[Cite as *State v. Fleming*, 2026-Ohio-4693.]

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

STATE OF OHIO	:	
	:	C.A. No. 2025-CA-91
Appellee	:	
	:	Trial Court Case No. 23-CR-0550
v.	:	
	:	(Criminal Appeal from Common Pleas
JERREL FLEMING	:	Court)
	:	
Appellant	:	**FINAL JUDGMENT ENTRY &**
	:	**OPINION**

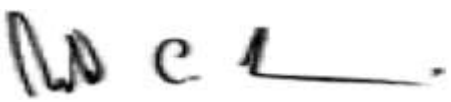
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Pursuant to the opinion of this court rendered on November 25, 2026, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), the clerk of the court of appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the service. 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
CLARK C.A. No. 2025-CA-91

CHRISTOPHER BAZELEY, Attorney for Appellant
JOHN M. LINTZ, Attorney for Appellee

LEWIS, P.J.

{¶ 1} Defendant-appellant Jerrel Fleming appeals from his convictions in the Clark County Common Pleas Court for murder and related offenses following a jury trial. For the following reasons, we affirm the judgment of the trial court.

I. Procedural History

{¶ 2} On August 23, 2023, Fleming was indicted by a Clark County grand jury on one count of murder in violation of R.C. 2903.02(A); one count of murder in violation of R.C. 2903.02(B); one count of felonious assault in violation of R.C. 2903.11(A)(2); one count of discharge of a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3); one count of having weapons under disability in violation of R.C. 2923.13(A)(2); and one count of having weapons under disability in violation of R.C. 2923.13(A)(3). Each of the murder charges and the felonious assault charge carried two firearm specifications. The charges arose from the August 7, 2023 shooting death of R.F.

{¶ 3} Prior to trial, the State dismissed the count of having weapons while under disability in violation of R.C. 2923.13(A)(2). A jury trial commenced on June 10, 2024; Fleming was found not guilty of murder in violation of R.C. 2903.02(A) but guilty on the remaining counts and specifications. Fleming was sentenced to an aggregate prison term of 46.5 years to life.

{¶ 4} Fleming filed a timely appeal raising several assignments of error, one of which alleged that he had been denied his right to a fair trial when the trial court allowed the

recorded phone call of a witness to be played at trial. This court sustained Fleming's assignment of error regarding the witness's recorded phone call, reversed his convictions, and remanded the matter to the trial court for further proceedings. *State v. Fleming*, 2025-Ohio-3165, ¶ 31 (2d Dist.).

{¶ 5} Upon remand, the case proceeded to a second jury trial. Prior to trial, the parties stipulated to "the proper foundation and admissibility of all exhibits previously admitted into evidence" during Fleming's first jury trial, with the exception of the witness's recorded phone call. The parties agreed that they had "enter[ed] into this stipulation having already laid satisfactory foundations for admissibility of this evidence" before the trial court. The following is a summary of the evidence and testimony presented at the second jury trial.

{¶ 6} Just before midnight on July 6, 2023, R.F., aka "Killa," and three of his acquaintances, Derek Nelson, Anthony Lane, and Charles Ingledue, arrived in a Nissan Altima at The Wayside Tavern on South Yellow Springs Street in Clark County, Ohio, just outside of Springfield. R.F., who was driving, parked the car, but none of the occupants got out. Moments later, a silver Chevrolet Equinox drove into the parking lot of The Wayside Tavern and backed into a parking space.

{¶ 7} Shortly after the Equinox arrived, the Altima drove out of the parking lot, circled back into the parking lot, and stopped with its front headlights shining on the passenger side of the Equinox. The occupants of the Equinox remained inside the vehicle while someone from the Altima fired a gun at them. Twenty-five spent 9 mm shell casings were recovered from the parking lot; all had been fired from the same gun. The Equinox fled the parking lot and turned northbound toward downtown Springfield. The Altima fled the parking lot and drove southbound toward Leffel Lane. Moments later, the Equinox made a U-turn and drove southbound in the direction of the Altima.

