[Cite as *State v. Frazier*, 2010-Ohio-1507.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 2008 CA 118

: T.C. NO. 08 CR 0804

RAYMOND FRAZIER : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 2nd day of April, 2010.

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HARSHA, J. (by assignment)

{¶ 1} Following a jury trial, Raymond Frazier was convicted of two counts of felonious assault and one count of having weapons while under disability. These charges stemmed from an incident in which Mr. Frazier purportedly fired shots at a vehicle occupied by his sister, Jasmine Frazier, and her boyfriend, James Swain. Ms. Frazier and Swain suffered no injuries in the incident.

{¶ 2} Initially, Mr. Frazier contends that the trial court erred when it allowed the State to amend the indictment on the day of trial by deleting the word "serious" before the phrase "physical harm" in both felonious assault counts. However, the amendments did not change the name or identity of the offense but instead deleted language irrelevant to an R.C. 2903.11(A)(2) prosecution, i.e. "surplusage." Thus, the court did not abuse its discretion in permitting the amendments.

{¶ 3} Mr. Frazier also implies that the trial court erred by not continuing the trial date after it amended the indictment. Even if we presume the amendments changed the substance of the indictment, Mr. Frazier was entitled to a reasonable continuance only if he was misled or prejudiced by the amendments. But he never requested a continuance. And, Mr. Frazier failed to explain with specificity how the surplus language in the original indictment misled him or the amendment prejudiced his defense. Thus, we find no error in the court's decision to proceed with the trial.

{¶ 4} In addition, Mr. Frazier contends that because the court amended the indictment, he was convicted based on charges essentially different from those returned by the grand jury. However, every instance of serious physical harm by definition includes physical harm. Therefore, in finding probable cause to believe Mr. Frazier attempted to cause

"serious physical harm" to the victims here, the grand jury necessarily found probable cause to believe he attempted to cause them "physical harm" as well. Therefore, this argument is meritless.

{¶ 5} Mr. Frazier, who is an African-American, also argues that he was denied his right to equal protection under the United States Constitution when the State used a peremptory challenge to strike the only African-American on the panel of prospective jurors. We will assume, without deciding, that Mr. Frazier made a prima facie case of racial discrimination. However, the State offered a race-neutral explanation for its use of the challenge – the prospective juror knew the defendant and alleged victims and worked with the defendant's father. The trial court's finding that this explanation was credible is entitled to deference, and Mr. Frazier provides no argument as to how the State's explanation was a pretext for discrimination. Thus, we conclude that Mr. Frazier failed in his burden to prove purposeful discrimination.

{¶ 6} Next, Mr. Frazier complains that over his objection, the trial court erroneously instructed the jury that it could not consider evidence that Swain had prior misdemeanor convictions for assault and aggravated menacing. Under Evid.R. 609, a prior misdemeanor conviction can only be used to impeach a witness's credibility if that conviction involved dishonesty or a false statement. Because Swain's assault and aggravated menacing convictions involved neither, the trial court correctly instructed the jury to disregard this evidence. Moreover, no evidence in the record indicates that the court acted unreasonably, arbitrarily, or unconscionably in crafting the jury instruction.

{¶ 7} Mr. Frazier also argues that the court erroneously instructed the jury that his failure to testify "must be considered for any purpose." We agree that the court's inadvertent

exclusion of the word "not " before the phrase "be considered" resulted in an incorrect statement about Mr. Frazier's constitutional right against compulsory self-incrimination. However, we decline to find plain error. The court properly included the word "not" in the written instructions the jurors had during deliberations, and we cannot say that the error in the oral instructions affected the outcome of the trial.

{¶ 8} In addition, Mr. Frazier contends that the court erred in instructing the jury, over his objection, about evidence that he threatened the alleged victims before the shooting occurred, i.e. "other acts" evidence under Evid.R. 404(B). He argues that by instructing the jury on the State's burden to produce "substantial evidence" that these acts occurred, the court confused the jury about the State's burden to prove his guilt beyond a reasonable doubt. However, the court correctly instructed the jury on the law regarding Evid.R. 404(B) evidence. Moreover, the court clearly confined its discussion of "substantial evidence" to the evidence of the threats, and the jury instructions repeatedly referenced the State's ultimate burden to establish guilt beyond a reasonable doubt. Thus, we find that the court did not abuse its discretion in wording or formatting the "other acts" instruction.

