[Cite as *State v. Echols*, 2023-Ohio-2206.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-220133 TRIAL NO. B-1806614-B
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
JAMES ECHOLS,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 30, 2023

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

The Law Office of John D. Hill and *John D. Hill, Jr.*, for Defendant-Appellant.

ZAYAS, Presiding Judge.

{¶1} James Echols appeals his convictions for aggravated burglary, aggravated murder, three counts of murder, eight counts of attempted murder, and eight counts of felonious assault, all with gun specifications. In five assignments of error, Echol argues that his convictions are not supported by sufficient evidence and are contrary to the manifest weight of the evidence, the trial court erred by allowing evidence of witness intimidation, the prosecutor committed misconduct by repeatedly attempting to portray Echols as a gang member, and the cumulative errors deprived him of a fair trial. For the reasons that follow, we affirm the trial court's judgment.

Factual Background

{¶2} On July 8, 2017, Cheyanne Willis was hosting a gender-reveal party in her home.[1] Toward the end of the night, the remaining guests were in the living room watching movies when two men burst into the home and started shooting. One person was killed, and eight were wounded.

{¶3} Roshawn Bishop eventually admitted that he had hired James Echols, Vandell Slade, and Michael Sanon to kill Willis. Roshawn, who believed he was the father of Willis's unborn child, owed her $10,000. Growing tired of her demands for repayment, Roshawn planned to murder her. Roshawn, Echols, and a third co-defendant Sanon[2] were charged with the shootings.

{¶4} At the trial, the victims gave various, limited descriptions of the shooters. Bryan Garrett, whose wife was killed, testified that one shooter was wearing a gray hoody, and one was wearing a red hoody. Willis testified that both wore dark hoodies, green or blue. Some witnesses said that the hoods were up. Other witnesses

[1] Willis later admitted that she was not pregnant at the time of the party.
[2] Sanon was acquitted of all charges except one count of attempted murder.

stated that the shooters wore sweaters of varying colors. One witness said the shooters wore masks. All of the victims agreed that there were two shooters.

{¶5} Deborah Bishop, the wife of Roshawn, testified that she met Echols on July 7, the day before the murders. Echols was on the front porch of her home speaking with Roshawn. The following night, Deborah was at home with her husband, children, sister-in-law, Robert Howard ("Geezy"), and Kevin Barton. They had eaten dinner outside that evening, and the men were outside drinking, including Slade and Echols. Deborah testified that Echols put his clothes on the grill and burned them.

{¶6} Kevin Barton testified that he sold methamphetamine for Roshawn and Geezy in 2017. Barton grew up with Geezy, and he met Roshawn when both of them were in prison. Barton met Echols on July 7 at Roshawn's home earlier that day. That evening, Barton went to Echol's hotel on Central Parkway to drink and smoke marijuana. The next day, Barton went to Roshawn's house for dinner. When he arrived, Echols was there. Everyone was standing outside and talking. A grill was burning. Slade was joking that someone wanted to burn his clothes, but Barton did not see anyone place the clothing on the grill or smell burning clothes. He did not know whose clothes were burned.

{¶7} Several days later, Barton learned about the shooting when Willis called Roshawn. Barton was with Roshawn when Roshawn met with Willis in a park in Price Hill. Barton could not hear their conversation, but observed Roshawn "going crazy." Roshawn was concerned and crying about Willis and the baby.

{¶8} A week or two after the shooting, Barton was riding around with Roshawn and Geezy when Deborah called and told Roshawn that Echols and Sanon were driving to Roshawn's home. When Roshawn knew they were coming, he

panicked and they drove to Barton's house to get a gun. They drove to Roshawn's house, and Roshawn met with Sanon. After they spoke, Echols and Sanon left.

{¶9} Roshawn testified that he met Willis about a year before the shooting at a Boost Mobile store where she worked. The two became friends, and Roshawn had intimate relations with her on two occasions. Roshawn, who sold drugs with Geezy, had lost $10,000 in a drug transaction. In June 2017, Willis loaned Roshawn $10,000 so he and Geezy could restart their business. Initially, he was supposed to repay Willis in 30 days. When Roshawn did not return the money, Willis began calling him and Geezy demanding the money. Instead of repaying Willis, Geezy and Roshawn hatched a plan to kill her.

{¶10} Roshawn called his cousin Slade, who lived in Columbus and was a member of the Crips gang, and asked him to come to Cincinnati to commit a robbery and to take care of Willis. Slade drove to Cincinnati a day or two before the shooting with Echols and a female. Roshawn took them to a hotel on Central Parkway where they stayed. The day before the shooting, Roshawn drove Echols and Slade past Willis's house.

{¶11} On the night of the shooting, Slade drove to Willis's home, with Echols and Sanon, who were the shooters. While Echols and Sanon were walking back and forth outside of Willis's house, Slade called Roshawn. Slade informed him that when they arrived at Willis's home, they noticed the front door was open, and they saw people in the house. Roshawn testified that he told Slade not to enter the home. Later, the three returned to his home.

{¶12} While they were talking, Echols said they wrapped their shirts around their heads, opened the screen door, ran into the house, and started shooting.

Roshawn had a grill in his backyard, in front of his back door and kitchen window. Roshawn testified that the shirts Echols and Sanon wore during the shooting, were burned in the grill. Roshawn gave Echols $1,500, and Sanon, Vandell, and Echols left his home.

{¶13} After the shooting, Roshawn, Willis, and Barton went to Mt. Echo Park, and she told him about the shooting. She told him details that were inconsistent with his understanding of what happened.

{¶14} A week after the shootings, Echols arrived at his home unannounced and demanded more money. Roshawn could not see who was driving the car. Roshawn was upstairs with his family and Barton when he learned Echols was on his way to his house. He grabbed a gun and called Geezy to come over. Roshawn went outside and met Echols at the door. Echols entered his home, and Roshawn gave him a few hundred dollars, and he left.

