

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

STATE OF OHIO

Appellee

v.

NICOLE CUNIGAN JR.

Appellant

:
:
:
:
:
:
:
:
:
:
:

C.A. No. 30608

Trial Court Case No. 2024 CR 01548

(Criminal Appeal from Common Pleas
Court)

**FINAL JUDGMENT ENTRY &
OPINION**

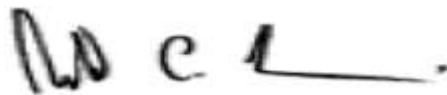
.....

Pursuant to the opinion of this court rendered on October 2, 2026, the judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with the opinion.

Costs to be paid as follows: 50% by the appellant and 50% by the appellee.

Pursuant to Ohio App.R. 30(A), the clerk of the court of appeals shall immediately send a copy of the court's ruling to each party and note that action on the docket. Additionally, pursuant to App.R. 27, the clerk of the court of appeals shall send a certified copy of this judgment, which constitutes a mandate, to the clerk of the trial court and note the service on the appellate docket.

For the court,



RONALD C. LEWIS, PRESIDING JUDGE

TUCKER, J., and HANSEMAN, J., concur.

OPINION
MONTGOMERY C.A. No. 30608

DAVID R. MILES, Attorney for Appellant
ANDREW T. FRENCH, Attorney for Appellee

LEWIS, P.J.

{¶ 1} Defendant-appellant Nicole Cunigan Jr. appeals from his convictions in the Montgomery County Common Pleas Court for murder and related offenses following a trial. For the following reasons, the judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded to the trial court for the purposes of advising Cunigan of the requirements in R.C. 2903.42(A)(1)(a) and resentencing him.

I. Facts and Course of Proceedings

{¶ 2} On August 1, 2024, Cunigan was indicted by a Montgomery County grand jury on two counts of purposeful murder, two counts of murder (proximate result), one count of felonious assault (serious physical harm), one count of felonious assault (deadly weapon), one count of involuntary manslaughter, one count of domestic violence (knowingly – 1 prior), one count of domestic violence (pregnant victim), one count of tampering with evidence, one count of having weapons while under a disability, and one count of unauthorized use of a vehicle. The counts of murder, felonious assault, involuntary manslaughter, domestic violence, and having weapons while under a disability all included three-year firearm specifications in accordance with R.C. 2941.145. The counts of murder, felonious assault, and involuntary manslaughter all included repeat violent offender (“RVO”) specifications in accordance with R.C. 2941.149. The charges arose from a shooting on May 22, 2024, during which D.J., P.T., and P.T.’s unborn child were killed inside P.T.’s home on Shaftesbury Road in Dayton, Ohio.

{¶ 3} On July 2, 2025, pursuant to Crim.R. 12.2, Cunigan filed a notice of self-defense. In response, the State filed a notice of intent to offer certain evidence at trial, some of which included parole officer testimony to disprove Cunigan's claim of self-defense. Defense counsel filed a response in opposition to the State's notice and filed proposed jury instructions requesting a self-defense instruction. Following a hearing, the trial court preliminarily ruled that the State would be permitted to introduce testimony of Cunigan's parole officers in its case-in-chief at trial.

{¶ 4} Cunigan waived his right to a jury trial on the charges of domestic violence (knowingly - 1 prior) and having weapons while under a disability, along with their attendant three-year firearm specifications. The remaining counts and specifications were tried to the jury. The following is a summary of the testimony and evidence presented at trial.

{¶ 5} On the morning of May 22, 2024, Dayton police officers responded to a 911 call reporting a shooting on Shaftesbury Road. At 6:32 a.m. officers forced entry into the one-and-a-half story single family home. Officers entered the unlocked front door and observed Jawuan Washington inside the house near the kitchen. Washington was removed from the home, and the officers conducted a protective sweep to search for the possible shooter and any victims. P.T.'s three-year-old twins were found in the first-floor rear bedroom and a deceased woman, later identified as P.T., was discovered at the bottom of the basement stairs. Washington, the 911 caller, informed police that there was another person inside the house. During a secondary sweep, officers uncovered the body of a deceased male, later identified as D.J., in the first-floor front bedroom laying on the bed under the covers. There was a hole in the comforter and D.J. was holding a firearm, which was removed from his hand. The firearm was a loaded TEC-9 9 mm handgun. A window in the bedroom was open, and the lower window had been pushed in.

{¶ 6} In the front bedroom, a .45 caliber fired cartridge casing was recovered from the floor below the open window, and two .45 caliber fired cartridge casings were recovered on the bed where D.J. had been found. Two additional .45 caliber fired cartridge casings were recovered from the kitchen. Another .45 caliber fired cartridge casing was found in the basement for a total of six fired .45 caliber casings. All six fired cartridge casings were later determined to have been fired from the same gun. No spent 9 mm cartridge casings were recovered from the scene. Testimony noted that .45 caliber bullets could not be fired from a 9 mm handgun (the type found with the decedent D.J.) due to the difference in the diameter of the bullets. A piece of orange hair, consistent with P.T.'s hair, was found on the floor in the kitchen. Suspected blood was found on the living room wall, the kitchen floor and cabinets, and on the walls and stairs leading to the basement.

{¶ 7} Washington testified that she was friends with P.T. and P.T.'s family who lived at Summit Square Apartments. Washington was familiar with Cunigan, a.k.a. "Nico," through P.T. and knew Cunigan shared three children with P.T., including twins. Washington was D.J.'s godmother.

{¶ 8} P.T. owned a white Chevrolet Malibu. On May 20, 2024, Washington was with P.T. at Summit Square Apartments when P.T. handed the car keys to the Malibu to Cunigan. At that time, Cunigan's hair was styled in long dreads that were orange at the bottom and retwisted.

{¶ 9} On the evening of May 21, 2024, P.T. asked Washington to come over. Washington and D.J. got a ride to P.T.'s house and arrived just after 10:00 p.m. Only P.T. and the twins were home when they arrived. Washington, D.J., and P.T. talked on the couch in the living room at the front of the house. During that time, Cunigan texted and called P.T. numerous times. P.T. pleaded with Cunigan to return her car, but he did not

return her car that night. P.T., D.J., and Washington smoked some marijuana and then Washington went to sleep on the couch in the living room around 11:30 p.m. P.T. and D.J. were still awake when Washington went to sleep.

{¶ 10} Around 5:57 a.m., Washington awoke and heard Cunigan's voice coming from P.T.'s bedroom. Washington heard P.T. ask Cunigan where her car was and Cunigan responded that he would get her car. Cunigan asked P.T. not to "police" him, meaning not to call the police on him. Washington did not hear D.J.'s voice even though he was also in P.T.'s bedroom. Washington saw Cunigan walk out of P.T.'s bedroom, which was the first-floor front bedroom, and then saw him walk out the front door. Cunigan was wearing all black, and he had his hair in the same style of dreads with orange coloring at the bottom that she had seen him wear two days prior. P.T. followed Cunigan outside but returned alone and locked the front door. After Cunigan left, Washington, P.T., and D.J. talked in the living room for a few minutes. P.T. said that Cunigan had entered the house through the window in her bedroom. Washington knew D.J. to carry a gun, but she did not see a gun while they were in the living room. Around 6:09 a.m., P.T. and D.J. returned to P.T.'s bedroom and Washington stayed on the couch in the living room.

{¶ 11} Shortly thereafter, Washington heard the window in P.T.'s bedroom come down and make a loud boom. Washington heard P.T. say, "Nico, why the f * * * do you keep doing that to my f * * * ing window?" Cunigan replied, "My bad, I didn't mean to do that to the window." Washington then heard three gunshots and P.T. scream, so Washington ran to the basement and hid under the stairs. Washington did not hear D.J. say anything and she did not see anyone in the house when she ran to hide in the basement. The basement stairs had open treads so that while Washington was hiding behind them, she could see through the stairs. While in the basement, Washington heard P.T., who had

run to the kitchen, beg for her life and yell, "Please, Nico. I'm sorry. I'm sorry. Please. No. I'm sorry. Please. No." Washington testified that the more P.T. pleaded, the more she was shot. Washington knew that one shot was fired in the kitchen because she heard P.T. slip and fall. P.T. then came down the basement stairs with her head turned back up toward the kitchen, and she was shot one final time in the head. P.T. tumbled down the remaining steps to the basement floor, where she was found by police. In total, Washington heard six or seven gunshots.

{¶ 12} After P.T. fell to the basement floor, Washington saw someone take a couple steps down the stairs; the person was wearing black Air Force One Supremes that had a red Supreme logo on the side and black and white shoestrings. The shooter did not come all the way down the steps but stopped and returned upstairs. Washington did not see the shooter's face but recognized the shoes as consistent with ones that she had previously seen Cunigan wearing.

{¶ 13} Washington attempted to call 911 twice at 6:17 a.m. but did not know where she was, so she looked up P.T.'s address on her phone. When Washington called 911 the third time at 6:20:03 a.m., she whispered to the dispatcher because she did not know if the shooter was still in the house. Once she heard the police sirens and the officers yell "police," she came upstairs from the basement and immediately told them that "Nico" was the shooter. After she was outside, Washington told police that D.J. was still inside the house, and then she helped get P.T.'s twins out of the home. She later learned from police that D.J. had died.

{¶ 14} Dayton Homicide Detective Zach Williams responded to the shooting on Shaftesbury Road. Detective Williams located surveillance cameras secured on the house of one of P.T.'s neighbors. The neighbor had four cameras on the exterior of her home that

captured video from each side of her house, one of which was pointed at P.T.'s bedroom window that had been forced open. The neighbor provided police access to her surveillance system, which was a motion-based DVR recording system, not a continuous recording system. Although the surveillance video was in color, it did not have audio.

{¶ 15} The surveillance video reflected that at 5:45 a.m., a white sedan, not P.T.'s Malibu, drove down Shaftesbury Road past P.T.'s house, turned around, and parked on the opposite side of the street from P.T.'s house. Shortly after the car stopped, a man approached P.T.'s bedroom window. The video depicted a black male wearing a black t-shirt, dark grey and black pants, and black shoes. He had long dreadlocks colored orange at the bottom. The man opened the window from the outside and appeared to have a conversation with the home's occupants. He climbed through the window and entered the house at 5:53 a.m. Shortly thereafter, P.T. came outside to her front lawn with a phone in her hand. The white car drove off at 5:57 a.m.

{¶ 16} At 6:15 a.m., P.T.'s Malibu backed into P.T.'s driveway, and the driver got out. The driver was the same black male with orange-colored dreads who had been at the house a few minutes earlier. He returned to P.T.'s bedroom window, carrying a semiautomatic pistol on the right side of his pants. P.T.'s bedroom window was pushed in, and he appeared to speak briefly with the occupants before firing the gun into the house. The man's right arm extended into the bedroom, and muzzle fire flashed from his gun. The man then aimed the gun to the left, where D.J.'s body was later found. After firing his gun, the man climbed into the house through the open window. A minute later, the man walked out of the house, returned to P.T.'s car, and drove off at 6:17 a.m.

{¶ 17} Dayton Homicide Detective Angela Woody testified that she also responded to the shooting on Shaftesbury Road. Officers obtained a search warrant for the home, and

Detective Woody found an ultrasound in a drawer in P.T.'s bedroom. It was labeled with P.T.'s name and dated April 11, 2024, with an estimated gestation of 10 weeks and 2 days.

