**[Cite as *State v. Yeager*, 2023-Ohio-2541.]**

# IN THE COURT OF APPEALS OF OHIO
## ELEVENTH APPELLATE DISTRICT
## LAKE COUNTY

| | |
|---|---|
| STATE OF OHIO,<br><br>Plaintiff-Appellee,<br><br>- v -<br><br>ANDRE M. YEAGER,<br><br>Defendant-Appellant. | **CASE NO. 2022-L-008**<br><br>Criminal Appeal from the Court of Common Pleas<br><br>Trial Court No. 2021 CR 001041 |

**O P I N I O N**

Decided: July 24, 2023
Judgment: Affirmed

*Charles E. Coulson*, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Andre M. Yeager*, pro se, PID# A784-808, Richland Correctional Institution, 1001 Olivesburg Road, P.O. Box 8107, Mansfield, OH 44905 (Defendant-Appellant).

EUGENE A. LUCCI, J.

**{¶1}** Appellant, Andre M. Yeager, has filed this pro se appeal from the judgment of the Lake County Court of Common Pleas convicting him, after trial by jury, of Grand Theft, Breaking and Entering, and Vandalism. Appellant raises multiple issues for this court's consideration. Specifically, appellant challenges: (1) the trial court's judgment permitting him to proceed to trial exercising his right to self-representation; (2) the sufficiency of the jury-verdict form; (3) the trial court's judgment allowing the admission of other-acts evidence, pursuant to Evid.R. 404(B); (4) the prosecutor's alleged introduction

of unfairly prejudicial evidence; and (5) the trial court's alleged errors in sentencing him to an aggregate term of 39-months imprisonment. For the reasons discussed in this opinion, we affirm the trial court's judgments.

**{¶2}** On March 4, 2021, at approximately 6:00 a.m., the Vision Emporium, an optometry clinic in Wickliffe, Ohio, was broken into and over $20,000 worth of glasses and frames were stolen. The suspect used a hand-held sledgehammer to break the glass of the business, entered the structure from a large hole in the front door, and eventually absconded with the merchandise.

**{¶3}** Anthony Previte is the funeral director for a funeral home located across the street from the Vision Emporium. Mr. Previte lives in the funeral home with his wife and children. On the morning of the incident, Mr. Previte's wife noticed a vehicle backed into the driveway in front of the funeral home's garage. Mr. Previte went into the garage and observed the vehicle, which was approximately two to four feet from the garage window. He then observed an individual exiting the Vision Emporium who was moving towards the vehicle. Mr. Previte called 911 and advised the operator that the clinic may have been broken into and the suspect was entering a vehicle parked in his driveway.

**{¶4}** Mr. Previte was able to provide 911 with the license plate number and described the vehicle as a silver Honda Civic. The vehicle drove away, and Mr. Previte additionally notified the operator of the direction the vehicle was traveling as it left. Police were immediately dispatched to the location. Mr. Previte noted the conditions on the morning of the incident were "clear" and he had a light which illuminated the driveway.

**{¶5}** The Vision Emporium has a video-surveillance system which captured the suspect breaking into the clinic with a "hand-held sledge" and taking merchandise. The

suspect had a bald head, appeared to be African American, was wearing shoes with a conspicuous pattern, and left with a box full of merchandise. The surveillance video in the Vision Emporium captured the incident in "night vision," which accurately captures activities occurring in the dark, but somewhat obscures colors. In particular, when surveillance occurs at night and the "night vision" is triggered, the visual complexion of colors is changed such that objects and individuals appear lighter than if the video occurred during the daytime.

**{¶6}** The funeral home also has a video-surveillance system. The funeral home's camera captured the silver Honda Civic backing into the driveway. The video shows the suspect who breaks into the Vision Emporium exits from the driver's side and a passenger exits and then enters the driver's side. The individual now in the driver's side, reclines the seat and waits for the suspect to return. As the suspect ambles toward the getaway car with a box full of glasses, he has an unusual gait pattern, walking with what was described as a slight limp.

**{¶7}** Sergeant Brett Peeples of the Wickiffe Police Department took a statement from Mr. Previte. Sgt. Peeples ran the license plate number through the LEADS system and found the 2001 silver Honda Civic was registered to an individual named Bhavinkumar Rana. The sergeant researched the recent history of the license plate and discovered that, six days prior to the underlying incident the license plate had been investigated by several Westlake, Ohio police officers. The history showed the plate was ran at approximately 2:26 a.m. on February 26, 2021. Sgt. Peeples stated it is uncommon to see multiple officers run the same license plate at roughly the same time.

**{¶8}** Sgt. Peeples notified the city of Westlake and contacted its records department which confirmed that on February 26, a police report was generated as a result of a stop. Sgt. Peeples obtained and reviewed the police report and determined there was video documentation from the stop. After reviewing the report, the sergeant discovered the occupants of the vehicle during the February 26 stop were appellant and his passenger, Richard Daniels. From the video, the sergeant asserted appellant had a completely bald head, like the suspect in the Video Emporium incident. Further, he noted that Mr. Daniels was wearing a substantially similar coat as the lookout from that incident. After investigations proceeded, the sergeant stated he was 100 percent certain Mr. Daniels was the lookout at the Vision Emporium incident because he had admitted as much and was later convicted.

**{¶9}** Officer Richard Dudas of the Westlake Police Department was the officer who stopped appellant and Mr. Daniels on February 26, 2021 at 2:26 a.m. He observed the vehicle with only one headlight illuminated and also noticed the vehicle travel left of center. He activated his emergency lights and proceeded with the traffic stop. Upon contacting the men via the passenger-side door, he noticed a small bag of marijuana and an open beer can near the console. He removed the men from the vehicle and, after backup arrived, searched the vehicle. He found two screwdrivers and a hand-held sledgehammer in the front passenger area. He also found a gray sweatshirt with broken pieces of glass in it. The men were ultimately released on scene.

