[Cite as *State v. Jackson*, 2023-Ohio-2381.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 111947
v.	:	
JAMES JACKSON,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 13, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-20-654915-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Gregory M. Paul, Assistant Prosecuting Attorney, *for appellee*.

Harris Law Firm, LLC, and Felice L. Harris, *for appellant*.

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, James Jackson ("Jackson"), appeals his convictions for murder, felonious assault, and having weapons while under disability ("HWWUD") following a bench trial. Jackson raises eight assignments of error. For the reasons set forth below, we affirm.

I. Facts and Procedural History

{¶ 2} This appeal stems from the death of Omar Crosby ("Crosby") and the felonious assault of Earl Franklin ("Franklin"). The incident occurred on November 14, 2020, at Regency Park Place Apartments ("Apartment Complex") in Cleveland, Ohio. Jackson was arrested on December 2, 2020, for his alleged involvement and, on December 9, 2020, Jackson was indicted in a five-count indictment. Count 1 charged Jackson with murder of Crosby under R.C. 2903.02(A) and Count 2 charged Jackson with murder under R.C. 2903.02(B). Each of Counts 1 and 2 carried one- and three-year firearm specifications. Count 3 charged Jackson with felonious assault under R.C. 2903.11(A)(1) for the serious physical harm caused to Crosby. Count 4 charged Jackson with felonious assault under R.C. 2903.11(A)(2) for causing or attempting to cause physical harm to Franklin. Each of Counts 3 and 4 carried one- and three-year firearm specifications, a notice of prior conviction specification, and a repeat violent offender specification. Count 5 charged Jackson with HWWUD under R.C. 2923.13(A)(2).

{¶ 3} On December 13, 2020, defense counsel was appointed, Jackson waived the reading of the indictment and pled not guilty, and the trial court set bond. Prior to the bench trial on June 23, 2022, numerous pretrials and trial dates were continued, new defense counsel was appointed on two separate occasions, and Jackson filed a number of pro se motions. The procedural history relevant to Jackson's speedy trial challenge is discussed in detail in our analysis of Jackson's sixth assignment of error. Other relevant events leading up to trial are as follows.

{¶ 4} In May 2021, Jackson's counsel filed a motion for reconsideration of bond reduction and the state filed a response. As part of its argument, the state indicated that a 9 mm gun with 19 live rounds was located at the home where Jackson was arrested. The state explained that Jackson's DNA was present on the 9 mm's grip, trigger, barrel, and magazine. The state alleged, "This weapon has been determined to be a ballistic match to an unsolved shooting/improper discharging a firearm outside the same apartment complex at 1560 Ansel Road on August 15, 2020." (Response, 05/18/21.) The state further claimed that Jackson "contacted a material witness dozens of times following his arrest in December." (Response, 05/18/21.) The state alleged that Jackson used another inmate's telephone PIN to "surreptitiously contact" the witness and 34 separate calls were made "urging her to recant her previous statement." (Response, 05/18/21.) The state also claimed that Jackson made several calls to his brother and directed him to confront the witness and force her to recant.

{¶ 5} At a pretrial held that month, arguments were made on the record regarding Jackson's pending motion for bond reduction. In its argument, the state discussed Jackson's prior criminal history and Jackson's calls "urging, insisting, pleading with [a] material witness to go talk to the detective and recant [her] story [and] version of the events that [she] gave to the police three days after the homicide." (05/19/21, tr. 9-10.) Ultimately, Jackson's motion to reduce bond was denied and Jackson's phone privileges were revoked.

{¶ 6} In April 2022, Jackson filed a pro se motion to dismiss pursuant to R.C. 2945.73(A). Therein, Jackson argued that his right to a speedy trial was violated. On June 22, 2022, the parties appeared for trial. While jurors were waiting to be called to the jury room, the trial court went on the record to discuss a potential plea. Jackson requested additional time to consider the plea deal. The parties reconvened the following day for Jackson's jury trial or plea hearing. Ultimately, Jackson decided not to plea and voluntarily waived his right to a jury trial. Prior to the bench trial's commencement, defense counsel orally adopted Jackson's pro se motion for dismissal invoking his right to a speedy trial. The court determined Jackson's speedy trial rights had not been violated, and Jackson's bench trial began. Opening statements were made, and a state's witness was sworn in before court was adjourned for the day.

