[Cite as *State v. Alexander*, 2023-Ohio-2708.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-22-1183

Appellee — Trial Court No. CR0202101678

v.

Branden Alexander — **DECISION AND JUDGMENT**

Appellant — Decided: August 4, 2023

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Andrew S. Pollis and Ashley E. Mueller, for appellant.

* * * * *

ZMUDA, J.

{¶ 1} Appellant, Branden Alexander, appeals the July 12, 2022 judgment of the Lucas County Court of Common Pleas, sentencing him to a prison term of 7 to 10-1/2 years, following a jury trial in which he was found guilty of felonious assault in violation of R.C. 2903.11(A)(1) and (D), a felony of the second degree. For the reasons that follow, we affirm.

I. Introduction

{¶ 2} On May 13, 2021, Alexander was indicted on one count of rape in violation of R.C. 2907.02(A)(2) and (B), a felony of the first degree, and two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (D), each a felony of the second degree. The indictment alleged that Alexander assaulted his girlfriend, M.C., on or about April 24, 2021, and assaulted and raped M.C. on April 27, 2021.

{¶ 3} On May 19, 2021, Alexander appeared for arraignment and entered a plea of not guilty to the indictment.

{¶ 4} On May 15, 2022, the matter proceeded to a jury trial. The state called M.C. as a witness, along with Detective Raynard Cooper, Officer Scott Histed, forensic nurse Natalie Jones, BCI forensic scientist Lindsay Nelson-Rausch, Laurie Renz, the Toledo Police supervisor of the crimes against persons unit, and Detective Theresa Talton, the lead detective assigned to the case for the domestic violence unit. For the defense case, Alexander called some of M.C.'s medical providers: residents Kevin Serdahely and Natalie Sirianni, and Dr. Kevin Nguyen. Alexander also called Aaron Nolan, the director of inmate services for the Lucas County Sheriff's Department, to challenge whether Alexander received a visit from an investigator from children services while he was in custody awaiting trial. As the final defense witness, Alexander testified.

{¶ 5} The jury returned a verdict of not guilty for the rape charge, charged in count one of the indictment. As to the remaining charges of felonious assault in counts two and three, the jury advised it was unable to reach a unanimous verdict and the trial court

declared a mistrial on these charges. The trial court scheduled the matter for a new trial on June 6, 2022.

{¶ 6} On June 6, 2022, a second trial commenced on the two felonious assault charges, counts two and three of the indictment. In the second trial, the state opted not to call all of the witnesses from the first case. The state again presented testimony of M.C., Detective Cooper, Officer Histed, and forensic nurse Jones. The state also called new witnesses, Julia Bomia, a children services caseworker who interviewed M.C. in the hospital, Allen County Probation Officer Doug DeWeise, assigned to supervise E.K. after his release from prison, and M.A., Alexander's ex-wife.

{¶ 7} After deliberations, on June 10, 2022, the jury returned a verdict of not guilty as to count 2, felonious assault arising from the incident of April 24, 2021, and a verdict of guilty as to count 3, felonious assault arising from the incident of April 27, 2021.

{¶ 8} On July 5, 2022, the trial court held a sentencing hearing. The court found Alexander had been found guilty of felonious assault in violation of R.C. 2903.11(A)(1) and (D), a felony of the second degree, and, after addressing the statutory factors under R.C. 2929.11 and 2929.12, determined he was not amendable to community control and imposed a stated minimum prison term of 7 years with a maximum indefinite prison term of 10 1/2 years. The trial court imposed mandatory post release control of not less than 18 months and not more than 3 years, and provided notice pursuant to R.C. 2929.19(B)(2)(c) and 2967.271.

{¶ 9} Alexander filed a timely appeal from the trial court's judgment.

II. Assignments of Error

{¶ 10} In his appeal, Alexander raises the following assignments of error:

1. Mr. Alexander's trial counsel rendered constitutionally ineffective assistance by failing to object to improper and highly prejudicial questioning and testimony of Mr. Alexander's ex-wife and by failing to cross-examine her.

2. The trial court erred in admitting Exhibit 35, which contained inadmissible character evidence.

3. The trial court erred in denying defense counsel's request for curative instruction regarding inadmissible character evidence.

4. The cumulative effect of the above errors deprived Mr. Alexander of a fair trial.

5. The trial court erred in sentencing Mr. Alexander to an indefinite term under the unconstitutional Reagan Tokes Act.

III. Analysis

{¶ 11} Alexander challenges his conviction and sentence, arguing ineffective assistance of counsel in failing to cross-examine M.A., error in the admission of character evidence, error in the jury instruction, and error in imposing a sentence under the Reagan Tokes Law, which Alexander argues is unconstitutional. In addressing the issues raised

on appeal, we first consider the relevant evidence adduced in Alexander's trial, followed by consideration of Alexander's argument relative to that evidence.

A. The Trial

{¶ 12} Alexander argues that the crucial difference in the second trial was the addition of testimony from M.A., Alexander's ex-wife. Otherwise, he argues, the two trials "largely mirrored each other." A thorough review of the trial transcripts reveals additional differences in the two trials, beyond the addition of M.A. as a witness.

{¶ 13} In the second trial, the rape charge was no longer at issue, based on the jury's acquittal in the first trial. Furthermore, the state opted not to call some witnesses who testified in the first case, including a forensic scientist and two of the investigating officers. The state also called two other new witnesses, in addition to M.A. The state called Julia Bomia, a children services caseworker who interviewed M.C. in the hospital in Alexander's presence. The state also called Allen County probation officer Doug DeWeise, who was assigned to supervise E.K. after his release from prison.

{¶ 14} In the second trial, M.C. testified first in the state's case in chief. She testified that she moved in with Alexander, at his invitation, in January 2021, after a few months of dating. Alexander and M.C. were the primary residents in Alexander's apartment. M.C. has a young son from a prior relationship, but her son lived in Lima with his father, E.K., spending only weekends with M.C. in Toledo. Alexander has a daughter from a prior marriage, but Alexander's ex-wife, M.A., has custody of the child and lives with her in Michigan.

{¶ 15} M.C. described her relationship with Alexander after they first began dating, as well as the change in the relationship after she moved in with Alexander and learned more about him. M.C. testified that she learned that Alexander misrepresented things about himself, claiming to be a college graduate when he never finished school or that he was financially secure when he relied on an ex-girlfriend to help him pay his bills. M.C. testified that money became a problem in the relationship, as she was not working and relied on her family for financial support.

