[Cite as *State v. Scarton*, 2020-Ohio-2952.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108474
v.	:	
APRIL SCARTON,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 14, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-633062-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kristin M. Karkutt and Carson Strang, Assistant Prosecuting Attorneys, *for appellee*.

Joseph V. Pagano, *for appellant*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Defendant-appellant April Scarton appeals her conviction for murder in violation of R.C. 2903.02(A) and guilty findings of murder in violation of R.C. 2903.02(B), felonious assault in violation of R.C. 2903.11(A)(1) and felonious

assault in violation of R.C. 2903.11(A)(2) following a jury trial. She argues that her conviction and guilty findings are not supported by sufficient evidence and are against the manifest weight of the evidence. She further argues that her conviction should be overturned because she was denied effective assistance of counsel, that the trial court improperly denied her request for a jury instruction on her accident defense and that the trial court abused its discretion in excluding "relevant evidence." For the reasons that follow, we affirm the trial court's decision.

Procedural History and Factual Background

{¶ 2} On October 4, 2018, a Cuyahoga County Grand Jury indicted Scarton on four counts: one count of murder in violation of R.C. 2903.02(A) (Count 1), one count of murder in violation of R.C. 2903.02(B) (Count 2), one count of felonious assault in violation of R.C. 2903.11(A)(1) (Count 3) and one count of felonious assault in violation of R.C. 2903.11(A)(2) (Count 4). The charges arose out of September 24, 2018 incident in which Scarton drove her vehicle onto the front lawn of the residence of Melissa Lang and her fiancé, Eric Clary, striking Lang, running her over and killing her. The incident followed an altercation involving Lang, Clary, Scarton, Scarton's husband, Anthony Scarton ("Anthony") and Anthony's friend, Richard Evcic. Scarton pled not guilty to the charges, and, in March 2019, the case proceeded to a jury trial.

{¶ 3} Eighteen witnesses testified on behalf of the state, including Clary, N.C. (the 12-year-old daughter of Lang and Clary), four other eyewitnesses, several police officers and detectives, a paramedic who treated Lang at the scene, two

forensic scientists who analyzed evidence from the scene, the doctor who performed Lang's autopsy, a physician assistant who treated Scarton following the incident and a corrections officer. Scarton and Evcic testified in Scarton's defense. A summary of the relevant evidence presented at trial follows.

{¶ 4} On the evening of Friday, September 21, 2018, Lang and Clary were hanging out with Anthony at their home on 13721 Astor Avenue in Cleveland. Clary had grown up with Anthony and had known him for approximately 20 years. The three of them were drinking, talking and smoking "wet," i.e., smoking cigarettes laced with PCP. Clary testified that he and Lang had used PCP "maybe once a month." According to Clary, Evcic, a friend of Anthony's, also "popped in and out" that evening.

{¶ 5} Clary testified that he next saw Anthony the following night at the home of a friend, Josh. Anthony had his dog with him. The three men and Lang were sitting out back, drinking, cooking out and "BS-ing." During the course of the evening, the dog started "biting on" Clary's leg, and Clary "kicked [the dog] off" him. Clary's actions angered Anthony. Clary testified that Anthony was "pretty much trying to get [Clary] to fight [Anthony]" the rest of the evening because Clary kicked his dog.

{¶ 6} Clary testified that for the next two days, Anthony sent Clary numerous text messages, "rapping * * * and like trying to rhyme and saying meet me here and hopefully your kids see me whoop on you and this and that and the other." Clary stated that he ignored "most of it" and "did not respond to any of it."

{¶ 7} Clary stated that during this time, Lang was on the phone repeatedly with Scarton and/or Anthony arguing over something and, at one point, had left the house to go meet one of them to fight. Clary stated that he did not know what they were arguing about and that he told Lang to "leave it alone, leave it alone, leave it alone" but that "[s]was doing what she was doing."

{¶ 8} On Monday, September 24, 2018, at approximately 5:40 p.m., Scarton drove herself, Anthony and Evcic to Clary and Lang's house. Scarton was driving a rental car, a maroon Kia Forte, because her car had been damaged in an accident a few days earlier. The house was located at the "dead end" of the street. Scarton stopped the vehicle in the street in front of the house, facing east, away from the dead end, toward West 130th Street.

{¶ 9} Clary testified that he was laying on the couch with his 18-month-old son when he heard a "pounding across the whole front of my house, my front door, my windows." Clary stated that he got up and saw Anthony pounding on the front door, Evcic standing in front of his front bay window and Scarton pacing in the driveway. According to Clary, the pounding continued and someone was screaming, "Motherf******* come outside." Clary testified that he exited the house from the side door with a small baseball bat, "yelling and telling them to leave." He walked towards the car in which they had arrived, which was stopped in the street in front of his house. Clary stated that they did not comply with his demands to leave and, instead, yelled back. Clary testified that he felt threatened and believed that Anthony wanted to fight him because he was still angry that Clary had kicked his

dog. Clary stated that, at one point during the altercation, he heard Anthony say, "I'm going to get the strap" or "I'm going to get the gat," which he understood to mean that "he has a pistol somewhere," but Clary never saw a gun.

{¶ 10} Clary testified that Lang came outside "a minute after I did." Lang went over to the side of the car where Scarton was and began arguing with her. Lang grabbed Scarton's hair and the two women began throwing punches at each other and pulling each other's hair.

{¶ 11} Clary stated that, at this point, he was standing at the rear of the vehicle. He testified that he said, "I'm going to count to three, and if you guys don't leave, I'm breaking every window out of this car." He began counting and then broke the vehicle's taillights. Scarton got back into the driver's seat and began hitting the gas while the vehicle was still in park — "high idle three or four times" — and Evcic and Anthony got back into the vehicle.

{¶ 12} Clary testified that Lang was standing in the street near the driver-side of the vehicle, screaming "leave b* * * *, leave, leave, leave." Lang began "running for safety" towards the house as the vehicle began moving. Clary testified that instead of going straight to leave, Scarton turned the vehicle right and drove into his front yard towards the house. He testified that "[w]hen the vehicle first went towards the house, it was halfway — the right wheel was halfway in the grass, left wheel was halfway in the very front edge of the driveway [a]nd the steering was turned all the way to the right, so it just made a complete circle right in the front yard." Clary stated that "[w]ithin seconds," the front right fender of the car hit Lang

on the head, and she rolled under the front wheel. Clary testified that the vehicle rolled over Lang's neck, torso and stomach, then "took off down the street," "full throttle," "doing 40, 50 mile[s] per hour." Clary stated that he "broke out" the passenger-side rear window with the baseball bat as the vehicle was leaving the grass.

{¶ 13} Clary testified that he yelled for someone to call an ambulance and that his daughter, N.C., handed him a blanket, which he placed over Lang. According to Clary, after "about four minutes," when he did not hear any sirens, he threw the bat in the bushes because he "didn't want the bat to be found" and then ran to the next street to tell Josh what had happened and to ask him to call for help. When he arrived back home, EMS was placing Lang into the ambulance.

{¶ 14} N.C. testified to a similar version of events. She testified that she was sitting in the living room watching television with her parents and her brother when Scarton, Anthony (whom she knew as "Tone") and another male she did not know came over. She stated that Anthony and the other man began banging on the windows and doors of the house, saying, "Open up." N.C. stated that Lang opened the front door and went outside and that Clary also went out into the front yard with a baseball bat. N.C. stated that the adults were "fighting" and "arguing" for approximately ten minutes but that she could not hear what they were saying. At one point, N.C. heard Anthony say, "Get the strap," but she did not understand what that meant. N.C.'s father told her to call police, and N.C. called 911.

{¶ 15} N.C. testified that she was looking out the door when she saw her mother walk over to Scarton's car, which was in the street. N.C. stated that, as her mother approached, the car began "moving a little bit." N.C. stated that she went back inside the house because the dog was trying to get outside and her brother had started crying. N.C. testified that her attention was turned back to what was happening outside because "the car kept making the motor sounds." N.C. stated that she went back outside and was standing in the driveway when she saw the car go into the yard twice. The first time the car turned into the yard, it spun in a circle. The second time the car turned into the yard, it went a "different direction," such that N.C. thought "it was going to run into the house." The car turned toward and ran over her mother, who had been standing in the middle of the front yard. N.C. testified that Scarton was driving when her mother was run over. N.C. was still on the phone with a 911 operator at that time.

