaine" as evidence of Jackson's character. Not only did the trial court instruct the jury to disregard that character evidence, the trial court's instruction to the jury was tailored to the facts of this case. *See Hartman*, 2020-Ohio-4440, at ¶ 70-71. When a trial court issues "a limiting instruction * * * in connection with the admission of Evid.R. 404(B) evidence, the jury is presumed to have followed the instruction." *State v. Estes*, 2d Dist. Greene No. 2018-CA-20, 2019-Ohio-1383, ¶ 21. There is no evidence that the jury failed to follow the trial court's instruction in this case since the jury found

Jackson not guilty of one of the felonious-assault charges of which it was presented. *See State v. Gideon*, 3d Dist. Allen Nos. 1-18-27, 1-18-28, and 1-18-29, 2021-Ohio-1863, ¶ 26. Consequently, Jackson's contention that he was prejudiced by the admission of the other-acts evidence is undermined by the jury's acquittal of one of the felonious-assault charges. *See Jackson*, 2020-Ohio-5224, at ¶ 37.

{¶74} Nevertheless, even if we assume without deciding that the other-acts evidence was improperly admitted as propensity evidence, Jackson cannot demonstrate that the outcome of his trial would have been different. *See Jackson* at ¶ 35. Importantly, even absent the other-acts evidence, the remaining evidence provides overwhelming evidence of guilt. *Accord id.* at ¶ 38. Indeed, as we summarized in our discussion in Jackson's sufficiency-of-the-evidence and manifest-weight-of-the-evidence assignments of error, the State presented formidable evidence of guilt. *Accord id.* Consequently, we conclude that Jackson failed to demonstrate plain error. *Accord Rodgers*, 2023-Ohio-734, at ¶ 80; *Graham*, 2020-Ohio-6700, at ¶ 93.

{¶75} Jackson's second and third assignments of error are overruled.

Fourth Assignment of Error

Appellant was deprived of his right to the effective assistance of counsel under the state and federal constitutions by counsel's failure to object to inadmissible evidence.

{¶76} In his fourth assignment of error, Jackson argues that he was denied his right to effective assistance of counsel. Specifically, Jackson argues that his trial counsel was ineffective for failing to object to the admission of hearsay and improper-character evidence.

Standard of Review

{¶77} A defendant asserting a claim of ineffective assistance of counsel must establish: (1) the counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defendant. *State v. Kole*, 92 Ohio St.3d 303, 306 (2001), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). In order to show counsel's conduct was deficient or unreasonable, the defendant must overcome the presumption that counsel provided competent representation and must show that counsel's actions were not trial strategies prompted by reasonable professional judgment. *Strickland* at 687. Counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675 (1998). Tactical or strategic trial decisions, even if unsuccessful, do not generally constitute ineffective assistance. *State v. Carter*, 72 Ohio St.3d 545, 558 (1995). Rather, the errors complained of must amount to a substantial violation of counsel's essential duties to his client. *See State v. Bradley*, 42 Ohio St.3d 136, 141-142

(1989), quoting *State v. Lytle*, 48 Ohio St.2d 391, 396 (1976), *vacated in part on other grounds*, 438 U.S. 910, 98 S.Ct. 3135 (1978).

{¶78} "Prejudice results when 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Liles*, 3d Dist. Allen No. 1-13-04, 2014-Ohio-259, ¶ 48, quoting *Bradley* at 142, citing *Strickland* at 691. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.*, quoting *Bradley* at 142 and citing *Strickland* at 694.

Analysis

{¶79} Here, Jackson argues that his trial counsel was ineffective for failing to object to certain hearsay and character evidence that he contends was inadmissible under the rules of evidence. Specifically, Jackson argues that his trial counsel was ineffective for failing to object to Snyder's out-of-court statements identifying Jackson as the shooter when Snyder did not testify at trial. Likewise, Jackson argues that his trial counsel was ineffective for failing to object to the evidence presented by Nees that he "was a drug dealer and a 'shooter' with experience shooting from cars." (Appellant's Brief at 16).

{¶80} "The 'failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.'" *Liles* at ¶ 49, quoting *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶ 139. "To prevail on such a claim, a defendant

must first show that there was a substantial violation of any of defense counsel's essential duties to his client and, second, that he was materially prejudiced by counsel's ineffectiveness." *State v. Holloway*, 38 Ohio St.3d 239, 244 (1988). "Because 'objections tend to disrupt the flow of a trial, and are considered technical and bothersome by the fact-finder,' competent counsel may reasonably hesitate to object in the jury's presence." *State v. Campbell*, 69 Ohio St.3d 38, 53 (1994), quoting Jacobs, *Ohio Evidence*, at iii-iv (1989).

{¶81} However, based on our conclusion under Jackson's second and third assignments of error, his argument that his trial counsel was ineffective for failing to object to the admission of the hearsay and improper-character evidence is without merit. Therefore, Jackson's fourth assignment of error is overruled.