{¶ 16} Soon after moving in with Alexander, the couple experienced conflict in their relationship, and verbal fights became physical in early March. In April, 2021, M.C. sustained injuries as a result of two, separate incidents, requiring hospitalization for the latter injuries. M.C. was admitted with a lacerated liver, a broken rib, a collapsed lung, and a ruptured disc in her neck, and underwent surgery to replace a ruptured disc on May 1, 2021. After M.C. was released from the hospital, she returned to Alexander's home and on May 5, 2021, the couple had another argument that M.C. claimed ended with Alexander pushing her into a wall. When Alexander left the home to pick up his daughter, M.C. packed her car to leave Alexander. M.C. testified that she drove a short distance from Alexander's apartment and called 911.

{¶ 17} M.C. had initially blamed E.K. for assaulting her on April 24 and blamed her injuries of April 27 on others when she sought medical treatment. After the argument of May 5, 2021, M.C. reported Alexander as her assailant to Officer Histed and his partner when they responded to her 911 call. M.C. accused Alexander of assaulting her

on both occasions, and further alleged that Alexander raped her on April 27, 2021. Police arrested Alexander shortly after M.C.'s report.

{¶ 18} Regarding the first assault, M.C. testified that on April 24, 2021, she attended a funeral in Napoleon, Ohio, and joined Alexander at a friend's home that night after returning to Toledo. At that gathering at their friend's home, M.C. and Alexander argued, Alexander became angry and began calling M.C. names, and M.C. left for home with her son. M.C. testified that Alexander arrived home about 45 minutes later, woke her to continue the argument, and then then assaulted her. She testified that Alexander struck her face repeatedly and then choked her until she passed out. She testified that, as a result of the assault, she could not open her left eye, had marks on her face, and her body and head ached, with the headache described as severe. M.C. indicated that she did not call the police because she was scared and she and her son had no other place to stay. After the assault, M.C. testified that Alexander showed remorse, apologized, and tended to her.

{¶ 19} After M.C.'s headache did not improve, she scheduled an appointment with her doctor. On April 26, 2021, M.C. saw her doctor, who photographed M.C.'s injuries. M.C. testified that Alexander instructed her to blame her ex, E.K., and M.C. complied. She initially accused E.K. as the perpetrator in seeking medical care but did not report the incident to police. E.K. had previously served a prison term for committing domestic violence against M.C., and M.C. saw E.K. each weekend she had visitation with their son. Her doctor recommended that M.C. go to the E.R. for a scan to rule out a

concussion. At the emergency room, M.C. repeated her accusation against E.K. as the perpetrator. M.C. testified that Alexander accompanied her on the doctor and emergency room visits.

{¶ 20} On April 27, 2021, the date of the second assault, M.C. testified that she was feeling much better and planned to attend Taco Tuesday at a restaurant with two of her female friends. M.C. covered the bruises on her face with make-up and dressed for a night out. She encouraged Alexander to do something with his friends and have a guys' night out. After dinner, M.C. and her friends went to Evolution Bar for drinks. Many of the bar patrons were outside in the parking lot, enjoying the weather and showing off their vehicles, and M.C. and her friends joined others for an impromptu party in the parking lot. M.C. returned home between 10:00 and 11:00 p.m.

{¶ 21} M.C. testified that she arrived home first, and Alexander was intoxicated when he arrived home sometime after. M.C. testified that she received a phone call from an unknown male, a wrong number, and Alexander became enraged and accused her of cheating on him. Alexander hit her and choked her until she briefly lost consciousness. M.C. testified that she awoke to Alexander's continued assault, which had transitioned to kicking and punching her torso as she lay on the floor, pinned against some furniture. After calming down a bit, Alexander attempted to engage in sex by putting his penis in her mouth, but stopped after noticing M.C. was not breathing. M.C. testified that Alexander helped her change out of her bloody clothing and took her to the hospital. On the way to the hospital, Alexander told M.C. to explain her injuries in a manner that did

not implicate him. M.C. testified that she initially told a story about a bar fight at Evolution, explaining she was knocked down by the crowd and injured in the melee.

{¶ 22} In explaining her initial false reports, blaming E.K. or a bar fight for her injuries, and her delay in naming Alexander as her assailant, M.C. testified that she feared Alexander because he threatened to kill her if she implicated him. M.C. also testified that Alexander was present throughout her hospital stay, with uncertainty as to where he was or when he would reappear in her room. After a hospital chaplain gave her literature that contained resources for domestic violence victims, she planned to seek assistance and move out after her release from the hospital.

{¶ 23} On cross examination, M.C. acknowledged her memory lapse in the first trial regarding the earlier incident, in which she did not remember her son was present. She also admitted she did not save any of her blood-spattered clothing and police did not secure bedding that she claimed was bloody. M.C. acknowledged she lied to her family after the incident of April 27, and told them she was in the hospital because of a car accident. Additionally, M.C. testified that she and Alexander had sex the night she returned home from the hospital, the day before she left, claiming Alexander initiated sex as his usual way of making amends after beating her. After leaving Alexander, M.C. testified that she spent the next nine months in a shelter where she received therapy and counseling, and later found work.

{¶ 24} The next witness for the state was Detective Raynard Cooper. Detective Cooper's testimony addressed the "bar fight" story, initially told by M.C. and later

recanted. He testified that he was a 28-year police veteran who worked off-duty, projecting at the Evolution Bar. He worked the night of April 27, 2021, and testified that the night was "very uneventful." On cross-examination, Cooper reiterated there were no fights at the bar the night of April 27, based on his own observation and subsequent questioning of other witnesses in response to the investigating detective's inquiry. He acknowledged that people often gathered in the parking lot when weather was nice, but these crowds cleared by 10:30 p.m. at the latest.

{¶ 25} Next, Officer Scott Histed testified about responding to M.C.'s 911 call on May 5, 2021. He testified that he met with M.C. at a car wash parking lot and she had visible bruises. Both Histed and his partner, Officer Andy Wrosek, were equipped with body cameras, and the video was published to the jury without objection. Histed testified that M.C. made no mention of a bar fight or her son's presence for either incident, and he acknowledged, on cross-examination, that M.C. was upset that children services was now involved with her son.

