[Cite as *State v. Wilson*, 2023-Ohio-27.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Appellee	:	C.A. No. 29349
	:	
v.	:	Trial Court Case No. 2021 CR 02391
	:	
WILLIE WILSON	:	(Criminal Appeal from Common Pleas Court)
	:	
Appellant	:	
	:	

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O P I N I O N

Rendered on January 6, 2023

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MATHIAS H. HECK, JR., by MICHAEL P. ALLEN, Attorney for Appellee

CARLO C. MCGINNIS, Attorney for Appellant

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WELBAUM, J.

{¶ 1} Defendant-Appellant, Willie Wilson, appeals from his convictions on one count of felonious assault (serious harm) and one count of felonious assault (deadly weapon). After the convictions were merged, the State elected to have the court

sentence Wilson for felonious assault (serious harm), and the court imposed a prison sentence of four to six years.

{¶ 2} According to Wilson, several errors occurred in the trial court. The alleged errors include: (1) that Wilson was denied a fair trial because the court failed to excuse a juror for cause; (2) the court erred in admitting text messages that were not properly authenticated; (3) the court erred in admitting "other bad acts" evidence and exacerbated the error when it gave an intended mitigating jury instruction; (4) the convictions were based on insufficient evidence and were against the manifest weight of the evidence; and (5) cumulative error deprived Wilson of a fair trial and due process.

{¶ 3} For the reasons discussed below, Wilson's assignments of error are without merit. Accordingly, the judgment will be affirmed. However, the judgment entry contains a clerical error (which the State has conceded), and this matter will be remanded to the trial court with instructions to file a nunc pro tunc entry correcting the clerical error.

I. Facts and Course of Proceedings

{¶ 4} On July 27, 2021, an indictment was filed charging Wilson with one count of felonious assault (serious harm) in violation of R.C. 2903.11(A)(1), one count of felonious assault (deadly weapon) in violation of R.C. 2903.11(A)(2), and one count of domestic violence in violation of R.C. 2919.25(A). The charges, respectively, were two second-degree felonies and a first-degree misdemeanor.

{¶ 5} The charges arose from events that occurred on July 17, 2021. At trial, the jury heard testimony from the following individuals: the victim, X.M.; Dayton police officer

Dalton Ishmael, who responded to the scene (Wilson's home); Dayton police officer Zachary Faltys, who responded to Grandview Hospital, where X.M. was treated; and Willie Wilson. In addition, the court admitted various exhibits, which included: photographs of the scene, X.M.'s automobile, and the parties' injuries; copies of text messages between X.M. and Wilson; and audio tapes of X.M.'s 911 calls.

{¶ 6} X.M. and Wilson told different stories about what had occurred, although they did agree on some details, like the fact that they had met a few years earlier while working together at Procter & Gamble but did not really know each well other at that point. They also agreed that at some time before the incident, X.M. came upon hard times and posted about it on Facebook. At that point, Wilson offered X.M. a place to stay and, eventually, X.M. came to stay with Wilson. Wilson also helped X.M. find a job.

{¶ 7} The parties also agreed that X.M. had a pattern of staying at Wilson's home, leaving, and then returning for various periods of time. They further agreed that they had been sexually involved, but they disagreed with the extent of it or how long it had lasted. Wilson claimed it had occurred only when they first met. In contrast, X.M. stated that he and Wilson had "fooled around" during their entire relationship, but that Wilson then began to develop feelings X.M. did not share. According to X.M., Wilson threatened to post pictures of him on Facebook and to expose him as being gay if he did not do what Wilson wanted. During this time, X.M. also had relationships with women. However, he did not want his family to know about Wilson, as this was his first experience with a man. Transcript of Proceedings ("Tr."), p. 116-117, 119, 120-121, 156-157, 202, and 222.

{¶ 8} At some point before July 17, 2021, X.M. moved back into Wilson's home.

However, according to X.M., something occurred on July 15, 2021, that made him uncomfortable and made him say he needed to move out. X.M. then moved in with his sister. *Id*. at p. 123-124. According to X.M., he talked to Wilson on July 16, 2021, about getting some of his things out of the house. *Id*. at p. 128.

{¶ 9} On July 17, 2021, at around 2:50 a.m., X.M. received a text message from Wilson saying that he was sorry and asking X.M. to return the key to the house. During the text messages, Wilson also said that he was just "hurt" and "come home, I need you here. I put everyone out." *Id*. at p. 218-219 and 222. X.M. told Wilson that it was "all good" but that he would not be coming back and would drop the key off and pick up the rest of his things. Wilson texted that the door would be unlocked. *Id*. at p. 125-126, 165, and 228.

{¶ 10} That morning, X.M. went to Wilson's house. He arrived at 9:40 or 9:50 a.m. *Id*. at p. 164-165. The door was unlocked, so he entered and went upstairs to see if his things were in one of the rooms. *Id*. at p. 132. Wilson was not home at the time, but about five or ten minutes after X.M. arrived, Wilson came home. *Id*. at p. 126 and 164-165. Previously, around 9:30 a.m., Wilson had sent a text indicating he had been up all night and was pulling up. X.M. responded that he was already in the house. *Id*. at p. 127. Wilson indicated at trial that he had been up all night and had done "coke" (cocaine). *Id*. at p. 216.

{¶ 11} Wilson came in, said hello, and went straight into his own bedroom. Wilson then said, "oh and yes," and X.M. said, "Don't start that sh**." X.M. said this because he knew, knowing Wilson as long as he had, what it was going to lead to. Tr. at p.132. As

X.M. was getting ready to walk out of the other room, Wilson walked up to him and stabbed him in the chest with a razor. The razor was a straight razor, like a razor from a box-cutter. X.M. knew that Wilson kept a razor on a plate in his bedroom. *Id*. at p. 133-135. X.M. had not realized that Wilson had a razor in his hand. When he realized what Wilson had done, X.M. asked him what he was doing, and Wilson stabbed him twice more. *Id*. at p. 134. X.M. then ran downstairs, because he realized Wilson was not going to stop stabbing him. *Id*.

