

[Cite as *State v. Brown*, 2002-Ohio-6765.]

**IN THE COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
MARION COUNTY**

**STATE OF OHIO**

**CASE NO. 9-02-02**

**PLAINTIFF-APPELLEE**

**v.**

**SHANNON DUNN BROWN**

**OPINION**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas  
Court**

**JUDGMENT: Judgment Affirmed.**

**DATE OF JUDGMENT ENTRY: December 11, 2002**

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**ATTORNEYS:**

**ROBERT C. NEMO  
Attorney at Law  
Reg. #0001938  
495 South State Street  
Marion, Ohio 44302  
For Appellant**

**JIM SLAGLE  
Attorney at Law  
Reg. #0032360  
133 1/2 East Center Street  
Marion, Ohio 43302  
For Appellee**

**WALTERS, J.**

{¶1} Defendant-Appellant, Shannon Dunn Brown, appeals a judgment of conviction and sentence entered by the Marion County Common Pleas Court upon a jury verdict where she was found guilty of murdering her boyfriend, Jeremy Holsinger. Brown argues that evidence of her threats, violence, and other obsessive behavior in the months preceding Holsinger's death was inadmissible at trial. However, this evidence was probative of her motive or intent and tended to negate claims that the death was accidental or that she possessed a bona fide belief that she was in imminent danger of great bodily harm. Brown further contends that, despite the lack of a request or objection, the trial court erred in failing to provide a limiting instruction as to other acts evidence. Having reviewed the manner in which the evidence was presented at trial, we cannot find that the failure to instruct was an obvious or outcome determinative defect in the proceedings. Because the remainder of Brown's assignments of error are without merit, we affirm the trial court's judgment.

{¶2} Facts and procedural history relevant to issues raised on appeal are as follows: Shannon Brown and Jeremy Holsinger began dating in late 1999, and thereafter went through varying periods of separation and reconciliation. During periods of reconciliation, Brown and Holsinger cohabited. In May 2001, the couple had taken up residence in Marion, Ohio with Sam Toland, Holsinger's

cousin, Lana Manley, Toland's girlfriend, and Ray Osborne, a mutual friend. Brown and Holsinger occupied a garage apartment behind the house but were preparing to move to a new residence in southern Ohio with Toland and Manley during the weekend of May 25-27, 2001.

{¶3} Sometime after 11 p.m. on May 24, 2001, Brown, Holsinger, and Toland went next door to Eric Keller's house to drink alcoholic beverages and socialize. Brown testified that she consumed approximately twelve beers between 9 p.m. and 2 a.m. Toland testified that Holsinger may have partially consumed one alcoholic beverage while at Eric's but ceased drinking thereafter. Brown, Holsinger, and Toland returned home sometime around 2 a.m. Osborne was already sleeping in his downstairs bedroom. Manley, however, remained awake.

{¶4} Manley testified that she, Brown, Holsinger, and Toland stood around talking in the kitchen for a period of time before she and Toland retired upstairs to their bedroom around 3:30 a.m. Manley indicated that as she was heading upstairs, Brown and Holsinger were laughing and preparing to watch a movie in the living room where, due to the cold weather, they planned to sleep that evening.

{¶5} At approximately 4:30 a.m., Toland and Manley awoke to Holsinger falling upon their bed and Brown screaming, "Call 9-1-1!" Pursuant to Toland's instructions, Manley ran downstairs to place the call but was unable to

locate either of the residence's two phones. She was eventually able to locate a phone under a chair in the living room and dialed 9-1-1. The other phone was found smashed in an alley behind the house later that day. Brown can be heard upon the 9-1-1 tape informing Manley that she and Holsinger had fought, he struck her, and she accidentally stabbed him.

{¶6} Shortly thereafter, police and emergency response services arrived. Holsinger was transported to a local hospital where he underwent surgery for his injury. Brown was arrested for felonious assault and taken into custody. She subsequently waived her Miranda rights and submitted to two taped interviews wherein she maintained that she grabbed the knife in self-defense and that the stabbing was accidental. Holsinger's surgery was unsuccessful, and he was pronounced dead at 8:27 a.m.

{¶7} On June 7, 2001, the Marion County Grand Jury indicted Brown on one count of involuntary manslaughter, in violation of R.C. 2903.04(A). Thereafter, the indictment was amended to include charges of murder, in violation of R.C. 2903.02(B), involuntary manslaughter, in violation of R.C. 2903.04(B), and felonious assault, in violation of R.C. 2903.11(A)(2). Brown pled not guilty to all charges. The state subsequently elected to proceed solely upon the murder charge, and the matter proceeded to trial on December 17, 2001.

{¶8} On December 20, 2001, the jury found Brown guilty of murder. She was subsequently sentenced to an indefinite prison term of fifteen years to life. The instant appeal followed, with Brown presenting five assignments of error for our review.

#### First Assignment of Error

{¶9} “The Trial Court committed prejudicial error by denying Appellant’s Motion in Limine to preclude Appellee from presenting evidence of Appellant’s prior bad acts.”

{¶10} In her first assignment of error, Brown claims that the trial court erred in admitting evidence of prior acts of violence and threats directed toward the victim and his former paramours. She argues that the only plausible use for this evidence was to draw impermissible character inferences, claiming that her conduct throughout these events was too far removed from the incident at issue and merely illustrates a predilection for violence. In response, the state maintains that the evidence was admissible to establish motive and intent and to disprove her claims that the stabbing was accidental.

{¶11} As a preliminary matter, we must determine whether Brown preserved her claimed errors for review. Prior to trial, Brown moved in limine to exclude evidence of other acts and threats toward the victim and his former girlfriends. The trial court denied the motion, advising her to renew the objection

at trial. Thereafter, the state proceeded to call Lana Manley, Sam Toland, Ray Osborn, and Jessie Howard to testify to the events surrounding Holsinger's death and previous incidents in which Brown reacted violently toward or threatened him or his former paramours. Brown failed to lodge an objection during this testimony. Instead, after these witnesses had completed their testimony and left the stand, she attempted to renew her motion as to evidence of other threats and argued the evidence was cumulative. At that point, the trial court denied the motion, the proceedings resumed, and the state presented nine more witnesses who corroborated this testimony or testified to similar conduct.

{¶12} Although a motion in limine is a useful technique for raising issues of evidentiary admissibility prior to trial, a ruling thereon is merely tentative, and the denial of a motion in limine does not preserve error for purposes of appeal, absent a proper objection at trial.<sup>1</sup> Therefore, "in order to preserve supposed error from an anticipatory order in limine, the complaining party must raise the evidentiary issue on the record at the place in the trial that the foundation and context have actually been developed. \* \* \* If counsel opposes the reception of an adverse party's evidence, he must object when the evidence is actually presented, or he may well have waived any objection to the denial of his earlier motion in limine."<sup>2</sup> While a subsequent ruling contemporaneous to the submission of the

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<sup>1</sup> *State v. Grubb* (1986), 28 Ohio St.3d 199, 201.

<sup>2</sup> *State v. White* (1982), 6 Ohio App.3d 1, 4 (citation omitted).

evidence at trial may be sufficient to preserve an alleged error for review on appeal, the renewal must come before or at the time the evidence is presented.<sup>3</sup> To permit one to retroactively preserve errors after several witnesses have completed their testimony without objection contravenes the volume of authority on preservation of errors. Therefore, while Brown's general objection at best preserved error as to Jessie Howard and the witnesses that followed, she waived any error, save plain error, in the admission of the testimony and evidence presented by the first four witnesses. Mindful of this and the limited scope of the objection, we proceed to examine the contested evidence under the circumstances presented herein.

{¶13} Brown was prosecuted under the theory that she was a “time bomb” and that Holsinger's death was the final culmination of a violent relationship characterized by her obsessive jealousy, possessiveness, and aggressive attempts to control him. This theory was pursued from two perspectives. First, the State challenged her recitation of events preceding the stabbing, attempting to refute her passive characterization of her role in the incident and contentions that Holsinger was the violent aggressor, and to establish that the argument that evening over her alleged flirtation with the neighbor had prompted a violent response precipitated

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<sup>3</sup> *State v. Maurer* (1984), 15 Ohio St.3d 239, 259, fn. 14, citing Palmer, Ohio Rules of Evidence, Rules Manual (1984) at 446; *Schurr v. Davies* (May 15, 1986), Van Wert App. No. 15-84-23, quoting *White*, 6 Ohio App.3d at 5; see, also *Thomas v. Tuway American Group* (Jan. 25, 2000), Mercer App. No. 10-99-17; *State v. Boyd* (Jan. 12, 1995), Cuyahoga App. No. 65883, 12462.

by her inability to control him or the potential breakdown of the relationship. In support of this theory, the state speculated that Holsinger had decided to leave her as a result of the argument and presented evidence that his bags were found packed the morning after the incident. Alternatively, it was argued that even assuming Brown's depiction of the events leading up to the stabbing to be true, her voluntary act of swinging or thrusting the knife was not mere posturing, motivated out of fear and intended to dissuade Holsinger's pursuit of her, but was conduct prompted by an awareness or desire that her actions would inflict physical harm upon him.