{¶ 26} Natalie Jones testified next. She testified as an expert in forensic nurse examinations, without objection. Jones was called to examine M.C. because the trauma team had concerns regarding possible domestic violence, based on M.C.'s initial story of the assault which "was bizarre" and prompted additional questions. Jones went through all the injuries sustained by M.C., and concluded the injuries were not consistent with being trampled in a bar fight. On cross-examination, Jones admitted she reviewed only a

portion of M.C.'s medical record and could not state with certainty how any of the injuries to M.C. occurred.

{¶ 27} The final three witnesses to testify for the state in the retrial were new witnesses. Children services investigator Julia Bomia testified regarding an interview she conducted with M.C. following a call regarding M.C.'s child. Bomia testified about her observations from that interview, indicating Alexander was present for the interview, holding M.C. in the hospital bed. She testified that Alexander informed her that he was M.C.'s main source of income and support.

{¶ 28} The next new witness was Probation Officer Doug DeWeise. He testified regarding E.K.'s possible role in an assault against M.C., indicating he supervised E.K., and E.K. seemed to be a model probationer. DeWeise received no reports of any misconduct until a Toledo detective called him in May, indicating an altercation in Toledo weeks before. E.K. had been checking in as required, and DeWeise had no knowledge of any incidents outside Allen County. DeWeise conducted an unannounced home visit on April 16 and an in-person check-in with E.K. on April 23, 2021, and DeWeise believed that E.K. was in compliance, reporting for drug screening, and maintaining employment.

{¶ 29} The final new witness, Alexander's ex-wife, M.A., testified regarding her history with Alexander, generally, and events on April 28, 2021, specifically. Much of her testimony described her relationship with Alexander. The couple dated for many

years before marrying, and M.A. described their life after the divorce was finalized in September 2020. When asked to describe the relationship, M.A. testified:

> Tumultuous. Aggressive. I would say that he was more worried about his reputation than – than anything. He's angry, and that caused a lot of problems in our relationship.

{¶ 30} M.A. met Alexander when she was 22, and at the time, she believed Alexander was a student at the University of Toledo. She indicated Alexander was "released as a student" at some point, but she was unsure of the exact date. She also stated, "There was not always truths given." Alexander portrayed himself as a college football player, but M.A. later learned he was kicked off the team and kicked out of school.

{¶ 31} Alexander and M.A. had a young daughter and agreed to meet at a neutral site in Sylvania to facilitate Alexander's weekend visitation. M.A. testified that she requested the meeting point as a change from a more remote location picked by Alexander, and because communications via phone did not work, she and Alexander began using an app recommended by family court that kept a record of their conversations, to ensure they limited their contact to co-parenting matters. M.A. indicated "using this app made me feel safer."

{¶ 32} After Alexander told M.A. about his girlfriend, M.A. asked to meet M.C., and Alexander brought M.C. to one of the exchanges. M.A. wanted to introduce herself

to M.C., as someone who would be spending time with her daughter on Alexander's weekends. M.A. had no other contact with M.C.

{¶ 33} M.A. then testified regarding the scheduled pickup on April 28, 2021. Alexander communicated to M.A. "at 3:36 p.m. on Wednesday the 28th that he would not be able to get our daughter for the arranged pickup time." M.A. was already on the way to the meeting place because pickup was scheduled at 4:00 p.m. M.A. testified that she was frustrated about the late notice because she had awakened their daughter from a nap to meet Alexander on time. M.A. then referenced her conversations with Alexander, printed out from the app, for April 28, and read Alexander's message, which stated:

> I am at the hospital. [M.C.] and I were in a car accident. I won't be able to get her. I am waiting to be discharged and don't know how long it's going to take.

M.A. responded with disbelief, and Alexander responded, "yeah, a car accident. It is ridiculous. You a piece of work. I couldn't even find my phone." M.A. then started asking Alexander questions, seeking details of his car accident, asking three times where the accident occurred. Instead of providing details, Alexander responded with insults and called M.A. crazy.

{¶ 34} M.A. continued to question Alexander regarding the accident, asking if it was caused by drunk driving. Alexander responded by pointing out M.A.'s family members who drink and drive, and then sent a photograph of himself wearing a hospital

visitor sticker on his shirt. M.A. asked Alexander about the visitor sticker, and questioned why he was not wearing a wristband. Alexander did not respond.

{¶ 35} The next communication recorded by the app occurred much later, at 10:16 p.m. The context of that message indicated a phone call to Alexander's daughter, earlier in the evening. M.A. testified that, during the phone call, he yelled at M.A. "saying how dare you tell my daughter that I was in a car accident. How dare you tell my daughter that. I didn't want to get her." M.A. testified she never did "those things." She did not believe Alexander had been in an accident.

{¶ 36} M.A. testified that she responded as she often did when Alexander yelled at her in front of their daughter, asking him to stop and telling him the yelling was not good for their child. She also testified that she told Alexander she prays he will change, because their daughter deserves better. The trial court admitted the printout of the messages from the app, which recorded all messages between April 7 and May 5, 2021, over the objection of Alexander's trial counsel. The text messages were not published to the jury at that time, however, with the jury hearing only the testimony of M.A. regarding the text messages related to the missed visitation of April 28.

{¶ 37} Alexander's trial counsel asked no questions on cross-examination.

{¶ 38} The state rested without calling any of the remaining witnesses identified on their witness list. Alexander moved for acquittal pursuant to Crim.R. 29, and the trial court denied the motion.

{¶ 39} Alexander was the first witness to testify for the defense. He testified he saw the injuries on M.C. but did not cause them. He noticed the first set of injuries after she dropped her son off to her ex, E.K., either on April 17 or April 24, 2021. He also claimed M.C. got into fights and bar fights, and she fought men and women. Much of Alexander's testimony portrayed M.C. as an unstable and aggressive person, contrasted with his own qualities of stability and calm.

{¶ 40} Alexander testified that he had M.C.'s son on April 24, 2021, while she attended a funeral, although he questioned where she really was that day. Alexander and M.C.'s child spent time at the house of Alexander's friend, and when M.C. joined them around 10 p.m., he and M.C. got into an argument before M.C. took her son and left for home. Alexander stated he got home later and went to bed. He indicated he was "checked out" of the relationship at that point but M.C. insisted she could not be kicked out; she had lived there too long and got her mail there. Alexander testified that he asked M.C. to leave, and in March she did leave for a few hours before breaking a window on the door to get back in. Alexander testified that, although he asked M.C. to move in with him in January, M.C. never had her own key to the home the entire time she stayed with him.