**{¶10}** In the course of the investigation relating to the Vision Emporium incident, Wickliffe officers became aware of a break-in of an optometry clinic, “Doctors Snow and Durkin,” in Akron, Ohio which occurred on February 4, 2021. Akron Police Officer Vincent

Christian Reddish was alerted to an "alarm drop" at 3:23 a.m. He arrived at the scene and noticed a large two feet by two feet hole in the glass of the clinic's entry way. He additionally observed a hand-held hammer which was "barrel-shaped" on both sides which was resting near the clinic's door. The officer called for backup before entering the building. While waiting, he noticed a vehicle across the street from the scene. The vehicle was moving without headlights and appeared to be a light-colored sedan. Officer Reddish reported the vehicle and its direction of travel and advised other units to "check it out."

**{¶11}** Officer Cory Mook of the Akron Police Department was proceeding to the incident and was advised by another officer that he had heard someone yelling near a vehicle near the scene. Officer Mook was advised to stop the vehicle, which he did. He approached the passenger side of the vehicle and observed two men in the car, a driver and passenger. The passenger was breathing heavily and appeared "very nervous." Officer Mook identified the driver as Richard Daniels and the passenger as appellant. The officer additionally observed a black garbage bag full of sunglasses; he also noticed a number of sunglasses in the vehicle's console that still had "tags" or "bar codes" on them. A video from the clinic's surveillance system showed the suspect taking a black garbage bag from inside the structure after breaking in. Both men were arrested.

**{¶12}** On August 9, 2021, after appellant had been arrested for the Vision Emporium incident, Detective Don Dondrea of the Wickliffe Police Department met with appellant. During the interview, he noticed appellant was wearing shoes with a distinct pattern, exactly the same as the pattern on the shoes of the Vision Emporium suspect. The detective seized appellant's shoes and compared them with the suspect's shoes and determined they matched. Det. Dondrea then took the shoes to the Vision Emporium

during the night and placed them in similar locations as the suspect was seen. After reviewing the new footage from the video surveillance and comparing this footage with the video from the incident, the detective determined "they are the exact shoes."

**{¶13}** Appellant was indicted on September 20, 2021 on the following charges: Count One, Grand Theft, a felony of the fourth degree, in violation of R.C. 2913.02(A)(1); Count Two, Breaking and Entering, a felony of the fifth degree, in violation of R.C. 2911.13(A); and Count Three, Vandalism, a felony of the fifth degree, in violation of R.C. 2909.05(B)(1)(a). Pleas of "not guilty" were entered on appellant's behalf.

**{¶14}** On October 14, 2021, the state filed a notice of its intention to use Evid.R. 404(B) evidence at trial. The "other acts" evidence involved the February 4, 2021 Akron incident and the February 26, 2021 Westlake incident. Appellant requested a hearing; the matter was discussed on record and the trial court ruled it would permit the evidence as proof of plan, identity, and modus operandi.

**{¶15}** On October 18, 2021, appellant moved the trial court to represent himself. The trial court held a hearing and, after engaging in a lengthy colloquy, the court determined appellant knowingly, intelligently, and voluntarily waived his right to counsel. The waiver was also reduced to writing.

**{¶16}** The matter proceeded to jury trial, and appellant was found guilty on each count of the indictment. After a sentencing hearing, the trial court sentenced appellant to serve a stated term of 17 months on Count One, 11 months on Count Two, and 11 months on Count Three. The terms were ordered to be served consecutively for an aggegrate term of 39 months of imprisonment. Appellant now appeals.

**{¶17}** His first assignment of error provides:

> The trial court on November 9, 2021 deprived Yeager of his right to counsel for his complete defense under the Sixth and Fourteenth Amendments of the United States Constitution, and Section 10, Article 1 of the Ohio Constitution as the court failed to obtain and ensure that Yeager had made a valid Constitutional voluntary, knowing, and intelligent waiver of his right to counsel in violation of Crim.R. 44, *Johnson v. Zerbst*, 304 U.S. 458, 467-68, *Argersinger v. Hamlin*, 407 U.S. 25, *Carnley v. Cochran*, 369 U.S. 506, *State v. Gibson*, 345 N.E.2d 399, *Gideon v. Wainwright*, 372 U.S. 335, *State v. Martin*, 103 Ohio St.3d 385, and *Von Moltke v. Gillies*, 332 U.S. 708. (Sic throughout.)

**{¶18}** A criminal defendant has a constitutional right to represent himself at trial. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 89, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A defendant may proceed to defend himself without counsel if he has made a knowing, voluntary, and intelligent waiver of the right to counsel. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 24. *See also* Crim.R. 44(A) (defendant may forgo counsel if after being fully advised, he knowingly, intelligently, and voluntarily waives the right to counsel). A criminal defendant must "unequivocally and explicitly invoke" the right to self-representation. *State v. Cassano,* 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 38. Requiring a request for self-representation be both unequivocal and explicit ensures a defendant will not "tak[e] advantage of and manipulat[e] the mutual exclusivity of the rights to counsel and self-representation." *United States v. Frazier-El,* 204 F.3d 553, 559 (4th Cir.2000). For this reason, courts must "indulge in every reasonable presumption against waiver" of the right to counsel. *Brewer v. Williams,* 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

