[Cite as *State v. Butcher*, 2017-Ohio-1544.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 15CA33 15CA34
vs.	:	
MARK ANTHONY BUTCHER, JR.,[1]	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Katherine R. Ross-Kinzie, Assistant State Public Defender, Columbus, Ohio, for appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 4-12-17
PER CURIAM.

{¶ 1} This is a consolidated appeal from two Athens County Common Pleas Court judgments. In case number 15CA33, the jury found Mark Anthony Butcher, defendant below and appellant herein, guilty of (1) aggravated burglary, in violation of R.C. 2911.11(A)(1), and (2) trespass in a habitation, in violation of R.C. 2911.12(B). The trial court merged the two offenses

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[1] Both judgment entries involved in this appeal list appellant's name as "Mark Anthony Butcher, Jr." The court, however, previously amended the charging documents (the indictment in one case and the notice of community control violations in the other) to remove the "Jr." For the sake of consistency, the caption uses the name as it appears on the trial court's judgment entries involved in this appeal.

and sentenced appellant to nine years in prison. The court additionally ordered appellant to serve a prison term consisting of the amount of time remaining on his postrelease control imposed in a prior criminal case and further ordered that the postrelease-control-prison-sanction sentence run consecutively to the sentence imposed for appellant's aggravated burglary conviction.

{¶ 2} In case number 15CA34, the trial court revoked appellant's previously-imposed community control for two intimidation of a witness convictions and imposed consecutive, three-year prison terms for the two convictions. The court ordered appellant to serve these two sentences consecutively to the sentences imposed for his aggravated burglary conviction and for his postrelease-control-prison-sanction.

{¶ 3} Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
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> "THE TRIAL COURT ERRED WHEN IT ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE, DENYING MR. BUTCHER HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL."
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> SECOND ASSIGNMENT OF ERROR:
>
> "MR. BUTCHER'S SENTENCE FOR AGGRAVATED BURGLARY IS NOT CLEARLY AND CONVINCINGLY SUPPORTED BY THE RECORD."
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> THIRD ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT IMPOSED A JUDICIAL SANCTION SENTENCE ON MR. BUTCHER IN CASE NO. 15CR0049, WHEN HE WAS NOT PROPERLY NOTIFIED IN HIS SENTENCING ENTRY FOR CASE NO. 09R0211 [SIC] THAT ANY FUTURE JUDICIAL-SANCTION SENTENCE FOR VIOLATION OF POSTRELEASE CONTROL WOULD HAVE TO BE SERVED CONSECUTIVELY TO ANY NEW FELONY SENTENCE."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN VIOLATION OF MR. BUTCHER'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, WHEN IT IMPOSED CONSECUTIVE SENTENCES FOR VIOLATIONS OF SUPERVISION, PUNISHING MR. BUTCHER DOUBLY FOR THE SAME CONDUCT."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT FAILED TO CALCULATE AND INCLUDE IN ITS SENTENCING ENTRY THE CORRECT NUMBER OF DAYS OF CREDIT MR. BUTCHER WAS ENTITLED TO UNDER R.C. 2967.191."

{¶ 4} Appellant's aggravated burglary and trespass in a habitation convictions arise out of an incident that occurred on January 24, 2015, when appellant and his girlfriend, Amber Snyder, went to the apartment complex where Richard Bloomfield lived. Although the parties dispute the precise sequence of events, they agree that appellant and Snyder entered Bloomfield's apartment. Bloomfield claimed that he did not give appellant and Snyder permission to enter, while appellant and Snyder claimed that Bloomfield acquiesced to their admittance.

{¶ 5} Shortly after appellant and Snyder entered Bloomfield's apartment, appellant and Bloomfield became embroiled in an argument. Bloomfield ordered appellant to leave. The parties again dispute the next sequence of events, but they agree that Bloomfield struck appellant with a baseball bat and that appellant then hit Bloomfield. The fight continued for a few minutes. Appellant and Snyder eventually left Bloomfield's apartment and allegedly took a red tool box in which Bloomfield stored his prescription pain medication, along with other personal items. Shortly thereafter, appellant and Snyder returned to the apartment complex and reportedly returned

the tool box. Bloomfield claimed that upon the return of his tool box, he discovered that most of his pain medication was missing.

{¶ 6} On February 23, 2015, an Athens County Grand Jury returned an indictment that charged appellant with six offenses: (1) two counts of theft of drugs, in violation of R.C. 2913.02(A)(1); (2) two counts of aggravated robbery, one in violation of R.C. 2911.01(A)(3), and the other in violation of R.C. 2911.01(A)(1); (3) aggravated burglary, in violation of R.C. 2911.11(A)(1); (4) and trespass in a habitation, in violation of R.C. 2911.12(B).

{¶ 7} Following appellant's indictment, the state filed a notice of community control violation and requested the court to revoke appellant's community control that the court previously imposed in a prior criminal case. The state asserted that appellant's conduct, as alleged in the February 2015 indictment, violated the terms and conditions of his community control. The trial court later found that appellant violated the terms and conditions of his community control.

{¶ 8} On August 27, 28, 31 and September 1, 2015, the trial court held a jury trial. At trial, Bloomfield testified that on January 24, 2015, his friend, Josh McCoy, visited Bloomfield's apartment. Shortly after McCoy's arrival, Bloomfield heard his screen door open and said, "just a minute." Bloomfield explained that although he did not open the door for appellant and Snyder, they nonetheless entered his apartment. Bloomfield told appellant that appellant should not "walk into somebodies [sic] home."

{¶ 9} Bloomfield testified that appellant and Snyder sat on the couch after entering his apartment, and appellant asked McCoy "if he knew where [appellant] could get some weed." Bloomfield indicated that he understood "weed" to mean "marijuana." He stated that after appellant asked McCoy about "some weed," Bloomfield told appellant to "get out of my house, I

don't care how much marijuana you want from anybody, how much you, nothing like that, just want you to leave my home [sic]."

{¶ 10} Bloomfield testified that appellant "got up" and appellant and Snyder "went to the door." Bloomfield told appellant, "leave Anthony." Bloomfield stated that appellant "just stood there" and the two started to argue. Bloomfield indicated that their confrontation continued to escalate, with appellant stating, "well I'll just take you outside and whoop your ass." Bloomfield informed appellant that he was "not able to fight."

{¶ 11} Bloomfield stated that appellant started to walk toward the door, then turned around and walked toward Bloomfield. Bloomfield testified that he knew "by the look what [appellant] was going to do." Bloomfield related that he picked up a bat, swung, and struck appellant once before appellant "got him down." Bloomfield explained that appellant, while trying to wrestle the bat from Bloomfield, obtained the upper-hand and hit Bloomfield. Bloomfield stated that he "was on all fours and [appellant] was straddling [Bloomfield's] back." Appellant then used his fist to hit Bloomfield in the back and top of his head, and Bloomfield believed appellant also hit him with an ashtray. Bloomfield claimed that appellant stated, "I'm going to kill you, you mother fucker."

{¶ 12} Bloomfield testified that when the fight ended, appellant told Bloomfield to give appellant the keys to open a locked, red tool box. Appellant then looked inside the tool box, shut it, and left with it. Bloomfield explained that he used the tool box to store his prescription pain medications (oxycodone and MS Contin), neurontin (a nerve damage medication), his birth certificate, approximately $40, and some personal items.

{¶ 13} After appellant and Snyder left, Bloomfield went to his neighbor's apartment and asked the neighbor to call 9-1-1. As his neighbor was calling 9-1-1, appellant and Snyder returned

to the apartment complex, and Snyder handed Bloomfield the tool box. Bloomfield stated that when he opened the tool box, the oxycodone, MS Contin, and cash were missing.

{¶ 14} On cross-examination, Bloomfield denied that he picked up the bat as appellant first walked toward the door to exit the apartment. Instead, he did not pick up the bat until appellant turned around and headed toward Bloomfield. Bloomfield testified that he did not have the bat in his hands "until [he] seen [appellant] coming."

