[Cite as *State v. Rice*, 2022-Ohio-3291.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KYLE RICE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0085

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 19 CR 158

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, and *Atty. Edward A. Czopur*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Rhys B. Cartwright-Jones, 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: September 13, 2022

D'Apolito, J.

{¶1} Appellant, Kyle Rice, appeals his convictions for aggravated murder, in violation of R.C. 2903.01(A)(F), an unclassified felony, and murder, in violation of R.C. 2903.02(A)(D), an unclassified felony, both with accompanying firearm specifications. The trial court merged the murder convictions and the firearms specifications, then imposed a sentence of twenty-five years to life on the aggravated murder conviction, and three years on the firearm specification related to the aggravated murder conviction, for an aggregate sentence of twenty-eight years to life.

{¶2} Appellant advances two assignments of error. First, Appellant contends that he suffered material prejudice with respect to both convictions based on the trial court's refusal to admit evidence that the victim, who was the mother of three of his ten children, had physically attacked him with a knife and damaged his automobile in 2014, and damaged his automobile again in 2016. Second, Appellant argues that there was insufficient evidence of prior calculation and design to sustain his aggravated murder conviction. For the following reasons, Appellant's convictions are affirmed.

FACTS AND PROCEDURAL HISTORY

{¶3} Two accounts of the events that occurred in the early-morning hours of February 8, 2019 and led to the shooting death of 28-year-old Danekua Bankston were offered at trial. Danekua's sister, Dajanae Bankston, testified on behalf of the state, and Appellant was the sole witness for the defense.

{¶4} Dajanae testified that she, Danekua, and the three children Danekua shares with Appellant – Kyle Jr. ("KJ"), then-age two; Kamaira, then-age seven; and Kyrie, then-age six – spent the evening of February 7, 2019 at the home of Dajanae's and Danekua's mother. They returned to Danekua's apartment at 2947 Oregon Avenue in Youngstown, Ohio at roughly 11:00 p.m.

{¶5} Upon returning to the apartment, Danekua sent the children to bed. Kamaira and Kyrie retired to their respective bedrooms, while KJ retired to Danekua's bedroom, where he regularly slept in Danekua's bed.

{¶6} While Danekua was styling Dajanae's hair, Danekua received several telephone calls from Appellant on her mobile telephone, however, his number was

blocked. When Danekua attempted to return Appellant's calls, he did not answer. In an effort to connect with Appellant, Danekua asked Dajanae to call him. Dajanae obliged, but Appellant did not answer Dajanae's call.

{¶7} After Danekua finished styling Dajanae's hair, Appellant "called [Danekua] private," (Trial Tr., 254), that is, he employed the "star 67" process, which hides a caller's identity when an outgoing phone call is made on a mobile telephone. Danekua answered and the two arranged for Appellant to visit the apartment. Appellant was already present at the Oregon Avenue apartment building when Danekua agreed to admit him, because he arrived as soon as he and Danekua completed their telephone call.

{¶8} Appellant arrived carrying a black backpack. Dajanae, who had known Appellant for ten years, testified that she had never before seen the black backpack. (However, Detective Michael Lambert of the Youngstown Police Department, who investigated Danekua's murder, testified that Dajanae told him during an interview immediately following the shooting that Appellant regularly carried the backpack.)

{¶9} According to Dajanae's testimony, Appellant arrived within a few minutes of the stroke of midnight, at which time Appellant and Danekua extended birthday greetings to Dajanae, who turned nineteen on February 8, 2019. Based on mobile phone records, Detective Lambert testified that Appellant placed his final telephone call to Danekua, that is, the "star 67" call, at 11:50 p.m. on February 7, 2019.

{¶10} Appellant and Danekua proceeded to the second floor of the apartment to Danekua's bedroom. Dajanae remained on the first floor fielding birthday messages and creating videos on her mobile telephone.

{¶11} Dajanae was "Facetiming" when she heard what she described as Danekua's "panic scream." (*Id.*, 256.) Dajanae dropped her mobile telephone with the Facetime call still connected and ran up the stairs. When she got to Danekua's bedroom door, Appellant slammed the door and held his body against it.