**{¶19}** To establish a valid and effective waiver of the right to counsel, a trial court must make a sufficient inquiry to determine whether the defendant fully understands and

intelligently relinquishes that right. *Johnson* at ¶ 89, quoting *State v. Gibson*, 45 Ohio St.2d 366, 345 N.E.2d 399 (1976), paragraph two of the syllabus; *Martin* at ¶ 39. The United States Supreme Court, however, has not set forth a precise formula to obtain a valid waiver when a defendant desires to proceed without counsel. *Johnson* at ¶ 101. Generally, to be valid, a waiver of the right to ""counsel must be made with an appreciation of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."" *Martin* at ¶ 40, quoting *Gibson* at 337, quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed. 309 (1948); *State v. Suber*, 154 Ohio App.3d 681, 2003-Ohio-5210, 798 N.E.2d 684, ¶ 15 (10th Dist.). A trial court must make a defendant aware "'of the dangers and disadvantages of self-representation, so that the record will establish that "'he knows what he is doing and his choice is made with eyes open."'" *State v. Montgomery*, 10th Dist. Franklin No. 02AP-927, 2003-Ohio-2888, ¶ 14, quoting *Faretta* at 835, quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942).

**{¶20}** During a November 9, 2021 hearing, appellant made an unequivocal and explicit request to represent himself. Upon receipt of the request, the trial court observed:

> Well, before I'm allowed to let you represent yourself, as you're aware, I have to ask you a series of questions. We did this once before in a prior occasion. It's going to be very similar questions, but I'm required to do that to just make sure you understand and it's something you still want to do in this case. So we're going to do that at this time; all right?

**{¶21}** The court then asked appellant's age, to which he replied, "52." The court asked whether appellant can read, write, and understand the English language. Appellant

stated he could. The court inquired into whether appellant had ingested any drugs or alcohol prior to coming to court. Appellant responded in the negative. The court asked appellant if he was on any prescribed medication and, if so, whether he had recently taken any. Appellant stated he is on a medication which he had taken the night before, but the medication did not make it difficult to understand or appreciate where he was or what was occurring in court. Appellant was asked if he was an attorney. Appellant stated he was not but was a trained paralegal who had previously worked with lawyers. Appellant stated, in addition to his paralegal training, he graduated high school and attended two years of college.

**{¶22}** The court then went on to explain each count appellant was charged with in the indictment. The court set forth the elements of the offenses, the name of the offenses, and the degree of felony each offense is designated. Appellant stated he understood the charges and had no questions about them at that time. The court went on to advise appellant of the potential punishment he would face if he were convicted of each offense. Appellant stated he understood.

**{¶23}** Next, the trial court inquired into appellant's past trial experience. The court noted it was aware of at least one matter in which appellant defended himself before the presiding judge. Appellant acknowledged he had defended himself before the judge in a prior Breaking and Entering case and he had made a valid waiver of counsel at that time. And appellant confirmed that, in that matter, he was acquitted of the charge. Appellant then advised the court that he had defended himself in three other cases, one resulting in a hung jury and the other two resulting in guilty findings. Also, in light of his previous experience, appellant confirmed he was involved in picking juries and understood what

that process entails. He also represented, in each of the cases he represented himself, he gave opening statements, closing arguments, questioned witnesses, and called his own witnesses.

**{¶24}** The court asked appellant if he understood he had to follow the rules of evidence while representing himself. Appellant stated he did. The court further explained that he would be held to the same standard as a certified, practicing attorney and that lack of knowledge on appellant's behalf would not prevent the court from enforcing evidentiary and procedural rules. Appellant acknowledged the court's statement and expressly stated he understood. The court advised appellant that he would not be allowed to testify by way of the questions he asks witnesses. Instead, if he wished to testify, he would subject himself to cross-examination by the prosecutor. Appellant stated he understood.

**{¶25}** The court advised appellant if he were found guilty of any of the charges, he would have the right to an appeal. In order to preserve an issue, however, appellant would have to raise it at the trial level first. And, the court emphasized that failure to challenge a point during trial could result in waiver. Appellant stated he understood, but brought up the possibility of raising plain error on appeal. The trial court cautioned appellant not to rely upon the doctrine of plain error because "it's a much tougher road to hoe." Appellant stated he understood.

**{¶26}** The court reiterated that appellant had a constitutional right to an attorney and even though appellant had successfully represented himself before, it is not a good idea to waive the right to an attorney. The court explained that a person representing himself is self-invested and might not be able to "sit back and react rationally and

objectively" due to the personal interest. Appellant acknowledged the court's point. The court, in light of the foregoing, asked appellant one final time: "You still want to represent yourself?" Appellant responded in the affirmative.

**{¶27}** The trial court went on to appoint appellant's former counsel, with whom appellant admitted he had no problem, as "stand-by" counsel. The court explained the role of stand-by counsel to appellant who stated he understood the attorney's role. After reaffirming his interest in representing himself for the third time on record, the court made the following statement:

> Well, based on the foregoing the court finds the defendant does understand the nature of the charges and the potential penalties he's facing if he's found guilty. He has a fundamental right - - the court understands that he understands that he has a fundamental right to counsel and what the waiver of this right to counsel means. The court further finds that Mr. Yeager understands what is expected of him in representing himself, as well as the significant risks involved in representing himself.
>
> The court finds the defendant has knowingly, voluntarily, and intelligently waived his right to counsel and that he is competent and has the ability to represent himself at trial in this case. Therefore, I will allow - - grant the defendant's motion and allow him to represent himself. The court will appoint Mr. Tomas Tatarunas as stand-by counsel in this matter.

**{¶28}** The trial court then obtained a written waiver signed by appellant in open court.

**{¶29}** The trial court fully engaged appellant and apprised him of the details, nuances, and perils of representing himself. The court provided more than sufficient warning of the seriousness of the charges and the possible results he might experience if he were convicted.