{¶ 7} Before the bench trial resumed, the trial court judge inquired whether the state had any objection to proceeding in light of a character reference letter that was written by defense counsel on the trial court judge's behalf:

> THE COURT: As many in the legal profession know, the Office of Disciplinary Counsel has seen fit to file a formal complaint against me. My attorney at Gallagher Sharp sent letters to a number of attorneys asking for character references. I found out last week that [defense counsel] was kind enough to write a letter on my behalf. So I just want to place that upon the record to determine if there is any objection on behalf of the State of Ohio.
>
> [STATE]: Not at all, your Honor. Thank you.
>
> THE COURT: Thank you very much * * *, I appreciate that.

(06/27/22, tr. 41-42.) The state then began its case and the following relevant evidence was adduced at trial.

{¶ 8} Dystine Allen ("Allen"), who was the only eyewitness of Crosby's murder to testify at trial, explained that she hosted a party at her apartment on the night of the shooting. She invited family and friends, including Crosby and Franklin. Allen recalled that Crosby arrived around 6:00 or 7:00 p.m. and Franklin arrived around 9:00 p.m. Allen testified that she and Jackson, who goes by the nickname Cube, dated for two years but were broken up by the time of her party. Allen stated that Jackson was not invited to the party and she did not want him there. However, Jackson showed up anyway around 10:00 or 11:00 p.m. Jackson was accompanied by two other men that Allen knew to be his friends. Allen testified that "he just came in, seen who was all there, and then left" with his two friends after about 15 or 20 minutes. (06/27/22, tr. 107.) Allen testified that everyone was having a good time at the party and there were not "any beefs." (06/27/22, tr. 80.) Allen further testified that Jackson did not "act angry" or "cuss at anybody." (06/27/22, tr. 107.)

{¶ 9} Allen explained that Jackson was later dropped off by his friends when the party was ending around midnight. Allen recalled that her two sisters, her sister's best friend, two other females, Crosby, and Franklin were still there when Jackson returned. Allen's child, nieces, and nephews were also there in the back room of Allen's apartment. Allen was cooking for the children when Crosby and Franklin left the party and went into the hallway. Several minutes later, Jackson's

phone rang and he told Allen that he was going to go talk on the phone. Jackson exited the apartment and went into the hallway.

{¶ 10} After a few minutes, Allen's sister's best friend said "they was out there fighting [in the hallway]" and Allen opened the door to see what was going on. (06/27/22, tr. 82.) Allen testified that Crosby and Jackson were "tussling" in the hallway right outside her door (06/27/22, tr. 82, 137.) Allen did not observe anyone else in the hallway, including Franklin. Allen testified that after she opened the door, Jackson and Crosby came into her apartment and she saw Jackson shoot Crosby in her living room. (06/27/22, tr. 82-83.) Allen said that her two sisters, her sister's best friend, and two other females were also there. Allen believed one shot was fired but did not know if anyone was shot at that time because "we grabbed the kids and ran out the back [door]." (06/27/22, tr. 83-84.)

{¶ 11} Allen recalled that Jackson ran out with them and identified him at trial on video surveillance footage as he was leaving out of the back door before the group of witnesses and kids. Allen testified that this footage captured the moments immediately after Jackson shot Crosby. Allen also identified Jackson in a compilation of surveillance video footage from different locations outside of the Apartment Complex. Allen recognized Jackson in some portions of the footage and was able to identify him in others based on the clothes he was wearing that evening: a black jacket with a red hoodie and fanny pack strapped across him. Allen further testified that the video surveillance footage captured Franklin laying on the sidewalk after he was injured, Jackson checking on Franklin, and Allen calling the police after

the shooting. Allen told police "somebody got shot in my apartment." (06/27/22, tr. 118.)

