[Cite as *State v. Hill*, 2024-Ohio-1543.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

GEORGE GILBERT HILL III,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0072

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 20 CR 757

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Edward A. Czopur*, Assistant Prosecutor, for Plaintiff-Appellee

Atty. John P. Laczko, for Defendant-Appellant

Dated: March 27, 2024

WAITE, J.

{¶1} Appellant George Gilbert Hill, III appeals the June 6, 2022 judgment entry convicting him of various offenses related to the death of his girlfriend, J.M. Appellant first argues the jury *voir dire* in this case did not accurately reflect the community, as not one African American was included. Second, he contends that the trial court improperly permitted bad acts evidence in violation of Evid.R. 404(B). Third, he challenges the manifest weight of the evidence. In his fourth argument he claims the court erred in admitting duplicative and gruesome photographs into evidence. Fifth, and finally, he challenges the constitutionality of the Reagan Tokes Act. For the reasons provided, all of Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Appellant and J.M. were in a relationship, and Appellant was living in J.M.'s house. During their relationship, multiple friends of J.M. observed she had various injuries that caused them to be concerned for her safety. One friend, E.E., testified that she regularly observed bruises on J.M. E.E. testified that J.M. also had black eyes on several occasions, which J.M. attempted to cover with makeup and dark sunglasses. E.E. testified that the last time she saw J.M. alive, she noticed an injury that particularly concerned her, "it was a bruise and it was on the whole side of her face from up here all the way down like (indicating). She got real nervous and she wouldn't look me in the eyes." (Trial Tr., p. 513.)

{¶3} J.M.'s best friend, D.C., testified that sometime after J.M. began dating Appellant, she noticed a change in her behavior. "She stopped coming around as much. I had asked her to go out and she would, like, make up excuses. They actually – he

would come out a lot, too, with us, and then it just stopped." (Trial Tr., p. 553) The few times J.M. would stop at her house, D.C. believed she had "snuck out" and did not want Appellant to know she was there. Similar to E.E., D.C. saw various injuries on J.M. and often noticed J.M. wearing sunglasses, even when indoors.

{¶4} Two incidents stood out to D.C. Once she observed a significant bruise from the victim's buttocks down her entire leg. Although J.M. conceded that Appellant caused the injury when he pushed her down a set of porch stairs, she refused to allow D.C. to photograph the injury. On another occasion, J.M. and Appellant appeared at D.C.'s house party. J.M. hugged her and teared up. D.C. asked her what was wrong, but Appellant had noticed the encounter and announced that it was time to leave. D.C. testified that "[t]hey went upstairs. He was very angry. So I followed. And she kind of turned around to, like, say she wanted to stay and he kind of took her by the hair and pushed her." (Trial Tr., p. 559)

{¶5} On May 31, 2023, Appellant and J.M. went to the Steel Valley Bar and Grill, an establishment that they regularly visited. Appellant originally told law enforcement that they left the bar at 2:00 a.m. because J.M. got into a fight with the bartender. He later changed his story after videos showed they were at home around 11:00 p.m. He then claimed they argued once they arrived home about J.M.'s fight with the bartender. He said she was highly intoxicated, and videotaped J.M. stumbling around the house as evidence. He said she consumed six or seven long island iced tea drinks while at the bar. However, the bartender, C.T., testified that she did not argue with J.M. on that night or any other. In fact, C.T. described J.M. as quiet and reserved, and said she only spoke

to two people. C.T. testified that J.M. never ordered long island iced teas but regularly ordered Tito's with Sprite. D.C. confirmed that this is what J.M. typically drank.

{¶6} Appellant conceded to law enforcement that he and J.M. "got into it" that night. (Trial Tr., p. 402.) However, officers were unclear whether he meant they engaged in a physical or verbal altercation. Regardless, Appellant told them that at some point, J.M. stumbled in the bathroom, fell, and hit her head on the toilet. He gave her a towel for the blood and asked if she wanted to go to the hospital, but she declined.

{¶7} Detective Greg Stepuk testified Appellant told him that the morning after the incident:

> [H]e woke up, saw that she was in distress, snoring real loudly, is how he was saying it. She wouldn't wake up. He was trying to rouse her. She wouldn't wake up. He did describe something with -- and I believe Attorney Wise brought this up -- with the spoon. He was explaining how he was trying to help her breathe or whatever, putting this or prying into her mouth or something along those lines. This happened before he called 911, or that probably happened within an hour before 911 was notified.

(Trial Tr., p. 403.)