**{¶30}** Moreover, appellant graduated from high school, had two years of college education, and is (or was) a certified paralegal. And, germane to this matter, appellant had represented himself on four other occasions. In two of those occasions, received favorable results defending himself, obtaining an acquittal and a "hung" jury.

**{¶31}** It is additionally important to underscore that appellant was skillful in questioning witnesses and, most critically, in cross-examination. He leveled regular and informed objections during the prosecutor's direct examination and defended his objections with reasonable and legally-based justifications. Appellant was articulate and respectful to the court, witnesses, and the prosecution. Finally, appellant presented a plausible "identity" defense to the charges. Viewing the circumstances in their totality, we are completely satisfied that appellant knowingly, voluntarily, and intelligently chose to represent himself.

**{¶32}** Appellant's first assignment of error lacks merit.

**{¶33}** Appellant's second assignment of error provides:

> The trial court committed prejudicial error as a matter of law when it sentenced appellant on a fifth degree felony for breaking and entering when, in fact, the jury verdict form only convicted him of a first degree misdemeanor criminal trespass in violation of [the] Due Process and [the] Equal Protection Clause[s] of the United States Constitution and the verdict form was insufficient to support his conviction for breaking and entering as a felony under R.C. 2945.75(A)(2) as his verdict form simply stated 'We, the jury, being duly impaneled and sworn, find the defendant, Andre M. Yeager guilty of breaking and entering.

**{¶34}** Appellant's second assignment of error argues the jury's verdict form was inadequate to convict him of felony-five breaking and entering and thus, as a matter of law, he can only be convicted of misdemeanor trespassing. Appellant contends that the

Breaking and Entering statute, R.C. 2911.13(A) "contemplates the enhancement of 'trespass in an unoccupied structure.'" Because the verdict form did not include this alleged enhancement, the guilty verdict constitutes a finding of guilty of misdemeanor trespass. We do not agree.

**{¶35}** In support of his position, appellant cites R.C. 2945.75, which provides:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> (1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.
>
> (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

**{¶36}** Appellant was convicted of, inter alia, Breaking and Entering, in violation of R.C. 2911.13(A), which states: "No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony." To establish the crime of Breaking and Entering, the state must prove appellant "trespass[ed] in an unoccupied structure." This is not an enhancement, but a basic and necessary element of the crime. In this respect, R.C. 2945.75(A)(2) does not apply to this matter.

**{¶37}** Moreover, statutorily, if a defendant is convicted under R.C. 2911.13(A) or (B), he or she is guilty of a fifth-degree felony. *See* R.C. 2911.13(C). Appellant correctly recites the language of the jury's verdict form in his assignment of error. Because,

however, a person found guilty of Breaking and Entering can *only* be convicted of a fifth-degree felony, there is no lesser degree of the offense. In this additional respect, the statutory pronouncement under R.C. 2945.75(A)(2), requiring a guilty-verdict form to set forth either the degree of the offense or an additional element that might constitute an enhancement, is inapplicable.

**{¶38}** Appellant's second assignment of error lacks merit.

**{¶39}** Appellant's third assignment of error asserts:

> The trial court denied the actual innocent appellant his Constitutional right to Due Process under the Fifth, Sixth and Fourteenth Amendments and Article 1, Section 10 and 16 of the Ohio Constitution when Judge Culotta abused his discretion in admitting other-acts evidence under 404(B) during the trial of Andre Yeager on Grand Theft, Vandalism, [and] Breaking and Entering without any analysis under *State v. Williams*, 2012-Ohio-5695 before allowing the state to use the inadmissible other acts evidence for each and every single purpose permitted under the rule thus appellant was denied his due process right to a fair trial by the other acts testimony of Officer's Mook, Reddish, Brett Peeples and Richard Dudas coupled with the prosecutor[']s repeated references to the improper, inadmissible evidence and there is a factual reasonable possibility that the improper evidence contributed to the conviction and therefore the unfair prejudicial error could never be harmless beyond a reasonable doubt in violation of the Sixth and Fourteenth Amendments of the United States Constitution, *Old Chief v. United States*, 519 U.S. 172, 179.

**{¶40}** Evid.R. 404(B) provides, in relevant part:

> (1) *Prohibited Uses.* Evidence of any other crime, wrong or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted Uses; Notice.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

**{¶41}** Accordingly, "Evid.R. 404(B) allows 'other acts' evidence as proof of identity." *State v. Allen*, 73 Ohio St.3d 626, 632, 653 N.E.2d 675 (1995) "When the identity of the perpetrator is at issue, 'other act' evidence tends to show the defendant's identity as the perpetrator by showing that he 'committed similar crimes within a period of time reasonably near to the offense on trial, and that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes.'" *State v. Shedrick*, 61 Ohio St.3d 331, 337, 574 N.E.2d 1065 (1991), quoting *State v. Curry*, 43 Ohio St.2d 66, 73, 330 N.E.2d 720 (1975). Further, "[t]o be admissible to prove identity through a certain *modus operandi,* other-acts evidence must be related to and share common features with the crime in question." *State v. Lowe*, 69 Ohio St.3d 527, 634 N.E.2d 616 (1994), paragraph one of the syllabus.