{¶ 18} Officers located P.T.'s missing Malibu at the Pinewood Gardens apartment complex in Trotwood, Ohio. The vehicle was towed and taken to the evidence garage. The Malibu had obvious front-end damage to it, and the vehicle registration verified that P.T. was the owner. Surveillance video from Pinewood Gardens showed that P.T.'s Malibu entered the complex at 6:29 a.m. on May 22, 2024, and a black male with distinctive orange-colored dreads parked and exited the vehicle. He carried a small bag and was dressed in a black t-shirt, dark grey and black pants, and black shoes, similar to the shooter at P.T.'s house. The driver entered 60 Pinewood Circle and walked down the stairs to the lower level.

{¶ 19} At 6:48 a.m., the Malibu driver left the apartment with another man, later identified as Ellis Morris, the boyfriend of Cunigan's mother, Alicia Williamson. Morris and Williamson lived in an apartment in the lower level of 60 Pinewood Circle. Morris and the Malibu driver got into a black Jeep and left the apartment complex. Eventually, the Jeep returned, and the police towed it to the evidence garage. Rental paperwork for the Jeep was found inside the car, and Morris was identified as the listed renter.

{¶ 20} Officers obtained Cunigan's phone records and tracked his cell phone location to Eagle Ridge Apartments.¹ Surveillance video from Eagle Ridge Apartments showed that at 7:06 a.m., Morris's black Jeep pulled into the apartment complex. The front passenger, still dressed in a black t-shirt, black pants, and black shoes, got out and walked into an apartment building where Paige Dearmon lived. At 7:26 a.m., a man, later identified as

1. The name of the apartment complex changed over time and was referenced by multiple names during trial. For ease of discussion, we use only the name Eagle Ridge Apartments.

Daquann Norman, walked out of the apartment building without a shirt on and retrieved a white Nissan Altima. At 7:29 a.m., Cunigan, wearing a white shirt and black shorts, got into the Altima, and he and Norman drove away.

{¶ 21} Norman testified that he was related to Cunigan and considered Cunigan his cousin. Norman had known Cunigan since they were children, and Norman knew Cunigan had children with P.T. At the time of trial, Norman was in a federal penitentiary in West Virginia for violating his probation. He had prior felony convictions for robbery, “representing disability,” and possession with intent to distribute.

{¶ 22} On the morning of May 22, 2024, Norman and his friend Derrick Hoskins were at Paige Dearmon’s apartment at Eagle Ridge Apartments. At 6:46 a.m. on May 22, 2024, Norman received a text message from Cunigan. Norman texted Dearmon’s address to Cunigan so he could come over. Cunigan told Norman not to say anything to anyone, including Hoskins. Norman testified he did not know what kind of trouble Cunigan was in, but texted Cunigan, “U my f * * * ing Cuzin u in trouble so it’s my duty to keep u safe n * * * * u called me not nobody els.”²

{¶ 23} Norman testified that Cunigan entered Dearmon’s apartment that morning wearing all black. Cunigan stated that he had gotten in trouble with some people and did not want them to see him, so Norman gave Cunigan his own shirt. Norman walked out of Dearmon’s apartment without a shirt on and retrieved Dearmon’s white Nissan Altima. He drove up to Dearmon’s apartment, where Cunigan got into the passenger seat wearing shorts. Cunigan had left his pants in Dearmon’s apartment. Norman drove Cunigan to Springfield, Ohio, to meet a girl, but the girl did not respond, so they turned around, got on

2. All quoted texts appear in original form, including spelling and grammatical errors. Expletives included in the original texts have been redacted with asterisks.

the interstate, and headed towards Indiana. Cunigan's phone records confirmed that he was in the Springfield, Ohio, area at 8:10 a.m., but then his phone was turned off.

{¶ 24} At 7:27 a.m., Norman's phone texted "Uncle Gary," alerting Uncle Gary that Cunigan was with Norman and requesting that Uncle Gary contact Cunigan via Norman's cell phone. According to Norman, Uncle Gary was a friend of the family. Norman dropped Cunigan off just over the Indiana border. Norman immediately turned around and drove back to Trotwood because Dearmon wanted her car back. Police obtained Norman's cell phone location information, which corroborated his testimony about his travel times from Dayton, to Springfield, to Richmond, and then back to Dayton. When Norman returned to Dearmon's apartment, Hoskins was wearing Cunigan's pants. Hoskins subsequently took them off because he claimed they were too tight. Later that day, Norman and Hoskins threw Cunigan's pants away in a dumpster at Norman's mother's house on Germantown Street.

{¶ 25} On May 24, 2024, officers went to the apartments located at 1207 Germantown Street and recovered a pair of pants inside a grocery bag from the dumpster behind the apartments. The pants matched those worn by the suspect in the video from the shooting on Shaftesbury Road. The parties stipulated that scientific testing established that the pants recovered from the dumpster had P.T.'s blood on them.

{¶ 26} Nicole Cunigan, Sr. ("Senior"), testified that he is Cunigan's father and Williamson is Cunigan's mother. Senior was aware that P.T. was the mother of some of Cunigan's children, specifically, the twins. Senior wanted Cunigan to get a job as a model and asked Cunigan to send photos of himself to help him get some work. On May 20, 2024, Cunigan sent Senior a photograph of himself that had been taken that morning depicting his orange-colored dreads, which was submitted to the jury.

{¶ 27} Senior had been a truck driver for almost 14 years, mostly working in the tri-state area. Sometime after 7:00 a.m. on May 22, 2024, while in Indiana, Senior received texts from Cunigan and learned about what had happened at P.T.'s house.

{¶ 28} Prior to May 22, 2024, Senior owned three guns: a shotgun, a 9 mm pistol, and a .45 caliber semiautomatic pistol. After he heard about what happened at P.T.'s house, he discovered that his .45 caliber semiautomatic pistol was missing. Senior denied giving his gun to Cunigan at any time in May 2024 and stated that Cunigan never returned a gun to him.

{¶ 29} On May 23, 2024, Dayton Police Homicide Detectives David House, Melissa Schloss, and Woody went to 60 Pinewood Circle, where they met with Williamson and Morris. The officers were given consent to check Williamson and Morris's apartment for anyone else who might be present. When Detective House went into the bathroom, he observed a paper towel bearing a handwritten number, which was later found to be Uncle Gary's phone number. When Uncle Gary's phone number was run in a police database, the number came back to Jerry Davis, a truck driver. After obtaining Davis's phone records, it was determined that Davis's phone travelled to Richmond, Indiana, on the morning of May 22, 2024.

{¶ 30} Richmond is located a few miles west of the Ohio border near the I-70 and U.S. 40 interchange. Detectives obtained surveillance video from one of the hotels in Richmond that was in the same area as Davis's phone on the morning of May 22, 2024. The surveillance video showed a red semitruck, which was leased to Davis, exit the highway and pull to the curb in front of a fireworks store. Cunigan got into the passenger side of the semitruck and then it pulled away at approximately 9:41 a.m. After leaving Richmond, the semitruck drove west to Indianapolis, Indiana, and then eventually traveled east to

Cleveland, Ohio. Davis's phone records showed that his phone traveled to an area close to Davis's listed address in Cleveland. Detectives House and Woody traveled to Cleveland, found Cunigan, and brought him back to Dayton.

{¶ 31} Seventeen-year-old C.T. was P.T.'s eldest child. Cunigan was not his father. C.T. testified that P.T. had three children with Cunigan, including the twins. In May 2024, C.T. lived on Shaftesbury Road with his mom, Cunigan, and his siblings, but C.T. did not stay there all the time. Because some of C.T.'s family lived at Summit Square apartments, C.T. often spent time there. D.J. was one of C.T.'s close friends and lived in the Whitney Young apartments.

{¶ 32} On the night of May 21, 2024, C.T. was at Summit Square Apartments at his friend Javon's house. Cunigan contacted C.T. looking for P.T., but C.T. did not know where she was. Cunigan arranged to pick up C.T. to go look for P.T. Cunigan told C.T. to bring a gun, so C.T. brought his Taurus G2 9 mm gun. C.T. always kept his gun on him, so it was not unusual for him to bring it along.

{¶ 33} Cunigan picked up C.T. and Javon in P.T.'s white Chevrolet Malibu. C.T. knew Cunigan had P.T.'s car and that she had wanted it back. That night, Cunigan wore his hair in dreads with a reddish-orange color to them. Cunigan had a gun in the cup holder of the Malibu, but C.T. did not know the make or model of it. Cunigan showed C.T. a video on Cunigan's phone that depicted P.T. in bed with someone, but C.T. could not identify the other person. Cunigan drove them to D.J.'s house at Whitney Young Apartments and walked up to D.J.'s door. Cunigan told C.T. to call his mom while they were standing outside D.J.'s apartment. C.T.'s phone records showed that he tried to call his mother between 1:14 a.m. and 1:28 a.m. on May 22, 2024. C.T. finally spoke to his mother, but she did not disclose her location. After C.T. got off the phone, Cunigan knocked on D.J.'s

door. As the door opened, Cunigan used his feet to kick the door open, but Cunigan was unable to get into the apartment because the person on the other side of the door was able to shut it. C.T., Cunigan, and Javon returned to P.T.'s car, and Cunigan dropped them off at Summit Square Apartments. Cunigan did not say where he was going after he dropped them off.

{¶ 34} Terraesha Reed, Cunigan's sister, testified that around 5:00 a.m. on May 22, 2024, Cunigan texted her. Cunigan asked her for a ride to pick up three of his kids who were at P.T.'s house. Reed was aware that P.T. was the mother of Cunigan's twins and lived on Shaftesbury Road. Reed did not have a car, but she lived with her brother Jamari, who was home and had a white Kia with 30-day tags. Jamari and Reed picked up Cunigan in Dayton around 5:35 a.m. At that time, Cunigan had his hair in dreads that were colored orange toward the bottom.

{¶ 35} They arrived at P.T.'s house about 7 minutes after picking up Cunigan and let Cunigan out of the car. Cunigan was gone for about 10 minutes and then Reed saw Cunigan come out of P.T.'s front door before returning to the Kia. She also saw P.T. come outside the house before they drove away. Cunigan did not say anything about what happened inside P.T.'s house. Reed and Jamari dropped Cunigan off at some apartments and left.

{¶ 36} Montgomery County Sheriff's Office Detective Sergeant Isaiah Keller was a specialist in computer forensics and was trained to examine computers, mobile devices, and other electronic devices. Detective Keller testified that he was given P.T.'s cell phone to download and analyze. Using Cellebrite software, his analysis of P.T.'s phone showed that from May 16, 2024, at 3:03:59 a.m. through May 22, 2024, at 4:46:00 a.m., Cunigan called or FaceTimed P.T. hundreds of times. Of those attempts, 827 went unanswered, while

74 attempts were answered. During that same time frame, P.T. contacted Cunigan 42 times, but there were no contacts from P.T. to Cunigan on May 16 or 17, 2024.

{¶ 37} In the days leading up to the shooting, Cunigan's texts indicated that at one point he had his father's gun and told P.T. not to be scared of him. Cunigan also indicated that he knew P.T. was pregnant with his child and suspected her of messing around with other men whom he threatened to beat up. Despite P.T. telling Cunigan that she was done with him, Cunigan repeatedly accused P.T. of cheating on him. On multiple occasions, P.T. told Cunigan to return her car and to stay away from her. In the early morning hours of May 22, 2024, Cunigan wanted P.T. to tell her where she was located, but she refused to answer. Around 12:30 a.m., Cunigan texted P.T. that he knew the address of the man she was with, and he told her to tell him to come outside or he would come in. P.T. did not respond. Cunigan told P.T. to answer the phone and asked if she had left the kids home alone. At 3:39 a.m., Cunigan texted P.T. asking where his kids were.