{¶8} Appellant admitted to the responding officers that, despite J.M.'s apparent dire condition, he waited one to two hours before he called 911. In explanation, he claimed that his phone could not make outgoing calls and he was forced to charge J.M.'s phone in order to use it for the 911 call. The officers found this explanation odd, noting that a cellular phone charges fairly quickly, and can be used after minimal charging. Appellant also claimed that J.M. did not want to go to the hospital the night before, so he

was reluctant to call for help in order to honor her wishes. Also, prior to calling 911, Appellant called D.C. four or five times. Appellant claims that he made the call to 911 an hour or two after he woke up.

{¶9} Sydney Livermore, an EMT, responded to the dispatch call. She assumed that the incident involved a drug overdose due to J.M.'s age and the information provided as to her condition. Once she saw J.M., Livermore changed her mind, because "you couldn't move her limbs. She was seizing so she was very rigid, and she was nonresponsive to any stimuli." (Trial Tr., p. 294.) Appellant, who was "fairly relaxed," provided limited information to Livermore's questions, which surprised her. Based on her experiences, most people attempt to give as much information as they are able following the need for emergency help. Livermore did not detect any odor of alcohol coming from J.M. She noticed J.M. had a gash and bloody, matted hair on the back of her head. When she removed J.M. from the bed, the fitted sheet came off and she noticed the mattress was soaked in blood.

{¶10} Officer Jamison Diglaw of the Boardman Police Department testified that he asked Appellant to see his phone multiple times, but Appellant never gave him the phone. He also testified that he asked to photograph areas in the house, but Appellant "declined any -- allowing me to do any type of photography or collect any evidence." (Trial Tr., p. 318) He also noted that Appellant seemed reluctant to provide much information.

{¶11} Around 7:25 a.m., shortly after J.M. arrived at the hospital, nurses obtained a blood sample, then a urine sample around 8:40 a.m. Neither of these contained a meaningful level of alcohol, showing she had consumed approximately one-half of an

alcoholic beverage. The only drugs found in her system were administered by hospital staff.

{¶12} While the officers were still at the scene, someone from St. Elizabeth's hospital called and asked for police personnel to document certain injuries they discovered on J.M.'s body. Dispatch sent Officer Daniel Baker of the Boardman Police Department to the hospital. The nurses positioned J.M.'s body to allow Officer Baker to photograph the injuries of concern. Officer Baker testified that he followed the lead of the nurses. He documented what they told him to and did not decide, himself, which areas of J.M.'s body to photograph.

{¶13} At some point after J.M. was taken to the hospital, D.C. awoke and found she had missed calls placed with J.M.'s phone. Concerned, she called J.M., but Appellant answered. He calmly informed her that J.M. was in a coma at the hospital. D.C. hung up and immediately called J.M.'s family, where she learned of J.M.'s grim condition. J.M. was not expected to survive, and even if she did, would undoubtedly reside in a nursing facility the remainder of her life.

{¶14} J.M. did not survive. Dr. Joseph Felo performed an autopsy and determined the manner of death was homicide. On Appellant's head, alone, he discovered trauma associated with three distinct injuries: one to the left side of her head, one to the back of her head, and one to the right of her head. He found nineteen bruises to the trunk area, but could not give a definitive count as to her extremities because in several areas the bruises were clustered. Some of these appeared new, and others appeared to be older and healing. He performed a drug and alcohol test using a blood sample and found no drugs were in the sample but it had an ethanol level of .012, about one-half of an alcoholic

beverage. He testified that six or seven long island iced tea drinks would take approximately twenty-four hours to dissipate for purposes of alcohol testing. Hence, it was impossible she consumed the drinks Appellant alleged she had on the night of the incident, which was less than ten hours before the blood sample was taken.

{¶15} On December 10, 2020, Appellant was indicted on one count of murder, an unclassified felony in violation of R.C. 2903.02(A), (D), R.C. 2929.02(B); one count of murder, an unclassified felony in violation of R.C 2903.02(B), (D); one count of felonious assault, a felony of the second degree in violation of R.C. 2903.11(A)(1), (D)(1)(a); and one count of domestic violence, a felony of the fourth degree in violation of R.C. 2919.25(A), (D)(3).

{¶16} At trial, the state presented testimony from several witnesses, notably the responding officers (EMT Livermore, Officer Diglaw, Officer Baker, Det. Stepuk), the emergency room doctor (Dr. Chad Donley), the coroner (Dr. Felo), the bartender (C.T.) and J.M.'s friends (E.E. and D.C.). Dr. Anthony Pizon (toxicology expert) and J.M.'s father were witnesses called by Appellant. Following trial, the jury convicted Appellant on all counts as charged in the indictment.

