[Cite as *State v. Walter*, 2023-Ohio-2700.]

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

STATE OF OHIO	:	
	:	
Appellee	:	C.A. No. 29614
	:	
v.	:	Trial Court Case No. 20CR3668
	:	
TAYLOR WESLEY WALTER	:	(Criminal Appeal from Common Pleas Court)
	:	
Appellant	:	
	:	

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O P I N I O N

Rendered on August 4, 2023

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MATHIAS H. HECK, JR., by RICKY L. MURRAY, Attorney for Appellee

DAVID R. MILES, Attorney for Appellant

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LEWIS, J.

{¶ 1} Defendant-Appellant Taylor Wesley Walter appeals from his conviction for murder after a jury trial in the Montgomery County Court of Common Pleas. Walter contends that the trial court erred in failing to suppress statements he made to the police, that it erred in admitting certain evidence at trial, that it should not have given certain jury

instructions requested by the State, and that his conviction was against the manifest weight of the evidence. For the following reasons, we affirm the trial court's judgment.

I. Procedural History

{¶ 2} In January 2021, Walter was indicted on two counts of felonious assault (serious physical harm and deadly weapon) and two counts of felony murder (proximate result of felonious assault). The charges stemmed from the stabbing death of his mother, Donna Walter, on February 12, 2020. A month after the indictment, Walter moved to suppress statements he made to law enforcement officers on several different days, asserting that his statements had been involuntarily made and had been obtained in violation of his *Miranda* rights. After a hearing, the trial court overruled the motion in its entirety.

{¶ 3} Walter's trial ultimately was scheduled for August 29, 2022. As the trial date neared, the State raised several evidentiary issues. In a motion in limine, the State sought to prevent Walter from introducing exculpatory and self-serving statements. The trial court overruled the motion. The State also filed a notice of its intention to use Evid.R. 803(3) statements in its case-in-chief. It identified ten statements made by Donna,[1] either orally or in writing, that she was fearful of her son and believed him to be dangerous. The court overruled Walter's motion to preclude the use of those statements. Finally, the State filed a notice of its intention to use Evid.R. 404(B) evidence, which mainly consisted of prior acts of violence and threats of violence by Walter against his mother. The trial court sustained Walter's objection regarding a December 13, 2019 text between

[1] To avoid confusion, we will refer to Walter's family members by their given names.

Donna and her sister, Doreen Hildebrand, and a text from Walter to Donna's friend, Angie Morgan (formerly known as Angie Hicks). However, it overruled Walter's objections to the use of statements by Donna about threats Walter had made on three occasions, as well as statements made in various jail calls and texts between Walter and his mother.

{¶ 4} The matter proceeded to a jury trial. The State presented 20 witnesses and numerous exhibits. Walter did not offer any evidence in his defense. During a discussion of the jury instructions, the State requested instructions on consciousness of guilt and voluntary intoxication. The trial court gave those instructions over Walter's objections. After deliberating, the jury found Walter guilty on all charges. At sentencing, the trial court merged the offenses and imposed a prison term of 15 years to life for murder, to be served consecutively to a sentence in another case. Walter also was designated a violent offender.

{¶ 5} Walter appeals from his conviction, raising six assignments of error. We will address them in an order that facilitates our analysis.

II. Manifest Weight of the Evidence

{¶ 6} In his sixth assignment of error, Walter claims that his conviction was against the manifest weight of the evidence. He argues that there was no eyewitness to the murder and that the forensic evidence did not support the conclusion that he committed the homicide. Walter emphasizes that the State resorted to improper statements of Walter's prior bad acts and of Donna's fear of him to convince the jury of his guilt. We disagree.

{¶ 7} "[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." *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 12. When evaluating whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice" that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Because the trier of fact sees and hears the witnesses at trial, we must defer to the fact finder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684, *4 (Aug. 22, 1997). A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin* at 175.

{¶ 8} We recognize that, in other assignments of error, Walter challenges the trial court's admission of certain evidence under Evid.R. 404(B) and Evid.R. 803(3). However, when reviewing claims based on the manifest weight of the evidence, we are required to consider all of the evidence admitted at trial, regardless of whether it was admitted erroneously. *See State v. Fleming*, 2d Dist. Clark No. 2021-CA-40, 2022-Ohio-1876, ¶ 27, citing, *e.g.*, *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284. Accordingly, we must consider that evidence as part of our analysis.

{¶ 9} Walter was found guilty of two counts of murder and two counts of felonious

assault. A person is guilty of murder under R.C. 2903.02(B) if he or she causes "the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code." Pursuant to R.C. 2903.11(A), a person commits felonious assault by either knowingly causing serious physical harm to another, R.C. 2903.11(A)(1), or by knowingly causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance, R.C. 2903.11(A)(2).

{¶ 10} According to the State's evidence at trial, in February 2020, 28-year-old Walter lived with his mother, Donna, in the family's residence in Perry Township, Ohio. Walter's father, Kevin, had died in June 2018 after a long battle with cancer. His brother, Landon, had moved out in June 2019 after a "situation" occurred. By all accounts, Walter had a turbulent relationship with his mother.

{¶ 11} At 7:07 a.m. on February 12, 2020, Donna called 911 about Walter. At 8:12 a.m, she texted her sister, Doreen, with whom she was close, saying that Walter had stolen her car and phone and to contact her on her back-up cell phone. Donna called 911 again at 8:21 a.m.

{¶ 12} Perry Township police did not have an officer on the road that morning, so the call was directed to Police Chief Timothy Littleton. Littleton responded to Donna's home at 8:42 a.m. Donna was in her vehicle, wearing her pajamas and robe, when Littleton arrived. Littleton described her as frightened and scared. After talking at the house, Donna and Littleton drove separately to the police department to prepare a

complaint against Walter. Donna provided a written statement, indicating that Walter had been high and wanted her car keys, that he had grabbed her and threatened to hurt her after she said no, that he had pushed her up the stairs, and that she then had given him her keys. Donna also wrote that he had left with the car and returned an hour later, at which time she had slipped out her back door and called the police. Chief Littleton prepared a complaint for driving without consent. Donna became upset that Walter would not be incarcerated.

{¶ 13} Donna returned to her home and waited in her vehicle for Chief Littleton to return to serve Walter with the complaint. At 9:42 a.m., Donna called Doreen, and they spoke for more than 30 minutes. Donna was "livid, hysterical, crying" and was upset about what had happened and how long it was taking the police to return. Stilling waiting, Donna called the police department's administrative line at 10:32 a.m.

{¶ 14} Chief Littleton and Officer Payne arrived at Donna's residence approximately ten minutes later. She was seated in her vehicle, and Walter was moving back and forth on the front porch, rapping. After calling to Walter multiple times, Chief Littleton served the complaint. Walter placed the papers on a table on the porch and returned to his music. Donna again expressed her dismay that Walter would not be arrested; Littleton advised her to get a restraining order, evict him, and use "tough love." Donna then went inside her home, and Walter soon followed. The officers left the house at approximately 10:56 a.m.

{¶ 15} Donna talked with Doreen again at 11:17 a.m.; this was Donna's last communication.