{¶ 8} A high-speed chase ensued that ultimately ended in downtown Springfield. When the Altima reached the corner of North Street and Spring Street, R.F. turned left onto North Street but lost control of the vehicle and crashed at the corner. The occupants of the crashed Altima fled on foot. R.F. crossed North Street and entered a United States Post Office parking lot. The Equinox, which had been following the Altima, stopped in the intersection of North Street and Spring Street. The barrel of a long gun was stuck outside the driver's side window, then was pulled back inside the vehicle and was placed on the front passenger seat, which appeared vacant. Several shots were then fired from a smaller handgun out of the driver's side window in the direction of the crashed Altima.

{¶ 9} The Equinox then drove into the parking lot of the post office, and a second round of gunshots was heard. The Equinox then left the parking lot, turned onto North Street, and drove westbound. While in the parking lot, the Equinox struck a mail truck and a fence, causing damage to both. Broken mirror pieces and a piece of the Equinox's front bumper were found at the scene. A dozen 9 mm spent casings were recovered from the post office parking lot and surrounding area, 11 of which had been fired by the same unknown gun. Blood was observed on the ground of the post office parking lot, and R.F. was discovered on the ground shot. R.F. was transported to the hospital where he died shortly thereafter from multiple gunshot wounds.

{¶ 10} No spent casings were recovered from the intersection of North Street and Spring Street. Two 9 mm spent casings were recovered from inside the crashed Altima, along with a .40 caliber firearm and a Glock model 19 9 mm caliber pistol ("Glock") with an extended magazine. The Glock was found to be the same gun that had discharged the 25 spent casings recovered from The Wayside Tavern parking lot and the two spent casings from inside the Altima.

{¶ 11} Approximately 10 minutes after R.F. was shot, Fleming texted his child's mother that "Them n * * * * * * just tried it again. Call me ASAP." On July 5, 2023, approximately one month prior to R.F.'s shooting death, Fleming had been shot and hospitalized. Fleming was aware that R.F.'s vehicle had been involved in his shooting, and Fleming's child's mother had texted him that "Killa" shot him. In a Snapchat video taken while Fleming recovered in the hospital from his July 5 gunshot wound, Fleming discussed getting shot, described R.F.'s family, and made vague threats such as "better move far," and "as soon as they release me." Fleming posted a Facebook message on July 5, 2023, that stated, "We ain't doing no attempts," with a devil emoji and a clock, meaning "demon time."

{¶ 12} Although Chantelle Robinson testified at trial that she did not recall what had happened on August 7, 2023, she told Springfield Police Detective Justin Massie during a September 19, 2023 recorded phone call that she had been with Fleming at The Wayside Tavern. No one else had been with them in the vehicle. Robinson claimed that once people started shooting at them at The Wayside Tavern, Fleming drove out of the parking lot, and Robinson got out of the car and ran to her friend's house. Robinson's cell phone records were consistent with her statement that she had been at The Wayside Tavern just after midnight on August 7, 2023, and had remained near that location during the time of the high-speed chase and the Altima's crash.

{¶ 13} None of the occupants in R.F.'s vehicle was able to identify the driver of the Equinox. Despite several surveillance videos tracking the vehicles and depicting the crash, the driver of the Equinox was not clearly visible on any of the videos. The Equinox was registered to Fleming's girlfriend, Jashala Forrest.

{¶ 14} Seth Dodson testified that he was a Public Safety Intelligence Analyst employed through the Ohio Department of Public Safety with the Ohio State Highway Patrol

Intelligence Unit. Dodson worked with Detective Massie to put together a PowerPoint presentation that was shown to the jury. The presentation included maps and animated graphics mapping location data from cell phone records associated with Fleming, Chantelle Robinson, Derek Nelson, and Jashala Forrest at various locations from August 2, 2023, to August 13, 2023. Additional data location was included from Flock photographs and surveillance videos obtained by law enforcement. The time and location data of Fleming's cell phone was consistent with photographs and surveillance video from before and after the August 7, 2023 shooting that connected Fleming to his cell phone and the Equinox.