{¶ 12} Franklin also testified about the facts and circumstances surrounding the shooting. Franklin testified that he and Crosby were childhood friends. Franklin believed he arrived at Allen's party after Crosby between 10:00 and 11:00 p.m. Franklin testified that Allen left to go do something outside or get some cooking grease and, when she returned, "the dude with the red jacket came in after her," "stared at everybody, [and] sat down." (06/27/22, tr. 183.) Franklin testified that the man in the red jacket was wearing a "red coat with a hoodie, with brown fur around it." (06/27/22, tr. 205.) Franklin testified that "[d]ude was looking at [Allen's sister and Crosby] all strange" and "didn't say a word to anyone." (06/27/22, tr. 184, 201.) Franklin explained:

> [The dude] got to looking at her — I mean [Crosby], all strange or whatever. He end up getting up, stepping by the door. He get on his phone. After that he leaves out.
>
> My dude [Crosby] get up, ask me to step a little by the kitchen. He ask me do I know the dude, why the dude staring at him, know what I'm saying, like, what's going on.
>
> By the time we get through talking, he's like, man, we just going to go on outside. Because we live in the building, we just gonna go outside —
>
> * * *
>
> By the time we go out the door, all I know I flash, light, and a sound, and I was going down the stairs.

(06/27/22, tr. 184-185.) Franklin explained that Crosby was behind him and he "didn't even know nothing happened to [Crosby]." (06/27/22, tr. 185.) Franklin

testified that he was attacked "immediately on walking out of the unit door" and he "made it outside, touching the walls" (06/27/22, tr. 203). Franklin further testified:

> [STATE]: Did you think you got shot?
>
> [FRANKLIN]: I thought I was dead, actually. I couldn't really see nothing. Ears ringing. Cloud of smoke. And blood was just coming down my face.

(06/27/22, tr. 188.) Franklin identified himself on surveillance video footage stumbling and falling on the sidewalk outside of the Apartment Complex. Franklin testified that he was "grazed" in the head and only remembered being in the ambulance and waking up in the hospital where he received seven or eight stitches (06/27/22, tr. 187.) Franklin did not know what happened to Crosby until he went home the next day and "just broke down and started crying." (06/27/22, tr. 187.)

{¶ 13} Cleveland Police Sergeant Andre Bays ("Sgt. Bays") was a patrol officer at the time of the shooting. He responded to the scene late at night after receiving "a call for male shot." (06/27/22, tr. 59.) Once Sgt. Bays arrived, he observed an officer assisting a "male who was shot" on the sidewalk outside of the Apartment Complex. (06/27/22, tr. 59-60.) Sgt. Bays began assisting the officer and the man outside, who was identified as Franklin. Sgt. Bays testified that Franklin suffered a laceration to his forehead but did not have gunshot wound. Franklin was not able to provide any information about what happened while Sgt. Bays assisted him.

{¶ 14} Sgt. Bays was told another person was shot inside the Apartment Complex. He went up to the unit where the shooting allegedly took place and

observed multiple people in the apartment and a male on the ground with a gunshot wound to his chest. Sgt. Bays testified that most people stayed inside the apartment and assisted the gunshot wound victim, but other people exited the unit. Sgt. Bays described the people helping inside as "frantic" and "crying, upset, just hysterical." (06/27/22, tr. 63.) Sgt. Bays learned the gunshot wound victim was Crosby. Crosby was unresponsive from the time Sgt. Bays arrived on scene and did not respond to any lifesaving measures. Sgt. Bays asked if anyone knew what happened but did not receive any information at that time.

{¶ 15} Sgt. Bays testified that EMS arrived and transported Crosby to the hospital. He stayed on scene to try to gather information and learned some details about the events that transpired from one of the witnesses inside:

> [I learned t]hat it was a card game that was going on inside the apartment, and during the card game someone knocked at the door, and there were males at the door who got into some kind of verbal argument with some of the people who opened the door. It was a fight that started, and a gunshot went off that struck * * * Crosby.

(06/27/22, tr. 68.) No one provided Sgt. Bays with the identification of the shooter, and Sgt. Bays was not further involved in the investigation after that day.

{¶ 16} Cleveland Patrol Officer Nicole Tango ("Officer Tango") was training on the day of the incident. She received a call "[f]or two males shot" and responded to the Apartment Complex after midnight. While retrieving a witness from across the Apartment Complex's courtyard, Officer Tango was handed a note by an unknown older female believed to be a resident of the Apartment Complex ("Unknown Author"). Officer Tango testified: "I was walking up a stairwell to that

witness's apartment unit, and this elderly or older female was walking down the stairwell, and she like passed me the note and said, put this in your pocket. And she walked away quickly." (06/27/22, tr. 51.) Officer Tango did not get the name of the person who gave her the note. The note said, "[T]wo brothers from 30th, Curb and M.J., start there." (06/27/22, tr. 52.) Officer Tango notified her superior about the note, gave it to a detective in the homicide department to be marked it into evidence, and wrote a report.