{¶12} On cross-examination, Appellant's counsel asked Dajanae if the couple was "yelling and screaming and fighting." (*Id.*, 267.) Dajanae responded that they were not fighting. The only thing she heard Danekua say was, "ask NaeNae." (*Id.*)

{¶13} Dajanae ran down the stairs to retrieve her mobile telephone and dialed 9-1-1 (but did not press the "send" button), then ran back up the stairs. When Dajanae

reached the top of the stairs, she heard Danekua say, "Kyle, don't shoot, don't shoot," and then Dajanae heard five or six gunshots – "pop, pop, pop, pop." (*Id.*, 259.) Two-year-old KJ was present in the bedroom when his mother sustained eight gunshot wounds.

{¶14} Dajanae ran back down the stairs, discontinued the Facetime call, and completed the call to 9-1-1. Detective Lambert testified that he responded to a telephone call placed between midnight and 1:00 a.m. The recording of the 9-1-1 call, which was admitted into evidence, established that the call was received at 00:51:29 hours on February 8, 2019. Therefore, Appellant was present at the Oregon Avenue apartment for roughly one hour before the shooting.

{¶15} Dajanae stood by the front door after she completed the 9-1-1 call because she did not want to leave the children. Shortly thereafter, Appellant descended the stairs, while "putting stuff in his backpack back." (*Id.*, 260.) Appellant looked at Dajanae, then Appellant ran out of the apartment through the front door.

{¶16} Dajanae testified that she thought that Appellant was going to kill her and she was afraid for her life. However, Dajanae conceded that she did not see anything that occurred in Danekua's bedroom. Dajanae further conceded that she did not see a firearm in Appellant's possession.

{¶17} Appellant graduated from Liberty High School in 2008 and received a football scholarship to Lake Erie College. He also attended Youngstown State University and Kent State University.

{¶18} Appellant acquired a concealed carry permit in 2011 or 2012. He testified that he carried a handgun for his own protection.

{¶19} Appellant described the backpack in his possession on the evening in question as his "traveling bag," which he carried with him "regularly, all the time." (*Id.*, 514.) The bag typically contained clothes and his handgun, and sometimes his X-box. Appellant testified that the backpack with the handgun inside is always with him unless he is in a school zone, and "everyone" knew that he carried the handgun in his backpack.

{¶20} Appellant spent most of the day and part of the evening of February 7, 2019 helping a friend move from the north side of Youngstown to the south side, and working

at his two jobs. Appellant is a barber and a home health aide. He testified that he and Danekua had been "Facetiming" and texting throughout the day.

{¶21} Appellant and his friend returned the rented moving truck at roughly 9:00 p.m. Appellant then traveled to another friend's house, Rachel, where he and Rachel watched a movie between 10:00 p.m. and 11:50 p.m.

{¶22} Appellant accidentally "pocket-dialed" Danekua, while he was with Rachel. He did not answer Danekua's and Dajanae's return calls because Rachel said to do so would be "kind of rude." (*Id.*, 532.)

{¶23} Appellant called Danekua at roughly 11:59 p.m. to ask that she open the door of the apartment for him. Rather than describing his ten-year intimate relationship with Danekua as "on-again/off-again," Appellant testified that they "might argue sometime" but they "just never separated." (*Id.*, 512.) When he entered the apartment, he extended a birthday greeting to Dajanae, and proceeded to walk up the stairs to Danekua's bedroom. Danekua followed.

{¶24} In Danekua's bedroom, KJ and Danekua were lying on the bed and Appellant was sitting on the floor. The two adults conversed about the day's events while KJ played with Danekua's mobile telephone until he fell asleep.

{¶25} Appellant fell asleep in a prone position, but was abruptly awakened when Danekua threw his mobile telephone at him. She attempted to pull him up by the chain he wears around his neck, but the chain broke. Appellant turned to face Danekua and discovered she was pointing his handgun at him.

{¶26} According to Appellant's testimony, Danekua was "cursing and stuff," but he "[didn't] really recall what she was saying." (*Id.*, 518.) Appellant testified, "[Danekua] was trippin'." Appellant further testified that he was "scared for his life," that he "feared for [his] well-being," and "thought [his life] was over," when Danekua was pointing his handgun at him. (*Id.*, 527.)

{¶27} In order to calm Danekua, and because Appellant knew she had a "weak spot for her kids," he explained that KJ, who was lying on the bed behind them, could be accidentally shot. Appellant's expression of concern for KJ prompted Danekua to look away from Appellant and direct her attention to KJ. Appellant seized the distraction to grasp Danekua by her wrists and raise them over her head, so that the gun was pointing

toward the ceiling. When Appellant took Danekua by the wrists, she screamed, "Nae Nae." (*Id.*, 518.) Appellant did not recall Danekua saying "don't shoot." (*Id.*, 548.)