{¶14} To refute Brown's contentions that the stabbing was accidental or necessary to defend herself from imminent danger of great bodily harm or death, establish a motive for her conduct, and show that she either intended or possessed an awareness of the result, the state introduced testimony and evidence demonstrating the instability and volatility of their relationship, her obsessive possessiveness, and the course of events leading up to the night in question. Specifically, the state presented the following testimony concerning threats issued by Brown against Holsinger and his girlfriends:

{¶15} Ray Osborne testified that in speaking with Brown after a May 2001 dispute, she told him that "[i]f she couldn't have Jeremy, no other bitch could have

him,” and, “[i]f Jeremy would ever leave she would do something, and I don’t know what she meant by it.”

{¶16} Jeri Toland, whom Jeremy had dated in November 2000 and January 2001, testified that as she and Holsinger were watching television in her apartment, Brown came over to confront Jeremy about their relationship and “\* \* \* was yelling saying she was going to beat us up and kill him, kill Jeremy and stuff like that.” Sam Toland testified that Brown admitted to him that she yelled that she was going to kill Holsinger. Lana Manley also testified that Brown conceded to her that she broke a window in an effort to get inside and “beat Jeri up.” In contrast, Brown denied having threatened anyone’s life or made any attempts to enter the residence.

{¶17} Melissa Breidenstein, Brown’s cousin, dated Holsinger when he was estranged from Brown in April 2001. Breidenstein testified that the first day Brown found out about the relationship she “[t]old me that she was going to stomp my brains in and that I’d better have the police and ambulance waiting for me because they wasn’t going to be able to identify my body when she was done with me. And she said that if she couldn’t have Jeremy, nobody could.” Lana Manley testified that when Brown found out that Breidenstein had been over to his residence in April, she told her to inform Breidenstein that “when she catches her out she’s going to beat her up real bad.” Jessie Howard, Holsinger’s cousin, was

present when Brown came to confront Holsinger regarding Breidenstein's presence at the residence. Howard testified that Brown informed him that she was going to beat Holsinger up for being with Breidenstein and stated that if she could not have him, nobody could. Breidenstein testified that Brown threatened her with violence on at least ten occasions, indicating that she had reported to the police that her life had been threatened and had broken up with him because she was terrified and didn't want to continue going out with him if she was going to have her life threatened.

{¶18} Lori Hummel, Brown's neighbor in April 2001, testified that when she inquired as to Holsinger's whereabouts after a prolonged absence, Brown responded that she did not know his whereabouts and informed her that she had spray-painted his clothes and was going to "beat the 'F' out of him" because he had stolen her checkbook and a J.C. Penny's gift card. Brown initially denied the story but subsequently admitted to the incident.

{¶19} Kira Holcomb, who also dated Holsinger in the months preceding his death, testified that Brown would call and threaten to "beat" or "rip her ass," and that "if I didn't stay away from Jeremy she was going to kill me." Jessie Howard confirmed that he had heard threats Brown left for Kira on her voice mail wherein she stated: "Kira, this is Shannon. When you get this message, if I was you I wouldn't be out running the streets because as soon as I find you I'm gonna

thump your head and you'd better crawl underneath a rock and die." Lindsay Tinnerello reported that she participated in a three-way phone conversation wherein Brown told Holcomb that if she did not stay away from Holsinger she would kill them both. Tinnerello further testified that around the preceding Christmas she heard Brown tell Holsinger that she would kill him if he ever broke up with her.

{¶20} Homer Young, Holsinger's uncle, and Holsinger's grandmother testified that in the month preceding Holsinger's death, Brown had stormed into his grandmother's house and immediately instructed him to "[s]hut your fucking mouth or I'll kill you," subsequently stating that "[i]f I can't have you Jeremy no one will." Brown initially denied this, recanted, and then indicated that all of the other witnesses were lying because they were family or were sleeping with the Holsinger family.

{¶21} It is well established that evidentiary rulings are within the trial court's broad discretion and will be the basis for reversal only on an abuse of discretion that amounts to prejudicial error.<sup>4</sup> "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."<sup>5</sup>

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<sup>4</sup> *State v. Graham* (1979), 58 Ohio St.2d 350, 352.

<sup>5</sup> Evid.R. 103.

{¶22} Evid.R. 404(B) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Evid.R. 404(B) permits other acts evidence in a criminal proceeding if: (1) substantial proof is adduced to show that the person against whom the evidence is offered committed the other acts; (2) one of the matters enumerated in the rule or the statute is a material issue at trial, and; (3) the evidence tends to prove the material enumerated matter.<sup>6</sup>

{¶23} Similarly, R.C. 2945.59 provides that evidence of other acts may be admissible “[i]n any criminal case in which the defendant’s motive or intent, the absence of mistake or accident on his part, or the defendant’s scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant’s scheme, plan or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.” Because the statute is in derogation of the common-law prohibition against other acts evidence, it is strictly construed against

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<sup>6</sup> See *State v. Lowe* (1994), 69 Ohio St.3d 527, 530; *State v. Curry* (1975), 43 Ohio St.2d 66, syllabus.

the State.<sup>7</sup> Therefore, “[e]vidence of other acts of a criminal defendant is admissible, pursuant to R.C. 2945.59, only if one or more of the matters enumerated in the statute is a material issue at trial and only if such evidence tends to show the material enumerated matter.”<sup>8</sup>

{¶24} As noted by the Ohio Supreme Court, “[s]ince it is assumed that human conduct is prompted by a desire to achieve a specific result, the question of motive is generally relevant in all criminal trials, even though the prosecution need not prove motive in order to secure a conviction.”<sup>9</sup> An individual with a motive is more likely to commit a crime than someone lacking a reason for the conduct. Where, as here, the motive behind an individual’s alleged attack upon another human being with a deadly weapon is not apparent, such evidence is relevant and admissible to prove that the individual’s conduct was prompted by a desire to achieve a specific result.<sup>10</sup>

{¶25} In addition, other acts evidence may be admissible under the parameters of Evid.R. 404(B) to establish intent, even where intent is not disputed at trial.<sup>11</sup> “[W]here the defendant specifically places his particularized intent to commit the charged crime in issue, either by directly denying such intent or by asserting accident or mistake, is it material (and therefore admissible) to introduce

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<sup>7</sup> *State v. DeMarco* (1987), 31 Ohio St.3d 191, 194.

<sup>8</sup> *Curry*, 43 Ohio St.2d 66, syllabus.

<sup>9</sup> *Id.* at 70-71 (citation omitted).

<sup>10</sup> *Id.* at 71.

otherwise relevant evidence of other acts of a similar nature as probative of the issue.”<sup>12</sup> “When the purpose of evidence of other acts is to show the absence of mistake or accident on the part of the defendant in committing the offense charged, it must be shown that a connection, in the mind of the defendant, must have existed between the offense in question and the other acts of a similar nature. The other acts of the defendant must have such a temporal, modal and situational relationship with the acts constituting the crime charged that evidence of the other acts discloses purposeful action in the commission of the offense in question. The evidence is then admissible to the extent it may be relevant in showing the defendant acted in the absence of mistake or accident.”<sup>13</sup>

{¶26} The state was required to prove, beyond a reasonable doubt, that Brown was aware that her conduct would probably cause physical harm to another by means of a deadly weapon.<sup>14</sup> Because Brown asserted that Holsinger was the aggressor, that she yielded the knife in self defense, and that in doing so she had no intention of injuring or killing him, there existed a genuine dispute supporting the introduction of other acts evidence to establish mens rea, i.e., whether she acted out of fear with the intent of merely threatening Holsinger or whether her conduct was indicative of an awareness, motivation, or desire to inflict physical

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<sup>11</sup> *State v. Smith* (1990), 49 Ohio St.3d 137, 141.

<sup>12</sup> *State v. Snowden* (1976), 49 Ohio App.2d 7, 12.

<sup>13</sup> *State v. Burson* (1974), 38 Ohio St.2d 157, 159, citing *State v. Moore* (1948), 149 Ohio St. 226.

<sup>14</sup> R.C. 2903.02; see, also R.C. 2901.22(B).

harm upon him. Moreover, as discussed in our review of Brown's fifth assignment of error, this evidence was relevant to whether she possessed a bona fide belief that she was in imminent danger of great bodily harm and that her only means of escape was the use of such force.

{¶27} As outlined above, the State contends that Brown's motive in yielding the knife was driven in part by her inability to deal with his rejection of her or her perceived loss of control over the relationship. The nature of their relationship bore directly on whether she had a motive to harm him or acted knowing that her actions would cause physical harm.<sup>15</sup> It is well established that evidence of a defendant's threats, violence, or other obsessive behavior in the months preceding a murder is probative of the defendant's motive or intent and tends to negate claims that the death was accidental.<sup>16</sup> In *State v. Newcomb*, we held that evidence indicating that the murder was the final culmination of the defendant's possessive control and testimony describing conflicts predicated upon his jealousy and violent reactions to the victim's alleged relationships with other

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<sup>15</sup> *State v. Newcomb* (Nov. 27, 2001), Logan County App. 8-01-07, dismissed, appeal not allowed by 94 Ohio St.3d 1489; *State v. Merchant* (Feb. 19, 1997), Lorain App. No. 96CA006334.