{¶ 17} Cleveland Police Detective Robby Prock ("Det. Prock") was working in the Crime Scene Unit and processed the scene on the night of shooting along with another detective. He testified, "We were called out for a felonious assault shooting. And then once we arrived and met with the officers and sergeant on scene, we were notified that it was now a homicide, and we were there to * * * process the scene." (06/27/22, tr. 144.) Det. Prock testified that photographs of the scene showed blood on the wall and floor by the doorway of Allen's apartment and a trail of blood coming down the stairs, through the Apartment Complex's Lobby, and onto the sidewalk outside. Det. Prock further testified that other photographs depicted the condition of the unit: the table was overturned, "cards and stuff" were on the ground, bloodstains were on the carpet, blood was suspected on a green blanket, and a blood smear was found on the wall above it.

{¶ 18} Dr. Erica Armstrong ("Dr. Armstrong"), a Forensic Pathologist Deputy Medical Examiner for the Cuyahoga County Medical Examiner's Office, supervised the autopsy of Crosby. Dr. Armstrong testified that Crosby sustained a

gunshot wound to the chest. An entrance wound was located on Crosby's left chest, there was no exit wound, and a damaged bullet was recovered from Crosby's mid back. Dr. Armstrong further testified that Crosby sustained recent blunt force injuries. There were abrasions on Crosby's right eyelid, right and left sides of his face, right side of his neck, and left lip; contusions or bruises on Crosby's lower lip on the left side and upper lip; and some injury to and dislocation of Crosby's right collar bone. Dr. Armstrong testified that Crosby's cause and manner of death were a "gunshot wound of [the] chest with visceral, vascular, skeletal, and soft tissue injuries, homicide." (06/28/22, tr. 323.)

{¶ 19} Curtis Jones ("Jones") was working for the Cuyahoga County Medical Examiner's Officer as the supervisor of the Trace Evidence Unit. He collected samples from Crosby's hands, fingernails, knuckles, and palms prior to autopsy, examined the items that were delivered to the medical examiner's office with Crosby's body for trace evidence, and authored the trace evidence report associated with Crosby's death. Jones testified that suspected blood and a bullet hole were located on Crosby's jacket and each of Crosby's shirts. Jones further testified that the bullet hole defect on Crosby's jacket was examined and tested; the results suggested an entrance bullet hole with "muzzle to target distance of close proximity" meaning, typically, within one foot. (06/27/22, tr. 163, 167-168, 172.) No testing was performed on the gunshot residue sample collected from the hands of Crosby due to the close proximity of the shooting.

{¶ 20} Cleveland Police Detective Andrew Hayduk ("Det. Hayduk") was working in the Homicide Unit and received a call for an assignment on Ansel Road on the night of the shooting. He was paged after Crosby was pronounced deceased and learned Crosby's official cause of death was a gunshot wound to the chest. Det. Hayduk arrived at the scene of the shooting "approximately an hour after it happened[, m]aybe closer to 2:00 a.m." (tr. 06/27/22, tr. 219.) Det. Hayduk explained that a uniformed officer gave him Unknown Author's note and he marked it into evidence. Det. Hayduk testified that "to this day [he did] not know the identity of the person that wrote that note." (tr. 06/28/22, tr. 282.) While on scene, Det. Hayduk spoke with patrol and the crime scene unit, took measurements, collected evidence, and briefly spoke with a few witnesses. On cross-examination, Det. Hayduk testified that there were no fingerprints or DNA evidence linking Jackson to the shooting. Det. Hayduk further testified that no shell casings were found at the scene of the crime and the type of gun used was unknown.