{¶ 12} When X.M. ran down the stairs, Wilson chased him. The configuration of the house was that the living room, dining room, and kitchen were in a circle. Wilson chased X.M. around the circle, throwing things. Eventually, X.M. threw a chair and slowed Wilson enough to escape from the house and get to his car. When X.M. got in and locked the car doors, Wilson tried to pull on the handle and get in the car. Wilson then sliced the car with the razor, and X.M. began backing up. At that point, Wilson jumped on top of the car, trying to pull the windshield wiper off and trying to smash the windshield with a log. *Id*. at p. 131, 134, 136-137, 144, and 148. X.M. drove down the alley, wiggling the car to get Wilson off without hurting him. X.M. then drove into a trashcan and Wilson fell off. *Id*. at p. 137.

{¶ 13} X.M. drove to the hospital and called 911 on the way. 911 also called him back to confirm some information. X.M. was pretty emotional on the call because he thought he was going to die. The police arrived while X.M. was being treated and took a statement. *Id*. at p. 138-140. Eighteen stiches were needed to close the wound on X.M.'s chest, and he had a scar as well as permanent pain from his injury. *Id*. at p. 146-

147. X.M. believed the stabbing took place at around 10:12 or 10:15 a.m. because the police were dispatched at 10:27 or 10:30. *Id.* at p. 168.

{¶ 14} Officer Faltys and his partner were dispatched to Grandview Hospital at around 10:30 a.m. on July 17, 2021, after a call came in saying that a stabbing victim had walked into the hospital. Tr. at p. 188. Faltys testified that he had observed multiple stab wounds on X.M.'s torso and that X.M. had been very emotional and very distraught. *Id*. at p. 189-190. There was a large slice down X.M.'s pectoral muscle. It was open, and Faltys could see the muscle though the skin, as the wound had not yet been stitched. Faltys took a statement and documented the injuries and then looked at X.M.'s vehicle, which was parked outside the emergency room. *Id.* at p. 190-191.

{¶ 15} A lot of debris and dirt and a couple of pieces of wood were on the vehicle's hood; on the passenger's side, the mirror was folded in and branches and leaves were stuck in between the mirror and the window. A rolled-up object was also in the windshield. *Id*. at p. 192 and 195.

{¶ 16} As noted, the parties' versions of the incident differed. Wilson's account was that he and X.M. had never discussed keeping a sexual relationship out of the public eye. *Id*. at p. 205. According to Wilson, when X.M. came back to stay with him the last time, X.M. kept all his belongings in the trunk of his car and nothing was in the house. *Id*. Wilson stated that he knew X.M. was moving out and that X.M. had returned the house key to the house before July 17, 2021. *Id*. at p. 206.

{¶ 17} On the morning of July 17, 2021, Wilson was upstairs at home when he heard the front door open and footsteps. He got out of bed, went downstairs, and found

X.M. between the door of the living room and the kitchen. Wilson testified that X.M. must have made a duplicate key and that his (Wilson's) wallet was missing from a table tray where it had been sitting. *Id*. at p. 206-208. Wilson asked X.M. how he got in there. At that point, X.M. began running, and Wilson ran after him to get his wallet back. After they circled around a couple of times, Wilson put his hand in X.M.'s back pocket; X.M. had something in his hand and swiped back, cutting Wilson's index finger a bit. That slowed Wilson down, and X.M. then threw a tray table at him. *Id*. at p. 208-209.

{¶ 18} X.M. ran out the back door, and Wilson ran after him, asking for his wallet to be returned. X.M. got in the driver's side of the car, and Wilson was banging on the passenger side. X.M. was sitting in the driver's seat, looking at the wallet, and had not yet put the car in reverse. Tr. at p. 209. Wilson then went to the driver's side and pounded on the window, asking for his wallet. At this point, X.M. slowly backed out, and Wilson got in front of the car. X.M. then "punched it." When this occurred, Wilson jumped on the hood of the car in an attempt to keep from going under the car. X.M. drove down the alley at around 60 to 70 miles an hour, jerking the car from side to side while Wilson hung on to the windshield wiper. Wilson eventually fell off the car. *Id.* at p. 209-210.

{¶ 19} After falling off the car, Wilson took a few moments to compose himself and then made it into the house. He circled around looking for his cell phone and went upstairs to look for it. Wilson then noticed he was dripping blood from his finger and took off his white shirt. He changed his shirt and took off for X.M.'s sister's house, rather than calling the police. *Id.* at p. 210 and 212. Wilson didn't call the police because he was

distraught from falling off the car; his purpose in going to the sister's house was to let her know she would be held accountable because the car was titled in her name. *Id*. at p. 211, 213, and 215-216. On the way there, Wilson also texted X.M., telling him he was "going to jail" and that he was going to tell X.M.'s sister and "baby momma." *Id*. at p. 212. After getting a call from the police that they were at his house waiting for him, Wilson returned home. *Id*. at p. 211.

{¶ 20} According to Wilson, X.M. had no injuries when he left Wilson's home, and Wilson had no idea how X.M. had sustained injuries. Wilson denied knowing anything about a razor, denied keeping a razor with his cocaine, and suggested that Wilson made up the 911 call and had gotten assaulted somewhere between Wilson's house and the hospital to cover up his crime. *Id*. at p. 231-233.

{¶ 21} Officer Ishmael was dispatched to Wilson's home at about 10:30 a.m. on July 17, 2021. He was told that it was a stabbing call and that Willie Wilson was the suspect. Ishmael was the first to arrive, and no vehicle was at the house. He walked around the house and noticed the back door was open. *Id*. at p. 170-171. Ishmael did not see any sign of forced entry and was able to see kind of a mess in the kitchen and blood was on the floor. *Id*. at p. 172. A TV tray was on the floor in the kitchen, and there was blood on top of it. *Id*.