<sup>16</sup> *State v. Nields* (2001), 93 Ohio St.3d 6, 22; *State v. White* (1999), 85 Ohio St.3d 433, 441; *State v. Kinley* (1995), 72 Ohio St.3d 491; *Newcomb, supra*; *State v. Bruno* (Feb. 8, 2001), Cuyahoga App. No. CR-375467A; *State v. Michael* (Dec. 15, 1999), Seneca App. No. 13-99-41; *State v. Parker* (Dec. 9, 1999), Cuyahoga App. Nos. 75117, 75118, dismissed, appeal not allowed by 88 Ohio St.3d 1480; *State v. Sargent* (1998), 126 Ohio App.3d 557, 568; *State v. Blankenship* (Dec. 9, 1998), Summit App. No. 18871; *State v. Jeffery* (Jun. 30, 1997), Franklin App. No. 96APA08-986, dismissed, appeal not allowed by 80 Ohio St.3d 1433; *State v. Dancy* (Sept. 1, 1995), Greene App. No. 94-CA-24; *State v. Morris* (Feb. 13, 1989), Butler App. No. CA88-06-08; *State v. Brown* (February 8, 1983), Montgomery App. No. 7710.

men, was admissible proof of the defendant's motive and why he would have a desire to kill her.<sup>17</sup>

{¶28} One could reasonably conclude, based upon circumstances surrounding the incident, that the argument that night over her alleged flirtation with another man prompted a violent response to a perceived loss of control over the relationship. Therefore, testimony describing prior threats and acts of violence predicated upon her jealousy, possessiveness, and need to control him tends to undermine her passive portrayal of her role in the altercation and supports the conclusion that the act of swinging or thrusting the knife was conduct prompted by an awareness or desire that her actions would inflict physical harm upon him.<sup>18</sup> The incidents admitted were similar because they all started with an argument or breakdown of the relationship and ended with Brown delivering threats or acts of violence. Contrary to Brown's assertions, her conduct throughout these incidents evidences more than a mere general propensity for violence, illustrating a "situationally specific" emotion and rationale for her conduct on the night in question.<sup>19</sup> Although Brown argues that this evidence was not identical to or inextricably related to the act in question, both R.C. 2945.59 and Evid.R. 404(B) contemplate and permit the introduction of acts which are not similar to the crime

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<sup>17</sup> *Newcomb, supra*; *State v. Prade* (2000), 139 Ohio App.3d 676, 685.

<sup>18</sup> *Id.*

<sup>19</sup> See Imwinkelried, *Uncharged Misconduct Evidence* (1995), Section 3:15.

at issue.<sup>20</sup> “The requirement of a ‘temporal, modal, and situational relationship’ between a prior act of the defendant and the crime charged does not mean that the two must be identical. This requirement merely represents the ‘common sense conclusion that an act too distant in time or too removed in method or type has no permissible probative value to the charged crime.’”<sup>21</sup>

{¶29} Furthermore, as mentioned above, Brown failed to object to extensive testimony from several witnesses regarding threats and specific instances of conduct. Significant portions of the testimony admitted after the renewal of the motion in limine related to the same events and merely provided a factual background for the otherwise unchallenged testimony. Although this was objected to as cumulative, Evid.R. 404 requires that “substantial proof [be] adduced to show that the person against whom the evidence is offered committed the other acts.” Brown’s denial that several of the incidents occurred and conflicting versions of other incidents exacerbated the need for and justified the presentation of multiple witnesses to prove that she committed those acts. Therefore, we do not find that the trial court abused its discretion in admitting this evidence.

{¶30} Accordingly, Brown’s first assignment of error is overruled.

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<sup>20</sup> *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the syllabus, cert. denied, (1989), 490 U.S. 1075.

<sup>21</sup> *State v. Morris* (Feb. 13, 1989), Butler App. No. CA88-06-081, jurisdictional motion overruled by 43 Ohio St.3d 712, citing *State v. Snowden* (1976), 49 Ohio App.2d 7, 10.

Second Assignment of Error

{¶31} “The Trial Court committed plain error by failing to instruct the jury that any alleged prior wrongs or acts of Appellant should only be considered for a limited purpose.”

{¶32} In her second assignment of error, Brown asserts that despite her failure to object to or request a limiting instruction on other act evidence, her motion in limine and subsequent renewal thereof placed the trial court on notice of the issues surrounding the admission of such evidence and the need for a corresponding jury instruction. She claims that the outcome of the trial would clearly have been otherwise if the trial court had issued the instruction. The State argues that there is no reason to believe that an appropriate instruction would have been outcome determinative.

{¶33} In *State v. Davis*, the Ohio Supreme Court held meritless the appellant’s argument that the trial court erred in failing to provide a limiting instruction to the jury regarding the ‘other acts’ evidence.<sup>22</sup> In doing so, the Court stated: “Crim.R. 30(A) provides in relevant part: ‘A party may not assign as error the giving or failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the

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<sup>22</sup> *State v. Davis* (1991), 62 Ohio St.3d 326.

objection out of the hearing of the jury.’ Having failed to request a limiting instruction, appellant has waived this issue for purposes of appeal.”<sup>23</sup>

{¶34} Similarly, Brown failed to request limiting instructions at trial and has thus waived this issue for purposes of appeal, absent plain error.<sup>24</sup> Courts are admonished to notice plain error “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”<sup>25</sup> Having reviewed the manner in which such evidence was presented and argued at trial and considering the dictates of Crim.R. 30 and 52(B), in light of our determination that the challenged evidence was admissible, we cannot find that the failure to instruct was an obvious or outcome determinative defect in the proceedings. Accordingly, Brown’s second assignment of error is overruled.

#### Third Assignment of Error

{¶35} “The Trial Court erred in failing to grant Appellant’s Motion for Judgment of Acquittal.”

#### Fourth Assignment of Error

{¶36} “The jury’s verdict of murder was against the manifest weight of the evidence.”

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<sup>23</sup> *Id.* at 339.

<sup>24</sup> *Id.* See, also, *State v. Barnes* (2002), 94 Ohio St.3d 21, 27; *State v. Perry* (1992), 80 Ohio App.3d 78, 84.

<sup>25</sup> *Barnes*, 94 Ohio St.3d at 27 (citations omitted).

{¶37} For her third and fourth assignments of error, Brown argues that “[d]ue to the lack of any eyewitness testimony and the lack of any problems between appellant and the victim [in the] hours before the victim’s death, reasonable minds could only have reached the conclusion that appellee failed to prove each material element of murder.” The state maintains that Brown’s credibility was undermined by substantial physical evidence contradicting her recitation of events, and, even assuming her version of events to be true, it would be incomprehensible to believe that she was unaware that her conduct was likely to cause physical harm or was excusable under the guise of self-defense.

*Motion for Acquittal/Sufficiency*

{¶38} According to Crim.R. 29(A), “[t]he court on motion of a defendant or on its own motion, after the evidence on either side has closed, shall order the entry of acquittal of one or more offenses charged in the indictment, information or complaint, if the evidence is insufficient to sustain a conviction of such offenses. \* \* \*.” In reviewing a trial court’s decision on a motion for acquittal, this Court is bound to follow the standard of review announced in *State v. Bridgeman*, which provides: “Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can

reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt.”<sup>26</sup>

{¶39} The *Bridgeman* standard, however, must also be viewed in light of the test for sufficiency of the evidence.<sup>27</sup> This test was set forth in *State v. Jenks*, wherein the Ohio Supreme Court stated: “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.”<sup>28</sup>

{¶40} In this case, the state sought to convict Brown of murder in violation of R.C. 2903.02, which provides that no person shall cause the death of another as a proximate result of the offender committing or attempting to commit a violent offense that is a felony of the first or second degree. Brown was prosecuted on the premise that she caused Holsinger’s death as a result of committing felonious assault in violation of R.C. 2903.11(A)(2), which provides that no person shall knowingly cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordinance. “A person acts knowingly,

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<sup>26</sup> *State v. Bridgeman* (1978), 55 Ohio St.2d 261.

<sup>27</sup> *State v. Foster* (Sept. 17, 1997), Seneca App. No. 13-97-09.

regardless of purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”<sup>29</sup> As discussed above, the State pursued the theory that Brown was a “time bomb” and that Holsinger’s death was the final culmination of a violent relationship characterized by her aggressive jealousy, possessiveness, and obsessive attempts to control him.

{¶41} Brown responded to the charges and has continued to argue on appeal both that she was trying to defend herself when Holsinger was stabbed and that the stabbing was accidental. Under Ohio law, self-defense is an affirmative defense for which an accused must prove the following by a preponderance of the evidence: (1) the accused was not at fault in creating the situation giving rise to the affray; (2) the accused had a bona fide belief that he or she was in imminent danger of death or great bodily harm and that the only means of escape from such danger was in the use of force; and (3) the accused must not have violated any duty to retreat or to avoid the danger.<sup>30</sup> Further, the “elements of self-defense are cumulative. \* \* \* If the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-

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<sup>28</sup> *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

<sup>29</sup> R.C. 2901.22(B).