{¶ 41} Alexander testified that his relationship with M.C. was a physical one, and M.C. liked to be choked during sex and they always started out with oral sex. "That's all she ever wanted to do, and at times I didn't want it and she would get mad at me for it." On the night of April 27, 2021, Alexander testified he was the first to arrive home and he

was not drunk. He testified that he was already in bed when M.C. came in, they had sex, and then he fell back asleep. Sometime later he awoke to M.C. sitting on the edge of the bed, saying she could not breathe or catch her breath. He thought she was having a panic attack and tried to calm her. M.C. then went into the bathroom and Alexander lay back down. He next remembered waking to the sound of M.C. coughing loudly and roughly, begging to be taken to the hospital. He testified he changed her into gray sweats and a yellow hoodie, collected M.C.'s phone and keys, and drove her to the hospital. He called off work to be with M.C.

{¶ 42} Alexander acknowledged that M.C. was seriously hurt. He claimed he took two days off from work to be with her but was never in the room when doctors or nurses spoke to her. He was present when the children services caseworker interviewed M.C. He slept some nights in a chair next to M.C.'s bed, and other nights in the car in the hospital parking lot.

{¶ 43} The state sought to question Alexander regarding why he left college, his felony charges, and his history of domestic violence in relationships, based on Alexander's own testimony on direct examination. The trial court noted the careful articulation of questions, specifically asking about convictions and not conduct, found no doors clearly opened on any of the topics, and denied the state's request.

{¶ 44} On cross examination, Alexander testified M.C. was not injured when she left for the funeral or wherever she went on April 24, then testified she was likely injured on April 17, 2021, by E.K., and covered the bruises with makeup. Alexander also

testified that on April 27, 2021, it was dark when M.C. came home and he did not see any injuries. He testified he and M.C. had sex and she woke him up some time after indicating she could not breathe. Alexander attributed the delay between M.C.'s injuries and her complaint of pain to M.C.'s intoxication that night.

{¶ 45} Alexander also testified he was trying to get rid of M.C. and did not consider her a girlfriend anymore, but he stayed with her two days at the hospital. Although Alexander admitted that staying with M.C. resulted in two unexcused absences from work, adding to his infractions at work and risking his job, Alexander also claimed that he had smoothed it over with his supervisor and planned to use FMLA leave to avoid termination. In response to M.A.'s testimony, Alexander admitted he lied to M.A. about being in a car accident or being injured and in the hospital for treatment.

{¶ 46} The prosecutor challenged Alexander about contradictions in his testimony. For example, Alexander was questioned regarding his assertion that he was through with M.C. but also devoted to her during her hospital stay, or that he took unauthorized time off from work, but the absences were permitted. As to the injuries of April 27, the prosecutor challenged Alexander's claim that M.C. was already injured when she returned home, referencing his testimony in the first trial.

> Q: You testified previously that when [M.C.] came home she was having trouble breathing. So she was already having trouble breathing when she got home?
>
> A: No.

Q: On April 27th?

A: No.

Q: She wasn't?

A: No, she was not.

Q: [M.C.] wasn't injured when she arrived home on April 27, 2021?

A: She was already injured previously, but I don't know other injuries, because when she came in that night it was dark, and she just came in, and we had sex.

Q: She was fine when she got home, is that your testimony?

A: I'm not going to say she was fine but –

Q: But she wasn't struggling to breathe?

A: She wasn't struggling to breathe.

Q: Her lung wasn't collapsed yet when she arrived home April 27th?

A: No. What I think was I think her alcohol started to wear off and the pain started to arise.

Q: That's what you think, Mr. Alexander.

A: Yes.

Q: So when she gets home, no sign of injury. Everything is fine. The two of you have sex. Correct?

A: That's correct.

Q: That's what you're telling us? You testified previously that [M.C.] performed oral sex on you on April 27th and was struggling to breathe while she did so, correct?

A: That's correct.

Q: [M.C.] was having a hard time breathing while you had your penis in her mouth?

A: That's correct. I don't think so, but yes. That's correct.

Q: And it was soon after that [M.C.] was struggling to breathe so much that she needed to go to the hospital, correct?

A: Not soon after, but awhile after, yes.

Q: Awhile after. How long?

A: Hour or two.

Q: An hour or two into the beating?

A: I never touched her.

Q: Never touched her. But you want the jury to believe that [M.C.] was home for several hours with you with these significant injuries, with a lacerated liver, and a collapsed lung, before it became clear that she needed medical treatment?

A: I never seen or knew anything about it. I never knew where she went. I never knew who she was with. I never knew she went to a parking lot party.

All she told me she went to Don Juan's. I don't know anything about what happened to her.

Q: You don't know anything. All I know is she's home for a couple hours. Everything seems fine. She is struggling to breathe while we have oral sex, but it takes several hours for those significant of injuries to really take effect, for the alcohol to wear off if there is a pain to settle in, is that right?

A: Alcohol and maybe drugs.

After cross-examination, trial counsel asked no questions on re-direct.

{¶ 47} The defense next presented two witnesses to corroborate Alexander's claims related to his work situation and property damage he claimed M.C. caused when she broke into the home, both issues unrelated to the injuries M.C. received on April 27. He called a human resources representative from the Toledo office of his employer and the property manager for his rental. The human resources witness had no knowledge of the documents the defense sought to introduce regarding Alexander's absences. The property manager brought a dated work order for repair of the door's window, a document never produced in discovery, and no other testimony placing the broken window on a timeline to demonstrate relevance. Neither document was admitted into evidence.

{¶ 48} The defense then called the emergency room doctor who treated M.C., Dr. Alisa Roberts. Dr. Roberts acknowledged that the injuries M.C. sustained would be

painful, but the pain could be dulled by intoxication. On cross examination, the doctor noted in M.C.'s chart that there was no indication of intoxication.

{¶ 49} The defense rested after Dr. Roberts' testimony, and the state called no rebuttal witnesses.