{¶15} Admittedly, Roshawn did not initially tell the police the truth, and his statements evolved over time. Roshawn had been threatened in jail and had been involved in multiple fights due to the situation and was scared for his family. While in pretrial confinement, Roshawn was awaiting a court hearing in JAX when he saw Echols. Roshawn testified that Echols made a threatening gun gesture toward him and wrote a threatening message on the wall. Roshawn testified that Echols's nickname "Wopp" was at the top of the message, but not visible on the photo of the message. The message said, "Roshawn Bishop a rat and got 30 racks on his head." Roshawn interpreted the message to mean that he was a cooperating witness and anyone who harms him would get $30,000. Roshawn was concerned by the threats and afraid that harm could come to him or his family because of his decision to testify.

{¶16} Eventually, Roshawn told the police what actually happened, once his wife had been moved and was safe. Roshawn provided the officer with a description of Echols and later identified him from a photo.

{¶17} The state introduced a letter that Echols had written while incarcerated to a person named S. Parks. In the letter, Echols asks Parks "to get like 4 or 5 people to say they seen me at The Rise on July 8, 2017 between 10:45 p.m. and 12:00 a.m." The letter specified the clothing Echols was allegedly wearing, individuals who should be contacted, what they should say, and emphasized that the alibis were "the only way [he would] shake this." The letter also dictated that "Debbie * * * gotta go ASAP plus it might make her husband recant his statement like he said he would." Echols included the names and personal information of several of the victims and promised to forward contact information for Roshawn's wife and Kevin Barton when he received it.

{¶18} GPS data from Echols's phone was also admitted into evidence. Special FBI Agent Lance Kepple, an expert in cell phone record analysis, testified about Echols's whereabouts before and after the shooting based on the GPS data from his phone. On July 7, Echols's phone left Columbus, arrived in Cincinnati around 4:00 p.m., and was present at a motel on Central Parkway. On the night of the shooting, Echols's phone left Roshawn's home at 10:47 p.m., and arrived "within a three meter radius" of Willis's home at 11:09 p.m. After 11:30 p.m., Echols's phone moved toward Roshawn's home. The phone left Cincinnati for Columbus at 2:31 a.m.

{¶19} At the end of the trial, the jury found Echols guilty of aggravated burglary, aggravated murder, three counts of murder, eight counts of attempted

murder, and eight counts of felonious assault, all with gun specifications. Echols was sentenced to an aggregate term of life with parole eligibility after 25 years.

Sufficiency and Manifest Wright

{¶20} In his first and second assignments of error, argued together, Echols contends that his convictions for aggravated murder, murder, and attempted murder were not supported by sufficient evidence and were contrary to the manifest weight of the evidence. Specifically, Echols argues that the state failed to prove he was the shooter because no evidence established that he was present except the testimony of three of the state's witnesses, who were not credible.

{¶21} In reviewing a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime had been proved beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶22} As to the weight of the evidence, we review whether the jury created a manifest miscarriage of justice in resolving conflicting evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). We consider all the evidence in the record, the reasonable inferences, the credibility of the witnesses, and whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Bailey*, 1st Dist. Hamilton No. C-140129, 2015-Ohio-2997, ¶ 59, quoting *Thompkins* at 387. We afford substantial deference to credibility determinations because the factfinder sees and hears the witnesses. *See State v. Glover*, 1st Dist. Hamilton No. C-180572, 2019-Ohio-5211, ¶ 30.

{¶23} Echols argues that the evidence failed to establish that he was "inside of the house with a gun in his hand." Echols acknowledges that the cell phone evidence demonstrated that he was near the scene when the shooting occurred but argues that no DNA, fingerprints, or victim testimony proved that he was a shooter. He further contends that the testimony of Roshawn, Deborah, and Barton was not credible because they were highly motivated to lie.

{¶24} Viewing the evidence in a light most favorable to the state, we cannot say that the state presented insufficient evidence to establish that Echols entered Willis's home, fired multiple shots injuring seven individuals and killing Autumn Garrett. Roshawn testified that he paid Echols to commit the shooting, and that Echols admitted to and described the shootings the night the shootings occurred. Roshawn further testified that Echols's shirt was burned that night, and Deborah confirmed that clothing was burned. Echols's letter sought alibis for that evening, and his cell phone data placed him near the house when the shootings occurred. With respect to the lack of physical evidence, the state is not required to present physical evidence to satisfy its burden. *See State v. English*, 1st Dist. Hamilton No. C-180697, 2020-Ohio-4682, ¶ 29.

{¶25} In finding Echols guilty, the jury found Roshawn's testimony to be credible. Because credibility is an issue for the trier of fact to resolve, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice. Accordingly, we overrule the first and second assignments of error.

Evidence of Witness Intimidation

{¶26} In his third assignment of error, Echols argues that the trial court erred in admitting into evidence his attempts to intimidate Roshawn by writing a message on the wall and making a gun gesture, and the letter he wrote while incarcerated.

{¶27} The admission of evidence lies within the broad discretion of a trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice. *State v. Issa*, 93 Ohio St.3d 49, 64, 752 N.E.2d 904 (2001).

{¶28} 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. Evid.R. 404(B). Such evidence may be admissible, however, to show consciousness of guilt. *State v. Grimes*, 1st Dist. Hamilton No. C-030922, 2005-Ohio-203, ¶ 55. Consciousness of guilt can be shown by specific evidence of witness intimidation and acts "designed to impede or prevent a witness from testifying." *Id.*, citing *State v. Richey*, 64 Ohio St.3d 353, 595 N.E.2d 915 (1992); *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 68. The evidence of intimidation "must be shown by evidence of the defendant's specific acts to that end." *State v. Carillo*, 2d Dist. Clark No. 00CA0025, 2000 Ohio App. LEXIS 4727, 9 (Oct. 13, 2000), quoting *State v. McWhite*, 73 Ohio App.3d 323, 597 N.E.2d 168 (6th Dist.1991). Evidence of witness intimidation is also admissible to explain why witnesses initially lied to police and "to bolster the credibility of those witnesses whose credibility would otherwise be suspect because they had previously lied." *Id.* at 10.

