[Cite as *State v. Smith*, 2026-Ohio-4405.]

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

STATE OF OHIO,	:	APPEAL NO. C-250485 TRIAL NO. B-2302405
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY*
DEMARCO SMITH,	:	
Defendant-Appellant.	:	

This cause was heard upon the appeal, the record, and the briefs.

For the reasons set forth in the Opinion filed this date, the judgment of the trial court is affirmed.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs be taxed under App.R. 24.

The court further orders that (1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and (2) the mandate be sent to the trial court for execution under App.R. 27.

To the clerk:

Enter upon the journal of the court on 11/6/2026.

Pursuant to App.R. 30, the clerk is directed to send all parties, or their counsel if represented, a copy of the court's judgment and note such action on the docket.

By:_____
Administrative Judge

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STATE OF OHIO,	:	APPEAL NO. C-250485 TRIAL NO. B-2302405
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N*
DEMARCO SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 6, 2026

Connie Pillich, Hamilton County Prosecuting Attorney, and *John D. Hill, Jr.,* Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Angela J. Glaser, for Defendant-Appellant.

MOORE, Judge.

{¶1} On May 14, 2023, defendant-appellant Demarco Smith was the victim of a shooting at the Budget Host Inn on Central Parkway in Cincinnati, Ohio. The next night, May 15, 2023, Smith returned to the motel armed with a gun. He was looking for his assailants.

{¶2} A.S. and his wife, N.H., were at the motel with M.H., W.D., G.K., and C.R. M.H., N.H., and A.S. were standing outside waiting for W.D. and G.K. Smith backed his truck into a parking spot in front of the group, exited from the truck, and approached the group. With his gun drawn and aimed at them, Smith asked the group if any of them shot at him the previous night.

{¶3} A.S. was able to calm Smith, who lowered his gun. Just as he did so, C.R. appeared in the doorway wearing a mask. C.R. and Smith engaged in a brief exchange before gunfire rang out. In less than 30 seconds, Smith had fired four shots, and C.R. had fired two from the doorway of the motel room. Smith, C.R., W.D., and G.K. sustained bullet wounds but lived. A.S., having been shot in the chest, torso, and hand, died from his injuries.

{¶4} Smith now appeals his convictions for murder, felonious assault, and having weapons while under disability. He asserts that his convictions were against the manifest weight of the evidence, that the court erroneously instructed the jury on self-defense, that the prosecutor engaged in misconduct, that the trial court erroneously excluded lay testimony, and that the court's imposition of consecutive sentences was contrary to law. For the reasons below, we affirm the trial court's judgment.

I. Factual and Procedural History

A. The Trial

{¶5} Smith was indicted on eight counts. He tried Counts 6 and 7—two third-degree felony counts of having weapons under disability, in violation of R.C. 2923.13(A)(2) and (A)(3), to the bench. The remaining counts were tried to a jury.

{¶6} The jury trial[1] commenced on the following counts:

Count	Description	Statute
One	Special Felony Murder	R.C. 2903.02(A)
Two	Special Felony Murder	R.C. 2903.02(B)
Three	Second-Degree Felonious Assault with Specifications	R.C. 2903.11(A)(1)
Four	Second-Degree Felonious Assault with Specifications	R.C. 2903.11(A)(1)
Five	Second-Degree Felonious Assault with Specifications	R.C. 2903.11(A)(2)
Eight	Third-degree Felony Tampering with Evidence	R.C. 2921.12(A)(2)

Officer Thomas Stanton's Testimony

{¶7} Officer Stanton was the first officer on the scene and arrived at the hotel at approximately 10:45 p.m. Upon arrival, he observed A.S. bleeding and lying on his back; he had been covered with a towel. N.H. was attempting CPR while sitting on him. Officer Stanton's body-worn-camera footage ("BWC"), which was admitted by stipulation and played for the jury, showed the scene, victims, and Officer Stanton's response. He remained on scene until the fire department arrived.

[1] The parties stipulated that (1) Smith has prior firearm specification convictions, (2) Smith previously pleaded guilty to a firearm specification under R.C. 2941.145, (3) G.K. died of accidental overdose on June 21, 2024, and (4) State's exhibits 1-21A were authentic, including body-camera footage, criminalistic evidence, DNA reports, and surveillance video sequences.