{¶17} On June 6, 2022, the trial court filed its sentencing entry. The court determined that all four counts merged for purposes of sentencing and the state elected to proceed on count two, murder. The court imposed fifteen years to life of imprisonment with credit for 473 days served. It is from this entry that Appellant timely appeals.

{¶18} This matter has a lengthy appellate procedural history, including several extensions of the briefing schedule. Thereafter, the matter was stayed at the request of the state pending the Ohio Supreme Court's decision on the constitutionality of the

Reagan Tokes Act, which required yet another extension of the briefing schedule once the Supreme Court reached its decision.

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT ERRED AS A MATTER OF LAW AND TO THE PREJUDICE OF APPELANT BY FAILING TO PROVIDE A FAIR CROSS SECTION REPRESENTATIVE OF THE COMMUNITY FROM THE JURY POOL RESULTING IN A VIOLATION OF APPELLANT'S RIGHT TO A JURY FREE FROM RACIAL BIAS AND TO BE TRIED BY A CROSS SECTION OF THE COMMUNITY AND HIS PEERS.

{¶19} Appellant argues that the jury *voir dire* in this matter excluded a distinctive portion of the community, as no African American jurors were included. Appellant contends that this is particularly problematic as he is of African American descent and accused of killing a white woman.

{¶20} The state responds that when the issue was raised, the trial court summoned the assistant jury commissioner, who testified that the normal procedure to obtain a jury pool was followed in this case. The court requested that thirty potential jurors appear, and the commissioner sent thirty consecutively-numbered potential jurors to the courtroom. This process is a "blind" one – the commissioner would have no knowledge of any potential juror's race or ethnicity.

{¶21} The racial makeup of a jury pool is contested through use of a "*Batson"* challenge, which has its genesis from United States Supreme Court law.

> The Ohio Supreme Court has set out the steps for analyzing a race-based challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), as follows:
>
> First, the opponent of the peremptory strike must make a prima facie case of racial discrimination. Second, if the trial court finds that the opponent has fulfilled this requirement, then the proponent of the strike must come forward with a racially neutral explanation for the strike. * * * The 'explanation need not rise to the level justifying exercise of a challenge for cause.' [*Batson*, 476 U.S.] at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88.
>
> Third, if the proponent puts forward a racially neutral explanation, the trial court must decide, on the basis of all the circumstances, whether the opponent has proved purposeful racial discrimination. * * * The burden of persuasion is on the opponent of the strike. (Internal citations omitted.)

State v. Herring, 94 Ohio St.3d 246, 255-256, 2002-Ohio-796, 762 N.E.2d 940; *State v. Moore*, 7th Dist. Mahoning No. 22 MA 0013, 2023-Ohio-1000, ¶ 14, appeal not allowed, 170 Ohio St.3d 1494, 2023-Ohio-2407, 212 N.E.3d 951.

{¶22} "An appellate court will not reverse the trial court's decision of no discrimination unless it is clearly erroneous." *Moore* at ¶ 15, citing *State v. Hernandez*, 63 Ohio St.3d 577, 583, 589 N.E.2d 1310 (1992).

{¶23} In this case, the *Batson* challenge did not arise from any attempt by the state to strike potential jurors. Instead, defense counsel raised a *Batson* challenge when the potential jurors entered the courtroom and counsel became aware no African

Americans were included within the group. The trial court called Michele Caputo, assistant jury commissioner, to address the issue. Caputo explained to the court that while not typical, occasionally a jury pool will lack diversity. She explained that in the normal process, 500 summons are sent out to county citizens blindly, without any knowledge of their race or ethnicity. When a bailiff requests a jury, the bailiff will ask to be sent a specific number of potential jurors, in this case thirty. The jury commission office selects the first thirty potential jurors in sequential and numeric order, again having no knowledge of their race or ethnicity. She stated that the process used for this case was the procedure normally used to generate a random group, and the fact that no African Americans were included is mere happenstance. Throughout this entire process, individual potential jurors are simply referenced as numbers until they appear in the courtroom.

{¶24} Again, the defense's objection was made to the jury pool before either party had begun *voir dire*. While this does not involve a typical *Batson* scenario, the same law applies. Beginning with the first prong of the *Batson* test, Appellant complains that despite being a large and distinctive group within the community, no African Americans were included among the potential jurors. The United States Supreme Court has held that the Sixth Amendment guarantee of a jury trial "contemplates a jury drawn from a fair cross-section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

{¶25} While this is the ideal scenario, Ohio law provides:

> [N]o requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are

> not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

State v. Johnson, 88 Ohio St.3d 95, 117, 723 N.E.2d 1054, 1073 (2000), citing *Taylor, supra,* at 527. While the ideal situation is to have every jury pool reflect the diversity of the community, so long as the group at issue was not excluded based on race, Appellant does not properly raise a *Batson* challenge.