{¶ 16} Doreen and Donna had plans to go to Landon's residence to wait for an internet installer while Landon was at work and also to help him clean his new house. After Donna failed to pick her up, Doreen texted Donna at 1:03 p.m., asking if she had left. When Donna did not reply, Doreen sent additional texts and attempted, unsuccessfully, to reach Donna by phone.

{¶ 17} Doreen also tried to reach Walter several times and spoke with him at 1:25 p.m. He denied that he was in a car, but Doreen could tell that he was. When Doreen asked him where he was, Walter told her, "Georgia, baby," and said he had gotten there by airplane. (Donna and Doreen had another sister who lived in Georgia.) Walter did not mention anything about his mother.

{¶ 18} Shortly after 2:00 p.m., Doreen called Tonia Keener, Donna's long-time friend, to ask Keener to check on Donna. When Keener arrived at Donna's residence, Donna's car was gone, and Walter was not there. Keener went into the home and noticed that the downstairs areas were unusually messy. She then went upstairs and found Donna on the floor of her bedroom, unresponsive and with blood around her head. Keener called 911 at 2:16 p.m. Keener's friend, Steve Yancey, arrived while Keener was on the phone with the dispatcher.

{¶ 19} Chief Littleton was the first officer to arrive at Donna's home. Yancey directed Littleton to Donna's bedroom, where he found her lying between her bed and the wall. Littleton pulled her away from the wall and administered CPR until paramedics from the Brookville Fire Department arrived. The paramedic's assessment found that Donna was not breathing, had no pulse, was cool to the touch, showed signs of bluishness

around her lips, and had some mottling in her arm and stomach areas. The blood around her head was coagulated, meaning that it had been there a while. The paramedics declared Donna deceased at the scene.

{¶ 20} It was not immediately apparent how Donna had died. Upon removing her body from the scene, a knife was found embedded in the back of her neck. The autopsy determined that Donna had 30 stab wounds to the back of her head and neck, ranging from ¼ inch to 4 inches in depth, and cuts to her head, left shoulder, and hands. The coroner also found bruising on three sides of her head and on her legs. Donna died from the multiple stab wounds to her head and neck, which caused substantial blood loss.

{¶ 21} Chief Littleton secured the residence and called Sergeant Douglas Hesler, an evidence technician, and Detective Tina Waymire to begin the investigation. Hesler saw no signs of forced entry at Donna's home. Upon entering the house pursuant to a search warrant, Hesler took photographs throughout the house, took fingerprints, and collected items with potential evidentiary value. He noticed, among other things, that the only open kitchen drawer contained knives of the same brand that was used to kill Donna. The house was messy, but Sergeant Hesler saw signs of a struggle only in Donna's bedroom. Foot powder had been spread all around the upstairs of the house. The upstairs bathroom had a "nice clean and fresh scent," as if someone had recently bathed. Hesler swabbed the bathroom shower and wall areas and areas of Donna's bedroom. He also collected, among other items, a golf putter that had been on the floor near Donna's head and a Clorox bottle with a red smear from the laundry room. However, upon examination by the Miami Valley Regional Crime Lab, no blood was detected on

those items.

{¶ 22} The investigation quickly focused on finding Walter. In her 911 call, Keener had expressed her belief that Walter was responsible, and the Perry Township police took efforts to locate him by having the Montgomery County Sheriff's Office ping his phone and by issuing a "be on the lookout" (BOLO) to other law enforcement agencies.

{¶ 23} At 2:31 p.m. that day, Patrick Bradford, a former acquaintance of Walter, received a text from Walter, saying "I'm in vandelia wanna chill." Bradford did not respond. At 4:07 p.m., Englewood Police Officer Doug Hacker located Walter seated in Donna's GMC Acadia in the Englewood Meijer parking lot. Officer Hacker and other Englewood officers apprehended Walter and placed him in a cruiser. No one informed Walter that his mother had been murdered.

{¶ 24} At Sergeant Hesler's instruction, Perry Township Officer Jason Collins went to the Meijer to take Walter into custody. Collins testified that he was given a direct order not to talk to Walter. As Officer Collins drove him to the Montgomery County Jail, Walter sang that he "killed my motherf*cking mom," his "best friend."

{¶ 25} When he was arrested, Walter was wearing a different shirt than what he had been wearing when Chief Littleton spoke with him earlier in the day. Detective Waymire went to speak with him and noticed that Walter's hands also were "extremely clean." The detective testified that Walter's hands had never een during her past encounters with him. Landon similarly stated that Walter lacked "body hygiene" and that he did not have clean hands and fingernails.

{¶ 26} The GMC Acadia was sealed and towed by Marlow's Towing to its facility,

which the Perry Township police used to impound vehicles. After obtaining a search warrant, Sergeant Hesler conducted a search of the vehicle. He located, among other things, Donna's phone and a plaid purse with several expired credit cards, which Doreen identified at trial as Donna's "dummy purse." (Doreen testified that Donna had had a "dummy" purse with expired cards and a "real" purse for her active cards and money.) Donna's primary set of car keys were in the ignition. Hesler collected latent fingerprints and swabs of suspected blood from the vehicle and items located within it. The swabbings from the vehicle either were not tested by the Miami Valley Regional Crime Lab or, upon testing, failed to indicate the presence of blood. Walter's fingerprints were matched to latent prints found on the driver's side area of the vehicle and to some cards from Donna's dummy purse.

{¶ 27} Walter was released from jail on April 16, 2020. On April 18, he contacted Detective Waymire and indicated that he wanted to talk about what had happened the day his mother died and to give a complete timeline. When they spoke at the police station on April 21, Walter stated that he had taken his mother's car on February 11 (the day before the murder) and had been at home when the police came the following day because of that. Walter said that, after the police left, he took the spare keys to Donna's vehicle and went to Drexel; his mother was in her room when he left. Walter told Detective Waymire, "That's where my story stops." When asked if had changed clothes before leaving, Walter said that he had not. Walter discussed his relationships with his family members and the family business. He said that most of his arguments with his mother were about drugs and her wanting him to get a job and move out. Walter

indicated that he would provide statements from friends, but Detective Waymire testified that he never did. The detective tried to follow up with Walter's ex-girlfriend but was unable to make contact with her.

{¶ 28} In early June 2020, Jim Marlow stopped at the Walter residence to ask about an old forklift truck that he had seen at the property. Marlow had heard about Donna's murder and, as part of his towing business, had towed her Acadia from Meijer for the police, but he did not realize that the homicide had occurred there and did not know the residents. Marlow spoke with Walter, who said that the truck had belonged to his father, who had died. Walter told Marlow that he was probably going to sell the house and was moving to Georgia. When Marlow asked why, Walter responded that "everyone here thinks I killed my mom" and everyone hated him. At that point, Marlow made the connection with Donna's murder but asked Walter why they thought that. Walter responded that it had happened in the house and it was a "crime of passion," but he did not do it. When asked what he meant by "crime of passion," Walter said that "she was beat and stabbed." After leaving the residence, Marlow immediately reported the conversation to the Perry Township police.

{¶ 29} Detective Waymire and Walter again spoke on June 4, 2020, shortly after Walter's interaction with Marlow. The interview covered a number of topics, including that Walter appeared to be sleeping on the floor of his mother's bedroom (the furniture had been removed), that he used a driver when golfing (no driver had been found by police), and that he had heard that his mother had been shot. Walter told Detective Waymire that he had been angry with his mother for filing the criminal complaint and that

she had treated him differently than his brother. Walter also claimed that he bought gas in Brookville at 11:52 a.m. on the day of the murder and returned home to find his mother "dead as f*ck." Walter acknowledged that he had not called the police.