{¶28} A struggle ensued and Appellant lost his balance and tumbled into the bedroom door as Dajanae approached the bedroom. Appellant remained against the bedroom door until he regained his balance. At that time, Appellant heard Dajanae collect the two older children and take them to the first floor of the apartment.

{¶29} Appellant testified that Danekua maintained control of the handgun, but Appellant maintained his grasp of her wrists, holding the gun over Danekua's head. At some point, Appellant was able to "snatch" the handgun, but Danekua "grabbed it back." (*Id.*, 523.)

{¶30} When the handgun was lowered, "[Appellant] had some of the gun [and] Danekua] had some of the gun." (*Id.*, 525.) On cross-examination, Appellant clarified, "[t]he only time I had control of the gun was around the hip part. So if anything happened to her around the hip, then I – I can say I might have did it, but I wasn't trying to kill Danekua. I was trying to not die myself and protect my son that was behind me." (*Id.*, 543-544.)

{¶31} Appellant testified that "when [Dajanae] first pushed the door, [he thought] one – one or two shots went off," and that the handgun "might have tilted over." (*Id.*, 525, 539.) He further testified that he thought that the handgun only discharged once or twice, but that it did not discharge after he gained control of the weapon.

{¶32} As they struggled, Danekua lost her balance and both Danekua and the handgun fell to the floor. Appellant testified that "[both he and Danekua] had the gun, and as [Danekua] was falling, she ripped the gun down." (*Id.*, 540.) The handgun did not discharge as it fell to the ground.

{¶33} According to Appellant, "everything was in slow motion." (*Id.*, 524.) With Danekua lying supine on the floor, her head turned to her side, Appellant "check[ed himself]" then "check[ed] to see [sic] was [Danekua] hit." (*Id.*, 524.) Appellant did not testify that he examined KJ for injuries.

{¶34} Appellant began on the right side of Danekua's body and "didn't see no [sic] marks." However, when he moved to the left side, he discovered what he described as a "graze" on her face. Appellant testified that he was not aware that Danekua was

seriously injured. Appellant testified that he "just froze" then "grabbed the [backpack] and walk[ed] downstairs – seen [sic] the kids." According to Appellant, Dajanae and two older children were to the right of the stairs.

{¶35} Dajanae was speaking to Appellant, but he was "like a zombie," that is, he could not hear her. (*Id.*, 526.) Appellant testified that he "panicked" because the sight of the "wound to [Danekua's] head frightened [him.]" On cross-examination, Appellant testified that he did not see any blood or brain matter. (*Id.*, 545.) He further testified that Danekua was "breathing pretty – pretty fast, but once [he saw] her wounded, [he panicked]." (*Id.*, 549-550.)

{¶36} Appellant walked past Dajanae, out of the apartment and into his automobile, then drove away. On cross-examination, Appellant explained that he left because he "didn't want the family to come and automatically they gonna [sic] blame [him], and that he "didn't want to have conflict because [he loves] all her family too." (*Id.*, 551.)

{¶37} Appellant spent the early morning in the parking lot of the Eastwood Mall "trying to figure out what happened." (*Id.*, 528.) Although Appellant left his mobile telephone in Danekua's apartment, he was able to communicate with his sister through a messaging application on a tablet that he stored in his automobile. He traveled to his sister's residence in Akron, Ohio and his sister accompanied him to an attorney's office on February 9, 2019.

{¶38} On cross-examination, Appellant testified that he was never in a position behind Danekua during the struggle. He further testified that Danekua was never "bent over," that both he and Danekua were "standing straight up wrestling with the gun." Appellant testified that he did not discharge the handgun into the floor or shoot Danekua when she was lying on the floor. (*Id.*, 541, 549.) Finally, he testified that his handgun only held seven bullets.

{¶39} The handgun was not recovered. Appellant testified that the handgun was in his automobile, which was towed while he was in Akron. Appellant testified that he would have produced the handgun if the investigating officers had asked for it.

{¶40} According to the report of Dylan Matt, a forensic scientist employed by the Ohio Bureau of Criminal Investigation in the Firearm and Toolmark Section, seven fired

cartridge cases, three fired bullet fragments, one fired bullet jacket, one bullet jacket fragment and four lead fragments were collected at the scene. One fired bullet jacket, one lead bullet core, and one lead fragment were recovered from Danekua's body. BCI policy prohibits examination of fragments, unless they are the only ballistic evidence collected, due to their limited evidentiary value.