M.H.'s Testimony

{¶8} M.H. described feeling "pissed" but was also scared and threatened when Smith got out of the truck and pointed a gun at them while yelling. M.H. explained that she, A.S., and N.H. tried to calm Smith, but without success.

{¶9} M.H. was shown the surveillance video capturing the shooting and testified to the sequence of events. She identified Smith in court as the shooter. By M.H.'s count, eight shots were fired. M.H., believing that Smith shot first, testified that C.R. saved their lives by "returning fire," adding that there was nowhere for her to retreat during the gunfire. M.H. recalled that a bullet grazed G.K.'s arm and A.S. was shot three times, and she rendered medical aid to A.S. until police arrived. She testified that A.S. was still alive when the police arrived, but she was later told that he had died.

{¶10} On cross-examination, M.H. acknowledged that C.R. was wearing a mask that covered his nose and mouth, spent time in the bathroom, and left the scene with G.K. after the shooting. She confirmed that the door to the room they were in remained open during the incident and that A.S. might have been shot from behind.

N.H.'s Testimony

{¶11} N.H. recalled that, while standing outside the motel room, she, A.S., and M.H. observed a truck driven by Smith slowly pull into the parking lot and circle suspiciously. N.H. stated that the truck turned around and came back more slowly, with windows partially down, revealing a female passenger. The truck backed into a parking spot in front of them with screeching tires. N.H. testified she got nervous and told M.H., "[T]his must be something serious going on."

{¶12} N.H. testified that Smith exited from the truck. When Smith pulled at his pants, N.H. recalled that A.S. said, "He got a gun," and made N.H. get behind him. N.H. testified she saw the gun after Smith pulled it from the right side of his waistband.

She described the gun as black, resembling a Glock .45 or .44 that her husband had once owned. N.H. testified that Smith approached the group with the gun in hand while appearing to be "pissed off." N.H. claimed that Smith told the group that he was looking for someone who robbed and shot at his brother at the motel the previous night. N.H. stated that Smith seemed intoxicated based on how he exited from the car and moved. N.H. recalled feeling threatened and afraid throughout the encounter.

{¶13} N.H. explained that A.S. tried to calm the situation, explaining that they had nothing to do with any robbery and had just arrived at the motel. N.H. stated that A.S. was skilled at de-escalating conflicts and successfully calmed Smith before C.R. appeared in the doorway wearing a mask. N.H. testified that although Smith had calmed down, he had not put his gun away. When asked who she feared at that moment, N.H. responded that she feared Smith.

{¶14} N.H. testified that, when Smith asked C.R. to remove his mask, C.R. lifted the mask and said, "This gonna be the last time you see this face," and then both men began shooting simultaneously. She recalled that A.S. was shot three times, and she found out when she got to the police precinct that he had died. The State then asked N.H. whether the incident would have occurred if Smith had never approached them, and she responded, "No."

{¶15} Defense counsel established that N.H. had known W.D. and M.H. for seven years as friends and drug customers. N.H. confirmed that C.R. had a gun inside the motel room, but she did not see it until after he fired it. She confirmed Smith never threatened to shoot them.

{¶16} Defense counsel asked if the incident would have occurred if C.R. had stayed in the bathroom. The trial court sustained the State's objection to that question, explaining that the State was permitted to ask N.H. a similar question during its direct

examination because defense counsel failed to object.

Dorothy Dean's Testimony

{¶17} Dr. Dorothy Dean has been a forensic pathologist and deputy coroner with the Hamilton County Coroner's Office since 2015. The defense stipulated to her expertise. Dr. Dean testified that A.S. died from gunshot wounds to the torso with injury to his left lung, liver, and aorta, and that either of two gunshot wounds could have independently caused his death. She determined that this was a homicide.

{¶18} On cross-examination, Dr. Dean clarified that the gunshot wounds were not numbered chronologically but by severity. She could not determine which gunshot wound occurred first, but all three were sustained while A.S. was alive.

Detective Kellyanne Best's Testimony

{¶19} Detective Best has been a homicide detective with the City of Cincinnati for eight years. She and her partner, Detective Dwayne McMenama, were assigned to investigate A.S.'s death.