{¶ 38} A video was recovered from P.T.'s phone that was taken around 5:57 a.m. on May 22, 2024. In the video, a white Kia Optima displaying a temporary plate on the left-hand corner of the back windshield drives away from P.T. At 5:59 a.m., Cunigan texted P.T. that he was going to get her car. P.T. responded that she had gotten their license plate. Cunigan claimed that he was just making sure his kids were not home alone. P.T. texted Cunigan at 6:00 a.m. that "they not gone have a car either they going to jail n that car waved a gun bye I'll show u," and Cunigan asked P.T. not to call the police. P.T. then texted Cunigan at 6:02 a.m., "They going to jail with u and u had your hand on your gun." Cunigan responded, "Ok, p. I ain't know if he had one tf." At 6:11 a.m., Cunigan texted P.T. that she could have her car and that he would bring it to her in 30 minutes. At 6:13 a.m.,

Cunigan texted P.T. that P.T. won and he was through. P.T. sent her final text to Cunigan at 6:14 a.m. telling him that she was done giving him chances that he did not deserve.

{¶ 39} Dr. Sean Swiatkowski, a pathologist from the Montgomery County Coroner's Office, testified that he conducted the autopsies of P.T. and D.J. P.T. had an abrasion on her left fifth finger caused by blunt force trauma. There was an entrance gunshot wound on P.T.'s back left shoulder and a corresponding exit wound on the inside of her left arm. The bullet traveled from P.T.'s back to the front and angled downward. Another gunshot entrance wound was located under P.T.'s right breast with a corresponding exit wound on the front right breast. The bullet's direction of travel was consistent with someone shooting P.T. from her right side. A third entrance wound was located on the top right front of P.T.'s forehead, which corresponded with a bullet that had entered P.T.'s skull. There was no corresponding exit wound, and a bullet was recovered from the soft tissue on the left side of P.T.'s neck. According to Dr. Swiatkowski, the barrel of the weapon must have been above P.T.'s head when causing this gunshot wound because the direction of travel of the bullet was downward. Toxicology results of P.T.'s blood reflected the presence of fentanyl, fentanyl metabolite, marijuana, and marijuana metabolite. None of these substances contributed to the death of P.T. Dr. Swiatkowski testified that the cause of P.T.'s death was multiple gunshot wounds.

{¶ 40} At the time of P.T.'s death, she was pregnant. The fetus inside P.T.'s uterus was a male, and its gestational age was about 14-15 weeks based on its weight and measurements. There was no evidence of maceration, which occurs when a fetus dies in utero while the mother is still alive. Congenitally, the fetus appeared fine with no abnormalities. According to Dr. Swiatkowski, it was a viable fetus at the time of death. Dr. Swiatkowski explained that once a mother loses her circulatory ability to provide blood to

her fetus, the fetus is unable to obtain oxygen and dies. A fetus is not viable very long after the mother loses her circulatory function and dies. P.T. lost her circulatory function when she succumbed to the gunshot wounds. Dr. Swiatkowski was not concerned about the level of fentanyl in P.T.'s blood as it related to the death of the fetus.

{¶ 41} D.J. had a gunshot entrance wound to the left side of his chest with a corresponding exit wound on his back. Near D.J.'s left wrist was a gunshot entrance wound with a corresponding exit wound on the posterior aspect of his ring finger. D.J. had a gunshot entrance wound to the left side of his neck with no corresponding exit wound. A bullet was recovered from the back of D.J.'s neck. Dr. Swiatkowski testified that the gunshot wound to the wrist could be indicative of a defensive wound. It was also possible that D.J. was shot through the wrist and the projectile exited his finger and entered his neck—all in one shot. D.J.'s toxicology results reflected the presence marijuana and fentanyl as well as xylazine. Nothing in the toxicology results contributed to D.J.'s death. D.J.'s cause of death was multiple gunshot wounds.

{¶ 42} Parole Officer Alec Sparkman testified that he worked for the Adult Parole Authority ("APA") and supervised individuals released from incarceration on post-release control ("PRC") or parole. After an individual's release, they were required to meet with a parole officer within 48-72 hours. Sparkman testified that he met with Cunigan and reviewed his conditions of supervision, which Cunigan signed on January 18, 2024. This document was admitted at trial. Cunigan's assigned parole officer had been on vacation, so Sparkman filled in for her to review Cunigan's forms. The first condition of Cunigan's supervision required him to obey all laws and have no contact with the victim of his current offense (the one for which he was on PRC). The third condition required Cunigan to obtain a written travel permit from the APA before leaving the state of Ohio. The fourth condition

prohibited Cunigan from purchasing, possessing, owning, using, or having under his control any firearm or ammunition.

{¶ 43} Parole Officer Elizabeth Ackerman was Cunigan's assigned parole officer. As part of her duties, she investigated where Cunigan planned to live upon his release. Ackerman met with Senior, who verified it would be okay for Cunigan to live with him. Ackerman was advised that there was a gun in the home but that it was in a locked safe. Senior agreed that Cunigan would not have access to any guns. Therefore, Ackerman approved Senior's address as a location for Cunigan to live. Ackerman last saw Cunigan in March 2024, and Cunigan never asked to change his address to any other location.

{¶ 44} Detective Melissa Schloss was the case detective assigned to investigate the deaths of P.T. and D.J. Because the police had a named suspect, Detective Schloss obtained Cunigan's phone number, researched his background, and conducted a background check on P.T. and her vehicle. P.T. was the victim of Cunigan's prior offense, and he was not supposed to have contact with her per his parole officer. Police never recovered the gun used to shoot P.T. and D.J.

{¶ 45} Outside the hearing of the jury, Detective Schloss testified to a certified copy of Cunigan's prior conviction for felonious assault, an offense of violence. The victim of that prior conviction in 2022 was P.T., a family or household member of Cunigan.

{¶ 46} Following the completion of the State's case, Cunigan made a Crim.R. 29 motion, arguing there was insufficient evidence of his identity as the perpetrator. Cunigan's motion was overruled.

{¶ 47} The following morning, Cunigan withdrew his notice of self-defense, declined to testify, and presented no witnesses on his behalf. In response to Cunigan's decision to withdraw his notice of self-defense, the State withdrew Cunigan's signed conditions of parole

supervision from submission to the jury, the State advised the court it would not discuss the PRC testimony during closing arguments, and Cunigan requested a limiting instruction from the court relating to the PRC evidence. A limiting instruction was given to the jury.

{¶ 48} The jury returned a verdict of guilty as charged on all counts and specifications. Before sentencing, the trial court found Cunigan guilty of domestic violence (knowingly – 1 prior) and having a weapon while under disability, along with their respective firearm specifications. The trial court further found that Cunigan was a repeat violent offender.

{¶ 49} At sentencing, the trial court advised Cunigan of his duty to enroll as a violent offender upon his release from prison. Defense counsel requested that all of the counts related to each separate victim be merged into one sentence for each victim and asked the court to impose the minimum sentence. The trial court merged the two counts of murder and two counts of felonious assault related to D.J. into one count of murder. The trial court merged the purposeful murder and involuntary manslaughter counts related to P.T.'s unborn child into one count of purposeful murder. The trial court merged the two domestic violence offenses into one count of domestic violence (knowingly – 1 prior), a fourth-degree felony. All of the three-year firearm specifications attached to the merged counts were ordered to run concurrently with one another.

{¶ 50} The trial court then imposed a mandatory sentence of 15 years to life in prison for the murder charge related to P.T., plus an additional mandatory 3-year prison term for the firearm specification and an additional 3-year prison term for the RVO specification. The trial court imposed a mandatory sentence of 15 years to life in prison for the murder charge related to the unborn child of P.T., plus an additional mandatory 3-year prison term for the firearm specification and an additional 2-year prison term for the RVO specification. The trial court imposed a mandatory sentence of 15 years to life in prison for the murder

charge related to D.J., plus an additional 3-year mandatory prison term for the firearm specification and an additional 1-year prison term for the RVO specification. The trial court imposed a stated prison term of 2 years on the charge of tampering with evidence, a term of 180 days in jail for the charge of unauthorized use of a motor vehicle, a stated prison term of 12 months for the charge of domestic-violence (knowingly – 1 prior) with an additional 3-year mandatory prison term for the firearm specification, and a stated prison term of 3 years for having weapons while under disability with an additional 3-year prison term for the firearm specification. The trial court ordered the underlying sentences to be served concurrently with each other. But the trial court ordered the firearm specifications and RVO specifications to be served consecutive to the underlying offenses and consecutive to each other for an aggregate sentence of a mandatory minimum term of 39 years to life in prison. Cunigan timely appealed.

II. Cunigan's Convictions Are Not Against the Manifest Weight of the Evidence and Are Supported by Sufficient Evidence

{¶ 51} Cunigan's first and second assignments of error are interrelated and thus we consider them jointly. The assignments of error state:

APPELLANT'S CONVICTIONS FOR THREE COUNTS OF MURDER, DOMESTIC VIOLENCE (KNOWINGLY-PRIOR), TAMPERING WITH EVIDENCE, UNAUTHORIZED USE OF MOTOR VEHICLE AND HAVING WEAPONS WHILE UNDER DISABILITY (PRIOR OFFENSE OF VIOLENCE) ARE BASED UPON INSUFFICIENT EVIDENCE.

APPELLANT'S CONVICTIONS FOR THREE COUNTS OF MURDER, DOMESTIC VIOLENCE (KNOWINGLY-PRIOR), TAMPERING WITH EVIDENCE, UNAUTHORIZED USE OF MOTOR VEHICLE AND HAVING

WEAPONS WHILE UNDER DISABILITY (PRIOR OFFENSE OF VIOLENCE)
ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 52} Cunigan argues that his convictions are against the manifest weight of the evidence and are not supported by sufficient evidence because: (1) the State failed to prove his identity as the perpetrator; (2) the State failed to prove that he and P.T. were family or household members for the charge of domestic violence; (3) the State failed to prove the viability of P.T.'s unborn child to support the murder conviction; and (4) his conviction for tampering with evidence was not supported by sufficient evidence and was based on testimony that was not credible. We limit our manifest weight and sufficiency analysis to the specific arguments raised by Cunigan.

A. Standards of Review

{¶ 53} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines all 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. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "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." *Id.* "The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis*, 1997-Ohio-372, ¶ 51, citing *Jenks* at 273.

{¶ 54} In contrast, when a conviction is challenged on appeal as being against the manifest weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers witness credibility, and determines

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*, 1997-Ohio-52, ¶ 25, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). A judgment should be reversed as being against the manifest weight of the evidence “only in the exceptional case in which the evidence weighs heavily against the conviction.” *Martin* at 175. “[W]hen conducting a manifest-weight review, appellate courts must defer to the fact-finder’s witness-credibility determinations.” *State v. Reillo*, Slip Opinion No. 2026-Ohio-2701, ¶ 38. “Mere disagreement over the credibility of witnesses is not a sufficient reason to reverse a judgment on manifest weight grounds.” *State v. Harris*, 2014-Ohio-2501, ¶ 25 (10th Dist.), citing *State v. G.G.*, 2012-Ohio-5902, ¶ 7 (10th Dist.).

B. Identity of the Shooter

{¶ 55} In a criminal case, the prosecution must prove every element of the crime charged beyond a reasonable doubt, including the identity of the perpetrator. *State v. Tate*, 2014-Ohio-3667, ¶ 15. The identity of the perpetrator may be proved by direct or circumstantial evidence. *Id.* This is because circumstantial evidence has the same probative value as direct evidence. *Jenks* at paragraph one of the syllabus.