{¶26} As to the second prong, Appellant contends no reason was given as to why two people were excused from the jury pool. However, not only is Appellant unable to link the absence of these two individuals to some kind of systematic exclusion, it was defense counsel who stated on the record that those individuals were excused simply because they failed to appear. There is no way to determine their race. Regardless, the assistant jury commissioner provided a race neutral explanation for the racial makeup of this jury pool. "The challenge is defeated so long as discriminatory intent is not inherent in the explanation." *State v. Nixon*, 1st Dist. Hamilton No. C-020428, 2003-Ohio-3384, ¶ 19, citing *Purkett v. Elem*, 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). There is nothing inherently discriminatory in a random process where the race of any potential juror is unknown until they appear in the courtroom.

{¶27} As to the third *Batson* prong, Appellant argues that it is impossible for any defendant to satisfy. We recently held that "underrepresentation or lack of representation of a group on a single jury does not constitute systematic exclusion." *State v. Haywood*, 7th Dist. Columbiana No. 21 CO 0035, 2023-Ohio-1121, ¶ 44; citing *State v. Bryan*, 101

Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 113; *State v. McNeill*, 83 Ohio St.3d 438, 444, 700 N.E.2d 596 (1988). Thus, a defendant must show some indicia of exclusion before merely alleging underrepresentation or lack of representation. Appellant had no evidence to support an indicia of purposeful race-based discrimination.

{¶28} Because the assistant jury commissioner provided a race neutral reason for the racial makeup of the jury pool, and the lack of diversity in a single jury, alone, does not provide evidence of systematic exclusion, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT ERRED AS A MATTER OF LAW AND TO THE PREJUDICE OF APPELLANT BY PERMITTING APPELLEE TO INTRODUCE IMPERMISSIBLE PRIOR BAD ACTS EVIDENCE OVER OBJECTION FROM APPELLANT CONTRARY TO RULE 404(B) OF THE OHIO RULES OF EVIDENCE.

{¶29} Appellant contends the court improperly permitted two of J.M.'s friends (E.E. and D.C.) to testify about prior domestic violence involving Appellant and J.M., despite having no personal knowledge of the exact cause of the injuries they previously observed. Appellant argues the state clearly offered this evidence to show that he acted in conformity with a certain character in order to prove he engaged in domestic violence. He contends that this evidence did not aid the trier of fact in determining the events that led to J.M.'s death and was prejudicial.

{¶30} In response, the state contends this evidence was offered as a direct consequence of Appellant's defense, in which he claimed that no criminal act occurred and J.M.'s death was accidental. The state cites to an earlier case from this Court addressing this exact issue and holding that similar evidence was proper, *State v. Hymes,* 7th Dist. 19 MA 0130, 2012-Ohio-3439.

{¶31} Pursuant to Evid.R. 404(B):

> 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. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

{¶32} "The admission of such [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. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14.

{¶33} The Ohio Supreme Court created a three-step analysis for reviewing the admissibility of a prior bad act:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action

> more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. See Evid.R 403.

State v. Williams, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶34} Here, the defense challenged the testimony of two witnesses, E.E. and D.C. Both were expected to, and did, testify that they observed various injuries on J.M. that appeared consistent with domestic abuse during her relationship with Appellant. The trial court deemed the testimony at issue relevant based on one of the exceptions to Evid.R. 404(B), as Appellant's sole defense was that the injuries suffered by J.M. were not the result of a criminal act, but were the result of an accident on her part. Appellant claimed at trial that J.M. consumed six or seven strong alcoholic beverages, stumbled, and hit her head on a toilet. The injury she sustained caused her death.

{¶35} Because Appellant's sole defense was based on an alleged accident, and one of the enumerated exceptions to Evid.R. 404(B) permits bad acts evidence to prove absence, mistake, or accident, Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT DENIED APPELLANT DUE PROCESS UNDER THE FOURTEENTH AMENDMENT DUE TO THE FACT THAT HIS CONVICTIONS FOR MURDER, FELONIOUS ASSAULT AND DOMESTIC VIOLENCE WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE JURY'S VERDICT WAS INCONSISTENT WITH THE EVIDENCE AND TESTIMONY PRESENTED AT TRIAL.