<sup>30</sup> *State v. Williford* (1990), 49 Ohio St.3d 247, 249, quoting *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus.

defense.”<sup>31</sup> In general, the decision whether to seek an instruction on self-defense is usually a matter of trial tactics.<sup>32</sup> However, the defenses of accident and self-defense are generally regarded as mutually exclusive.<sup>33</sup> In *State v. Barnd*, we noted that the defenses of accident and self-defense are “inconsistent by definition,” as accident involves “the denial of a culpable mental state and is tantamount to the defendant not committing an unlawful act,” whereas a defendant claiming self-defense “concedes he had the purpose to commit the act, but asserts that he was justified in his actions.”<sup>34</sup> Considering the parties’ respective positions, we proceed to outline evidence of the events surrounding Holsinger’s death.

{¶42} Brown testified that as they were preparing to watch a movie, Holsinger “started telling me that he knew I didn’t want to be there with him, I wanted to be next door with the neighbor.” She indicated that when the argument began to escalate, she told him she was not going to argue with him, but was going to go down the street to her mother’s house. When she got to the back door in the kitchen and put her hand on the doorknob, Holsinger approached her from behind, grabbed her by the hair, spun her around, and then punched her in the face. Brown stated that she stumbled and fell over the stove as Holsinger told her she

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<sup>31</sup> *State v. Jackson* (1986), 22 Ohio St.3d 281, 284.

<sup>32</sup> *State v. Aria* (Dec. 8, 2000), Hamilton App. No. C-990848.

<sup>33</sup> *State v. Burns* (Aug. 3, 2000), Cuyahoga App. No. 69676.

<sup>34</sup> *State v. Barnd* (1993), 85 Ohio App.3d 254, 260.

was not going anywhere. She then grabbed a knife out of an adjacent butcher's block and turned to find Holsinger returning to the front room. Brown testified that she took the knife only to deter any subsequent pursuit.

{¶43} In her police interview, Brown described the events to follow, stating: "I told him I was leaving. I'm going to my Mom's. And I walked out the back porch. And I can't remember if it was on the porch or right off the back porch, he grabbed me by my hair again and told me I wasn't going nowhere. And when he grabbed me by the hair, I turned around and I, and I just meant to scare him. I didn't mean to hurt him." Throughout the interview she used the phrase "I turned around," repeating at one point that she grabbed the butcher knife, "walked out the back door with it and either on the back porch or in the back yard he grabbed me again. And I turned around and I cut him." She offered the following account at trial: "I was -- I got off of the back porch and I was running through the back yard, and Jeremy come out after me and grabbed me by the back of my hair. My hair was in a pony tail and he was pulling me, and I just swung around with the knife like that (Indicating)." Brown admitted that Holsinger had no idea she possessed the knife, and she did not warn him of such prior to turning around. She did not contest and agreed that she thrust the knife into Holsinger, claiming only that she accidentally stabbed him while attempting to defend herself.

{¶44} When asked of her purpose in turning around with the knife, Brown reiterated that she only meant to scare him, did not mean to harm him, and merely wanted him to leave her alone. She denied being upset or angry with him, claiming only to be scared of his advances. When asked whether it would be correct to conclude that “since you claim you weren’t trying to stab Jeremy, that you didn’t feel like you were in enough danger that you needed to try to use deadly force against Jeremy,” Brown responded that she did not know whether she was in danger of receiving great bodily harm. In her second police interview, she indicated that “it just scared me tonight, you know, ‘cause I had been trying real hard not to, you know, put my hands on him ‘cause I know, you know, I been in prison and I know what can happen.” When asked whether she could have held her own with him that evening, she responded that “I probably could have, but I didn’t want to go that, that far.”

{¶45} Dr. Walter E. Beasley, the thoracic surgeon who performed emergency surgery on Holsinger, testified that he was admitted with a stab wound above the left clavicle, which appeared to extend in a downward direction toward the chest, indicating that “if the person was vertical it would be toward the floor.” He opined that because the wound had entered the chest cavity, damaging blood vessels, collapsing his lung, and filling the cavity with blood, it had to be at least three to five inches deep. Dr. Beasley testified that Holsinger had a slim chance of

surviving the wound, characterizing the operation as a “desperation surgery.” When asked whether the wound was consistent with a person swinging a knife in a horizontal motion, he responded that “it couldn’t have happened without being in a downward motion.” He conceded however, that he was unable to tell the parties’ respective postures or positions during the event from the nature of the wound.

{¶46} When the police requested that she describe the manner in which she turned and swung the knife, Brown indicated that she made a counter-clockwise turn, swung the knife in a horizontal motion, and believed that she had cut him across the chest. She claimed to have held the knife in a clenched fist with the blade protruding in an upward direction between her thumb and index-finger. When asked as to their relative positions when the injury was inflicted, Brown indicated that they were standing. Confronted with the inconsistencies between the location and characteristics of the wound, the parties’ relative heights, their standing position, and the manner in which she claimed to have inflicted the injury, Brown could offer no explanation as to how Holsinger received a downward stab three to five inches into his chest above his right collarbone. On redirect, she qualified her previous testimony as to the parties’ relative positions, stating that she was unsure as to their exact posture or her exact motion. She continued, however, to deny having employed an overhand stabbing motion.

{¶47} In addition, Brown admitted to consuming approximately twelve beers that evening, conceding that she thinks less clearly, tends to have a diminished perception as to what she is doing, and may be inclined to make stronger threats when she is intoxicated. Although she asserted that Holsinger was prone to violence and claimed that he had knocked her unconscious, no one had ever seen him hit her or were able to corroborate her testimony, and she was unable to explain why none of his former girlfriends experienced any problems with him being abusive. With respect to evidence concerning the nature of their relationship and her related conduct, Brown would initially deny that certain incidents occurred and then subsequently admit thereto. Her depiction of other events directly contradicted eyewitness testimony or her admissions to others. She further denied having ever threatened anyone's life, recanted, admitted to certain threats, and then indicated that all of the other witnesses were lying.

{¶48} Having examined the evidence admitted at trial in a light most favorable to the prosecution, we find that such evidence, if believed, was sufficient to permit a rational trier of fact to find that the essential elements of the crime had been proven beyond a reasonable doubt. Inconsistent testimony, conflicting versions of events, admitted alcohol-induced perception deprivation, and contradictory evidence raised significant issues as to Brown's credibility. Even assuming a majority of her recitation of events preceding the stabbing to be true,

one could reasonably conclude that she voluntarily swung the knife at Holsinger with an awareness or desire that her actions would inflict physical harm upon him, that she did not possess a bona fide belief that she was in imminent danger of death or great bodily harm, and that situation did not warrant deadly force. Accordingly, the trial court did not err in overruling her Crim.R. 29 motion for judgment of acquittal.

*Manifest Weight*

{¶49} Having addressed Brown’s arguments regarding sufficiency, we must turn our attention to her assertion that the convictions were against the manifest weight of the evidence. Though evidence may be sufficient to sustain a guilty verdict, the issue of manifest weight requires a different type of analysis. “Weight of the evidence concerns ‘the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.’”<sup>35</sup> In making its determination on this issue, the appellate court: \* \* \* [Reviews] the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] *clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed* and a new trial ordered.<sup>36</sup> Appellate courts are cautioned to sustain a manifest weight

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<sup>35</sup> *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting Black’s Law Dictionary (6 Ed.1990) 1594.

<sup>36</sup> *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

argument in exceptional cases only, where the evidence “weighs heavily against the conviction.”<sup>37</sup>

{¶50} The record herein does not support a reversal on this basis. While it is true that the state’s case relied in part upon circumstantial evidence and Brown’s testimony conflicted with that of other witnesses in several respects, having reviewed the record in its entirety, we cannot say that the trier of fact clearly lost its way in resolving these conflicts in favor of the State or created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Therefore, we find that the conviction is not against the manifest weight of the evidence. Accordingly, Brown’s third and fourth assignments of error are hereby overruled.

#### Fifth Assignment of Error

{¶51} “Appellant was denied effective assistance of counsel due to her trial counsel’s failure to object to inadmissible character evidence, failure to request a limiting instruction concerning prior extrinsic acts, failure to present evidence concerning Brown’s post-traumatic stress disorder and failure to object to the admission of Brown’s privileged communications and medical records.”

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<sup>37</sup> *Id.*

{¶52} For her fifth assignment of error, Brown presents several arguments in support of her proposition that she received ineffective assistance at trial. We proceed to address these arguments in turn.

*Standard for Ineffective Assistance Claims*

{¶53} As a preliminary matter, we set forth the applicable standard of review. A claim for ineffective assistance of counsel requires proof that trial counsel's performance fell below objective standards of reasonable representation and that the defendant was prejudiced as a result.<sup>38</sup> In asserting an ineffective assistance of counsel claim, the appellant must overcome the presumption that a licensed attorney is competent and that his decisions constitute sound trial strategy.<sup>39</sup> An appellate court reviewing an ineffective assistance of counsel claim will generally not second-guess counsel's strategy in direct and cross-examination of witnesses.<sup>40</sup> Therefore, to show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, but for counsel's errors, the outcome at trial would have been different.<sup>41</sup> "Reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial.<sup>42</sup>

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<sup>38</sup> *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

<sup>39</sup> *Strickland*, 466 U.S. at 689-90.