{¶ 15} Cindy Misner testified that her friend, Snyder, asked Misner if she could borrow Misner's car so that Snyder could go to the store. Snyder called Misner later in the day, however, to tell her that the police had impounded the car. Misner went to the police department, signed a consent to search her car, and was present when law enforcement officers searched the vehicle and discovered a marijuana pipe that did not belong to her. Appellant's counsel objected on the basis of "relevance," but the trial court overruled the objection.

{¶ 16} Snyder testified that when she and appellant arrived at Bloomfield's apartment, they knocked on the door "about three times." She claimed that they "heard [Bloomfield] say yea and then we just assumed we could come in." Snyder stated that when she and appellant entered the apartment, Bloomfield and McCoy "were weighing marijuana." Snyder related that appellant and Bloomfield started to argue about how much the marijuana weighed, "and then the next thing you know Mr. Bloomfield said that we needed to leave." Snyder explained that as she and appellant prepared to exit, Bloomfield "said something else." Appellant turned around to "say something," and Bloomfield hit appellant with a baseball bat. Snyder stated that "a bad fight" ensued and that appellant told Bloomfield, multiple times, to drop the bat, but Bloomfield would not drop the bat.

{¶ 17} Snyder testified that after the fight ended, she and appellant left the apartment and

appellant took the red tool box, but that they returned the box "within a matter of seconds." Snyder testified that she did not know whether appellant had removed any items from the box before he returned it to Bloomfield.

{¶ 18} Snyder explained that after he returned the tool box, they left the apartment and drove to a nearby grocery store. They next went to a Staples parking lot and discussed "the pills." Snyder related that she knew appellant had "the pills," but she did not know where they were. After the prosecutor refreshed her recollection, Snyder stated that appellant "had the pills in his pocket," and she asked him what he did with the pills. Appellant replied, "they are put up."[2]

{¶ 19} Snyder explained that after Misner's vehicle was impounded, Snyder asked if she could retrieve appellant's jacket from the car in order to obtain a marijuana pipe. Appellant's counsel unsuccessfully objected on the basis of "relevance."

{¶ 20} Snyder also testified that after appellant's arrest, appellant asked her to write a letter stating that she took the tool box. Snyder clarified at trial, however, that she did not take the box, but instead, appellant did.

{¶ 21} On cross-examination, Snyder stated that she had been to Bloomfield's apartment on past occasions and that she did not believe that entering his apartment would create any problems. Snyder explained that when she and appellant entered Bloomfield's apartment, Bloomfield and McCoy were "laying out" "[q]uite a bit of marijuana." She stated that appellant was not at Bloomfield's apartment to purchase marijuana.

{¶ 22} Appellant's counsel asked Snyder if appellant had "anything to do with the marijuana." Snyder responded that he did not, and further denied that appellant had been looking

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[2] Later testimony indicates that the apparent meaning of this

to purchase marijuana. Snyder indicated that appellant and Bloomfield's argument may have involved the topic of "how much an eighth" of marijuana weighs, then the exchange became heated and Bloomfield asked them to leave.

{¶ 23} As they prepared to leave, Snyder stated that Bloomfield said "something really rude," but she could not recall exactly what he said. Appellant then turned around and Bloomfield struck him three times with the bat. Appellant and Bloomfield then began to wrestle over the bat. Snyder alleged that appellant "just wanted [Bloomfield] to drop the bat," and appellant kept repeating, "drop the bat"

{¶ 24} Snyder claimed that when the fight ended, she and appellant left the apartment and appellant grabbed the tool box. She further admitted, however, that at the preliminary hearing she testified that appellant did not take the box, but instead, took only the medication. Snyder also agreed that the first time she spoke with the officers at the scene, she told them that they had not taken anything from Bloomfield's apartment. She explained that she "was trying to keep [appellant] from getting in trouble." Snyder further claimed that "the pills" appellant had in his pocket were not from Bloomfield's apartment, but instead, they had purchased them.

{¶ 25} Snyder also admitted that appellant asked her to write a letter to indicate that she took the tool box. Appellant's counsel asked whether she and appellant "talked about the letter on the phone," and Snyder responded affirmatively. Appellant's counsel also asked her other questions regarding her jail-house conversations with appellant.

{¶ 26} On re-direct, the prosecutor asked Snyder whether, at the preliminary hearing, she told the truth about the medication. Snyder responded: "Yea we had pills in the pocket." She

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statement is that appellant hid "the pills" in his rectum.

again clarified that she did not know whether the medication belonged to Bloomfield. Snyder stated that "the pills" were morphine and oxycontin, and when she spoke to the officer on January 26, she told him that appellant had disposed of the bottle and placed the pills in a plastic bag. At the preliminary hearing, Snyder indicated that she knew oxycodone and morphine were taken from Bloomfield's apartment and that she saw the medication in appellant's possession when they were outside Bloomfield's apartment.

{¶ 27} On re-cross examination, appellant's counsel asked Snyder whether, prior to January 24, 2015, she and appellant "had bought and used * * * oxycodone and percocets and morphine." Appellant responded affirmatively and additionally related that "it wasn't unusual for [appellant] to have a few on him." Snyder additionally indicated that she did not see appellant remove any pills from the tool box and that she believes that the pills appellant had in his pocket may have been ones they had purchased at an earlier time.

{¶ 28} Once the prosecutor and defense counsel finished questioning Snyder, the court permitted the jurors to submit questions. One question asked Snyder "[h]ow many times [she had seen appellant] smoke marijuana." Appellant did not object to this question, and Snyder responded, "Quite a bit."

{¶ 29} Athens City police officer Destry Flick testified that he investigated the incident at Bloomfield's apartment. Officer Flick stated that Bloomfield indicated that he had been "assaulted and robbed." Bloomfield advised the officer that (1) appellant and Snyder entered his apartment uninvited; (2) Bloomfield and appellant argued; (3) Bloomfield told appellant, multiple times, to leave; and (4) Bloomfield retrieved a baseball bat and, yet again, ordered appellant to leave. Officer Flick testified that Bloomfield indicated that the situation escalated when appellant walked

toward Bloomfield, and Bloomfield then hit appellant with the baseball bat. Officer Flick related that Bloomfield claimed that appellant ordered Bloomfield to open the red tool box where Bloomfield kept his pain medication and money and that Bloomfield alleged that appellant took the medication and approximately $40.

{¶ 30} Officer Flick testified that he spoke with appellant when he and Snyder returned to the scene and that appellant asserted that Bloomfield struck him with a baseball bat and that the two fought. Appellant admitted that (1) Bloomfield asked him to leave, (2) he struck Bloomfield, and (3) he did not leave Bloomfield's apartment immediately after Bloomfield ordered him to leave. Officer Flick explained that appellant claimed that the argument began when they disputed "how to weight out [sic] marijuana."

{¶ 31} Officer Flick stated when he spoke with Snyder, she appeared nervous and afraid to speak with the officer. He explained that Snyder seemed concerned that she might upset appellant. Officer Flick testified that Snyder reluctantly informed him that Bloomfield asked appellant and Snyder to leave the apartment, and that appellant refused. Snyder indicated that the exchange became heated, and that Bloomfield and appellant fought. Officer Flick additionally stated that Snyder advised him that "there were pills in the SUV from the residence."

{¶ 32} Officer Flick stated that when officers searched the vehicle that appellant and Snyder had borrowed on the day of the incident, the officers located "a jacket that contained a marijuana pipe." Appellant did not object, nor did appellant object when the officer stated that Snyder informed him that there was a marijuana pipe in a jacket inside the car.