**{¶42}** The rationale for refusing to admit "other-acts" evidence, however, is such evidence may tempt a jury to draw an inference of guilt, not from the substantive evidence, but from the prior "bad acts" or the defendant's character for engaging in such acts. In other words, "[o]ffering evidence of a person's character poses an inherent risk that the trier of fact will be distracted from the central issues in the case, and decide the case based upon the trier's attitude toward a person's character, rather than upon an objective evaluation of the operative facts." *State v. Grubb,* 111 Ohio App.3d 277, 280, 675 N.E.2d 1353 (2d Dist.1996), citing Weissenberger, *Ohio Evidence,* Section 404.4 (1996). "Character evidence is generally excluded not because it lacks relevancy, but because its probative value is substantially outweighed by the danger of unfair prejudice." *Id.,* citing Weissenberger at Section 404.2. Exclusion of this evidence, therefore, protects defendants against unfair prejudice.

**{¶43}** Appellant argues the trial court erred in admitting Evid.R. 404(B) evidence because it failed to consider the unfair prejudice he would suffer by allowing the evidence. We do not agree.

**{¶44}** Prior to trial, the trial court ruled in open court on the state's notice of intention to introduce Evid.R. 404(B) evidence and appellant's memorandum in opposition. The trial court stated:

> [I]n addressing this, [the court] first finds that the evidence, other acts evidence that the state wants to introduce, is relevant to an issue in this case on the issue of identity which is obviously a relevant issue. Also the evidence the state wants to introduce, the other acts evidence, does fall under several of the exceptions set forth in 404(B). Falls under the exception of proof of plan, proof of identity, proof of modus operandi. As the prosecutor mentioned, it's directly on point. It's classic 404(B) evidence. It's not even other B & Es. It's the exact same type of store that was broken into, and the exact same type of method that was broken into, using the same type of tools.
>
> The defendant mentioned *State versus Lowe* and it's cited by the state. Other acts evidence is permissible to prove identity as being used, "…to prove identity through the characteristics of the acts rather than the person's character." And that is exactly what the state is attempting to do here. The characteristics of the act is what they want to introduce and what I'm going to allow. That being breaking into an eyewear optical store by using a hammer to break through the window and the glass and it's the exact same thing that was done in this case.
>
> So the court finds that I will permit that evidence to be admissible as proper 404(B) evidence to prove plan, identity, and modus operandi. * * * I'm allowing the evidence of the incident in Akron as well as the traffic stop in, was it Westlake * * *.

**{¶45}** In *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, the Supreme Court of Ohio set forth the following test for admitting evidence pursuant to Evid.R. 404(B):

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R 403.

**{¶46}** Appellant takes issue with the court's alleged failure to entertain the third prong of the admissibility test.

**{¶47}** In this matter, the probative value of the Akron break-in and the Westlake stop is significant and strongly dispositive of appellant's identity. The Akron break-in demonstrates a fundamental commonality in modus operandi and methodology. The Westlake stop connects appellant and his accomplice with the vehicle that was used as the getaway in the underlying matter. Although the trial court did not expressly engage in a weighing exercise on record, this is not fatal. We recognize the introduction of the other-acts evidence was damaging to appellant's identity defense and was clearly prejudicial. The evidence of the other acts, however, does not strongly suggest the forbidden inference that appellant was acting in conformity with a predisposition to commit the alleged crime at issue.

**{¶48}** The Westlake stop simply connected appellant to the vehicle at the Vision Emporium incident. And the Akron break-in demonstrated that appellant had previously

used a hand-held sledgehammer to unlawfully enter an optometry clinic to take various types of designer eyewear. The exact same facts appellant was tied to in the Wickliffe incident. Fundamentally, this demonstrates a common plan, modus operandi, and therefore reasonably supports an inference of identity. In our view, the probative value of the other-acts evidence was not substantially outweighed by the danger of *unfair* prejudice. To the contrary, the evidence was fairly and reasonably admitted to assist the jury in connecting appellant with the crimes alleged in the underlying indictment.

**{¶49}** Appellant's third assignment of error lacks merit.

**{¶50}** Because they are related, we shall address appellant's fourth assignment of error and sixth assignment of error together. They provide:

> [4.] The actual innocent appellant was denied his constitutional right to due process and a fair trial when prosecutor Carolyn Mulligan committed actual fraud and fraud-on-the-court when she prepared state's notice of intention to introduce 404(B) evidence knowing the actual person who physically went through the window in Akron after breaking it with a hammer was [a] Caucasian male not the African defendant, she knew the silver Honda was not owned by Richard Daniels and appellant's phone number was no longer the same number as was in Akron in violation of *Schlup v. Delo*, Sixth and Fourteenth Amendments of the United States Constitution.
>
> [6.] Appellant who is actually innocent and asked for review under actual innocence standard as a Constitutional violation resulted in him being deprived of his liberty and denied due process of law and his federal Constitutional right to a fair trial when prosecutor Carolyn Mulligan knowingly used perjured testimony of Akron Officer Reddish who claimed that Dr. Jeff Durkin did not ever state that the actual person who came through the window of his store was Caucasian and appellant was denied due process of law when prosecutor Carolyn Mulligan knowingly used perjured testimony, conspired with Akron police officers to lie under oath at Andre M. Yeager's jury trial and fabricated evidence to prepare the state's motion

> to use other acts evidence in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

**{¶51}** Appellant's arguments under these assignments of error essentially claim the prosecutor committed prosecutorial misconduct on behalf of the state by fraudulently misrepresenting evidence, procuring false testimony, and/or suborning perjured testimony of certain witnesses. We find them unavailing.

**{¶52}** "'[T]he touchsone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Slagle*, 65 Ohio St.3d 597, 606, 605 N.E.2d 916 (1992), quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Hence, prosecutorial misconduct is not a basis for overturning a conviction, unless, on the record as a whole, the misconduct deprived the defendant of a fair trial. *State v. Dudas,* 11th Dist. Lake Nos. 2008-L-109, 2008-L-110, 2009-Ohio-1001, ¶ 26.