<sup>40</sup> *State v. Gray* (Mar. 28, 2000), Franklin App. No. 99AP-666, citing *State v. Edwards* (Feb. 17, 1998), Clermont App. No. CA97-04-035.

<sup>41</sup> *Bradley*, 42 Ohio St.3d 136, at paragraph three of the syllabus.

<sup>42</sup> *State v. Waddy* (1992), 63 Ohio St.3d 424, 433, citing *United States v. Bagley* (1985), 473 U.S. 667, 682.

A. *Failure to Object to Evidence of Victim's Reputation for Peacefulness.*

{¶54} The State elicited testimony as to Holsinger's role in the couple's altercations and his reputation for being a peaceful person. Several witnesses indicated that they believed Holsinger to be a peaceful person and had never seen him strike Brown. Jessie Howard testified that Holsinger did not respond with violence when struck by Brown. Brown argues that the admission of this evidence during the state's case-in-chief and the admission of specific instances of his conduct were clearly objectionable and inadmissible.

{¶55} As a preliminary matter, we note that "[t]he failure to object to questions improperly posed by the prosecution is not [generally] enough to sustain a claim of ineffective assistance of counsel."<sup>43</sup> Nevertheless, Evid.R. 404(A)(2) permits the introduction of "evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." As outlined above, Brown's defense was that Holsinger was the initial aggressor and that she reacted in self-defense, accidentally stabbing him. Evid.R. 405(A) states that: "In all cases in which evidence of a character or trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion."

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<sup>43</sup> *State v. Ward* (Aug. 17, 1992) Allen App. No. 1-91-63, *State v. Robinson* (May 31, 2002), Union App. No. 14-02-01.

{¶56} In addition, although Evid.R. 405(B) has been construed to preclude the introduction of specific instances of conduct to prove that the victim was the initial aggressor,<sup>44</sup> courts have generally admitted testimony by the accused and by corroborating witnesses concerning the victim's reputation for violence and specific instances of violent conduct for the purpose of proving the accused's state of mind at the time of the offense, i.e., whether the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was the use of such force.<sup>45</sup> By claiming that Holsinger's behavior during the incident and her awareness of his prior conduct necessitated that she yield a knife in self-defense, Brown placed his penchant for violence at issue and would have opened the door to the admission of evidence of specific instances of conduct. Although no objection was lodged to the State's introduction of this evidence, this may well have been a tactical decision for which we will not second-guess counsel's strategy. Accordingly, we do not find that there was a reasonable probability that an objection would have changed the result of the trial.

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<sup>44</sup> *Barnes*, 94 Ohio St.3d at 24.

*B. Failure to Present Post-Traumatic Stress Disorder Evidence.*

{¶57} Brown further avers that her trial counsel's failure to present evidence that she was suffering from post-traumatic stress disorder and was prone to an exaggerated startled response prejudiced her argument of self-defense and prevented the jury from understanding her state of mind during the incident. The State argues that the decision of whether to present the evidence was a matter of trial strategy, asserting that the diagnosis was undermined by inconsistencies in her recitation of events and that issues relating to the foundation of the opinion would open the door to other harmful evidence.

{¶58} At an early stage in the proceedings, defense counsel requested funds for the appointment of an expert to provide a psychological evaluation of Brown. She was subsequently evaluated by Dr. James Sunbury at the District V Forensic Diagnostic Center in Mansfield, Ohio. Dr. Sunbury concluded that Brown was not suffering from battered women syndrome but opined that she was suffering from post-traumatic stress disorder, which produced an exaggerated startle response. After Brown testified, defense counsel requested a recess so that he could talk with Dr. Sunbury and determine whether to present his testimony in her defense.

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<sup>45</sup> *State v. Wetherall* (March 22, 2002), Hamilton App. No. C-000113, 2002-Ohio-1613 (citations omitted). See, also, *State v. Baker* (1993), 88 Ohio App.3d 204, 211.

{¶59} The record does not disclose that Brown's trial counsel neglected to investigate the defense of post-traumatic stress syndrome. Conversely, the record reflects that defense counsel made a tactical decision not to present the evidence. Whether this decision was predicated upon discrepancies in her testimony, foundational issues related to his opinion, or the possibility of introducing damaging evidence, we will not second-guess counsel's strategy. Therefore, we find that Brown has failed to overcome the presumption that her trial counsel was competent and that his decisions constitute sound trial strategy.

*C. Failure to Object to Each Specific Other Act; Failure to Request  
A Limiting Instruction as to Other Acts.*

{¶60} In light of our disposition of the preceding assignments of error, we cannot find that there is a reasonable probability that an objection to each specific other act or a limiting instruction as to the use thereof would have changed the result of the trial.

*E. Failure to Object to Admission of Hospital Records and  
Privileged Communications Related Thereto.*

{¶61} Brown also maintains that her trial counsel was ineffective because he permitted the introduction of hospital records and the testimony of a physician's assistant relating to an altercation in the weeks preceding Holsinger's death wherein she sought treatment for a broken hand. She argues on appeal that

this evidence contained privileged communications and should have been objected to and excluded under R.C. 2317.02.

{¶62} The fact that a patient received medical treatment on a particular day and time and the nature of the injuries for which treatment was sought are not privileged.<sup>46</sup> Moreover, the evidence regarding the reported source of Brown's injury merely reiterated substantial other independent evidence concerning the events and was consistent with her own testimony. Brown informed police in her second interview that she had broken her hand striking Holsinger and admitted to Lana Manley that she had lied to medical service providers when she told them she received the injury while boxing. She further claimed to have been knocked unconscious during the altercation, attempting to employ the incident to buttress her claim to have been in fear of imminent danger of great bodily harm. She was unable however, to corroborate this claim and, as evidenced by her admissions and hospital records, failed to seek treatment for any related injury.

*F. Failure to Object to Other Acts Evidence Contained  
in Recorded Statements to Police.*

{¶63} The Marion City Police department recorded two statements from Brown the night of the incident, which were subsequently played and admitted without objection before the trial court. During the interview, she recounted

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<sup>46</sup> See, e.g., *Jenkins v. Metropolitan Life Ins. Co.* (1961), 171 Ohio St. 557, paragraph two of syllabus.

altercations with Holsinger, including the fight in which she broke her hand, and spoke about her history of alcohol abuse and the role alcohol played in that evening's events. Deferring to the arguments presented in support of her first assignment of error, Brown argues that this evidence was inadmissible and asserts that she received ineffective assistance due to her trial counsel's failure to object thereto.

{¶64} As discussed previously, the altercation referenced in the interview was admissible for purposes of establishing motive and intent and was relevant to Brown's claim that she reacted in self-defense. Furthermore, her use of alcohol and its effects upon her cognitive ability were relevant to her ability to accurately recall the events of the night in question. Therefore, we cannot find that there is a reasonable probability that an objection to this evidence would have changed the result of the trial.

{¶65} Accordingly, Brown's fifth assignment of error is overruled.

{¶66} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, the judgment of the Marion County Common Pleas Court is hereby affirmed.

*Judgment affirmed.*

**HADLEY, J., concurs.**

**BRYANT, J., dissents.**

**Bryant, J., dissenting.**

{¶67} For the reasons set forth in the opinion below, I respectfully dissent from the majority and would reverse the judgment of the trial court based on the impermissible use of other acts character evidence.

{¶68} Today, the majority of a panel of this court finds no error in the admission of evidence of prior threats, prior acts of violence and general bad behavior committed by defendant-appellant Shannon Brown. Specifically, the majority finds that the aforementioned character evidence, “describing prior threats and acts of violence predicated upon [Shannon’s] jealousy, possessiveness, and need to control [Jeremy] tends to undermine her passive portrayal of her role in the altercation and supports the conclusion that the act of swinging the knife was conduct prompted by an awareness or desire that her actions would inflict physical harm upon him.” (Emphasis added.) The majority’s finding does not state that the testimony regarding prior threats and prior bad acts were used to prove Shannon’s motive, or that the other acts demonstrated how the stabbing was not an accident but intentional. Rather, the majority states, just as the prosecution suggested to the jury below, that Shannon’s “jealousy, possessiveness, and need to control” support a finding of guilt. It is my position, that the majority’s finding contravenes well-stated Ohio law that permits the use of character evidence in limited and specific circumstances.

*Facts*

{¶69} Though I generally agree with the majority's statement of facts, I will reemphasize the facts I believe to be pertinent to my dissent. On May 25, 2001, somewhere between 3a.m. and 5a.m., defendant-appellant Shannon Brown stabbed her boyfriend, Jeremy Holsinger in the chest with a kitchen knife, thereby causing his death. Shannon did not then, nor does she now, deny her role in Jeremy's death. Indeed, in the hours directly following the incident, Shannon gave police two taped statements detailing the events that lead to the stabbing. Thereafter, at trial, Shannon offered testimony consistent with her original statements to police. The following is Shannon's version of events.