{¶ 21} Det. Hayduk then took Allen and her two sisters to the Homicide Unit for interviews where they were interviewed separately. Det. Hayduk testified that they did not have a suspect after the initial round of separate interviews. Det. Hayduk then spoke with all three sisters together because "[a]ll of their statements were inconsistent, and I believe[d] that they were lying to me. I think they knew more than they were telling. And I told them that very straightforward, that if they wanted to tell me the truth they could call me at a later date." (06/27/22, 220-221.) Det. Hayduk provided the sisters with his card and cell phone number. Allen

conceded that she lied to police the evening of the shooting and did not provide an accurate description or identification of the shooter. Instead, Allen told police that the suspect was wearing all black and that she did not know who the shooter was. Allen testified that she did not tell the truth initially because she was scared and it was her first time experiencing something like that.

{¶ 22} Det. Hayduk testified that he received a call from Allen the day after the shooting and initial interview. Allen stated that she called Det. Hayduk because she wanted to tell him what really happened. Det. Hayduk explained that they agreed to meet the following day. Allen testified that she told Det. Hayduk that Jackson shot Crosby in this subsequent interview "[b]ecause he did it." (06/27/22, tr. 98.) Det. Hayduk verified Jackson's identity, consulted with city prosecutor, and issued a warrant. During the course of his investigation, Det. Hayduk also learned that Jackson had a brother who went by the nickname of "M.J." and Jackson's street name was "Cube." (06/27/22, tr. 225-226.)

{¶ 23} Franklin recalled being interviewed by the police and shown a photo array the second or third day after he left the hospital. Franklin identified the person in photo five and remarked that "he looks like that damn dude." (06/27/22, tr. 190.) According to the photo lineup array and key submitted as a state's exhibit, Franklin identified Jackson. Franklin testified that based on what he remembered the night of the shooting the person in the photo "came in, sat down, and was responsible for [his] friend's death" and was wearing a "hoodie — coat, red coat rather." (06/27/22, tr. 190.) However, on cross-examination, Franklin conceded that he had no

personal knowledge of the identity of his attacker; rather, Franklin was told by other people, like Allen and Allen's sisters, that "the guy in the red jacket" was responsible. (06/27/22, tr., 194-198.) Det. Hayduk confirmed that when he spoke to Franklin a few days after the incident, Franklin initially believed he was shot and had no idea who was responsible.

{¶ 24} After Jackson's arrest at his mother's house, Det. Hayduk met with Jackson in jail and video recorded the interview. During Jackson's interview, Det. Hayduk showed Jackson portions of the surveillance video footage he obtained from the Apartment Complex's management company soon after the shooting. Det. Hayduk also showed Jackson stills from the video surveillance footage. Some of the video footage and stills were in black and white and were grainy. Det. Hayduk testified that Jackson denied he was in portions of the video surveillance footage but confirmed he was pictured in some of the stills during his interview. Jackson also told Det. Hayduk that he checked on Franklin when he was on the ground outside of the Apartment Complex and insisted that he was wearing a red hoodie with a black jacket and blue jeans on the night of the shooting.

{¶ 25} Det. Hayduk testified that in the video footage where Jackson identified himself in a still photograph, "it appears on his right side that he's got an object that's consistent with a handgun sticking out of his pocket." (06/27/22, tr. 235.) Det. Hayduk believed Jackson could be identified throughout the surveillance videos because he was wearing a black jacket with a red hoodie and blue jeans. Det. Hayduk further believed the compilation of surveillance video footage showed

Jackson interacting with a car that pulled into the parking lot for "just a second or two" and "g[etting] rid of the gun most likely in the car before entering the back door" of the Apartment Complex. (06/27/22, tr. 256-257.) During his interview, Jackson said he never saw this vehicle before but identified himself in a still taken "seconds before he interacted with the car." (06/27/22, tr. 253.) Jackson also provided inconsistent information about the shooting and claimed three people were responsible. Det. Hayduk testified that no one meeting Jackson's descriptions of the alleged perpetrators could be found on any of the Apartment Complex's surveillance footage.