{¶ 22} When backup arrived, Ishmael conducted a protective sweep of the house with another officer. They found a blood trail leading from the kitchen. They followed it through the living room and up the stairs. They found a few drops of blood on the stairs and then followed the blood trail inside a bedroom, where they saw a white t-shirt with

blood on it on the bed. Tr. at p. 173-174.

{¶ 23} The police then encountered someone in the basement (Wilson's nephew), who said he had not seen or heard anything. He gave them consent to search, but before they did, they waited for Wilson to return home. *Id.* at p. 176. When Wilson arrived, he pulled into the driveway very fast. As he did so, the police asked him what had happened, and he told them. At that point, they handcuffed Wilson and placed him in a cruiser. Officer Ishmael did not notice anything about Wilson's physical condition. Later, when Wilson said he was injured and wanted to see medics, Ishmael noticed that Wilson had a cut finger like some sort of box-cutter or knife had been held, and he had road rash on his shoulder. *Id*. at p. 177. After searching the house, the officers did not find a knife, but they took the white shirt as evidence. *Id*. at p. 178.

{¶ 24} Wilson claimed he told the police about the robbery, but they failed to record it. He claimed he had also mentioned his wallet and insisted the officers left that out as well. *Id.* at p. 227-228.

{¶ 25} Wilson was charged with two counts of felonious assault and one count of domestic violence. The State dismissed the domestic violence charge during trial, and the jury found Wilson guilty of the remaining charges. After merging the convictions, the court sentenced Wilson to a minimum of four years in prison and a maximum of six years. This timely appeal followed.

II. Denial of a Right to a Fair Trial

{¶ 26} Wilson's first assignment of error states that:

Appellant Was Denied His Right to a Fair Trial Thus Depriving Him of Substantial Rights Under State Law and His Due Process Rights Under the Ohio and Federal Constitutions.

{¶ 27} Under this assignment of error, Wilson presents three main points: (1) the trial court erred in failing to excuse a juror who could not be impartial; (2) the court erred in letting the State introduce text messages sent from Wilson's cell phone; and (3) the court improperly admitted "other bad acts" evidence and then exacerbated the prejudicial effect in its instruction to the jury. We will address each argument separately.

A. Failure to Exclude Juror

{¶ 28} As noted, Wilson's first argument is that the trial court erred in failing to exclude a juror. Wilson notes that the trial court excused some jurors who had prior experiences with assault and had expressed doubt about being impartial. However, the court did not excuse Juror 4. According to Wilson, this deprived him of the right to due process and a fair trial under both the Ohio and federal constitutions.

{¶ 29} Our review of the record reveals the following facts: (1) Wilson did not ask for Juror 4 to be excused for cause; (2) Wilson did not examine this juror when given a chance to ask questions of jurors; (3) Wilson failed to object to anything concerning Juror 4; (4) Wilson stated that he had no challenges for cause to the entire pool; and (5) Wilson had one preemptory challenge left when he passed, ending his ability to remove jurors without cause. *See* Tr. at p. 52-53, 68-69, 82-91, and Transcript of Proceedings (Jury

Selection in Chambers) ("Tr., Jury Selection"), p. 2 and 5.[1] As a result, Wilson has forfeited this issue. *See State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21. The rule is well-established that " ' "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." ' " *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986). (Other citation omitted.)

{¶ 30} "Crim.R. 52(B) affords appellate courts discretion to correct '[p]lain errors or defects affecting substantial rights' notwithstanding the accused's failure to meet his obligation to bring those errors to the attention of the trial court. However, the accused bears the burden of proof to demonstrate plain error on the record." *Rogers* at ¶ 22, citing *Quarterman* at ¶ 16. In addition, the accused "must show 'an error, *i.e.*, a deviation from a legal rule' that constitutes 'an "obvious" defect in the trial proceedings.' " *Id.*, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). The Supreme Court of has interpreted this to mean that " 'the trial court's error must have affected the outcome of the trial.' " *Id*., quoting *Barnes*.

{¶ 31} "The accused is therefore required to demonstrate a reasonable *probability* that the error resulted in prejudice—the same deferential standard for reviewing ineffective assistance of counsel claims." (Emphasis sic.) *Id.*, citing *United States v.*

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[1] In his brief, Wilson also alleged error based on the trial court's failure to make a transcript of the preemptory challenge proceedings. *See* Appellant's Brief, p. 13, fn.1 and p. 14. However, the court did make a transcript of these proceedings, and it has been filed with our court.

Dominguez Benitez, 542 U.S. 74, 81-83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004). As a final matter, the court stressed in *Rogers* that courts should " 'notice plain error "with the utmost caution, under exceptional circumstances and *only* to prevent a manifest miscarriage of justice." ' " (Emphasis sic.) *Id*. at ¶ 23, quoting *Barnes* at 27, which in turn quoted *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶ 32} Having reviewed the record under the above standards, we find no plain error warranting reversal.

{¶ 33} "The Fourteenth Amendment to the United States Constitution provides that the state shall not deprive any person of life, liberty, or property without due process of law. Though it uses slightly different language, Article I, Section 16 of the Ohio Constitution provides the same guarantee." *In re Adoption of H.N.R.*, 145 Ohio St.3d 144, 2015-Ohio-5476, 47 N.E.3d 803, ¶ 24, citing *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544-545, 38 N.E.2d 70 (1941). The right of jury trial guaranteed by Article I, Section 10 of the Ohio Constitution also necessarily implicates " 'trial by a jury composed of unbiased and unprejudiced jurors. This right being guaranteed, all courts are charged with the imperative duty of affording every litigant the opportunity of having his cause tried by an impartial jury.' " *State v. Anderson*, 30 Ohio St.2d 66, 71, 282 N.E.2d 568 (1972), quoting *Lingafelter v. Moore*, 95 Ohio St. 384, 387, 117 N.E. 16 (1917).