{¶ 15} On August 12, 2023, less than a week after R.F.'s death, Fleming was shot a second time near Liberty Street in Springfield. A maroon Chevrolet Malibu registered to Forrest was shot up, and Fleming's phone records reflected that his cell phone was in the area at the time of the August 12, 2023 shooting. Fleming went to the Miami Valley Hospital in Dayton and was treated for his gunshot wounds. On August 13, 2023, Forrest drove her Equinox to the hospital and picked Fleming up. Surveillance video from the hospital showed that a piece of the front bumper on the Equinox was missing and there was damage to the driver's side mirror.

{¶ 16} The Equinox was recovered from Columbus, Ohio, on September 13, 2023. A broken bumper piece that had been left behind in the post office parking lot matched the damaged front bumper of Forrest's Equinox. On the same day the Equinox was recovered, Fleming was arrested at an apartment in Columbus, and Fleming's cell phone was discovered hidden in a child's crib at the apartment. A review of the cell phone reflected that Fleming was the primary user, and it contained several relevant text messages regarding the August 7, 2023 shooting. No firearm was recovered that matched the spent casings from the post office parking lot.

{¶ 17} A certified copy of Fleming's prior felony drug conviction from the Montgomery County Common Pleas Court was submitted at trial. Detective Massie testified that, because of Fleming's prior conviction, Fleming was under a legal disability that prohibited him from carrying a firearm.

{¶ 18} Following the State's case-in-chief, Charles Ingledue and Derek Nelson testified on behalf of Fleming. Ingledue claimed he did not recall the events on August 7, 2023, because he was highly intoxicated. Ingledue claimed he did not know Fleming and had never seen Fleming prior to the court proceedings.

{¶ 19} Nelson testified that he recalled the shooting on August 7, 2023, and had been in the car with R.F. He stated that a car had followed them, but he had not been able to see anyone inside that car and had not seen anyone get out of that car. Nelson was familiar with Fleming, but he had not seen into the other vehicle to know whether Fleming had been inside it.

{¶ 20} The jury found Fleming guilty on all counts and specifications. Fleming was sentenced to an aggregate prison term of 46.5 years to life. Fleming filed a timely notice of appeal.

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

{¶ 21} In his first and second assignments of error, Fleming makes the following related arguments:

> FLEMING'S CONVICTIONS ARE AGAINST THE WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL AND ARE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.

FLEMING'S CONVICTIONS FOR FELONY MURDER, FELONIOUS ASSAULT, AND IMPROPER DISCHARGE OF A FIREARM ARE BASED UPON THE JURY'S IMPROPER STACKING OF INFERENCES FROM CIRCUMSTANTIAL EVIDENCE.

{¶ 22} "When a defendant challenges the sufficiency of the evidence supporting his conviction, a reviewing court must consider the evidence in a light most favorable to the State and determine whether the evidence, if believed, would convince an average person that each element of the crime had been met." *State v. McClain*, Slip Opinion 2026-Ohio-3934, ¶ 1. "A verdict should not be disturbed on appeal unless reasonable minds could not reach the trier of fact's conclusion." *State v. Jordan*, 2023-Ohio-3800, ¶ 16.

{¶ 23} 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). "Sitting as the 'thirteenth juror,' the court of appeals considers whether the evidence should be believed and may overturn a verdict if it disagrees with the trier of fact's conclusion." *Jordan* at ¶ 17. 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.

{¶ 24} Fleming does not challenge whether the State produced sufficient evidence of each element of his offenses. Rather, the crux of Fleming's argument for both his manifest weight and sufficiency challenges is that the State failed to prove his identification as the

person who killed R.F. He also argues that, in order to find him guilty, the jury improperly "stacked inferences, drawn from circumstantial evidence." We limit our analysis to these two arguments.