{¶ 50} The trial court then addressed any pending motions before finalizing the jury instructions with counsel. Alexander's trial counsel indicated a request for a limiting instruction regarding prior acts, sent by email to the trial court's staff attorney and opposing counsel. Alexander's trial counsel acknowledged they did not file a requested jury instruction, but instead orally requested the trial court to give the standard jury instruction regarding prior acts. Trial counsel argued that this instruction was necessary due to the text exchange within Exhibit 35 that referenced a prior history of domestic violence between Alexander and his ex-wife, M.A. The trial court had previously admitted Exhibit 35, over a defense objection to the hearsay contained within the document, but had not published the contents of the exhibit to the jury. M.A.'s testimony, furthermore, did not address prior domestic violence committed by Alexander against her.

{¶ 51} The following exchange then occurred between the trial court and Alexander's trial counsel:

> The Court:
>
> There is a couple ways of handling this. The whole document is marked as State's Exhibit 35 and it is part of the record, and when any

record that we admit many times there is areas that should just be blacked out or censored or edited. That could be one of those. If I give an instruction other prior convictions the language in that is evidence was received about the commission of crimes, wrongs, or other acts, so that is articulating that we received some sort of evidence in connection to that, meaning there was put in front of the jury evidence of other crimes, wrongs, or acts other than the offenses charged here.

It doesn't seem to me that that actually occurred unless we put this document in without editing, and if I give that instruction then I'm calling attention to something that didn't occur and saying that Mr. Alexander had evidence about his prior crimes, wrongs, or bad acts put into the record, which I don't think that's accurate.

So I mean you're asking for an instruction that seems like it is out of place. I'm not sure of the strategy on that, but if you look at it the way I am articulating that what are you really looking for?

[Trial Counsel]:

I would prefer the redaction of Mr. – of [M.A.'s] statement of that and his response regarding you know you hit me. You slapped me around. You are a big girl. And then goes on to that response.

The trial court then asked the prosecution regarding redaction, and directed Alexander's trial counsel to note all the instances in Exhibit 35 counsel believed should be redacted.

{¶ 52} After lengthy discussion off the record, the trial court addressed the matter further.

> The Court:
>
> We have been talking about adding instruction for other acts or prior convictions. We've been on the record and off the record throughout that, but that was largely because we're going through State's Exhibit 35, which is a copy of communications on a communication app for shared parenting from Mr. Alexander and his ex-wife, [M.A.].
>
> There were three entries that were lines from both of the two engaged in this conversation that were being objected to and causing concern, which caused the Defense to request the other acts and prior convictions instruction.
>
> After reading [O.J.I] 401.251 the Court's feeling was that draws more attention to the concerns that the Defense has than simply excising the lines out of Exhibit 35 that have not been read into the record by either side and have not been presented to the jury.
>
> There was initial objection by the State. I believe there is still objection on that. However, I indicated a resolution could be the excising of those lines that had not been utilized in testimony nor presented to the jury.

> We have decided that there are three such entries, and the parties have agreed that if the Court is going to excise anything that the entire sentence of that entry, whether it be sent by [M.A.] or Mr. Alexander, should just be excised as opposed to editing the concerning portions of the sentence out of that entry.

The prosecution and defense both agreed on the record to admit a redacted version, Exhibit 35A, for the jury to consider during deliberation.

{¶ 53} Alexander's trial counsel, however, maintained a request for the instruction, based on the testimony that was adduced at trial from M.A. regarding Alexander's aggressive character despite counsel's lack of contemporaneous objection to this testimony. After the close of testimony, trial counsel noted, "[M.A.]'s not the victim in this case. The only relevant testimony was the lying about the car crash." Counsel suggested the trial court could instruct, "Any character testimony by the witness – particular witness who testified as to Defendant's character – not to be weighed in deciding the guilt or innocence of this case against [M.C.]."

{¶ 54} In response, the trial court noted the lack of "an appropriate copy of a requested instruction" in advance, such as the day before when the jury was released so such matters could be addressed, and the fact "the jury is in the jury room waiting to come out for closing arguments." The trial court denied the request for a potential jury instruction, noting the time had passed and trial counsel failed to submit a proposed instruction in writing.

{¶ 55} After addressing the defense objection and denying the request for a limiting instruction, the defense formally rested in front of the jury. The case then proceeded to closing argument.

{¶ 56} In closing, the state stressed M.C.'s testimony and the acknowledged evidence of serious injury following the second incident. The state also pointed out the many contradictions exhibited by Alexander's testimony and Alexander's attempts to portray M.C. as the cause of her own injuries. The state referenced Exhibit 35A in closing, noting that M.A. called Alexander on his lie about being admitted to the hospital, followed by "pages and pages" of an exchange in which Alexander tried to "make his ex-wife look like the liar and the bad guy when he was the one lying in the first place."

{¶ 57} The defense emphasized the many stories M.C. told before accusing Alexander, blaming both assaults on her ex, E.K. Defense counsel argued that the first injuries were caused by E.K., "no question," and the later injuries were likely also his fault, too. The defense also argued that M.C. exaggerated her injuries in her testimony, and that the police did not conduct a proper investigation into each assault charge with insufficient investigation to corroborate all of M.C.'s claims regarding the assaults.

{¶ 58} The jury acquitted Alexander of count two, felonious assault arising from an incident on or about April 24, 2021. The jury found Alexander guilty of count three, felonious assault arising from the incident on April 27, 2021.

B. Admission of Evidence

{¶ 59} In challenging the conviction for felonious assault in count three, Alexander argues his trial counsel was ineffective for failing to cross-examine his ex-wife, M.A. He also argues that the trial court erred in admitting the redacted Exhibit 35. We address each argument in turn.

1. Ineffective Assistance of Counsel

{¶ 60} In his first assignment of error, Alexander argues his trial counsel was ineffective in failing to object to M.A.'s testimony or to cross examine her. He argues that "[a] reasonable probability existed that [M.A.]'s testimony, the key difference between the trials, changed the outcome."

{¶ 61} The right to counsel, under the Sixth Amendment, exists "to protect the fundamental right to a fair trial." *Strickland v. Washington,* 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> "When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Lytle* [48 Ohio St.2d 391, 396–397, 358 N.E.2d 623 (1975)]. This standard is

essentially the same as the one enunciated by the United States Supreme Court in [*Strickland*].