{¶ 30} The State also presented substantial evidence about the tumultuous relationship between Donna and Walter. Doreen and Landon testified that part of the discord stemmed from the closing of Kevin's (Walter's father) water softening business. Doreen stated that the business had not been profitable, and when Kevin became ill, Walter had helped with the business and hoped to take it over. Bradford, who had worked at the water softening business on occasion, also confirmed that Walter had wanted to take over the business. Walter became upset when Donna closed the business after Kevin's death. Walter was unemployed after Kevin died, and Donna performed occasional jobs for friends. Several witnesses testified that Walter's drug use and taking Donna's car without permission had caused a strain in their relationship. Donna had previously tried to kick Walter out of the house.

{¶ 31} Donna told Doreen daily that she feared Walter would hurt her. Doreen was aware that Walter was not on good terms with his brother, and he would have nowhere to go if Donna evicted him. Landon confirmed that Walter would not have been allowed to stay with him. Landon also testified that his mother said she was scared of Walter multiple times, including the day before she was killed.

{¶ 32} Numerous additional witnesses testified that Walter had previously threatened Donna and that Donna had been afraid of him. Keener testified that Donna had had issues with Walter "for years" and, in the months prior to Donna's death, Keener

could hear Walter yelling and screaming at Donna in the background when the two talked on the phone. A week before the murder, Donna told Brielle Slaton that she was scared of Walter and afraid he was going to hurt her. In July 2019, Donna texted Angie Morgan that she never used to be afraid of Walter but was then. Several police officers described encounters with Donna and Walter at different times in 2019, in which Donna described being assaulted by Walter, Walter's demanding money from her, and Donna's being afraid that Walter would hurt her. On some of those prior occasions, Walter was removed from the residence.

{¶ 33} The State also offered five sets of text messages between Donna and Walter. On April 26, 2019, Donna wrote: "Back the f*ck off ur not getting any money from me period," to which Walter responded, "Mom if u dont go away ill make sure that I give u a problem I promis u." State's Ex. 133A. On July 16, 2019, Walter and Donna had an exchange which concluded with Donna's writing to Walter: "Oh and for your information, hurting your mother and holding a knife to her throat and busting up your home and antiques that can't be replaced, how it that smart af. It's dumb af and disrespectful." State's Ex. 133B. In a series of messages to Walter on August 31, 2019, Donna wrote:

> You're a drug addict punk and I'm not dealing with you anymore. I won't be threatened and hit by you ever again. Don't bother coming home. The doors are locked. Take your money and shove it.
>
> Your not getting my vue or any other car so go f*ck yourself. I'm tired of your sh*t. And I'm tired of you threatening my life. It's over. And by

> Tuesday you'll be evicted.
>
> You just want everyone to do everything for you. Well forget it. Make it on your own. I got your truck off the highway and it took all my money. But you don't care. You don't appreciate anything. I feed you and give you a place to live and you threaten to kill me. I don't trust you. Go away.

State's Ex. 133C.

{¶ 34} On October 25, 2019, Walter wrote to Donna: "I live [sic] drugs and I will never give them up until I make the choice to period. So f*ck yourself if you dont like it I could care less all of your old self is gone I'll see u in hell if you dont give me dads knife he got me and some my stuff cause I'm telling you it's only reason I havent killed your ass." State's Ex. 133D. Fifteen minutes later, Donna texted back: "And your always threatening to kill me so why would I try to help you get pot or anything else. What son threatens to kill their mother." State's Ex. 133E. Taylor responded, "Because of this right here you wont ever shut the f*ck up. Just do it or dont. You can fight argue and bitch but never can you just support anything I'm great at or even have passion to do. And I'm deffinetly needing t irk smoke mom I got nothing it's better then sans or blow or heroin or smack or that hard or that mf sniffing hate back or shooting up pain or to may pills type sh*t." State's Ex. 133E.

{¶ 35} Doreen and Landon testified that Donna did not have any enemies. Although Walter told Detective Waymire that he wanted to investigate who had killed his mother, Walter did not provide any leads to the police. When Donna's autopsy was conducted, Donna still had her jewelry and some money on her person.

{¶ 36} Upon review of the evidence as a whole, we cannot conclude that the jury lost its way in finding Walter guilty of killing his mother. No one witnessed Donna's murder, and the State relied upon circumstantial evidence to prove that Walter had committed the crime. Circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991), citing *State v. Nicely*, 39 Ohio St.3d 147, 529 N.E.2d 1236 (1988); *State v. St. John*, 2d Dist. Montgomery No. 27988, 2019-Ohio-650, ¶ 49. In some cases, "circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence." *State v. Jackson*, 57 Ohio St.3d 29, 38, 565 N.E.2d 549 (1991).

{¶ 37} Here, the State's evidence demonstrated that Donna and Walter had a difficult and volatile relationship, and by July 2019, Donna had come to fear him. Between July 2019 and the February 2020 murder, Donna had contacted the police several times due to violence and threats of violence by Walter. In one text, Donna indicated that Walter had threatened her with a knife. Donna had attempted to kick him out of the house, and the two had argued repeatedly over Walter's unemployment, drug use, and unauthorized use of her car. Donna continued to express her fear of him in the days prior to the murder.

{¶ 38} Donna had again reported Walter to the police on the morning of February 12, 2020. After Walter was served with the complaint shortly before 11:00 a.m., Donna expressed apprehension about going back into her house. Within minutes, Walter followed her inside. Donna was killed sometime between her last conversation with Doreen at approximately 11:15 a.m. and when she was discovered by Keener shortly

after 2:00 p.m. Based on Donna's lack of responsiveness to Doreen's efforts to contact her and the paramedic's assessment, the jury could have reasonably concluded that Donna was killed prior to 1:00 p.m. There was no evidence that anyone other than Walter was at the home during that time or that anyone other than Walter potentially had had the opportunity or reason to kill her.

{¶ 39} The condition of the house also supported the conclusion that someone close to Donna had committed the murder. Although there was substantial damage to doors in the house, the damage was not new and there were no signs of forced entry. The only signs of struggle were in Donna's bedroom. The murder weapon was the same brand as knives in the kitchen, and the only open kitchen drawer contained some of those knives.

{¶ 40} Finally, Walter's own conduct and statements on the day of and following the murder further supported the jury's verdict. When he was arrested, Walter sang that he had killed his mother, his best friend; at that point, no one had told him that Donna had been murdered. In June 2020, Walter told Marlow that his mother had been beaten and stabbed; Detective Waymire indicated that the fact Donna had been beaten was never released to the public. Walter had changed his shirt between being served with the complaint and being arrested on February 12, 2020, a fact he later denied. Although he generally had poor hygiene and unclean hands, his hands were "extremely clean" when he was apprehended that day; Sergeant Hesler noticed that the upstairs bathroom in Donna's home smelled as if someone had recently bathed. Walter initially told Detective Waymire that he had left the residence and gone to Drexel. In a later interview, he told

her that he had returned home before noon and found his mother deceased, but he never called the police or mentioned his mother in his subsequent conversation with Doreen.