{¶ 25} While we agree with Fleming that the evidence presented by the State to prove the identity of the shooter was circumstantial, we do not agree that it was based on improper inference stacking. "Circumstantial evidence and direct evidence inherently possess the same probative value." *State v. Jenks*, 61 Ohio St.3d 259, 272 (1991). "Like any fact, the state can prove the identity of the accused by 'circumstantial or direct' evidence." *State v. Tate*, 2014-Ohio-3667, ¶ 15, citing *Jenks* at 272-273. Circumstantial evidence alone "'is sufficient to sustain a conviction if that evidence would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. McKnight*, 2005-Ohio-6046, ¶ 75, quoting *State v. Heinish*, 50 Ohio St.3d 231, 238 (1990).

{¶ 26} "When drawing reasonable inferences from the evidence, jurors are 'free to rely on their common sense and experience.'" *State v. Dunn*, 2024-Ohio-5742, ¶ 32, quoting *State v. Allen*, 1995-Ohio-283, ¶ 45. "An inference which is based solely and entirely upon another inference and which is unsupported by any additional fact or another inference from other facts is an inference upon an inference and is universally condemned." *Hurt v. Charles J. Rogers Transp. Co*., 164 Ohio St. 329, 333 (1955). "An inference which is based in part upon another inference and in part upon factual support is called a parallel inference and is universally approved provided it is a reasonable conclusion for the jury to deduce." *Id*. "Where a jury bases its verdict partly on a reasonable inference drawn from facts in evidence, and partly on an inference drawn both from those same facts and from common human experience, the verdict is not the result of the impermissible stacking of an inference upon an inference." *Motorists Mut. Ins. Co. v. Hamilton Twp. Trustees*, 28 Ohio St.3d 13

(1986), syllabus.

{¶ 27} The driver of the Equinox was observed on surveillance video shooting a firearm out of the driver's side window at the intersection of Spring Street and North Street. After firing a few rounds, the Equinox followed R.F. into the post office parking lot, circled around the lot, and made a quick getaway. This all occurred within a matter of approximately 30 seconds. During the time the Equinox was in the parking lot, a second round of gunfire was heard, and R.F. was shot multiple times, leading to his death. The jury could have reasonably found that the driver of the Equinox was the same person who had fired the gun at R.F. in the post office parking lot and killed him. The question for the jury was whether Fleming was the driver.

{¶ 28} In the days leading up to the August 7, 2023 shooting, Fleming was observed on multiple occasions with the Equinox, and his cell phone was tracked to the same locations as the Equinox. Between August 2 and August 4, 2023, Fleming's cell phone locations were consistent with several Flock camera locations that depicted the Equinox. On August 5, 2023, Fleming was observed on surveillance video at the Sunoco gas station at 1202 Sunset Avenue in Springfield; Fleming was sitting in the driver's seat of the Equinox, and his cell phone location data was consistent with the location of the Sunoco gas station.

{¶ 29} Between 7:00 and 7:30 a.m. on August 6, 2023, Fleming's cell phone traveled from Dayton to Springfield and stopped at the Sunoco gas station at 1202 Sunset Avenue in Springfield. Surveillance video from the Sunoco gas station showed Fleming with the Equinox. At that time, there was no apparent damage to the front bumper of the vehicle.

{¶ 30} Throughout the day on August 6, 2023, Fleming's cell phone location data consistently matched the locations of Flock camera photographs of the Equinox and surveillance video depicting the Equinox. Around 9:15 p.m., the location data for Fleming's

and Robinson's phones was consistent with the Sunoco gas station at Selma Road and East Street in Springfield. Video surveillance from the gas station at that time showed the Equinox pull in and park at a gas pump. A female passenger sitting in the back seat of the Equinox got out of the vehicle, then eventually reentered the car. Although the driver could not be seen, it was clear there was also a front seat passenger. The Equinox left the gas station at 9:27 p.m. and turned southeast onto Selma Road. A Flock camera captured the Equinox at 9:27 p.m. at Selma Road and East Street.