{¶ 34} In order to protect this right, Ohio gives defendants the right to exercise both challenges for cause and preemptory challenges. *See* R.C. 2945.23 (indicating when

preemptory challenges must be made); R.C. 2945.25 (setting out grounds for challenges for cause); R.C. 2945.26 (containing the procedure for challenging for cause). Consistent with this process, "[v]oir dire serves the purposes of allowing the court and the parties to identify and remove jurors to ensure an impartial jury." *State v. Froman*, 162 Ohio St.3d 435, 2020-Ohio-4523, 165 N.E.3d 1198, ¶ 49. *See also Anderson* at 72.

{¶ 35} As pertinent here, the grounds for challenges for cause in R.C. 2945.25 include:

> (B) That [the juror] is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;
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> * * *
>
> (O) That he otherwise is unsuitable for any other cause to serve as a juror.

{¶ 36} Wilson argues that Juror 4 should have been removed for cause. We disagree. The Supreme Court of Ohio has stressed that "[v]oir dire, like the entire litigation process, is inherently adversarial. With both parties attempting to push a prospective juror into a certain position in order to remove him or her from the jury, it is the job of the trial judge to determine which statements of the prospective juror reflect that

individual's true state of mind and ability to follow the law." *State v. Williams*, 79 Ohio St.3d 1, 7-8, 679 N.E.2d 646 (1997). The court has also said that erroneously failing to excuse a juror for cause may be prejudicial if a defendant exhausts his or her preemptory challenges. *Id*. at 8. This did not occur here, as Wilson passed on the jury for cause and then did not exhaust his peremptory challenges. Tr., Jury Selection at p. 2 and 5.

{¶ 37} Considering the type of error alleged here, we give the same deference as is used to evaluate ineffectiveness of counsel. *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, at ¶ 22. In that context, the Supreme Court of Ohio has said that to demonstrate prejudice, the defendant " ' "must show that [a] juror was *actually* biased against him." ' " (Emphasis sic.) *State v. Bates*, 159 Ohio St.3d 156, 2020-Ohio-634, 149 N.E.3d 475, ¶ 25, quoting *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 67. (Other citation omitted.) " 'Actual bias is "bias in fact" – the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.' " *Id*., quoting *United States v. Torres*, 128 F.3d 38, 43 (2d Cir.1997). "Actual bias can be revealed through a prospective juror's express admission, but 'more frequently, jurors are reluctant to admit actual bias' and it must be exposed through circumstantial evidence." *Id*. at ¶ 33, quoting *Miller v. Webb*, 385 F.3d 666, 673 (6th Cir.2004).

{¶ 38} The relevant facts here are as follows. After initially swearing in the jury, the court instructed the jury on various matters, including the fact that the case was criminal and involved assault charges involving physical harm and a deadly weapon. The court stressed that the jurors needed to approach the case with open minds and

agree to keep their minds open until reaching a verdict, that jurors could not be influenced by preconceived ideas, that the jury had the duty to follow the law as given to it, that the State had the burden of proving every element of the case beyond a reasonable doubt, and that the defendant was presumed innocent and did not have the burden of proving anything. Tr. at p. 12-16.

{¶ 39} During voir dire, the court asked the jurors if they would experience an "unusual hardship" by serving on the jury, i.e., "[s]omething different than will be experienced by the other jurors." *Id*. at p. 25. After this, the court excused a juror who said privately during a sidebar that he would be unable to be fair and impartial on an assault case because he had been the victim of an assault, had almost been killed, and had been hospitalized for a while as a result. *Id*. at p. 28 and 31-32. Another juror mentioned medications he was taking, and the court deferred a decision on that until the attorneys had a chance to question him. *Id*. at p. 33. The court then asked if anyone else had an unusual hardship, and no juror, including Juror 4, responded. *Id*. at p. 34.

{¶ 40} After discussing various other situations, the court asked the jurors if any of them had been the victim of a crime. *Id*. at p. 48. The court then excused a juror who had been assaulted on two occasions. This juror stated privately during a sidebar that he was angry with law enforcement for dismissing the charges in one case and was also angry with the abuser. He therefore said he could not be impartial. *Id*. at p. 48-52.

{¶ 41} The following exchange then occurred between the court and Juror 4:

> THE COURT: Anyone else? * * *
>
> JUROR NO. 4: I have –

JUROR NO. 4: In an indirect way, I have a family member who was involved in an assault that resulted * * * in manslaughter.

* * *

JUROR NO. 4: I have a family member – or ex-family member that was involved in an assault that resulted in a manslaughter case.

THE COURT: Was that individual the alleged victim or the alleged perpetrator?

JUROR NO. 4: The victim.

THE COURT: All right. Did you participate in any way in seeing prosecutors, law enforcement, or anything like that?

JUROR NO. 4: Did I participate?

THE COURT: Yeah. Did you go see prosecutors or law enforcement?

JUROR NO. 4: Yeah, I had to –

THE COURT: Were you a witness?

JUROR NO. 4: No, I was the parent of a child that witnessed – * * * the, you know.

THE COURT: Is there anything about that circumstance you feel would influence you in deciding this case?

JUROR NO. 4: You're asking me? I'm not sure.

THE COURT: Okay. All right. The lawyers may have additional questions for you, okay?

Tr. at p. 52-54.

{¶ 42} Subsequently, during the State's part of voir dire, this further exchange occurred with Juror 4:

MR. MERRELL: * * * [Juror No. 4,] You mentioned that you had a family member that was a victim.

[JUROR NO. 4]: That's correct.