{¶ 16} George Gearing, one of Lang and Clary's neighbors, was in his living room watching television on the afternoon of September 24, 2018 when he heard an argument outside. He testified that he initially ignored it, but when it "got louder," he looked out his front door to see what was going on. He stated that a dark-colored sedan pulled out of the front yard at 13721 Astor Avenue and "sped off" down the street. When the vehicle moved away, he saw someone lying in the front yard, "closer to the house than * * * the street."

{¶ 17} Shirley Sterling, another of Lang and Clary's neighbors, testified that she was in her living room on the afternoon of September 24, 2018 when her dog

started barking "like crazy." Sterling went to the front of the house to see why the dog was barking and observed a "commotion" at the end of the street. She stated that saw a woman trying to pull someone out of the driver-side of a car that was parked in front of the driveway of 13721 Astor Avenue. Behind the car, near the rear driver-side of the vehicle, she saw Clary "swinging" a baseball bat. Sterling went inside and called 911. After she called 911, she went back outside, and "everything was over then." Sterling indicated that "people" were "gathered" around Lang, who was "down" in the front yard, and the car was gone.

{¶ 18} Jorge Serrano Rodriguez lived two doors down from Clary and Lang, on the same side of Astor Avenue. He testified he had just gone outside to smoke when he saw a red car "flying down the street." The car turned around in the driveway at 13721 Astor Avenue and then parked in the street in front of the house. Rodriguez stated that he saw two males get out of the vehicle and that one of them went up to the house and was knocking on the windows and door. A female driver remained in the vehicle. He testified that Clary came out of the house, swinging a baseball bat, and told the men to leave. Rodriguez immediately called 911 and told the operator what was going on.

{¶ 19} Rodriguez testified that Lang came out of the house and went to the car. He indicated that the driver opened the car door and that Lang reached in, grabbed the driver by the hair and punched her four times, "wailing" on her. He indicated that Clary then went to the rear of the vehicle and began swinging the

baseball bat at the taillights. He testified that the men came back to the car and that one of them said, "Get the strap," which he understood to mean a gun.

{¶ 20} Rodriguez testified that once the men got back into the vehicle, the vehicle turned into the yard and did a "u-turn" in the front lawn. He stated that as the vehicle began moving, Lang ran in front of the car, towards her house. He said Lang was trying to run out of the way of the vehicle when the driver grabbed Lang "like from behind * * * on her arm" and "tried to like swing her in front of the hood" "so she could turn the wheel and like run [Lang] over." He stated that after Lang was struck, they "punched it" and the vehicle travelled at "like 50, 60 [m.p.h.] all the way down Astor." Rodriguez was still on the phone with the 911 operator when Lang was run over. He ran over to Lang and stayed with her until EMS arrived.

{¶ 21} James Clemons, Jr. was visiting a friend who lived across the street from 13721 Astor Avenue that afternoon. Clemons testified that he was standing in the doorway, about to go outside to move his car from the driveway into the street, when he observed two men get out of a vehicle across the street. He indicated that one of the men (later identified as Anthony) went up to the house and began banging on the windows, saying, "Come on out." Clemons stated that a girl (later identified as N.C.) opened the front door and that Anthony told her, "Tell them to come out." He indicated that Anthony "may have been inebriated" because based on "his actions, the way he moved * * * just seemed like he might have been on something." Clemons testified that the other male who came with Anthony was "kind of standoff * * * just stood back" and "wasn't being aggressive or nothing."

{¶ 22} Clemons stated that a woman (later identified as Lang) came out of the house and that the male homeowner (later identified as Clary) appeared in the driveway with a baseball bat, swinging the bat and telling the two men to leave. He stated that the two men who came to the house were saying, "Come on, come on," and that they were "trying to get close" to Clary, but could not do so because he was swinging the bat. Eventually, the two men got on either side of Clary until they had him "sandwiched" in the front yard.

{¶ 23} Clemons testified that Lang "ran over" to the car, which was parked on the street near the driveway and said, "Get out the car, April. Come on, let's fight, get out the car." Scarton was sitting in the driver's seat of the vehicle, and the driver-side door was open. Clemons testified that Lang grabbed Scarton's hair through the open car door and began pulling it. According to Clemons, when the two men saw what was happening at the car, they came back towards the car. Clary hit the taillights of the vehicle with the baseball bat, and Lang let go of Scarton's hair and walked up the driveway to the side of the house. The two men then got into the backseat of the vehicle. As to what happened next, Clemons testified:

> A. Then the lady that was driving the car put the car in drive and turned the car up in the driveway. The lady that got ran over saw her coming, she tried to jump out of the way.
>
> Q. In which direction did she jump?
>
> A. She jumped to the right of the car.
>
> Q. In relation to the driveway, would it have been towards the grass? Away from the grass?

A. Towards the grass.

Q. Okay. And then what happened?

A. And then the driver of the car turned the car to the right to catch her. And she did. She caught her — the front end of the car caught her, she was trying to run out of the way. The front end caught her and it took her down.

* * *

Q. What did you see next?

A. After she caught her, the car knocked her down, the front tires and the rear tires ran her over, and the car just like did a complete U-turn and just sped on down Astor.

Q. In which area did the car do a U-turn?

A. On the grass in front of the victim's house.

Q. And when you said sped down Astor, can you describe what you mean by that?

A. I mean, it was like all one motion, she just never stopped. I mean, it was like a conscious effort to — because you're already facing east, all you have to do is leave, but you turned up in the driveway. You was making a conscious effort to run this lady over and ran her over. * * * The vehicle just pretty much — it was like a complete U-turn. So she came up the driveway. As the victim tried to run out the way of the car and run this way, she turned that way too after her, and the car just caught her — she couldn't get out of the way of the car fast enough.

{¶ 24} Clemons stated that, based on where she was standing, there was nothing Lang could have done to avoid being hit by the car. He indicated that Scarton, however, could have just driven straight down the street to avoid hitting Lang. Clemons testified that he ran over to try and assist Lang and stayed with her

until EMS arrived. Clemons stated that he had never seen any of the individuals involved in the incident before.

{¶ 25} Clary testified that after the ambulance took Lang to the hospital, police officers began questioning him. At the officers' request, he retrieved the baseball bat from the bushes. After the officers left and he arranged for N.C.'s older sister to come and stay with the younger children, he went the hospital. Lang died at the hospital from her injuries a few hours later. At the time of the incident, Lang was 5'8" and weighed 234 pounds.

{¶ 26} Cleveland patrol officer Donna Brown, along with her partner Officer Woods, was one of the initial responding officers. EMS was already on the scene when they arrived. Officer Brown testified that she spoke with Clary and N.C. regarding what had happened. She indicated that Clary told her that "these people came over banging on his house windows and doors screaming," that one of them yelled, "Go get the strap" and that he grabbed a bat and went outside. According to Officer Brown, Clary told her that Lang and Scarton then began to fight and that he had tried to stop the fight by "busting out" the car's taillights. At her request, Clary retrieved and gave her the bat he had used in the incident, an aluminum T-ball or baseball bat, which he told Officer Brown he had placed "outside somewhere behind some bushes" following the incident. Officer Brown testified that after speaking with Clary and N.C., they went to the hospital to check on Lang's status, then returned to the First District Police Station because the officers had been made

aware that Scarton, Anthony and Evcic had appeared at the police station to give an account regarding what had occurred.

{¶ 27} After leaving Lang and Clary's residence, Scarton drove first to a gas station, then to the First District Police Station to report Lang's assault on her and the damage to her vehicle. Cleveland Patrol Officer Frank Giuliano recorded his interaction with Scarton, Anthony and Evcic on his body camera, and a portion of the body camera footage was played for the jury. Scarton told Officer Giuliano that 20 minutes earlier, they had gone to Lang and Clary's house and that she had parked in the street and was sitting in the driver's seat while Anthony knocked on the door. She indicated that two days earlier, Clary had kicked their dog, that the dog was now limping and was going to be seen by a vet, and that Anthony had gone to Clary's house to ask Clary how he was going to pay for the dog's medical bills. Scarton indicated that Clary came out of the house with a baseball bat and began smashing her car windows. When Officer Giuliano asked Scarton why she had come to the police station "instead of calling police on scene," Scarton replied:

> We left the scene of the accident, sir, because she had me by the hair out the driver's side f****** window, and I'm not gonna get out of the car. First of all, these people are crazy and on drugs to begin with. The husband is smashing my windows out. I'm not getting out and putting myself in a position to be assaulted. I'm already being assaulted through the window of my vehicle. So I drive forward. She lets go of me. I continue forward to you guys. Parked back there and called my lawyer.