**{¶53}** Appellant's arguments presume the state admitted evidence it knew to be false or somehow corruptly induced witnesses to falsify testimony. Appellant has failed to establish these serious allegations and therefore essentially assumes what he needs to prove in order to establish his claims.

**{¶54}** Initially, the other-acts evidence submitted by the state was introduced in a good-faith effort, pursuant to Evid.R. 404(B), to establish appellant's identity, plan, and/or modus operandi. Although appellant continuously maintained the individual in the Akron break-in was Caucasian, this was premised upon comments made by Dr. Jeff Durkin, one of the owners of the Akron optometry clinic where the break-in occurred. Appellant points out that, pursuant to the evidence of Officer Reddish's body camera, Dr. Durkin, while

viewing the clinic's video-surveillance footage, claimed the suspect in the incident was Caucasian. The footage to which appellant referred was not played for the jury, but it was admitted as Defendant's Exhibit J. And appellant underscored his position so the jury was able to consider and evaluate the claim in relation to the remaining evidence, including the evidence that appellant was arrested near the clinic with the stolen merchandise. In light of this backdrop, we cannot conclude that the state submitted this evidence with any alleged knowledge that it was false or inaccurate. Appellant's due process right to a fair trial was not violated in this respect.

**{¶55}** Further, evidence was adduced that appellant's accomplice, Richard Daniels, purchased the silver Honda from an auction and, in effect, had failed to register the vehicle under his name. The vehicle was therefore connected to Mr. Daniels as well as the Westlake stop *and* the Vision Emporium incident. The jury was able to weigh the evidence and draw the reasonable inference that Mr. Daniels was the owner of the vehicle at issue and was present with appellant at the Vision Emporium incident. We perceive nothing unfair in the admission of the evidence relating to the vehicle in question.

**{¶56}** Finally, appellant argues that his due process rights were violated when the state introduced evidence of a phone number appellant allegedly had during the Westlake stop. He claims that because his phone number was not the same at the time he was arrested in connection with the Vision Emporium incident as that obtained during the Westlake stop, his right to a fair trial was denied. Again, we do not agree.

**{¶57}** The prosecutor introduced testimony that, even though appellant had different phones at different times, it is not inconceivable that a person might have more than one phone or could change phones. We accordingly conclude the evidence

appellant challenges goes to weight, not admissibility. The jury was able to weigh the evidence that there were different phone numbers and draw reasonable inferences from this weighing exercise. We discern no error, let alone unfairness.

**{¶58}** Appellant's fourth and sixth assignments of error lack merit.

**{¶59}** Appellant's fifth assignment of error contends:

**{¶60}** "Appellant's breaking [and] entering conviction was not supported by legally sufficient evidence as it was obtained in violation of the Due Process Claus of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article 1 and 16 of the Ohio Constitution and Criminal Rule 29."

**{¶61}** A "sufficiency" argument raises a question of law as to whether the prosecution offered some evidence concerning each element of the charged offense. *State v. Windle,* 11th Dist. Lake No. 2010-L-033, 2011-Ohio-4171, ¶ 25. "[T]he proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Troisi,* 179 Ohio App.3d 326, 2008-Ohio-6062, 901 N.E.2d 856, ¶ 9 (11th Dist.), citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "'Sufficiency of the evidence tests the burden of production.'" *State v. Rice*, 2019-Ohio-1415, 135 N.E.3d 309, ¶ 65 (11th Dist.), quoting *State v. McFeely*, 11th Dist. Ashtabula No. 2008-A-0067, 2009-Ohio-1436, ¶ 23.

**{¶62}** Appellant was convicted of Breaking and Entering, in violation of R.C. 2911.13(A), which provides: "No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony."

**{¶63}** Appellant argues the state failed to present evidence to establish, beyond a reasonable doubt, that the Vision Emporium was "unoccupied" at the time the March 4, 2021 incident occurred. He claims there was no testimony that, at the time of the crime, "nobody was inside" the structure. This argument lacks merit.

**{¶64}** "[C]ircumstantial evidence and direct evidence inherently possess the same probative value." *State v. Fasline*, 11th Dist. Trumbull No. 2014-T-0004, 2015-Ohio-715, ¶ 39, citing *State v. Biros*, 78 Ohio St.3d 426, 447, 678 N.E.2d 891 (1997). "Circumstantial evidence has been defined as testimony not grounded on actual personal knowledge or observation of the facts in controversy, but of other facts from which inferences are drawn, showing indirectly the facts sought to be established." *State v. Payne*, 11th Dist. Ashtabula No. 2014-A-0001, 2014-Ohio-4304, ¶ 22, citing *State v. Nicely*, 39 Ohio St.3d 147, 150, 529 N.E.2d 1236 (1988). "An inference is 'a conclusion which, by means of data founded upon common experience, natural reason draws from facts which are proven.'" *Windle*, 2011-Ohio-4171, at ¶ 34, quoting *State v. Nevius*, 147 Ohio St. 263, 71 N.E.2d 258 (1947). "It consequently follows that 'when circumstantial evidence forms the basis of a conviction, that evidence must prove collateral facts and circumstances, from which the existence of a primary fact may be rationally inferred according to common experience.'" *State v. Armstrong*, 11th Dist. Portage No. 2015-P-0075, 2016-Ohio-7841, ¶ 22, quoting *Windle* at ¶ 34.

**{¶65}** Lindsey Savitt, the office manager and daughter of the owner of the Vision Emporium testified she was notified and arrived at the scene at approximately 7 a.m. on the date of the incident. Ms. Savitt testified that police alerted her that the business' alarm had been activated at approximately 6:30 a.m. that morning. And, upon arrival, she

observed the clinic's front glass door had a hole in it and a significant amount of merchandise was missing.

