[Cite as *State v. Bond*, 2023-Ohio-2361.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 2019CA0033
KHAIRI A. BOND	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case 2018-CR-0366
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 10, 2023

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GARY BISHOP Prosecuting Attorney BY: JOSEPH C. SNYDER Assistant Prosecutor 38 South Park Street Mansfield, OH 44902	CHARLES A. KOENIG 5354 North High Street Columbus, OH 43214

Gwin, P.J.

{¶1} This matter is before this Court upon remand from the Supreme Court of Ohio. In Khari A. Bond's direct appeal of his conviction and sentence by the Richland County Court of Common Pleas, *State v. Bond,* 5th Dist. Richland No. 2019 CA 0033, 2020-Ohio-398, we addressed his First Assignment of Error and found the trial court violated Bond's right to a public trial under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution when it closed the trial to the public. We declined to address Bond's Second, Third and Fourth Assignments of Error as moot in light of our ruling. The state appealed, and the Ohio Supreme Court accepted a discretionary appeal. The Supreme Court found that a public-trial violation occurred but that Bond did not establish that the violation rose to the level of a plain error that we must correct. The Supreme Court reversed our decision and remanded the case to this Court to address Bond's remaining assignments of error. *State v. Bond,* Slip Op. No. 2022-Ohio-4150, 2022 WL 17170221. Pursuant to the Supreme Court's judgment entry, we therefore address Bond's Second, Third and Fourth Assignments of Error.

Facts and Procedural History

{¶2} Bond was indicted by a Richland County grand jury on two counts of murder, one under R.C. 2903.02(A) ["purposely"] and one under R.C. 2903.02(B) [felony murder], each with a firearm specification under R.C. 2941.145 arising from the shooting death of Nolan Lovett on May 3, 2018.

{¶3} In the morning of May 3, 2018, Nolan Lovett had driven to the home of Benjamin Smith to exchange drugs. 2T. at 64.[1] Lovett was driving a gold Ford Taurus

[1] For clarity, the transcript from Bond's jury trial on March 19, 20, 21 and 22, 2019 will be referred to as, "__T.__," signifying the volume and the page number.

rental car. Id. Smith asked Lovett if he could borrow his car to go see his parole officer. Id. at 65. Lovett agreed he could borrow it for a few hours. Id. Approximately three hours later, in the afternoon, Smith saw Lovett again at 642 Stocking Avenue. Id. at 67; 70. Smith then drove Lovett to the home where Dearco Stillwell, aka "Bruce Bruce" was staying on Johns Avenue. Id. at 61; 69. Smith drove the Ford Taurus with Lovett in the passenger's seat. Id. at 69. As they were driving, Lovett told Smith to go to Lovett's house at 737 Bowman Street instead. Id. at 71-72. Smith did not see a firearm of any sort in the vehicle or on Lovett when they started driving. 2T. at 75.

{¶4} At around 1:00 pm, Dearco Stillwell was at 737 Bowman Street when he heard a knock on the door. 2T. at 194. When he answered it, he saw Bond, though he was not familiar with him. Id. Bond had never been to the house before and was not welcome there. Id. at 197. Stillwell greeted Bond with, "What the fuck you doing here?" Id. at 194. Bond responded that Lovett had just left his house. Stillwell knew the pair had history, so he attempted to contact Lovett. Id. at 198. Stillwell told Bond that he did not know what issue Bond had with Lovett, but that they needed to handle the situation in a "talking manner." 2T. at 198-199. Bond said "okay" and began to walk back towards his car.