{¶41} Matt testified that all of the casings and bullets from the scene are from the same known 9mm handgun, a Smith & Wesson M&P series pistol. However, he acknowledged that other possibilities of unknown weapons may exist.

{¶42} Specifically, Matt testified:

> Just based off of, you know, my experience looking at firearms and reference data bases, Smith & Wesson is known to have pistols that are five [lands and grooves with a] right [twist], and also on the cartridge cases, it had a certain type of teardrop shear, which other manufacturers have, but in combination with the number of lands and grooves and the direction of the twist and those cartridge cases, it points towards Smith & Wesson.

(*Id.*, 366-367.)

{¶43} Comparison of the bullet jacket taken from Danekua's body with the bullets taken from the scene provided inconclusive results, but they all had five land and groove impressions. No rifling or identifying marks were observed on the lead bullet core, rendering it unsuitable for comparison.

{¶44} Based on the seven shell casings and three bullets at the crime scene, Detective Lambert concluded that "most likely a handgun, a 9mm, had been fired facing the door and more specifically downward as the – three of the bullets that [YPD] recovered from the floor had been smashed up pretty good, pretty well deformed, and had left holes in the carpet of the floor." (*Id.*, 398.) Lambert continued:

> The hardest surface in this room was the floor. It was a poured concrete slab as opposed to drywall walls and * * * the pine trim. However, we did inspect the entire room, doors, walls, and ceiling, to see if any projectiles

> had gone in any other direction and they – we found no defects anywhere in the room.

(*Id.*, 398.)

{¶45} Joseph Felo, M.D., a forensic pathologist and Chief Deputy Medical Examiner for Cuyahoga County, acted as a substitute witness for the forensic pathologist that performed the autopsy on Danekua. The autopsy was performed on February 14, 2019 after Danekua succumbed to her injuries.

{¶46} Danekua sustained perforating gunshot wounds to the head (traveling right to left then downward), left forearm (back to front), left hand (back to front and right to left), left thigh (right to left and upwards), and left hip (right to left and upwards). Danekua likewise sustained two penetrating gunshot wounds to the trunk (front to back and upwards), and one penetrating gunshot wound to the neck and trunk (downward).

{¶47} The fatal wound was to Danekua's head. Dr. Felo testified that there was stipple present around the head wound, which established that the barrel of the handgun was within eighteen inches of her forehead when it discharged. He further opined that the bullet entered through the forehead and skimmed across the left side of the skull, causing a small fracture. The bullet likewise skimmed the left side of Danekua's brain, causing terminal damage, before exiting through the area near her left ear.

{¶48} Dr. Felo explained that Danekua's brain began pumping more blood to the damaged area, in an effort to stave off further trauma. Because the blood pooled there and did not dissipate, Danekua's brain swelled and compressed vital nerve centers. Dr. Felo opined, "ultimately [that is] the mechanism of how [Danekua] dies, is severe brain swelling that shuts down all of her organs throughout her body." (*Id.*, 439-440.)

{¶49} The second-most significant wound Danekua suffered was to her posterior neck. Dr. Felo described the point of entry as T-1, that is, "where the neck meets the upper back." (*Id.*, 441). The bullet entered the spine at T-1, traveled to T-4 and shattered. Dr. Felo opined that the wound was non-lethal, but would have caused paralysis "essentially from the belly button or even higher up and downward." Dr. Felo further opined, "she wouldn't be able to go to the bathroom on her own, [or] walk." (*Id.*, 442-444.)

{¶50} The bullet that entered Danekua's posterior left forearm (near the elbow) and exited the anterior left forearm shattered her ulna. The wound to the left forearm bore stipple marks, and like the head wound, was determined to have been fired from an intermediate range. Dr. Felo opined that the muzzle was closer to Danekua's head when the head shot was fired, than it was to the left forearm when the forearm shot was fired. Based on the entry points of the bullets fired into Danekua's back and posterior left forearm, she was not facing Appellant when he fired at her.

{¶51} By way of a motion in limine filed on October 19, 2020, the state sought to prevent Appellant from offering testimony regarding the substance of two police reports filed in 2014 and 2016. Neither police report is in the record.

{¶52} The first described an altercation between Appellant and Danekua, where Appellant alleged that Danekua slashed the tires on his automobile and injured his ear. Appellant alleged in the second police report that Danekua damaged his automobile. The state argued that substantial proof did not exist to show that the alleged events actually occurred, and in the alternative, that the prior acts would be offered for the sole purpose of demonstrating Danekua's propensity for violence, in order to prove that she was the aggressor in the conflict that resulted in her death.