{¶ 33} Officer Flick further explained that on January 26, Snyder arrived at the police station and indicated that she needed some medicine from the car. Snyder additionally claimed

that she "wanted to set the record straight" and "had some new information." Snyder stated that when Bloomfield asked appellant and Snyder to leave, he made a comment that upset appellant, but she he did not know exactly what Bloomfield stated to upset appellant. Snyder asserted that appellant "pushed" past her and approached Bloomfield, at which point Bloomfield struck appellant with a baseball bat. Snyder claimed that appellant took the pills from Bloomfield, but that she and appellant returned shortly after leaving because appellant "wanted to make things right."

{¶ 34} On cross-examination, appellant's counsel asked the officer whether the argument concerned "some marijuana weight." The officer responded that appellant "did say that * * * the argument was over how to weigh out marijuana."

{¶ 35} Southeastern Ohio Regional Jail records custodian Teresa Tracy testified that she copied certain jail-house conversations between appellant and Snyder. Appellant objected and asserted that the recordings were not relevant and were not properly authenticated, but the trial court overruled the objection and allowed the jury to listen to the recordings. Although the recordings were not transcribed, they are included as exhibits in the record. During appellant and Snyder's sometimes cryptic conversations, appellant refers to Snyder as a "bitch," a "snitch," and accuses her of "fuck[ing him] over." At times, appellant berates Snyder for talking to the police. Appellant also reveals his frustration with the situation and claims that he "went [to Bloomfield's apartment] to smoke a fucking joint." Appellant tells Snyder several times that she should have "pled the Fifth."

{¶ 36} Throughout the conversations, Snyder expresses her love for appellant and states that she "would do anything" for appellant, including calling the police to tell them that she

removed the items from Bloomfield's apartment. Snyder also told appellant that she would "take a bullet for [him]."

{¶ 37} In his defense, appellant presented testimony from David Snuff (Bloomfield's neighbor), Joshua McCoy, and Holly Bailey (a Bloomfield's acquaintance). Snuff testified that on the day of the incident, Bloomfield came to Snuff's apartment and asked him to call the police. Snuff explained that before Bloomfield arrived at his apartment, Snuff had heard a lot of "commotion."

{¶ 38} McCoy testified that appellant and Bloomfield argued "over the weight of the bag." Bailey testified that Bloomfield asked her to take the medication after the incident.

{¶ 39} After hearing the evidence, on September 2, 2015 the jury found appellant not guilty of theft of drugs, not guilty of aggravated robbery, guilty of aggravated burglary, and guilty of trespass in a habitation. The trial court (1) sentenced appellant for the aggravated burglary and trespass in a habitation convictions, as well as for his community control violations, (2) revoked appellant's community control that the court previously had imposed for appellant's two intimidation convictions in case number 09CR211, (3) ordered appellant to serve consecutive thirty-six-month prison sentences for each intimidation conviction, and (4) ordered that the sentences be served consecutively to appellant's sentence imposed in the more recent criminal case.

{¶ 40} The trial court then merged appellant's burglary and trespass in a habitation convictions and sentenced him to serve nine years in prison, with the nine-year prison sentence to be served consecutively to the sentence for appellant's community control violations. In addition, the court (1) terminated appellant's postrelease control that it previously imposed in case number

09CR0211 for his kidnapping, abduction, and two felonious assault convictions, and (2) ordered appellant to serve a prison term consisting of the balance of time remaining on his postrelease control and ordered this sentence to run consecutively to the other sentences. The court gave appellant 221 days of jail time credit, plus time served while awaiting transport. This appeal followed.

I

{¶ 41} In his first assignment of error, appellant asserts that the trial court abused its discretion by admitting "irrelevant and prejudicial evidence." In particular, appellant asserts that the trial court abused its discretion by allowing the jury to hear the following evidence: (1) testimony that law enforcement officers recovered a marijuana pipe from the car that appellant and Snyder borrowed from Misner; and (2) the recorded jail-house conversations between appellant and Snyder, during which appellant "verbally accosted his girlfriend." Appellant asserts that the marijuana pipe and the jail-house conversations were not relevant to establishing his guilt regarding the charged offenses of theft, aggravated robbery, aggravated burglary, or trespass, and further argues that even if the jail-house conversations and the marijuana pipe were relevant evidence, the evidence was unfairly prejudicial. Appellant also contends that the evidence was "prejudicial character evidence," and that the state introduced the jail-house conversations "in order to show [appellant] was crime-prone and violent, and therefore more likely to commit the charged offenses." Appellant asserts that the marijuana pipe tended to show that appellant used drugs "and therefore [is] more likely to be guilty of the theft of drugs."

A

STANDARD OF REVIEW

{¶ 42} The admission or exclusion of evidence generally rests within the trial court's sound discretion. *E.g., State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶67; *State v. Morris*, 132 Ohio St.3d 337, 2012©Ohio©2407, 972 N.E.2d 528, ¶19. Thus, "[u]nless the trial court has 'clearly abused its discretion and the defendant has been materially prejudiced thereby, [reviewing courts] should be slow to interfere' with the exercise of such discretion." *Kirkland* at ¶67, quoting *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). Generally, an abuse of discretion implies that a court's attitude is unreasonable, arbitrary, or unconscionable. *Id.*

B

RELEVANT EVIDENCE GENERALLY ADMISSIBLE

{¶ 43} Generally, all relevant evidence is admissible. Evid.R. 402. Evid.R. 401 defines relevant evidence as "evidence having any 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."

{¶ 44} In the case sub judice, we do not believe that the trial court clearly abused its discretion by determining that the marijuana pipe and jail-house conversations tended "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." In overruling appellant's relevancy objection to the marijuana pipe, the trial court stated that it believed that the marijuana pipe would help the jury evaluate the credibility of the witnesses' statements regarding the events surrounding the

altercation. Bloomfield's version of the events that led to the altercation differed from Snyder's version. Bloomfield claimed that the argument erupted after appellant asked McCoy if McCoy knew where appellant "could get some weed" and after appellant defied Bloomfield's order to vacate the apartment. Snyder testified that the altercation arose following a dispute between Bloomfield and appellant concerning the proper weight of a certain amount of marijuana. Thus, evidence that appellant had a marijuana pipe in his jacket pocket helped the jury evaluate whether Bloomfield's or Snyder's version of events was more credible. Appellant's possession of a marijuana pipe lends support to Bloomfield's assertion that appellant asked McCoy where appellant "could get some weed." *See generally State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶95 (concluding evidence admissible when it "directly aided the jury in understanding, and thus assessing, the credibility of [defendant's] version of events). Thus, we find nothing clearly unreasonable, arbitrary, or unconscionable associated with the trial court's decision that the marijuana pipe constituted relevant evidence.

{¶ 45} We likewise do not believe that the trial court clearly abused its discretion by determining that the jail-house conversations were relevant. The jail-house conversations, at a minimum, helped the jury assess Snyder's credibility, which permeated the trial. The jail-house conversations reveal Snyder's willingness to lie for appellant–she stated that she "would take a bullet" for him–and help to explain why she told varying accounts of the incident. Moreover, the conversations tend to demonstrate appellant's consciousness of guilt. Thus, we cannot state that the court acted unreasonably, arbitrarily, or unconscionably by determining that the jail-house conversations constituted relevant evidence.

{¶ 46} Consequently, we do not believe that the trial court abused its discretion by

determining that the marijuana pipe and jail-house conversations constituted relevant evidence.[3]

C

HARMLESS ERROR

{¶ 47} Even if we assume for purposes of argument that the trial court abused its discretion by determining that the evidence was relevant, we nevertheless believe that any error in admitting the evidence constitutes harmless error.

{¶ 48} Crim.R. 52(A) states that reviewing courts must disregard "[a]ny error, defect, irregularity, or variance which does not affect substantial rights." The phrase "'substantial rights' has been interpreted to require that '"'the error must have been prejudicial.'"'" *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶23.