{¶ 28} In describing the incident to police, Scarton did not indicate that she had driven the vehicle into the front lawn or that anyone had been hit or run over by

the vehicle. Although he did not ask the individuals whether they had sustained any injuries in the incident, Officer Guiliano testified that none of the individuals appeared to be injured and that no one complained of any pain or injuries. On the body camera footage, Scarton appears lucid, coherent and shows no sign of any injuries.

{¶ 29} Cleveland Police Sergeant Richard Jackson testified that he was on duty at the First District Police Station when Scarton, Anthony and Evcic came in to make a report. He testified that he just spoken with an officer who was on the scene of the incident and knew that they were looking for three suspects that matched the descriptions of Scarton, Anthony and Evcic. He went out into the lobby to hear what they had to say. After listening to their description of the incident, Sergeant Jackson arrested Scarton, Anthony and Evcic and placed them in holding cells.

{¶ 30} Sergeant Jackson testified that after being held for approximately 45 minutes, one of the men requested medical attention for Scarton. Sergeant Jackson stated that Scarton was complaining about irritation from glass in her eye. Sergeant Jackson contacted EMS, and EMS came and attended to Scarton, washing her eye out with water. Scarton requested that she be taken to the hospital, and the police escorted her to Fairview Hospital for further evaluation and treatment.

{¶ 31} Andrea Dolenc, a physician assistant employed in the Emergency Department at Fairview Hospital treated Scarton. Dolenc testified that Scarton came into the emergency room with police at approximately 9:00 p.m., complaining of a headache, neck pain, left eye pain and a foreign body in her left eye following an

alleged assault four hours earlier. Dolenc testified that Scarton informed her that "someone started beating back of car with bat, then reached in the driver-side window where she was sitting and pulled her hair." Dolenc stated that Scarton was "awake, alert, and oriented" upon arrival, that Scarton appeared to be in no distress and that she observed no "external trauma" on Scarton, including no open wounds, abrasions, lacerations or other skin color changes and "no palpable deformities to face or skull." Dolenc stated that Scarton denied any loss of consciousness during or as a result of the incident.

{¶ 32} Dolenc testified that Scarton reported that she had been seeing "flashing lights" in her left eye following a prior accident but reported "[n]o new vision changes" as a result of the alleged assault. Dolenc stated that numerous tests were performed on Scarton, including CAT scans of the brain, cervical spine and the orbits, an EKG and various examinations of Scarton's eyes, and that no trauma or other significant findings were noted based on the test results. Dolenc stated that Scarton's eyes were "[p]ositive for pain and discharge, negative for photophobia, redness, and visual disturbance" and that Scarton was ultimately diagnosed with "pain of left eye and a closed head injury" and released.

{¶ 33} Dr. David Dolinak with the Cuyahoga County Medical Examiner's Office conducted an autopsy of Lang on September 26, 2018. He detailed Lang's significant injuries from the incident, including: abrasions to her left upper forehead and left cheek; bruising to her right eye, lower lip, the right front side of her face and right temporal scalp and forehead; a seven-by-three inch bruise in her right breast;

a twelve-by-eight inch bruise in her upper abdomen; bruising to her left upper chest; scrapes and bruising on her back and hips; bruising of her right kidney; a six-by-five inch area of scrapes and bruising to her right lower abdomen, groin and hip; numerous rib fractures; a fractured right shoulder; bruising of both arms and shoulders; a separated fracture of the top part of her left upper arm; bruising to her mid right thigh; bleeding in the back of her head, mid back and right shoulder; internal bleeding in her abdomen, chest and the tissue surrounding her intestines and a large bloody tear that transected the liver.

{¶ 34} He stated that the toxicology report revealed that, in addition to drugs that were administered to Lang during her treatment at MetroHealth Medical Center, nicotine, PCP and trace amounts of marijuana were detected in her system. Dr. Dolinak indicated that they could not get a "good reading" on the PCP level and could not state when Lang might have ingested it, but that none of these substances contributed to her death.

{¶ 35} Following the incident, text messages between Lang and Scarton were extracted from Lang's cell phone. Cleveland Police Detective Michael Legg, who was one of the detectives assigned to investigate Lang's death, testified that from Saturday, September 22, 2018, at 6:21 p.m. to Monday, September 24, 2018, at 6:31 a.m., the women sent numerous vulgar and threatening messages back and forth, including messages in which Scarton claimed that Lang's PCP use had led to her son's underdevelopment and in which she told Lang, "I will bet your life on the fact my husband won't be around your sorry c***** out a** unless it's to beat your sorry

a** dude for kicking my dog," and messages in which Lang threatened Scarton and offered to fight her, such as, "If we cross paths, I'm smashing you on site." The back-and-forth ended with a text message Lang sent to Scarton at 6:31 a.m. on September 24, 2018: "I'll be at your house as soon as I take [N.C.] to school."

{¶ 36} Lisa Przepyszny, a forensic scientist in the trace evidence department and Lisa Moore, a scientist employed in the DNA department at the Cuyahoga County Regional Forensic Science Laboratory in the Cuyahoga County Medical Examiner's Office analyzed evidence collected from Scarton's rental car. Przepyszny testified that she tested an "orange-ish, reddish-type material" that was found on the underside of the vehicle's exhaust pipe and found it to be consistent with the screen print on the back of the T-shirt Lang was wearing at the time of the incident. Moore testified that Lang's DNA was found on swabs taken from underneath Scarton's rental car.

{¶ 37} While she was in the Cuyahoga County Jail awaiting trial, Scarton got into an argument with her cellmate. Cuyahoga County Corrections Officer Margarita Garcia testified that she heard Scarton tell her cellmate, "You're an a**hole, I should f*** you up, I should have killed you like I did her." Officer Garcia did not witness the beginning of the argument between Scarton and her cellmate.

{¶ 38} At the close of the state's case, Scarton moved for acquittal pursuant to Crim.R. 29(A) on Count 1, murder in violation of R.C. 2903.02(A), arguing that

there was "no evidence that this was a purposeful act by the defendant."[1] The trial court denied the motion.

{¶ 39} Scarton and Evcic then testified in Scarton's defense, offering a slightly different version of events.

{¶ 40} Evcic testified that on the afternoon of September 24, 2018, Scarton and Anthony picked him up and that Scarton drove the three of them to Clary and Lang's house. According to Evcic, while en route, he learned that a couple of days earlier, Clary had kicked Anthony's dog and that Anthony wanted to talk to Clary

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[1] It is not clear from the record whether defense counsel even moved for acquittal as to the remaining counts. When making his Crim.R. 29 motion at the close of the state's case-in-chief, defense counsel stated:

> Judge, I make a Rule 29 that the burden of proof as it relates to — specifically starting with the charges of murder, there is throughout no evidence that this was a purposeful act by the defendant, and because of that, that a Rule 29 should be granted as it relates to the charges of murder and murder with the — supplementing the felonious assault. You know, depending on your ruling as it relates to that, I'll address the rest of it, your Honor.
>
> The following exchange then occurred:
>
> [THE STATE]: Your Honor, I'm confused. Are we doing this in a piecemeal –
>
> THE COURT: I don't know.

The state proceeded to argue why it believed it had presented sufficient evidence on all four counts. The trial court then engaged in a further exchange with defense counsel as follows:

> THE COURT: * * * Same argument I assume?
>
> [DEFENSE COUNSEL]: Yes, your Honor.
>
> THE COURT: Rule 29 denied.

about paying the vet bill. When they arrived, Scarton pulled into the driveway, then backed out and parked in the street, facing east. Evcic stated that his "purpose in being there" was "to hear testimony," i.e., "to hear if [Clary] was going to pay for the vet bill or not pay for the vet bill" and serve as a witness, if necessary, in a future civil lawsuit regarding the issue.

{¶ 41} Evcic testified that after Scarton parked the car, Anthony got out and walked to the house, knocking first on the front door, then the side door and then pounding on the front window. He stated that a teenage girl came to the front door.

{¶ 42} Evcic testified that, at this time, he was still in the car. According to Evcic, Scarton told him, "Get this idiot, let's get out of here," so Evcic got out of the car to get Anthony. As he started walking up the driveway, Lang came to the front door, and Lang and Anthony began "arguing, swearing, cussing at each other." Evcic stated that he and Scarton wanted to leave but that Anthony did not want to leave and was not listening to them.

{¶ 43} Evcic testified that once Lang realized Scarton was in the car, she ran to the car, attempted, unsuccessfully, to get into the passenger-side door, then went over to the driver-side of the vehicle where Scarton was sitting. Evcic testified that when Lang reached the car, she grabbed Scarton's hair in her left hand and began punching her in the face and head with her right hand, "over and over again * * * for a few minutes."