{¶20} Best began her investigation at the motel. She also interviewed N.H., M.H., and W.D. on the night of the shooting, and obtained surveillance video from the Budget Host Inn. From her investigation, Best learned that G.K.—who was being treated at Good Samaritan Hospital for his injuries—and Smith had also been shot. Medical records were admitted from Christ Hospital and UC Medical Center for Smith, and from Tri-Health for G.K. G.K. had been shot in the left elbow by the same 9 mm gun that the six shell casings at the scene came from. DNA analysis of blood swabs from the rear bumper of G.K.'s vehicle matched Smith's DNA.

{¶21} Best guided the jury through the Budget Host Inn surveillance video from the shooting between Smith and C.R., and the incident involving Smith on the previous night. She explained that surveillance videos showed Smith leaving the

Budget Host Inn in a black truck and being dropped off at Christ Hospital emergency department by a female driver. Smith was later transported to UC Medical Center. Best briefly interviewed Smith at that hospital, where he claimed that he was driving on McMicken when somebody shot at him, making no mention of the Budget Host Inn incident. Best explained that further surveillance showed Smith subsequently leaving the hospital in a hospital gown without checking out or receiving medication or discharge instructions. Smith also left his personal effects behind, including over $400 in cash. Best later confirmed that Smith was not detained or arrested when he left UC Medical Center and was not breaking any laws by leaving.

{¶22} Upon discovering that the truck that Smith was driving was a rental, Best tracked Smith down using the rental registration for the truck. It had been rented by Smith's acquaintance, P.M. At P.M.'s apartment, Best found a firearm and bloodied bandages. That firearm was ruled out as being used in the shootout between Smith and C.R. The Nissan truck was processed and showed what appeared to be bleach stains[2] on the rear passenger seat and driver's seat.

{¶23} Using cell phone tower data, Best located Smith at an apartment on Harrison Avenue in Cincinnati, where she found a first aid kit, ibuprofen, bandages, braids, cell phone, and Honda car keys. Inside the Honda, which belonged to a woman who was not involved in this matter, Best found a mask and a shoe.

{¶24} Smith was arrested and transported to the police station. Best photographed Smith to document his appearance at that time. Best obtained a Cellebrite[3] download from Smith's iPhone, which contained text messages between

[2] The court sustained objections to questions about whether the stains were from bleach as speculative, finding that whether the stains were caused by bleach was a question for the jury to decide.

[3] Best testified that Cellebrite is a computer program that law enforcement uses to extract data and contents from a cell phone and put it in a format that "is usable for humans."

Smith and "one of his girlfriends" (who was not involved in this matter) from May 18, 2023—three days after the incident. Smith had instructed her to "erase all messages and keep it on u." The court noted defense counsel's objection to the text messages for the record.

{¶25} Unobjected-to photographs extracted from the phone pursuant to a warrant showed Smith with a faux-dreadlock installation in his hair on May 18 and May 21, 2023. The photographs had been taken at the apartment on Harrison Avenue where Smith was arrested.

{¶26} Best identified C.R. through witness interviews and located him at a house where G.K. stated he had previously picked C.R. up. Best testified that the video showing the shooting revealed that C.R. fired twice and Smith fired at least six times, based on the muzzle flashes. The 9 mm gun used by Smith was never recovered.

{¶27} Best had concluded that C.R. was not at the Budget Host Inn the night before the shooting based on cell phone tower records showing GPS coordinates for C.R.'s phone. Best explained that she did not charge C.R. with murder because she believed he was not the aggressor in the situation and because he did not shoot A.S.

{¶28} On cross-examination, Best again reviewed the video of the shooting involving Smith and C.R., frame by frame. After observing that Smith is left-handed, she acknowledged that Smith's left arm went up briefly before C.R. started shooting, and that this was probably when Smith pointed at C.R. after C.R. appeared in the doorway wearing a ski mask. Best confirmed that C.R. fired two shots first, both hitting Smith, before Smith returned fire with six shots. All eight shots occurred within approximately two seconds.

{¶29} Christ Hospital medical records indicated Smith sustained six gunshot wounds: two to the abdomen, two to the right arm, and two to the right leg. Best

acknowledged that if C.R. had only fired twice, some bullets must have passed through one part of Smith's body into another, he could have been shot the day before, or C.R. could have fired more than two shots.