{¶ 9} Finally, Mr. Frazier argues that the trial court abused its discretion by allowing the jury to read a partial transcript of trial testimony in response to one of the jury's questions. However, the partial transcript was responsive to the jury's question. Moreover, the trial court did not act unreasonably, arbitrarily or unconscionably by refusing to redact information from the end of a sentence in this transcript in light of its concern that the jury might speculate about the substance of the missing testimony. Accordingly, we affirm the trial court's judgment.

I. Facts

{¶ 10} The Clark County Grand Jury indicted Mr. Frazier on two counts of felonious assault and one count of having weapons while under disability, all with firearm specifications. On the day trial began, the trial court allowed the State to amend the indictment to dismiss the firearm specification from the weapons under disability count. The court also permitted the State to strike certain language from the felonious assault counts.

{¶ 11} After the procedural matters were resolved, the State presented the following version of events. In 2002, Mr. Frazier was convicted of robbery, a second degree felony, in violation of R.C. 2911.02. Ms. Frazier testified that on September 8, 2008, her brother held a knife to her throat and "was talking about how he was going to kill [her] because [she] wouldn't give him the names of people that were talking about him or running their mouth about him while they were -- he was locked up for the five years* * *." Ms. Frazier and Swain testified that on September 9, 2008, Swain picked Ms. Frazier up from work in her Monte Carlo at approximately 11:15 p.m. The couple heard gunfire and saw Mr. Frazier shooting in their direction while standing next to a green truck or Ford Explorer they recognized as a vehicle he drove. After the bullets struck their vehicle, Swain returned fire. He testified that he had a gun in the car that day because some time before this incident occurred, Mr. Frazier called him and said that he could "die with Jasmine[.]"

{¶ 12} At some point after the couple exited the parking lot, officers from the Springfield Police Department pulled them over. Officer Greg Ivory testified that he initiated the traffic stop after hearing multiple shots fired in the area and receiving a call from dispatch that the occupants of a gold or silver Monte Carlo and a green SUV had fired shots back and forth at each other. Swain and Ms. Frazier both implicated Mr. Frazier as the one who initiated the shooting.

{¶ 13} Mr. Frazier attempted to discredit the testimony of Swain and Ms. Frazier at trial and argued that law enforcement did not thoroughly investigate their story. However, the jury found Mr. Frazier guilty on all counts. After sentencing, he filed this appeal.

II. Assignments of Error

{¶ 14} Mr. Frazier assigns the following error for our review:

{¶ 15} "Assignment of Error I: The trial court erred when it allowed the prosecution to amend the indictment on the first day of trial.

{¶ 16} "Assignment of Error II: The trial court erred to the prejudice of the defendant when it allowed the prosecution to remove the only African American juror. Tr. p. 17.

{¶ 17} "Assignment of Error III: The trial court's jury instructions were incorrect and confusing to the prejudice of appellant.

{¶ 18} "Assignment of Error IV: The trial [court] erred in sending a portion of the trial transcript back to the jury room over the defense objection."

III. Amendments to Indictment

{¶ 19} In his first assignment of error, Mr. Frazier contends that the trial court erred by allowing the State to amend the felonious assault counts in the indictment on the day trial began. Section 10, Article I of the Ohio Constitution states: "[N]o person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury[.]" "This provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury." *State v. Headley* (1983), 6 Ohio St.3d 475, 478, citing *Harris v. State* (1932), 125 Ohio St. 257, 264. "Where one of the vital elements identifying the crime is omitted from the indictment, it is

defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury." Id. at 478-79, citing *Harris*; *State v. Wozniak* (1961),172 Ohio St. 517, 520.

{¶ 20} Crim.R. 7(D) supplements this constitutional right, see *Headley* at 479, by specifying when a court may permit an amendment to an indictment:

{¶ 21} "The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." * * *Thus, Crim.R. 7(D) permits most amendments but flatly prohibits amendments that change the name or identity of the crime charged. See *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, at ¶ 5.

{¶ 22} A trial court commits reversible error when it permits an amendment that changes the name or identity of the offense charged, regardless of whether the defendant suffered prejudice. *State v. Honeycutt*, Montgomery App. No. 19004, 2002-Ohio-3490. "Whether an amendment changes the name or identity of the crime charged is a matter of law." *State v. Kittle*, Athens App. No. 04CA41, 2005-Ohio-3198, at ¶12, quoting *State v. Cooper*, (June 25, 1998), Ross App. No. 97CA2326. Hence, we review this question de novo.