{¶5} Smith and Lovett arrived at the house at this time. 2T. at 199-200. Smith pulled the Taurus up onto the sidewalk, slightly behind and to the left of the driveway. Id. at 201. Smith saw Bond and Stillwell standing in the front yard and Bond's car in the driveway. Id. at 73. Stillwell was wearing a white shirt and black sweatpants. 2T. at 210-211; 3T. at 301; State's Exhibit 7. Smith was wearing shorts and

a grey hoodie. Id.; State's Exhibit 8. Lovett was wearing a red shirt. 3T. at 276. Bond was wearing a black jacket, black jeans, and black boots. 2T. at 211; State's Exhibit 2. Before they got out of the car, Smith told Lovett that he thought Bond had a gun in his jacket pocket. Id. at 81-82. He felt Bond had a gun because Bond's left hand was down by his side and his right hand was in the pocket of his jacket. Id. at 82.

{¶6} Lovett got out of the car, walked toward the house and asked Bond, "What are you doing at my residence?" 2T. at 201-202. Smith testified that Bond responded that he could go, "Where the fuck he wants to go." Id. at 83. Stillwell testified that Bond responded, "You came to my motherfucking residence first." 2T. at 204. Smith testified that Bond then pulled his gun out and started shooting. Id. at 83; 142.

{¶7} Stillwell testified that Bond drew his weapon when Smith got out of the car. 2T. at 205; 206. After hearing gunfire, Stillwell hit the ground, looked up and saw Bond shoot Lovett one time in the chest. Id. at 207. Stillwell heard Lovett say, "Oh, I'm hit." Id.

{¶8} After the first shot, Smith testified that he believed he saw Lovett reaching toward his waist for something. Id. at 86. He believed it was a gun because after Lovett fell, Smith observed a gun next to him. Id. at 86. Smith testified to the Grand Jury that Lovett fired his gun two to three times. Id. at 149-150.

{¶9} Smith testified that he pulled his weapon, later identified as a Stallard Arms Model JS9mm semi-automatic handgun[2]. 2T. at 87; 92; 3T. at 377; State's Exhibit 102. This handgun had electrical tape on the grip. 4T. at 561. The tape was necessary because the gun had a missing or broken magazine catch, meaning that the magazine would not lock into the firearm. 3T. at 378-379; 4T. at 561. Smith's firearm malfunctioned

[2] Because the two companies are related, this handgun is sometimes confused with a Hi-Point. 3T. at 377; 4T. at 561.

and would not fire. 2T. at 87; 90. Smith believed that his gun would not fire because he pulled the hammer on it too far back which locked the trigger. Id. at 90; 209.

{¶10} Bond began firing at Smith. Id. After firing several shots, Bond took off running towards the rear of 737 Bowman. 2T. 90; 207; 276. Bond is seen on the surveillance video taken from a facility run by the local Mental Health and Recovery Service Board, just a short distance from the scene of the shooting. 4T. at 456-460; 5T. at 653-659; State's Exhibit 1; State's Exhibit 2; State's Exhibit 3; State's Exhibit 4 and State's Exhibit 5.

{¶11} Smith ran over to Lovett and rolled him from his side onto his back. Id. at 89. Not knowing if Bond would return, Smith attempted to pull the hammer back from his gun and, in the process, he ejected two unfired rounds from the gun. Id. at 91. Concerned that Bond would return, Smith picked up Lovett's gun, a SCCY[3] nine-millimeter Luger pistol, that he found lying in the grass to defend himself. 2T. at 92-93; 3T. at 368; State's Exhibit 103. Smith went to the side of the house to see if Bond was still in the area but he could not find him. Id. at 93. Approximately thirty seconds later Smith returned to Lovett's side. At this time Dearco Stillwell was still at the scene and was crying. Smith told him to call 9-1-1 because he did not have a phone on him. Id. Stillwell got a phone to call 9-1-1. 2T. at 209; 213-214; State's Exhibit 79.

{¶12} Smith attempted to pick up Lovett to get him into the car to take him to the hospital because the ambulance was taking too long. 2T. at 94. Lovett was unresponsive and Smith was unable to move him by himself. Id. Smith began to hear sirens approaching and threw his gun and Lovett's gun under a porch to the rear of the house

[3] Sometimes pronounced "sky." 3T. at 368.

for fear of violating his parole. 2T. at 95-99. A condition of Smith's parole was that he not possess a firearm. Id.