{¶53} On October 23, 2020, Appellant responded in his opposition brief to the motion in limine that the events of 2014 and 2016 were relevant to show Appellant's state of mind during the 2019 altercation. In other words, Appellant argued that Danekua's prior conduct was relevant to establish that Appellant's stated fear for his life was reasonable given her violent prior behavior.

{¶54} The state renewed the motion at trial prior to Appellant's testimony and argued the following in support of the motion:

> I'm going to focus on the 2014 incident whereby it was alleged that [the] victim, Danekua Bankston, had had a knife and not only slashed the defendant's tires but also cut his ear or bit his ear or something like that in 2014, and we're moving to exclude that evidence as not probative of anything in this case. They're trying to show maybe that she was the aggressor; that he still had some fear of her. But they've had [another] kid since 2014 together. * * * So obviously there is no fear of the defendant,

> especially when he's the one showing up to the victim's house after repeatedly calling her.

(*Id.*, 500.)

{¶55} Defense counsel, who clarified that the 2014 police report specifically alleges that Danekua cut Appellant's ear, argued the following with respect to that incident:

> It's the defense's position that he was acting in self-defense, and what was going on in his mind at the point he was being threatened by the victim in this case is pertinent and certainly goes directly to self-defense and the fact that she does have the capacity to threaten deadly harm to him, that's what he was thinking about at the time he responded to her aggression.

(*Id.*, 501.)

{¶56} The trial court acknowledged that case law in Ohio governing self-defense prohibits the introduction of specific instances of the victim's conduct to prove that the victim was the initial aggressor, citing *State v. Barnes*, 94 Ohio St.3d 21, 759 N.E.2d 1240 (2022). The trial court likewise acknowledged a growing body of Ohio appellate court case law recognizing that testimony regarding the victim's conduct may be admissible to explain the state of mind of a defendant asserting self-defense. The trial court reasoned:

> I'm really hard[-]pressed to believe that [Appellant] came to this location with fear in his mind – apparently there were texts that went back and forth; so he was determined, it seems, at this point to go to the victim's house. When he went to the victim's house, he brought his gun with him. I understand he was authorized to carry that gun through a CCW permit. So he created the circumstances. If he's going to testify to the victim reaching for the gun or going for the gun and that's why he had to use deadly force on her, then he should have rethought in bringing that gun into the household to begin with.

> And I tend to agree with the state, I mean, you know, that incident happened in 2014, they apparently, you know, made amends over the situation. They had a child afterwards. They have two kids together during the incident, and, you know, I understand there might be a history of contention between these two parties, but he apparently keeps coming back to her. And my thought is if he is truly afraid of her, he wouldn't want anything to do with her; he wouldn't even want to be around her. But he put himself in that situation, and so I'm going to sustain the state's motion to exclude those two incidents. I don't think they're admissible for purposes of showing that the victim is the primary aggressor here in a self-defense claim, and I also believe that it's not admissible to show his state of mind under these circumstances.

(*Id.*, 503-504.)

{¶57} Appellant was convicted on both murder charges and the corresponding specifications. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN BARRING APPELLANT-RICE FROM PRESENTING EVIDENCE OF THE ALLEGED VICTIM'S PRIOR VIOLENT ATTACKS ON HIM, CONTRARY TO THE FOURTEENTH AMENDMENT'S RECOGNITION OF DUE PROCESS.

{¶58} Self-defense, if proved, relieves a defendant of criminal liability for the force used. There are two types of self-defense in Ohio: (1) defense against danger of bodily harm, also known as non-deadly force self-defense; and (2) defense against danger of death or great bodily harm, or deadly force self-defense. *Struthers v. Williams*, 7th Dist. Mahoning No. 07 MA 55, 2008-Ohio-6637, ¶ 13. Appellant asserted the use of deadly force self-defense at trial.

{¶59} Prior to March 28, 2019, self-defense was an affirmative defense, which placed the burden on the defendant to prove each element by a preponderance of the

evidence. On March 28, 2019, a new law went into effect in Ohio placing the burden on the prosecutor, not the defendant, to prove the accused did not act in self-defense. The self-defense statute, R.C. 2901.05, enacted as a result of Am.Sub.H.B. 228, was amended to shift the burden of proof to the state to "prove beyond a reasonable doubt that the accused person did not use the force in self-defense * * *." R.C. 2901.05(B)(1). The Ohio Supreme Court recently opined that the amended self-defense statute applies prospectively to all trial occurring after its effective date, regardless of when the underlying alleged criminal conduct occurred. *State v. Brooks*, -- Ohio St.3d --, 2022-Ohio-2478, ¶ 23.