{¶70} In the early morning hours of May 25, 2001, Shannon Brown and Jeremy Holsinger were alone in the living room at 632 Sugar Street watching television. The couple's three housemates, Sam Toland, Lana Manley and Ray Osborne, were in bed sleeping. Shannon testified that she and Jeremy began to argue when he accused her of flirting with and "wanting to be with" their next door neighbor, Eric. The argument escalated quickly so Shannon decided to leave 632 Sugar Street and walk to her Mother's house, located just a few blocks away.

{¶71} As Shannon moved to exit the house through the back door in the kitchen, Jeremy grabbed Shannon by her ponytail, swung her around, hit her in the face and told her she was not going anywhere. Shannon testified that the force of

the blow caused her to stumble and brace herself on the stove where she saw a butcher block of steak knives. Shannon stated that, with little thought, she grabbed a knife out of the block to scare Jeremy so that he would not hit her again. When she turned around she saw that Jeremy was heading into the other room, so she decided to run out of the house through the back door and head to her mother's. Shannon was still clutching the knife in her hand as she ran out the back door.

{¶72} Thereafter, Shannon testified that Jeremy followed her into the back yard, where he again grabbed her by her hair. Shannon testified that this time, as she came around to face him, she fell into him, somehow stabbing him. Shannon told the police that the stabbing was an accident and that she never intended to cause Jeremy physical harm. Police photos of Shannon's bruised and swollen face taken by police on May 25, 2001 were entered into evidence in addition to photos depicting a jostled stove next to a butcher block of knives.

{¶73} At trial, the prosecution challenged Shannon's testimony by presenting an alternative version of events to the jury. This version was based on Shannon's alleged fear of losing Jeremy. According to the prosecution, on the night of the stabbing, Jeremy terminated his relationship with Shannon, causing her to erupt into a murderous rage. In the exact words of the prosecution, Shannon had been a "time bomb waiting to go off" and the break-up lit the fuse. In this

theory, Jeremy broke off his relationship with Shannon and then went to the couple's room located in the garage to pack his bags. In order to stop him from leaving her, Shannon stabbed Jeremy in the back yard. As an alternative theory to this alternative, the prosecution told the jury that even if Shannon's version were true, it could prove Shannon turned around with the intent to stab Jeremy.

{¶74} Having no physical evidence to support its theory and faced with the fact that the last time anyone saw Shannon and Jeremy they were laughing happily and planning on moving away together the very next day, the prosecution turned to the only evidence remaining that would lend support to its theories-Shannon's ghastly character. To this end, the prosecution called twenty witnesses. Three witnesses had contact with Jeremy and Shannon during the hours before the stabbing.<sup>47</sup> Six witnesses consisted of the emergency or medical personnel who came into contact with Shannon and Jeremy during the hours after the stabbing.<sup>48</sup> The remaining eleven witnesses had no contact with the defendant or the victim on the day of the stabbing and in most cases, the witnesses had not seen or heard from Shannon or Jeremy for weeks or months.<sup>49</sup> The State called these eleven witnesses for the sole purpose of testifying as to Shannon's prior bad acts. The following is a summation of that testimony.

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<sup>47</sup> Lana Manley, Sam Toland, Ray Osborne.

<sup>48</sup> Dr. Beasley, surgeon; Cheryl Shortred, records custodian; Larry Tate, coroner; Patrolman Isom, second officer on scene; Patrolman Wiggins, first officer on scene; Det. Scott Sterling; investigator.

{¶75} Lana Manley, Shannon and Jeremy's housemate, testified that several weeks prior to the stabbing she witnessed Shannon "smack" Jeremy during an argument. She also saw Shannon throw clothes, beer bottles and furniture during the same argument. Lana testified that on another occasion, over a month before the stabbing, Shannon said that she was going to "beat up" another girl who was seeing Jeremy romantically. Finally, Lana testified that Shannon told her she "busted" another girl's window in an attempt to beat the girl up.

{¶76} Sam Toland, Jeremy's cousin and housemate, testified that six months prior to the stabbing Shannon admitted to "busting" out the same window Lana testified to. Shannon allegedly told Sam she was going to kill Jeremy.

{¶77} Amy Cutchall, an emergency room physician's assistant, testified that two weeks prior to the stabbing she treated Shannon for a broken hand. Amy told the jury that Shannon's injury looked like a "boxing" type break and that Shannon had explained to her that she and Jeremy, who stood by her side during the examination, had been boxing.

{¶78} Ray Osborne, another housemate, testified that Shannon once told him that if she couldn't have Jeremy, "no other bitch could have him," and that if Jeremy ever left her she didn't know what she'd do. Ray also told the jury that Shannon admitted to hitting Jeremy in the head, thereby breaking her hand.

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<sup>49</sup> Amy Cutchall, Jessie Howard, Kira Holcumb, Melissa Breidenstein, Lindsay Tinnerello, Trevanna Holsinger, Jeri Toland, Patrolman Thomas, Lori Hummel, Jennifer Jordon, Homer Young

{¶79} Jessie Howard, Jeremy's cousin, testified that he saw Shannon hit Jeremy once or twice, but could not recall the specific circumstances. He also heard Shannon tell Jeremy, "If I can't have you no one will have you."

{¶80} Kira Holcomb, one of Jeremy's former girlfriends, testified that two months prior to the stabbing, Shannon left threatening messages on her voice mail telling her "stay away from Jeremy." Kira also alleged that in those same messages Shannon threatened to "walk down to my house and beat my ass." Additionally, Kira claimed Shannon intended to "rip my ass" and that if she didn't stay away from Jeremy "she was going to kill me."

{¶81} Melissa Breidenstein, Shannon's cousin, told the jury that she started dating Jeremy while he and Shannon were living together. Melissa explained that when Shannon discovered what was going on, she threatened to "stomp my brains in and that I'd better have the police and an ambulance waiting for me because they wasn't going to be able to identify my body when she was done with me." Melissa also alleged that Shannon said she was going to kill her unless she broke up with Jeremy. Melissa ended her testimony by telling the jury that she was "terrified" of Shannon and her whole family.

{¶82} Lindsay Tinnerello, also a former girlfriend of Jeremy's, took the stand next and gave another account of the threats on Kira Holcomb's voice mail.

Additionally, Lindsay told the jury that “last Christmas” she heard Shannon tell Jeremy, “If you ever break up I will kill you.”

{¶83} Trevana Holsinger, Jeremy’s grandmother, testified that she heard Shannon say to Jeremy, “shut your fucking mouth or I will kill you.” She also testified to seeing Shannon shove Jeremy on various occasions.

{¶84} Jeri Toland testified that seven months prior to the stabbing, she and Jeremy were at her house watching television when, “Shannon had come over, was beating on my door trying to get into my apartment to get me and Jeremy because we were together and she busted out my kitchen window and was kicking my door, punching my door, and Jeremy was trying to talk to her through the upstairs bedroom window because I didn’t have any screens in there, and she was yelling saying she was going to beat us up and kill him, kill Jeremy, and stuff like that.”

{¶85} Patrolman Thomas, of the Marion Police Department, testified that he responded to a broken window at Jeri Toland’s house and that Jeri told him that she did not know who did it.

{¶86} Lori Hummel, Jeremy and Shannon’s former neighbor, testified to an occasion on which Shannon admitted to spray-painting Jeremy’s clothing when she discovered that he had taken one of her credit cards without permission. Additionally, Shannon told Lori she was going to “beat the fuck out of him.”

{¶87} Jennifer Jordan, also a former neighbor and according to her, a former girlfriend of Jeremy's, told the jury that she was sitting on the porch at Jeremy and Shannon's house talking to Jeremy, when Shannon showed up and told Jennifer to go home. Jennifer testified that Shannon told Jeremy to "get in the house and he wasn't allowed to talk to us."

{¶88} Finally, Homer Young, Jeremy's uncle, took the stand and testified that he also heard Shannon tell Jeremy, "shut your fucking mouth or I will kill you." He also heard her say, "If I can't have you Jeremy, no one will."

{¶89} I would be remiss if I failed to mention a few facts that are generally extraneous to my dissent, but nevertheless offer some perspective into the framework of this case. As discernable from the list of witnesses above, ten of the twenty witnesses called by the prosecution were either related to Jeremy by blood or had engaged in a romantic relationship with Jeremy at some point prior to his death. Often, these romantic relationships transpired simultaneous to his relationship with Shannon. The majority of the prior bad acts testimony, and the most damaging, was delivered via these ten witnesses.

*Legal Standard for Other Acts Evidence*

{¶90} Inherent in an analysis of other acts testimony is the understanding that Evid.R.404 is a rule of relevancy; a rule that states that a person's character is always irrelevant to the issue of guilt. "An accused cannot be convicted of one

crime by proving he committed other crimes or is a bad person.” *State v. Jamison* (1990), 49 Ohio St.3d 182, 184, 552 N.E.2d 180. The danger imposed by character evidence is the likelihood that the jury will speculate that since the defendant has shown a propensity for committing criminal or bad acts in the past, he probably committed the present crime. “The result is a potential for prejudice with respect to not only the weighing of the evidence but also the creation in the jury’s mind of an urge to punish for past acts.” *State v. Griffin* (2001), 142 Ohio App.3d 65, 71, 753 N.E.2d 967, citing *Lily, the Law of Evidence* (1978) 124, Section 43.