**{¶66}** Ms. Savitt testified the clinic's hours are from Monday through Thursday, 8 a.m. to 5 p.m. and on Saturday, 8:30 a.m. to 1 p.m. The break-in occurred well outside of the hours of business operation. In light of this point, the jury was able to draw the inference that the structure was "unoccupied" at the time the crime took place. There was consequently sufficient, credible circumstantial evidence that the Vision Emporium was "unoccupied" as a matter of law to support the jury's verdict on this element.

**{¶67}** Appellant's fifth assignment of error lacks merit.

**{¶68}** Appellant's seventh assignment of error provides:

**{¶69}** "The cumulative errors in the trial denied appellant due process under the Ohio and Federal Constitutions."

**{¶70}** Under his final assignment of error, appellant asserts his convictions should be reversed based upon the cumulative errors throughout the proceedings. Because, however, we find no error, there can be no cumulative error.

**{¶71}** Appellant's seventh assignment of error lacks merit.

**{¶72}** Although the foregoing analysis fully addresses each of appellant's primary assignments of error, this court granted appellant leave to file supplemental assignments of error. Each of his first four supplemental assignments of error address purported sentencing irregularities. We shall therefore address them collectively. They provide, respectively:

> "[1.] Appellant was denied due process of law when Judge Culotta imposed consecutive sentences without first considering the number of consecutive sentences along with appellant's aggregate sentence.

> "[2.] Appellant was denied due process of law when Judge Culotta failed to consider appellant's mental illness in mitigation of consecutive sentences when he made the organized crime finding when there was no record support of a plan, serious finding.
>
> "[3.] Appellant's consecutive sentences are contrary to law as the sentences of one month short of each maximum sentence were imposed as a trial tax and the long sentence does not fit the sentences of other Ohio offenders of the same offenses.
>
> "[4.] The trial court's imposition of consecutive sentences was not supported by judicial fact finding necessary to overcome the presumption of concurrent sentencing."

**{¶73}** Pursuant to R.C. 2929.11(A), "[a] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing," and it "shall consider the factors * * * relating to the seriousness of the conduct" and "to the likelihood of the offender's recidivism." R.C. 2929.12(A).

**{¶74}** This court reviews felony sentences pursuant to R.C. 2953.08(G)(2). That subsection provides, in pertinent part:

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

**{¶75}** "A sentence is contrary to law when it is 'in violation of statute or legal regulations' * * *." *State v. Meeks*, 11th Dist. Ashtabula No. 2022-A-0060, 2023-Ohio-988, at ¶ 11, quoting *State v. Jones* 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649, ¶ 34. Thus, "'[a] sentence is contrary to law when it does not fall within the statutory range for the offense or if the trial court fails to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12.'" *State v. Shannon*, 11th Dist. Trumbull No. 2020-T-0020, 2021-Ohio-789, ¶ 11, quoting *State v. Brown*, 2d Dist. Montgomery Nos. 24520, 24705, 2012-Ohio-199, ¶ 74; *see also State v. Wilson*, 11th Dist. Lake No. 2017-L-028, 2017-Ohio-7127, ¶ 18. The Supreme Court has further held that a sentence is contrary to law if "it is imposed 'based on factors or considerations that are extraneous to those [seriousness and recidivism factors] that are permitted by R.C. 2929.11 and 2929.12.'" *Meeks* at ¶ 11, quoting *State v. Bryant*, 168 Ohio St.3d 250, 2022-Ohio-1878, 198 N.E.3d 68, ¶ 22. "But an appellate court's determination that the record does not support a sentence does not equate to a determination that the sentence is 'otherwise contrary to law' as that term is used in R.C. 2953.08(G)(2)(b)." *Jones* at ¶ 32.

**{¶76}** Further, this court has frequently noted that "even though a trial court is required to consider the R.C. 2929.11 and R.C. 2929.12 factors, it is not required to make specific findings on the record to comport with its statutory obligations." *Shannon* at ¶ 17, citing *State v. Parke*, 11th Dist. Ashtabula No. 2011-A-0062, 2012-Ohio-2003, ¶ 24; *State v. Blake*, 11th Dist. Lake No. 2003-L-196, 2005-Ohio-686, ¶ 16.

**{¶77}** Pursuant to R.C. 2929.14(C)(4), separate prison terms for multiple offenses may be ordered to be served consecutively if the court finds it is necessary to protect the

public from future crime or to punish the offender; that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and if the court also finds any of the factors in R.C. 2929.14(C)(4)(a)-(c) are present. Those factors include the following:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) 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.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

**{¶78}** To impose consecutive terms of imprisonment "a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry[.]" *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37.

**{¶79}** At the sentencing hearing, the trial court made the following statements on the record:

> This court reviewed the presentence report and investigation. I received a victim impact statement. I've read and considered that. I've considered the particular facts and circumstances of the offenses involved here, the nature of the offenses and obviously I presided over the trial and was able to hear all the evidence that was involved and considered that.

I've considered what's been said here today by Mr. Tatarunas on behalf of Mr. Yeager, Mr. Yeager himself, the prosecutor's comments and recommendations. All of this is being considered in light of the purposes and principles of felony sentencing which are set forth in 2929.11 of the Revised Code.

As for the factors indicating the conduct is more serious, the Court finds that the victim here suffered serious, serious economic harm. Damage was over $25,000 all together. There was serious psychological harm as well. In reviewing the victim impact statement * * * [i]t says multiple employees quit because of what happened. They were in fear thinking something like this was going to happen again.