{¶ 41} As noted by defense counsel in his closing argument, no forensic evidence linked Walter to the crime. Although numerous swabs were taken from Donna's home and her vehicle and various items were collected, the laboratory testing of the items did not implicate Walter. A blood stain on Walter's orange t-shirt, which he was wearing when he was arrested, was matched to Walter himself. The blood on the handle of the murder weapon was matched to Donna. Many of the swabs and items failed to indicate the presence of blood. Walter's DNA was found inside work gloves, but there was no indication the gloves had been used by the perpetrator. Walter's fingerprints were also found on credit cards recovered from Donna's vehicle, but there was no evidence that he had taken them as part of the murder. Counsel emphasized that fingernail scrapings taken from Donna showed a mixed DNA profile, but Walter was excluded as a possible contributor. Walter had no injuries when he was arrested.

{¶ 42} It was the province of the jury, as the trier of fact, to assess the witnesses' credibility and determine whether the State had proven beyond a reasonable doubt that Walter committed the murder. In reaching its verdict, the jury was free to believe all, part, or none of each witness's testimony. *State v. Peterson*, 2d Dist. Montgomery No. 29061, 2021-Ohio-3947, ¶ 27. Although there was some evidence (such as the lack of forensic evidence) that could have led the jury to question Walter's culpability, the State presented substantial circumstantial evidence of his guilt. We cannot conclude that the jury lost its way when it determined, based on the evidence presented, that the State had proven

beyond a reasonable doubt that Walter committed the murder.

{¶ 43} Walter's sixth assignment of error is overruled.

III. Motion to Suppress Walter's Statements

{¶ 44} In his third assignment of error, Walter contends that the trial court erred in denying his motion to suppress the statements he made on February 12, 2020, while inside a police cruiser. Walter's motion to suppress had addressed five distinct interactions with the police, but he does not challenge the trial court's suppression ruling as to the other four interactions.

{¶ 45} In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court outlined procedural safeguards needed for securing the privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution. "*Miranda* requires police to give a suspect certain prescribed warnings before custodial interrogation commences and provides that if the warnings are not given, any statements elicited from the suspect through police interrogation in that circumstance must be suppressed." *State v. Petitjean*, 140 Ohio App.3d 517, 523, 748 N.E.2d 133 (2d Dist.2000). "If a suspect provides responses while in custody without having first been informed of his or her *Miranda* rights, the responses may not be admitted at trial as evidence of guilt." *Cleveland v. Oles*, 152 Ohio St. 3d 1, 2017-Ohio-5834, 92 N.E.3d 810, ¶ 9, citing *Miranda* at 479.

{¶ 46} "An individual is in custody when there has been a formal arrest or a restraint of freedom of movement such that a reasonable man would believe that he is under arrest." *State v. Wenzler*, 2d Dist. Greene No. 2003-CA-16, 2004-Ohio-1811,

¶ 15, citing *State v. Biros,* 78 Ohio St.3d 426, 440, 678 N.E.2d 891; *State v. Hudson*, 2d Dist. Montgomery No. 29333, 2022-Ohio-3253, ¶ 32.

{¶ 47} " 'Interrogation' includes express questioning as well as 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *State v. Strozier*, 172 Ohio App.3d 780, 2007-Ohio-4575, 876 N.E.2d 1304, ¶ 20 (2d Dist.), quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). "Interrogation" must reflect "a measure of compulsion above and beyond that inherent in custody itself." *Innis* at 300.

{¶ 48} "Police officers are not responsible for unforeseeable incriminating responses." *State v. Waggoner*, 2d Dist. Montgomery No. 21245, 2006-Ohio-844, ¶ 14; *Strozier* at ¶ 20. "A suspect who volunteers information, and who is not even asked any questions, is not subject to a custodial interrogation and is not entitled to *Miranda* warnings." *State v. Fair*, 2d Dist. Montgomery No. 24120, 2011-Ohio-3330, ¶ 39, citing *State v. McGuire*, 80 Ohio St.3d 390, 401, 686 N.E.2d 1112 (1997); *State v. Hall*, 2018-Ohio-2321, 114 N.E.3d 730, ¶ 37 (2d Dist.).

{¶ 49} The State's evidence at the suppression hearing established that on February 12, 2020, Officer Collins was sent to Donna's residence to assist with a homicide investigation. While there, Sergeant Hesler told him to go to the Meijer store in Englewood to pick up Walter, who was in the custody of the Englewood police. Officer Collins testified that he was instructed not to speak with Walters at all. When Officer Collins arrived at the store, Walter was handcuffed and seated in an Englewood cruiser.

Collins placed Walter in his own marked cruiser and transported him to the Montgomery County Jail. The officer did not provide *Miranda* warnings to Walter.

{¶ 50} Walter made incriminating statements to Officer Collins while in the officer's cruiser. However, Collins did not ask Walter any questions to elicit those statements, and he did not respond to what Walter said. Officer Collins testified that he did not question Walter in any way and did not do anything to elicit Walter's statements. Collins's cruiser video (State's Exhibit 1) corroborated his testimony.

{¶ 51} The trial court found that Officer Collins did not interrogate Walter and, instead, Walter made spontaneous voluntary statements while in the back of Officer Collins's cruiser. Upon review, we similarly conclude that the statements were not the product of police interrogation and therefore were not obtained in violation of *Miranda*. The trial court did not err in denying Walter's motion to suppress the volunteered statements that he made to Officer Collins in the cruiser.

{¶ 52} In his appellate brief, Walter acknowledges that spontaneous statements by a suspect who is not being interrogated do not fall within *Miranda*. He states, however, that "[i]t is [his] position that *Miranda* warnings should be given to a suspect in custody even in the absence of questioning or interrogation." He therefore asks us to reconsider our prior case law that *Miranda* warnings are not required in this circumstance.

{¶ 53} We find no basis to revisit our prior rulings on this issue. Our case law on spontaneous volunteered statements by a suspect is based on binding precedent from the Ohio Supreme Court and the United States Supreme Court. As an intermediate court of appeals, this court must continue to follow the precedent established by those higher

courts. *See, e.g., State v. Simpson*, 2d Dist. Montgomery No. 28558, 2020-Ohio-2961, ¶ 20; *State v. White*, 110 Ohio App.3d 347, 356, 674 N.E.2d 405 (4th Dist.1996).

{¶ 54} Walter's third assignment of error is overruled.

IV. Evidentiary Rulings

{¶ 55} In his first assignment of error, Walter claims that the trial court erred in overruling his motion in limine regarding the State's use of Evid.R. 803(3) statements in its case-in-chief. His second assignment of error raises a similar claim regarding Evid.R. 404(B) evidence. We will address them in reverse order.

{¶ 56} "A decision on a motion in limine is a tentative, interlocutory, precautionary ruling by the trial court on the admissibility of evidence; as such, it cannot serve as the basis for an assignment of error on appeal." *State v. Tyra*, 2d Dist. Montgomery No. 27040, 2017-Ohio-313, ¶ 28. Failure to object at trial based on the disposition made in a preliminary motion in limine constitutes a waiver of any challenge. *State v. Robinson*, 2d Dist. Montgomery No. 29272, 2022-Ohio-2896, ¶ 15.