MR. MERRILL: Okay. And I think you mentioned that it was your daughter?

[JUROR NO. 4]: No, my daughter – one of my daughters witnessed it.

MR. MERRILL: Witnessed it. Okay, okay. Did that have an effect on your daughter?

[JUROR NO. 4]: Yeah.

MR. MERRILL: Yeah? Does it still have an effect on her?

[JUROR NO. 4]: Yeah.

MR. MERRELL: Okay. And did it have an effect on you, kind of being there for your daughter?

[JUROR NO. 4]: Yeah.

MR. MERRELL: Okay. In spite of that do you think you can be fair and impartial and sit here today and, you know, judge credibility?

[JUROR NO. 4]: I presume I'll have to try.

MR. MERRELL: Okay, sir. Thank you.

Tr. at p. 68-69.

{¶ 43} As noted, the defense did not question Juror 4, did not ask that he be removed for cause, and did not exercise its remaining preemptory challenge to excuse this juror. After the selection of jurors was complete, the trial court again instructed them on the fact that they must apply the law as the court instructed, that the defendant did not have "any requirement to meet any burden of proof," and that any violation of the court's orders "may cause a new trial or may require the imposition of a penalty for disobedience." *Id*. at p. 97-98 and 103.

{¶ 44} Finally, at the end of the trial, the court again instructed the jury on these matters: (1) the jury had a duty to accept the court's instructions on the law; (2) the defendant was presumed not guilty and must be acquitted unless the State provided proof beyond a reasonable doubt on every element of the charges; and (3) the jury must fairly and impartially consider the evidence. *Id*. at p. 271-272. The court also instructed the jury that it "must not be influenced by any sympathy or prejudice" and that it should "[c]onsider all of the evidence and make [its] findings with intelligence and impartiality and without bias, sympathy or prejudice so that the State of Ohio and the Defendant will feel that their case was fairly and impartially tried." *Id*. at p. 282.

{¶ 45} Our review of the evidence indicates that Juror 4 did not exhibit bias against Wilson either directly or circumstantially. In the first place, neither this juror nor his daughter were victims of an assault; the juror's daughter witnessed an assault, and Juror 4 did not even witness it. Furthermore, while Juror 4 first said he was not sure if he could put the incident aside, on additional questioning, he said that he presumed that he would

have to try to be impartial and fair and to judge credibility. This was not a statement that he would be prejudiced or biased against Wilson.

{¶ 46} Furthermore, the trial court instructed the jurors in depth about their duties to be fair and impartial, to follow the law, and to accord Wilson the presumption that he was innocent and had no burden of proof. "A presumption exists that the jury has followed the instructions given to it by the trial court." *State v. Murphy*, 65 Ohio St.3d 554, 584, 605 N.E.2d 884 (1992).

{¶ 47} As an additional point, there could have been no prejudice significant enough to affect the outcome, because the evidence against Wilson was overwhelming. While the victim and Wilson told different stories, Wilson's testimony, frankly, lacked credibility. The most compelling example of this was William's statement that X.M. had not been injured when he left Wilson's home. However, Williams had no explanation for how X.M. arrived at the hospital within minutes of the altercation with a significant gash on his chest (exposing the muscle and requiring 18 stitches) and other stab injuries. Tr. at 230-231. There are other examples we could mention but need not do so, given the complete lack of credibility that this example reveals. Accordingly, there is no basis for reversing the verdict.

B. Admission of Text Messages

{¶ 48} Wilson's next argues that the trial court erred in admitting text messages between Wilson and the victim. According to Wilson, the State should have called a forensic expert to testify about the dates and times the messages were sent and received.

Wilson contends (without evidence) that X.M. could have cut and pasted the text messages or altered them in some way.

{¶ 49} We review a trial court's admission or exclusion of evidence for abuse of discretion. *State v. Dyer*, 2017-Ohio-8758, 100 N.E.3d 993, ¶ 24 (2d Dist.), citing *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. An abuse of discretion " 'implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " (Citation omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "[M]ost instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp*., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "A decision is unreasonable if there is no sound reasoning process that would support that decision." *Id*.

{¶ 50} "Text messages have been admitted in situations involving a party opponent, or under the exception for business records in Evid.R. 803(6). * * * However, before a record may be admitted, it must be properly authenticated." (Citations omitted.) *State v. Irwin*, 2d Dist. Montgomery No. 26224, 2015-Ohio-195, ¶ 19-20. "The threshold standard for authenticating evidence is low." *State v. Norris*, 2016-Ohio-5729, 76 N.E.3d 405, ¶ 33 (2d Dist.), citing *State v. Wiley*, 2d Dist. Darke No. 2011-CA-8, 2012-Ohio-512, ¶ 11.

{¶ 51} "In this regard, 'Evid.R. 901(A) requires, as a condition precedent to the admissibility of evidence, a showing that the matter in question is what it purports to be.' " *Id.*, quoting *State v. Simmons*, 2d Dist. Montgomery No. 24009, 2011-Ohio-2068, ¶ 12.

"Evid.R. 901(B) provides examples of numerous ways that the authentication requirement may be satisfied, the most common of which is testimony that a matter is what it is claimed to be under Evid.R. 901(B)(1)." *Id.*, citing *State v. Renner*, 2d Dist. Montgomery No. 25514, 2013-Ohio-5463, ¶ 30.

{¶ 52} " '[I]in most cases involving electronic print media, i.e., texts, instant messaging, and e-mails, the photographs taken of the print media or the printouts of those conversations are authenticated, introduced, and received into evidence through the testimony of the recipient of the messages.' " *Irwin* at ¶ 21, quoting *State v. Roseberry*, 197 Ohio App.3d 256, 2011-Ohio-5921, 967 N.E.2d 233, ¶ 75 (8th Dist.). "In *Roseberry,* the court of appeals noted that the state could have properly admitted text messages from the defendant through the victim's testimony, 'because she was the recipient of the text messages, had personal knowledge of the content, and could [identify] the sender of the messages.' " *Id*.