The Court finds also that the Defendant acted as part of an organized criminal activity. The Court also will find other relevant factors indicating it's more serious is just the nature of the conduct itself. In terms of B&Es, vandalism, this is one of the worst forms of the offenses you've committed. This is what you see in movies in terms of what happened. Normal B&E isn't anything like this and the damage that was caused by Mr. Yeager and the theft that occurred. People break into stores, steal cigarettes. But to do what he did in this case and the damage that he caused without any concern or care whatsoever. The very evidence from watching the video, certainly makes the conduct in this case more serious than normal.

There's nothing that makes it less serious.

As for the recidivism factors, almost all of these are present. The Defendant committed this offense while he was [on] bond for another breaking and entering out of Summit County or the city of Akron. He's got a lengthy, lengthy, lengthy history of criminal convictions dating back thirty-four years which would make him eighteen years old at the time when he first started. He has served multiple prison terms. On my count I have one, two, three, four, five, six, seven, eight, nine, ten, eleven; eleven separate cases in which he was - - at least eleven separate cases in which he was sentenced to prison. That's six separate terms. Some of those counts or cases were concurrent with each other. But at least six separate prison stints. Some of those were lengthy periods of time. I couldn't figure it out, the total amount of years, but thirty-four years as an adult that he's spent in prison. But it's a significant number

of those years. He committed this offense only four months after getting out of prison for committing multiple B&Es. There's no genuine remorse at all.

There's no factors indicating recidivism is less likely; recidivism is going to occur. There's no question on that based on the history here and conduct, on Mr. Yeager's conduct and history.

Under [R.C.] 2929.13(B)(1), the Court finds the Defendant acted as part of organized criminal activities, he's previously served a prison term, he committed the offense while he was on bond. Those are all factors overriding any presumption for community control. [This] permits the Court to impose a prison sentence. Prison is consistent with the purposes and principles of sentencing. The Defendant's not amenable to any available community control sanctions.

The Court further finds that the three offenses here do not merge for purposes of sentencing. Each of these were committed separately, independently. Again the B&E is committed as soon as he breaks the window with the intent to just commit a B&E. He doesn't have to commit the offense. Vandalism throughout the inside of the store breaking all the showcases and windows. Those are all separate acts. The Court finds they do not merge. Not even an issue, quite frankly.

Therefore, it will be the sentence of this Court that on Count One, a charge of Grand Theft, the Defendant serve a term in prison of seventeen months. On Count Two, the charge of Breaking and Entering, the sentence of this Court the Defendant serve a term in prison of eleven months. Count Three, a charge of Vandalism, it's the sentence of this Court the Defendant serve a term in prison of eleven months. Each of these * * * sentences will be served consecutive to each other for a total of thirty-nine months in prison. * * *

The Court finds in this matter that consecutive service is necessary to protect the public from future crime and to punish the offender. That the sentences are not - - consecutive sentences are not disproportionate to the seriousness of his conduct and the danger that he poses to the public. And this Court further finds that the Defendant committed these offenses while he was waiting trial and on bond in Akron; that at least two of these multiple offenses were committed as part

> of one or more courses of conduct and the harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of the courses of conduct adequately reflect the seriousness of his conduct and his history [of] criminal conduct going back thirty-four years demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender which will occur when he gets the opportunity.

**{¶80}** The individual sentences for each conviction were within the statutory range and were clearly imposed as a result of the trial court's overt and express consideration of the R.C. 2929.11 and R.C. 2929.12 factors. They are therefore *not* contrary to law.

**{¶81}** Moreover, appellant's contention that the trial court erred in failing to consider his mental illness is belied by the record. His counsel at sentencing directed the court's attention to appellant's potential, yet unspecified mental illness. The court determined that, irrespective of counsel's representation, nothing in the record made the criminal acts less serious. Simply because the court did not find the purported mental illness as a mitigating factor does not mean it failed to consider this point.

**{¶82}** Appellant also argues the trial court denied him due process of law when it imposed consecutive sentences without first considering the individual sentences for each crime. The record demonstrates, as just noted, that the court engaged in a lengthy recitation of the reasons why it elected to impose the individual sentences. Only after it made these findings *and* imposed the individual sentences did the court order the sentences to be served consecutively. And, in so doing, the trial court made the appropriate statutory findings to support the imposition of consecutive sentences. Appellant's challenges are meritless.

**{¶83}** Finally, appellant maintains the trial court erred when it imposed sentence without considering the proportionality of the aggregate term against other similar

offenders. This court, however, "has repeatedly held that consistency in sentencing is established by the trial court's application of the statutory sentencing guidelines[,]" and not by comparison of the sentence to other offenders. *State v. Petti*, 11th Dist. Lake No. 2012-L-045, 2012-Ohio-6130, ¶ 21, citing *State v. Swiderski*, 11th Dist. Lake No. 2004-L-112, 2005-Ohio-6705, ¶ 58. Moreover, "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *Jones*, 2020-Ohio-6729, at ¶ 42.

**{¶84}** Appellant's first through fourth supplemental assignments of error lack merit.

**{¶85}** For his final supplemental assignment of error, appellant states:

**{¶86}** "The trial [court] committed prejudicial error when appellant was sentenced on count two for [a] felony when the jury verdict form was contrary to law under R.C. 2945.75(A)(2), *State v. Smitley* and due process of law."

**{¶87}** This supplemental assignment of error essentially mimics the argument of appellant's threshold second assignment of error. *See infra*, ¶ 34-39. This court rejected his verdict-form argument and thus, for the same reasons stated therein, appellant's fifth supplemental assignment of error lacks merit.

**{¶88}** For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas is affirmed.

JOHN J. EKLUND, P.J.,

MATT LYNCH, J.,

concur.