{¶ 23} If the amendment does not change the name or identity of the crime charged, then we apply an abuse of discretion standard to review the trial court's decision to allow a Crim.R. 7(D) amendment. *State v. Smith*, Franklin App. No. 03AP-1157, 2004-Ohio-4786, at ¶10, citing *State v. Beach*, 148 Ohio App.3d 181, 2002-Ohio-2759, at ¶23. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the

court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, citing *Steiner v. Custer* (1940), 137 Ohio St. 448.

{¶ 24} The original indictment alleged that Frazier committed two counts of felonious assault, specifically stating that he "did knowingly cause or attempt to cause *serious* physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, to wit: a firearm, in violation of Section 2903.11(A)(2) of the Ohio Revised Code." (Emphasis added). However, R.C. 2903.11(A)(2) provides that: "No person shall knowingly * * * (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance," i.e. it does not include the word "serious." In contrast, a felonious assault conviction under R.C. 2903.11(A)(1) requires proof that the defendant knowingly "[c]ause[d] *serious* physical harm to another or to another's unborn." (Emphasis added). On the day of trial, the court allowed the State to amend the indictment by striking the word "serious" from both felonious assault counts. Thus the language in the amended indictment reflected that of R.C. 2903.11(A)(2).

{¶ 25} Contrary to Mr. Frazier's assertion, the amendments did not change the name or identity of the felonious assault offenses. The names of the offenses remained the same after the amendment. Likewise, the identity of the offenses remained the same. The original indictment and its amended version included all the elements required by R.C. 2903.11(A)(2).

{¶ 26} We regard the inclusion of the word "serious" in the indictment as mere surplusage, which is "an averment which may be stricken, leaving sufficient description of the offense." *State v. Berecz*, Washington App. No. 08CA48, 2010-Ohio-285, at ¶24, quoting *Kittle*, supra, at ¶15, in turn, quoting *State v. Bush* (1996), 83 Ohio Misc.2d 61, 65. An

indictment is valid even when it contains "surplusage or repugnant allegations when there is sufficient matter alleged to indicate the crime and person charged[.]" R.C. 2941.08(I). And Crim.R. 7(C) permits a court to strike surplusage from the indictment. Here, "serious" is surplusage because it is not relevant to a charge of felonious assault under R.C. 2903.11(A)(2) and can be removed from the indictment while leaving all the essential elements of the crime. Therefore, the trial court's decision to allow the amendments was proper.

{¶ 27} Mr. Frazier also implies that the trial court erred by not granting him a continuance after it allowed the State to amend the indictment because he prepared to defend against felonious assault charges under R.C. 2903.11(A)(1), not R.C. 2903.11(A)(2). Crim.R. 7(D) provides in part that:

{¶ 28} "If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury."

* * *

{¶ 29} Here, the indictment was amended before the jury was impaneled. We assume that by striking the word "serious" from the felonious assault counts the trial court amended the substance of the indictment. Thus, Mr. Frazier was entitled to a reasonable continuance unless it is clear that he was not misled or prejudiced by the amendments and his

rights could otherwise be protected.

{¶ 30} However, Mr. Frazier did not request a continuance when the court granted the State's motion to amend the indictment. In fact, immediately after the jury was impaneled, the trial court offered to grant Mr. Frazier a continuance because of an unrelated discovery matter, and Mr. Frazier rejected that offer. Moreover, Mr. Frazier failed to explain with specificity how the surplus language in the original indictment misled him or prejudiced his defense. Again, the original indictment mirrored the language in and cited to R.C. 2903.11(A)(2), with the exception that it unnecessarily included the word "serious" before the phrase "physical harm." The bill of particulars notified Mr. Frazier that the State planned to argue that the shots he allegedly fired struck the vehicle occupied by Swain and Ms. Frazier, i.e. that he attempted to cause them physical harm. The State never indicated that it planned to argue he in fact caused the alleged victims serious physical harm, as felonious assault convictions under R.C. 2903.11(A)(1) would require. For instance, the State did not disclose any medical records indicating the alleged victims in fact suffered physical harm. Nor did the defense ever request such records. We conclude that Mr. Frazier was sufficiently on notice that the State intended to proceed under R.C. 2903.11(A)(2), not R.C. 2903.11(A)(1). Thus, the court did not err by proceeding with trial after amending the indictment.