{¶ 31} At 9:55 p.m., Fleming's brother called him from jail. On the recorded jail call, Fleming, Robinson, and a female named Leslie Moore were heard talking. Moore's family lived near the location of the timing advance arcs from Fleming's cell phone during the time Fleming's brother spoke with him. Around 10:30 p.m., Fleming told his brother on the jail call that "I got 90 and 30, I got 120 rounds," then stated, "gonna let them all go." Detective Massie explained that a rifle, like an AR-15, can have a drum magazine that carries 90 rounds and a semiautomatic handgun with an extended magazine can hold 30 rounds. The shooter inside the Equinox appeared to possess both an AR-15 style long gun and a semiautomatic handgun based on the surveillance video from the intersection. Fleming's use of the phrase "let them all go" was one that he had used in his Snapchat video following the July 5, 2023 shooting, when he referenced how the shooter had fired at him that day. Fleming believed that R.F. had been involved in the July 5, 2023 shooting and made veiled threats to R.F. in his Snapchat video. Fleming also made statements to his brother on the recorded jail call that he could "drop [him] with the first shot. I'm going [to] pull up on him and give him the rest of them bitches," and finished by promising "on my kids."

{¶ 32} Additional Flock camera photographs of the Equinox were captured at 11:39 and 11:40 p.m., which likewise coincided with the location of Fleming's phone. Robinson's phone was also consistent with the location of those Flock camera photographs.

{¶ 33} Just after midnight on August 7, 2023, Fleming's, Robinson's, and Nelson's cell phones were in the vicinity of The Wayside Tavern. Nelson was in the Altima with R.F. while Robinson was in the Equinox with Fleming. After someone from the Altima shot at the Equinox, the Altima fled southbound on South Yellow Springs Street and the Equinox fled northbound on South Yellow Springs Street. However, the Equinox quickly made a U-turn and followed the Altima southbound on South Yellow Springs Street. Around 12:10 a.m., Fleming and Nelson's phones traveled very quickly east and north toward Springfield from The Wayside Tavern. Surveillance video from the BP Gas Station at 2300 South Limestone Street captured video of the Altima driving eastbound and running a red light to turn northbound onto South Limestone Street; the Equinox followed quickly behind it. A Flock photograph captured the Equinox at 12:10 a.m. heading north on South Limestone Street, which was consistent with the location of Fleming's cell phone. At 12:11:29 a.m., the surveillance video at the intersection of Spring Street and North Street showed the Altima crash, the Equinox stop in the intersection, and the driver of the Equinox shoot from inside the vehicle. No one was seated in the front passenger seat of the Equinox at that time. After firing several shots, the Equinox followed R.F. into the post office parking lot, more shots were fired, and R.F. fell to the ground after being struck by multiple bullets. Eleven 9 mm spent casings were recovered from the parking lot area, which had all been fired from the same unknown gun. The Equinox fled the parking lot and headed westbound on North Street, which was captured on surveillance video. Another Flock camera captured the Equinox at 12:11:46 a.m. heading westbound at East North Street and Spring Street.

{¶ 34} Fleming's cell phone returned to the area just north of The Wayside Tavern, while Nelson's phone stayed in the Springfield area after the shooting. Robinson's phone, however, remained just north of The Wayside Tavern during the time that Fleming and Nelson's phones traveled to downtown Springfield. This was consistent with Robinson's statement that although she was in the car with Fleming at The Wayside Tavern, she got out of the car just after they had been shot at in the parking lot and ran to her friend's house. After the shooting downtown, Fleming's phone traveled to the same area where Robinson's phone was located. At 12:22:12 a.m., Fleming texted his child's mother that, "Them n * * * * * * just tried it again," indicating that he had been shot at again. Fleming also told her to call him as soon as possible, which reflected that Fleming had his cell phone with him.

{¶ 35} Around 3:00 a.m. on August 7, 2023, Fleming's cell phone traveled to Dayton, where it stayed for several hours. Later that morning, Forrest's cell phone traveled to Dayton, to the same area Fleming's phone had been, and then went east to the Fairborn Municipal Court, where it arrived around 9:00 a.m. Fleming's cell phone location also appeared at the Fairborn Municipal Court at 9:00 a.m. Surveillance video from the courthouse showed that just after 9:00 a.m., Forrest and Fleming arrived at the courthouse parking lot in Forrest's maroon Malibu with Forrest driving. Forrest and Fleming entered the courthouse and stayed until around 10:15 a.m. Both of their cell phones remained at the courthouse during that time, indicating they had possession of their cell phones.