{¶ 53} Here, the victim, X.M., testified that on July 17, 2021, he sent text messages to a cell phone number listed in X.M.'s phone as "Bro"; this was the number X.M. had routinely used for Wilson. Tr. at p. 124-127, 141, 150, 165, and State's Exs. 7, 8, and 9. X.M. also received messages from Wilson that day from the "Bro" number. *Id*. at p. 124-127 and 150. Therefore, there was sufficient evidence that the text messages were what they were claimed to be.

{¶ 54} The fatal flaw in Wilson's argument is that Wilson reviewed the text messages during his testimony and admitted that he recalled the texts, which were exchanged between X.M. and Wilson between 2:50 a.m. and around 9:30 a.m. on July

17, 2021, i.e., the day of the incident. Wilson also sent texts to X.M. right after the incident. *Id*. at p. 218 and 224-225. Furthermore, Wilson discussed all these texts during his testimony. *Id*. at p. 211, 212, 218, and 219-225. The only exception was a text at around 9:30 a.m. (before the stabbing incident). In this text, Wilson told X.M. that he loved him and to have a nice day (this was shortly before X.M. arrived at Wilson's home). Wilson stated that he did not recall telling X.M. that he loved him and to have a nice day. *Id*. at p. 225.

{¶ 55} Given that the victim authenticated the text messages, there is no basis for concluding that they were not properly authenticated and should not have been admitted. As noted, Wilson also identified the messages.

C. Admission of "Other Bad Acts" Evidence

{¶ 56} Wilson's final argument under this assignment of error is that the trial court erred in admitting evidence about "other bad acts" in violation of Evid.R. 404(B). Wilson further contends that the trial court exacerbated the error by its mitigating instruction. This alleged error refers to evidence that Wilson was up all night using cocaine before the incident and that he had a razor on a plate in his bedroom. Again, we review the trial court's admission of evidence for an abuse of discretion.

{¶ 57} Evid.R. 404(B)(1) states: "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." However, this type of evidence can be admitted "for another purpose, such as proving motive, opportunity, intent, preparation,

plan, knowledge, identity, absence of mistake, or lack of accident." Evid.R. 404(B)(2). "[T]he list of purposes for which evidence of other crimes, wrongs, or acts may be admitted is not an exhaustive listing." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 18.

{¶ 58} In the case before us, Wilson did not object when evidence was introduced about the fact that he kept a razor on a plate in his bedroom, nor was any objection made when the prosecutor questioned Wilson on this point during cross-examination. Tr. at p. 135 and 232-233. Wilson's counsel also did not object when the prosecutor elicited testimony from Wilson about the fact that he used cocaine and had been up all night doing cocaine the night before the incident. *Id*. at p. 216 and 220. Furthermore, counsel did not object when the prosecutor asked how Wilson acted when he was "jacked up on coke." *Id*. at p. 217. Due to the failure to object, Wilson waived any error regarding admission of these matters. However, we can still "correct '[p]lain errors or defects affecting substantial rights' notwithstanding the accused's failure to meet his obligation to bring those errors to the attention of the trial court." *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, at ¶ 22.

{¶ 59} Although Wilson failed to object, the trial court did say, when discussing jury instructions, that it wished to address the issue of Wilson's drug use. Tr. at p. 401. The court found the drug use relevant because it concerned Wilson's "ability to discern a variety of things." *Id*. The court, however, felt a limiting instruction on how the jury could consider this evidence should be given. *Id*.

{¶ 60} Concerning the razor, the State indicated that it had offered evidence about

a razor being in the bedroom in order to show that Wilson had access to a weapon. *Id*. at 241. The trial court did not believe that evidence about access to a weapon fit within character evidence prohibited by Evid.R. 404(B). *Id*. at p. 240-241, 242, and 244. However, because Evid.R. 404(B)(2) uses the word "opportunity," the court elected to include the razor as well in its limiting instruction. *Id*. at 241 and 247.

{¶ 61} After discussing these points with the parties, the court indicated it would give the following the instruction:

> You have heard testimony that the Defendant Willie Wilson engaged in the use of cocaine at or near the time of the alleged offenses. * * * You are instructed that that evidence was received only for a limited purpose. You may consider that evidence only for the purpose of considering access to a razor and Defendant's credibility or believability; however, you may not consider that evidence to prove Defendant's character as an individual's character is not relevant to whether the State has proven beyond a reasonable doubt each element of the offenses changed. You may not consider the evidence for any other purpose.

Tr. at p. 246.

{¶ 62} Both sides agreed that this instruction was acceptable. *Id*. at p. 246-247. The court then gave the jury the same instruction. *Id.* at p. 275.

{¶ 63} In view of the above facts, the evidence was not improperly admitted, nor was the jury instruction inappropriate. Evidence about the razor was pertinent because it did show that Wilson had access to a weapon in his bedroom, which is where Wilson

was located immediately before he stabbed X.M.

{¶ 64} Furthermore, Wilson's drug use was appropriately admitted for credibility and believability purposes. Specifically, X.M. testified that he had tried to talk to Wilson while Wilson was chasing him in a loop, but Wilson had been throwing things at him and talking gibberish. *Id*. at p. 125. X.M. also testified that it was hard to make out some of the things Wilson said in his texts. *Id*. at p. 126. In addition, Wilson claimed that he could not recall what some of his texts meant, such as ones that said, "Come home when you got your key" and that the back door would be unlocked when Wilson brought the key over. *Id.* at p. 126, 165, and 221. Wilson testified that he was not high on drugs when he wrote these messages. *Id*. at p. 221. However, the jury was entitled to consider the extent to which Wilson's drug use affected his ability to recall events, which, in turn, impacted his believability and credibility.