{¶ 49} In general, "improper evidentiary admission * * * may be deemed harmless error on review when, after the tainted evidence is removed, the remaining evidence is overwhelming." *Id.* at ¶32. Moreover, error is harmless when there is not "a '"reasonable possibility that the evidence * * * might have contributed to the conviction."'" *State v. McKelton*, – Ohio St.3d —, 2016-Ohio-5735, — N.E.3d —, ¶190, quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 706 (1967), quoting *Fahy v. Connecticut*, 375 U.S. 85, 86, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

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[3] We also question whether appellant invited any error by asking marijuana-related questions and by asking Snyder about her jail-house conversations with appellant. *State v. Sowell*, – Ohio St.3d —, 2016-Ohio-8025, — N.E.3d —, ¶50, *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.*, 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), paragraph one of the syllabus ("'The doctrine of invited error specifies that a litigant may not "take advantage of an error which he himself invited or induced.'"). The state, however, did not raise this point, and we

{¶ 50} In addition to the foregoing basic principles, the Ohio Supreme Court set forth a tripartite analysis that guides courts that are determining whether error amounts to harmless error:

{¶ 51} First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. *[State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153] at ¶25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. *Id.* at ¶28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt. *Id.* at ¶29, 33.

State v. Harris, 142 Ohio St.3d 211, 2015-Ohio-166, 28 N.E.3d 1256, ¶37; *accord State v. Arnold*, 147 Ohio St.3d 138, 2016-Ohio-1595, 62 N.E.3d 153, ¶50.

{¶ 52} In the case at bar, we see no reasonable possibility that the marijuana pipe and jail-house conversations might have contributed to appellant's aggravated burglary and trespass in a habitation convictions. The jury was not required to find that appellant possessed a marijuana pipe in order to convict him of either aggravated burglary or trespass in a habitation convictions. Furthermore, other evidence that pertained to marijuana and to appellant's marijuana use was introduced at trial and appellant did not object to this evidence. Thus, evidence that appellant possessed a marijuana pipe was merely cumulative to other evidence that tended to show that appellant used marijuana. *See generally State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶50 (explaining that defendant could not establish prejudicial error when testimony "merely cumulative of other evidence").

{¶ 53} Moreover, if we excise the marijuana pipe and jail-house conversations from

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find it unnecessary to address it.

consideration, the remaining evidence establishes, beyond a reasonable doubt, that appellant committed aggravated burglary and trespass in a habitation. The aggravated burglary statute, R.C. 2911.11(A)(1), states:

> No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
>
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
>
> * * * *

{¶ 54} R.C. 2911.12(B) sets forth the offense of trespass in a habitation and states: "No person, by force, stealth, or deception, shall trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present."

{¶ 55} Bloomfield testified that appellant ignored Bloomfield's orders to vacate his apartment and menacingly approached Bloomfield. Appellant therefore trespassed by force, stealth, or deception. Appellant and Bloomfield subsequently became engaged in a fight, and appellant caused physical injury to Bloomfield. Moreover, the state presented evidence that appellant trespassed in Bloomfield's apartment with purpose to commit any criminal offense (i.e., theft).[4]

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[4] We recognize that the jury did not find appellant guilty of the theft of drugs. The jury's not guilty verdict concerning the theft of drugs offenses does not necessarily mean, however, that the jury was precluded from determining that appellant trespassed with purpose to commit theft. The jury may have believed that appellant intended to take Bloomfield's pain medication, but that the state failed to show, beyond a reasonable doubt, that

{¶ 56} Consequently, we believe that any error that the trial court may have arguably committed by determining that the marijuana pipe and jail-house conversations constituted relevant evidence constitutes harmless error.

D

EVID.R. 403 AND 404(B)

{¶ 57} Appellant next asserts that even if the marijuana pipe and jail-house conversations constituted relevant evidence, Evid.R. 403 and Evid.R. 404(B) mandated their exclusion.

{¶ 58} Initially, we observe that during the trial court proceedings, appellant did not specifically object to evidence regarding the marijuana pipe or the jail-house conversations on the basis that the evidence constituted improper character or unfairly prejudicial evidence in violation

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appellant actually took them so as to be guilty of theft of drugs.

We further note that the state apparently did not theorize that appellant trespassed in Bloomfield's apartment with purpose to commit assault. It is not clear whether the jury properly could have reached that determination on its own. *See generally State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722, 950 N.E.2d 931, ¶16-17, quoting *State v. Gardner,* 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶71 and 73 (plurality opinion), quoting *State v. Bergeron*, 105 Wash.2d 1, 16, 711 P.2d 1000 (1985) (explaining that in an aggravated burglary case "'"the specific crime or crimes intended to be committed inside burglarized premises is not an element of burglary that must be included in the * * * jury instructions,"'" but expressing preference that trial court "'instruct the jury in all aggravated-burglary cases as to which criminal offense the defendant is alleged to have intended to commit once inside the premises and the elements of that offense'" so that jury has a "'road map'" that helps "'ensure that jurors focus on specific conduct that constitutes a criminal offense'").

of Evid.R. 404(B) and 403, respectively. Instead, appellant claimed that the marijuana pipe was not relevant and that the phone calls were irrelevant and not properly authenticated.

{¶ 59} Evid.R. 103(A)(1) states:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.] * * *

Because appellant did not specifically object on the basis that the evidence violated Evid.R. 404(B) or 403 means that appellant cannot raise these particular issues on appeal. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶128-129 (determining that defendant "waived his claims" when he failed "to 'stat[e] the specific ground of objection'"); *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶80, 83; *State v. Tibbetts*, 92 Ohio St.3d at 161, 749 N.E.2d 226, citing *State v. Mason*, 82 Ohio St.3d 144, 159, 694 N.E.2d 932 (1998). We may, however, evaluate appellant's arguments using a plain error analysis. *E.g.*, *Hale*; *Conway*; *Tibbets*; *State v. Smith*, 4th Dist. Scioto No. 15CA3686, 2016-Ohio-5062, 2016 WL 3977524, ¶74.

{¶ 60} Crim.R. 52(B) provides appellate courts with discretion to correct "[p]lain errors or defects affecting substantial rights." *State v. Barker*, — Ohio St.3d —, 2016-Ohio-2708, — N.E.3d —, ¶65. "To prevail under the plain-error standard, a defendant must show that an error occurred, that it was obvious, and that it affected his substantial rights," i.e., the trial court's error must have affected the outcome of the trial. *State v. Obermiller*, 147 Ohio St.3d 175, 2016–Ohio–1594, 63 N.E.3d 93, ¶62, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002–Ohio–68, 759 N.E.2d 1240. "We take '[n]otice of plain error * * * with the utmost caution, under exceptional

circumstances and only to prevent a manifest miscarriage of justice.'" *Obermiller* at ¶62, quoting *State v. Long,* 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). "Reversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill,* 92 Ohio St.3d 191, 203, 749 N.E.2d 274 (2001). "Moreover, the burden of demonstrating plain error is on the party asserting it." *State v. Jackson,* — Ohio St.3d —, 2016-Ohio-5488, — N.E.3d —, ¶134, citing *State v. Jester,* 32 Ohio St.3d 147, 150, 512 N.E.2d 962 (1987).

{¶ 61} With these principles in mind, we will consider whether the trial court plainly erred by failing to exclude the marijuana pipe and the jail-house conversations as unfairly prejudicial or improper character evidence.

1

EVID.R. 403

{¶ 62} A trial court must exclude relevant evidence "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 trial court has broad discretion to determine whether to exclude evidence under Evid.R. 403(A), and "'an appellate court should not interfere absent a clear abuse of that discretion.'" *State v. Yarbrough,* 95 Ohio St.3d 227, 2002–Ohio–2126, 767 N.E.2d 216, ¶40.

{¶ 63} Evid.R. 403(A) "manifests a definite bias in favor of the admission of relevant evidence, as the dangers associated with the potentially inflammatory nature of the evidence must substantially outweigh its probative value before the court should reject its admission." *State v. White,* 4th Dist. Scioto No. 03CA2926, 2004–Ohio–6005, ¶50. Thus, "[w]hen determining whether the relevance of evidence is outweighed by its prejudicial effects, the evidence is viewed in a light most favorable to the proponent, maximizing its probative value and minimizing any

prejudicial effect to the party opposing admission." *State v. Lakes,* 2nd Dist. Montgomery No. 21490, 2007–Ohio–325, ¶22.