{¶29} While in pretrial confinement, Roshawn was awaiting a court hearing when he saw Echols. Roshawn testified that Echols made a threatening gun gesture toward him and wrote a threatening message on the wall. The message, which included Echols's nickname "Wopp," said, "Roshawn Bishop a rat and got 30 racks on his head." Roshawn interpreted the message to mean that he was a cooperating witness and anyone who harmed him would get $30,000. Roshawn was concerned by

the threats and afraid that harm could come to him or his family because of his decision to testify.

{¶30} The letter written by Echols while incarcerated, included a threat against Roshawn's wife, and said, "She gotta go ASAP plus it might make her husband recant his statement." The letter included the names and phone numbers of several of the victims and a promise to forward personal information for Roshawn's wife and Kevin Barton when he received it.

{¶31} Echols's threats are evidence of his efforts to intimidate witnesses and reflect a consciousness of guilt. The threats were "designed to impede or prevent a witness from testifying," and admissible to show consciousness of guilt. *See Grimes*, 1st Dist. Hamilton C-030922, 2005-Ohio-203, at ¶ 55. The threats were also relevant to explain why Roshawn was initially reluctant to tell the truth and why his story changed over time. Therefore, the trial court did not abuse its discretion in admitting the evidence of witness intimidation.

{¶32} We overrule the third assignment of error.

Prosecutorial Misconduct

{¶33} Next, Echols asserts that the prosecutor committed misconduct by repeatedly attempting to associate Echols with the Columbus Crips gang.

{¶34} "The test for prosecutorial misconduct is whether the remarks were improper, and if so, whether they prejudicially affected the accused's substantial rights. The touchstone of the analysis 'is the fairness of the trial, not the culpability of the prosecutor.' " *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 154. Where the trial court sustained objections to the testimony and provided a curative instruction to the jury, we must presume the jury followed the trial court's

instructions. *State v. Williams*, 8th Dist. Cuyahoga No. 82094, 2003-Ohio-4811, ¶ 40, citing *State v. Raglin*, 83 Ohio St.3d 253, 699 N.E.2d 482 (1998).

{¶35} During the direct examination of Roshawn, the prosecutor elicited testimony that Slade was a member of the Crips gang. The defense did not object to this testimony. When the prosecutor asked Slade's rank in the Crips, the trial court sustained Echols's objection, but the court allowed testimony that Slade was associated with the Crips.

{¶36} The prosecutor asked Roshawn if "the fact that [Slade] and his associates were in the Crips, did that have an impact with you at all?" Echols immediately objected, and the question went unanswered. The trial court instructed the jury that the "last statement is just not an appropriate question. So please just disregard what you heard there." The court further instructed the jury "not to consider that last question even though there was no answer for it."

{¶37} When the prosecutor asked whether Roshawn knew if Echols was a Crip, the objection was sustained before Roshawn answered the question. The judge again informed the jury that the question was improper and instructed the jury to disregard the question and to "not let that influence you in any way." No further mention of the Crips occurred during the remainder of the trial.

{¶38} During jury instructions, the trial court reiterated that statements that it had been asked to disregard "must be treated as if you never heard them." The court instructed the jury that it could not speculate as to why an objection was sustained, or to draw any inference from a question or what the answer may have been.

{¶39} Even assuming the questions were improper, Echols has not established that the questions affected his substantial rights. Echols immediately objected to the

questions that attempted to elicit testimony of a gang affiliation, and the questions went unanswered. Moreover, the trial court repeatedly instructed the jury to disregard the questions, and we presume that the jury followed the instructions.

{¶40} We overrule Echols's fourth assignment of error.

Cumulative Error

{¶41} Echols claims that the cumulative effect of all of the errors denied him his right to a fair trial.

{¶42} "The doctrine of cumulative error allows a conviction to be reversed if the cumulative effect of errors, deemed separately harmless, deprived the defendant of his right to a fair trial." *State v. Johnson*, 1st Dist. Hamilton No. C-170354, 2019-Ohio-3877, ¶ 57. After finding no error in Echols's assignments of error, we cannot find cumulative error. Consequently, we overrule the fifth assignment of error.

Conclusion

{¶43} Having overruled Echols's five assignments of error, we affirm the trial court's judgment.

Judgment affirmed.

BERGERON, J., concurs separately.
KINSLEY, J., concurs in part and dissents in part.

BERGERON, J., concurring separately.

{¶44} I concur in the lead opinion but write separately to highlight an evidentiary issue that should warrant clarification from the Supreme Court of Ohio. Specifically, I believe that evidence of witness intimidation should be analyzed under Evid.R. 404(B) pursuant to the standard recently prescribed by the Supreme Court. Extant Ohio authority largely fails to do this (although there is confusion on this score

punctuating our jurisprudence). Guidance from federal courts helps illuminate the matter and shows why clarification is needed.

{¶45} Historically, federal courts considered the admissibility of evidence of witness intimidation under Fed.R.Evid. 404(b). The federal rule is, for all intents and purposes, substantively identical to the Ohio rule, Evid.R. 404(B). In early cases on this topic, federal courts tended to admit evidence of witness intimidation pursuant to Fed.R.Evid. 404(b) so long as courts provided "careful cautionary instructions as to the limited purpose for which the evidence was introduced." *United States v. Cirillo*, 468 F.2d 1233, 1240 (2d Cir.1972). These early cases also required application of Fed.R.Evid. 403's balancing test to ensure that the evidence was more probative than prejudicial. *See, e.g., United States v. Bein*, 728 F.2d 107, 114 (2d Cir.1984) ("Evidence demonstrating a defendant's consciousness of guilt [here, threats made by the defendant against a potential witness] is admissible under Fed.R.Evid. 404(b) if the court determines that the evidence is more probative than prejudicial under Fed.R.Evid. 403."); *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir.1986), quoting Fed.R.Evid. 403 ("Spoliation evidence [including evidence that a defendant "attempted to bribe and threatened a witness"] should not be admitted if its probative value 'is substantially outweighed by the danger of unfair prejudice.' "); *United States v. Gatto*, 995 F.2d 449, 456 (3d Cir.1993) ("[E]vidence alleged to show intimidation through the defendant's demeanor may frequently be excludable under Federal Rule of Evidence 403, which instructs that relevant evidence may be excluded if its probative value is substantially outweighed by, among other things, the danger of unfair prejudice.").