{¶ 57} In this case, defense counsel consistently objected to the admission of the State's Evid.R. 803(3) and 404(b) evidence throughout the trial. Accordingly, Walter's challenges to the Evid.R. 803(3) and 404(B) evidence have not been waived, and we will construe his assignments of error as challenging the admission of that evidence at trial.

{¶ 58} A trial court has broad discretion to admit or exclude evidence, and its exercise of that discretion will not be disturbed on appeal absent an abuse of discretion. *State v. Hunt*, 2d Dist. Darke No. 2018-CA-9, 2019-Ohio-2352, ¶ 27. A trial court abuses its discretion if it makes an unreasonable, unconscionable, or arbitrary decision. *Id*.

{¶ 59} "When engaging in this gatekeeper role regarding the admissibility of evidence, the trial court must determine if potential evidence is relevant. To be relevant, evidence must have a 'tendency to make the existence of 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. In other words, there must be some probative value to the evidence. Generally, relevant evidence is admissible. Evid.R. 402. However, even if evidence is relevant, it can become inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury. Evid.R. 403(A)." *State v. Robinson*, 2d Dist. Montgomery No. 29272, 2022-Ohio-2896, ¶ 18.

A. Other Acts Evidence under Evid.R. 404(B)

{¶ 60} In his second assignment of error, Walter argues that the trial court erred in allowing the State to present evidence of his violence and threats of violence against Donna during the year preceding the murder. He argues that the trial court did not employ the correct legal analysis in overruling his motion in limine and that it failed to give a proper limiting instruction at trial.

{¶ 61} "Evid.R. 404(B) categorically prohibits evidence of a defendant's other acts when its only value is to show that the defendant has the character or propensity to commit a crime." *State v. Smith*, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123, ¶ 36. Nevertheless, evidence of a defendant's other crimes, wrongs, or acts may be admitted for other purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Evid.R. 404(B)(2).

"The key is that the evidence must prove something other than the defendant's disposition to commit certain acts. Thus, while evidence showing the defendant's character or propensity to commit crimes or acts is forbidden, evidence of other acts is admissible when the evidence is probative of a separate, nonpropensity-based issue." *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 22.

{¶ 62} The Supreme Court of Ohio has put forth a three-step analysis for a trial court to use in determining the admissibility of other acts evidence. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20. "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." *Id*., citing Evid.R. 401. Next, the trial court must determine "whether the evidence is presented to prove a person's character to show conduct in conformity therewith or whether it is presented for a legitimate other purpose." *State v. Tench*, 156 Ohio St.3d 85, 2018-Ohio-5205, 123 N.E.3d 955, ¶ 139. "The nonpropensity purpose for which the evidence is offered must go to a 'material' issue that is actually in dispute between the parties." *Hartman* at ¶ 27, citing *Huddleston v. United States*, 485 U.S. 681, 686, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). Finally, the last step is "to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice." *Williams* at ¶ 20.

{¶ 63} We have stated that "[e]vidence of a defendant's threats, violence, or other behavior in the months preceding a murder is probative of the defendant's motive or intent." *State v. White*, 2015-Ohio-3512, 37 N.E.3d 1271, ¶ 33 (2d Dist.), citing *State v.*

Nields, 93 Ohio St.3d 6, 22, 752 N.E.2d 859 (2001). However, "an act too distant in time has no probative value to the charged crime." *Id*. The defendant's other act "must have such a temporal, modal and situational relationship with the acts constituting the crime charged that evidence of the other acts discloses purposeful action in the commission of the offense in question." *State v. Snowden*, 49 Ohio App.2d 7, 10, 359 N.E.2d 87 (1st Dist.1976), citing *State v. Burson*, 38 Ohio St.2d 157, 159, 311 N.E.2d 526 (1974).

{¶ 64} "The admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law. The court is precluded from admitting improper character evidence under Evid.R. 404(B), but it has discretion to allow other-acts evidence that is admissible for a permissible purpose." (Citation omitted.) *State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700, 172 N.E.3d 841, ¶ 72, citing *Hartman* at ¶ 22, citing *Williams* at ¶ 17.

{¶ 65} Here, Walter challenges the State's evidence of five instances prior to the murder that reflected Walter's threatening and violent behavior toward his mother and illustrated the sources of conflict between them. First, Officer Collins testified that he took a written statement from Donna on August 13, 2019. In that statement, Donna wrote, in part:

> Taylor Walter, my son, wanted to use one of my vehicles and wanted money and I said no. He threatened to take my vehicle and money by force and I stayed out in car for almost 2 hours[.] [W]hen I finally came back into the house I locked myself in my bedroom. He the[n] proceeded to bust down my bedroom door to take the items by force. That's when I called 911. He threatened to harm me if I didn't give him the money and car. He has a

> long drug history and needs serious help. I believe he's not only dangerous to myself by [sic] also to himself.

Tr. 614-615; State's Ex. 130. Officer Collins read the redacted statement at trial.

{¶ 66} Second, on November 21, 2019, Perry Township Officer Matthew Guillozet responded to a bank parking lot and spoke with Donna and Walter. Donna's written statement for that incident, which the officer read for the jury, stated:

> We returned home from dinner and when I parked the car he started getting crazy. Said he needed money to go to Georgia to a bank to retrieve money he had waiting there. I realized he was on drugs and he was going to try to get money from me at that point. I went into the house and he started slamming things around and threatening me. At one point he slapped me in the face. Then he calmed down for a bit and then it started again. He wanted me to go and get him money so he could leave and go to Georgia. I told him I didn't have any money and that I didn't get paid until Friday. I was in the living room and trying to decide how to escape. I had locked my purse and keys to my car in the barn and put my barn key in my shoe earlier. I was able to get out of the house but not quick enough to get into my car and leave before he blocked me from doing that. We ended up back in the house where he slapped my face again and kicked me in my breast. I then sat there awhile and we argued, but he was making no sense whatsoever, so I just went along. Then he took my phone in order to make me go up town to get money. So we drove up town and went to the ATM, but I put

> in the wrong number so that the receipt would say denied, which it did. Then we drove to Speedway and I jumped out of the car. He had my camcorder and was videoing. A police officer drove in the parking lot and [Walter] got out and told me not to make a scene, but I told him I was. Then he got out of car and went over and spoke to the officer. I proceded [sic] to leave and go home. He walked home from Speedway and I had locked myself in my bedroom. He still had my phone. He didn't bother me the rest of the night. Then in the morning I went down and he was sleeping on the couch and I tried to get my phone back. His phone was laying there so I picked it up and took it to my room and locked the door. He came up immediately and said we're going to get money and I said ok. But he didn't believe me and busted down my door. I gave him his phone back and we headed for the ATM. When we got to the ATM I turned the car off and jumped out. That's when I went to the laundromat and asked to use someone's phone and called for help.

Tr. 449-450; State's Ex. 44.