{¶ 64} All relevant evidence may be prejudicial in the sense that it "tends to disprove a party's rendition of the facts" and thus, "necessarily harms that party's case." *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶23. Evid.R. 403(A) does not, however, "attempt to bar all prejudicial evidence." *Id.* Instead, the rules provide that only unfairly prejudicial evidence is excludable. *Id.* "'Evid.R. 403(A) speaks in terms of unfair prejudice. Logically, all evidence presented by a prosecutor is prejudicial, but not all evidence unfairly prejudices a defendant. It is only the latter that Evid.R. 403 prohibits.'" *State v. Skatzes*, 104 Ohio St.3d 195, 2004–Ohio–6391, 819 N.E.2d 215, ¶107, quoting *State v. Wright,* 48 Ohio St.3d 5, 8, 548 N.E.2d 923 (1990). "Unfair prejudice '"does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis."'" *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶89, quoting *United States v. Bonds*, 12 F.3d 540, 567 (C.A.6, 1993), quoting *United States v. Schrock*, 855 F.2d 327, 335 (C.A.6, 1988), quoting *United States v. Mendez–Ortiz*, 810 F.2d 76, 79 (C.A.6, 1986). Unfairly prejudicial evidence is evidence that "'might result in an improper basis for a jury decision.'" *Oberlin v. Akron Gen. Med. Ctr.,* 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001), quoting Weissenberger's Ohio Evidence (2000) 85–87, Section 403.3. It is evidence that "'arouses the jury's emotional sympathies,'" that "'evokes a sense of horror,'" or that "'appeals to an instinct to punish.'" *Id.* "'Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect.'" *Id.* Thus, "[u]nfavorable evidence is not equivalent to unfairly prejudicial evidence." *State v. Bowman*, 144 Ohio App.3d 179, 185,

759 N.E.2d 856 (12th Dist.2001).

{¶ 65} "'Only in rare cases are an accused's own actions or language unfairly prejudicial.'" *State v. Blevins*, 4th Dist. Scioto No. 10CA3353, 2011–Ohio–3367, ¶32, quoting *State v. Lee*, 10th Dist. Franklin No. 06AP226, 2007–Ohio–1594, ¶7. Thus, a defendant's profanity-laden statements ordinarily are not unfairly prejudicial. *State v. Bailey*, 4th Dist. Ross No. 14CA3427, 14CA3428, 2015-Ohio-2144, ¶12 (determining that defendant's statements that individual was a "dumb motherfucker" and "stupid ass bitch" and use of other profanity-laden verbal assaults not unfairly prejudicial); *State v. Dennison*, 10th Dist. Franklin No. 12AP–718, 2013–Ohio–5535, ¶79 (concluding that audio recordings containing defendant's "repeated and frequent use of words deemed by many to be offensive" were not unfairly prejudicial and did not "effectively constitute[] character assassination").

{¶ 66} In the case sub judice, we do not believe that the trial committed plain error by failing to determine that the marijuana pipe or jail-house conversations constituted inadmissible, unfairly prejudicial evidence. It is not readily apparent from the record that either the marijuana pipe or the jail-house conversations constituted unfairly prejudicial evidence. Moreover, even if the trial court had obviously erred, appellant cannot show that the result of the trial would have been different if the court had excluded the evidence.

{¶ 67} First, we point out that the jury did not convict appellant of a marijuana-related offense. We thus find it unlikely that evidence regarding a marijuana pipe led the jury to convict appellant of aggravated burglary or trespass in a habitation. Furthermore, we observe that appellant did not consistently object when "marijuana" was mentioned throughout the trial. We especially note that appellant did not object when the jury questioned Snyder how often she had

observed appellant smoking marijuana, and when Snyder responded, "Quite a bit." Consequently, even if the court had excluded the marijuana pipe evidence, ample other "marijuana" evidence was mentioned during the trial to which appellant did not object.

{¶ 68} Second, even if the jail-house conversations were prejudicial, we cannot state that they were "unfairly" prejudicial. We do not believe that the profanity-filled statements, and sometimes verbal attacks, led to an improper basis for appellant's conviction, that the statements served to appeal to the jury's emotions, that they "'evoke[d] a sense of horror,'" or that they "'appeal[ed] to an instinct to punish." Although the statements may have been unfavorable to appellant, we cannot state that they were so unfairly prejudicial that the trial court obviously erred by admitting them.

{¶ 69} Furthermore, we do not believe that the jury would have reached a different result if it had not heard the jail-house conversations during which appellant used profanity and berated Snyder. The state presented overwhelming evidence that appellant (1) trespassed in Bloomfield's apartment by failing to heed Bloomfield's order to leave, (2) hit Bloomfield multiple times, and (3) caused Bloomfield physical injury. Additionally, the state presented evidence that appellant trespassed in Bloomfield's apartment with purpose to commit any criminal offense (i.e., theft).

{¶ 70} We therefore do not believe that any unfair prejudice that may have resulted from the marijuana pipe or the jail-house conversations affected the outcome of the trial.

2

EVID.R. 404(B)

{¶ 71} Appellant next claims that the marijuana pipe and jail-house conversations constituted inadmissible character evidence.

{¶ 72} We first observe that "trial court decisions regarding the admissibility of other-acts evidence under Evid.R. 404(B) are evidentiary determinations that rest within the sound discretion of the trial court. Appeals of such decisions are considered by an appellate court under an abuse-of-discretion standard of review." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶22.

{¶ 73} Although in a criminal case evidence of an accused's character, including his prior "bad acts," may be relevant, Evid.R. 404 sets forth a general bar against the use of such character evidence. Evid.R. 404(B) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident.

{¶ 74} Additionally, R.C. 2945.59 provides:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

{¶ 75} In *State v. Schaim*, 65 Ohio St.3d 51, 600 N.E.2d 661 (1992), the court discussed the underlying rationale for the limited admissibility of other acts evidence as follows:

> The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes

> that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. See *State v. Curry* (1975), 43 Ohio St.2d 66, 68, 330 N.E.2d 720, 723. This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, * * *.

Schaim, 65 Ohio St.3d at 59, 600 N.E.2d 661.

{¶ 76} Although both R.C. 2945.59 and Evid.R. 404(B) carefully limit the admissibility of other acts evidence, neither the statute nor the rule contains an exhaustive list of permissible purposes for which other acts evidence may be offered. *State v. Smith*, 49 Ohio St.3d 137, 140, 551 N.E.2d 190 (1990) (noting that "Evid.R. 404(B) permits 'other acts' evidence for 'other purposes' including, but not limited to, certain enumerated issues"); *State v. Watson,* 28 Ohio St.2d 15, 20–21, 275 N.E.2d 153 (1971) (stating that other acts evidence "was not inadmissible simply because it did not fall within the exceptions permitting introduction of prior acts specified in R.C. 2945.59"). Rather, other acts evidence generally is admissible if the evidence does not otherwise violate the general rule against propensity evidence. *State v. Roe*, 41 Ohio St.3d 18, 23, 535 N.E.2d 1351 (1989), quoting *State v. Watson,* 28 Ohio St.2d at 21, 275 N.E.2d 153 and Evid.R. 404(B) (noting that the other acts evidence "w[as] admitted for purposes '"other than to show mere propensity or disposition on the accused's part to commit the crime"'"). As the court explained in *Watson,* 28 Ohio St.2d at 21, 275 N.E.2d 153:

> * * * It is an established principle of law that, notwithstanding the general rule that evidence of other criminal acts is not admissible, such "general rule of exclusion does not apply where the evidence of another crime is relevant and tends directly * * * to prove * * * [the] accused's guilt of the crime charged, or to connect him with it, or to prove some particular element or material fact in such crime; and evidence of other offenses may be received if relevant for any purpose other than to show

> mere propensity or disposition on [the] accused's part to commit the crime." 22A Corpus Juris Secundum 744, Section 683.
>
> Stated another way, the rule is that "except when it shows merely criminal disposition * * * evidence that is relevant is not excluded because it reveals the commission of an offense other than that charged. 'The general tests of the admissibility of evidence in a criminal case are: * * * does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime, or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.'" *People v. Peete* (1946), 28 Cal.2d 306, 314, 169 P.2d 924.