{¶ 26} Allen mentioned that Jackson called her "[a] lot probably" from jail and she hung up on him. (06/27/22, 124.) The parties stipulated that Allen and Jackson communicated after he was arrested. During discussions regarding this stipulation defense counsel noted that "[Allen] did have communication * * * with James Jackson after he was arrested and he would call from the jail. It wasn't [Allen] just hanging up; they did talk a lot. We would agree, we're talking 43 calls?" (06/28/22, tr. 275.) Det. Hayduk testified that he listened to "a few calls between [Allen] and James Jackson." (06/28/22, tr. 276.) Det. Hayduk further testified that in those calls, Jackson asked Allen to recant the statement she made to Det. Hayduk. On cross-examination, Det. Hayduk advised that these calls came from another inmate's PIN number and that often times inmates will use different PIN numbers "[t]o try to have conversations that that [he] or the Prosecutor's Office won't be able to track." (06/28/22, tr. 304.)

{¶ 27} Jackson called three witnesses to testify on his behalf. Jackson's mother offered testimony about Jackson's arrest and his relationship with Allen. Jackson also called his sister to offer testimony about text messages she received from one of Allen's sisters who was present the night of the shooting. Lastly, Jackson recalled Det. Hayduk to evaluate the chronology of the compilation video of surveillance footage, the layout of the Apartment Complex, and Jackson's path of travel. Det. Hayduk testified that he was "not a hundred percent sure of [Jackson's] exact path of travel" because there are "a variety of different entrance and exit points" in the Apartment Complex and "[i]t's possible" the compilation video was not in chronological order. (06/29/22, tr. 369.) Det. Hayduk testified that he does not believe the compilation video's order casts doubt on the whole investigation because "[i]t's a series of videos that captured that I believe show the activities around the murder. But it's very possible that they are not in exact chronological order." (06/29/22, tr. 376.)

{¶ 28} Thereafter, the defense rested. The parties agreed that there was no relevant DNA evidence in Jackson's case. The trial court advised that he was "going to withhold judgment until [he] had an opportunity to review portions of the transcript" and certain exhibits and the parties would "reconvene once the Court has arrived at a determination of the ultimate issue of guilt or innocence." (06/29/22, tr. 412-413.)

{¶ 29} On August 4, 2022, the trial court found Jackson guilty of all counts and specifications as charged in the indictment. The trial court judge explained that

he "reviewed every exhibit that was admitted in this case"; "[his] notes, which were extensive"; "the testimony either through notes or the transcript of all of the witnesses who testified in this case"; and "a computer that was provided to the Court with much of the video that surrounded the situation." (08/04/22, tr. 416-418). The trial court judge then stated, "The Court's had an opportunity, as I said, to review all of this, and I do believe at this point that the State of Ohio has clearly established beyond any reasonable doubt at all each and every one of the elements against the defendant in this case." (08/04/22, tr. 418).

{¶ 30} In reaching its decision, the trial court judge stated:

> In terms of other evidence that was adduced in this case, there was testimony from the witnesses, [Allen] and the detective in this case, that during the pendency of the case, James Jackson made numerous calls to [Allen] to try to get her to recant. He may have made as many as 34 phone calls, sometimes using another defendant's PIN to make those calls.
>
> The motion filed by the State of Ohio says he made 34 separate phone calls, and then directed his brother * * * to confront the same witness to force her to recant her previous statements.
>
> Additionally, it should be noted that when the defendant was arrested on December 2nd by officers of the Northern Ohio Violent Fugitive Task Force, he was arrested, I believe, inside his mother's home with a 9mm pistol and 19 live rounds.
>
> The defendant's DNA had been determined to be present on the grip, the trigger, the barrel and the magazine of the pistol.
>
> This weapon has been determined to be a ballistic match to an unsolved shooting, improperly discharging of a firearm outside the very same apartment complex at 1560 Ansel Road on August 15th of 2020.
>
> So these are the many of the facts and circumstances that lead to the verdict in this case.

(08/04/22, tr. 422-423.) The trial court then concluded the proceedings by stating, "I believe that the evidence clearly establishes beyond any doubt whatsoever that this defendant was involved in the senseless murder of the victim in this case and the felonious assault of the other victim in this case." (08/04/22, tr. 426.)

{¶ 31} The matter proceeded to sentencing on August 30, 2022.