{¶ 67} Third, Chief Littleton testified to his interactions with Donna on the morning of February 12, 2020, prior to the murder. During his testimony, the State played a cruiser video showing Donna's conversation with Littleton after he served the complaint on Walter.[2] Tr. 318; State's Ex. 37. In the video, Donna reiterated the conduct that had

[2] The State's notice of intention to use Evid.R. 404(B) evidence also referenced a recording of Chief Littleton's interaction with Donna when he first responded to her home on February 12, 2020. At trial, the State presented screenshots from the cruiser video (State's Ex. 36A and 36B) but did not play the video.

precipitated her complaint against Walter and expressed her frustration with Chief Littleton and the fact that Walter would not be arrested. When Officer Payne indicated that Donna had not previously followed through on her complaints against Walter, Donna contradicted him, saying how she had previously gone to court and that Walter had been sent to jail for 30 days. On redirect examination, Chief Littleton read Donna's written statement from that day, which read:

> Taylor Walter was high on drugs and wanted the keys to my car. He threatened me to give them to him when I said no. He grabbed me and threatened to hurt me if I didn't give him the keys. He pushed me up the stairs and I gave him the keys. He wanted money but I told him I didn't have any and he left with car. He was gone an hour or so and he came back with car. I slipped out back door while he entered front door. That's when I called police.

Tr. 355; State's Ex. 152.

{¶ 68} Fourth, the State presented five sets of text messages, quoted above, which indicated that Walter had used drugs, damaged Donna's house, threatened to kill Donna, and held a knife to her throat. The messages also reflected Donna's frustration with Walter and her intention to kick him out of her house.

{¶ 69} Fifth, Walter challenges the State's use of Donna's statements during the November 23, 2019 jail phone call with Walter. The State had indicated in its notice of intention that these calls showed that Walter had threatened to kill Donna. However, the recordings admitted at trial (State's Ex. 147) did not describe prior acts or threats by

Walter and, specifically, did not include a threat to kill Donna. Accordingly, those statements did not fall under Evid.R 404(B), and we will address them under Evid.R. 803(3).

{¶ 70} In ruling on Walter's motion in limine regarding the four instances other than the jail call, the trial court determined that the August 2019, November 2019, and February 2020 evidence were "not only relevant, but they also tend to demonstrate motive and absence of mistake." The court further commented that the threats pertained directly to Donna and demonstrated the escalation of conflict between her and her son. With respect to the text messages between Walter and Donna, the court noted that texts referred to threats against Donna, Walter's holding a knife to her throat, Donna's expressions that she was done helping him, and her plans to evict him. The court found that these statements went to Walter's motive and that the references to violence and the use of a knife also could demonstrate intent, preparation, and a plan under Evid.R. 404(B). The court reaffirmed its prior ruling in overruling Walter's objections at trial.

{¶ 71} We agree with the trial court that the evidence at issue was admissible under Evid.R. 404(B). The State's evidence focused on the defendant's relationship with the victim, which was relevant to the murder charge; none of the instances was so remote in time to diminish its value. Additionally, the evidence was offered for the legitimate purpose of demonstrating Walter's motive and opportunity to commit the crime. Donna's statements and text messages were not offered to show Walter's general propensity to commit violence, but rather to show the volatile relationship he had with his mother, which included violence against her and threats of violence, including the use of a knife as a

threat. It also demonstrated Donna's reaction to his behavior, which included her acts to remove him from her home. It is unquestionable that the State's Evid.R. 404(B) evidence was prejudicial to Walter. However, we cannot conclude that it was unduly prejudicial or that the trial court erred in admitting the evidence against him.

{¶ 72} Walter further argues that the trial court's jury instruction on the Evid.R. 404(B) evidence was inadequate. He argues that the instruction was not tailored to the specific facts of his case.

{¶ 73} At trial, the trial court informed the jury on "other acts" evidence, stating:

> Now, evidence was received about the commission of crimes or acts other than the offenses of which the Defendant is charged in this trial. The evidence was received only for the limit of purpose of proving, A, motive. You may consider evidence of other acts that shows motive or other evidence that establishes that the accused has a specific reason to commit the offense charged in the case.
>
> B, opportunity, you may consider the evidence of other acts to show that the Defendant has the opportunity to commit the offenses with which he is charged in this case.
>
> C, intent, you may, but are not required to infer from the evidence of other acts by the Defendant that is it more probable than not that the Defendant intended to commit the offenses charged in this case. The question is whether under the circumstances the detailed facts of the charged offenses and other wrong acts strongly suggest that an innocent

explanation is not plausible.

Tr. 843.

{¶ 74} Defense counsel agreed to the language of the "other acts" instruction, subject to a general objection to the admission of Evid.R. 404(B) evidence. Tr. 755. Accordingly, our review is limited to plain error. Plain error arises only when "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id*. at paragraph three of the syllabus. We find no plain error in the trial court's instruction.

{¶ 75} Walter's second assignment of error is overruled.

B. Hearsay Exception under Evid.R. 803(3)

{¶ 76} In his first assignment of error, Walter claims that the trial court erred in allowing evidence from multiple witnesses, pursuant to Evid.R. 803(3), that Donna was afraid of Walter and believed him to be dangerous.

{¶ 77} Evid.R. 801(C) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement." A "statement" is an oral or written assertion or nonverbal conduct of a person if that conduct is intended by him as an assertion. Evid.R. 801(A). "An 'assertion' for hearsay purposes 'simply means to say that something is so,' e.g., that an event happened or that a condition existed." (Emphasis and citations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 97.

In general, hearsay is not admissible. Evid.R. 802.

{¶ 78} Evid.R. 803 identifies certain types of statements that are excluded from the hearsay rule. Of relevance here, Evid.R. 803(3) permits the admission of a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)[.]" This exception does not include "a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Evid.R. 803(3).

{¶ 79} "A victim's hearsay statements that [he or] she feared the defendant are admissible under Evid.R. 803(3) as declarations of the declarant's then-existing state of mind or emotion." *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 219. To be admissible, however, "such hearsay testimony must still be relevant to the issues in the case." *Id*.; *State v. Dillon*, 2016-Ohio-1561, 63 N.E.3d 712, ¶ 22 (2d Dist.). In addition, it "must point towards the future rather than the past. When the state of mind is relevant it may be proved by contemporaneous declarations of feeling or intent." *State v. Apanovitch*, 33 Ohio St.3d 19, 21, 514 N.E.2d 394 (1987), citing *United States v. Cohen*, 631 F.2d 1223 (5th Cir.1980). Evid.R. 803(3) does not permit witnesses to relate any of the declarant's statements as to why he or she held a particular statement of mind. *Id*.

{¶ 80} In *Apanovitch*, the Ohio Supreme Court held that six witnesses were permitted to testify, pursuant to Evid.R. 803(3), that the rape-murder victim was fearful or apprehensive of the defendant, a contractor who had painted portions of the exterior of

the victim's home. *Apanovitch* did not discuss why the victim's fear of the defendant was relevant. *See State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 109. In *Adams*, which also involved a rape and murder, the Supreme Court stated that the victim's statements regarding her fear of the defendant only hours before the sexual conduct occurred were relevant to prove absence of consent. *Adams* at ¶ 220.

{¶ 81} The Supreme Court has also repeatedly upheld the admission of a victim's fear of the defendant in murder cases that did not involve sexual contact. *See, e.g., State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 74 (evidence of estranged wife's fear of defendant was admissible in prosecution for aggravated murder of estranged wife and her family members); *State v. O'Neal*, 87 Ohio St.3d 402, 411, 721 N.E.2d 73 (2000) (victim/wife's statements within a week of her murder that she was feeling stressed and was afraid of her husband were relevant to prove her intent to end the marriage and were admissible under Evid.R. 803(3); statements of her plans to separate and end the marriage were similarly admissible); *State v. Simko*, 71 Ohio St.3d 483, 491, 644 N.E.2d 345 (1994).