{¶13} While these events were taking place, Jamie Heacock was parked across the street from 737 Bowman where he stopped in his company truck to eat lunch. 3T. at 270-271. He was talking on his phone when he heard a group of men arguing across the street. Heacock then heard a bang and looked to his right. In quick succession, he heard more shots; approximately three to four shots in total. As he looked over, Heacock saw four men, with three of them grouped together and one off to the side. Id. at 273-274. One of the men fell after the shots and it looked like he may have been reaching for something in his hip area as he was falling. Id. at 277-278. Heacock saw a man in a white shirt run toward the porch. Id. at 276. He saw one of them standing alone holding a gun but did not see a gun being held by any of the others. Id. at 275. The person with the gun took off running. Heacock then put his car in drive and drove off in the opposite direction that he saw the man with a gun flee.

{¶14} Officers Charles Hamilton and Mark Boggs arrived on scene prior to the ambulance and secured the scene while providing what aid they could to Lovett. 3T. at 290; 312. Officer Boggs observed Stillwell coming from the house. 3T. at 297. Both officers testified that Smith was coming from behind the house. 3T. at 298; 316. Officer Hamilton walked around the house to look out for an ambush. Id. at 320. Officers located the JS9mm semi-automatic handgun and the SCCY nine-millimeter Luger pistol that Smith had thrown underneath the house. 3T. at 368; State's Exhibit 103; 2T. at 87; 92; 3T. at 377; State's Exhibit 102; 3T. at 414-415; State's Exhibit 59; 60. An AR-15 assault

rifle was removed from the front passenger side of the car in which Lovett and Smith had arrived at the residence. 3T. at 331; 384; State's Exhibit 104.

{¶15} Dr. Russell Uptegrove, the medical examiner, testified that the bullet which killed Lovett entered his body through his right lung, continued through his superior vena cada, ascending aorta and pulmonary artery, before lodging in the tissue in his lower left side. Lovett died of a single gunshot wound to his chest. 4T. at 621. The bullet's trajectory took it through Lovett's right chest and exited through his left chest. Id. at 611-613. The bullet and four small bullet fragments were recovered. Id. at 610; State's Exhibit 105; State's Exhibit 125.

{¶16} Four nine-millimeter Luger cartridge casings were retrieved from the crime scene. 3T.at 403; 408; 409; 419. All four were found to have been fired from the same gun. Id. at 372; 375. The casings were not fired from either of the guns that were hidden under the house by Smith. Id. at 372; 380. A fired jacketed bullet and two bullet fragments were also recovered from the scene. Smith's firearm was excluded as the source of these items. Id. at 380. Attempts to compare these items to Lovett's firearm were inconclusive. Id. at 375. The two unfired bullets found at the scene were matched to Smith's gun. Id. at 383. The assault rifle in Lovett's car fires 5.56-millimeter cartridges. Id. at 384. Therefore, it would have been incapable of firing the four nine-millimeter cartridges found at the scene. Id. No other firearms were found at the scene. Id. at 424-425.

{¶17} The houses at 737 and 739 Bowman were examined to see if any gunfire hit them and no evidence of such was found. 4T. at 547. Two cell phones at the scene were located and attributed to Bond. Id.at 552; 647-648.

{¶18} On May 7, 2018, the Ohio Violent Fugitive Task Force received a tip that Bond was in Lewis Center, near Columbus, Ohio. 3T. at 324-325. As a member of the task force Officer Hamilton responded to 3026 McCammon Chase Way along with other members of law enforcement and surrounded the house. They entered the house and ordered Bond to come downstairs, but he refused. Id. At first, Bond refused as he was holding a baby. Id. After about five to ten minutes Bond came downstairs and was arrested on the murder warrant. Id. at 325-326; 334.