{¶46} Today, most circuits remain faithful to this approach, requiring district courts to employ a full Fed.R.Evid. 404(b) analysis (including Fed.R.Evid. 403 balancing) to determine the admissibility of witness intimidation evidence. *See United States v. Sutton*, 769 Fed.Appx. 289, 296 (6th Cir.2019) (reviewing admissibility of witness intimidation evidence under Fed.R.Evid. 404(b) and subjecting it to a Fed.R.Evid. 403 analysis); *United States v. Jones*, 873 F.3d 482, 497-498 (5th Cir.2017) (treating evidence of witness intimidation as Fed.R.Evid. 404(b) evidence); *United States v. Calabrese*, 572 F.3d 362, 368 (7th Cir.2009) (holding that witness intimidation evidence was properly admitted where the district court applied Fed.R.Evid. 404(b)); *United States v. Elwell*, 515 Fed.Appx. 155, 161-162 (3d Cir.2013) (reviewing witness intimidation evidence under Fed.R.Evid. 404(b) and requiring a limiting instruction to minimize the risk of unfair prejudice); *United States v. Begay*, 673 F.3d 1038, 1046 (9th Cir.2011) (treating witness intimidation evidence as Fed.R.Evid. 404(b) evidence and requiring application of Fed.R.Evid. 403 balancing); *but see United States v. Skarda*, 845 F.3d 370, 378 (8th Cir.2016) (Citations omitted.) (holding that witness intimidation evidence "is considered direct evidence of the crime charged and is not subject to a Rule 404(b) analysis" but still subjecting the evidence to a Fed.R.Evid. 403 analysis).

{¶47} Interestingly, in Ohio, the rationale for allowing admission of witness intimidation evidence developed separately from the 404(B) approach adopted by most federal courts. In 1969, the Ohio Supreme Court held, "It is to-day universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." *State v. Eaton*, 19 Ohio

St.2d 145, 160, 249 N.E.2d 897 (1969), citing 2 Wigmore, *Evidence*, Section 276, at 111 (3d Ed.1940). Later, in 1992, the Ohio Supreme Court expanded this proposition, holding that the defendant's threats against a prosecutor "reflect a consciousness of [the defendant's] guilt, similar to evidence of flight to avoid prosecution, or efforts made to cover up a crime or intimidate witnesses." *State v. Richey*, 64 Ohio St.3d 353, 357, 595 N.E.2d 915 (1992), citing *Eaton*. The line of cases stemming from *Eaton* and *Richey* does not rely on Evid.R. 404(B) as the basis for admitting witness intimidation evidence (or similar bad acts). Instead, under *Eaton* and *Richey*, evidence of witness intimidation is admissible as admission by conduct, permitting introduction of this evidence as a matter of course rather than requiring an Evid.R. 404(B) analysis to determine its admissibility on a case-by-case basis. *See State v. Hamm*, 1st Dist. Hamilton Nos. C-160230 and C-160231, 2017-Ohio-5595, ¶ 20, citing *Richey* at 357 ("Evidence of threats or intimidation of witnesses reflects a consciousness of guilt. * * * The evidence was admissible as an admission by conduct.").

{¶48} Underpinning the rule in *Eaton* and *Richey* is, I submit, a false and outdated psychological assessment of criminal defendants. Why would a criminal defendant flee from police or intimidate a witness? Because he's guilty, of course—so the reasoning goes. But I think it's equally fair to presume that a defendant might take such measures because he believes he will be convicted, *regardless of his guilt*. In other words, many people charged with a crime may not trust the legal system to accurately sort out innocence from guilt, believing the deck to be unfairly stacked against them. I don't mean to excuse flight or witness intimidation, of course, only to consider it with a fresh perspective consistent with the overall purposes of the Ohio

Rules of Evidence. Back when *Eaton* was handed down, maybe we couldn't imagine an innocent person engaging in such conduct. Now, however, we certainly can.

{¶49} In fact, a number of federal and state jurisdictions recognize that "flight does not create a presumption of guilt but, to the contrary, may be completely consistent with innocence." *United States v. Benedetti*, 433 F.3d 111, 116 (1st Cir.2005); *see Comford v. United States*, 947 A.2d 1181, 1187 (D.C.Cir.2008) (Citations omitted.) ("[F]light does not necessarily reflect consciousness of guilt and may be motivated by a variety of factors which are fully consistent with innocence."); *Commonwealth v. Holt*, 273 A.3d 514, 547 (Pa.2022) ("Such flight or concealment does not necessarily show consciousness of guilt in every case. A person may flee or hide for some other motive and may do so even though innocent."). Developments in our understanding of wrongful convictions further lend credence to this point. *See* Gross et al., *Race and Wrongful Convictions in the United States* (Mar. 7, 2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf (accessed May 5, 2023).