{¶60} Under the amended statute, when an accused raises self-defense, the state must prove beyond a reasonable doubt that the accused: (1) was at fault in creating the situation giving rise to the incident; (2) did not have a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was the use of force; and (3) violated the duty to retreat or avoid danger. " *State v. Italiano*, 7th Dist. Mahoning No. 19 MA 0095, 2021-Ohio-1283, ¶ 18.

{¶61} "Evid.R. 404 and Evid.R. 405 govern the admission of character evidence. Evid.R. 404(A) specifies when character evidence is admissible * * *." *State v. Barnes*, 94 Ohio St.3d 21, 23, 2002-Ohio-68, 759 N.E.2d 1240, 1244-1245 (2002). Evid.R. 404 reads, in its relevant part:

> (A) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:
>
> * * *
>
> (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; * * *.

> (B) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evid.R. 404.

{¶62} A trial court is precluded as a matter of law from admitting improper character evidence under Evid.R. 404(B), but has discretion to admit other acts evidence that has a permissible purpose. *State v. Graham*, 164 Ohio St. 3d 187, 172 N.E.3d 841, 2020-Ohio-6700, ¶ 72, citing *Hartman*, 161 Ohio St.3d 214 ("the admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law"), citing *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 17 (the rule bars evidence to prove character in order to demonstrate conforming conduct, but it gives the trial court discretion to admit other acts evidence for a permissible other purpose).

{¶63} The trial court employs 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.

Graham at ¶ 72.

{¶64} In general, evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination * * * more probable or less probable than it would be without the evidence." Evid.R. 401. See also *Hartman* at ¶ 24; Evid.R. 402 ("Evidence which is not relevant is not admissible."). The relevancy determination in this

context asks "whether the evidence is relevant to the particular purpose for which it is offered," which must be one other than character or propensity. *Hartman* at ¶ 26.

{¶65} However, the Ohio Supreme Court has cautioned, "[t]he supposition that proposed other-acts evidence, if true, would be relevant is not a license for courts to allow the jury to consider every unsubstantiated accusation." *Hartman* at ¶ 28. Therefore, there must be "substantial proof that the alleged similar act was committed by the defendant." *State v. Carter*, 26 Ohio St.2d 79, 83, 269 N.E.2d 115 (1971).

{¶66} In addition to the limitations in Rule 404(B), evidence of a victim's character "may only be offered in accordance with the * * * dictates of Evid.R. 405[.]" *State v. Smith*, 3d Dist. Logan No. 8-12-0520, 13-Ohio-746, at ¶ 15. See *Barnes* at 23. Evid.R. 405(B) reads as follows:

> (A) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (B) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Evid.R. 405.

{¶67} Evidence concerning whether the victim was the initial aggressor is limited to reputation or opinion testimony regarding the defendant's propensity for violence. *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240, ¶ 24 (2002). As such, evidence of the victim's specific violent behavior is not permitted.

{¶68} The rationale for this conclusion is that, although Evid.R. 404(A)(2) allows the introduction of evidence regarding a pertinent character trait of the victim, the introduction of such evidence is regulated by Evid.R. 405. Evid.R. 405(A) allows opinion or reputation testimony concerning a relevant character trait. When a character trait is an essential element of a "charge, claim, or defense," evidence of the character trait may be introduced through "specific instances of such conduct." Evid.R. 405(B).

{¶69} The Ohio Supreme Court, interpreting Evid.R. 404 and 405, has held that a defendant may successfully assert self-defense without resort to proving any aspect of a victim's character. *Barnes* at ¶ 25. For this reason, character evidence is not an "essential component of the defense" and "falls outside the limited scope of Evid.R. 405(B)." *Id.* Thus, "Evid.R. 405(B) precludes a defendant from introducing specific instances of the victim's conduct to prove that the victim was the initial aggressor." *Id.*