{¶ 36} When Forrest's Equinox was recovered by police on September 13, 2023, the piece of bumper that had been left behind in the post office parking lot on the night of R.F.'s shooting matched a missing piece of the front bumper. Video surveillance showed the front-end damage and missing portion of the bumper was not present on August 6, 2023, but was

visible on August 13, 2023. When Fleming was arrested on September 13, 2023, the cell phone associated with him was located hidden inside the residence where he was found.

{¶ 37} Direct evidence was presented that on August 7, 2023, Fleming's cell phone and his girlfriend's Equinox were present at the time R.F. was shot and killed. The jury could have reasonably inferred, without engaging in impermissible inference stacking, that Fleming had been the driver of Forrest's Equinox and that he had shot and killed R.F. Fleming was known to travel with his cell phone and was observed driving the Equinox on the days leading up to the shooting. Fleming had possession of his cell phone as of 10:30 p.m. on August 6, 2023, when he was recorded on a phone call with his brother. The evidence also suggested that Fleming had possession of his cell phone at 12:22:12 a.m. when he texted his child's mother. It was reasonable for the jury to conclude that Fleming traveled with his cell phone and therefore was in the Equinox at the time of the shooting. *See State v. Pack*, 2024-Ohio-190, ¶ 24 (12th Dist.). Moreover, Robinson placed Fleming in the Equinox while at The Wayside Tavern. After she got out of the car, Fleming was the only remaining occupant of the vehicle.

{¶ 38} Taken in the light most favorable to the State, we conclude that the State presented sufficient evidence of the identity of the shooter and all the elements of the crimes of which Fleming was convicted beyond a reasonable doubt. Further, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. This is not the exceptional case in which the evidence weighed heavily against the convictions.

{¶ 39} Fleming's first and second assignments of error are overruled.

III. Plain Error is Not Found in the Admission of Dodson's Testimony

{¶ 40} In his third assignment of error, Fleming makes the following argument:

THE TRIAL COURT PLAINLY ERRED WHEN IT ALLOWED THE STATE'S WITNESS TO PROVIDE CRITICAL CELL PHONE AND FLOCK CAMERA TESTIMONY AND OPINIONS WITHOUT QUALIFYING HIM AS AN EXPERT OR PROVIDING A FOUNDATION OF HIS QUALIFICATIONS FOR DOING SO.

{¶ 41} Fleming argues that the trial court should not have permitted Seth Dodson to testify about the Flock camera systems and cell phone analyses without first qualifying him as an expert or providing a foundation to qualify him as an expert. Fleming concedes that his trial counsel did not object to Dodson's testimony, and therefore this assignment of error is subject to plain error review. He contends that the trial court plainly erred in allowing Dodson to testify as an expert without the State laying the proper foundation, which resulted in prejudice.

{¶ 42} The State counters that Dodson was not an expert witness, as the State never formally tendered Dodson as an expert and the court never qualified him as such. Further, it asserts that Dodson's testimony was not technical in nature and that he was testifying as a lay witness. Finally, the State argues that although Fleming acknowledged that this assignment of error is subject to plain error review, Fleming did not set forth a plain error argument, and this assignment of error should be rejected on that basis.

{¶ 43} "Errors that arise during a trial that are not brought to the attention of the court are ordinarily waived and may not be raised on appeal unless there is plain error, *i.e.*, but for the error, the outcome of the trial clearly would have been otherwise." *State v. McKee*, 2001-Ohio-41, ¶ 6, citing Crim.R. 52(B). In order to constitute plain error, the error (1) must have occurred and been a deviation from a legal rule, (2) must have been an obvious defect in the trial proceedings, and (3) must have affected substantial rights, meaning that the trial

court's error must have affected the outcome of the trial. *State v. Morgan*, 2017-Ohio-7565, ¶ 36. "Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it." *State v. Barnes*, 2002-Ohio-68, ¶ 21. Plain error should be noticed "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. "The burden of demonstrating plain error is on the party asserting it." *State v. Quarterman*, 2014-Ohio-4034, ¶ 16, citing *State v. Payne*, 2007-Ohio-4642, ¶ 17.