{¶36} Appellant contends the jury heard inconsistent evidence about whether the victim had alcohol in her system at the time of her death, which if true would support his defense. Appellant says he took videos of J.M. stumbling around the house for the purpose of confronting her the next day about her drinking and her drunken behavior. Appellant also takes issue with the lack of a thorough investigation, particularly since the authorities failed to test evidence of possible drug use in the house.

{¶37} The state responds that the blood alcohol testing completed at the hospital and again during the autopsy showed the equivalent of less than one alcoholic beverage was in J.M.'s system. Further, there was evidence that J.M. suffered three distinct injuries to her head (on the left, right, and back), thirty-one bruises/blunt trauma injuries, and contusions to her chest. Medical testimony showed that injuries of this nature could not be caused based on Appellant's theory that the victim fell once and hit her head on the toilet. The state also emphasizes Appellant's dilatory conduct after discovering the extent of J.M.'s condition.

{¶38} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id*. Weight of the evidence involves the state's burden of persuasion. *Id*. at 390, 678 N.E.2d 541 (Cook, J. concurring). The appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, at 387, 678 N.E.2d 541. This discretionary power of the appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶39} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. No. 09 JE 15, 2010-Ohio-3282, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 N.E.2d 650 (1971). When there are two fairly

reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶40} Beginning with the expert testimony, the state offered testimony from Dr. Chad Donley, the emergency room physician who treated J.M., and Dr. Felo, who performed the autopsy. The state also presented physical evidence in the form of blood alcohol testing results completed by the hospital shortly after J.M. arrived (both blood test and urine test) and a blood test completed during Dr. Felo's autopsy. To counter this, Appellant offered testimony from Dr. Anthony Pizon, chief of the division of medical toxicology at the University of Pittsburgh Medical Center. However, this testimony was not based on separate testing, but was based on information provided by Appellant. Hence, the matter became a credibility issue for the jury.

{¶41} Dr. Pizon conceded at trial that he did not evaluate J.M. nor complete any independent testing, forcing him to rely on statements made by Appellant. Dr. Pizon testified that "[t]he picture painted for me sounds like a chronic alcoholic." (Trial Tr., p. 698.) However, he also stated that "if she is not a chronic alcoholic there is no way that she consumed that much alcohol" and that "drinking that much and not being a chronic alcoholic are incompatible." (Trial Tr., p. 699-700.)

{¶42} Dr. Felo contradicted Appellant's claim that J.M. was a chronic alcoholic through testing of her liver, which revealed no conditions associated with alcoholism. It was noted that her liver was healthy enough to be donated for a transplant. Dr. Pizon conceded that in looking at her medical information, "[t]here wasn't anything that, I don't think, stood out to me as the stigmata of an alcoholic." (Trial Tr., p. 702.)

{¶43} As to the three videos taken by Appellant of J.M. stumbling around the house the night before, Det. Stepuk testified that the videos did show J.M. stumbling, but did not indicate if it was due to intoxication or the result of head trauma. Dr. Pizon, Appellant's own expert, testified that it appeared to him that J.M. was slowly dying when those videos were taken.

{¶44} Even more significant than the alcohol testing, a reasonable jury could also have found that the pattern and extent of the injuries J.M. suffered were caused by intentional acts. The record contains evidence of inconsistent statements made by Appellant of the events on the night of the incident. The record contains unrebutted evidence there was clearly a disturbance in the home that night. Officers found a broken mirror, broken knickknacks, and significant damage to the bedroom door. This provides evidence that a physical encounter took place.

{¶45} Appellant also has no explanation for the number of bruises on J.M.'s body, both fresh and healing. These do not support his story J.M. sustained a single fall. Dr. Felo testified that "[t]ypically you would need trauma to separate areas to cause [the injuries suffered by the victim] unless you were saying a rollover car crash or something like that, it would be uncommon that injury to the head would cause that injury to the chest as well." (Trial Tr., p. 381) The autopsy revealed J.M. sustained a plethora of bruises, abrasions, swelling, and internal bleeding inconsistent with a single fall.

{¶46} In addition, Appellant's conduct was not what would be expected under the circumstances. The record established that he waited at least an hour or two before calling for help despite J.M.'s serious condition, claiming that he needed to charge her phone before making the 911 call, and that she said (the previous evening) she did not

want to go to the hospital. It is clear from the first responder's testimony that J.M. clearly required medical assistance. Once emergency help arrived, Appellant's demeanor was both more calm, and less forthcoming, than witnesses would have expected.