{¶ 56} In this case, there is overwhelming evidence that identified Cunigan as the perpetrator. The most damning piece of evidence is the surveillance video footage that shows Cunigan shooting into P.T.’s bedroom window with a semiautomatic pistol and then climbing inside the bedroom through the open window. While Cunigan is correct that no one explicitly identified him as the individual in the surveillance video, the evidence submitted at trial overwhelmingly identified him as the person who entered P.T.’s residence and killed D.J., P.T., and P.T.’s unborn child.

{¶ 57} Washington testified that she knew Cunigan and had seen him on May 20, 2024, when P.T. let Cunigan borrow P.T.'s car. Washington described Cunigan as wearing his hair in dreads with the bottoms colored orange and retwisted. That same day, Cunigan sent his father a photograph of himself, which showed his distinctive, orange-colored dreads. C.T. likewise described Cunigan as having reddish-orange-colored dreads when he saw Cunigan in the early morning hours of May 22, 2024.

{¶ 58} Between May 20, 2024, and May 22, 2024, P.T. repeatedly asked Cunigan to return her car—the same car that Cunigan drove C.T. in during the early morning hours of May 22, 2024, the same car that the shooter drove to P.T.'s house at 6:15 a.m. that morning, and the same car that Cunigan drove to Pinewood Gardens at 6:29 a.m.

{¶ 59} In the days leading up to the murder, Cunigan's texts reflect that he was angry about P.T. being with another man and about finding a video of P.T. engaged in sexual acts with someone else. Cunigan threatened to beat up the other man and claimed that he knew where the man lived. Cunigan made significant efforts to track down P.T. in the early morning hours of May 22, 2024, including enlisting C.T. to find her.

{¶ 60} Just after 5:00 a.m. on May 22, 2024, Cunigan contacted his sister, Reed, seeking a ride to P.T.'s house under the guise of checking on his children. Reed got her brother Jamari to go with her to pick up Cunigan and to drive him to P.T.'s house on Shaftesbury Road. According to Reed, Cunigan had his hair in dreads that were colored orange toward the bottom. Jamari drove them in his white Kia with 30-day tags, the same car that surveillance video showed driving by P.T.'s house at 5:45 a.m. and parking on the opposite side of the street.

{¶ 61} Surveillance video showed that a black male looked into P.T.'s bedroom window at 5:47 a.m. His hair was in dreads colored orange toward the bottom, and he wore

dark grey and black pants, a black t-shirt, and black shoes. He briefly left and returned at 5:49 a.m., at which point he lifted the window screen, the window, and the window shades of P.T.'s bedroom and appeared to talk to someone inside the room. At 5:53:20 a.m., he climbed through the window into P.T.'s bedroom. Washington testified that she heard Cunigan talking to P.T. in P.T.'s bedroom and that she saw Cunigan leave P.T.'s bedroom and walk through the living room and out the front door around 5:57 a.m. She testified that Cunigan wore all black and had his hair in the same style of dreads with orange coloring at the bottom that she had seen him wearing two days prior. Washington also testified that P.T. asked Cunigan about the location of her car and Cunigan asked P.T. not to call the police on him.

{¶ 62} Reed testified that Cunigan was gone for only about 10 minutes before she saw him walk out of P.T.'s front door and return to Jamari's car. The surveillance video showed P.T. on her front lawn with a phone in her hand at 5:57:48 a.m. Reed testified that she saw P.T. walk outside the house while they were in the car before they drove off. Based on Reed and Washington's testimony, both of whom had personally observed Cunigan and were familiar with him, the male visitor who climbed through P.T.'s bedroom window and walked out the front door was Cunigan.

{¶ 63} Text messages between Cunigan and P.T. beginning at 5:59 a.m. on May 22, 2024, indicated that Cunigan was going to get P.T.'s car and return it. P.T. sent Cunigan a video at 6:00 a.m. after texting him that she had gotten their license plate and that they were going to go to jail. A video recovered from P.T.'s phone showed a white Kia Optima with 30-day tags drive away from her. That video appears to coincide with P.T.'s 6:00 a.m. text message and the surveillance video that showed P.T. holding up a phone as Jamari's Kia drove away from her house. P.T. also texted Cunigan that she saw him with a gun.

{¶ 64} Surveillance video showed that, at 6:15 a.m., P.T.'s white Malibu drove up to P.T.'s house, backed into her driveway, and parked. The white Malibu was the same car Cunigan texted that he was going to bring to her. At 6:15:56 a.m., a black male with dreads colored orange toward the bottom, who was wearing dark grey and black pants, black shoes, and a black t-shirt, got out of P.T.'s car and walked directly to P.T.'s bedroom window. The man in the video wore the same outfit and had the same color and style of hair that Cunigan had when he was at P.T.'s home less than twenty minutes before. Based on the prior identification, it was clear this person was Cunigan. At 6:16 a.m., Cunigan lifted the window screen and then tried to lift the window up like he had done previously, but it fell forward into the bedroom. After knocking in the window, Cunigan lifted the window shades and appeared to speak briefly with the occupants in the room. Washington testified that she heard the window in P.T.'s bedroom come down with a loud boom. She then heard P.T. say, "Nico, why the f * * * do you keep doing that to my f * * * ing window?" Washington heard Cunigan reply, "My bad, I didn't mean to do that to the window."

{¶ 65} At 6:16:28 a.m., while still standing outside the window, Cunigan pulled out a black semiautomatic handgun that had been tucked into his pants. Using his right hand, he reached into P.T.'s bedroom window and fired his gun. A flash from the muzzle could be seen in the video and a .45 caliber shell casing was recovered on the floor of the bedroom just below the window. After firing the first shot, Cunigan aimed the gun to the left side of the bedroom, the location where D.J. was found shot and killed. Two additional .45 caliber shell casings were recovered on the bed where D.J.'s body was found. At 6:16:34 a.m., Cunigan crawled through the window and entered the house, just as he had done earlier that morning.

{¶ 66} Washington testified that after she heard P.T. and Cunigan talking, she heard three gunshots and P.T. scream, so she ran to the basement. While hiding in the basement, Washington heard P.T., who had fled to the kitchen, beg for her life and yell, “Please, Nico. I’m sorry. I’m sorry. Please. No. I’m sorry. Please. No.” Washington knew at least one shot was fired in the kitchen because she heard P.T. slip and fall. Then, when P.T. came down the basement stairs, she was shot one final time in the head. Washington saw the shooter start to come down the stairs and testified that the shooter was wearing shoes consistent with ones she had previously seen Cunigan wear. Washington attempted to call 911 at 6:17 a.m., the same time Cunigan returned to P.T.’s car and drove off.

{¶ 67} Six .45 caliber spent shell casings were recovered from the house, all fired from the same gun. Senior testified that he owned a .45 caliber handgun that he discovered missing after the shooting. Cunigan’s text messages to P.T. indicated that he had possession of a gun that belonged to his father in the days leading up to the shooting. C.T. testified that in the early morning hours of May 22, 2024, when Cunigan picked him up in P.T.’s white Malibu, Cunigan had a gun in the cup holder. P.T.’s 6:02 a.m. text message to Cunigan on May 22, 2024, reflected that she had observed Cunigan with a gun that morning.

{¶ 68} At 6:17:13 a.m., Cunigan walked away from P.T.’s house. He then got into P.T.’s white Malibu and drove away. P.T.’s Malibu was found at the Pinewood Gardens Apartments where Cunigan’s mother lived. Surveillance video showed the Malibu entering the apartment complex at 6:29:47 a.m. on May 22, 2024. The Malibu parked, and Cunigan, still wearing a black t-shirt, grey and black pants, and black shoes and sporting the distinctive, orange-colored dreads, got out of the driver’s seat of the car. Cunigan entered

60 Pinewood Circle and went downstairs, the same location where Cunigan's mother and Morris lived.

{¶ 69} At 6:46 a.m. on May 22, 2024, Cunigan contacted his cousin Norman. Norman texted Dearmon's address to Cunigan, and Cunigan texted Norman not to say anything to anyone. Although Norman claimed he did not know what kind of trouble Cunigan was in, he nevertheless texted Cunigan, "U my f * * * ing Cuzin u in trouble so it's my duty to keep u safe n * * * u called me not nobody els."

{¶ 70} At 6:48 a.m., Cunigan walked outside with Morris and got into Morris's rented black Jeep. When Detective House visited the apartment after the murders, he found a paper towel on the bathroom sink with the phone number of Jerry Davis, the same person who picked up Cunigan in Indiana and drove him to Cleveland.

{¶ 71} At 7:06 a.m., Morris's Jeep pulled into the Eagle Ridge apartment complex. Cunigan, still wearing all black and donning orange dreads, got out of the Jeep and went into Dearmon's apartment building. Norman identified Cunigan as the individual who entered Dearmon's apartment that morning wearing all black. However, Cunigan changed into a white shirt (which Norman gave to him) and shorts, leaving his pants behind. According to Norman, Cunigan changed clothes because Cunigan claimed to have "gotten into it" with someone and did not want to be seen.

{¶ 72} At 7:26 a.m., Norman walked out of Dearmon's apartment building and acquired Dearmon's white Nissan Altima. At 7:27 a.m., Norman texted Davis and stated that "cuz" was with him and that Davis should call his phone if Davis needed Cunigan. At 7:29 a.m., Cunigan, wearing black shorts and Norman's white shirt, got into the passenger side of the Altima and drove off with Norman. Norman drove Cunigan toward Springfield, Ohio, and eventually to Richmond, Indiana. Davis texted Norman at 8:11 a.m. to "[t]ell him

to turn that phone off, and hit me from yo line.” Cunigan’s cell phone last pinged in Springfield, Ohio, at 8:10 a.m. but then was turned off.

{¶ 73} Norman dropped Cunigan off in Richmond, Indiana, and returned to Dearmon’s apartment. Cunigan was picked up in Richmond by Davis’s red semitruck and driven first to Indianapolis and then eventually to Cleveland. After Norman arrived back in Trotwood, Norman and Hoskins took Cunigan’s pants to Norman’s mother’s house on Germantown Street and threw them away in a dumpster. Those pants were recovered by police on May 24, 2024. Laboratory analysis revealed that blood found on Cunigan’s pants belonged to P.T.

{¶ 74} While Cunigan points to the lack of fingerprint or DNA evidence to tie him to the crime scene, the vast amount of evidence identifies him as the perpetrator. Likewise, the fact that the murder weapon was never recovered does not preclude the jury from finding Cunigan guilty of the offenses. Notably, after the offenses were committed, Cunigan fled the scene to his mother’s apartment, then to Dearmon’s apartment, and then to Springfield, Richmond, Indianapolis, and finally Cleveland, where he was eventually arrested. In that time, Cunigan had changed clothing and driven across the state, which allowed him plenty of time and opportunity to dispose of the weapon prior to his arrest.

{¶ 75} Cunigan also points to the lack of credibility of the witnesses, either due to marijuana use or prior criminal history, as a basis for reversal. Based on their verdict, the jury obviously chose to believe the State’s witnesses, which they were entitled to do. *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967). The jury had the opportunity to view all the evidence, including the surveillance videos, and consider the credibility of the witnesses. We cannot conclude that the jury lost its way in choosing to credit the testimony and evidence presented by the State and finding Cunigan guilty of the murders and related

offenses. When the evidence is viewed in the light most favorable to the State, a rational trier of fact could have found that Cunigan was the perpetrator of all the offenses. Additionally, based upon the stipulation regarding Cunigan's prior conviction, the trial court had more than enough evidence to find that Cunigan was guilty of having a weapon while under disability and domestic violence (knowingly – 1 prior).