{¶ 82} We addressed state-of-mind evidence in *Dillon*, 2016-Ohio-1561, 63 N.E.3d 712, a case in which the 25-year-old defendant murdered his mother in their home. There, the trial court permitted the State to present a letter the victim had written to a judge in a criminal proceeding against her son three years prior to the murder. The letter detailed the tumultuous relationship she had with her son and stated that the defendant had threatened her and her husband daily and had threatened to kill her if he went to jail. On review, we rejected the State's assertion that the letter was admissible under Evid.R.

803(3). We distinguished *Adams*, stating that the State had not identified the relevance of the victim's fear of Dillon in 2009, when the letter was written, to any material issue. *Id*. at ¶ 24. We concluded the error was prejudicial as to Dillon's conviction for aggravated murder, where the jury had to determine whether there was prior calculation and design, but harmless beyond a reasonable doubt as to the jury's guilty verdicts for purposeful murder and felony murder. *Id*. at ¶ 26-32.

{¶ 83} In Walter's case, the State filed a pretrial notice of intention to use ten Evid.R. 803(3) statements in its case-in-chief. These statements consisted of oral statements and text messages from Donna to friends and family members, oral and written statements to Officers Biscardi and Collins, and statements she made to Walter during a jail phone call, all of which included comments that Donna was afraid of Walter. The trial court overruled Walter's pretrial objections, reasoning that "the victim's statements regarding her feelings regarding Defendant are likely relevant" and that the proposed evidence reflected Donna's "state of mind and emotional state at that moment." The trial court subsequently allowed the statements at trial over defense counsel's repeated objections.

{¶ 84} On appeal, Walter argues that all ten statements went beyond what is permissible under Evid.R. 803(3). He asserts that Donna's statements to Officers Biscardi and Collins improperly referred to past actions by Walter and why she was afraid of him. Walter further contends that the jail conversation was simply a conversation between him and his mother and not reflective of Donna's then-existing state of mind. He argues that Donna's oral statements to Morgan, Slaton, and Landon were "outside the

scope of *Apanovitch* and cumulative" and that the text messages to Morgan were also improper.

{¶ 85} We begin with the statements that Donna made shortly before the murder to Doreen, Landon, Morgan, and Slaton. Slaton testified that she was in a car with Donna approximately a week before the murder. During their conversation, Donna told Slaton that she feared Walter. Tr. 437. Slaton expressed concern that Walter would "really hurt" Donna. Donna sat silently for a couple minutes and then replied, "I think he's going to hurt me, too." Tr. 437-438. Around the same time, Donna told Morgan that she "didn't feel safe in her home." Tr. 442. When asked if Donna had ever indicated that she was scared of Walter, Landon responded, "Multiple times." He elaborated that she had said so for "many weeks leading up to February 12" and again on February 12th itself. Tr. 428. Doreen testified that she spoke with Donna every day, and Donna told her "daily" that she was afraid that Walter would hurt her. Tr. 382. While testifying about her conversation with Donna on the morning of the murder while Donna was waiting in her car, Doreen stated that Donna was upset that Walter was not going to be arrested, that Donna expressed being afraid of Walter, and that she said that she had slipped out the back door to avoid Walter. Tr. 394-396.

{¶ 86} The State presented evidence of similar sentiments by Donna in the fall of 2019. Officer Collins testified that he had responded to Donna's residence on October 21, 2019. While discussing Walter with Officer Collins, Donna said, "I'm afraid of him." Tr. 617-618; State's Ex. 131. During Detective Waymire's testimony, the State played four short segments from a recording of a phone call that Walter had made to his mother

from the Montgomery County Jail on November 23, 2019. State's Ex. 147; Tr. 763-764. In one segment, Donna said to Walter: (1) "If it takes me sending you to jail to keep you from killing yourself or me or anybody else, then that's what I'm going to do." In the others, Donna expressed that she "can't live like this anymore." State's Ex. 147.

{¶ 87} Three witnesses also testified about statements that Donna made in the late spring/summer of 2019. Officer Biscardi testified that he was dispatched to Donna's residence on the morning of June 4, 2019. Donna prepared a written statement, which read, in part, "I believe Taylor Walter is a danger to me. I'm worried he will inadvertently hurt himself or me or my family." State's Ex. 43; Tr. 473. Angie Morgan testified about text messages she exchanged with Donna on July 28, 2019. Morgan wrote, "Are you afraid of him at all." Donna replied, "Yes" and "I never used to be but I am now." Tr. 444; State's Ex. 46. A couple weeks later, on August 13, 2019, Officer Collins responded to a call at Donna's residence. At trial, he read a redacted copy of Donna's written statement from that call, the last sentence of which read, "I believe [Walter's] not only dangerous to myself by [sic] also to himself."[3] Tr. 614-615; State's Ex. 130.

{¶ 88} We find no reversible error in the admission of all these statements. The statements Donna made to Doreen, Landon, Morgan, and Slaton shortly before the murder were relevant to understanding the relationship between Donna and Walter when the crime occurred. Her statements regarding her emotional state related to whether she considered his threats of violence to be genuine and her efforts before and on February 12, 2020, to remove him from her home, whether through criminal or civil

[3] The State's notice of intent to use Evid.R. 803(3) evidence cited only the last sentence that Officer Collins read at trial.

processes. Donna's statements were properly admitted under Evid.R. 803(3) as evidence of her then existing state of mind.

{¶ 89} Donna's less recent expressions of fear correspond to the admissible evidence regarding Walter's threats of violence against her. While Donna's less recent feelings toward her son were perhaps not as relevant to her February 2020 murder as those shortly before the murder, we do not need to decide whether any of Donna's statements were too remote in time to be pertinent. Any error in their admission was harmless given that the jury was already aware through properly admitted evidence that Donna feared Walter shortly before and at the time of the murder.

{¶ 90} We further note that, with respect to the August 2019 written statement, only the last sentence constituted proper Evid.R. 803(3) evidence. The remainder of the written statement described the circumstances surrounding Donna's statement, which Evid.R. 803(3) does not permit. *Apanovitch,* 33 Ohio St.3d 19, 514 N.E.2d 394. Regardless, as discussed above, the additional portion of the statement was properly admitted under Evid.R. 404(B).

{¶ 91} Additionally, Doreen's testimony that Donna snuck out of her house was a hearsay statement of what Donna did, not of her state of mind, and thus did not fall within Evid.R. 803(3). However, this evidence was cumulative of other admissible evidence, specifically Chief Littleton's cruiser video (State's Ex. 37) and Donna's written statement from February 12, 2020. This portion of Doreen's testimony, while improper under Evid.R. 803(3), was harmless beyond a reasonable doubt.

{¶ 92} Walter's first assignment of error is overruled.

V. Jury Instructions

{¶ 93} In his fourth and fifth assignments of error, Walter claims that the trial court erred in instructing the jury on consciousness of guilt and voluntary intoxication. We disagree.