{¶50} The same point applies to witness intimidation, as illustrated by the recent case *United States v. Robertson*, D.N.M. No. 17-CR-02949-MV-1, 2021 U.S. Dist. LEXIS 82824, 13-14 (Apr. 30, 2021), in which the defendant made various strongly-worded calls trying to persuade people to testify on his behalf. While the government argued that the evidence of the calls should be admitted to establish consciousness of guilt, the court found that "[defendant's] statements on the call * * * could just as easily reflect far less sinister motivations, such as a desire for the Court to see his family and community support as it makes decisions on critical issues such as his release." *Id.* The court acknowledged defendant's concern that "if people do not

show up at court, the government will 'bury' him and 'just do it quietly,' " and concluded, "[r]ather than suggesting a consciousness of guilt, these statements are consistent with [defendant's] proclamations of innocence. And they suggest a desire for public and emotional support rather than a desire to intimidate witnesses." *Id.*

{¶51} Therefore, it is time to anchor claims of witness intimidation and the like in a solid evidentiary foundation, and Evid.R. 404(B) seems up to the task (as federal courts have demonstrated). In some respects, this is starting to happen, with various Ohio courts starting to blur the line between admitting evidence of witness intimidation as an admission by conduct and under Evid.R. 404(B). For example, in *State v. Williams*, 8th Dist. Cuyahoga No. 89461, 2008-Ohio-1948, ¶ 21-29, the Eighth District considered both the text of Evid.R. 404(B) and *Richey* and its progeny treating evidence of witness intimidation as admissible as an admission by conduct to determine that the trial court did not err in admitting the intimidation evidence at issue. Similarly, the Fifth District in *State v. Conner*, 5th Dist. Tuscarawas No. 2007 AP 06 0035, 2008-Ohio-4042, explained the applicability of Evid.R. 404(B) and the Evid.R. 403 balancing test to witness intimidation evidence, then proceeded to uphold the admission of the evidence as "relevant to [defendant's] guilty conscience regarding the indicted charges." *Id.* at ¶ 28-30, 38. These cases that intermingle the *Richey* approach with the Evid.R. 404(B) approach were decided pre-2020, when Evid.R. 404(B) carried little practical weight in governing admissibility of evidence.

{¶52} But that changed in September 2020, when the Ohio Supreme Court decided a pair of cases—*State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, and *State v. Smith*, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123—that together strengthened and clarified the role of Evid.R. 404(B) in Ohio

evidentiary practices. *Hartman* and *Smith* emphasize the requirements of Evid.R. 404(B) with respect to the admission of other acts evidence—first, ensuring that the evidence is relevant to the particular purpose for which it is offered (de novo standard of review); second, determining that the evidence is being used for a purpose other than propensity and this purpose is "material" in the context of the case (de novo); and third, weighing the probative value of the evidence against a danger of unfair prejudice (abuse of discretion). *Hartman* at ¶ 20-33; *Smith* at ¶ 36-50. Once a court determines, pursuant to the preceding steps, that the other acts evidence should be admitted, *Hartman* dictates that the court "*must* take steps to minimize the danger of unfair prejudice inherent in the use of such evidence * * *." (Emphasis added.) *Hartman* at ¶ 34.

{¶53} While neither *Hartman* nor *Smith* specifically addresses the use of evidence of witness intimidation in the Evid.R. 404(B) context, these two cases warrant a second look at how Ohio law treats this type of evidence. Considering the developing consensus that a defendant's flight, intimidation of witnesses, assumption of false name, refusal to cooperate, etc., are not necessarily evidence of guilt (rather, they may well indicate a defendant's fear of wrongful conviction), the relevance of this evidence becomes heavily questionable. And, needless to say, evidence of witness intimidation is highly prejudicial, because threats against witnesses "constitute a striking example of evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *United States v. Thomas*, 86 F.3d 647, 654 (7th Cir.1996), quoting *United States v. Guerrero*, 803 F.2d 783, 785 (3d Cir.1986). Rather than assuming the admission of evidence of

witness intimidation pursuant to precedent based on antiquated notions, requiring courts to conduct a full Evid.R. 404(B) analysis each time they are faced with evidence of witness intimidation would remain faithful to the principles contained in *Hartman* and *Smith* and will protect trials from being unnecessarily tainted by prejudicial evidence.

{¶54} In light of *Eaton* and *Richey*, I believe the lead opinion correctly considers the admissibility of the witness intimidation evidence at hand. However, I believe that the admissibility result may well differ under an Evid.R. 404(B) analysis, given the extremely prejudicial nature of the evidence at hand (particularly juxtaposed against the thin level of inculpatory evidence).

KINSLEY, J., concurring in part and dissenting in part.

{¶55} I concur with the thorough lead opinion as to the first, second, fourth, and fifth assignments of error. However, I believe that the admission of two pieces of witness intimidation evidence in this case, namely (1) a letter Echols wrote his uncle while Echols was awaiting trial, and (2) an image of graffiti found by codefendant Roshawn Bishop in a holding cell before he testified at Echols's trial, was improper under Evid.R. 404(B) and would therefore sustain the third assignment of error. For this reason, I dissent from the lead opinion's disposition of the third assignment of error.

I. Evid.R. 404(B) and State v. Hartman

{¶56} Echols argues in his third assignment of error that the introduction of the letter and graffiti violated Evid.R. 404(B). The lead opinion's resolution of this issue implies, without expressly saying so, that evidence of witness intimidation falls outside of the Evid.R. 404(B) framework. In a single sentence, the lead opinion nods

to Evid.R. 404(B) by acknowledging that evidence a defendant committed other wrongful acts is inadmissible for the sole purpose of demonstrating his propensity to commit the crime with which he is charged. Without explaining why that rule does not apply here, the lead opinion suggests that a separate line of cases allows witness intimidation evidence to be admitted without regard to Evid.R. 404(B). Those cases include our 2005 opinion in *State v. Grimes*, 1st Dist. Hamilton No. C-030922, 2005-Ohio-203, ¶ 55, and the Ohio Supreme Court's 1992 decision in *State v. Richey*, 64 Ohio St.3d 353, 595 N.E.2d 915 (1992). Both of these cases suggest that witness intimidation evidence is admissible to show consciousness of guilt.[3] *Richey* at 357; *Grimes* at ¶ 55. Neither addresses the application of Evid.R. 404(B) to the issue.[4]

{¶57} Importantly, these cases substantially predate *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651. In *Hartman*, the court established a detailed framework for lower courts to follow in resolving challenges to the admissibility of other acts evidence under Evid.R. 404(B). The concurring opinion discusses the *Hartman* framework in detail, which I merely summarize here.