1. Jury Instructions

{¶30} The trial court granted defense counsel's request to include a self-defense instruction, which included an instruction that the jury consider whether Smith withdrew from the incident. The State requested a consciousness-of-guilt instruction, to which defense counsel objected. The court discussed the Ohio Jury Instructions with the parties, stating, "The only thing I would -- the testimony is going to indicate that the Defendant left the hospital against medical advice. You are instructed – you're instructed that that conduct alone does not raise a presumption, but it may tend to indicate his consciousness of guilt." The court initially stated that the instructions would also permit the jury to consider that Smith changed his appearance and asked a female friend to delete text messages. The court explained that it believed that Smith's acts of changing his appearance and asking that text messages be deleted were the type of "other" conduct that the Ohio Jury Instructions explain support the use of the consciousness-of-guilt instruction. The court, however, ultimately decided not to add this other conduct in the instruction, listing only the fact that Smith left the hospital as conduct that could be construed as consciousness of guilt.

{¶31} In its closing, the State discussed Smith's leaving the hospital before being discharged without his belongings, changing his appearance, hiding out, and instructing his girlfriend to erase text messages as an indication of his consciousness of guilt and an attempt to evade the police. There was no objection to these comments.

2. The Jury Finds Smith Guilty

{¶32} Before the jury rendered its verdicts, Smith moved for acquittal under Crim.R. 29, which the court granted only as to Counts 5—second-degree felonious assault with specifications—and Count 8—tampering with evidence. Smith also requested that the court instruct the jury on self-defense, which was granted.

{¶33} The jury found Smith not guilty of Count 1—purposeful murder in violation of R.C. 2903.02(A). Smith was convicted of Count 2—murder with specifications in violation of R.C. 2903.02(B), Counts 3 and 4—felonious assault with specifications in violation of R.C. 2903.11(A)(1), and Counts 6 and 7—having weapons while under disability.

3. Smith's Prison Sentence

{¶34} The trial court stated that Smith apparently went to the Budget Host Inn to get revenge on whomever had shot at him the previous night, based on the way he backed the truck into the parking spot and having a getaway driver. The court commented that the group was cornered with "no place to go." The court announced that Smith "had no right to self-defense because he came there with a gun with the intention of . . . shooting [who shot at him]." The court described what it witnessed on the BWC regarding A.S. as a "terrible" and "very painful death," adding that G.K. was also severely hurt. The court then discussed Smith's extensive and violent juvenile and criminal history, deeming him "a violent person" from whom the public needed protection.

{¶35} After the trial court merged a number of specifications, merged Counts 3 and 4, and merged Counts 6 and 7, Smith was sentenced to (1) 15 years to life in the Ohio Department of Rehabilitation and Correction ("ODRC") on Count 2; (2) eight years on Count 4 to be served consecutively to Count 2; (3) three years on Count 6 to

be served consecutively to Counts 2 and 4; (4) four-and-a-half years on firearms specification number two to Count 2 to be served consecutively to Count 6; (5) four-and-a-half years on firearm specification number two to Count 4 to be served consecutively to Counts 2, 4, and 6; and (6) the ten-year sentence on the repeat-violent-offender specification number three in Count 2 was to run consecutively to all. The court imposed all counts and specifications consecutively for an aggregate sentence of 45 years to life in the ODRC. The court credited Smith with 783 days of time served and remitted costs.

{¶36} The trial court stated that, pursuant to R.C. 2914(B)(2)(a)(i) through (v), the sentence of 15 years to life alone on Count 1—murder—was "inadequate to punish this defendant and to protect the public." Considering the recidivism factors in R.C. 2929.12 (D) through (E), the court found that "it would demean the seriousness of [the murder] offense to just give him 15 to life." The court announced that it was running Counts 2, 4, and 6 consecutively because it is necessary to "protect the public and/or punish the defendant." The court concluded that this was not disproportionate to the seriousness of Smith's conduct and the danger that Smith poses to the public, adding that the harm caused by the two or more offenses was so great or unusual that no single prison term for any of the offenses that Smith committed would adequately reflect the seriousness of his conduct.

{¶37} This appeal followed.