{¶ 94} "A trial court has broad discretion to decide how to fashion jury instructions, but it must 'fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.' " *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 46, quoting *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. "When reviewing the trial court's jury instructions, the proper standard of review is whether the trial court's decision to give or exclude a particular jury instruction was an abuse of discretion under the facts and circumstances of the case." (Citation omitted.) *State v. Fair*, 2d Dist. Montgomery No. 24388, 2011-Ohio-4454, ¶ 65.

{¶ 95} "In examining errors in a jury instruction, a reviewing court must consider the jury charge as a whole and 'must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights.' " *Becker v. Lake Cty. Mem. Hosp. W.*, 53 Ohio St.3d 202, 208, 560 N.E.2d 165 (1990); *State v. Gillilan*, 2d Dist. Montgomery No. 29182, 2023-Ohio-325, ¶ 12. "A substantial right is, in effect, a legal right that is enforced and protected by law." *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 526, 709 N.E.2d 1148 (1999).

A. Consciousness of Guilt

{¶ 96} Walter first argues that the evidence at trial did not support a consciousness

of guilt instruction. He states that "the record indicates that [he] never left the nearby area of the crime scene. There is no indication of deliberate flight, affirmative steps to avoid detection, or change of appearance to justify a consciousness of guilty based on flight."

{¶ 97} "[W]hen an accused takes an affirmative step to conceal conduct or avoid consequences of his or her illicit dealings, that person has demonstrated 'consciousness of guilt.' " *State v. Sutherland*, 2021-Ohio-2433, 173 N.E.3d 942, ¶ 18 (2d Dist.). "For instance, the Ohio Supreme Court has commented that 'today [it is] universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.' " *Id.*, quoting *State v. Williams*, 79 Ohio St.3d 1, 11, 679 N.E.2d 646 (1997), quoting *State v. Eaton*, 19 Ohio St.2d 145, 160, 249 N.E.2d 897 (1969), *vacated on other grounds*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 750 (1972).

{¶ 98} In this case, the State presented evidence that Walter took steps to avoid the consequences of his conduct. When reviewing the crime scene, Sergeant Hesler noticed that the bathroom smelled as if someone had recently bathed. Walter's brother, Landon, and Detective Waymire both testified that Walter's hands generally were not clean, yet Walter's hands were "extremely clean" when he was arrested. He had also changed his shirt before leaving the home, and he had denied doing so when asked by Detective Waymire. Moreover, within hours of the murder, Walter untruthfully told Doreen that he had gone to Georgia. With this evidence, the trial court did not abuse its

discretion in concluding that Walter's exhibited behavior consistent with consciousness of guilt and that a consciousness of guilt instruction was warranted.

{¶ 99} In instructing the jury, the trial court based its consciousness of guilt instruction on evidence that Walter "fled the scene." The court stated:

> Testimony has been admitted indicating that the Defendant fled the scene. You are instructed that this alone does not raise a presumption of guilt, but it may tend to indicate the Defendant's consciousness or awareness of guilt. If you find the facts do not support that the Defendant fled the scene, or if you find that some other motive prompted the Defendant's conduct, or if you're unable to decide what Defendant's motivation was for fleeing the scene, then you should not consider this evidence for any purpose. However, if you find the facts support the Defendant engaged in such conduct, and if you decide that the Defendant was motivated by consciousness or awareness of guilt, you may, but are not required to, consider that evidence in deciding whether the Defendant is guilty of the offenses charged. You alone will determine what weight, if any, to give to the evidence.

{¶ 100} We find the instruction as given to be potentially misleading. The jury heard evidence that when Donna's body was discovered, her vehicle was gone and Walter was not there. With that evidence, the jury could have reasonably interpreted the trial court's instruction to mean that Walter's absence from the home constituted "fleeing the scene." However, a person's mere departure from the scene of a crime does not

constitute flight. *E.g.*, *State v. Shepherd*, 8th Dist. Cuyahoga No. 102951, 2016-Ohio-931, ¶ 23; *see State v. Cargle*, 2d Dist. Montgomery No. 28044, 2019-Ohio-1544, ¶ 48 (discussing definition of flight as applied in jury instructions for purposes of defining flight in R.C. 2905.01(A)(2)). Rather, to constitute flight, "it must be clear that the defendant took affirmative steps to avoid detection and apprehension beyond simply not remaining at the scene of the crime." *Cargle* at ¶ 48; *see State v. White*, 2015-Ohio-3512, 37 N.E.3d 1271, ¶ 48 (2d Dist.), quoting *State v. Wesley*, 8th Dist. Cuyahoga No. 80684, 2002-Ohio-4429, ¶ 19 ("Flight means some escape or affirmative attempt to avoid apprehension."). The trial court did not define "flight" or "fleeing the scene" for the jury. Nor did the trial court tailor the instruction to Walter's specific conduct showing consciousness of guilt. *See Ohio Jury Instructions*, CR Section 409.13 (Rev. Aug. 17, 2005).

{¶ 101} We nevertheless conclude that the error in the trial court's instruction was harmless. The instruction informed the jury that any consciousness of guilty finding was entirely permissive and applicable only if the jury concluded that Walter had fled the scene due to consciousness of guilt. *Accord State v. Ross*, 2023-Ohio-1185, __ N.E.3d __, ¶ 56 (9th Dist.). Moreover, the jury was instructed that it had the discretion to give no weight to consciousness of guilt evidence. The court expressly told the jury that Walter's fleeing the scene did not create a presumption of guilt. We have previously commented that an instruction on flight is "all but innocuous." *White* at ¶ 51; *State v. St. John*, 2d Dist. Montgomery No. 27988, 2019-Ohio-650, ¶ 106. After reviewing the jury instructions as a whole, we cannot say that the trial court's instruction on flight affected Walter's

substantial rights.

{¶ 102} Walter's fourth assignment of error is overruled.

B. Voluntary Intoxication

{¶ 103} Walter next claims that the trial court erred in giving a jury instruction on voluntary intoxication.

{¶ 104} At trial, the State requested a voluntary intoxication instruction, saying "there is visual evidence that hours before the homicide, the Defendant is high. I just don't want the jury to get confused and start to wonder if that matters, since the law is clear that voluntary intoxication is not a defense." Defense counsel objected to the instruction. He emphasized that he did not assert intoxication as a defense and that the jury might interpret the instruction to mean that Walter had committed the offense.

{¶ 105} The trial court overruled the objection, finding that there was evidence that Walter had been high both at the house and in Officer Collins's cruiser and there had been discussion of Walter's drug use throughout the trial. The court concluded that "the law is pretty clear that I need to give an instruction in regards to the voluntary intoxication." The trial court's subsequent instruction to the jury read: "Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Intoxication is not an excuse for an offense."

{¶ 106} We find no error in the trial court's ruling. There was substantial evidence at trial that Walter abused drugs. In her statement to Chief Littleton on the morning of the murder, Donna wrote that Walter was high. Based on Walter's behavior at his house when he was served with the complaint and later that afternoon in Officer Collins's cruiser,

the jury could have reasonably determined that Walter was high throughout the day, including when the murder occurred. The trial court provided a correct statement of law, which was warranted by the evidence. *See* R.C. 2901.21(E).

{¶ 107} Walter's fifth assignment of error is overruled.

VI. Conclusion

{¶ 108} Having overruled Walter's assignments of error, the judgment of the trial court is affirmed.

. . . . . .

WELBAUM, P.J. and EPLEY, J., concur.