{¶70} Nonetheless, several Ohio appellate courts have opined that a defendant may "testify about specific instances of the victim's prior conduct known to the defendant in order to establish the defendant's state of mind." *Smith*, 2013-Ohio-746, at ¶ 18, quoting *State v. Moore*, 3d Dist. Allen Nos. 1-06-89, 1-06-96, 2007-Ohio-3600, ¶ 59. See also *State v. Cobb*, 3rd Dist. Allen No. 1-20-43, 2021-Ohio-3877, ¶ 71, appeal allowed sub nom. *State v. Cobb*, 166 Ohio St.3d 1413, 2022-Ohio-554, 181 N.E.3d 1207, ¶ 71; *State v. Herron*, 2d Dist. Montgomery No. 28146, 2019-Ohio-3292, ¶ 28; *State v. Ryan*, 2018-Ohio-2600, 115 N.E.3d 659, ¶ 93 (11th Dist.); *State v. Gott*, 6th Dist. Lucas No. L-11-1070, 2013-Ohio-4624, ¶ 35.

{¶71} The Eighth District opined that "[t]hese events are admissible in evidence, not because they establish something about the victim's character, but because they tend to show why the defendant believed the victim would kill or severely injure him." *State v. Carlson*, 31 Ohio App.3d 72, 73, 508 N.E.2d 999 (8th Dist. 1986). The Fourth District has held that "[t]he critical issue is what the defendant knew about the alleged victim at the time of the confrontation." *State v. Steinhauer*, 4th Dist. Scioto No. 12CA3528, 2014-Ohio-1981, ¶ 29.

{¶72} " 'The admission of [other-acts] evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice.' " *State v. Hill*, 7th Dist. Belmont No. 19 BE 0050, 2021-Ohio-3327, ¶ 22, quoting *State v. Morri*s, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14.

{¶73} The trial court excluded Appellant's testimony regarding the 2014 and 2016 allegations because there was no evidence that Appellant feared Danekua. The trial court cited Appellant's decision to bring a handgun to Danekua's residence as further evidence that he did not fear her. Further, the trial court opined that Appellant and Danekua had

obviously "made amends" following the 2014 and 2016 incidents, as evidenced by the birth of KJ and Appellant's visit to Danekua's residence that evening. Although not cited by the trial court, the state also asserted that Appellant declined to pursue charges with respect to the 2014 police report, which alleged that Danekua cut Appellant's ear with a knife.

{¶74} Contrary to Appellant's argument, we find that the trial court did not abuse its discretion when it excluded any testimony from Appellant regarding the 2014 and 2016 incidents. First, the 2016 incident did not involve a physical attack. Accordingly, Appellant's testimony regarding the 2016 incident would not inform his state of mind as it relates to Danekua's propensity to seriously injure or kill him.

{¶75} Further, there was insufficient evidence offered by Appellant to conclude that the 2014 incident, which did involve a physical assault, was relevant. According to the state, the 2014 police report established that Danekua slashed Appellant's tires and cut his ear with a knife. However, it is not clear whether Danekua was in a rage in 2014 and had to be disarmed or she might have seriously injured or killed Appellant with the knife, or that cutting his ear was part of a non-frenzied, non-lethal assault. Moreover, the degree of the injury inflicted by Danekua in 2014 is not in the record.

{¶76} Even assuming arguendo that the trial court abused its discretion, the exclusion of Appellant's testimony regarding the 2014 and 2016 incidents did not cause material prejudice to Appellant based on the remaining evidence in the record. Appellant's testimony regarding the struggle for the handgun was wholly inconsistent with the physical evidence offered at trial. Appellant did not even attempt to reconcile his testimony regarding the alleged struggle for the handgun with the uncontroverted physical evidence establishing that Danekua sustained gunshot wounds to her head, left forearm, left hand, left thigh, left hip, trunk, and neck.

{¶77} Accordingly, we find that the trial court did not abuse its discretion when it excluded Appellant's testimony regarding the 2014 and 2016 incidents, and in the alternative, that Appellant suffered no prejudice as a result of the trial court's decision. We further find that Appellant's first assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN ALLOWING A CONVICTION ON INSUFFICIENT EVIDENCE, CONTRARY TO THE FOURTEENTH AMENDMENT'S DUE PROCESS REQUIREMENT.

{¶78} Appellant was convicted of R.C. 2903.01(A), which provides, in relevant part: "[n]o person shall purposely, and with prior calculation and design, cause the death of another * * *." Appellant challenges whether the state presented sufficient evidence that he acted with prior calculation and design.

{¶79} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. Jefferson No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955), reversed on other grounds. When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. Mahoning No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. Jefferson No. 09 JE 26, 2011-Ohio-1468, ¶ 34.