{¶ 44} Evcic testified that as Lang ran toward the car, Clary came out of the side door with a baseball bat raised above his head and told Anthony to leave. Clary

proceeded down the driveway toward Evcic, who was now in the middle of the street, and pointed the bat at him across the roof of the car. Evcic testified that Scarton told Clary, "Get this girl off me, get this girl off me," and that he said to Clary, "Put the bat down and get your wife." Evcic stated that Clary responded, "F* ** that s***, whoop her f****** a**." Evcic testified that Clary then went around to the back of the vehicle, said "One, two, three," and broke out both rear taillights with the bat.

{¶ 45} Evcic stated that Anthony was already in the front passenger seat when he got back into the car in rear driver-side. As soon as he got into the car, Clary broke the rear passenger-side window out with the baseball bat. At this point, Lang was still next to the driver-side of the vehicle.

{¶ 46} Evcic denied that anyone said, "Get the strap," but stated that he told Clary more than once to "[d]rop the bat" and that Anthony was just there "to talk to him."

{¶ 47} Evcic testified that, as soon Clary broke out the passenger-side window, he "immediately" got glass in his eye and could not see anything. Evcic stated that he told Scarton "to go, get out of here, just go" but that Scarton was "not sort of responsive, not replying." Two seconds later, Evcic heard another crash. He said, "The driver's side rear window broke on top like in my ear."

{¶ 48} Evcic testified that he heard the vehicle "revving" and was "thrown back in [his] seat" as the vehicle began moving. He claimed that he could not see the direction the vehicle was traveling due to the glass in his eye but did not feel the vehicle turn and felt like he was "going straight" down Astor Avenue towards West

130th Street. He stated did not recall traveling in the circular path as shown in police photographs, taken after the incident, of the tire tracks in Lang and Clary's front lawn. He testified that he did not feel "anything unusual," such as "a thump or anything to that effect," that he did not feel the vehicle turning and that he did not feel the vehicle go over a curb or hit anything. He stated the "next thing" he "recall[ed]" was being at the corner of Astor Avenue and West 130th Street.

{¶ 49} Evcic testified that when they were "four or five car lengths from the end of the street," he was able to use the inside of his shirt to get the glass out of his eye. He stated that, when he looked up, he saw Anthony with "his hand on the steering wheel helping [Scarton]." He could not say whether Anthony had been holding the steering wheel before that time.

{¶ 50} Evcic testified that the vehicle turned onto West 130th Street from Astor Avenue and that Anthony had to continue to help Scarton steer the wheel because Scarton "had something in her eye and she couldn't see or see very well." He stated that it was "around" the corner of Bellaire and West 130th Street that Scarton started to drive the car again "on her own."

{¶ 51} Evcic testified that while Scarton was driving, Anthony called his lawyer. The lawyer did not answer, and, a minute or so later, called Anthony back. Evcic stated that, as Anthony was talking to his lawyer, Anthony told Scarton to pull into a nearby Sunoco gas station. Evcic did not hear the conversation with counsel and stated that he did not know why Anthony was calling his lawyer. Evcic stated that he had already told Scarton and Anthony that they should go to the First District

Police Station to report the assault on Scarton and the damage to the vehicle. Evcic claimed that he did not know, at that point, that someone had been struck by the vehicle.

{¶ 52} Evcic stated that when they arrived at the First District Police Station, Anthony and Scarton told the officers what had happened and that they were arrested and placed in holding cells. Evcic stated that it was "at least an hour or two after they had been arrested" before he learned that someone had been struck by the vehicle. He claimed that it was not until he was released from the homicide unit that he learned that Lang had died.

{¶ 53} Scarton testified that she babysat Lang and Clary's son for three hours on the afternoon of September 21, 2018, taking him to a nearby library while Lang was at work. She indicated that this was the second time she had babysat the child and that he "didn't engage very well," was not walking or crawling, was not talking and was "very thin" and appeared to be malnourished. After she dropped the child back off at Lang and Clary's home, Scarton called 696-KIDS and reported the matter to the Cuyahoga County Division of Children and Family Services.

{¶ 54} Scarton testified that her next contact with Lang was on Saturday, September 22, 2018, when Scarton sent Lang a text message. Scarton indicated that she sent Lang a text message stating that if she needed a babysitter, "to have [Anthony] do it" because her dog had been taken from her home while she was at the library with Lang's son and Lang was the only person who knew she was not home then. Scarton stated that Lang responded by calling her multiple times and

sending her threatening texts. Scarton testified that when the threats continued, on Sunday, September 23, 2018, Scarton sent a "very vulgar" text message back to Lang and then "blocked her." Scarton testified that even after she blocked Lang, the calls and text messages continued. She indicated that she later learned that Lang had sent Scarton 32 calls or texts between Sunday, September 23, 2018 and Monday September 24, 2018, most of which were blocked and never received by Scarton.

{¶ 55} According to Scarton, on the afternoon of September 24, 2018, Anthony asked her to pick up Evcic and give him a ride. She agreed. Scarton stated that, at the time, she was driving a rental car because she had "[n]ot [been] paying attention" and rear-ended another vehicle a few days earlier, disabling her vehicle. After Scarton picked Evcic up, Anthony told her that he wanted to go to Clary and Lang's house "[t]o ask [Clary] about what he was going to do for the dog being kicked." Scarton drove to Lang and Clary's house.

{¶ 56} Scarton stated that when she arrived, she first turned into the driveway, then turned her wheel to the right and backed out of the driveway and parked in the street. She testified that she "didn't straighten the [steering] wheel out" after parking in the street, so the wheels remained turned towards the driveway.

{¶ 57} After Scarton parked the car, Anthony went up to the house, knocked on the front door and began banging on the windows. Scarton testified that after someone came to the door, she asked Evcic to "get Anthony" because "he was being an idiot." Scarton stated that Evcic exited the vehicle to get Anthony and that she lit a cigarette.

{¶ 58} Scarton testified that as Evcic walked in front of the car up the driveway, Lang came running out of the house, screaming at Scarton to get out of the car. Scarton stated that Lang first attempted to enter the passenger-side of the vehicle but after Scarton locked that door, ran over to the driver-side of the vehicle. Scarton testified that Lang grabbed her hair, which was in a "sloppy bun," and "[s]lugged" her "quite a bit" in the back of the head. Scarton stated that after Lang's second or third punch, she was "seeing stars." Scarton indicated that she did not fight back and did not "strike her or grab her or push her or anything." Scarton testified that she was screaming, "Someone help me. * * * Get her off of me." Scarton claimed that "[a]fter [she] saw stars," she did not "recall much of what happened."

{¶ 59} According to Scarton, while Lang was running around the vehicle, Clary "busted out" the vehicle's taillights and rear passenger-side window. Scarton testified that the car had been running the entire time. She stated that she did not recall "revving" the engine or operating the vehicle on Clary and Lang's front lawn and that did not know "how the car even got into gear." Scarton testified that she did not recall "striking somebody or running somebody over or hitting somebody." She stated that she "saw stars again" and that, as she was "seeing the stars, * * * looking towards the end of the street at that point," Anthony was "controlling" the steering wheel. She testified that, with Anthony's assistance, she continued to drive down Astor Avenue to West 130th Street and that Anthony "guided" her to make a left-hand turn onto West 130th Street. Scarton stated that she was driving to the First District Police Station because she knew that "having my vehicle assaulted and

being assaulted was report-worthy." On the way, she stopped at a gas station. While she went into the gas station, Anthony called his attorney. Scarton stated that when she got out of the car at the gas station, she saw that both rear taillights and rear windows were broken and that glass was "all over."

{¶ 60} Scarton testified that when she arrived at the police station, she felt like she had "sand" in her eye. After speaking with police officers, she, Anthony and Evcic were arrested and placed in holding cells. She stated that she complained for several hours about the discomfort in her eye before receiving medical attention. Scarton testified that she did not learn that Lang had been struck by the vehicle until she was released from the hospital and taken downtown to the Cuyahoga County Jail.

{¶ 61} Scarton acknowledged that her trial testimony was different in certain material respects from what she initially told the police, including her statements that she drove "forward" or "straight." Scarton claimed that these inconsistencies were due to a "lapse in recollection at that time," the fact that she was "in distress" and could not "recollect in that moment every final detail" and because she was precluded from "finish[ing] the rest of what occurred" when describing the incident to police. Scarton testified that she told the officers that she did not strike anyone with the vehicle because she was not aware of having struck anyone at that time.