C. Cunigan and P.T. Were Family or Household Members

{¶ 76} R.C. 2919.25(A) provides that no person shall knowingly cause or attempt to cause physical harm to a family or household member. Cunigan argues that the State failed to prove the element that P.T. was a family or household member. "Family or household member" is defined in part as "[t]he natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent." R.C. 2919.25(F)(1)(b).

{¶ 77} The testimony of several witnesses at trial established that Cunigan was the natural parent of at least two of P.T.'s children. Washington and C.T. testified that Cunigan was the father of P.T.'s twins as well as a third child. Cunigan's cousin, Norman, testified that Cunigan had children with P.T. Cunigan's father and sister both testified that Cunigan was the father of P.T.'s twins. Accordingly, the State proved beyond a reasonable doubt that Cunigan and P.T. were family or household members because P.T. was the natural parent of a child of whom Cunigan was the other natural parent. Therefore, we conclude that Cunigan's domestic violence conviction was not against the manifest weight of the evidence and was supported by sufficient evidence.

D. Viability Is Not An Element of Unlawful Termination of Another's Pregnancy

{¶ 78} Cunigan argues that the State was required to prove that P.T.'s fetus was viable as defined in R.C. 2901.01(B)(1)(a). We do not agree.

{¶ 79} Cunigan was found guilty under R.C. 2903.02(A) for purposely causing the unlawful termination of P.T.'s pregnancy. "Unlawful termination of another's pregnancy" means "causing the death of an unborn member of the species homo sapiens, who is or was carried in the womb of another, as a result of injuries inflicted during the period that begins with fertilization and that continues unless and until live birth occurs." R.C. 2903.09(A). The definition of an unlawful termination of another's pregnancy does not include the term "viable."

{¶ 80} In contrast, the term "viable" is applicable to any section in Revised Code Title 29 that sets forth a criminal offense involving a "person." R.C. 2901.01(B)(1)(a). A "person" includes "an unborn human who is viable." R.C. 2901.01(B)(1)(a)(ii). But because the offense for which Cunigan was convicted involved the unlawful termination of another's pregnancy, it required the death of an unborn human. It was not an offense involving "a person" that included the element of viability. See *State v. Cole*, 2024-Ohio-5303, ¶ 19 (6th Dist.) (viability is not an element of the offense of purposely causing the unlawful termination of another's pregnancy); *State v. Pesta*, 2007-Ohio-2295, ¶ 27 (12th Dist.) (viability of the unborn child is not an element of the offense of unlawful termination of another's pregnancy); *State v. Feller*, 2012-Ohio-6016, ¶ 35 (1st Dist.) (R.C. 2903.09(A) does not require viability because the General Assembly elected to protect the unborn human from the moment of fertilization, not from the moment of viability). The State was required to prove that Cunigan caused the death of an unborn member of the species homo sapiens, who was carried in the womb of P.T., as a result of injuries inflicted during the period that began with fertilization and that continued unless and until live birth occurred. The State presented sufficient evidence to prove that Cunigan purposely caused the unlawful termination of P.T.'s pregnancy when he shot P.T. repeatedly and killed her

knowing that she was pregnant. Further, we cannot conclude that the jury lost its way in finding Cunigan guilty of this offense.

E. Tampering with Evidence

{¶ 81} Finally, Cunigan argues that Norman’s testimony was insufficient to sustain a conviction for tampering with evidence. R.C. 2921.12(A)(1) defines the offense of tampering with evidence: “No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall . . . [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.” The “thing” involved for this offense was Cunigan’s pants, which were worn by the shooter in the surveillance video and contained P.T.’s blood.

{¶ 82} According to Norman, when Cunigan appeared at Dearmon’s apartment, he changed clothes because Cunigan claimed to have “gotten into it” with someone and did not want to be seen in the clothes he had been wearing. Norman gave the white t-shirt he had been wearing to Cunigan, and Cunigan took off his pants, changed into shorts, and left his pants behind at Dearmon’s apartment. Upon Norman’s return to Dearmon’s apartment after dropping Cunigan off in Richmond, Norman and Hoskins disposed of Cunigan’s pants in a dumpster near Norman’s mother’s house. The pants were recovered from the dumpster two days after the shooting. When analyzed, the pants had P.T.’s blood on them.

{¶ 83} It was within the province of the jury to believe some, all, or none of Norman’s testimony. *State v. Tate*, 2013-Ohio-5167, ¶ 39 (2d Dist.). It was not unreasonable for the jury to find credible Norman’s testimony that, after murdering P.T. and D.J., Cunigan told Norman that he needed to change his appearance to avoid recognition. This is further supported by the surveillance video showing Cunigan’s changed appearance. Notably, the

evidence showed that Cunigan abandoned the pants he had worn during the shootings by leaving them at Dearmon's apartment, a location unconnected to Cunigan, and then fled from the area. Cunigan shot and killed P.T. and D.J. after climbing through the window of P.T.'s residence and proceeding through her blood-spattered kitchen, so the jury could have reasonably inferred that Cunigan knew that his clothing contained some evidence of his crimes or tied him to the commission of the offenses. See *State v. Martin*, 2017-Ohio-7556, ¶ 113. Moreover, the jury could have reasonably inferred that Cunigan knew that an official proceeding or investigation was about to be or likely to be instituted after he murdered two people in a residential neighborhood with surviving children in the home. See *id.* at ¶ 118. Cunigan's decision to abandon evidence at a location unconnected to him could have been reasonably interpreted by the jury as concealing or removing a thing "with the purpose to impair its value or availability as evidence." R.C. 2921.12(A)(1).

{¶ 84} We conclude that the State presented sufficient evidence to permit a reasonable juror to conclude that Cunigan committed the offense of tampering with evidence. Further, we cannot conclude that the jury clearly lost its way and created such a manifest miscarriage of justice that his conviction must be reversed and a new trial ordered. This is not the exceptional case in which the evidence weighs heavily against the convictions.

{¶ 85} Cunigan's first and second assignments of error are overruled.

III. Cunigan's Convictions for Murdering P.T. and Committing Domestic Violence Against P.T. Are Not Allied Offenses of Similar Import

{¶ 86} Cunigan's third assignment of error states:

THE OFFENSE OF MURDER (PT) AND DOMESTIC VIOLENCE
(KNOWINGLY PRIOR) ARE ALLIED OFFENSES OF SIMILAR IMPORT.

{¶ 87} Cunigan contends that his convictions for the murder of P.T. and domestic violence against P.T. occurred during a continuous sequence of events and should have been merged at sentencing. We disagree.

{¶ 88} “The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall ‘be subject for the same offence to be twice put in jeopardy of life or limb.’” *State v. Ruff*, 2015-Ohio-995, ¶ 10. Ohio affords the same constitutional right. *Id.*; Ohio Const., art. I, § 10. R.C. 2941.25 incorporates the constitutional protections against double jeopardy. *State v. Whitfield*, 2010-Ohio-2, ¶ 7.

{¶ 89} A three-part test is used to determine whether offenses should be merged in accordance with R.C. 2941.25. *Ruff* at ¶ 31. The court must consider: “(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation?” *Id.* “An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.” *Id.* “A defendant bears the burden of establishing that offenses should be merged as allied offenses, and we review the trial court’s merger ruling de novo.” *State v. Farra*, 2022-Ohio-1421, ¶ 62 (2d Dist.), citing *State v. Frazier*, 2021-Ohio-4155, ¶ 20 (2d Dist.).

{¶ 90} Cunigan was convicted of domestic violence (knowingly – 1 prior) in violation of R.C. 2919.25(A), which required the State to prove that Cunigan knowingly caused or attempted to cause physical harm to a family or household member, P.T., and that Cunigan had previously pleaded guilty to or been convicted of an offense involving a family or household member at the time of the violation. Cunigan was also convicted of murder in violation of R.C. 2903.02(A), which required the State to prove that Cunigan purposely caused the death of P.T.

{¶ 91} The evidence demonstrates that the offenses of domestic violence and murder involving P.T. were committed separately and the harm that resulted from each offense was separate and identifiable. Cunigan first shot P.T. when she was in the bedroom while he stood outside the bedroom window firing into the house. After P.T. was shot, she ran to the kitchen, leaving a blood trail through the living room. While P.T. was in the kitchen, Cunigan, who had climbed into the house through the bedroom window, shot P.T. again while she was begging for her life. As P.T. descended the basement stairs to flee from Cunigan, he shot her a final time in the head, resulting in her body coming to rest at the bottom of the basement stairs.

{¶ 92} Although Cunigan's animus for each offense may have been the same, there was a separation of time and space, notwithstanding the offenses' proximity in time. Each element of the domestic violence offense was completed when Cunigan first shot P.T. in the bedroom while he was standing outside the window. At that point, the offense of domestic violence was completed. Only after Cunigan completed the domestic violence offense did he then climb through the window, enter the house, pursue P.T. into the kitchen, and shoot and kill her on the basement stairs. When one offense is completed prior to the completion of another offense during the defendant's course of conduct, "the two offenses were committed separately for purposes of R.C. 2941.25(B), notwithstanding their proximity in time" *State v. Mooty*, 2014-Ohio-733, ¶ 49 (2d Dist.), quoting *State v. Turner*, 2011-Ohio-6714, ¶ 24 (2d Dist.).

{¶ 93} Moreover, the injury P.T. sustained from the shooting in the bedroom was separate and distinct from the injury she sustained when Cunigan shot her in the head, which led to her almost immediate death at the bottom of the stairs. After P.T. was shot in the bedroom, she was able to ambulate and orally communicate, as demonstrated by the

blood trail from the bedroom to the kitchen and Washington's testimony that she heard P.T. begging Cunigan for her life. The coroner testified that P.T. was shot once through her right breast and once through her arm. Although it is unknown which of those two injuries occurred as a result of the gunshot in the bedroom, the fatal gunshot wound to P.T.'s head did not occur until she was walking down the basement stairs.

{¶ 94} Because each of Cunigan's offenses were committed separately and resulted in separate, identifiable harm to P.T., the trial court did not err in refusing to merge those offenses. Cunigan's third assignment of error is overruled.

IV. The Trial Court's Error in Admitting Evidence of Cunigan's Post-Release Control Conditions Is Harmless

{¶ 95} Cunigan's fourth assignment of error states:

THE TRIAL COURT ERRED IN PERMITTING EVIDENCE OF APPELLANT'S
POST RELEASE CONTROL STATUS IN APPELLEE'S CASE IN CHIEF.

{¶ 96} Cunigan argues that testimony that he had been released from prison and placed on PRC with certain conditions should not have been admitted at trial because it was not relevant and was prohibited by Evid.R. 404(B). The State responds that, under the unique circumstances of this case, the trial court did not abuse its discretion in admitting the testimony. Alternatively, the State argues that if there was error, it was invited by Cunigan and constitutes harmless error.

A. Background

{¶ 97} On July 2, 2025, Cunigan filed a notice of self-defense pursuant to Crim.R. 12.2. According to his notice, Cunigan claimed that when he discovered D.J. in bed with P.T., D.J. pulled out a gun, pointed it at Cunigan, and threatened to shoot him if

Cunigan came through the window. Cunigan claimed he fired his gun to protect himself from serious bodily harm and/or death.