{¶ 31} Finally, Mr. Frazier's assertion that he was convicted based on charges essentially different from those returned by the grand jury is meritless. In the original indictment, the grand jury found probable cause to believe Mr. Frazier knowingly caused or attempted to cause "serious physical harm to another * * * by means of a deadly weapon or dangerous ordnance." When the grand jury made this finding, it necessarily must have found probable cause to believe that he knowingly caused or attempted to cause "physical harm" to

the alleged victims. In other words, the phrase "serious physical harm" by definition includes "physical harm." Accordingly, we overrule Mr. Frazier's first assignment of error.

IV. Venire

{¶ 32} In his second assignment of error, Mr. Frazier, who is an African-American, contends that the trial court erred by overruling his objection to the State's use of a peremptory challenge to excuse the only African-American on the panel of prospective jurors. In *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, the United States Supreme Court found that the Equal Protection Clause forbids the State from exercising a peremptory challenge to excuse a juror solely because of that juror's race. See *State v. Murphy*, 91 Ohio St.3d 516, 2001-Ohio-112. "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors[.]" *Batson* at 86 (citations omitted).

{¶ 33} "A court adjudicates a *Batson* claim in three steps." *Murphy* at 528. First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Id.; see *Batson* at 93-94. To establish a prima facie case of discrimination, "the defendant must point to facts and other relevant circumstances that are sufficient to raise an inference that the prosecutor used its peremptory challenge specifically to exclude the prospective juror on account of his race." *State v. Carver*, Montgomery App. No. 21328, 2008-Ohio-4631, at ¶48, citing *Batson* at 95. "The trial court should consider all relevant circumstances in determining whether a prima-facie case exists, including statements by counsel exercising the peremptory challenge, counsel's questions during voir dire, and whether a pattern of strikes against minority venire members is present." *Hicks v.*

Westinghouse Materials Co., 78 Ohio St.3d 95, 98, 1997-Ohio-227, citing *Batson* at 96-97.

{¶ 34} If the defendant establishes a prima facie case, the proponent of the peremptory challenge must provide a racially neutral explanation for the challenge. *Murphy* at 528; see *Batson* at 97. "A simple affirmation of general good faith will not suffice." *Hicks* at 98. However, the explanation "need not rise to the level justifying exercise of a challenge for cause." *Batson* at 97. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem* (1995), 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (per curiam), quoting *Hernandez v. New York* (1991), 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (plurality opinion).

{¶ 35} Third, the trial court must determine whether the defendant carried his burden of proving purposeful discrimination. *Batson* at 98. The trial court must decide whether the prosecutor's race neutral explanation is credible or is instead a pretext for unconstitutional discrimination. *Carver* at ¶50, citing *Hernandez* at 363. A trial court's conclusion that the state did not possess discriminatory intent in the exercise of its peremptory challenges will not be reversed on appeal unless clearly erroneous. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, at ¶61, citing *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, at ¶106. The court's finding is entitled to deference because it rests largely on the trial court's evaluation of the prosecutor's credibility. See *Hicks* at 102.

{¶ 36} Here, the trial court found that the mere fact that the State exercised a peremptory challenge on the only African-American on the panel of prospective jurors did not establish a prima facie case of race discrimination. We will assume, without deciding, that

the trial court erred in this ruling.[1] However, the trial court also found that the State offered a credible, race-neutral explanation for its use of the peremptory challenge: the prospective juror knew the defendant, knew the alleged victims Ms. Frazier and James Swain, and worked with the defendant's father. Mr. Frazier offered no argument or evidence to demonstrate this explanation was a pretext for discrimination. And because the trial court's determination that the prosecutor's explanation was credible is entitled to deference, we agree that Mr. Frazier failed in his burden to prove purposeful discrimination. Accordingly, we overrule his second assignment of error.

V. Jury Instructions

{¶ 37} In his third assignment of error, Mr. Frazier contends that the trial court gave erroneous jury instructions. Generally, a trial court should give a requested jury instruction if it is a correct statement of the law as applied to the facts of the particular case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591. R.C. 2945.11 requires a trial court to charge the jury with all the law required to return a verdict. Our review concerning whether jury instructions correctly state the law is de novo. *State v. Brown*, Athens App. No. 09CA3, 2009-Ohio-5390, at ¶34. However, reversible error should not be predicated upon one phrase or one sentence in a jury charge; instead, a reviewing court must consider the jury charge in its entirety. *State v. Porter* (1968), 14 Ohio St.2d 10, 13. Moreover, if an instruction correctly states the law, its precise wording and format are within the trial court's discretion. *Brown* at ¶34. To constitute an abuse of discretion, the trial court's decision must be unreasonable, arbitrary, or unconscionable. *Adams*, supra, at 157, citing *Steiner*,

[1]The author of this opinion agrees with the trial court's conclusion. The other panel members do not.

supra; *Conner*, supra.