{¶58} At step one, the court must require the proponent of the evidence to identify a specific purpose from those enumerated in Evid.R. 404(B) for which the evidence is being admitted and then assess the relevance of the proffered evidence to that purpose. *Hartman* at ¶ 26. Among the purposes for which evidence of other acts may be admitted under Evid.R. 404(B) are motive, opportunity, intent, preparation, plan, knowledge, and identity. *Id.* at ¶ 22, quoting Evid.R. 404(B). At this juncture,

[3] The concurrence also notes that *State v. Eaton*, 19 Ohio St.2d 145, 160, 249 N.E.2d 897 (1969), reaches the same conclusion with regard to the admissibility of evidence that the defendant fled before trial.

[4] The dissent in *Richey* suggests that evidence of witness intimidation should be subject to the Evid.R. 404(B) admissibility standards, but the lead opinion is silent on this question. *See Richey*, 64 Ohio St.3d at 375, 595 N.E.2d 915 (Brown, J., dissenting).

trial courts should look to the materiality of the nonpropensity purpose for which the evidence is being introduced and must ensure that there is sufficient reason to believe the defendant actually committed the other wrongful act. *Id.* at ¶ 27-28.

{¶59} Assuming that test is met, at step two, trial courts must turn to Evid.R. 403(A) and weigh the prejudicial impact of admitting the evidence against its probative value to make a final determination as to whether the evidence comes in at trial. *Id.* at ¶ 29. This weighing process should be "robust" and should take into account the human predisposition to more heavily emphasize a record of wrongful acts in judging whether a new crime occurred. *Id.*

{¶60} If the evidence meets these threshold inquiries, trial courts admitting evidence of a defendant's other wrongful conduct under Evid.R. 404(B) should issue a carefully worded instruction that limits the jury's consideration of the evidence to the stated purpose for which it is admitted. *Id.* at ¶ 34, 66. The instruction must be tailored to the facts of the case and should "explain, in plain language, the purposes for which the other acts may and may not be considered." *Id.* at ¶ 70-71. Where the defendant requests the instruction, courts must give it. *Id.* at ¶ 67.

{¶61} As the concurring opinion observes, we review errors at step one of the *Hartman* framework de novo. *See id.* at ¶ 22. We review errors at step two for an abuse of discretion. *Id.* at ¶ 30.

{¶62} The lead opinion does not address *Hartman* at all, apparently because its author believes Evid.R. 404(B) does not apply to witness intimidation evidence. The concurrence reads *Hartman* to be in tension with the line of cases cited by the lead opinion that admit witness intimidation evidence to demonstrate consciousness of guilt. Respectfully, I disagree with both of these approaches.

{¶63} To begin, I believe that Evid.R. 404(B), and therefore *Hartman*, governs the admissibility of the witness intimidation evidence in this case. Notably, the plain language of Evid.R. 404(B) applies to evidence of "*any* other crime, wrong, or act." (Emphasis added.) Evid.R. 404(B)(1). This text is written in broad terms, without limitation. Neither the rule itself nor any case that I can find suggests that categories of "crimes, wrongs, or acts," like intimidating a witness or fleeing the jurisdiction after a crime is committed, are expressly excluded from Evid.R. 404(B)'s purview. To the contrary, the rule makes exceptions based on the purpose for which the evidence is offered, not the nature of the other wrongful behavior the evidence describes.

{¶64} It is a crime to intimidate a witness in a criminal case in Ohio. *See* R.C. 2921.04. As a result, evidence of witness intimidation is by definition evidence of "other crimes" falling squarely within the scope of Evid.R. 404(B). At least one other Ohio court has agreed and has analyzed the admissibility of witness intimidation under Evid.R. 404(B)'s requirements. *See State v. Abdelhaq*, 8th Dist. Cuyahoga No. 74534, 1999 Ohio App. LEXIS 5573 (Nov. 24, 1999).

{¶65} Thus, because I believe Evid.R. 404(B) to apply to the state's introduction of witness intimidation evidence against Echols, I part ways with the lead opinion as to which law applies. Echols's assignment of error regarding the admissibility of his letter and the jailhouse graffiti cannot be resolved, in my opinion, without examining how this evidence fares under *Hartman*.

{¶66} Moreover, while I support the concurrence's call for reexamination of outdated assumptions in this area of law, I do not agree with the concurring opinion's stance that *Hartman* and the line of cases regarding consciousness of guilt are at odds with one another. This is because, unlike the concurrence, I do not read *Hartman* to

conflict with *Richey* and *Grimes*. To the contrary, the holdings in those cases that witness intimidation evidence is admissible to show consciousness of guilt logically squares with both the text of Evid.R. 404(B) and the *Hartman* framework. There are two ways to align the *Richey*/*Grimes* body of law with *Hartman*.

{¶67} For one thing, consciousness of guilt approximates knowledge that a person committed a crime, which is one of the listed purposes for which the state may present evidence of other acts under Evid.R. 404(B).

{¶68} Synergizing *Richey* and *Grimes* with *Hartman* in this way allows the state to designate knowledge as the enumerated Evid.R. 404(B) purpose for which witness intimidation evidence is being introduced. At that point, the trial court can examine whether a defendant's knowledge of his guilt is relevant and material to the issues to be tried, whether there is substantial reason to believe the defendant committed the witness intimidation, and, if so, whether the prejudicial impact of the evidence outweighs its probative value. *Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 191 N.E.3d 651, at ¶ 26-29. If the trial court admits the evidence, it can also craft a tailored instruction, specific to the facts of the case, that tells the jury in plain terms exactly what it can and cannot consider with regard to a defendant's knowledge of criminality. *Id.* at ¶ 34, 66.