{¶91} The bulk of the testimony rendered at Shannon’s trial was comprised of prior threats, prior assaults and prior bad behavior. Evidence of other acts committed by a criminal defendant will sometimes be admissible but, “not *because* it shows that the defendant is crime prone, or even that he has committed an offense similar to the one in question, *but in spite of* such facts.” *State v. DeMarco* (1987), 31 Ohio St.3d at 194, quoting *State v. Burson* (1974), 38 Ohio St.2d 157, 158, 311 N.E.2d 526. (emphasis added) Furthermore, even if the other acts evidence is relevant to some other material issue at hand, it shall be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. *State v. Harrington*, Logan App. No. 8-01-20, 2002-Ohio-2190; R. 403(A).

{¶92} Thus, in order for the plethora of testimony regarding Shannon's threats, assaults, and bad behavior to be deemed admissible, they had to have been proffered for some other purpose as identified in Evid.R. 404(B) and R.C. 2945.59. Shannon confessed to stabbing the victim within moments of doing so. Thus, Shannon's identity as Jeremy's killer is not a material issue. Rather, the material issue is whether or not Shannon stabbed Jeremy knowingly as opposed to accidentally as she claims.<sup>50</sup> Evidence tending to show the absence of an accident on Shannon's part, or that she intended to stab Jeremy, would therefore be admissible despite any possible character implications and provided that the probative value of the evidence outweigh any prejudicial impact.

*The Relevancy of Other Acts Evidence*

{¶93} The state and the majority opinion collectively refer to the evidence of Shannon's prior threats, assaults and bad behavior as evidence of either motive or intent. While I agree that the issue of Shannon's intent or the absence of an accident on her part is material in this matter, I would examine the prior threats, assaults and general prior bad behavior individually for compliance with the stated law. By viewing the other acts evidence as one lump occurrence, the majority fails to differentiate between threats issued against Jeremy and threats issued

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<sup>50</sup> I disagree with the majority that the reasonableness of Shannon's belief that danger was imminent was a material issue. Shannon never asserted that she stabbed Jeremy in self defense, only that she grabbed the knife in self defense. Shannon was not on trial for holding a knife in her hand. I recognize that the

against others. Moreover, the majority fails to identify the connection between prior “shoves” and “slaps,” to the intent to assault with a deadly weapon.

{¶94} By looking at each instance of other acts evidence, the majority would see, as do I, that Shannon’s prior threats issued in anger to women she believed to be having clandestine relations with her significant other have no permissible relevance to whether or not several weeks or months later, Shannon knowingly stabbed that significant other with a kitchen knife during a heated argument. This much was established over fifty years ago in *State v. Moore* (1948), 149 Ohio St. 226, 78 N.E.2d 365, where the Supreme Court of Ohio determined that “threats made by a defendant against a particular person with whom he had a quarrel sometime previously, were not admissible against him in his trial for killing another person in a different quarrel, there being no relation between the two incidents.” *Id.* at 230 citing, *Warren on Homicide* (Perm.Ed.), 295, 491, Sections 199, 210; *Wharton’s Criminal Evidence*, 11th Ed., 363, Section 283; *26 American Jurisprudence*, 404, Section 359; *40 Corpus Juris Secundum*, Homicide, §§ 238, 241; *Bird v. United States* (1901), 180 U.S. 356, 21 S.Ct. 403, 45 L.Ed. 570.

{¶95} The doctrine regarding the irrelevance of threats made against third parties in dissimilar situations remains good law. In *State v. Bayless* (1976), 48

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prosecution continually discussed self defense at trial and that a self defense instruction was delivered to the jury. I find this to be perplexing and can only imagine the confusion it must have caused for the jury.

Ohio St.2d 73, 357 N.E.2d 1035, *Certiorari Granted, Judgment Vacated on Other grounds* by 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155, the Supreme Court of Ohio concluded that in a prosecution for aggravated murder, testimony as to threats made by the defendant against a third person subsequent to the killing, which did not involve the deceased and formed no part of the murder affair was inadmissible in evidence against the defendant. In that case, the trial court had allowed the prosecution to ask the defendant whether on one occasion the defendant had told a deputy “(t)hat he was a dead man when you got out: if you couldn’t do it, your people would,” and whether on another occasion the defendant had threatened a deputy by saying “you were going to kill him if you had to do it with your bare hands.”

{¶96} Thereafter, Bayless denied making either threat in those terms and only admitted to making angry statements. In response, the prosecution called the two deputies as rebuttal witnesses and was allowed, also over objection, to introduce testimony of the two deputies that the alleged threats were in fact made. The Supreme Court determined the questions put to the defendant and the rebuttal testimony to be “plainly error” and “irrelevant to any issue in the case and was not admissible under R.C. 2945.59. *Id.* at 106; citing *State v. Moore*, *supra*. Additionally, the court determined that it was immaterial to their conclusion that *Bayless* issued the threats subsequent to the killing for which he was on trial.

Like the threats in *Bayless*, the threats issued to Kira Holcumb, Melissa Briedenstien and Jeri Toland are not relevant to any matter at hand. Shannon did not threaten nor attempt to stab any of these witnesses. That the threats were issued in response to an argument over Jeremy is not enough to establish their relevance. Jealousy is an emotion and does not establish that Shannon intended to stab Jeremy. The only useful purpose of threats issued to Kira, Melissa and Jeri was to illustrate Shannon's violent nature to the jury.

{¶97} Next, I would find instances in which Shannon broke a window, rudely told a neighbor to go home and spray painted Jeremy's clothing to be even more irrelevant to proving her intent to stab Jeremy. In *State v. Johnson* (1994), 71 Ohio St.3d 332, 1994-Ohio-304, 643 N.E.2d 1098 the Ohio Supreme Court held that testimony indicating a defendant's hatred and contempt of women was inadmissible as evidence of the defendant's reasons for killing his sister. *Id* at 340. Additionally, in *State v. Gillard* (1988), 40 Ohio St.3d 226, 533 N.E.2d 272, rehearing denied 41 Ohio St.3d 723, 535 N.E.2d 315, certiorari denied 109 S.Ct. 3263, 492 U.S. 925, 106 L.Ed.2d 608, overruled on other grounds by *State v. McGuire*, 80 Ohio St.3d 390, 686 N.E.2d 1112, 1997-Ohio-335 the Supreme Court found that the other acts testimony of a witness regarding a murder defendant's attack on individual in bar was irrelevant and tended to portray defendant as a violent man. Here, Shannon's dislike of the women Jeremy was

dating, and the ways in which she went about displaying that dislike, are irrelevant to showing Shannon's intent or the absence of accident on the night of the stabbing. Shannon has not been accused of killing one of Jeremy's former girlfriends. What's more, there is no evidence that Jeremy was leaving Shannon for another woman. Shannon's issues with other woman do not demonstrate that she would intentionally stab Jeremy.

{¶98} The majority opines that the evidence as proffered by the prosecution demonstrates Shannon's situationally specific emotional reactions. I do not believe that any member of this court maintains the proper credentials that would qualify them to label or identify Shannon's emotional reactions as being similar or dissimilar from one moment to the next. In any event, the prosecution did not use Shannon's prior threats or bad acts to demonstrate any similarity in her responses to anger. On the contrary, the prosecution attempted to show a pattern of escalating reactions by describing Shannon as "a time bomb waiting to go off." The prosecution drew a picture of Shannon as a ticking bomb in the jury's mind, and thereafter used the countless instances of other acts testimony to give life to that image. Despite its position now on appeal, the trial transcript is clear. The state used evidence of Shannon's prior bad acts as substantive evidence of her guilt.

{¶¶99} The majority relies on *State v. Newcomb*, Logan App. No. 8-01-07, 2001-Ohio-2325, in which this court held that testimony describing intoxicated conflicts, predicated upon the defendant's jealousy and violent reactions to the victim's alleged relationships with other men, was admissible proof of the defendant's motive and why he would have a desire to seriously injure or kill the victim. First of all, I reject the suggestion that motive is material in this case. The prosecution's theory that Shannon stabbed Jeremy because he broke off their relationship is mere speculation, for which there is no supporting evidence.<sup>51</sup> Secondly, the facts sub judice are distinguishable from the *Newcomb* decision. In *Newcomb*, the defendant was on trial for aggravated murder and denied his identity as the killer. What's more, the other acts testimony admitted in *Newcomb* were acts of extreme physical violence rather than random threats or a few shoves or slaps. Furthermore, in *Newcomb*, the defendant alleged that someone other than himself inflicted the victim's past injuries in addition to killing her. Therefore, this court held that evidence of circumstances in which Newcomb had previously beaten the victim and the severity of the injuries he inflicted were relevant to rebut these contentions and to prove that Newcomb, rather than his brother, had inflicted the fatal injuries. *Id.* citing *State v. Tillett* (June 24, 1999), Cuyahoga App. No. 74275, dismissed, appeal not allowed by (1999), 87 Ohio St.3d. Unlike *Newcomb*,

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<sup>51</sup> The state claims that Jeremy's belongings were packed indicating that he was leaving Shannon. However, numerous witnesses confirmed that Jeremy and Shannon were moving in to a trailer in Southern Ohio the

the issue here is not whether Shannon set out to kill Jeremy on May 25, 2001, but whether the stabbing was an accident. Shannon does not deny causing Jeremy's injuries and does not blame the incident on someone else.