A. Witness's Prior Convictions

{¶ 38} Without objection, both parties elicited testimony from Swain regarding his prior misdemeanor convictions for assault and aggravated menacing. Mr. Frazier challenges the court's decision to give the jury the following limiting instruction on these convictions, over his objection at the end of the trial: "Evidence was presented that James Swain has prior misdemeanor convictions for assault and aggravated menacing. That evidence is not relevant to any issue in this case. You are to disregard it and you are not to permit it to influence your deliberations."

{¶ 39} Evid.R. 609 provides for impeaching a witness' s credibility by evidence of conviction for certain crimes. Under this rule, a prior misdemeanor conviction can be used to impeach a witness if that conviction involved dishonesty or a false statement. See Evid.R. 609(A)(3). Swain's assault and aggravated menacing convictions involved neither. Therefore, regardless of the parties' failure to prevent the jury from hearing testimony on these convictions, the trial court correctly instructed the jury to disregard them. Moreover, no evidence in the record indicates that the court acted unreasonably, arbitrarily, or unconscionably in crafting the instruction. Therefore, we reject Mr. Frazier's argument.

B. Defendant's Failure to Testify

{¶ 40} Next, Mr. Frazier contends that the court improperly instructed the jury regarding his failure to testify at trial in violation of his constitutional right against compulsory self-incrimination. The court gave the jury the following oral instruction: "The defendant did not testify in his own defense. He has a constitutional right to not testify. The fact that he did not testify must be considered for any purpose." Mr. Frazier correctly argues

that his failure to testify could *not* be considered by the jury for any purpose. *State v. Fanning* (1982), 1 Ohio St.3d 19, at paragraph one of the syllabus. Although we agree that the court erred by inadvertently excluding the word "not" before the phrase "be considered" in the oral instruction, Mr. Frazier fails to persuade us that this constitutes reversible error.

{¶ 41} Because Mr. Frazier did not object to the erroneous oral instruction, he has waived all but plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "A silent defendant has the burden to satisfy the plain-error rule[,] and a reviewing court may consult the whole record when considering the effect of any error on substantial rights." *State v. Davis*, Highland App. No. 06CA21, 2007-Ohio-3944, at ¶22, citing *United States v. Vonn* (2002), 535 U.S. 55, 59, 122 S.Ct. 1043, 152 L.Ed.2d 90.

{¶ 42} For a reviewing court to find plain error: (1) there must be an error, i.e., "a deviation from a legal rule"; (2) the error must be plain, i.e., "an 'obvious' defect in the trial proceedings"; and (3) the error must have affected "substantial rights," i.e., it "must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Furthermore, the Supreme Court of Ohio has stated that "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, at paragraph three of the syllabus.

{¶ 43} We find no plain error in this case. As the State points out, the jury received written instructions for use in their deliberations. Those instructions provided that: "The defendant did not testify in his own defense. He has a constitutional right to not testify. The fact that he did not testify must *not* be considered for any purpose." (Emphasis added). In

light of the correct written instructions, we cannot conclude that the outcome of the trial would have been different but for the error in the oral instructions. Therefore, we reject this argument.

C. "Other Acts" Evidence

{¶ 44} Mr. Frazier also complains that the court erred in instructing the jury on its use of "other acts" evidence under Evid.R. 404(B), which provides:

{¶ 45} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 46} Evidence of other acts is only admissible if "there is substantial proof that the alleged other acts were committed by the defendant[.]" *State v. Lowe*, 69 Ohio St.3d 527, 530, 1994-Ohio-345.

{¶ 47} Over Mr. Frazier's objection, the trial court gave the jury the following instruction regarding evidence that he threatened the alleged victims before the shooting occurred:

{¶ 48} "Evidence was also admitted that the defendant, on or about September 8, 2008, threatened his sister, Jasmine, and her boyfriend, James Swain. If you find that the State failed to produce substantial evidence that these threats occurred, you must disregard this evidence.