II. Analysis

A. Self-Defense

{¶38} Smith's first assignment of error alleges that his convictions were against the manifest weight of the evidence because the State failed to prove beyond a reasonable doubt that he was not acting in self-defense. In asserting the affirmative

defense of self-defense, a defendant has the initial burden of producing legally sufficient evidence that his use of force was in self-defense. *State v. Mitchell*, 2023-Ohio-2604, ¶ 12 (1st Dist.). The elements of a self-defense claim in a deadly-force case are (1) the defendant was not at fault in creating the situation giving rise to the affray, (2) the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and his only means of escape was in the use of similar force, and (3) the defendant did not violate any duty to retreat. *State v. Sexton*, 2025-Ohio-718, ¶ 22 (1st Dist.). The State then bears the burden of persuasion to disprove at least one of the elements of self-defense (or defense of another) beyond a reasonable doubt. *Id.*

{¶39} We apply the manifest-weight-of-the-evidence review when scrutinizing whether the State met its burden of persuasion. *State v. Messenger*, 2022-Ohio-4562, ¶ 26. In reviewing the weight of the evidence, an appellate court must address clear conflicts in testimony and afford the factfinder deference; therefore, it cannot simply substitute its judgment for that of the factfinder. *State v. Reillo*, Slip Opinion No. 2026-Ohio-2701, ¶ 21. The Ohio Supreme Court recently addressed how a court of appeals must apply a weight-of-the-evidence challenge. *Id.* at ¶ 22-28.

> Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on *its effect in inducing belief*."

(Emphasis added in *Thompkins*.) *Reillo* at ¶ 25, citing *Eastley v. Volkman*, 2012-Ohio-

2179, ¶ 12, quoting *State v. Thompkins*, 1997-Ohio-52, ¶ 24. Accordingly, a reviewing court must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine 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. *Id.* at ¶ 26. A new trial, however, may be ordered only in exceptional cases where the evidence weighs heavily against the conviction. *Id.* at ¶ 27. In such cases, the reviewing court sits as a "'thirteenth juror' who may disagree with the fact-finder's resolution of the conflicting evidence." *Id.*, quoting *State v. Martin*, 2022-Ohio-4175, ¶ 26.

{¶40} In weighing the evidence, the reviewing court must always be mindful of the presumption in favor of the finder of fact. *Id.* at ¶ 28. "If the evidence may be construed in more than one way, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." (Citations omitted.) *Id.* The Court emphasized that we give deference to the fact finder, as the fact finder is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations to weigh the credibility of the testimony. *Id.*

1. Smith's Self-Defense Claim Fails

{¶41} Although Smith met his initial burden on his self-defense claim, it fails because the State disproved the first element by showing that Smith was at fault for creating the situation that led to the shooting because Smith aggressively approached the group with his gun drawn and he failed to put his gun away or withdraw from that altercation after the situation had de-escalated.

{¶42} While a person no longer has a duty to retreat from a place he or she is lawfully permitted to be, R.C. 2901.09(C) does not suggest that a trier of fact is

precluded from considering whether the defendant was the initial aggressor or whether the defendant attempted to withdraw from the situation when determining whether the defendant was at fault in creating the situation giving rise to the affray. *State v. Warth*, 2023-Ohio-3641, ¶ 31 (1st Dist.), quoting *State v. Hughkeith*, 2023-Ohio-1217, ¶ 88 (8th Dist.). The first element—often described as the "not at fault" requirement—does not require in all situations that the defendant "must refrain from throwing the first punch"; the concept extends beyond identifying the initial aggressor and examines whether the defendant's conduct leading to the confrontation created the situation that gave rise to the affray. *State v. Haley*, 2024-Ohio-2303, ¶ 108 (12th Dist.); *State v. Brock*, 2026-Ohio-2036 ¶ 36 (12th Dist.). In determining whether a defendant was at fault, courts consider whether the defendant escalated the encounter, such as by transforming a verbal dispute into a physical altercation or by introducing a weapon into the conflict. *State v. Mitchell*, 2023-Ohio-2604, ¶ 22 (1st Dist.).

{¶43} Here, Smith argues that C.R. was the initial aggressor because (1) Smith no longer had his gun raised when C.R. appeared in the doorway of the motel room, (2) C.R. confronted Smith and was trying to push past N.H. and A.S. to get closer to Smith, and (3) C.R. lifted his mask, stating that it would be the last time Smith saw his face, and fired his gun first. This argument fails simply because Smith aggressively approached the group with his gun drawn while asking them if they knew about the shooting on the previous night. Because the group posed no threat when Smith approached them, Smith was the initial aggressor.

{¶44} Smith's argument that he withdrew from the affray by lowering his gun also fails. Successfully withdrawing from the affray would certainly entail holstering the gun or otherwise putting it out of sight, which Smith failed to do. Because Smith initiated the altercation by aggressively approaching the group with his gun drawn and

failed to subjectively demonstrate his withdrawal, Smith was at fault for creating the situation leading to the shooting.