{¶47} Appellant also complains that the investigation was incomplete, as possible drug evidence found in the house was not tested. The only drugs found in J.M.'s system were administered at the hospital, and Appellant told police at the scene that drugs were not involved. Even if there were drugs in the house, it is equally plausible they belonged to Appellant. Unlike J.M., Appellant was not drug tested the day of the incident. Regardless, there was a plethora of evidence as to J.M.'s cause of death, none of it drug-related.

{¶48} Accordingly, Appellant's third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

> THE TRIAL COURT ERRED AS A MATTER OF LAW AND TO THE PREJUDICE OF APPELLANT BY ADMITTING INTO EVIDENCE DUPLICATIVE AND GRUESOME PHOTOGRAPHS OF THE VICTIM OVER OBJECTION FROM COUNSEL.

{¶49} Appellant challenges the admission of hospital and autopsy photographs that were admitted into evidence. Appellant argues that these photographs were repetitive, gruesome, and admitted for the sole purpose of shock value.

{¶50} The state replies that the photographs illustrate and support the testimony of multiple witnesses and allowed the jury to understand the nature and extent of J.M.'s

injuries. Additionally, the state contends that the photographs served to rebut Appellant's defense.

{¶51} Pursuant to Evid.R. 403(A): "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶52} At trial, Appellant objected to the following exhibits: 4-25, 87-132, 134-135. The collection of photographs in general were discussed throughout the testimony of Dr. Felo, who described the cause of J.M.'s death. In addition, the photographs were discussed within Officer Baker's testimony as he addressed the progression of the investigation. As stated, Appellant contests the trial court's decision to admit these photographs as duplicative and unnecessarily gruesome.

{¶53} Generally, "[a] gruesome photograph is admissible only if its ' "probative value * * * outweigh[s] the danger of prejudice to the defendant." ' " *State v. Fo*rd, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 237, citing *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 96; *State v. Morales*, 32 Ohio St.3d 252, 258, 513 N.E.2d 267 (1987). However, "even a photo that satisfies the balancing test is inadmissible if it is repetitive or cumulative." *Id*., citing *Mammone, supra*; *State v. Thompson*, 33 Ohio St.3d 1, 9, 514 N.E.2d 407 (1987). Absent gruesomeness or shock value, numerous photographs challenged simply due to their number will not result in prejudicial error. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 232.

{¶54} "A trial court's decision that a photo satisfies the standard is reviewable only for abuse of discretion." *Ford*, at ¶ 237, citing *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 69.

{¶55} Beginning with exhibits 4 through 25, police were asked to document injuries found on J.M. when she was admitted to the hospital. Officer Baker photographed these injuries. These exhibits are Officer Baker's photographs.

{¶56} Exhibit 4 is photograph of J.M. lying on a hospital bed. Only her face is visible. Her eyes are closed and a breathing tube is inserted in her mouth. No blood is visible nor is any injury depicted. Officer Baker testified that he took the photograph to show J.M. as he found her. Under Ohio law, "[p]hotographs showing bodies as discovered are admissible as probative." *State v. Sharpe*, 7th Dist. Mahoning No. 22 MA 0021, 2023-Ohio-2570, ¶ 33, appeal not allowed, 171 Ohio St.3d 1456, 2023-Ohio-3670, 218 N.E.3d 973, citing *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 135. Because the purpose of the photograph is proper under Ohio law and is not in any way gruesome, the court did not error in admitting it into evidence.

{¶57} Exhibit 5 is essentially the same photograph, however, J.M.'s eyes were held open for this photograph. The photograph is neither graphic nor gruesome and documents J.M.'s comatose state. It was admissible.

{¶58} Exhibit 6 in the first in a series of photographs documenting physical injuries discovered by J.M's nurses. This photograph shows her forehead and depicts a cut just underneath her hairline. There is no blood visible and nothing about the photograph can be said to be gruesome or graphic. The photograph has probative value as it shows J.M.'s injury.

{¶59} Exhibits 7 through 25 are in the same series of hospital photographs. In exhibit 7, a nurse is holding up one of J.M.'s arms. At least nine prominent bruises and several lighter bruises are visible. Again, the purpose of the photograph is clear: to demonstrate the injuries that raised concerns in J.M.'s nurses. There is nothing graphic nor gruesome about the photograph and its purpose is clearly probative.

{¶60} Exhibit 8 illustrates multiple bruises to the inside of J.M.'s forearm. Also visible in the photographs is a moderately sized area filled with abrasions. Exhibit 9 shows several large, prominent bruises on J.M.'s knee. Exhibit 10 reveals three large prominent bruises and at least eight smaller bruises on J.M.'s right arm. Exhibit 11 is a similar photograph of J.M.'s arm but is taken at a different angle to show additional bruises not present in the earlier photographs. Exhibits 11 and 13 show various injuries to J.M.'s legs.