State v. Bradley, 42 Ohio St.3d 136, 141-42, 538 N.E.2d 373 (1989).

{¶ 62} Pursuant to *Strickland,* a claim of ineffective assistance of counsel first requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Bradley* at 142, quoting *Strickland* at 687-688. Trial counsel is entitled to "a strong presumption" that their "conduct falls within the wide range of reasonable professional assistance," with a "highly deferential" scrutiny of counsel's representation. *Bradley* at 142, quoting *Strickland* at 689. "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation, and, in addition, prejudice arises from counsel's performance." *Bradley* at 142.

{¶ 63} Once an error by counsel is demonstrated, "the 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." *Bradley* at 146, quoting *Strickland* at 694. In other words, "the deficient performance must have been so serious that, 'were it not for counsel's errors, the result of the trial would have been different.'" *State v. Welninski*, 2018-Ohio-778, 108 N.E.3d 185, (6th Dist.) ¶ 69, quoting *Bradley* at 141–142.

{¶ 64} Alexander argues that the testimony of M.A., except for testimony regarding his lie about being in the hospital, constituted improper character evidence under Evid. R. 404(B)(1). In the alternative, Alexander argues that Evid.R. 608(A)

precludes evidence regarding his credibility through specific instances of conduct or extrinsic evidence. In response, the state argues that M.A.'s testimony was introduced to address Alexander's lie about being admitted to the hospital, with the lie demonstrating consciousness of guilt.

a. Character and Other Acts Evidence

{¶ 65} Character evidence is addressed under Evid.R. 404(A), which "is essentially a rule of relevancy." *Toledo v. Schmiedebush,* 192 Ohio App.3d 402, 2011-Ohio-284, 949 N.E.2d 504, ¶ 39 (6th Dist.), citing *State v. Horsley*, 10th Dist. No. 05AP–350, 2006-Ohio-1208, ¶ 18. Pursuant to Evid.R. 404(A)(1), an accused is permitted to introduce character evidence, "but only when such evidence is pertinent to the crime at issue," and refers to character traits "that are inconsistent with commission of the alleged offense." *Id.*, citing *State v. Hale*, 21 Ohio App.2d 207, 215, 256 N.E.2d 239 (10th Dist.1969) (additional citations omitted). The prosecution may introduce character evidence "to rebut the same." *See* Evid.R. 404(A)(1).

{¶ 66} Other acts evidence is addressed under Evid.R. 404(B)(1), which precludes admission of evidence of other acts "to prove a character trait in order to demonstrate conduct in conformity with that trait." *State v. Williams,* 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 16, citing *State v. Lowe,* 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994) (additional citation omitted.). However, pursuant to Evid.R. 404(B)(2), such evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

{¶ 67} Alexander refers to character evidence and other acts evidence as if they are interchangeable, but M.A.'s testimony referenced her experience with Alexander's aggressive and angry behavior during their marriage, and after the divorce, as part of M.A.'s interactions with Alexander concerning their daughter. Alexander argues that the state "took great pains to draw parallels between Mr. Alexander's relationship with [M.A.] and his relationship with M.C., thereby seeking improperly to demonstrate actions in conformity." There was no testimony, however, that Alexander assaulted M.A. or was physically abusive, and the trial court excised all references to such conduct from the state's Exhibit 35A. The trial court, furthermore, prevented the state from inquiring into Alexander's prior felony charges or his exit from college amidst allegations of domestic violence.

{¶ 68} Propensity evidence, introduced to "prove the character of a person in order to show action in conformity therewith," is not admissible. *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 21, citing *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994); Evid.R. 404(B). Here, Alexander argues that M.A.'s testimony introduced propensity evidence, but he fails to connect that testimony to the two felonious assault charges addressed at trial. Instead, Alexander focuses on M.A.'s depiction of Alexander as argumentative, with no support for the argument that M.A.'s testimony demonstrated a propensity for physical assault. Considering the record, we do not find M.A.'s testimony introduced any evidence regarding Alexander's propensity to commit felonious assault.

b. Credibility Evidence

{¶ 69} In the alternative, Alexander argues that the state introduced M.A.'s testimony to preemptively attack his credibility. Evid.R. 608(A) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

{¶ 70} In reviewing M.A.'s testimony, it is clear she indicated Alexander has a reputation for lying in the context of her challenge to a specific assertion made by Alexander on April 28, 2021, which M.A. believed to be untruthful. M.A. immediately questioned Alexander's reason for canceling the pickup of their daughter, based on her experience with Alexander. Alexander stuck to his lie of a car accident, but later admitted he lied, ostensibly to spare M.C. embarrassment by telling M.A. why she was really in the hospital. The rest of M.A.'s testimony, referencing his reputation, was admitted without objection by his trial counsel.

{¶ 71} Whether M.A.'s testimony constituted improper character evidence or other acts evidence or acted as a preemptive impeachment of his credibility, Alexander appears to agree that the testimony demonstrating Alexander lied about a car accident was properly admitted. We have consistently found lies or deceptive conduct by an

accused, relative to the charged conduct, to be admissible as consciousness of guilt. *See, e.g., State v. Zimbeck*, 195 Ohio App.3d 729, 2011-Ohio-2171, 961 N.E.2d 1141, ¶ 63 (6th Dist.), citing *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001) (attempting to establish a false alibi "strongly indicates consciousness of guilt."); *State v. Knight*, 6th Dist. Erie No. E-21-017, 2022-Ohio-1787, ¶ 51 (the defendant, accused of sex offenses, did not immediately open the door to police and denied there was a child in his home, admissible as consciousness of guilt).

{¶ 72} In reviewing the record, the remainder of M.A.'s testimony falls somewhere between the overwhelming attack on Alexander's reputation and credibility, as claimed by Alexander, and the negligible reference to bad character, as argued by the state. Considering M.A.'s testimony in its entirety, M.A. opined on Alexander's reputation for telling lies and addressed his anger issues and his need to always be right and protect his reputation. Trial counsel did not object and chose not to cross examine M.A.