The *Watson* court therefore "repudiate[d] the notion that criminality of conduct offered for some relevant purpose is an obstacle to its reception." *Id.* at 21.

{¶ 77} Thus, both the statute and the rule permit other acts evidence: (1) if the evidence is offered to show one of the matters enumerated in the statute or the rule; or (2) if the evidence tends to show any other matter at issue, as long as the evidence does not tend only to show the accused's propensity to commit the crime in question. *See State v. Smith*, 84 Ohio App.3d 647, 664, 617 N.E.2d 1160 (1992) (stating that other acts "evidence is never admissible when its sole purpose is to establish that the defendant committed the act alleged of him in the indictment"); *see also State v. Bey*, 85 Ohio St.3d 487, 490, 709 N.E.2d 484 (1999); *see e.g. State v. Tibbetts*, 92 Ohio St.3d 146, 161, 749 N.E.2d 226 (2001); *State v. Williams*, 79 Ohio St.3d 1, 11, 679 N.E.2d 646 (1997). Thus, to determine whether to admit other acts into evidence, a court must evaluate whether the evidence relates to one of the matters set forth in R.C. 2945.59 or Evid.R. 404(B), or whether it

relates to a matter other than the defendant's propensity to commit the crime in question.[5] *See generally State v. Slagle*, 65 Ohio St.3d 597, 606, 605 N.E.2d 916 (1992); *State v. Gardner*, 59 Ohio St.2d 14, 20, 391 N.E.2d 337 (1979); *Watson*, supra.

{¶ 78} In the case sub judice, we do not believe that the trial court obviously erred by failing to exclude evidence concerning the marijuana pipe or the jail-house conversations as improper character evidence. It is not readily apparent from the record that either the marijuana pipe or the jail-house conversations constituted improper character evidence. The evidence "does not tend only to show [appellant's] propensity to commit the crime[s] in question." Instead, the marijuana pipe, as we previously explained, helped the jury assess witness credibility in order to evaluate whether Bloomfield's or Snyder's version of the altercation was more credible.

{¶ 79} Furthermore, the jail-house conversations helped the jury evaluate whether Snyder had a motive to lie. The jail-house conversations additionally helped prove appellant's consciousness of guilt. *See Watson, supra* (explaining that character evidence not inadmissible

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[5] We recognize that in *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, the court set forth a three-part analysis that courts should apply to determine the admissibility of "other acts" evidence. *Id.* at ¶19. The first and third steps examine relevance under Evid.R. 401 and unfair prejudice under Evid.R. 403(A). *Id.* at ¶20. "The [second] step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B)." *Id.* We have already addressed the first and third steps and thus find it unnecessary to repeat the analyses here.

when "the evidence * * * is relevant and tends directly * * * to prove * * * [the] accused's guilt of the crime charged, or to connect him with it"). Thus, neither the marijuana pipe nor the jail-house conversations showed only appellant's propensity to commit the crimes in question. Instead, both were relevant for other purposes.

{¶ 80} Moreover, even if the trial court had obviously erred by failing to exclude the evidence as improper character evidence, as we explained when we discussed appellant's Evid.R. 403 argument, appellant cannot show that the result of the trial would have been different if the court had excluded the evidence. Consequently, we do not believe that the trial court plainly erred by failing to exclude the marijuana pipe or the jail-house conversations as unfairly prejudicial or improper character evidence.

{¶ 81} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶ 82} In his second assignment of error, appellant argues that the record does not clearly and convincingly support the nine-year prison sentence that the trial court imposed for his aggravated burglary conviction. More specifically, appellant complains that the court failed to appropriately consider the following factors indicating that appellant's aggravated burglary offense was less serious: (1) the victim induced or facilitated the offense; (2) appellant acted under strong provocation; and (3) there are substantial grounds to mitigate appellant's conduct. Appellant contends that the trial court improperly focused only on the factors that made appellant's aggravated burglary offense more serious without considering whether any factors showed that his offense was less serious.

{¶ 83} R.C. 2953.08(G)(2) defines appellate review of felony sentences and provides, in relevant part, as follows:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶ 84} "[A]n appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶1. This is a deferential standard. *Id.* at ¶23. Furthermore, "appellate courts may not apply the abuse-of-discretion standard in sentencing-term challenges." *Id.* at ¶10. Additionally, although R.C. 2953.08(G) does not mention R.C. 2929.11 or 2929.12, the Ohio Supreme Court has determined that the same standard of review applies to findings made under those statutes. *Id.* at ¶23 (stating that "it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court," meaning that "an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence").

> "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'"
> *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

Id. at ¶22.

> It is important to understand that the "clear and convincing" standard applied in R.C. 2953.08(G)(2) is not discretionary. In fact, R.C. 2953.08(G)(2) makes it clear that "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." As a practical consideration, this means that appellate courts are prohibited from substituting their judgment for that of the trial judge.
>
> It is also important to understand that the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative. It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.

State v. Venes, 8th Dist. Cuyahoga No. 98682, 2013–Ohio–1891, ¶20–21, 992 N.E.2d 453.

{¶ 85} In the case sub judice, we do not believe that clear and convincing evidence shows that the record fails to support trial court's sentence, including its R.C. 2929.12(B) and (C)[6]

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[6] R.C. 2929.12(B) and (C) state:

> (B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:
>
> (1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental

condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

findings. We do not find any clear and convincing evidence in the record to indicate that the trial court failed to consider all relevant R.C. 2929.12 sentencing factors. To the contrary, the record demonstrates that the trial court was well-aware of the sentencing factors and entered appropriate findings. The court's sentencing entry states:

> The Court considered the record, evidence from the trial, oral statements of counsel and Defendant, the victim's trial testimony, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12. The Court has considered the factors under R.C. 2929.13.
>
> The Court finds the recidivism factors outweigh the non-recidivism factors and the more serious factors outweigh the less serious factors. Therefore, Defendant is not amenable to a community control sanction.

{¶ 86} Furthermore, during the sentencing hearing, the court indicated that it "balanced the seriousness" factors under R.C. 2929.12. The court explained that it reviewed the more serious factors and found that (1) the victim's "injuries were exa[cerbated] by his physical and mental condition as well as his age"; (2) the victim suffered "serious physical and psychological harm as a result"; and (3) appellant and the victim "had some sort of relationship that lent itself for this offense." The court additionally stated that it considered the less serious factors and explained that it did not "find that any of the factors apply whether the conduct is less serious other than there

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> (1) The victim induced or facilitated the offense.
>
> (2) In committing the offense, the offender acted under strong provocation.
>
> (3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.
>
> (4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

may have been indications that the victim may have * * * by virtue of what happened that night somehow lent itself to the conduct that lead [sic] to the altercation." The court found "that the other fact[or]s are not involved in making this a less serious offense."

{¶ 87} Our review reveals that the trial court's statements show that contrary to appellant's assertion, the court did, in fact, consider the "more serious" and the "less serious" factors. Simply because the court did not balance the factors in the manner appellant desires does not mean that the court failed to consider them, or that clear and convincing evidence shows that the court's findings are not supported by the record.

{¶ 88} We additionally note that during the sentencing hearings, appellant's counsel argued that the R.C. 2929.12(C) "less serious" factors applied. He asserted that (1) a mitigating factor applied in that appellant claimed to have acted in self-defense, (2) the victim provoked appellant, and (3) the victim struck the first blow. Consequently, we believe that the trial court was well-aware of the R.C. 2929.12(C) less serious factors, but determined that they did not apply so as to lessen the seriousness of appellant's aggravated burglary offense. We therefore do not find by clear and convincing evidence that the record fails to support the trial court's nine-year prison sentence.