{¶ 65} Even if this were otherwise, the Supreme Court of Ohio has said that "the real issue when Evid.R. 404(B) evidence is improperly admitted at trial is whether a defendant has suffered any prejudice as a result. If not, the error may be disregarded as harmless error." *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 25. In *Morris*, the court also discussed principles that had emerged from its cases. These included: (1) "there must be prejudice to the defendant as a result of the admission of the improper evidence at trial"; (2) "an appellate court must declare a belief that the error was not harmless beyond a reasonable doubt"; and (3) "in determining whether a new trial is required or the error is harmless beyond a reasonable doubt, the court must excise the improper evidence from the record and then look to the remaining

evidence." *Id*. at ¶ 27-29.

{¶ 66} For the reasons previously discussed, even if the evidence had been improperly admitted (which it was not), any error would have been harmless beyond a reasonable doubt, because the evidence against Wilson was overwhelming and his testimony lacked credibility. Accordingly, the trial court did not err in admitting evidence under Evid.R. 404(B), and the court's instruction was not improper.

{¶ 67} Based on the preceding discussion, the first assignment of error is overruled.

III. Manifest Weight and Insufficient Evidence

{¶ 68} Wilson's second assignment of error states that:

> Appellant's Convictions Are Based on Insufficient Evidence and ,Against the Manifest Weight of the Evidence in Violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution [and] Sections 10 & 16, Article I of the Ohio Constitution.

{¶ 69} As indicated above, Wilson made no argument under this assignment of error. Consequently, we may disregard it. *See* App.R. 12(A)(2). *See also* App.R. 16(A)(7) (requiring an appellant's brief to include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies").

{¶ 70} Even if we considered the manifest weight and sufficiency arguments, we

would reject them. "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." (Citation omitted.) *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). In such situations, we apply the test from *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), which states that:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

(Citation omitted). *Id*. at paragraph two of the syllabus.

{¶ 71} In contrast, "[a] weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." (Citation omitted.) *Wilson* at ¶ 12. In this situation, a court reviews " 'the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence

weighs heavily against the conviction.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). *Accord State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 193.

{¶ 72} "Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency." (Citations omitted.) *State v. McCrary*, 10th Dist. Franklin No. 10AP-881, 2011-Ohio-3161, ¶ 11. *Accord State v. Winbush*, 2017-Ohio-696, 85 N.E.3d 501, ¶ 58 (2d Dist.). Consequently, "a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Citations omitted.) *State v. Braxton*, 10th Dist. Franklin No. 04AP-725, 2005-Ohio-2198, ¶ 15.

{¶ 73} Based on the discussion above, which found compelling evidence to support the conviction and further found that Wilson lacked credibility, there is no basis for finding the conviction against the manifest weight of the evidence or unsupported by sufficient evidence. The second assignment of error therefore is overruled.

IV. Cumulative Errors

{¶ 74} Wilson's final assignment of error states that:

> Other Errors Were Committed at the Trial Not Raised Herein But Apparent on the Record and the Cumulative Effect of All the Errors Occurring at Trial Deprived the Defendant of a Fair Trial and Due Process.

{¶ 75} Under this assignment of error, Wilson contends that cumulative errors

apparent on the record deprived him of a fair trial and due process. According to Wilson, these errors include: (1) a speedy trial violation; (2) failure to make a transcript of preemptory challenge proceedings; and (3) errors in the judgment entry.

{¶ 76} Under the cumulative error doctrine, "a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223, citing *State v. DeMarco*, 31 Ohio St.3d 191, 196-197, 509 N.E.2d 1256 (1987).

{¶ 77} As to the failure to transcribe the preemptory challenge proceedings, we have already noted that the transcript was filed. Next, regarding a speedy trial violation, "[t]he Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial. R.C. 2945.71 implements this guarantee with specific time limits within which a person must be brought to trial. If a defendant demonstrates that his or her speedy-trial right has been violated, he or she may seek dismissal of the criminal charges." *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, ¶ 10, citing R.C. 2945.73.

{¶ 78} Under R.C. 2945.71(C)(2), persons arrested for a felony must be brought to trial within 270 days after their arrest. For purposes of computing time, "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E).

{¶ 79} Wilson contends that he was arrested on July 17, 2021, and that his speedy trial rights were violated because he was not brought to trial until November 22, 2021,

which caused him to be confined for more than 90 days.

{¶ 80} The State agrees there were no tolling events. However, the State argues that Wilson's speedy trial time did not lapse because he was also being held in jail on a probation revocation in Montgomery County C.P. No. 2018-CR-3558. As a result, Wilson was not entitled to benefit of the triple-count provision. We agree with the State.

{¶ 81} The " 'triple count' provision applies only when the defendant is being held in jail solely on the pending charge." *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, ¶ 7, citing *State v. MacDonald*, 48 Ohio St.2d 66, 357 N.E.2d 40 (1976), paragraph one of the syllabus. "Thus, the triple-count provision does not apply when a defendant is being held in custody pursuant to other charges. * * * Nor does it apply when the accused is being held on a parole- or probation-violation holder." *Id*., citing *State v. Brown*, 64 Ohio St.3d 476, 479, 597 N.E.2d 97 (1992) (parole-violation holder), and *State v. Martin*, 56 Ohio St.2d 207, 211, 383 N.E.2d 585 (1978) (probation-violation holder).

{¶ 82} Wilson was arrested and jailed on the current charges on July 17, 2021. According to the presentence investigation report ("PSI"), Wilson was on community control in Case No. 2018-CR-3857 at the time of the current crime, and Probation Services instituted a revocation proceeding on July 20, 2021. PSI, p. 5.