{¶ 73} As an initial matter, "whether to cross-examine witnesses and the extent of that cross-examination is a tactical matter committed by the discretion of trial counsel and cannot form the basis for an ineffective assistance of counsel claim." *State v. Ellison*, 6th Dist. Lucas No. L-02-1292, 2003-Ohio-6748, ¶ 33, citing *State v. Flors*, 38 Ohio App.3d 133, 139, 528 N.E.2d 950 (8th Dist.1987). We presume the decision to forgo cross- examining M.A. was part of trial counsel's sound trial strategy; Alexander must overcome this presumption to justify a finding of ineffective assistance of counsel. *State*

v. Mohamed, 151 Ohio St.3d 320, 2017-Ohio-7468, 88 N.E.3d 935, ¶ 18, citing *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995), citing *Strickland* at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 74} In this case, Alexander admitted to the lie about a car accident, the most pertinent aspect of M.A.'s testimony, and M.A.'s testimony clearly established that she and Alexander were dealing with custody issues following a recent divorce. Alexander presents no argument that negates a presumption of sound trial strategy, arguing instead that the state must identify a reasonable trial strategy in order to defeat a claim of ineffective assistance based on the failure to cross-examine M.A. The law requires Alexander to overcome the presumption, however. *See Mohamed* at ¶ 18.

{¶ 75} Additionally, even if Alexander demonstrated that trial counsel was ineffective in failing to object to M.A.'s testimony, Alexander must also show that such failure affected the outcome of the trial to merit reversal based on ineffective assistance of counsel. The failure to demonstrate either deficiency or prejudice will defeat a claim for ineffective assistance of counsel. *Strickland* at 687. Thus, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. * * * If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland* at 697.

{¶ 76} Alexander argues that counsel's failure to object to testimony bolstered the credibility of M.C. Such a failure to object, bolstering credibility, has been deemed as

ineffective assistance of counsel "where resolution of factual issues turns solely upon the credibility of those witnesses." *State v. Nichols*, 116 Ohio App.3d 759, 765, 689 N.E.2d 98 (10th Dist.1996). M.A.'s testimony did match the testimony of M.C. in some aspects, in that both women described identical lying behavior of Alexander. Considering the record, however, we do not find the case rested solely on M.C.'s versus Alexander's credibility.

{¶ 77} At trial, there was no dispute that M.C. had sustained serious injuries; the dispute concerned the identity of the assailant, or how M.C. sustained her injuries. M.C. testified that she reported her ex, E.K. as the assailant in the first assault and attributed her later injuries to being caught in a bar fight. She subsequently accused Alexander of both assaults and testified at trial regarding each incident. The jury had more evidence, however, than M.C.'s testimony.

{¶ 78} Here, the jury clearly weighed M.C.'s credibility and Alexander's credibility, along with the rest of the evidence, and found Alexander guilty of only the second assault on April 27, 2021. The jury resolved the factual issues based on M.C.'s credibility and also Alexander's credibility, considering credibility in the context of all the evidence, including the medical record that all parties acknowledged demonstrated painful injuries. The fact that deliberations produced a different verdict as to each count, moreover, is indicative of a jury that weighed the testimony and evidence, with no indication that Alexander was actually prejudiced by the admission of the M.A.'s testimony, considering the jury's acquittal on count two. *See State v. Ridley,* 6th Dist.

Lucas No. L-10-1314, 2013-Ohio-1268, ¶ 40 (evidence of past acts did not prejudice jury where they returned a guilty verdict on only one of three counts); *see also State v. Sergent,* 3d Dist. Seneca No. 13-19-20, 2019-Ohio-4717, ¶ 32 ("the split verdict in the instant case supports the conclusion that the jury critically weighed the testimony and evidence, accepting some and rejecting others.").

{¶ 79} Considering the record, we find Alexander's first assignment of error not well-taken.[1]

2. Admission of Exhibit 35

{¶ 80} In his second assignment of error, Alexander argues that the trial court improperly admitted the state's Exhibit 35, containing inadmissible character evidence. Alexander contends the messages within the exhibit were inflammatory and prejudicial, and could lead to inference of domestic violence between Alexander and M.A.

{¶ 81} We review the trial court's admission of evidence under an abuse of discretion standard. *State v. Morris,* 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 22. An abuse of discretion connotes that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

[1] We note that Alexander attempted to assert additional assignments of error, with supplemental argument, relegated to footnotes throughout his brief. We limit our review to the assignments of error asserted according to App.R. 16(A)(3), as provided by App.R. 12(A)(2) ("The court may disregard an assignment of error presented for review if the party raising it * * * fails to argue the assignment separately in the brief, as required under App.R. 16(A).").

{¶ 82} Alexander challenges the trial court's admission of Exhibit 35. During trial, Alexander's trial counsel raised an objection to that exhibit, but was overruled. The trial court, however, revisited its ruling in response to Alexander's request for a curative instruction, addressing specific references to conduct within the unredacted Exhibit 35. The trial court carefully reviewed the unredacted Exhibit 35 and suggested alternatives to counsel, as follows:

> There is a couple ways of handling this. The whole document is marked as State's Exhibit 35 and it is part of the record, and when any record that we admit many times there is areas that should just be blacked out or censored or edited. That could be one of those. If I give an instruction other prior convictions the language in that is evidence was received about the commission of crimes, wrongs, or other acts, so that is articulating that we received some sort of evidence in connection to that, meaning there was put I front of the jury evidence of other crimes, wrongs, or acts other than the offenses charged here.
>
> It doesn't seem to me that that actually occurred unless we put this document in without editing, and if I give that instruction then I'm calling attention to something that didn't occur and saying that Mr. Alexander had evidence about his prior crimes, wrongs, or bad acts put into the record, which I don't think that's accurate.

So I mean you're asking for an instruction that seems like it is out of place. I'm not sure of the strategy on that, but if you look at it the way I am articulating that what are you really looking for?

In response to the trial court's query, Alexander's trial counsel opted for the redactions and the prosecutor consented to a redacted Exhibit 35A. The trial court then confirmed with the parties, as follows:

THE COURT: Before doing that we will have to make sure everyone is in agreement that this Exhibit 35 as amended is acceptable to both parties.

PROSECUTOR: Yes, Your Honor.

TRIAL COUNSEL: Yes, Your Honor.