{¶ 98} In response to Cunigan's notice of self-defense, the State filed a notice of intent to offer certain evidence at trial. This included evidence that Cunigan was placed on PRC and signed certain conditions, such as that he was not to have any contact with P.T., the victim of his prior offense, and that he was not to have or possess any firearms or ammunition. The State further indicated its intent to show that Cunigan had provided a home address different than P.T.'s to his parole officer. As part of its argument, the State reasoned that because Cunigan had filed a notice of self-defense, the State could present evidence that Cunigan was not lawfully in a place where he could claim self-defense because he could not lawfully have contact with P.T. That evidence therefore showed that Cunigan had a duty to retreat before using deadly force, which he did not do. The State further argued that the evidence was admissible in the State's case-in-chief to identify Cunigan as the shooter.

{¶ 99} Defense counsel filed a response opposing the State's notice of intent to offer certain evidence. Counsel also filed proposed jury instructions requesting instructions for self-defense.

{¶ 100} A hearing was held regarding the State's notice of intent to offer certain evidence at trial. At the hearing, Cunigan argued that the State could put forth the evidence in rebuttal rather than during its case-in-chief. The State responded that if the State rested and Cunigan put on no witnesses, then the State would be precluded from having a rebuttal witness. In that circumstance, Cunigan could argue self-defense, but the State would not have an opportunity to present the parole officers' evidence to rebut the self-defense claim. The trial court asked defense counsel if he would agree to waive a Crim.R. 29 argument

solely on the issue of self-defense, but defense counsel declined. The trial court preliminarily agreed to allow the State to admit the testimony of the parole officers to counter Cunigan's self-defense argument.

{¶ 101} At trial, Cunigan's attorney waived an opening statement. Evidence was presented that P.T. and D.J. had been in the bedroom when Cunigan pushed in the window. A loaded TEC-9 semiautomatic pistol was recovered from D.J.'s hand when his body was discovered on the bed under the covers. There was no evidence presented that D.J. fired the gun or pointed it at anyone.

{¶ 102} Prior to the testimony of the parole officers, a discussion was held during which defense counsel reiterated his objection to their testimony. The trial court summarized its prior ruling in which it permitted the testimony because the evidence was relevant to Cunigan's claim of self-defense and the State's burden to demonstrate that Cunigan was not entitled to use self-defense. Tr. 728. The court questioned defense counsel whether he still intended to present a self-defense claim, and defense counsel replied affirmatively. The trial court overruled defense counsel's objection. Tr. 732-735.

{¶ 103} Parole Officers Sparkman and Ackerman then testified about Cunigan's PRC conditions and his expected residence upon release. The State rested its case-in-chief that afternoon. The following morning, Cunigan declined to testify and withdrew his notice of self-defense. In response, the State withdrew Cunigan's conditions of supervision so that it would not go back to the jury in deliberations. The State further agreed not to discuss the conditions during closing arguments. Cunigan requested a limiting instruction relating to the conditions and the evidence that there was to be no contact between Cunigan and P.T. The trial court provided the limiting instruction.

B. Relevant Law

{¶ 104} “Evidence that an accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused’s propensity or inclination to commit crime or that he acted in conformity with bad character.” *State v. Williams*, 2012-Ohio-5695, ¶ 15, citing *State v. Curry*, 43 Ohio St.2d 66, 68 (1975), and *State v. Jamison*, 49 Ohio St.3d 182, 184 (1990). Evid.R. 404(B), however, allows evidence of a defendant’s other crimes, wrongs, or acts to be admitted “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” “The key is that the evidence must prove something other than the defendant’s disposition to commit certain acts.” *State v. Hartman*, 2020-Ohio-4440, ¶ 22.

{¶ 105} For other-acts evidence to be admissible, the court must find: (1) the evidence is relevant, (2) the evidence is not offered to prove a person’s character to show action in conformity therewith but instead is presented for a legitimate purpose in accordance with Evid.R. 404(B), and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *State v. Graham*, 2020-Ohio-6700, ¶ 72, citing *Williams* at ¶ 20. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid.R. 401. “In the Evid.R. 404(B) context, the relevance examination asks whether the proffered evidence is relevant to the particular purpose for which it is offered, as well as whether it is relevant to an issue that is actually in dispute.” *State v. Smith*, 2020-Ohio-4441, ¶ 37, citing *Hartman* at ¶ 26-27.

{¶ 106} “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.” *Graham* at ¶ 72, citing *Hartman* at ¶ 22, citing *Williams* at ¶ 17. “The

exceptions allowing the evidence ‘must be construed against admissibility, and the standard for determining admissibility of such evidence is strict.’” *State v. Conway*, 2006-Ohio-2815, ¶ 61, quoting *State v. Broom*, 40 Ohio St.3d 277 (1988), paragraph one of the syllabus. “The determination of whether other-acts evidence is admitted for a permissible purpose is a question of law, which we review de novo.” *State v. Echols*, 2024-Ohio-5088, ¶ 30, citing *Hartman* at ¶ 22.

C. Use of Deadly Force in Self-Defense

{¶ 107} In Ohio, a person is allowed to act in self-defense, which is an affirmative defense. *State v. Messenger*, 2022-Ohio-4562, ¶ 21; R.C. 2901.05(B)(1). The elements of a self-defense claim when deadly force is used are: “(1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger.” *State v. Barnes*, 2002-Ohio-68, ¶ 11, citing *State v. Robbins*, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus. A person has no duty to retreat before using force in self-defense if that person is in a place in which the person lawfully has a right to be. R.C. 2901.09(B).

{¶ 108} R.C. 2901.05(B)(1) provides that:

If, at the trial of a person who is accused of an offense that involved the person’s use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense . . . the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense

This statute “places the initial burden of producing evidence ‘that tends to support’ a self-defense claim on the defendant.” *State v. Bowen*, 2024-Ohio-1079, ¶ 11 (2d Dist.), quoting R.C. 2901.05(B)(1). “The standard for judging whether a defendant meets his burden and presents legally sufficient evidence is ‘[s]imilar[] to the standard for judging the sufficiency of the state’s evidence.’” (Bracketed text in original.) *State v. Palmer*, 2024-Ohio-539, ¶ 20, quoting *Messenger* at ¶ 25. “[I]f the defendant’s evidence and any reasonable inferences about that evidence would allow a rational trier of fact to find all the elements of a self-defense claim when viewed in the light most favorable to the defendant, then the defendant has satisfied the burden.” *Messenger* at ¶ 25.

{¶ 109} Once the defendant has satisfied their burden of production, the burden then shifts to the State to prove that the defendant did not act in self-defense. *Bowen* at ¶ 12, citing *Messenger* at ¶ 19. The State can defeat a self-defense claim by disproving any one of the elements of self-defense beyond a reasonable doubt. *State v. Knuff*, 2024-Ohio-902, ¶ 191.

D. Analysis

{¶ 110} The trial court allowed the State to present testimony from two parole officers for the purpose of disproving Cunigan’s anticipated self-defense claim by introducing evidence of Cunigan’s PRC condition that prohibited him from having contact with P.T. Tr. 728. The State, however, did not limit the parole officers’ testimony to this one condition. Instead, the State also had the parole officers testify that Cunigan was not permitted to leave the state of Ohio without permission, was not permitted to possess a firearm, and that Cunigan had been approved to live with his father, Senior, upon his release from custody. None of this additional testimony was relevant to Cunigan’s self-defense claim and should have been excluded.

{¶ 111} The trial court also allowed evidence that Cunigan's PRC conditions precluded him from having contact with P.T. because she was the prior victim of his underlying conviction that resulted in his incarceration. Determining whether that evidence should have been admitted is more complex. The stated purpose for admitting this evidence was that it would have shown Cunigan was not lawfully in a place where he could be at the time of the shooting and therefore had a duty to retreat before using deadly force, which he did not do. Even though the PRC conditions testimony constituted propensity evidence, it would have been admissible under Evid.R. 404(B) to counter an element of self-defense. See *State v. Nicholson*, 2024-Ohio-604, ¶ 99-101 (finding other-acts evidence was relevant to an issue in dispute to rebut defendant's testimony that he shot the victims in self-defense).

{¶ 112} Although Cunigan filed a notice of self-defense prior to trial and sought a jury instruction on self-defense, Cunigan ultimately abandoned that defense. The question before us is whether the trial court should have allowed the State to introduce the other-acts evidence in its case-in-chief to preemptively disprove Cunigan's anticipated self-defense claim. We conclude that the trial court should not have allowed the State to introduce Cunigan's PRC conditions into evidence before legally sufficient evidence was introduced at trial that tended to support that Cunigan had acted in self-defense.

{¶ 113} To maintain a self-defense claim, there must be evidence introduced at trial that "tends to support" that the defendant acted in self-defense. R.C. 2901.05(B)(1). A defendant, however, is not required to wait to put forth evidence of self-defense in his or her case-in-chief but may instead rely on evidence elicited during the State's case-in-chief to satisfy his or her burden. *Messenger*, 2022-Ohio-4562, at ¶ 22. But regardless of when the evidence is introduced that tends to support a self-defense claim, "the state's burden of

persuasion is not triggered until the defendant produces ‘legally sufficient evidence’ for every self-defense element.” *Palmer*, 2024-Ohio-539, at ¶ 19, citing *Messenger* at ¶ 19. Notably, the mere filing of a notice of self-defense is not evidence presented at trial sufficient to shift the burden to the State.

{¶ 114} We acknowledge the State’s dilemma caused by Cunigan’s late decision to abandon his self-defense claim. During the course of trial, it is not always clear whether the defendant’s burden of production has been met based solely on the evidence presented in the State’s case-in-chief. But the trial judge, who is “in the best position to gauge the evidence before the jury,” must determine whether evidence introduced in the State’s case-in-chief and tending to support a self-defense claim is sufficient to shift the burden to the State to disprove the claim. *State v. Fulmer*, 2008-Ohio-936, ¶ 72. The trial judge assumes the role of gatekeeper to ascertain whether to admit other-acts evidence for a permitted purpose. That decision in this case was dependent on the trial court first determining whether sufficient evidence had been presented during trial that tended to support the argument that Cunigan had used force in self-defense. In this situation, if the trial court had concluded that the defendant had not yet met his or her initial burden of production, then the burden would not have shifted to the State to introduce evidence to prove that the defendant did not act in self-defense. Absent such burden shifting, the other-acts evidence should not have been admitted unless offered for a different permitted purpose.

{¶ 115} The State acknowledged at trial that it intended to present the other-acts evidence solely to disprove Cunigan’s self-defense claim, which was premised on Cunigan’s filing of a Crim.R. 12.2 notice. Despite defense counsel’s significant efforts during cross-examination to obtain favorable evidence in support of a self-defense claim, there was not

legally sufficient evidence admitted at trial that tended to support that Cunigan used force in self-defense. The fact that D.J. was discovered with a firearm in his hand, standing alone, was not sufficient evidence tending to support a claim that Cunigan shot and killed the decedents in self-defense. Therefore, at the time the State sought to introduce the other-acts evidence, the burden had not shifted to the State to disprove an element of self-defense, and whether Cunigan had acted in self-defense was not an issue actually in dispute. Accordingly, the other-acts evidence was not admitted for a proper purpose. This is not to say that the State could never introduce other-acts evidence in its case-in-chief to counter a self-defense claim, but there must first be sufficient evidence presented that tends to support a claim that the defendant had used force in self-defense. Because that did not occur here, the trial court erred in allowing the admission of the PRC evidence.

{¶ 116} Despite the trial court's error in admitting the other-acts evidence, we conclude that the error was harmless beyond a reasonable doubt. The Supreme Court of Ohio has explained 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*, 2014-Ohio-5052, ¶ 25. "Crim.R. 52(A) defines harmless error in the context of criminal cases and provides: 'Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.'" *Id.* at ¶ 23, quoting Crim.R. 52(A). "Whether the defendant's substantial rights were affected depends on whether the error was prejudicial, i.e., whether it affected the outcome of the trial." *State v. Jones*, 2020-Ohio-3051, ¶ 18, citing *State v. Fisher*, 2003-Ohio-2761, ¶ 7.