{¶19} Bond was interviewed by Detective Richard Miller. 5T. at 642. During the interview, Detective Miller noticed several behaviors from Bond that he believed were indicative of lying. Id. at 644-645. These signs included dry mouth, crossed hands, unwillingness to make eye contact, answering questions with questions, and trying to change the topic and find out what Detective Miller already knew. Id. During the interview, Bond denied having a cell phone. Id. at 647-648. Two cell phones were found at the crime scene attributable to Bond. Id. One of the phones had a video of Bond on it. Id. at 651-652.

{¶20} During the interview, Bond denied being at the murder scene and claimed that he knew nothing about the incident. 5T. at 652-653. Bond even presented an alibi for his whereabouts during the time of the shooting. Id. at 653. However, when confronted with the pictures of him fleeing the scene of the murder, Bond became very defensive and guarded. Id. at 657. Bond indicated that he did not have a gun and had nothing to do with a gun. Id. at 666. In text messages on Bond's phone, was found a conversation where an unknown person asks Bond to get his gun, among other things, and Bond responded in the affirmative. Id. at 667-669.

{¶21} Bond eventually admitted to being present on Bowman where the murder took place. 5T. at 669-670. Bond claimed to have been at the house with Stillwell when Lovett walked out of the house into the yard when Smith arrived at the house with an unknown person. Id. at 671. Bond referred to a newspaper article about the murder several times, about the incident itself, who had been arrested and was in jail, and who Detective Miller should be interviewing. Id. at 674-675. Bond claimed that he ran straight home after the murder and told his grandmother that "he was shooting at me." Id. at 676. He claimed his grandmother called 9-1-1; however, the dispatch logs did not show that she had called 9-1-1 on the day of the incident. Id. at 676.

{¶22} The defense called one witness, Montgomery Napier, who had driven past Lovett's residence while the shooting occurred. 5T. at 757. Napier testified that he observed three men standing on the front lawn, including a man dressed all in black. Id. at 757. Napier testified that he saw the man dressed in black make "a quick downward motion, bringing his hand down and ducking down." Id. at 758. He then heard a bang, which Napier believed could have been from the individual slapping the car. Id. at 758-759. Napier saw a man come from around a dark colored car with a pistol, pointing it first at one and then the other. Id. at 759. He then heard shots. Id at 760. Napier believed the man was wearing a light-colored shirt and blue pants. Id. at 760-761.

{¶23} Following deliberations, the jury acquitted Bond of purposeful murder (Count One) with the attendant firearm specification, but found him guilty of felony murder (Count Two) and the firearm specification for Count Two. Bond was sentenced to an aggregate of 18 years to life for his convictions.

{¶24} Bond's remaining Assignments of error are,

{¶25} "II. THE VERDICT OF THE JURY FINDING THE DEFENDANT GUILTY OF FELONY MURDER IN VIOLATION OF R.C. 2903.02(B) WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶26} "III. THE TRIAL COURT IMPROPERLY ALLOWED IRRELEVANT AND OTHER ACTS EVIDENCE, AND PERMITTED THE STATE TO ENGAGE IN PROSECUTORIAL MISCONDUCT, BY ADMITTING A "GANGSTA" RAP SONG, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

{¶27} "IV. APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, AS A CONSEQUENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL."

II.

{¶28} In his Second Assignment of Error, Bond admits that the record contains sufficient evidence to support the jury's finding of guilty with respect to Count Two of the Indictment and the attendant firearm specification; however, Bond argues the testimony from the eyewitnesses was so riddled with inconsistencies and contradictions, that it was not credible. Therefore, Bond contends that his conviction is against the manifest weight of the evidence.

Standard of Appellate Review – Manifest Weight

{¶29} As to the weight of the evidence, the issue is whether the jury created a manifest miscarriage of justice in resolving conflicting evidence, even though the

evidence of guilt was legally sufficient. *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith, 80 Ohio St.3d 89, 684 N.E.2d 668, 1997–Ohio–355*; *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001).