{¶ 83} After the jury found Wilson guilty of assault as charged, the trial court revoked Wilson's bond in the current case. At that time, the court noted that bond in the revocation case had been already set for no bond. Tr. at p. 289. The court then set a hearing date of December 8, 2021, for both the sentencing and consideration of the

revocation. *Id*. The court further commented that the current conviction as well as Wilson's admission about substance abuse during his testimony constituted grounds for revocation. *Id*.

{¶ 84} On December 8, 2021, the court found that Wilson had violated the terms of his community control. *Id*. at p. 291-292. The court sentenced Wilson to a prison term for the current felonies (after merging them), and then terminated community control based on the prison term that had been imposed for the felonies. *Id*. at 292, 294, and 297. In light of the above facts, Wilson was not entitled to the benefit of the triple-count provision in R.C. 2945.71(E), and the trial court did not make any error in this regard.

{¶ 85} Concerning the judgment entry (termination entry), Wilson contends that the entry refers to the penalties for violation of post-release control but incorrectly fails to refer to penalties under R.C. 2929.141. Wilson further contends that the trial court incorrectly referred to the crime for sentencing during the sentencing entry as felonious assault (deadly weapon). However, Wilson does agree that the court referred to the correct crime of conviction in the judgment entry as felonious assault (serious harm).

{¶ 86} As a preliminary point, even if these matters were true, they would not even potentially affect Wilson's convictions; at most, they might require remand for re-sentencing.

{¶ 87} The State notes that Wilson was not on post-release control at the time of his conviction and the court, therefore, was not required to make findings under R.C. 2929.141. We agree. R.C. 2929.141(A) refers to "the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony,"

and then refers to various penalties that may be imposed for the post-release control violation. However, Wilson was on community control, not post-release control, when the felonies in this case were committed.

{¶ 88} "Although it is true that both community control sanctions and post-release control involve statutory procedures which allow for the imposition of a jail term upon a convict who has violated restrictions on his behavior, the jail time imposed under each procedure is separate and distinct from the other, and also results from a very different process. Community control sanctions are essentially a distinct form of penalty which a trial court can give to some defendants immediately after their conviction in lieu of a jail term. * * * However, in contrast to community control sanctions, post-release control can be imposed upon a convict only after he has served his original jail term and is scheduled to be released from custody. Furthermore, instead of being imposed by the trial court, the restrictions under post-release control are set by the Ohio Adult Parole Authority." *Strzala v. Gansheimer*, 11th Dist. Ashtabula No. 2004-A-0049, 2004-Ohio-6472, ¶ 10-11. Consequently, R.C. 2929.141 does not apply here.

{¶ 89} During the sentencing hearing, the trial court correctly noted the two felonious assault crimes for which Wilson had been convicted and also noted, correctly, that the State had elected to proceed on "the felonious assault – serious physical harm, F-2," when the court merged the two convictions. *See* Tr. at p. 292. Subsequently, when imposing sentence, the court did incorrectly refer to the conviction as the "felonious assault count, deadly weapon, F2." *Id*. at p. 294.

{¶ 90} The State notes that both counts are felonies of the second-degree, that the

penalties are identical, and that Wilson was correctly advised at the sentencing hearing. Wilson has not disputed these points.

{¶ 91} The State has conceded a clerical error in the trial court's termination entry. Specifically, in the entry, the court first correctly stated that Count 1 was "(felonious assault (serious harm)," and that Count 2 was "felonious assault (deadly weapon)." Termination Entry (Dec. 9, 2021), p. 1. The court also correctly stated that the State had elected to have Wilson sentenced on Count 1 and that Count 2 had merged into Count 1. *Id.*

{¶ 92} However, the Court incorrectly stated later in the entry that:

> The Court notifies the defendant that, as part of this sentence, on **COUNT 1: FELONIOUS ASSAULT (deadly weapon) – 2903.11(A)(2) F2**, the defendant **WILL** be supervised by the Parole Board for a period of **BETWEEN EIGHTEEN MONTHS AND THREE (3) YEARS** Post-Release Control after the defendant's release from imprisonment.

(Bolding sic.) *Id*.

{¶ 93} This paragraph should instead have referenced the crime as "**FELONIOUS ASSAULT (serious harm) – 2903.11(A)(1)**." However, this is simply a clerical error that the trial court can correct by filing a nunc pro tunc entry.

{¶ 94} "Crim.R. 36(A) permits trial courts, in their discretion, to correct clerical mistakes in judgments or orders arising from oversight or omissions, using a nunc pro tunc entry. The purpose of nunc pro tunc orders, however, is to officially record actions that were actually taken, but not duly recorded." *State v. Arnold*, 189 Ohio App.3d 238,

2009-Ohio-3636, 938 N.E.2d 45, ¶ 56 (2d Dist.).

{¶ 95} " 'The term "clerical mistake" refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment. * * * Thus, the power to file an entry nunc pro tunc is restricted to placing on the record a judicial action that has already been taken but was omitted due to some mechanical mistake.' " *Id*. at ¶ 57, quoting *State v. Brown*, 136 Ohio App.3d 816, 819-820, 737 N.E.2d 1057 (3d Dist.2000). " '[N]unc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide.' " *Id*., quoting *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 164, 656 N.E.2d 1288 (1995). Here, what the trial court actually decided is clear, and a nunc pro tunc entry is appropriate.

{¶ 96} Because no error warranting reversal has been found, much less cumulative error, the third assignment of error is overruled. However, the case will be remanded to the trial court for correction of the clerical error in the judgment entry. *See State v. Cooks*, 2d Dist. Clark No. 2014-CA-88, 2015-Ohio-3380, ¶ 33.

V. Conclusion

{¶ 97} All of Wilson's assignments of error having been overruled, the judgment of the trial court is affirmed. However, this cause is remanded with instructions that the trial court file a nunc pro tunc entry correcting the clerical error in the termination entry.

. . . . . .

TUCKER, P.J. and LEWIS, J., concur.