{¶ 49} "If, however, you find that the State produced substantial evidence that these

threats occurred, you must disregard this evidence.[2]

{¶ 50} "If, however, you find that the State produced substantial evidence that these threats occurred, you may consider that evidence but only for the limited purpose of determining whether it proves the identity of the defendant with respect to the crimes with which he's charged and/or his intent, plan, and/or motive to commit those crimes.

{¶ 51} "That evidence was not admitted, and you may not consider it, to prove the character of the defendant in order to show that he acted in conformity with that character on the date in question, September 9, 2008."

{¶ 52} Mr. Frazier argues that because the trial court repeatedly referred to the State's obligation to produce "substantial evidence" that these threats occurred, the jury was confused about the State's obligation to establish his guilt beyond a reasonable doubt. However, the court correctly instructed the jury on the standard for admissibility of "other acts" evidence. See *Lowe* at 530. We find no abuse of discretion in the court's wording of the instruction. The court clearly confined its "substantial evidence" references to the State's evidence of Mr. Frazier's alleged threats to the victims. And throughout the jury instructions, the court reminded the jury of the State's burden to prove guilt beyond a reasonable doubt. Mr. Frazier's contention that the jurors were confused by the wording and format of the "other acts" instruction amounts to nothing more than mere speculation. Accordingly, we also reject this argument and overrule Mr. Frazier's third assignment of error.

VI. Providing Jury a Partial Transcript

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[2]We recognize that this sentence of the court's oral instruction is incorrect, but the court corrected the instruction in the following sentence and the written instructions the jury had during deliberations do not contain the erroneous sentence. Moreover, Mr. Frazier does not raise this issue on appeal.

{¶ 53} In his fourth assignment of error, Mr. Frazier argues that the trial court erred by permitting the jury to read a partial transcript of trial testimony in response to one of its questions. A trial court possesses broad discretion in deciding whether to permit a jury to re-hear all or part of a witness's testimony during its deliberations. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, at ¶123. See *State v. Carter*, 72 Ohio St.3d 545, 560, 1995-Ohio-104; *State v. Berry* (1971), 25 Ohio St.2d 255, at paragraph four of the syllabus. Accordingly, absent an abuse of discretion, a reviewing court may not reverse the trial court's decision. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Adams* at 157, citing *Steiner*.

{¶ 54} Here the jurors posed the following question, titled "Officer Ivory's Testimony," to the trial court: "Was there mention of dispatch telling Officer Ivory that there was a green SUV & gold Monte Carlo involved?" Mr. Frazier objected to the court giving any response to this question except to instruct the jurors to rely on their collective memories. However, the trial court opted to send four lines from one page of the transcript back to the jury. According to this portion of the transcript, Officer Ivory testified that "dispatch put out there was two groups of cars shooting back and forth. One was a Monte Carlo and I can't remember if they said it was gold or silver and the other was a green SUV."[3] Mr. Frazier asked the court to excise the statement "there was two groups of cars shooting back and forth,"

[3]This language does not precisely match Officer Ivory's testimony in the official transcript, which reads: "As I came down Cedarview, dispatch was putting out that there was two groups of cars shooting back and forth at one another. One was a Monte Carlo, and I don't remember if they said it was gold or silver; and the other was a green SUV." However, the differences are minor and in any event, Mr. Frazier does not raise this issue on appeal.

arguing this information went beyond the scope of the jury's question. However, the court refused.

{¶ 55} We find that the trial court did not abuse its discretion by giving the jury a copy of the above-quoted portion of the transcript. The partial transcript was responsive to the jury's question about the physical description dispatch gave Officer Ivory on the involved vehicles. While the fact that dispatch told the officer that "there was two groups of cars shooting back and forth" is not particularly relevant to this inquiry, the court's decision to not redact this phrase was not unreasonable, arbitrary or unconscionable. First, there was abundant other testimony to establish the "shooting back and forth." Thus, we reject any contention that this reference overemphasized selected facts, i.e., the shooting. Moreover, the court feared the omission of the end of a sentence could impact the jury's interpretation of the testimony. Therefore, we overrule his fourth assignment of error.

VII. Conclusion

{¶ 56} Having overruled each of the assignments of error, we affirm the trial court's judgment.

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DONOVAN, P.J. and GRADY, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Amy M. Smith
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Hon. Douglas M. Rastatter

Case Name: *State of Ohio v. Raymond Frazier*

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Panel: Donovan, Grady, Harsha
Author: William H. Harsha