{¶30} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, *supra,* 78 Ohio St.3d at 386-387, 678 N.E.2d 541(1997), *State v. Williams,* 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶83. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the fact finder's resolution of the conflicting testimony. *Thompkins* at 387, 678 N.E.2d 541, *citing Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652(1982) (quotation marks omitted); *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1244, ¶25, citing *Thompkins.*

{¶31} Once the reviewing court finishes its examination, an appellate court may not merely substitute its view for that of the jury, but must find that "'the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins, supra*, 78 Ohio St.3d at 387, *quoting State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721(1st Dist. 1983). The Ohio Supreme Court has emphasized: "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.'" *Eastley v. Volkman,* 132 Ohio St.3d 328, 334, 972 N.E.2d 517, 2012-Ohio-2179, *quoting Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80,

461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978).

{¶32} As one Court has explained,

> When faced with a manifest weight of the evidence challenge, we must consider whether the state "carried its burden of persuasion" before the trial court. *State v. Messenger*, Slip Opinion No. 2022-Ohio-4562, ¶ 26; *see State v. Martin*, Slip Opinion No. 2022-Ohio-4175, ¶ 26. Unlike the burden of production, which concerns a party's duty to introduce enough evidence on an issue, the burden of persuasion represents a party's duty to convince the factfinder to view the facts in his or her favor. *Messenger* at ¶ 17. Therefore, in order for us to conclude that the factfinder's adjudication of conflicting evidence ran counter to the manifest weight of the evidence—which we reserve for only the most exceptional circumstances—we must find that the factfinder disregarded or overlooked compelling evidence that weighed against conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 387-388, 678 N.E.2d 541 (1997). We accordingly sit as a "thirteenth juror" in this respect. Id.

State v. Gibson, 1st Dist. Hamilton No. C-220283, 2023-Ohio-1640, ¶ 8.

{¶33} Further, to reverse a jury verdict as being against the manifest weight of the evidence, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required pursuant to Article IV, Section 3(B)(3) of the Ohio Constitution. *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, ¶ 2-4, *citing Thompkins* at paragraph four of the syllabus.

Issue for Appellate Review: *Whether the jury clearly lost their way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.*

{¶34} Bond argues that it is more likely that Smith shot Lovett with the same firearm that had fired the four .9 mm Luger cartridge casings that were found at the scene. Bond posits that Smith disposed of that firearm before the police arrived. [Appellant's brief at 17-18]. Bond points to inconsistencies between the witness's statements and the trajectory of the fatal shot. Bond further emphasizes that one of the .9 mm Luger cartridge casings was found behind the car where Smith had been standing.

{¶35} In addition to the inconsistent statements of the eyewitnesses, the jury also heard that Bond gave conflicting and inconsistent stories to the police. He first claimed he was not at the scene and had an alibi. Bond told the police that he knew nothing about the incident. Bond claimed that he did not have a gun and knew nothing about a gun. Bond further claimed he ran home and told his grandmother who called 9-1-1 to report the incident.

{¶36} While there was conflicting testimony presented at trial, a defendant "is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented." *State v. Rankin*, 10th Dist. No. 10AP-1118, 2011-Ohio-5131, ¶ 29. *See also State v. J.E.C.,* 10th Dist. No. 12AP-584, 2013-Ohio-1909, ¶ 42. The jury may consider conflicting testimony from a witness in determining credibility and the persuasiveness of the account by either discounting or otherwise resolving the discrepancies. *State v. Taylor,* 10th Dist. No. 14AP-254, 2015-Ohio-2490, ¶ 34, *citing Midstate Educators Credit Union, Inc. v. Werner*, 175 Ohio App.3d 288, 2008-Ohio-641,

¶ 28 (10th Dist.). "'The finder of fact can accept all, part or none of the testimony offered by a witness, whether it is expert opinion or eyewitness fact, and whether it is merely evidential or tends to prove the ultimate fact.'" *State v. Petty*, 10th Dist. Franklin No. 15AP-950, 2017-Ohio-1062, ¶ 63, *quoting State v. Mullins*, 10th Dist. No. 16AP-236, 2016-Ohio-8347, ¶ 39.