{¶ 83} Because Alexander ultimately agreed to admission of Exhibit 35A, and the jury never viewed Exhibit 35, Alexander has waived all but plain error relative to admission of Exhibit 35A.[2] *State v. Pelmear,* 6th Dist. Fulton Nos. F-21-003, F-21-006, 2022-Ohio-1534, ¶ 43, citing *State v. Rios,* 6th Dist. Williams No. WM-13-004, 2014-Ohio-341, ¶ 32 (additional citations omitted.). Plain error is error "affecting substantial rights." Crim.R. 52(B). "Notice of plain error under Crim.R. 52(B) is to be taken with

[2] In his appellant's brief, Alexander consistently identifies Exhibit 35 as the improperly admitted exhibit, despite the fact his trial counsel later consented to admission of a redacted Exhibit *35A.* In his reply brief, Alexander argues that, even with redactions, the exhibit contained improper character evidence. However, Alexander fails to address the lack of objection prior to admission, or application of the plain error standard on appeal.

the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Pelmear* at ¶ 43, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶ 84} Alexander argues that the text messages contained within the redacted exhibit were inflammatory and portrayed Alexander as a bad father and hinted at domestic abuse. Similar to his argument concerning M.A.'s testimony, Alexander argues that the text messages introduced improper character evidence that was "especially prejudicial when the case turns on the jury's assessment of the defendant's and complainant's relative credibilities." However, as we noted in resolving Alexander's first assignment of error, the case did not rest solely on M.C.'s versus Alexander's credibility.

{¶ 85} Alexander testified in both trials, and his testimony was often contradictory. He was checked out of the relationship with M.C. but also so devoted to her while she was in the hospital that he missed work to stay with her, risking his job. Most significantly, however, Alexander testified that M.C. was already injured when she returned home after Taco Tuesday, and despite the admittedly painful injuries she had incurred, he did not notice any injury and engaged in sex with M.C., only to notice her distress hours later. While Alexander explained this unawareness of prior injury based on M.C.'s intoxication, the record demonstrated M.C.'s medical providers on the 27th did not note intoxication in her medical chart. Considering this record, there was additional evidence, besides the testimony of M.C. and Alexander, for the jury to consider in

resolving any credibility issues regarding the assault on April 27. We, therefore, do not find the necessary "exceptional circumstances" meriting reversal for plain error.

{¶ 86} Accordingly, we find Alexander's second assignment of error not well-taken.

C. Curative Instruction

{¶ 87} In his third assignment of error, Alexander argues the trial court erred in denying trial counsel's renewed request for a curative instruction regarding character testimony. Based on the record, trial counsel did not submit a proposed instruction in writing, but instead made an oral request for the following:

> That any character testimony by the witness – particular witness who testified as to Defendant's character should be limited and not to – not to be weighed in deciding the guilt or innocence of this case against [M.C.]

In response, the trial court noted the late hour, considering proposed instructions had been distributed to counsel the day before and the case was poised for closing argument. The trial court also took issue with the lack of specific citations for the proposed instruction. In denying inclusion of trial counsel's character instruction, the trial court also questioned the relevance of the instruction, stating:

> If someone is going to base a decision on whether or not Mr. Alexander committed two acts of felonious assault to [M.C.] because of his salty relationship with his ex-wife I think that's stretching it to a point that's not realistic.

So right now I am going to deny the addition of a proposed jury instruction that is not even fully articulated, and that's just the fact of the record right now.

{¶ 88} A trial court must "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Roberts,* 2023-Ohio-142, 206 N.E.3d 144, ¶ 93 (6th Dist.), quoting *State v. Comen,* 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. We review a trial court's decision, denying a requested instruction, for an abuse of discretion. *Roberts* at ¶ 93, citing *State v. Adams,* 144 Ohio St.3d 428, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240 (additional citation omitted.).

{¶ 89} Here, the record demonstrated that the trial court considered the possible effect of providing Alexander's character instruction, and in its sound discretion, declined to include the proposed instruction in the jury charge. Considering the evidence adduced at trial, we find no abuse of discretion by the trial court. Appellant's third assignment of error, accordingly, is not well-taken.

D. Cumulative Error

{¶ 90} In his fourth assignment of error, Alexander argues that the cumulative effect of trial errors deprived him of a fair trial. The cumulative error doctrine requires reversal of a conviction "when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial court error does not individually constitute cause for reversal." *State v. Alliman,* 2023-Ohio-206,

206 N.E.3d 765, ¶ 105 (6th Dist.), quoting *State v. McKelton,* 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 321 (additional citation omitted.).

{¶ 91} In order to find cumulative error, "there must first be a finding that multiple errors were committed at trial." *Alliman* at ¶ 105, quoting *State v. Moore,* 6th Dist. Wood No. WD-18-030, 2019-Ohio-3705, ¶ 87. Where no instances of harmless error are found, however, as in this case, the cumulative error doctrine does not apply. *State v. Leu,* 2019-Ohio-3404, 142 N.E.3d 164, ¶ 56, citing *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). Accordingly, Alexander's fourth assignment of error is not well-taken.

E. Reagan Tokes Law

{¶ 92} In his fifth and final assignment of error, Alexander argues the trial court erred in sentencing him to an indefinite prison term under the Reagan Tokes Act, R.C. 2967.261. Alexander does not argue specific error regarding his sentence, but instead notes that we have determined the law is constitutional and the Ohio Supreme Court has accepted review of all three constitutional challenges previously argued in other cases: that Reagan Tokes violates the separation of powers doctrine, violates the right to a jury trial, and violates the right to due process. *See State v. Simmons,* 163 Ohio St.3d 1492, 2021-Ohio-2270, 169 N.E.3d 1273; *State v. Hacker*, 161 Ohio St.3d 1449, 2021-Ohio-534, 163 N.E.3d 585. Alexander asserts "these same constitutional challenges to preserve these issues in the event that the Supreme Court holds the [Reagan Tokes law] is unconstitutional."

{¶ 93} On July 26, 2023, after briefing was complete in the appeal, the Ohio Supreme Court issued its decision in *State v. Hacker*, Slip Opinion 2023-Ohio-2535, finding the Reagan Tokes law constitutional, and determining the law does not violate the separation of powers doctrine, the right to a jury trial, and the right to due process. *Hacker* at ¶ 41. Considering this ruling, as well as the lack of argument relative to any specific error not otherwise addressed by the Supreme Court, we find Alexander's fifth and final assignment of error not well-taken.

IV. Conclusion

{¶ 94} Based on the foregoing, we affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs of the appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, J. _____
JUDGE

Gene A. Zmuda, J. _____
CONCUR.
JUDGE