Seventh Assignment of Error

Indefinite prison terms imposed under the Reagan Tokes Law violate the jury trial guarantee, the doctrine of separation of powers, and due process principles under the federal and state constitutions.

{¶82} Under his seventh assignment of error, Jackson specifically argues that his sentence, imposed under Ohio's current sentencing scheme (commonly known as the "Reagan Tokes Law"), is unconstitutional. Specifically, Jackson challenges the constitutionality of the Reagan Tokes Law for violating his right to a trial by jury, and he challenges the Reagan Tokes Law for violating the separation-of-powers doctrine and due-process clause of the Ohio and United States Constitutions.

Standard of Review

{¶83} Under R.C. 2953.08(G)(2), an appellate court will reverse a sentence "only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶ 1. Clear and convincing evidence is that "'which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *Id.* at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

Analysis

{¶84} In this case, Jackson challenges the constitutionality of the Reagan Tokes Law—namely, Jackson alleges that the Reagan Tokes Law violates his constitutional right to a trial by jury in addition to violating the separation-of-powers doctrine and due-process clause of the Ohio and United States Constitutions.

{¶85} """An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible."""" *State v. Mitchell*, 3d Dist. Allen No. 1-21-02, 2021-Ohio-2802, ¶ 12, quoting *State v. Brown*, 3d Dist. Marion No. 9-10-12, 2010-Ohio-4546, ¶ 9, quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955),

paragraph one of the syllabus. """That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution."""" *Id.*, quoting *Brown* at ¶ 9, quoting *Xenia v. Schmidt*, 101 Ohio St. 437 (1920), paragraph two of the syllabus.

{¶86} "'A statute may be challenged on constitutional grounds in two ways: (1) that the statute is unconstitutional on its face, or (2) that it is unconstitutional as applied to the facts of the case.'" *Id.* at ¶ 13, quoting *Brown* at ¶ 10, citing *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 37. "'To mount a successful facial challenge, the party challenging the statute must demonstrate that there is no set of facts or circumstances under which the statute can be upheld.'" *Id.*, quoting *Brown* at ¶ 10. "'Where it is claimed that a statute is unconstitutional as applied, the challenger must present clear and convincing evidence of a presently existing set of facts that make the statute unconstitutional and void when applied to those facts.'" *Id.*, quoting *Brown* at ¶ 10.

{¶87} However, our review of the record reflects that Jackson is attempting to, on appeal, raise his constitutional arguments for the first time. """'The question of constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution this means in the trial court.'"""" *Id.* at ¶ 14, quoting *Bagley*, 2014-Ohio-1787, at ¶ 70, quoting *State v. Rowland*, 3d Dist. Hancock No.

5-01-28, 2002 WL 479163, *1 (Mar. 29, 2002), quoting *State v. Awan*, 22 Ohio St.3d 120, 122 (1986). "This applies to challenges to the facial constitutionality of a statute and to the constitutionality of a statute's application.'" *Id.*, quoting *Bagley* at ¶ 70.

{¶88} "'The Supreme Court of Ohio has held that, "'[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal.'"'" *Id.* at ¶15, quoting *State v. Heft*, 3d Dist. Logan No. 8-09-08, 2009-Ohio-5908, ¶ 29, quoting *State v. Rice*, 3d Dist. Allen Nos. 1-02-15, 1-02-29, and 1-02-30, 2002-Ohio-3951, ¶ 7, quoting *Awan* at syllabus. "'However, the waiver doctrine * * * is discretionary; thus, "even where waiver is clear, a reviewing court may consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it."'" *Id.*, quoting *Heft* at ¶ 29, quoting *Rice* at ¶ 7. "Nevertheless, '"'discretion will not ordinarily be exercised to review such claims, where the right sought to be vindicated was in existence prior to or at the time of trial.'"'" *Id.*, quoting *Heft* at ¶ 29, quoting *Rice* at ¶ 7, quoting *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170-171 (1988), quoting *State v. Woodards*, 6 Ohio St.2d 14, 21 (1966).

{¶89} Here, Jackson neither objected to the constitutionality of the Reagan Tokes Law while his case was pending before the trial court nor did he challenge the trial court's application of the Reagan Tokes Law at his sentencing hearing. Thus, Jackson waived his arguments on appeal. *Accord id.* at ¶ 16.

{¶90} Notwithstanding Jackson's failure to raise his arguments in the trial court, we will address the merits of his arguments in the interest of justice. Generally, Jackson urges this court to diverge from our prior precedent in which we rejected similar facial- and as-applied-constitutional challenges. We decline to diverge from our standing precedent. *Accord Bradshaw*, 2023-Ohio-1244, at ¶ 73. Accordingly, Jackson's sentence is not contrary to law.

{¶91} Jackson's seventh assignment of error is overruled.

{¶92} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

MILLER, P.J. and EPLEY, J., concur.

/jlr

**** Judge Christopher B. Epley of the Second District Court of Appeals, sitting by Assignment of the Chief Justice of the Supreme Court of Ohio.**