{¶37} In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002–Ohio–1152, at ¶ 13, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist. 1999). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer,* 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶ 24.

{¶38} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. Based upon the entire record in this matter we find Bond's conviction is not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury heard the witnesses, evaluated the evidence, and was convinced of Bond's guilt.

{¶39} Upon review of the entire record, weighing the evidence and all reasonable inferences as a thirteenth juror, including considering the credibility of witnesses, we cannot reach the conclusion that the trier of facts lost its way and created a manifest

miscarriage of justice. We do not find the jury erred when it found Bond guilty. Taken as a whole, the testimony and record contain ample evidence of Bond's responsibility for the alleged crime. The fact that the jury chose to believe the testimony of the state's witnesses does not, in and of itself, render his convictions against the manifest weight of the evidence. While Bond is certainly free to argue that the eyewitnesses were either mistaken or lying, on a full review of the record we cannot say that the jury clearly lost its way or created a manifest injustice by choosing to believe the testimony of the state's witnesses. The jury was able to observe the eyewitnesses testify subject to cross-examination, as well as hear Bond's explanation to the police.

{¶40} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crime for which Bond was convicted. We do not find that the jury disregarded or overlooked compelling evidence that weighed against conviction.

{¶41} Bond's Second Assignment of Error is overruled.

III.

{¶42} In his Third Assignment of Error, Bond argues that it was improper for the state to introduce the full lyrics and music video of a so-called "Gangsta" rap song as evidence of Bond's predisposition to shoot Lovett.[4]

Standard of Appellate Review

{¶43} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty*., 58 Ohio St.3d 269, 271, 569 N.E.2d

[4] The song in question, is titled "YoungBoy Never Broke Again — Overdose"

1056 (1991). "However, we review de novo evidentiary rulings that implicate the Confrontation Clause. *United States v. Henderson*, 626 F.3d 326, 333 (6th Cir. 2010)." *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶97.

Issue for Appellate Review: *Whether the trial court violated Bond's right to a fair trial by allowing the state to present evidence of "Gangsta" rap lyrics and the music video*

{¶44} Detective Richard Miller testified that Bond admitted to tweeting a lyric taken from a rap song, "Hit him in his head knock off dreads now he can't make a sound." 5T. at 685. Bond told the detective that he was playing the song for his son. Id. No objection was raised to the lyric found on the cellphone; however, the defense did object to the state's admission of the entire lyrics to the song as well as the state's playing the song's video for the jury. 5T. at 686. The defense raised objections to the state's line of questioning concerning the song. Id. at 688-690. The state played the entire video of the song and provided the jury with a written copy of the song's entire 634 words as a listening aid. 5T. at 686-687, 720.

{¶45} Bond argues that the lyrics were irrelevant, improper evidence of prior bad acts, and substantially more prejudicial than probative, and should have been excluded under Ohio Rules of Evidence 401, 404(b), and 403, respectively.

"Other acts" evidence

{¶46} In *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20, the Ohio Supreme Court set forth a three-part analysis for determining the admissibility of other-acts evidence: to be admissible, (1) the evidence must be relevant, Evid.R. 401, (2) the evidence cannot be presented to prove a person's character to show

conduct in conformity therewith but must instead be presented for a legitimate other purpose, Evid.R. 404(B), and (3) the probative value of the evidence cannot be substantially outweighed by the danger of unfair prejudice, Evid.R. 403. The admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law. *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 22. The court is precluded from admitting improper character evidence under Evid.R. 404(B), but it has discretion to allow other-acts evidence that is admissible for a permissible purpose. *Hartman* at ¶ 22, *citing Williams* at ¶ 17.