{¶ 89} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

III

{¶ 90} In his third assignment of error, appellant asserts that the trial court erred by imposing a prison term consisting of the balance of his time remaining on postrelease control previously imposed in an earlier criminal case. Appellant asserts that the prior imposition of

postrelease control is void due to the court's failure to advise him of all of the R.C. 2929.141(A) potential consequences of violating the terms of his postrelease control. Specifically, appellant argues that the court failed to notify him that any prison term imposed for violating postrelease control by committing a felony "shall be served consecutively to any prison term imposed for the new felony." R.C. 2929.141(A)(1).

{¶ 91} R.C. 2929.19(B)(2)(c) imposes a duty upon trial courts conducting sentencing hearings to notify certain felony offenders[7] about postrelease control. Under R.C. 2929.12(B)(2)(c) and (e), a sentencing court must notify certain felony offenders that (1) "the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison"; and (2) "if a period of supervision is imposed following the offender's release from prison * * * and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender."[8]

{¶ 92} Additionally, R.C. 2929.141(A)(1) sets forth the sentence that a trial court may impose upon an offender who violates postrelease control by committing a new felony. The statute reads:

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[7] R.C. 2929.19(B)(2)(c) applies to felony offenders who committed a "felony of the first degree or second degree, * * * a felony sex offense, or * * * a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person."

[8] At the time of appellant's earlier sentencing hearing (March 2010), these requirements were contained within R.C. 2929.19(B)(3).

> (A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following * * * :
>
> (1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

{¶ 93} Through a series of cases, the Ohio Supreme Court has held that a trial court's failure to comply with the postrelease control notification provisions renders the imposition of postrelease control void, but subject to correction via a nunc pro tunc entry or the procedure outlined in R.C. 2929.191 so long as the offender has not been released from prison. *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, paragraphs two and three of the syllabus; *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶18 (stating that "a trial court must provide statutorily compliant notification to a defendant regarding postrelease control at the time of sentencing, including notifying the defendant of the details of the postrelease control and the consequences of violating postrelease control"); *Qualls* at ¶16, citing *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, ¶28–30 ("[o]ne principle is that unless a sentencing entry that did not include notification of the imposition of postrelease control is corrected before the defendant completed the prison term for the offense for which postrelease control was to be imposed, postrelease control cannot be imposed."); *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶23 (stating that a trial court "must conform to the General Assembly's mandate in imposing postrelease-control sanctions as part of a criminal

sentence"); *see State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶77-79 (determining on direct appeal in a capital case that trial court's imposition of postrelease control improper when court failed to accurately inform defendant of consequences of violating postrelease control).

{¶ 94} Although the Ohio Supreme Court has not specifically held that a trial court must also notify the offender at the sentencing hearing of the R.C. 2929.141 consequences, this court, until recently, had included the R.C. 2929.141 consequences within the *Qualls*' court's definition of the "consequences" that a court must explain to certain felony offenders.[9] *State v. Dixon*, 63 N.E.3d 591, 2016-Ohio-1491 (4th Dist.); *State v. Adkins*, 4th Dist. Lawrence No. 14CA29, 2015-Ohio-2830; *State v. Pippen*, 4th Dist. Scioto No. 14CA3595, 2014-Ohio-4454. Our prior cases held that a sentencing court must notify offenders subject to postrelease control that conviction of a felony while on postrelease control may result in the court terminating postrelease control and imposing a prison term for the postrelease control violation that "shall be served consecutively to any prison term imposed for the new felony." *Pippen* at ¶24. We previously concluded that the "[f]ailure to advise of the possible consequences of violating post-release control renders that part of the sentence void and it must be set aside." *Id.* at ¶25, citing *Fischer*.

{¶ 95} In *State v. Mozingo*, 4th Dist. Adams No. 16CA1025, 2016-Ohio-8292, however, this court determined that *Dixon*, *Adkins*, and *Pippen* were wrongly decided and overruled them. We ultimately concluded that "R.C. 2929.141(A) does not require the trial court in the original sentencing context to notify a defendant that a court sentencing the defendant for a subsequent

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[9] In *State ex rel. Cornwall v. Sutula*, — Ohio St.3d —, 2016-Ohio-7652, — N.E.3d —, ¶9, the court noted that the issue posed "an interesting" question, but the court did not reach the merits

crime can impose additional sanctions for the violation of post-conviction relief." *Id.* at ¶29. Thus, under our *Mozingo* holding, a trial court need not inform a defendant that if the defendant commits a new felony while under postrelease control, the trial court may impose a prison term that "shall be served consecutively to any prison term imposed for the new felony." R.C. 2929.141(A).

{¶ 96} In the case at bar, therefore, any failure to explain the R.C. 2929.141(A) consequences during the 2010 proceedings does not render the imposition of postrelease control void. Consequently, we disagree with appellant that the trial court could not order appellant to serve a prison term consisting of the balance of his time remaining on postrelease control consecutively to the prison sentence imposed for appellant's commission of a new felony.

{¶ 97} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

IV

{¶ 98} In his fourth assignment of error, appellant argues that the prison terms the trial court imposed for his community and postrelease control violations violate the Double Jeopardy Clause's prohibition against multiple punishment for the same offense. Appellant claims that the same act (his new felony conviction) formed the basis for both his community and postrelease control violations and that the Double Jeopardy Clause thus prohibits multiple punishments for those violations.

{¶ 99} The double jeopardy protections contained in the United States and Ohio Constitutions prohibit the government from placing a person twice in jeopardy for the same

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of the issue.

offense. United States Constitution, Fifth Amendment (stating that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb"); Ohio Constitution, Article I, Section 10 ("No person shall be twice put in jeopardy for the same offense."); *see State v. Gustafson*, 76 Ohio St.3d 425, 432, 668 N.E.2d 435 (1996) (explaining that double jeopardy "protections afforded by the two Double Jeopardy Clauses are coextensive"); *accord State v. Anderson*, — Ohio St.3d —, 2016-Ohio-5791, — N.E.3d —, ¶31. This means that when "'a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.'" *Brown v. Ohio*, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), quoting *In re Nielsen*, 131 U.S. 176, 188, 9 S.Ct. 672, 33 L.Ed.2d 119 (1889). Thus, the Double Jeopardy Clause "'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Brown*, 432 U.S. at 165, quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

{¶ 100} "[D]ouble jeopardy principles do not prohibit the imposition of every additional sanction that could be labeled 'punishment' in common parlance." *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250, ¶8, citing *Hudson v. United States* (1997), 522 U.S. 93, 98–99, 118 S.Ct. 488, 139 L.Ed.2d 450, and *United States ex rel. Marcus v. Hess* (1943), 317 U.S. 537, 549, 63 S.Ct. 379, 87 L.Ed. 443. Instead, "double jeopardy principles protect 'only against the imposition of multiple criminal punishments for the same offense * * * and then only when such occurs in successive proceedings.'" *Id.*, quoting *Hudson*, 522 U.S. at 99, 118 S.Ct. 488, 139 L.Ed.2d 450. Thus, a "threshold question" when examining an alleged double jeopardy

violation "is whether the government's conduct involves criminal punishment." *State v. Williams*, 88 Ohio St.3d 513, 528, 728 N.E.2d 342 (2000).

{¶ 101} A prison term imposed for violating postrelease control does not constitute "criminal punishment" for purposes of examining alleged double jeopardy violations. *Martello* at syllabus; *see State v. McMullen*, 6 Ohio St.3d 244, 246-246, 452 N.E.2d 1292 (1983) (determining that sentence imposed for probation violation does not violate double jeopardy principles). Rather, as the *Martello* court explained:

> "'post-release control is part of the original judicially imposed sentence.' Therefore, jeopardy does not attach when a defendant receives a term of incarceration for the violation of conditions of postrelease control. Such a term of incarceration is attributable to the original sentence and is not a 'criminal punishment' for Double Jeopardy Clause purposes that precludes criminal prosecution for the actions that constituted a violation of the postrelease control conditions."