{¶ 62} Scarton also acknowledged discrepancies between her trial testimony and what she told the hospital staff when she sought medical attention at Fairview Hospital following the incident. Scarton admitted that she never told the hospital

staff that she had a "lapse of consciousness," "saw stars" or could not recall a significant portion of what had occurred earlier that afternoon. She claimed this was because she was "detained" with a "police officer right outside [her] door."

{¶ 63} At the close of her case, Scarton renewed her Crim.R. 29 motion "on the same basis." Once again, the trial court denied the motion.

{¶ 64} The jury found Scarton guilty on all counts. The counts were found to be allied offenses of similar import that merged for sentencing, and the state elected to have Scarton sentenced on Count 1. On March 28, 2019, the trial court sentenced Scarton to fifteen years to life in prison.

{¶ 65} Scarton appealed, raising the following five assignments of error for review:

> Assignment of Error I: The trial court erred when it denied appellant's motion for acquittal under Crim.R. 29 because the state failed to present sufficient evidence to establish beyond a reasonable doubt the elements necessary to support the convictions.
>
> Assignment of Error II: Appellant's convictions are against the manifest weight of the evidence.
>
> Assignment of Error III: Appellant was deprived of the effective assistance of counsel in violation of the Sixth Amendment where cross-examination elicited irrelevant and highly prejudicial hearsay testimony and there was no objection to other acts evidence in violation of Evid.R. 404(B).
>
> Assignment of Error IV: The trial court erred by denying appellant's request for jury instructions and appellant was denied effective assistance of counsel where objections prevented jury instructions on inferior degree offense charges in violation of the Sixth Amendment.
>
> Assignment of Error V: The trial court erred by excluding relevant evidence.

{¶ 66} For ease of discussion, we address Scarton's assignments of error together where appropriate.

Law and Analysis

Sufficiency of the Evidence and Manifest Weight of the Evidence

{¶ 67} In her first and second assignments of error, Scarton contends that the trial court erred in denying her Crim.R. 29 motion for acquittal and that her conviction for murder in violation of R.C. 2903.02(A) and the jury's guilty findings on the other offenses were not supported by sufficient evidence and were against the manifest weight of the evidence. Although they involve different standards of review, because they involve interrelated issues, many of the same arguments and a review of the same evidence, we address Scarton's first and second assignments of error together.

{¶ 68} A Crim.R. 29(A) motion for acquittal tests the sufficiency of the evidence. *See, e.g., State v. Hale*, 8th Dist. Cuyahoga No. 107646, 2019-Ohio-3276, ¶ 80, citing *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578, ¶ 13. Accordingly, we review a trial court's denial of a defendant's motion for acquittal using the same standard we apply when reviewing a sufficiency-of-the-evidence challenge. *Id.*

{¶ 69} A challenge to the sufficiency of the evidence supporting a conviction requires a determination of whether the state met its burden of production. *State v. Hunter*, 8th Dist. Cuyahoga No. 86048, 2006-Ohio-20, ¶ 41. When reviewing

sufficiency of the evidence, an appellate court must determine "'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.'" *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In a sufficiency inquiry, an appellate court does not assess whether the evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction beyond a reasonable doubt. *State v. Starks*, 8th Dist. Cuyahoga No. 91682, 2009-Ohio-3375, ¶ 25; *Jenks* at paragraph two of the syllabus.

{¶ 70} In contrast to a challenge based on sufficiency of the evidence, a manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. Weight of the evidence "addresses the evidence's effect of inducing belief," i.e., "whose evidence is more persuasive — the state's or the defendant's?" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1977). When considering an appellant's claim that a conviction is against the manifest weight of the evidence, the appellate court functions as a "thirteenth juror" and may disagree "with the factfinder's resolution of * * * conflicting testimony." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The appellate court examines the entire

record, weighs the evidence and all reasonable inferences that may be drawn therefrom, considers the witnesses' credibility and determines 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, 485 N.E.2d 717 (1st Dist.1983). Reversal on manifest weight grounds is reserved for the "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins* at 387, quoting *Martin* at 175.

{¶ 71} Scarton was convicted of murder in violation of R.C. 2903.02(A). That statute provides, in relevant part, that "[n]o person shall purposely cause the death of another." "A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶ 72} "'Purpose * * * can be established by circumstantial evidence from the surrounding facts and circumstances in the case.'" *State v. Hope*, 2019-Ohio-2174, 137 N.E.3d 549, ¶ 73 (11th Dist.), quoting *State v. Peak*, 11th Dist. Lake No. 2004-L-124, 2005-Ohio-6422, ¶ 39. "Because no one can know the mind of another, a defendant's intent is 'not discernible through objective proof.'" *State v. McCoy*, 2d Dist. Montgomery No. 22479, 2008-Ohio-5648, ¶ 14, quoting *State v. Huffman*, 131 Ohio St. 27, 1 N.E.2d 313 (1936), paragraph four of the syllabus. A defendant's intent

in acting may be determined from the manner in which an act is done, the means or instrument used and all the other surrounding facts and circumstances in evidence. *State v. Howell*, 5th Dist. Richland No. 18CA49, 2019-Ohio-1506, ¶ 14; *see also In re Rivera*, 8th Dist. Cuyahoga No. 65078, 1994 Ohio App. LEXIS 269, 9-10 (Jan. 27, 1994) ("The intent to kill * * * may be presumed where the natural and probable consequence of a wrongful act is to produce death. * * * Intent may thus be inferred from all the surrounding circumstances, such as the instrument used to produce death and the manner of inflicting the fatal wound."), citing *State v. Robinson*, 161 Ohio St. 213, 218-219, 118 N.E.2d 517 (1954); *State v. Treesh*, 90 Ohio St.3d 460, 484-485, 739 N.E.2d 749 (2001) ("Because the intent of an accused dwells in his or her mind and can never be proved by the direct testimony of a third person, it must be gathered from the surrounding facts and circumstances.").

{¶ 73} Scarton argues that the evidence presented was insufficient to prove beyond a reasonable doubt that Scarton "purposely" caused the death of Lang and that the trial court should have, therefore, granted her motion for acquittal because: (1) witnesses testified that Scarton was in the car while Lang was pulling her hair and punching Scarton; (2) Scarton testified that she was "seeing stars" from the punches and "none of the witnesses refuted" her and Evcic's testimony that Scarton was "unconscious for a period of time" while Anthony was "handling the steering wheel"; (3) the scene of the incident was "chaotic" and witnesses had identified Anthony as the "aggressor," not Scarton; (4) cell phone records showed that Lang was threatening Scarton in the days leading up to the incident; (5) there was

evidence that Anthony, Lang and Clary had used PCP as recently as September 21, 2018 and that PCP was in Lang's system at the time of her death and (6) evidence showed that Scarton drove to the police station following the incident to report Lang's assault on her and the damage to her vehicle and (7) she and Evcic testified that they were not aware anyone had been struck by the vehicle at the time they went to the police station.

{¶ 74} Scarton makes similar arguments with respect to her manifest weight challenge. She contends that her testimony that she was "seeing stars" after Lang hit her, that she "does not recall much of what happened after that" and that she "did not know" that anyone had been struck or run over by the vehicle was "consistent," "credible" and "reasonable." She further contends that "[t]he [p]ath of the car towards the house" was "reasonably explained" by her testimony "that the wheels were pointing in that direction" and that her and Evcic's testimony that Anthony was "steering the car" should have been believed over Clary's testimony because Clary "encouraged Lang's assault" of Scarton and thereafter "attempted to hide his involvement in the incident by putting the bat in the bushes." Scarton asserts that "considering the record as a whole, the evidence does not satisfy the burden of proving purposeful, knowing intent * * * to injure Lang beyond a reasonable doubt" and that "[a]t best, it portrays a tragic and unfortunate accidental death." We disagree.

{¶ 75} Viewing the evidence in the light most favorable to the state, we find that the evidence presented at trial was sufficient for the jury to find beyond a

reasonable doubt that Scarton purposely caused the death of Lang in violation of R.C. 2903.02(A). There was no dispute that Lang was run over after she had been involved in an altercation with Scarton, that Scarton was in the driver's seat of the vehicle at the time Lang was run over and that that Lang died from the injuries she sustained after being run over. There was likewise no dispute that before the vehicle began moving, the vehicle was in the street, facing east, such that all Scarton needed to do to get out of the situation was to drive off straight down Astor Avenue. Instead, as Clary, N.C., Rodriguez and Clemons all testified, Scarton turned the vehicle right, drove up into the front lawn and continued driving around the front lawn until she reached, struck and ran over Lang.