{¶47} Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Evid.R. 403. The trial court is vested with broad discretion when weighing evidence under Evid.R. 403. *State v. Lang,* 129 Ohio St.3d 512, 2011–Ohio–4215, 954 N.E.2d 596, ¶ 87. "A reviewing court will not interfere absent a clear abuse of that discretion." *State v. Bethel*, 110 Ohio St.3d 416, 2006–Ohio–4853, 854 N.E.2d 150, ¶ 171.

{¶48} The state argues that the lyrics were relevant to show Bond's state of mind as he was going to Lovett's house. [Appellee's brief at 14]. The state admits that the purpose of talking about the song was to show that Bond went to Lovett's home, a home where he was not welcome, with the intent to murder Lovett. [Id. at 15]. The state argues that Lovett had dreads or dreadlocks and that the song referenced "dreads."

{¶49} Bond was not indicted for premeditated murder. The lyrics cannot be construed as an admission because the rap lyrics were not written by Bond. Only one sentence or lyric was found on Bond's phone. The lyrics cannot be considered a threat by Bond because it was not established to whom Bond tweeted the line from the song, or that Lovett ever saw the reference. The tweet was sent hours before the confrontation.

{¶50} The identity of the shooter was not an issue at trial. The state does not elucidate how the other words or lyrics in the song, or the music video relate in any way to Bond, Lovett or the events which transpired. The state does not suggest or prove a strong nexus between specific details of the artistic composition or the music video, and the circumstances of the offense for which the evidence is being adduced. *See, State v. Skinner,* 218 N.J. 496, 95 A.3d 236, 251-252 (2014). Listening to music with disturbingly graphic lyrics is not a crime. Id. at 249.

{¶51} The lyrics of the song, as well as the music video, are not relevant to any material issue that is actually in dispute in the case. Each of the purported rationales raised by the state either invited an improper character reference or was irrelevant to a material issue in the case. Either Bond shot Lovett or he did not. The lyrics and the video were irrelevant to that determination.

{¶52} The defense did not object to the lyric recovered from Bond's cell phone. While the lyric found on Bond's cell phone was admissible, the remainder of the lyrics and the music video were not. The lyrics and the music video did not have the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Improperly admitted "other acts" evidence

{¶53} "In determining whether to grant a new trial as a result of the erroneous admission of evidence under Evid.R. 404(B), an appellate court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record." *State v. Morris,* 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, syllabus.

{¶54} In the case at bar, the jury found Bond not guilty of purposely causing the death of Lovett. R.C. 2903.02(A). Thus, the jury was not persuaded that Bond acted with the specific intention to shoot Lovett. We find it extremely speculative that the jury abandoned their oaths and their integrity, and found Bond guilty of the crime of murder pursuant to R.C. 2903.02(B) because of the testimony concerning the rap lyrics. We find there is no reasonable possibility that this testimony contributed to Bond's conviction, and, after removing the evidence related to the lyrics, the remaining evidence is sufficient to prove beyond a reasonable doubt Bond's guilt for murder pursuant to R.C. 2903.02(B). We further find that any error in the admission of the rap lyrics and music video to be harmless beyond a reasonable doubt.

{¶55} Bond's Third Assignment of Error is overruled.

IV.

{¶56} In his Fourth Assignment of Error, Bond contends that his trial counsel was ineffective in failing to request the court instruct the jury on the offense of Aggravated Assault as an alternative defense theory. He further contends that counsel was ineffective in failing to properly object to the rap lyrics and video introduced by the state.

Standard of Appellate Review

{¶57} "To prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 694 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." Id., at 688, 104 S.Ct. 2052. In addition, to establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. 2052. *Andtus v. Texas,* 590 U.S. __, 140 S.Ct. 1875, 1881, 207 L.Ed.2d 335 (June 15, 2020).

Issue for Appellate Review: *Whether there is a reasonable probability that, but for counsel's failure to request a jury instruction on aggravated assault, the result of the proceeding would have been different.*

{¶58} Based upon the testimony of his initial encounter with Stillwell during which Bond agreed to work out his differences with Lovett, Bond believes that the evidence presented during his jury trial demonstrated Bond harmed Lovett as a result of being provoked by Lovett. [Appellant's brief at 33].