{¶100} In conclusion, after a thorough examination of the testimony, I would at the very least find error in the admission of (1) prior threats allegedly issued against Jeremy's former girlfriends, (2) testimony that Shannon allegedly broke Jeri Toland's window, (3) testimony that Shannon spray painted Jeremy's clothes, (4) testimony that Shannon told Jennifer Jordon that she could not talk to Jeremy and had to go home, and (5) testimony from Patrolman Thomas stating that he investigated a broken window at Jeri Toland's house. Therefore, the next issue I would address is whether those errors amounted to reversible error or were otherwise harmless.

*Preservation of Error for Review*

{¶101} Before finding no error in the admission of prior bad acts, the majority first determined that even if error was present, all but plain error was waived by the defense counsel's failure to object at trial. Again, I respectfully disagree.

{¶102} Prior to trial, Appellant-Defendant filed a motion in limine, requesting that all other acts evidence of prior bad acts, including alleged threats

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next day.

and acts of violence be excluded. According to the motion, the state's proposed evidence was incredible, more prejudicial than probative and far removed from the circumstances surrounding the stabbing on May 25, 2001. According to the State, Shannon's threats of bodily harm were "a repeated occurrence that happened all the time. And it's a continued pattern that relates directly to what Shannon's motive was." The prosecution would later change its position and allege that the other acts testimony was probative of Shannon's intent or to show the absence of accident.

{¶103} As it considered Appellant's motion, the trial court noted that Shannon was on trial for murder rather than aggravated murder and therefore precalculation and premeditation were not at issue. The court went on to read Evid.R.404(B), stating that evidence of prior bad acts was admissible to show motive, intent, knowledge, mistake or absence of accident. In light of that, the trial court determined, "from what I have read thus far, from what I have heard, my feeling is that this stuff is going to come in." The court thereafter denied Appellant's motion with the caveat that she could renew her objection at trial but stated, "My guess is, and my suspicion is going to be that that stuff is going to come in."

{¶104} At that point, the case proceeded to trial and the state presented its "time bomb" theory to the jury. Midway through the state's case in chief, after five

witnesses had testified to various prior bad acts committed by Shannon, the following dialog took place outside of the jury's audible range:

{¶105} “Defense Counsel: I want to renew our Motion in Limine, all these people coming in here saying that they have heard these threats \*\*\*, for whatever the Court thought it was worth initially, we didn't think it was admissible, the Court did. This is cumulative is all it is.”

{¶106} “The State: It's not cumulative. You're disputing the accuracy of--  
- so clearly it's not cumulative.”

{¶107} “The Court: You made your record. Lets go.”

{¶108} Today, the majority concludes that this exchange did not preserve error with respect to the first four witness who testified to bad acts and therefore, all but plain error was waived with regard to any perceived errors in their testimony. *State v. Agner* (1999), 135 Ohio App.3d 286, 294, 733 N.E.2d 676. However, the majority then goes on to conduct a plain error analysis that encompasses testimony and perceived error admitted into evidence after the renewal of the motion in limine. According to the majority, anything testified to after to the renewal was “related to the same events and merely provided a factual background for otherwise unchallenged testimony.”

{¶109} Contrary to the majority's characterization of the renewal motion, I would find the aforementioned exchange between the trial court and counsel to be

a proper renewal of the pre-trial motion in limine. Irrespective of the testimony already admitted, the renewal of the motion in limine was sufficient to enable the trial court to make a final determination as to the admissibility of future testimony regarding prior bad acts. The rule requiring counsel to renew objections raised in a motion in limine exists so that trial courts have the opportunity to consider the objected evidence in the context of the actual trial and to enter the objection into the record. Here, the trial court was given the opportunity to reconsider its prior ruling. The court chose not to do so and indicated that Shannon's objection to the threats were on the record. For an appellate court to refuse to honor that renewal as a proper objection is counterproductive and inherently unfair.

{¶110} Consequently, for purposes of determining the appropriate standard of review for any perceived errors alleged by the Appellant, I would dissect the trial into two distinct parts; pre and post renewal of the motion in limine. Thus, I would agree with the majority that all but plain error was waived with respect to prior bad acts and prior threats attested to by Lana Manley, Sam Toland, Ray Osborne, Amy Cutchall and Jessie Howard. However, the renewal of the motion in limine was sufficient to preserve objections to prior threats thereafter attested to.

{¶111} Subsequent to the renewal of Shannon's motion in limine, nine witnesses took the stand to testify almost exclusively to Shannon's prior bad acts.

As previously discussed and stressed above, several witnesses attested to multiple incidents of bad acts. Most incidents were not reiterations of testimony proffered before the renewal, but new incidents and new details, thus ruling out the notion that any errors subsequent to the renewal were cumulative to any testimony admitted prior to the objection and therefore harmless. For instance, new to the jury was Kira Holcumb and Lindsay Tinnerello's testimony regarding Shannon's alleged voice mail threats, Melissa Briedenstein's account of Shannon's threats, Jennifer Jordon's porch debacle, Lori Hummel's spray paint incident and Jeri Toland's detailed account of her broken window. Therefore, I would examine all instances of prior bad acts admitted after the renewal for harmless or reversible error.

*Harmless or Reversible error*

{¶112} A trial court's improper admission of other acts evidence requires a reversal of a conviction if there is a reasonable possibility that the evidence contributed to the conviction. *State v. Clemons* (1994), 94 Ohio App.3d 701, 711, 641 N.E.2d 778, 784-785; *State v. Elliott* (1993), 91 Ohio App.3d 763, 771, 633 N.E.2d 1144, 1148-1149. In order to hold the error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt. Crim.R. 33(E)(4); Crim.R. 52(A). Error is harmless beyond a reasonable doubt if the remaining evidence standing alone constitutes overwhelming proof of

defendant's guilt. *State v. Williams* (1983) 6 Ohio St.3d 281, 452 N.E.2d 1323; *State v. Moreland* (1990) 50 Ohio St.3d 58, 552 N.E.2d 894.

{¶113} Here, the evidence of defendant's guilt in view of the entire record is weak. There are no witnesses to the stabbing, visually or audibly. As far as anyone knew, as of the day of the stabbing, Shannon and Jeremy were getting along and planning on moving away together. The physical evidence comports with Shannon's version of events. Shannon's face was bruised when she was arrested but according to Lana Manley it was not bruised when she went to bed. Crime scene photographs reveal a disheveled kitchen with a stove that appears to have been jostled. A butcher block of steak knives is positioned on the countertop immediately to the right of the stove. Also, a blood trail indicates the stabbing took place in the backyard, not far from the back door. Shannon admitted to stabbing Jeremy immediately, never denying it, and her story remained consistent during her testimony at trial.

{¶114} The state's most compelling testimony was that of the surgeon who operated on Jeremy in an attempt to save his life. The surgeon testified that the stab wound must have been delivered in a downward motion in order to cause the damage that it did. However, on cross examination, the doctor admitted that he had no way of knowing Jeremy's body position when the blow was delivered and therefore could not say for sure how the wound was inflicted. Other evidence

presented by the state included a necklace found in the back yard, a crushed telephone found in the alley next to the house, and Jeremy's packed belongings. I am baffled as to the relevance of the first two pieces of evidence and find the third to be consistent with that of a person moving away.

{¶115} Undoubtedly, this case hinged on credibility; on whether or not the jury believed Shannon's version of events. I would find the volume of improperly admitted testimony concerning threats, physical assaults and bad behavior to have created a situation in which it is impossible to suggest that the jury did not use that impermissible evidence to gage Shannon's credibility. The errors are exacerbated by the fact the prosecution practically begged the jury to consider Shannon's character and that court did not deliver a limiting instruction regarding the proper use of other acts testimony. Therefore, I would not find the error to be harmless beyond a reasonable doubt.

{¶116} Furthermore, assuming *arguendo* that Shannon's trial counsel failed to preserve error with respect to some or all instances of other acts testimony, the collective error in this matter amounts to plain error. Plain error exists where the outcome of the trial would clearly have been different but for the error. *State v. Biros* (1997), 78 Ohio St.3d 426, 431. The plain error rule must be applied with the utmost caution and invoked only under exceptional circumstances to prevent a manifest miscarriage of justice. *State v. Cooperrider* (1983), 4 Ohio St.3d 226,

227. As I have pointed out, the evidence of Shannon's guilt was weak and the amount of error great. Had the jury not heard the inadmissible character testimony I do not believe there was adequate evidence such that a jury would have been able to find Shannon guilty of intentionally stabbing Jeremy, beyond a reasonable doubt.

{¶117} Accordingly, I would sustain Appellant's first assignment of error, rendering the consideration of the remaining assignments unnecessary. I would then reverse the judgment of the trial court and remand the action to that court for new trial.