{¶ 76} Rodriguez, Clemons, N.C. and Clary all testified that the vehicle was specifically targeting Lang, i.e., that Lang was running away for safety in the direction of the house when the vehicle turned towards her, striking her. Clary testified that the vehicle was moving "[n]ot fast at all" as it traveled through the front lawn following Lang, such that the vehicle could have easily turned away or backed up and avoided Lang. He and other witnesses testified that when the vehicle struck Lang, it did not stop, but instead, continued forward, running her over and then speeding away from the scene. Based on the evidence presented, a rational jury could conclude beyond a reasonable doubt that Scarton purposely ran over Lang with her vehicle. A rational trier of fact could also conclude beyond a reasonable doubt that Scarton knew that running over Lang with her vehicle would surely cause her death. It is well known that a car can be a deadly weapon. *See, e.g., State v.*

Bandy, 7th Dist. Mahoning Nos. 10 MA 74 and 10 MA 121, 2011-Ohio-4332, ¶ 2, 22-23. Thus, the evidence was sufficient to support Scarton's conviction for purposeful murder in violation of R.C. 2903.02(A).

{¶ 77} We reach a similar conclusion with respect to Scarton's manifest weight challenge. This case came down to which version of events — and which witnesses — the jury found to be more credible: The version of events to which Scarton and Evcic testified at trial or the version of events to which the other witnesses testified at trial.

{¶ 78} As detailed above, multiple disinterested eyewitnesses, as well as Clary and N.C., testified that after Scarton was arguing and fighting with Lang, the vehicle Scarton was driving, instead of going straight down the road to leave, turned into Lang and Clary's front lawn, drove around the front lawn, followed Lang (who was running toward the house), struck Lang and ran over her body. The testimony of these eyewitnesses was substantial, competent, credible evidence supporting Lang's murder conviction. Although there were minor inconsistencies among certain of the eyewitness accounts, the accounts were consistent in all material respects and were supported by physical evidence, including the tire track marks in the front lawn and DNA evidence recovered from underneath Scarton's rental car.

{¶ 79} Scarton's testimony, on the other hand, that she was "unconscious," was not in control of the vehicle at the time Lang was struck and did not realize that the vehicle had struck someone at the time she left the scene was not credible. Likewise, Evcic's testimony that he did not know what happened once the car began

moving, did not sense that the car was not moving straight and did realize that anyone or anything had been struck (because he got glass in his eye right as the car began moving) was not credible.

{¶ 80} Scarton made no mention of her loss of consciousness, "seeing stars" or lack of control of the vehicle during her initial statement to police or when seeking medical treatment several hours after the incident. Scarton simply claimed that she had been assaulted by Lang and that Clary had damaged her vehicle. She expressly told police when she arrived at the First District Police Station that she drove "forward" down the street and immediately left the scene once Clary began smashing out her windows.

{¶ 81} Further, Lang was 5'8" and 234 pounds at the time of the incident. It hardly seems possible that one could be in a vehicle that not only struck — but ran over — an adult woman of this size, in the manner in which she was struck and run over in this case, and not realize it.

{¶ 82} Based on the evidence presented, this was not a case in which it could be reasonably said that the vehicle "accidentally" turned into the front yard and struck Lang. Even if, as Scarton contends, the vehicle's wheels were already turned toward the driveway when it started moving, this does not explain why the vehicle continued through the front lawn towards the house, following Lang, until the vehicle struck and ran her over. By all accounts, Lang was running away from the vehicle towards the house. If the vehicle had "accidentally" turned into the front lawn, it could have stopped and then turned out of the front lawn or backed out of

the front lawn without striking Lang. The path Scarton's car took was not the path of a vehicle simply trying to leave the scene.

{¶ 83} Following a thorough review of the record, weighing the strength and credibility of the evidence presented and the reasonable inferences to be drawn therefrom, we cannot say that this is one of those "'exceptional cases'" in which the trier of fact clearly lost its way and created a manifest miscarriage of justice that the defendant's convictions must be reversed. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717.

{¶ 84} Because we find that Scarton's murder conviction in Count 1 was supported by sufficient evidence and was not against the manifest weight of the evidence and because Counts 2-4 merged with Count 1 and the state elected that Scarton be sentenced on Count 1, we need not address Scarton's sufficiency and manifest-weight-of-the-evidence challenges relating to the jury's findings of guilt on Counts 2-4. When counts in an indictment are allied offenses and the reviewing courts finds that the offense on which the state elects to have the defendant sentenced is both supported by sufficient evidence and is not against the manifest weight of the evidence, the court need not consider sufficiency and manifest-weight-of-the-evidence challenges on the counts that are subject to merger because any error relating to those counts would be harmless. *See, e.g.*, *State v. Womack*, 8th Dist. Cuyahoga No. 108422, 2020-Ohio-574, ¶ 30-31; *State v. Rosa*, 8th Dist. Cuyahoga No. 108051, 2019-Ohio-4888, ¶ 26, fn. 1, citing *State v. Ramos*, 8th Dist.

Cuyahoga No. 103596, 2016-Ohio-7685, ¶ 14; *State v. Sheldon*, 3d Dist. Hardin No. 6-18-07, 2019-Ohio-4123, ¶ 11-12.

{¶ 85} Even if we were to consider the issue, we would conclude that the jury's guilty findings on Counts 2-4 were supported by sufficient evidence and were not against the manifest weight of the evidence.

{¶ 86} Accordingly, Scarton's first and second assignments of error are overruled.

Ineffective Assistance of Counsel

{¶ 87} In her third and fourth assignments of error, Scarton contends that she was denied effective assistance of counsel due to defense counsel's (1) elicitation of hearsay testimony from Sergeant Jackson, (2) failure to object to testimony by Officer Garcia regarding statements Scarton had made to her cellmate during an altercation and (3) objection to the state's request for jury instructions on voluntary manslaughter and aggravated assault as inferior-degree offenses of murder and felonious assault.

{¶ 88} A criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel's performance fell below an objective standard of reasonable representation, and (2) that counsel's errors prejudiced the defendant, i.e., a reasonable probability that but for counsel's errors, the result of the trial would have been different. *Strickland* at 687-688, 694;

State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus; *see also State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 391 ("Reversal of a conviction for ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and second, that the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial."). "Reasonable probability" is "probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶ 89} In Ohio, every properly licensed attorney is presumed to be competent. *State v. Black*, 8th Dist. Cuyahoga No. 108001, 2019-Ohio-4977, ¶ 35, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Thus, in evaluating counsel's performance on a claim of ineffective assistance of counsel, the court must give great deference to counsel's performance and "indulge a strong presumption" that counsel's performance "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *see also State v. Powell*, 2019-Ohio-4345, 134 N.E.3d 1270, ¶ 69 (8th Dist.) ("'A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'"), quoting *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 69.

{¶ 90} As a general matter, defense counsel's tactical decisions and trial strategies, even "debatable" ones, do not constitute ineffective assistance of counsel. *See, e.g., Black* at ¶ 35; *State v. Foster*, 8th Dist. Cuyahoga No. 93391, 2010-Ohio-3186, ¶ 23; *see also State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848

N.E.2d 810, ¶ 101, 111. Reviewing courts "will ordinarily refrain from second-guessing strategic decisions counsel make at trial," even where trial counsel's strategy was "questionable" and even where appellate counsel argues that he or she would have defended against the charges differently. *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, ¶ 152; *State v. Mason*, 82 Ohio St.3d 144, 169, 694 N.E.2d 932 (1998); *State v. Quinones*, 8th Dist. Cuyahoga No. 100928, 2014-Ohio-5544, ¶ 25.

Defense Counsel's Elicitation of Improper Testimony from Sergeant Jackson

{¶ 91} During his cross-examination of Sergeant Jackson, defense counsel asked Sergeant Jackson whether he thought Scarton, Anthony and Evcic knew, at the time they were reporting the damage to the vehicle, that someone had been struck by the vehicle. Sergeant Jackson replied that he did. When asked why he thought this, Sergeant Jackson explained:

> Because I was told from the officers on the scene that the people who struck this person ran her over, then they backed up over her body again and then ran over her again. And I would think after you run a person over the first time and then you back up over them, you obviously know that you've run somebody over.

{¶ 92} Defense counsel continued along this line of inquiry as follows:

> Q. And if I told you that that's not the way the -- that isn't the way it happened, would that make a difference?
>
> A. If you were on scene at that time and you told me * * * Or are you talking about right now?
>
> Q. The person got ran over, and that's what happened one time. No backing up, no second time or anything of that nature.