{¶69} In addition to these practical benefits, reading the early cases admitting witness intimidation evidence to show consciousness of guilt into the knowledge component of Evid.R. 404(B) also harmonizes Ohio law with the federal analogs referenced by the concurrence. *See, e.g., United States v. Sutton*, 769 Fed.Appx. 289, 296 (6th Cir.2019) (subjecting witness intimidation evidence to admissibility analysis

under Fed.Evid.R. 404(b)); *United States v. Jones*, 873 F.3d 482, 497-498 (5th Cir.2017) (considering evidence of witness intimidation under Fed.Evid.R. 404(b)).

{¶70} Another way to read *Richey* and *Grimes* in alignment with *Hartman* is to treat consciousness of guilt as one of the "other purposes" outside of propensity for crime allowed by Evid.R. 404(B).

{¶71} While true to the text of Evid.R. 404(B), this interpretation strays somewhat from *Hartman*, which more faithfully tracks the enumerated reasons a proponent might offer other acts evidence at trial rather than hypothesizing what "other purposes" might exist. *See, e.g., Hartman* at ¶ 37 (discussing "identity" purpose enumerated in Evid.R. 404(B) in the context of modus operandi); *Id.* at ¶ 40-42 (discussing "plan" purpose enumerated in Evid.R. 404(B)). Nonetheless, *Hartman* does suggest that "[t]he key is . . . prov[ing] something other than the defendant's disposition to commit certain acts," and identifying consciousness of guilt as the specified purpose fulfills this initial requirement of the *Hartman* framework. *Id.* at ¶ 22.

{¶72} Thus, under my understanding of Ohio law, witness intimidation evidence may be admissible under Evid.R. 404(B) if it establishes a defendant's knowledge—or consciousness—of his own guilt of the crime for which he is charged. But that is merely the beginning, not the end, of the analysis. Courts must work through the entire *Hartman* framework before admitting evidence of "other crimes, wrongs, or acts," including witness intimidation. This is where the lead opinion stops short.

II. Factual Application

{¶73} Under the *Hartman* framework, a trial court must first determine whether the proffered evidence is relevant to the purpose for which it is being offered, then weigh the prejudice to the defendant of admitting the evidence against this carefully proscribed probative value to determine its ultimate admissibility. If the evidence comes in, the court must fashion a limiting instruction to mitigate against the jury's natural instinct to infer that the defendant is guilty merely because he committed the wrongful act of intimidating a witness to the alleged crime being tried.

{¶74} None of that happened in this case. The state never tethered the admissibility of Echols's letter and the jailhouse graffiti to a specific, identified purpose authorized by Evid.R. 404(B). The trial court never tested the relevance of the evidence to that specified purpose, nor instructed the jury to limit its use of the evidence to that purpose. And the required weighing of prejudicial impact and probative value under Evid.R. 403(A) also never occurred. This was despite the fact that, at a pretrial hearing challenging the admissibility of the letter Echols wrote from jail, Echols's counsel specifically raised the applicability of *Hartman* to the witness intimidation evidence and sought a limiting instruction tailored to the state's purpose for admitting the evidence.

{¶75} As a matter of law, and reviewing the record de novo, I find the trial court's failure to apply *Hartman* and Evid.R. 404(B) to the state's witness intimidation evidence to be reversible error. The trial court undertook no analysis under Evid.R. 404(B) at all and simply admitted the witness intimidation evidence without explanation. Given that the jury acquitted Echols's codefendant of all but one attempted-murder charge, there is every indication that the jury harbored doubts about the state's theory of the case. Moreover, as the concurrence points out, the

evidence against Echols was not overwhelming. As a result, the admission of witness intimidation evidence without the required Evid.R. 404(B) analysis prejudiced Echols.

{¶76} The trial court's failure to analyze the Evid.R. 404(B) implications of the witness intimidation evidence was compounded by its refusal to issue the limiting instruction that *Hartman* requires. Echols's counsel specifically asked for a tailored jury instruction and cited *Hartman* at the pretrial hearing to determine the admissibility of the letter. *Hartman*, in no uncertain terms, holds that "[t]he court must give a limiting instruction upon request." *Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, at ¶ 67. Its failure to do so here was error.

{¶77} Aside from this error of law, I also note several factual problems that, in my opinion, and applying a de novo standard of review to the Evid.R. 404(B) inquiry, would have precluded the admissibility of the proffered witness intimidation evidence.

{¶78} In general, witness intimidation evidence only proves a defendant's knowledge that he committed the crime with which he is charged if a number of evidentiary prerequisites exist. First, the defendant must be aware of the witness's status with respect to the crime at issue. *See* R.C. 2921.04(A) (requiring knowledge for witness intimidation offense); R.C. 2921.04(E) (defining witness for the purpose of witness intimidation). Next, the defendant must intimidate the witness for the purpose of disguising or evading his own guilt and not for some other purpose, such as preventing the witness from testifying falsely or protecting the witness from the discomfort of appearing in court. As the concurrence points out, there may be many reasons why a defendant tries to discourage a witness from testifying, and some of those reasons point away from knowledge or consciousness of guilt. *See, e.g., United States v. Robertson*, D.N.M. No. 17-CR-02949-MV-1, 2021 U.S. Dist. LEXIS 82824,

13-14 (Apr. 30, 2021) (discussed in concurring opinion). *Hartman* requires the trial court to distinguish between those reasons before admitting the evidence.

{¶79} Focusing first on the letter, its meaning is ambiguous. In the letter, Echols provides his uncle with the names, dates of birth, social security numbers, and partial address information for some of the witnesses who may testify against him at trial. He says "see what you can do with this info," but does not otherwise direct any specific action towards these individuals. The letter also contains a request that Echols's uncle "get like 4 or 5 people to say they [saw Echols]" at a particular location at a certain time, but does not identify the people, either by name or description. Elsewhere in the letter, Echols expresses doubts about the state's case, as well as his fear of being wrongfully convicted. He says that, to convict him, the state needs someone to say "this s***'s true" to obtain a conviction, and he comments that the state's case is based on hearsay. At no point does he admit his own guilt or role in the offense.