{¶45} The State needs only to disprove one of the elements of Smith's self-defense claim beyond a reasonable doubt. By disproving Smith's claim that he did not create the situation that caused the altercation, the State has met its burden and disproved Smith's self-defense claim. His first assignment of error is, therefore, overruled.

B. Jury Instructions

{¶46} In Smith's second assignment of error, he argues the trial court committed plain error by instructing the jury that he had a duty to retreat, in conflict with Ohio's "Stand Your Ground" law. Smith did not object to the instruction.

{¶47} Plain errors must satisfy three limitations set forth in Crim.R. 52(B). *State v. Browner*, 2024-Ohio-1547, ¶ 8 (1st Dist.), citing *State v. Garrett*, 2022-Ohio-4218, ¶ 63. First, an error, meaning a deviation from a legal rule, must have occurred. *Id.* Second, the error must be plain, in that there must be an obvious defect in the trial proceedings. *Id.* Third, the error must have affected substantial rights, meaning that "the trial court's error must have affected the outcome of the trial." *Id.* However, an appellate court may not reverse a criminal conviction due to jury instructions unless "it is clear that the jury instructions constituted prejudicial error." *State v. Houston*, 2020-Ohio-5421, ¶ 33.

{¶48} As to the "at-fault" element of self-defense, the trial court instructed the jury,

> At Fault
>
> The Defendant did not act in self-defense if the State proved beyond a reasonable doubt that the Defendant was at fault in creating

> this situation, incident, or argument that resulted in death. The Defendant was at fault if the Defendant was the initial aggressor and:
>
> A. [C.R.] did not escalate the incident to great bodily force or deadly force; or
>
> B. The Defendant provoked [C.R.] into using force; or
>
> C. The Defendant did not withdraw from the incident; or
>
> D. The Defendant withdrew from the incident but did not reasonably indicate by words or acts to [C.R.] of his withdrawal.

As to the third element of self-defense, the trial court instructed the jury,

> Duty to Retreat
>
> The Defendant had no duty to retreat before using force in self-defense, if the Defendant was in a place in which he lawfully had a right to be. Lawfully had a right to be means that the Defendant was not trespassing when he used force in self-defense. The Court finds that the Defendant was not trespassing.

{¶49} Under R.C. 2901.09(B), a person has no duty to retreat before using force in self-defense if that person is in a place in which the person lawfully has a right to be. A trier of fact shall not consider the possibility of retreat as a factor in determining whether a person who used force in self-defense reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety. *Warth*, 2023-Ohio-3641, at ¶ 30 (1st Dist.).

{¶50} Again, R.C. 2901.09(C) does not suggest that a trier of fact is precluded from considering whether the defendant attempted to withdraw from the situation when determining whether the defendant was at fault in creating the situation giving rise to the affray. *Id.* at ¶ 31. Therefore, the jury was not precluded from considering

whether Smith attempted to withdraw from the situation.

{¶51} Contrary to Smith's assertion, the trial court clearly instructed the jury that Smith had no duty to retreat and reiterated this when the jury submitted questions during deliberations. Smith's argument conflates the concepts of "withdrawal" and "retreat," which pertain to separate elements of self-defense. The instruction on withdrawal pertained to the first element regarding fault, while the instruction on duty to retreat pertained to the third element. These are distinct inquiries.

{¶52} The trial court did not commit plain error where the State presented overwhelming evidence that Smith was at fault in precipitating the shooting. The second assignment of error is overruled.

C. Prosecutorial Misconduct

{¶53} In his third assignment of error, Smith asserts the prosecutor committed misconduct during closing argument by making certain arguments concerning "consciousness of guilt" in violation of the trial court's ruling that the jury was to consider only that Smith left against medical advice. Smith failed to object to these statements, so we apply plain-error review.

{¶54} In determining whether prosecutorial misconduct has occurred, the test is whether (1) the prosecutor's remarks were improper, and, if so, (2) "whether they prejudicially affected the accused's substantial rights." *State v. Smothers*, 2025-Ohio-5250, ¶ 71 (1st Dist.), quoting *State v. Howard*, 2014-Ohio-655, ¶ 31 (1st Dist.), quoting *State v. Jones*, 2012-Ohio-5677, ¶ 200. The test balances the fairness of the trial against the prosecutor's culpability. *Id.*; *see State v. Godfrey*, 2025-Ohio-1575, ¶ 20 (1st Dist.); *Jones* at ¶ 200.