A. Are you saying would I believe you? Is that what you're asking?

Q. No. That's okay. I mean, that's the reason you thought because of that description you had from somebody at the scene, correct?

A. Yeah. Generally[,] when you run someone over three times, you pretty much know you ran them over.

{¶ 93} Sergeant Jackson was never at the scene of the incident. As Sergeant Jackson acknowledged, the only information he had regarding the incident was based on what he was "told from the officers on the scene" (or what he heard when Scarton, Anthony and Evcic came to the First District Police Station to report the assault on Scarton and the damage to her vehicle). It is unclear from the record precisely why defense counsel elicited this testimony from Sergeant Jackson. However, we cannot say that decision was not a matter of trial strategy. None of the witnesses to the incident has ever claimed that Lang was run over three times. Defense counsel may have sought to call into question Sergeant Jackson's credibility by pointing out his lack of knowledge of the true facts, to call into question the credibility of other of the state's witnesses who testified as to different facts or to call into question the thoroughness of the police investigation into the incident. Nevertheless, even if trial counsel had erred in eliciting this testimony, Scarton has made no showing that she was prejudiced thereby.

Failure to Object to Officer Garcia's Testimony

{¶ 94} Scarton also contends that defense counsel provided ineffective assistance of counsel by failing to object to Officer Garcia's testimony that Scarton

told another inmate, "I should have killed you like I did her," during an altercation at the Cuyahoga County Jail. Scarton contends that this testimony was prejudicial and that if counsel had objected, her testimony "would have likely been excluded as a violation of Evid.R. 404(B)." Under Evid.R 404(B), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

{¶ 95} "'Objecting is a tactical decision.'" *State v. Frierson*, 8th Dist. Cuyahoga No. 105618, 2018-Ohio-391, 105 N.E.3d 583, ¶ 25, quoting *State v. Johnson*, 7th Dist. Jefferson No. 16 JE 0002, 2016-Ohio-7937, ¶ 46. Accordingly, the failure to make an objection is not, in and of itself, generally sufficient to sustain a claim of ineffective assistance of counsel. *Id.*; *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 168. Further, the failure to perform a futile act cannot be the basis for a claim of ineffective assistance of counsel. *See, e.g., State v. Kilbane*, 8th Dist. Cuyahoga No. 99485, 2014-Ohio-1228, ¶ 37; *see also State v. Mitchell*, 53 Ohio App.3d 117, 119, 559 N.E.2d 1370 (8th Dist.1988) ("[A] trial attorney does not violate any substantial duty in failing to make futile objections.").

{¶ 96} In this case, it appears that defense counsel's failure to object was a reasonable tactical decision based on the rules of the evidence. There is nothing in the record to suggest that Scarton had killed anyone other than Lang. Accordingly, it could be reasonably inferred that Scarton's statement "like I did her" referred to the death of Lang. Thus, Scarton's statement to her cellmate was not inadmissible

"other acts" evidence under Evid.R. 404(B). It related to the very act at issue and was admissible under Evid.R. 801(D)(2) as an admission of a party-opponent.

{¶ 97} Further, even if Scarton's statement to her cell mate was not admissible and even if defense counsel had erred in failing to object to that testimony, Scarton has, once again, failed to show that she was prejudiced thereby. As detailed above, there was substantial, competent, credible evidence supporting Scarton's murder conviction aside from her statement to her cellmate. Numerous eyewitnesses testified that Scarton was driving the car that ran over and killed Lang. Accordingly, even if defense counsel had objected to Officer Garcia's testimony and even if the objection had been sustained and her testimony excluded, Scarton has not shown that there is a reasonable probability that the result of the trial would have been different.

Objections to the State's Requested Jury Instructions on Inferior-Degree Offenses

{¶ 98} Scarton also contends that her trial counsel was ineffective because he objected to the state's request for jury instructions on voluntary manslaughter and aggravated assault as inferior-degree offenses of the murder and felonious assault offenses with which she had been charged.

{¶ 99} The decision about which defense or theory to pursue at trial is a matter of trial strategy "'within the exclusive province of defense counsel to make after consultation with his [or her] client.'" *State v. Murphy*, 91 Ohio St.3d 516, 524, 747 N.E.2d 765 (2001), quoting *Lewis v. Alexander*, 11 F.3d 1349, 1354 (6th

Cir.1993). Defense counsel's decision to forego an inferior-degree-offense instruction may be a strategic maneuver designed to obtain an acquittal, instead of a conviction on an inferior-degree-offense. *See, e.g., State v. Fouts*, 4th Dist. Washington No. 15CA25, 2016-Ohio-1104, ¶ 73 ("[T]he historical development of trial strategies shows that the lesser included offense jury instruction can sometimes favor the state and sometimes favor the defendant. * * * Where a defendant wishes to pursue an 'all or nothing' defense strategy, counsel may decide not to request the lesser offense instruction."). As such, defense counsel's decisions regarding inferior-degree-offense jury instructions ordinarily constitute matters of trial strategy and do not support a claim of ineffective assistance of counsel. *See, e.g., State v. Moore*, 4th Dist. Scioto No. 15CA3717, 2016-Ohio-8274, ¶ 34; *see also State v. Clayton*, 62 Ohio St.2d 45, 47-49, 402 N.E.2d 1189 (1980) (defendant was not denied effective assistance of counsel where defense counsel, "'elect[ing] to seek acquittal rather than to invite conviction of the lesser offense,'" made a tactical choice not to include an instruction on attempted voluntary manslaughter and "limited the instruction" to attempted murder), quoting *United States v. Meyers*, 443 F.2d 913, 914 (9th Cir.1971).

{¶ 100} In this case, it appears that defense counsel's decision to object to the state's request for inferior-degree-offense jury instructions was part of the trial strategy. Throughout this case, defense counsel has maintained that Lang's death was nothing more than a "horrible, tragic accident." The inferior-degree-offense jury instructions requested by the state were inconsistent with that theory.

{¶ 101} Had the jury been instructed on the inferior-degree offenses requested by the state, the defense would have run the risk of the jury finding Scarton not guilty of the offenses with which she had been charged but guilty of other lesser (but serious offenses) rather than being acquitted. Such a trial strategy, even if "questionable" or "if, in hindsight, it looks as if a better strategy had been available," does not support a claim of ineffective assistance of counsel. *See, e.g., State v. Cottrell*, 4th Dist. Ross Nos. 11CA3241 and 11CA3242, 2012-Ohio-4583, ¶ 21; *State v. Henderson*, 7th Dist. Mahoning No. 15 MA 0137, 2018-Ohio-2816, ¶ 71-73.

{¶ 102} Accordingly, Scarton's third assignment is overruled and her fourth assignment of error is overruled as it relates to her claim of ineffective assistance of counsel.

Failure to Instruct Jury on Accident

{¶ 103} In her fourth assignment of error, Scarton also contends that the trial court erred in denying her request for jury instructions on "vehicular homicide" and "accident." Scarton does not include any argument in her brief as to why she believes the trial court erred in refusing to instruct the jury regarding vehicular homicide. Accordingly, we need not address that issue. App.R. 16(A)(7); *State v. Sparent*, 8th Dist. Cuyahoga No. 96710, 2012-Ohio-586, ¶ 11.

{¶ 104} With respect to Scarton's request for a jury instruction on "accident," after the presentation of all the evidence, defense counsel requested that the trial court give the jury an instruction on the defense of accident. The state

objected to the instruction "[b]ased on the evidence that came in during the defense case-in-chief." The specific jury instruction defense counsel requested has not been included in the record on appeal. However, the trial transcript reflects that defense counsel submitted "a charge on accident" that he represented was "right out of [the *Ohio Jury Instructions*]." The trial court sustained the objection and refused to give a separate jury instruction on accident.

{¶ 105} The instruction for accident, set forth in the general criminal trial instructions of the *Ohio Jury Instructions* states:

> 1. The defendant denies any purpose to (describe). He denies that he committed an unlawful act and says that the result was accidental.
>
> 2. DEFINED. An accidental result is one that occurs unintentionally and without any design or purpose to bring it about. An accident is a mere physical happening or event, out of the usual order of things and not reasonably (anticipated) (foreseen) as a natural or probable result of a lawful act.
>
> 3. FORESEEABILITY. OJI-CR 417.25.
>
> 4. CONCLUSION ON ACCIDENT. If after considering all the evidence, including that on the subject of accident, you are not convinced beyond a reasonable doubt that the defendant had a purpose to (describe), you must return a verdict of not guilty.

Ohio Jury Instructions, CR Section 421.01.