{¶80} Viewed with the careful scrutiny *Hartman* requires, Echols's letter is not relevant to either knowledge or consciousness of guilt under Evid.R. 404(B).[5] For one thing, it is not witness intimidation, as Echols does not himself contact any witnesses or direct communication to witnesses. To the extent the letter attempts to set up a manufactured alibi, the "4 or 5 people" referenced in the letter do not meet the statutory definition of "witnesses" because they are not identified, actual people who have or claim to have knowledge about a crime. *See* R.C. 2921.04(E). To be sure, the letter does invite investigation into particular witnesses and their backgrounds,

[5] This is not to excuse Echols's conduct or to express an opinion as to its legality, but merely to focus, as Evid.R. 404(B) requires, on the evidentiary value of the letter relevant to the specific purpose for which it was being offered at trial.

but it lacks the evidentiary link necessary to show that Echols intimidated the witnesses against him not to testify because he was aware of his own guilt in the shootings. As a result, applying *Hartman*, the relevance of the letter to Echols's knowledge of his own guilt is questionable.

{¶81} With regard to the graffiti, a different problem exists. *Hartman* requires trial courts to carefully examine whether a defendant actually committed the alleged other wrongful act before permitting its admissibility. *Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, at ¶ 28. For the evidence to be admissible, "there must be 'substantial proof that the alleged similar act was committed by the defendant.' " *Id.*, citing *State v. Carter*, 26 Ohio St.2d 79, 83, 269 N.E.2d 115 (1971).

{¶82} Here, very little foundation was laid to admit the graffiti into evidence. Roshawn Bishop was the only person who testified as to the image. Bishop indicated that he saw the graffiti in the holding cell where every person in confinement who is transported to court is housed and concluded that Echols placed it there. But Bishop also conceded that codefendants and those in protective custody awaiting court hearings are housed in a separate area, undercutting the notion that Echols was responsible for the graffiti. Remarkably, the state presented no surveillance video or testimony from corrections officers to document the origins of the graffiti, and no witness actually saw Echols—or anyone, for that matter—create the message. As a result, there was not substantial proof that Echols created the graffiti, and the trial court should have excluded it on this basis.

{¶83} Moreover, the graffiti also suffered from the same flaw that the letter did. While the person who created the graffiti clearly seemed motivated to discourage Bishop from testifying, what is lacking is the reason for that motive. Similar to the

letter, we simply do not know whether the author of the graffiti did not want Bishop to testify because the author feared Bishop's untruthful testimony and therefore a wrongful conviction or because the author feared Bishop's truthful testimony and was therefore conscious or aware of his own guilt. Absent this evidence, I cannot say that the graffiti is relevant to knowledge under Evid.R. 404(B) and the *Hartman* framework and therefore believe it to be inadmissible.

II. Evid.R. 403(A) Weighing

{¶84} All of this says nothing of the required weighing of prejudicial impact and probative value that is required for all Evid.R. 404(B) evidence. Because the trial court paid short shrift to the other wrongful-acts standards in this case, it never reached the weighing step and never conducted the analysis that Evid.R. 403(A) requires.

{¶85} Although this is a closer call, given our deferential standard of review at this step of the *Hartman* framework, I believe the trial court abused its discretion in admitting what was clearly prejudicial evidence that offered very little in the way of probative value to the issues in dispute in this case.

{¶86} I share the concurring opinion's view that the letter and the graffiti were extremely prejudicial, particularly considering what little inculpatory evidence existed to tie Echols to the shootings. Because the jury was not given a limiting instruction, admission of these pieces of evidence invited the jury to surmise that Echols is a person who will resort to violence and concoct evidence to avoid accountability. In other words, this evidence encouraged the jury to convict Echols

based on his propensity for crime and his general negative character, both inferences that Evid.R. 404(B) prohibits. *See State v. Smith*, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123, ¶ 3.

{¶87} Further demonstrating the prejudicial impact of the witness intimidation evidence on Echols is the jury's split verdict in the case. The jury acquitted Echols's codefendant, Michael Sanon, who was tried at the same time based on the same evidence, of all but one attempted-murder charge. This outcome suggests that the jury harbored serious doubts about the prosecution's evidence. The only real difference in the evidence presented at trial between Echols and his codefendant was Echols's letter and the graffiti. Thus, it appears that this evidence had a direct and prejudicial impact on the verdict in Echols's case.

{¶88} On the other hand, compared to its prejudice, the witness intimidation evidence had very little probative value. Even assuming Echols created the graffiti, at most it demonstrated that he did not want Bishop to testify. That is not the same as showing that Echols was conscious of his own guilt. The letter was even more ambiguous and conveyed no clear meaning in terms of Echols's knowledge of his own participation in the crime. Thus, the value of these pieces of evidence to a purpose enumerated in Evid.R. 404(B) was scant.

{¶89} Weighing the extreme prejudice to Echols against the value of the evidence to the question of Echols's participation in the crimes for which he was charged, I believe the trial court abused its discretion in admitting the letter and the graffiti at trial.

IV. Conclusion

{¶90} The Ohio Supreme Court in *Hartman* unanimously reversed a jury verdict convicting the defendant of rape because the trial court improperly admitted evidence under Evid.R. 404(B) that the defendant had previously sexually victimized his former stepdaughter when she was a child. *Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, at ¶ 1, 12, 73. As *Hartman* demonstrates, adherence to the Evid.R. 404(B) framework is not optional, even when it results in a form of justice that feels unsatisfying.

{¶91} The events that took place at Cheyanne Willis's gender-reveal party were tragic, life-changing for the victims, and unquestionably wrong. We must follow the law in holding the perpetrators of those events accountable. Because I understand Evid.R. 404(B) and *Hartman* to apply to the witness intimidation evidence presented in this case, I would sustain Echols's third assignment of error and reverse his conviction and remand for a new trial.

Please note:

The court has recorded its own entry this date.