{¶55} Prosecutorial misconduct only creates reversible error when it deprives

the defendant of a fair trial. *Id.* The remarks must be evaluated in the context of the entire trial rather than individually. *Id.* Under this test, the defendant must demonstrate that there is a reasonable probability that, but for the prosecutor's misconduct, the outcome of the proceedings would have been different. *Id.*

{¶56} First, the comments that Smith points to in the State's closing were all based on the evidence presented at trial. In fact, the trial court stated that those were "good points" for the State to raise. Even though the trial court did not list the other conduct in the jury instructions, the trial court did not restrict the State from making statements in closing that were based on evidence that went toward consciousness of guilt. Finally, no plain error occurred because the State did not commit misconduct; the prosecutor's comments were based on evidence in the record. Smith's third assignment of error is, therefore, overruled.

D. Evidentiary Ruling

{¶57} In his fourth assignment of error, Smith argues that the trial court erred by allowing the State to question N.H. as to whether the shooting would have occurred had Smith not approached the group with the gun, then compounded this error by prohibiting defense counsel from asking N.H. whether the shooting would have occurred had C.R. not appeared in the doorway of the motel room.

{¶58} "A trial court has broad discretion in the admission of evidence, and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision." *State v. Carson*, 2019-Ohio-4550, ¶ 22 (1st Dist.), quoting *State v. Obermiller*, 2016-Ohio-1594, ¶ 61. "An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.*, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶59} The trial court's explanation is dispositive of this issue—defense counsel failed to object to the State's question while the State did object to defense counsel's similarly-posed question. While defense counsel's failure to object to the State's question to N.H. suggests that we review this issue for plain error, counsel did make a record as to what he perceived to be an inconsistent ruling. There is nothing in the record to suggest that the differing rulings prejudiced Smith; overall, it was evident that the shooting would not have occurred but for Smith's actions. Smith's fourth assignment of error is overruled.

E. Consecutive Sentencing

{¶60} In his fifth and final assignment of error, Smith argues that the aggregate 45-years-to-life sentence he received was excessive and proposes, in the alternative, that the trial court should have imposed 25 years to life. In the alternative, he asserts that 34 years to life in prison would have been the maximum sentence in considering the repeat-violent-offender specification.

{¶61} There is a general presumption in favor of concurrent service of prison terms in Ohio law. *See State v. Bonnell*, 2014-Ohio-3177, ¶ 16, 23; R.C. 2929.41(A). To deviate from this presumption and justify consecutive sentences, the trial court must make the findings outlined in R.C. 2929.14(C)(4). *State v. Beasley*, 2018-Ohio-493, ¶ 252. Specifically, the court must find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) at least one of the three findings outlined in R.C. 2929.14(C)(4)(a)-(c) applies. *Id.*

{¶62} Pursuant to R.C. 2953.08(G)(2), a reviewing court may modify or vacate a felony sentence only if it finds by clear and convincing evidence that the record does

not support the trial court's findings or the sentence is otherwise contrary to law. *State v. Jones*, 2024-Ohio-1083, ¶ 13.

{¶63} Smith concedes that the trial court made the requisite statutory findings under R.C. 2929.14 at the sentencing hearing and in the judgment entry but argues that the record did not support consecutive sentences. He does not claim that the sentences fell outside of the statutory range. Instead, Smith asserts that the trial court's reliance on his prior record and the fact that he shot four people was not sufficient to support consecutive sentences.

{¶64} Here, the trial court discussed its findings on the record. The court further discussed Smith's extensive history of criminal conduct beginning in his youth, including weapons, drugs, and violent adjudications and convictions. The record demonstrates that the first two prongs under R.C. 2929.14(C)(4) are met. The record further shows that "at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct." R.C. 2929.14(C)(4)(b). Finally, Smith's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crimes by him. R.C. 2929.14(C)(4)(c). The consecutive sentences are clearly and convincingly supported by the record. Smith's fifth assignment of error is overruled.

III. Conclusion

{¶65} For the foregoing reasons, we affirm the trial court's judgment.

Judgment affirmed.

BOCK, P.J., and **NESTOR, J.,** concur.