{¶80} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id.* Where reasonable minds can reach different conclusions upon conflicting evidence, determination as to what occurred is a question for the trier of fact. It is not the function of the appellate court to substitute its judgment for that of the factfinder. *State v. Jones*, 166 Ohio St.3d 85, 2021-Ohio-3311, ¶ 27.

{¶81} The legislature intended the element of "prior calculation and design" to require more than mere instantaneous or momentary deliberation. *State v. Kerr*, 7th Dist. Mahoning No. 15 MA 0083, 2016-Ohio-8479, ¶ 20. Prior calculation requires evidence "of 'a scheme designed to implement the calculated design to kill' and 'more than the few moments of deliberation permitted in common law interpretations of the former murder statute.' " *Id.* Nonetheless, prior calculation and design can be found where a defendant "quickly conceived and executed the plan to kill within a few minutes." *State v. Coley*, 93 Ohio St.3d 253, 264, 754 N.E.2d 1129 (2001), citing *State v. Palmer*, 80 Ohio St.3d 543, 567-568, 687 N.E.2d 685 (1997).

{¶82} A finding of prior calculation and design is evaluated on appeal by looking at the totality of the circumstances on a case-by-case basis. *Id.* at ¶ 21. When reviewing whether prior calculation and design is established, Ohio courts analyze several factors. *State v. Carosiello*, 7th Dist. Columbiana No. 15 CO 0017, 2017-Ohio-8160, ¶ 33. These factors include whether the defendant and victim knew each other, if the relationship was strained, whether the defendant gave thought in choosing the murder weapon or site, and whether the act was drawn out or sprung from an instantaneous eruption of events. *Id.,* citing *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 56-60.

{¶83} Appellant moved for acquittal of the aggravated murder charge at the conclusion of the state's case. He argued that no evidence of prior calculation and design was offered by the state. The trial court overruled the motion, reasoning:

> With respect to Count One, aggravated murder, and the element of prior calculation and design, I think that's an issue that can go to the jury because the defendant showed up at a domestic dispute with a firearm, and, I mean, I don't know what his intention was. And I think based on the evidence and depending upon what your client testifies to on your case in chief if he takes the stand, I think the jury can form that decision as to whether or not he went there with the intention to kill the victim, so. In addition, I believe the evidence should be presented to the jury because viewed in light of most favorable to the state, I think reasonable minds might fairly find guilt beyond a reasonable doubt, and, again, that's up to the jury. I believe the state in their case in chief presented a prima facie case for the two counts in the

> indictment, and as such, I'm going to respectfully overrule your motion for acquittal.

(Trial Tr., p. 496-497.) Appellant renewed his motion at the conclusion of his testimony, and the trial court overruled the motion for the reasons previously stated.

{¶84} The first factor to be considered is the nature of the relationship between Appellant and the victim. While the couple shared three children and a long, intimate history, the record reflects that their relationship was strained, as Appellant's number was blocked on Danekua's mobile phone. Further, according to Appellant's own testimony, he had to request admission to the apartment, that is, despite their purported ongoing relationship, he did not have a key.

{¶85} The next factors considered are whether Appellant gave thought in choosing the murder weapon or site. Appellant conceded that Danekua was killed with his handgun. Further, it is undisputed that Appellant invited himself to Danekua's apartment on the evening of February 7, 2019, and was already present when he called to request admittance.

{¶86} The final factor considered is whether the act was drawn out or if it sprung from an instantaneous eruption of events. Dajanae testified that Appellant and Danekua were not arguing when Dajanae first went up the stairs. On cross-examination, Appellant's counsel asked Dajanae if the couple was "yelling and screaming and fighting." (*Id.*, 267.) Dajanae responded that they were not fighting, and the only thing she heard Danekua say was, "ask NaeNae." (*Id.*)

{¶87} Further, the physical evidence in this case is completely at odds with Appellant's testimony that he was defending himself. Danekua sustained gunshot wounds to the head, left forearm, left hand, left thigh, left hip, and trunk. The number and location of Danekua's wounds are evidence of a premeditated murder as opposed to an accident resulting from a wrestling match for a handgun.

{¶88} Considering the foregoing facts and the inference drawn therefrom in a light most favorable to the state, the jury could have concluded that Appellant arrived at Danekua's apartment on February 7, 2019 with the intent to kill her. Accordingly, we find that Appellant's second assignment of error has no merit.

CONCLUSION

{¶89} For the foregoing reasons, Appellant's aggravated murder conviction and the corresponding firearm specification are affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.