{¶ 44} Whether Dodson provided lay witness testimony or expert testimony is immaterial in this case because the parties stipulated to the proper foundation and admissibility of all the exhibits previously admitted into evidence during Fleming's first trial, which included Dodson's PowerPoint presentation. Dodson's testimony was limited to explaining the PowerPoint presentation, which was also discussed during Detective Massie's testimony. Notably, Fleming has not challenged Detective Massie's testimony on appeal. Thus, the evidence would have been before the jury even if Dodson had not testified. It appears that defense counsel, who also represented Fleming during his first jury trial, may have made a strategic decision to not highlight Dodson's qualifications given the following statement we made in Fleming's first appeal: "Dodson's testimony established that he had expertise in cell phones and towers and the analysis thereof for mapping locations. Indeed, he testified that he had been doing such work since 2017 and had been certified as a "subject matter expert in the field." *Fleming*, 2025-Ohio-3165, at ¶ 26 (2d Dist.). In light of the foregoing, we cannot conclude the trial court committed plain error in allowing Dodson to testify about the PowerPoint presentation that the parties agreed was admissible. This is not the exceptional circumstance where reversal is necessary to prevent a manifest miscarriage of justice.

{¶ 45} Fleming's third assignment of error is overruled.

IV. Fleming's Trial Counsel Was Not Ineffective

{¶ 46} In his fourth assignment of error, Fleming makes the following argument:

> FLEMING WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY REFUSED TO ALLOCUTE AT SENTENCING.

{¶ 47} "To obtain a reversal of a conviction on the basis of ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 2000-Ohio-448, ¶ 49, citing *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). The failure to establish either of the two prongs negates a court's need to consider the other. *Id*. at ¶ 49, citing *Strickland* at 697.

{¶ 48} Judicial scrutiny of counsel's performance is highly deferential, and "reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *Strickland* at 689. "As a result, trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance." *State v. Sallie*, 1998-Ohio-343, ¶ 10, citing *State v. Thompson*, 33 Ohio St.3d 1, 10 (1987).

{¶ 49} To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

{¶ 50} At sentencing, the trial court afforded defense counsel an opportunity to speak on behalf of Fleming in accordance with Crim.R. 32(A)(1). When asked if counsel had

anything to say, Fleming's counsel stated, "Not from me. I believe my client might have something he would like to state." Sentencing Tr. 3. Thereafter, Fleming provided his own statement in allocution. Fleming claims he was prejudiced by counsel's failure to make a statement on his behalf, because it caused the trial court to presume "that there must not be any mitigating circumstances." *Id*.

{¶ 51} This court has rejected similar arguments alleging ineffective assistance of trial counsel when counsel stands silent or omits a presentation of evidence in mitigation of a sentence. *See State v. Day*, 2026-Ohio-1999, ¶ 12 (2d Dist.) (listing cases). Even if counsel had performed deficiently by failing to make statements on Fleming's behalf, Fleming has not demonstrated "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. Fleming was sentenced for murder following a jury trial and made his own plea for leniency at sentencing on his own behalf. Fleming has not directed us to any evidence contained in the record that would have supported a lesser sentence. And any evidence trial counsel could have submitted in mitigation that is not contained within the record cannot be considered on direct appeal. *Day* at ¶ 13.

{¶ 52} Based on the record before us, and Fleming's failure to cite any mitigating circumstances therein, we cannot say that prejudice resulted from trial counsel's failure to offer a statement in mitigation of sentence. Thus, Fleming has not demonstrated ineffective assistance of counsel. Fleming's fourth assignment of error is overruled.

V. Conclusion

{¶ 53} Having overruled the assignments of error, the judgment of the trial court is affirmed.

. . . . . .

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