Id. at ¶26; *accord State v. Dunne*, 8th Dist. Cuyahoga No. 100460, 2014-Ohio-3323, 2014 WL 3778311; *State v. Rayburn*, 4th Dist. Jackson No. 09CA6, 2010-Ohio-5693, 2010 WL 4792440.

{¶ 102} Likewise, sanctions imposed for violating community control do not constitute "criminal punishment" for purposes of double jeopardy analysis. *State v. Black*, 2nd Dist. Montgomery No. 24005, 2011-Ohio-1273, ¶13; *State v. Peters*, 8th Dist. Cuyahoga No. 92791, 2009-Ohio-5836, 2009 WL 3681639, ¶14, quoting *State v. Seeman*, 6th Dist. Lucas No. 98-1176 (Mar. 19, 1999), quoting *United States v. Miller*, 797 F.2d 336, 340 (C.A.6, 1986) (stating that "'"a finding that a defendant violated the terms and conditions of community control is not the equivalent of a criminal prosecution in that it does not result in a conviction, nor does it constitute punishment"'"); *State v. Myers*, 5th Dist. Richland No. 2003CA0062, 2004-Ohio-3715, 2004 WL 1567767, ¶23 (determining that community control violation "is not a second penalty for a new

offense, but rather the original sentence * * * being now imposed"); *see generally Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (stating that "the revocation of parole is not part of a criminal prosecution"). Instead, a prison term imposed for violating community control "is a 'continuing consequence of the original conviction.'" *State v. Black*, 2nd Dist. Montgomery No. 24005, 2011-Ohio-1273, ¶13, quoting *State v. Wellbaum*, 2nd Dist. Champaign No. 2000-CA-5 (Sept. 1, 2000).

{¶ 103} In the case sub judice, neither sanction the court imposed for appellant's community and postrelease control violations constitutes "criminal punishment" for purposes of double jeopardy analysis. Instead, the sanctions were a continuation of the original sentences imposed in the prior criminal matter. The imposition of a prison term for appellant's community control violation was a continuation of the sentence the court originally imposed for appellant's intimidation convictions. The imposition of a prison term for appellant's postrelease control violation was a continuation of the sentence that the court originally imposed for appellant's kidnapping, abduction, and felonious assault convictions. Thus, because neither sanction that the court imposed for the community and postrelease control violations constitutes "criminal punishment," the double jeopardy protections are inapplicable. We therefore reject appellant's argument that imposing prison sentences for the community and postrelease control violations subjected him to multiple criminal punishments for the same offense.

{¶ 104} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error.

V

{¶ 105} In his fifth assignment of error, appellant asserts that the trial court erred by

failing to properly calculate appellant's jail time credit. Appellant claims that the 221 days of credit specified in the trial court's sentencing entry accounts only for the time between his arrest and the date of his first sentencing hearing, September 2, 2015. Appellant argues that the court failed to include the six days in between the September 2, 2015 sentencing hearing and the September 8, 2015 sentencing hearing, and thus requests that we remand the matter to the trial court so that it may accurately calculate the amount of jail time credit.

{¶ 106} The state agrees that the trial court did not include the time between the sentencing hearings when calculating the amount of appellant's jail time credit, but asserts that the trial court may correct the error by issuing a nunc pro tunc entry. Appellant agrees.

{¶ 107} In *State v. Williams*, 8th Dist. Cuyahoga No. 104155, 2016-Ohio-8049, 2016 WL 7159123, ¶¶12-14, the court succinctly discussed "[t]he practice of awarding jail-time credit" as follows:

> The practice of awarding jail-time credit, although now covered by state statute, has its roots in the Equal Protection Clauses of the Ohio and United States Constitutions. *State v. Fugate*, 117 Ohio St.3d 261, 2009–Ohio–856, 883 N.E.2d 440, ¶7. The rationale for giving jail-time credit "is quite simple[;][a] person with money will make bail while a person without money will not." *Id.* at ¶25 (Stratton, J., concurring). That means for "two equally culpable codefendants who are found guilty of multiple offenses and receive identical concurrent sentences," the poorer codefendant will serve more time in jail than the wealthier one who was able to post bail. *Id.* at ¶25–26. "[T]he Equal Protection Clause does not tolerate disparate treatment of defendants based solely on their economic status." *Id.* at ¶ 7.
>
> In Ohio, this principle is codified in R.C. 2967.191, which provides in relevant part:
>
> The department of rehabilitation and correction shall reduce the stated prison term of a prisoner * * * by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial * * * as determined by the sentencing court under division (B)(2)(g)(i) of section 2929.19 of the Revised Code[.]
>
> R.C. 2929.19(B)(2)(g)(i) states that
>
> [I]f the sentencing court determines at the sentencing hearing that a prison

> term is necessary or required, the court shall * * * [d]etermine, notify the offender of, and include in the sentencing entry the number of days that the offender has been confined for any reason arising out of the offense for which the offender is being sentenced and by which the department of rehabilitation and correction must reduce the stated prison term under section 2967.191 of the Revised Code. * * *

{¶ 108} R.C. 2929.19(B)(2)(g)(iii) provides sentencing courts with "continuing jurisdiction to correct any error not previously raised at sentencing in making a determination [of the appropriate jail-time credit]," and allows offenders, "at any time after sentencing, [to] file a motion in the sentencing court to correct any error made in making a determination [of the appropriate jail-time credit] * * *." *Accord State v. Thompson*, 147 Ohio St.3d 29, 2016-Ohio-2769, 59 N.E.3d 1264, ¶¶4-5; *State v. Copas*, 2015-Ohio-5362, 49 N.E.3d 755, ¶19 (4th Dist.); *State v. Thompson*, 8th Dist. Cuyahoga No. 102326, 2015-Ohio-3882, 2015 WL 5608269, ¶¶21-22; *State v. Alredge*, 7th Dist. Belmont No. 14BE52, 2015-Ohio-2586, 2015 WL 3946320, ¶¶10-12. Thus, "jail-time credit errors can be corrected through a direct appeal," or by filing an R.C. 2929.19(B)(2)(g)(iii) motion with the trial court. *Thompson*, 2015-Ohio-3882, at ¶23, citing *State v. Ponyard*, 8th Dist. Cuyahoga No. 101266, 2015–Ohio–311, ¶10–12; *State v. Collins*, 8th Dist. Cuyahoga No. 99111, 2013–Ohio–3726, ¶22–25.

{¶ 109} In the case at bar, the parties agree that (1) the trial court miscalculated the amount of jail-time credit to which appellant is entitled, and (2) the trial court should correct the error by issuing a nunc pro tunc entry. The parties' agreement appears consistent with the record and with R.C. 2929.12(B)(2)(g). We therefore agree with the parties that the trial court incorrectly calculated the amount of appellant's jail-time credit and that the court may remedy the error by issuing a corrected sentencing entry pursuant to R.C. 2929.12(B)(2)(g)(iii).

{¶ 110} Accordingly, based upon the foregoing reasons, we sustain appellant's fifth

assignment of error and remand case number 15CA33 to the trial court for the limited purpose of correcting the amount of jail time credit to which appellant is entitled.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part, vacated in part and remanded for further proceedings consistent with this opinion. Appellee and appellant shall equally share 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 Athens County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J.: Concurs in Judgment & Opinion
McFarland, J.: Concurs in Judgment Only
Hoover, J.: Concurs in Judgment & Opinion as to Assignments of Error 2, 3, 4 & 5; Concurs in Judgment Only as to Assignment of Error 1

For the Court

BY:
Peter B. Abele, Judge

BY:
Matthew W. McFarland, Judge

BY:
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.