{¶ 117} An appellate court must determine whether the admission of improper evidence at trial was harmless beyond a reasonable doubt. *Morris* at ¶ 28. "In determining whether to grant a new trial as a result of the erroneous admission of evidence under

Evid.R. 404(B), an appellate court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record.” *Id.* at syllabus. “[A]n improper evidentiary admission under Evid.R. 404(B) may be deemed harmless error on review when, after the tainted evidence is removed, the remaining evidence is overwhelming.” *State v. Humphries*, 2026-Ohio-373, ¶ 105 (2d Dist.), quoting *Morris* at ¶ 32.

{¶ 118} The testimony of the parole officers in this case was limited and brief relative to the amount of other evidence and testimony introduced at trial. In excising that evidence, the remaining evidence of Cunigan’s guilt was overwhelming. Cunigan was observed on video shooting into P.T.’s bedroom window where D.J. was found deceased and then climbing into the home. Inside the home, Washington heard more shooting, heard P.T. begging “Nico” for her life, and then saw the shooter’s shoes, which were consistent with shoes she had previously seen Cunigan wearing. After killing P.T., Cunigan fled from the house, changed his appearance, fled the area, and turned off his phone. Moreover, P.T.’s blood was found on Cunigan’s pants, which were disposed of by Cunigan’s cohorts. It is also pertinent to our analysis that the trial court provided a limiting instruction to the jury regarding the parole officers’ testimony, which reduced any danger of unfair prejudice. *State v. McKelton*, 2016-Ohio-5735, ¶ 206. This court presumes that the jury followed those instructions. *State v. Garner*, 1995-Ohio-168, ¶ 39. Moreover, the State honored its agreement not to refer to the testimony during its closing argument. The overwhelming evidence of guilt establishes that any error the trial court may have committed by allowing the parole officers to testify about Cunigan’s PRC conditions is harmless beyond a reasonable doubt.

{¶ 119} Cunigan’s fourth assignment of error is overruled.

V. The Trial Court Did Not Abuse its Discretion in Prohibiting Cross-Examination of a Witness's Status on Intervention in Lieu of Conviction

{¶ 120} Cunigan's fifth assignment of error states:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S TRIAL COUNSEL THE RIGHT TO CROSS-EXAMINE A STATE'S WITNESS ON CONDUCT BECAUSE OF THE WITNESS' STATUS OF INTERVENTION IN LIEU OF CONVICTION.

{¶ 121} Cunigan claims that the trial court abused its discretion by refusing to allow defense counsel to cross-examine Washington about pending criminal charges for which Washington had been placed on intervention in lieu of conviction ("ILC"). On appeal, Cunigan acknowledges that he could not have inquired into Washington's offenses under Evid.R. 609, as that rule relates to impeachment with evidence of conviction. Instead, he argues that his counsel should have been allowed to inquire on cross-examination into the specific instances of conduct underlying Washington's ILC offenses pursuant to Evid.R. 608(B). We do not agree.

{¶ 122} "Cross-examination of a witness is a matter of right, but the 'extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court.'" *State v. Green*, 1993-Ohio-26, ¶ 26, quoting *Alford v. United States*, 282 U.S. 687, 691, 694 (1931). "A trial court abuses its discretion when it acts in an unreasonable, arbitrary or unconscionable manner." *State v. Finnerty*, 45 Ohio St.3d 104, 107 (1989).

{¶ 123} "The right of cross-examination includes the right to impeach a witness' credibility." *Green* at ¶ 26. "The Ohio Rules of Evidence clearly delineate the methods by which a party may impeach a witness. Credibility may be attacked by evidence that the

witness has been convicted of a crime (Evid.R. 609), or by evidence of the witness's character for untruthfulness (Evid.R. 608)." *State v. Rodriguez*, 31 Ohio App.3d 174, 176 (9th Dist. 1986), citing *State v. Kamel*, 12 Ohio St.3d 306 (1984). "Criminal activities not resulting in conviction cannot ordinarily form the basis for an attack upon a witness's credibility." *State v. Skatzes*, 2003-Ohio-516, ¶ 183 (2d Dist.).

{¶ 124} Evid.R. 608(B) provides in part that "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence." Specific instances of the conduct of the witness "may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness" Evid.R. 608(B). "The decision to admit evidence of earlier misconduct of a witness for impeachment under Evid.R. 608(B) is 'within the sound discretion of the trial court.'" *State v. Drummond*, 2006-Ohio-5084, ¶ 100, quoting *State v. Boggs*, 63 Ohio St.3d 418, 424 (1992).

{¶ 125} Evid.R. 609, on the other hand, provides in part that evidence that a witness "has been convicted of a crime" is admissible if (1) the crime was punishable by death or imprisonment in excess of one year, or (2) the crime involved dishonesty or false statement, regardless of the punishment. Evid.R. 609(A)(1) and (3). An order granting ILC does not qualify as a conviction because the case is not yet complete while the defendant is subject to the terms of ILC. *State v. Yontz*, 2022-Ohio-2745, ¶ 18.

{¶ 126} Cunigan's trial counsel indicated a desire to cross-examine Washington regarding her criminal offenses for which she was granted ILC. No proffer was provided as to what questions defense counsel wished to ask or what information defense counsel

intended to elicit that related to specific instances of conduct. Rather, the only information proffered was the name and level of offenses for which Washington was on ILC. The anticipated cross-examination was therefore based on the nature of the offenses for which Washington was on ILC, not specific instances of the conduct of the witness as Cunigan now alleges. No information involving the specific instances of conduct was before the trial court. Accordingly, we cannot conclude that the trial court abused its discretion in prohibiting Cunigan from cross-examining Washington under these circumstances.

{¶ 127} Cunigan's fifth assignment of error is overruled

VI. Admission of a Single Photograph of the Deceased Fetus was Not an Abuse of Discretion

{¶ 128} Cunigan's sixth assignment of error states:

THE TRIAL COURT ERRED IN ADMITTING ONE PHOTOGRAPH OF THE FETUS INTO EVIDENCE.

{¶ 129} According to Cunigan, one coroner's office photograph of P.T.'s deceased fetus was admitted solely for the purpose of inflaming the jury's passion, which was overly prejudicial. We do not agree.

{¶ 130} The admission or exclusion of photographs of a murder victim is left to the sound discretion of the trial court. *State v. Hill*, 12 Ohio St.2d 88 (1967), paragraph two of the syllabus. "When considering the admissibility of photographic evidence under Evid.R. 403, the question is whether the probative value of the photographic evidence is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. Morales*, 32 Ohio St.3d 252, 257 (1987). Thus, pursuant to Evid.R. 403, a trial court has discretion to "reject an otherwise admissible photograph which, because of its inflammatory nature, creates a danger of prejudicial impact that substantially outweighs the probative

value of the photograph as evidence.” *Id.* “Absent such danger, the photograph is admissible.” *Id.* This court “will not interfere with the trial court’s balancing of probativeness and prejudice ‘unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby’” *State v. Slagle*, 65 Ohio St.3d 597, 602 (1992), quoting *State v. Hymore*, 9 Ohio St.2d 122, 128 (1967).

{¶ 131} The photograph at issue was taken by the coroner’s office at the direction of Dr. Swiatkowski, who performed the autopsies of P.T. and D.J. The photograph was taken shortly after the fetus was removed from P.T.’s uterus during her autopsy. It depicts P.T.’s deceased fetus and displays no outward signs of physical injury. Contrary to Cunigan’s contentions, the evidence was not cumulative. The ultrasound, which was dated more than a month prior to the murders, did not prove that P.T. was pregnant at the time of the offense or that her unborn child died as a result of Cunigan’s actions. The photograph was identified at trial by Dr. Swiatkowski in connection with his testimony regarding the fetus’s estimated gestational age, sex, and physical condition. This single photograph was probative concerning P.T.’s pregnancy and the cause of death of P.T.’s unborn child.

{¶ 132} The State had the burden to prove beyond a reasonable doubt that P.T. was pregnant at the time of the domestic violence offense and that Cunigan purposely caused the death of P.T.’s unborn child. “The state is entitled to offer evidence showing the cause of death, even if the cause of death is uncontested, to give the jury an ‘appreciation of the nature and circumstances of the crimes.’” *Nicholson*, 2024-Ohio-604, at ¶ 130, citing *State v. Evans*, 63 Ohio St.3d 231, 251 (1992). Given that (1) only one photograph was introduced into evidence, (2) the photograph was not unduly gruesome, and (3) it was probative of material facts (that P.T. was pregnant at the time of the offense and the pregnancy was terminated as a result of P.T.’s death, not the result of maceration) and was

illustrative of medical testimony on those issues, we are unable to conclude that the trial court abused its discretion in determining that the probative value of this photograph was not substantially outweighed by the danger of unfair prejudice to Cunigan. *State v. Alfieri*, 132 Ohio App.3d 69, 83-84 (1st Dist. 1998).

{¶ 133} Cunigan's sixth assignment of error is overruled.

VII. Cumulative Errors Did Not Deprive Cunigan of a Fair Trial

{¶ 134} Cunigan's seventh assignment of error states:

THE CUMULATIVE EFFECT OF TRIAL COURT ERRORS DEPRIVED
APPELLANT HIS RIGHT TO A FAIR TRIAL.

{¶ 135} Pursuant to the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *Garner*, 1995-Ohio-168, at ¶ 62. "In order to find cumulative error, we must find: (1) that multiple errors were committed at trial, and (2) there is a reasonable probability that the outcome of the trial would have been different but for the combination of the separately harmless errors." *State v. Goldblum*, 2014-Ohio-5068, ¶ 58 (2d Dist.), citing *State v. Kelly*, 2005-Ohio-305, ¶ 33 (2d Dist.).

{¶ 136} Cunigan generally argues that the trial included multiple errors that collectively resulted in the denial of a fair trial. He appears to rely on the alleged errors raised in his prior assignments of error to support this assignment of error. Having not found multiple errors in his prior assignments of error, we conclude there are no cumulative errors necessitating reversal.

{¶ 137} Cunigan's seventh assignment of error is overruled.

VIII. The Trial Court Failed to Make Consecutive Sentence Findings for the Violent Offender Specifications

{¶ 138} Cunigan's eighth assignment of error states:

THE TRIAL COURT'S SENTENCE ON VIOLENT OFFENDER SPECIFICATIONS IS CONTRARY TO LAW.

{¶ 139} In this assignment of error, Cunigan argues that the prison terms imposed for the three RVO specifications are contrary to law for three reasons. First, the trial court failed to make the requisite findings under R.C. 2929.14(B)(2) to impose the discretionary prison terms. Second, the court should have merged the RVO specifications. Third, the trial court ordered the prison terms for the RVO specifications to run consecutively without making the requisite consecutive sentence findings pursuant to R.C. 2929.14(C)(4). The State disputes Cunigan's first two arguments but concedes that the trial court failed to make consecutive sentence findings as required under R.C. 2929.14(C)(4).