{¶59} Aggravated assault, an inferior degree offense of felonious assault, is defined as follows:

> No person, while under the influence of sudden passion or in sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:

(1) Cause serious physical harm to another or to another's unborn.

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordinance, as defined in section 2923.11 of the Revised Code.

{¶60} To determine whether sufficient evidence of serious provocation exists, a trial court must engage in a two-part inquiry to determine whether the evidence was sufficient to warrant a jury instruction on aggravated assault.

{¶61} First, the court must objectively determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. *State v. Mack*, 82 Ohio St.3d 198, 201, 694 N.E.2d 1328 (1998). "If this objective standard is met, the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case 'actually was under the influence of sudden passion or in a sudden fit of rage.'" Id.*, quoting State v. Shane*, 63 Ohio St.3d at 634–35, 590 N.E.2d 724.

{¶62} In examining whether provocation is reasonably sufficient to bring on a sudden fit of passion or fit of rage, the Ohio Supreme Court has stated that, "it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *State v. Shane*, 63 Ohio St.3d 630, 635, 590 N.E.2d 272(1992). In determining whether the provocation was reasonably sufficient, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time. *State v. Mabry*, 5 Ohio App.3d 13, 449 N.E.2d 16 (8th Dist. 1982), paragraph five of the syllabus, approved.

{¶63} "[W]ords alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations" and "[f]ear alone is insufficient to demonstrate

the kind of emotional state necessary to constitute sudden passion or fit of rage." *Shane* at 634–635, 590 N.E.2d 272; *Mack* at 198, 694 N.E.2d 1328. Cases have held that a victim's simple pushing or punching does not constitute sufficient provocation to incite the use of deadly force in most situations. *See, State v. Koballa,* 8th Dist. Cuyahoga No. 82013, 2003-Ohio-3535 (concluding that sufficient provocation did not exist when the victim grabbed the defendant by the testicles and the arm); *State v. Poe* 4th Dist. Jackson No. 00CA9, 2000-Ohio-1966 (concluding that the victim's conduct in approaching the defendant with a hammer and stating "come on" did not constitute sufficient provocation). *State v. Pack*, 4th Dist. Pike No. 93CA525, 1994 WL 274429(June 20, 1994) ("We find that a mere shove and a swing (which appellant by his own testimony ducked) are insufficient as a matter of law to constitute serious provocation reasonably sufficient to incite or arouse appellant into using deadly force.").

{¶64} Bond cites to no evidence in the record to indicate that he shot Lovett while under the influence of sudden passion or in a sudden fit of rage, brought on by serious provocation by Lovett, or that any provocation by Lovett was reasonably sufficient to incite Bond into using deadly force. Based upon our own review of the record, we find that there was insufficient evidence to warrant a jury instruction on aggravated assault. The evidence did not establish any provocation by Lovett which could be considered reasonably sufficient to incite Bond into a sudden fit of passion or rage, or justifying the use of deadly force. We also do not find any evidence that Bond actually was under the influence of sudden passion or in a sudden fit of rage sufficient to arouse the passions of an ordinary person beyond the power of his or her control at the time he shot Lovett.

{¶65} Accordingly, as no jury instruction was warranted, Brooks cannot demonstrate that he was prejudiced by counsel's failure to request an instruction on aggravated assault as an alternative defense theory.

{¶66} We have found in our disposition of Bond's Third Assignment of Error that the introduction of the rap lyrics was harmless beyond a reasonable doubt; therefore, any failure of defense counsel to object to the evidence did not prejudice Bond.

{¶67} Accordingly, Bond has failed in his burden to demonstrate that as a result of counsel's failures the result of the proceeding would have been different.

{¶68} Bond's Fourth Assignment of Error is overruled.

{¶69} The judgment of the Richland County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Delaney, J., and

Baldwin, J., concur