{¶ 106} As a general matter, the trial court must "fully and completely give all jury instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the trier of fact." *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 46, quoting *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus; *State v. Joy*, 74 Ohio

St.3d 178, 181, 657 N.E.2d 503 (1995). Requested jury instructions should ordinarily be given — at least in substance — if they are correct statements of law, if they are applicable to the facts in the case and if reasonable minds might reach the conclusion sought by the requested instruction. *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240; *State v. Crawford*, 2016-Ohio-7779, 73 N.E.3d 1110, ¶ 14 (8th Dist.). However, there are limits. A trial court need not present "redundant jury instructions or instructions that are so similar to other instructions to be presented as to be confusing." *State v. Griffin*, 141 Ohio St.3d 392, 2014-Ohio-4767, 24 N.E.3d 1147, ¶ 5. We review a trial court's refusal to give a requested jury instruction for abuse of discretion. *Adams* at ¶ 240.

{¶ 107} Even assuming that sufficient evidence was presented for the jury to reasonably to find that Lang's death was accidental, Scarton has not shown that the trial court's failure to give a separate jury instruction on the defense of accident constituted reversible error. Reviewing the jury instructions as a whole, we find that the instructions as given sufficiently apprised the jury of all the information necessary to find Scarton guilty or not guilty of the offenses charged.

{¶ 108} As this court explained in *Crawford*, if the jury charge is otherwise correct, it is "doubtful" that the omission of an instruction on the defense accident would affect the outcome of a trial:

> [T]he defense of accident is not an excuse or justification for the admitted act; it is a complete denial that an unlawful act was committed because the defendant did not have the requisite mens rea. *State v. Poole*, 33 Ohio St.2d 18, 19, 294 N.E.2d 888 (1973). Thus, the accident instruction simply reminds the jury that the defendant presented

> evidence of accident to negate the defendant's criminal intent. [*State v. Sunderman*, 5th Dist. Stark No. 2006-CA-00321, 2008-Ohio-3465, ¶ 27.] If the jury believes the defendant's accident argument, it would be required to find the defendant not guilty pursuant to the court's general instructions. *Id.*

2016-Ohio-7779, 73 N.E.3d 1110, ¶ 17.

{¶ 109} The trial court's general charge to the jury included instructions on purposeful murder. Although the trial court did not give Scarton's requested separate jury instruction on accident, in defining "purpose," the trial court specifically instructed the jury that an act is not done purposely if it is done "accidentally":

> Purpose is a decision of the mind to do an act with a conscious intent to produce a specific result or engage in specific conduct. To do an act purposely is to do it intentionally and not accidentally.

{¶ 110} The trial court also instructed the jury that the state bore the burden of proving every element of the charged offenses beyond a reasonable doubt. Defense counsel repeatedly argued both in opening and closing arguments that Lang's death was an accident. Thus, even without a separate instruction on the defense of accident, the jury was aware that it was free to consider Scarton's accident defense and to find her not guilty of purposeful murder on that basis if they believed the defense.

{¶ 111} Accordingly, we overrule Scarton's fourth assignment of error.

Exclusion of "Relevant Evidence"

{¶ 112} In her fifth and final assignment of error, Scarton contends that the trial court abused its discretion in excluding "relevant evidence": (1) additional

evidence relating to Clary's drug use and (2) evidence of "Lang's text messages with other individuals at the time frame relevant to the charges."

{¶ 113} We review a trial court's decision to admit or exclude evidence for abuse of discretion. "A trial court has broad discretion in admitting or excluding evidence, and a trial court's ruling on the admissibility of evidence will be upheld absent an abuse of that discretion and a showing of material prejudice." *See, e.g., State v. Ortiz-Vega*, 8th Dist. Cuyahoga No. 107694, 2019-Ohio-2918, ¶ 52. A trial court abuses it discretion where its evidentiary ruling is unreasonable, arbitrary or unconscionable. *See, e.g., State v. Lindsey*, 8th Dist. Cuyahoga No. 106111, 2019-Ohio-782, ¶ 86; *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Following a thorough review of the record, we find no abuse of discretion and no showing of prejudice resulting from the trial court's exclusion of this evidence.

{¶ 114} For evidence to be relevant, it must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Even relevant evidence, however, must be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

Additional Evidence of Clary's Drug Use

{¶ 115} With respect to Clary's drug use, Scarton contends that the trial court abused its discretion by (1) sustaining the state's objections to defense counsel's

questions regarding Clary's other, prior incidents of drug use and (2) precluding defense counsel from further cross-examining Clary regarding whether he was under the influence of PCP at the time of the incident. Scarton contends that evidence of Clary's drug use was "probative of a fact in issue — April's state of mind at the time of the incident" and was also "relevant towards impeaching [Clary's] credibility."

{¶ 116} With respect to the potential impact of Clary's drug use on his credibility, we note that some evidence of Clary's prior drug use was admitted by the trial court. Clary testified that, prior to the incident, he and Lang had used PCP "maybe once a month," and multiple witnesses (including Clary) testified regarding Clary and Lang's PCP use on September 21, 2018. The trial court permitted defense counsel to cross-examine Clary regarding whether he had lied to police when police questioned him following the incident and he told the officers that the only drug he had ever used was marijuana and that he had stopped using marijuana when his brother died.

{¶ 117} Likewise, although Scarton contends that defense counsel was precluded from cross-examining Clary regarding whether he was under the influence of PCP at the time of the incident, the record reveals otherwise. The record shows that the trial court permitted defense counsel to cross-examine Clary regarding whether he or Lang had used PCP after September 21, 2018 and regarding the effects of his PCP use. In response to defense counsel's inquiries, Clary stated that he and Lang did not use PCP after September 21, 2018 and that the only effect

he had from PCP use was a "high," that the "high" lasted for "20 minutes maybe" and that, after the "high," he was "pretty much" "back to normal." Clary stated that he did not know and did not have "any reason to know" how long PCP stayed in his system after use. When asked on cross-examination whether he had "read that PCP can cause hallucinations, distorted perception of sounds, and violent behavior," Clary responded that he did not "have an answer to that."

{¶ 118} Based on the record before us, we cannot say that the trial court abused its discretion in precluding further questioning of Clary regarding his drug use. Scarton has not shown that evidence of any drug use by Clary prior to September 21, 2018 was admissible under Evid.R 401 and 403. Scarton offered no evidence that Clary had used PCP (or any other illegal substance) after September 21, 2018 and offered no medical evidence that the "high" or any other effect of Clary's PCP use on September 21, 2018 would still be present at the time of the incident, three days later.

{¶ 119} Contrary to Scarton's assertion, it is not clear to this court how *Clary's* prior drug use could have been probative of *Scarton's* state of mind at the time of the incident, particularly given that Scarton claimed she was unconscious and was not controlling the vehicle at the time Lang was struck and run over. To the extent Clary's PCP use (or his inaccurate statements to police about his PCP use) impacted his credibility, the jury was presented with ample evidence upon which to make that credibility determination.

Evidence of Lang's Texting with Third Parties

{¶ 120} Scarton's complaint regarding the trial court's exclusion of evidence of text messages between Lang and "other individuals" relates to a document (defendant's exhibit No. 3) that defense counsel sought to use during his cross-examination of Detective Legg and then have admitted into evidence as a trial exhibit. The document was not included in the record on appeal. As such, it is not available for our review. However, according to defense counsel's description of the document in the trial transcript, it contained "an extraction of all of [Lang's] text messages," both incoming and outgoing, identified by cell phone number, for some unidentified period of time. Once again, Scarton contends that this evidence should have been admitted because it was probative of Scarton's state of mind at the time of the incident.

{¶ 121} Based on the record before us, we cannot say that the trial court abused its discretion in excluding this document. No proper evidentiary foundation was laid for the document. When shown the document on cross-examination, Detective Legg could identify only the text messages between Lang and Scarton. No evidence was presented at trial regarding the identity of any of the other persons with which Lang was purportedly exchanging texts as shown in defendant's exhibit No. 3. To the extent the document contained text messages between Lang and Scarton, it was duplicative of state's exhibit No. 173, which was admitted into evidence, and contained the text messages between Lang and Scarton from September 21-24, 2018. Further, no evidence was presented that Scarton was aware

of any of the text messages between Lang and any of these other individuals prior to the incident. As such, they could not have been probative of Scarton's state of mind at the time of the incident.

{¶ 122} Accordingly, we overrule Scarton's fifth assignment of error.

{¶ 123} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry out this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, JUDGE

SEAN C. GALLAGHER, P.J., and
PATRICIA A. BLACKMON, J., CONCUR