{¶ 140} In reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 2016-Ohio-1002, ¶ 21. Under this statute, an appellate court may increase, reduce, or otherwise modify a sentence, or it may vacate the sentence and remand for resentencing, only if it "clearly and convincingly" finds either: (1) that the record does not support certain specified findings (including those in R.C. 2929.14(C)(4), which concern the imposition of consecutive sentences); or (2) that the sentence imposed is otherwise contrary to law. R.C. 2953.08(G)(2). "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier

of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶ 141} Sentencing on an RVO specification is governed by R.C. 2929.14(B)(2). R.C. 2929.14(B)(2)(a) addresses the discretionary imposition of an additional prison term for an RVO specification, and R.C. 2929.14(B)(2)(b) addresses the mandatory imposition of an additional prison term for an RVO specification. R.C. 2929.14(B)(2)(a) applies only if R.C. 2929.14(B)(2)(b) does not apply.

{¶ 142} Taking the latter subsection first, R.C. 2929.14(B)(2)(b) states, in pertinent part, that the trial court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one to ten years, in one-year increments, if the following three criteria are met: (1) the offender is convicted of or pleads guilty to an RVO specification; (2) the offender has been convicted of or has pleaded guilty to three or more RVO offenses in the last 20 years; and (3) the current offense is one of the listed qualifying offenses. R.C. 2929.14(B)(2)(b)(i) through (iii) and R.C. 2929.01(CC)(1). R.C. 2929.14(B)(2)(b) does not apply because Cunigan has not been convicted of or pleaded guilty to three or more prior RVO offenses. Therefore, R.C. 2929.14(B)(2)(a) applies.

{¶ 143} Pursuant to R.C. 2929.14(B)(2)(a), a trial court “may” impose upon an offender an additional definite prison term of one to ten years, in one-year increments, if the following five criteria are met: (1) the offender is convicted of or pleads guilty to an RVO specification; (2) the offender is currently convicted of or pleads guilty to murder (among other eligible offenses), and the court does not impose a sentence of life imprisonment without parole; (3) the court imposes the maximum prison term (but not life imprisonment without parole) or the longest minimum term for the offense; (4) the court finds that the prison

terms imposed are “inadequate to punish the offender and protect the public from future crime because the applicable factors under [R.C. 2929.12] indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism;” and (5) the court finds that the prison terms imposed are “demeaning to the seriousness of the offense” after considering and weighing the seriousness factors of R.C. 2929.12. R.C. 2929.14(B)(2)(a)(i) through (v).

{¶ 144} Cunigan was convicted of three counts of murder and their accompanying RVO specifications and had a prior conviction for a qualifying offense, felonious assault. Cunigan was sentenced to the maximum prison term on the murder counts that were not a life sentence without parole, and the trial court imposed additional prison terms for each of the three RVO specifications. It is undisputed that Cunigan fits within the definition of a repeat violent offender in that he was being sentenced for committing murder and had previously been convicted of felonious assault. R.C. 2929.01(CC) Nor does Cunigan allege that the trial court could not have imposed additional prison terms for the RVO specifications. Rather, he contends that the trial court failed to make the requisite findings on the record to impose the discretionary prison terms. Of significance to Cunigan’s argument, R.C. 2929.14(B)(2)(e) requires the trial court to state its findings explaining the imposed sentence when it imposes a sentence under R.C. 2929.14(B)(2)(a).

{¶ 145} At the sentencing hearing, the trial court found that Cunigan was a repeat violent offender, was being sentenced for murder, and the court imposed the maximum prison sentence for the murder counts but did not impose a sentence of life imprisonment without parole. Therefore, the criteria in R.C. 2929.14(B)(2)(a)(i) through (iii) were satisfied. The trial court did not, however, explicitly state its findings regarding R.C. 2929.14(B)(2)(a)(iv) and (v) when it imposed the additional prison terms for the RVO

specifications. Notably, the findings addressed in R.C. 2929.14(B)(2)(a)(iv) and (v) have been found unconstitutional, were excised from the RVO statute in *State v. Foster*, 2006-Ohio-856, and have not been explicitly reenacted. *State v. Oller*, 2017-Ohio-7575, ¶ 8 (10th Dist.). Accordingly, the trial court was not required to state the findings in R.C. 2929.14(B)(2)(a)(iv) and (v) prior to imposing an additional prison sentence for an RVO specification. *Id.*; accord *State v. Fenderson*, 2023-Ohio-2903, ¶ 51 (6th Dist.) (holding that a trial court need not make findings under R.C. 2929.14(B)(2)(a)(iv) and (v), and the additional term of imprisonment for an RVO specification can be imposed based solely on the factors set forth in R.C. 2929.14(B)(2)(a)(i) to (iii)); *State v. Lewis*, 2019-Ohio-4081, ¶ 43 (7th Dist.) (the trial court was not required to make the findings set out in R.C. 2929.14(B)(2)(a)(iv) and (v) before sentencing the appellant on the RVO specification); *State v. Davis*, 2026-Ohio-1096, ¶ 30 (12th Dist.) (judicial findings pursuant to R.C. 2929.14(B)(2)(iv) and (v) are unconstitutional). Therefore, the trial court's imposition of additional prison terms was not contrary to law.

{¶ 146} Cunigan next argues that the additional prison terms on the RVO specifications should have been merged. Cunigan, however, makes no argument about why the specifications should have merged and cites no statute or case law in support of this merger argument. We decline to make an argument for him and reject his contention. *State v. McKnight*, 2023-Ohio-1933, ¶ 21 (9th Dist.).

{¶ 147} Finally, Cunigan argues that the additional prison terms imposed for the RVO specifications should be served concurrently because the trial court failed to make consecutive sentence findings. The State concedes this error, and we agree that the trial court erred in failing to make consecutive sentence findings regarding the additional prison terms imposed for the RVO specifications.

{¶ 148} “Ohio law presumes that a defendant convicted of multiple crimes will serve his sentences concurrently.” *State v. Glover*, 2024-Ohio-5195, ¶ 38, citing R.C. 2929.41(A). Nevertheless, pursuant to R.C. 2929.14(C)(4), a trial court has discretion to impose consecutive sentences if it finds that (1) consecutive service is necessary to protect the public from future crime or punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public; and (3) one or more of the following findings are made:

(a) The offender committed the offenses while awaiting trial or sentencing, was under a sanction imposed pursuant to R.C. 2929.16, R.C. 2929.17, R.C. 2929.18, or was under post-release control;

(b) At least two of the offenses were committed as part of one or more courses of conduct, and the harm was so great that no single prison term adequately reflects the seriousness of the conduct;

(c) The offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4)(a) through (c). The trial court needs only to find one of the three potential findings under R.C. 2929.14(C)(4)(a) through (c) to impose consecutive sentences. *State v. Parrish*, 2023-Ohio-2409, ¶ 24 (2d Dist.). “[A] trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.” *State v. Bonnell*, 2014-Ohio-3177, syllabus.

{¶ 149} While the trial court generally has discretion to impose consecutive sentences if the consecutive sentencing requirements are satisfied, there are certain

circumstances that require the imposition of consecutive sentences by law. *State v. Sergeant*, 2016-Ohio-2696, ¶ 16. “For example, R.C. 2929.14(C)(1)(a), which requires that any mandatory prison term for having a firearm in the commission of a felony shall be served consecutively to any mandatory sentence imposed for the underlying felony.” *Id.* By operation of law, the prison term imposed for a RVO specification must be served consecutively to and prior to the prison term imposed for the underlying offense. R.C. 2929.14(B)(2)(d). Therefore, the trial court was obligated to order the prison term for each of the RVO specifications to be served consecutively to and prior to the underlying felony offenses.

{¶ 150} However, while the sentences imposed for the RVO specifications were required by statute to be served consecutively to and prior to their underlying felony offenses, there is no statutory requirement for the prison terms imposed for the RVO specifications to be served consecutively to one another. The trial court, therefore, has discretion to order the additional prison terms for the RVO specifications to be served consecutively to each other. *State v. Krug*, 2009-Ohio-3815, ¶ 174-175 (11th Dist.). But to do so, the trial court was required to make consecutive sentence findings pursuant to R.C. 2929.14(C)(4); it did not. Because the trial court failed to address the consecutive sentence findings, we must reverse the judgment in part and remand the cause for a resentencing hearing. R.C. 2953.08(G)(1). If the court on remand elects to order the additional prison terms for each of the RVO specifications to be served consecutively to each other, then the trial court must make the appropriate consecutive sentence findings and include those findings in the judgment entry.

{¶ 151} Though not mentioned by either party, we note an error in the judgment entry. The trial court failed to include the fact that Cunigan was found guilty by the court of the

violent offender specification on the three murder counts. This omitted fact should be included in the new judgment entry when the trial court resentsences Cunigan.

{¶ 152} Cunigan's eighth assignment of error is sustained in part.

IX. The Trial Court Failed to Advise Cunigan of the Requirements in R.C. 2903.42(A)(1) Prior to Sentencing

{¶ 153} Cunigan's ninth assignment of error states:

THE TRIAL COURT FAILED TO GIVE CERTAIN ADVISEMENTS REQUIRED BY R.C. 2903.42(A)(1)(A).

{¶ 154} In his final assignment of error, Cunigan contends that the trial court failed to advise him of the notifications regarding his duty to enroll in the violent offender database prior to sentencing. The State agrees with Cunigan and concedes error.

{¶ 155} Violent offenders convicted of specific offenses, including murder, are required to enroll in the violent offender database. R.C. 2903.42(A)(1). There is a presumption that violent offenders must enroll in the database, and enrollment is required for a minimum of 10 years. Offenders must re-enroll in the database annually.

{¶ 156} The presumption that a person classified as a violent offender must enroll in the violent offender database is rebuttable. To rebut the presumption, the offender must file a motion in accordance with R.C. 2903.42(A)(2)(a) or (b), whichever is applicable, prior to or at sentencing. The trial court is required to inform the defendant of the presumption, of the defendant's "right to file a motion to rebut the presumption, the procedure and criteria for rebutting the presumption, and of the effect of a rebuttal and the post-rebuttal hearing procedures and possible outcome." R.C. 2903.42(A)(1). These notifications must be provided to the defendant "*before sentencing*." (Emphasis added.) R.C. 2903.42(A)(1)(a).

{¶ 157} The record reflects, and the parties agree, that the trial court never provided the notifications required by R.C. 2903.42(A)(1)(a) before sentencing Cunigan. Consequently, Cunigan was never informed by the trial court of the statutory presumption that he was required to enroll in the violent offender database and of his ability to file a written motion to rebut the presumption. Furthermore, Cunigan was not made aware of the effect of the rebuttal or the post-rebuttal hearing procedures and possible outcomes.

{¶ 158} We agree with the parties that the portion of the trial court's judgment addressing Cunigan's duty to enroll in the violent offender database must be reversed, and the trial court must provide Cunigan the notifications under R.C. 2903.42(A)(1)(a) and an opportunity to file a motion to rebut the statutory presumption that he must enroll in the violent offender database. As a reminder, these notifications and opportunity must be provided to Cunigan *before* he is re-sentenced.

{¶ 159} Cunigan's ninth assignment of error is sustained.

X. Conclusion

{¶ 160} Having sustained Cunigan's eighth assignment of error in part and his ninth assignment of error, the judgment of the trial court is affirmed in part and reversed in part. The portion of the trial court's judgment imposing Cunigan's duty to enroll in the violent offender database is reversed, and the matter is remanded for the trial court to advise Cunigan of the notifications under R.C. 2903.42(A)(1)(a), to provide him an opportunity to file a motion to rebut the statutory presumption, and to issue a new ruling on whether Cunigan is required to enroll in the violent offender database.

{¶ 161} The portion of the trial court's judgment ordering the repeat violent offender specifications to run consecutively to each other is reversed, and the cause is remanded to

the trial court for resentencing consistent with this opinion. In all other respects, the trial court's judgment is affirmed.

.....

TUCKER, J., and HANSEMAN, J., concur.