{¶61} We have held that photographs depicting extensive bruising are admissible as they "further illustrated the bruise patterns and coloring, which according to expert testimony indicated that the bruises occurred over a period of time and did not result from one incident, alone." *State v. Todd*, 7th Dist. Columbiana No. 12 CO 28, 2015-Ohio-2682, ¶ 33.

{¶62} Exhibits 12, 18, 19, 20, and 21 show various lacerations, large cuts, scrapes, and wounds on J.M.'s back, stomach, neck, and shoulders. While some of the cuts are red in color, no blood is visible. Exhibits 22 through 25 depict scrapes and cuts on J.M.'s elbow, fingers, and knuckles. A small amount of either dried blood or vomit is visible on J.M.'s fingers, but in no way can the photographs be called graphic or gruesome.

{¶63} The state's arguments were premised on the theory that Appellant committed repeated physical assaults on J.M., eventually causing her death. Dr. Felo testified that the patterns and stages of healing suggest that the injuries causing the bruises did not result from a single event. Thus, the photographs are highly relevant to both the cause of J.M.'s death, which was squarely at issue, and Appellant's defense that her death was the result of a drunken, accidental fall. Prior to the nurse's call to police reporting the extent of her injuries, her death had largely been treated as an accident. After the nurses' call, the investigation shifted and took on a criminal nature. This series of photographs was discussed during Officer Baker's testimony and provided a backdrop for the stages of the investigation. The trial court did not err in admitting these exhibits.

{¶64} The next series of photographs to which Appellant objects were taken during Dr. Felo's autopsy. The Ohio Supreme Court has held that photographs illustrating a coroner's testimony and which provide a general perspective of a victim's body are relevant and admissible. *Diar* at ¶ 103. The Court noted that such photographs provide the jury with a "total appreciation of the nature and circumstances of the crimes." *Id*. at ¶ 109, citing *State v. E.E.*, 63 Ohio St.3d 231, 251, 586 N.E.2d 1042 (1992).

{¶65} Exhibit 87 shows J.M., unclothed, lying on an autopsy table with breathing tubes still attached to her face. Exhibit 88 is a close up of her face with the breathing tube, while exhibit 89 shows the same view without the tubes attached. From Dr. Felo's testimony, these photographs were taken for identification purposes, both with and without the breathing tubes. Again, photographs taken for purposes of identification are probative. Photographs of a body lying on an autopsy table are also admissible. *Sharpe* at ¶ 43.

{¶66} While exhibit 89 may be unsettling, because it shows J.M.'s open mouth with teeth missing and loose dental implants, the photograph was relevant to the competing claims at trial of the opposite sides: that Appellant either jarred the dental device loose through an act of violence, or as he claimed in his defense, he used a spoon in an attempt to pry her mouth open to help her breathe.

{¶67} Exhibits 90 and 91 are photographs that document bruising to J.M.s right ear. The second, exhibit 91, shows more extensive bruising to the area not easily seen in exhibit 91. Exhibits 92, 94, 95, and 96 illustrate bruising to J.M.'s left ear and cheek area. The photographs collectively show bruising to the outside, inside, and back of the ear, and are not repetitive. Regardless, there is nothing gruesome or graphic about the injuries depicted in these photographs.

{¶68} Exhibit 93 shows a cut on J.M.'s forehead. No blood is visible although the cut is red. Exhibit 97 depicts a cluster of at least five blueish-purple bruises near the right breastbone. We note that exhibit 97 shows some stitching down the center of J.M.'s chest. Dr. Felo pointed out that this is from the process of harvesting her organs for donation, and bears no relevance to the injuries she suffered otherwise. Thus, the jury could not have mistakenly believed those stiches were the result of an injury,

{¶69} Exhibits 98, 99, 100, 101, and 102 each depict clusters of bruises on the inside of J.M.'s bicep, elbow, and forearm. Although they may seem somewhat repetitive, some views are taken from a farther distance and others are close up, which Dr. Felo testified is a technique used to show the pattern, amount, and size of the injuries.

{¶70} Exhibits 103 through 107 illustrate injuries to J.M.'s trunk area. Depicted in these photographs are bruises and lacerations. Again, stitching is visible but was

explained to the jury by Dr. Felo as related to organ donation. Exhibits 112 through 121 show various bruises to J.M.'s upper and lower extremities. Again, photographs of bruises are probative where they illustrate bruise patterns and coloring to support the notion that the bruises occurred over a period of time and not as the result of one incident, alone.

{¶71} Exhibits 122 through 126 show various injuries to J.M.'s back, both bruises and lacerations. In exhibit 123, a large reddish patch resembling a bruise is present, however, Dr. Felo testified that this is lividity, caused by the stage of death and not an injury. Again, these photographs were probative of the cause of death, and provided rebuttal evidence to Appellant's defense.

{¶72} The remaining exhibits are the most significant. Exhibits 127 through 132 illustrate the gash on the back of J.M.'s head that was responsible for the large amount of blood discovered on the mattress where paramedics found J.M. Appellant claimed that this wound was caused by J.M. falling and hitting her head on the toilet. At first glance, this wound appeared to be about one and one-half inches long. However, in exhibit 128, the hair around the wound was shaved. This revealed that the actual length of the laceration was about two and one-half inches. The cut remained open at the time the photograph was taken. While the exhibits are somewhat graphic, they are not gruesome. Regardless, the photographs depict a significant wound suffered by J.M., and are thus highly relevant and probative.

{¶73} Moving to the last exhibits at issue, exhibits 134 and 135 are unquestionably graphic and unsettling. Exhibit 134 is a photograph of the top of J.M.'s head with the scalp pulled back, exposing her skull. A large black and red lump is visible on the side of

the area. Exhibit 135 shows part of the skull removed, exposing the brain. Dr. Felo testified at length that J.M., although suffering a multitude of injuries, died as a result of blunt trauma to the head that caused a skull fracture, hemorrhaging, and swelling of the brain, all of which led to a massive stroke. (Trial; Tr., p. 624.) The lumps visible on these photographs depict the hemorrhage area. Thus, while the photographs are gruesome, they are vital in explaining the cause of death.

{¶74} Photographs supporting testimony of cause of death are generally admissible. *Sharpe* at ¶ 48, citing *Trimble, supra*, at ¶ 154. In *Trimble*, a photograph showing damage to a lung, blood in a chest cavity, and a metal probe inside a victim's neck was admissible, as it supported testimony about the cause of death. In *Sharpe,* an exhibit showing a close up view of the victim's organs surrounded by blood was deemed admissible. Further, "photographs, even if gruesome, are admissible to give the jury an 'appreciation of the nature and circumstances of the crimes' and to show 'intent and the manner and circumstances of the victims' deaths.' " *Sharpe* at ¶ 47, citing *Trimble*, at ¶ 134, 136.

{¶75} The Ohio Supreme Court has held that a trial court did not commit error in admitting photographs which supported a forensic pathologist's testimony that a victim sustained injuries sufficient to cause death, particularly as the photographs showed the jury the effects of all of the injuries suffered by the victim. *State v. Todd*, 7th Dist. Columbiana No. 12 CO 28, 2015-Ohio-2682, ¶ 28-30, citing *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 161, ¶ 56. Even a photograph that can be characterized as gruesome is admissible if the trial court, in exercising its discretion, feels

that it would be useful to assist the jury. *State v. Woodwards*, 6 Ohio St.2d 14, 25, 215 N.E.2d 568 (1966).

{¶76} Again, the critical issue at trial came down to whether Appellant intentionally caused J.M.'s death through physical acts of violence or whether she stumbled and fell on her own, causing her death. Collectively, these photographs, coupled with Dr. Felo's testimony, tend to show that multiple intentional acts caused J.M.'s death and largely disprove Appellant's defense.

{¶77} For the reasons above, Appellant's fourth assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 5

> APPELLANT'S SENTENCE IS UNCONSTITUTIONAL PURSUANT TO REAGAN TOKES LAW, R.C. 2967.271, AS IT VIOLATES THE SEPERATION [SIC] OF POWERS DOCTRINE AND THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶78} Appellant argues that the Reagan Tokes Act is unconstitutional. However, the state correctly asserts that the Ohio Supreme Court has declared the Act is constitutional. *State v. Hacker*, 173 Ohio St.3d 219, 2023-Ohio-2535, -- N.E.3d --.

{¶79} Accordingly, Appellant's fifth assignment of error is without merit and is overruled.

Conclusion

{¶80} Appellant argues that the jury *voir dire* in this case did not accurately reflect the community, as not one African American was included. He argues that the court improperly permitted bad acts evidence in violation of Evid.R. 404(B) and challenges his conviction under a theory of manifest weight of the evidence. Appellant also contends the court erred in allowing the admission of certain photographs which were duplicative and graphic and prejudiced his defense. Finally, he challenges the constitutionality of the Reagan Tokes Act. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, P.J. concurs.

Hanni, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's 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 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.