{¶ 32} The court sentenced Jackson as follows: Count 2 (murder under R.C. 2903.02(B)) and Count 3 (felonious assault of Crosby under R.C. 2903.11(A)(1)) merged into Count 1 (murder under R.C. 2903.02(A)) and the state elected to proceed on that count. On Count 1, Jackson was sentenced to "3 year(s) on the firearm specification(s) to be served prior to and consecutive with 15 year(s) to life imprisonment on the base charge." (Journal Entry, 8/30/22.) On Count 4 (felonious assault of Franklin under R.C. 2903.11(A)(2)), Jackson was sentenced to "3 year(s) on the firearm specification(s) to be served prior to and consecutive with a minimum prison term of 8 year(s) on the base charge [and] a mandatory 5 years [of] post release control." (Journal entry, 8/30/22.) On Count 5 (HWWUD), Jackson was sentenced to 36 months. The firearm specifications in Counts 1 and 4 were run consecutively and the base charges in Counts 1, 4, and 5 were run concurrently. Ultimately, Jackson was sentenced to "life imprisonment with parole eligibility after serving 21 full years at the Lorain County Correctional Institution." (Journal entry, 8/30/22.) Jackson received jail-time credit for 636 days, and his phone privileges were reinstated. All motions not specifically ruled on prior to the sentencing journal entry were denied as moot.

{¶ 33} Jackson now appeals his convictions, raising eight assignments of error for review:

> **Assignment of Error I:** Jackson was denied his fundamental right to a fair trial and Sixth Amendment right to the effective assistance of conflict-free counsel.
>
> **Assignment of Error II:** The trial court erred and violated James Jackson's constitutional rights to due process of law and a fair trial by taking judicial notice of "evidence" not properly admitted at trial.
>
> **Assignment of Error III:** The trial court erred and violated James Jackson's constitutional right to confront the witness against him by improperly admitting and relying on hearsay in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution and Ohio Evid.R. 801.
>
> **Assignment of Error IV:** James Jackson's conviction for the felonious assault of Earl Franklin is in violation of his right to due process of law guaranteed by Article I, Section 10 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.
>
> **Assignment of Error V:** James Jackson's convictions are against the manifest weight of the evidence.
>
> **Assignment of Error VI:** The trial court erred in denying [Jackson's] Motion to Dismiss Due to Speedy Trial Provisions of R.C. 2945.71.
>
> **Assignment of Error VII:** The Reagan Tokes Act is unconstitutional as it impermissibly violates the Separation of Powers doctrine and the Due Process Clauses of the United States and Ohio Constitutions.
>
> **Assignment of Error VIII:** James Jackson was denied his constitutional right to a fair trial as a result of cumulative errors at trial.

II. Law and Analysis

A. Alleged Conflict of Interest

{¶ 34} In his first assignment of error, Jackson argues that the trial court erred when it failed to inquire or recuse itself when it knew a potential conflict existed. Jackson asserts that the trial court judge had an affirmative duty to do so and believes, at minimum, the case must be remanded with instructions for the trial court to conduct a hearing to determine whether an actual conflict of interest existed. Alternatively, Jackson claims recusal of the trial court judge or defense counsel was required and the trial court's failure to inquire resulted in structural error, requiring a finding of per se prejudice and reversal of his convictions.

{¶ 35} The state argues that the record does not indicate any special circumstances by which the trial court knew or reasonably should have known that particular conflict existed of which it had a duty to inquire. The state further argues that no actual conflict occurred that adversely affected defense counsel's ability to represent Jackson and Jackson failed to make the requisite showing that there was some plausible alternative strategy or tactic that defense counsel could have pursued. The state also claims this court is without jurisdiction to consider whether the trial judge erred by failing to recuse or disqualify himself.

{¶ 36} We agree with the state: this court lacks jurisdiction to consider whether disqualification of the trial court judge was appropriate. Jackson never asked the trial court judge to recuse himself, nor was an affidavit of disqualification filed with the Supreme Court of Ohio pursuant to R.C. 2701.03. An appellant who

fails to file an affidavit of disqualification cannot complain on appeal that the trial judge was biased. *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 64-65, citing *State v. Moore*, 93 Ohio St.3d 649, 650, 758 N.E.2d 1130 (2001); *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 78. Moreover, exclusive authority to pass upon the disqualification matters vests in the chief justice of the Ohio Supreme Court or any judge of that court designated by her. *Osie* at ¶ 62; Ohio Constitution, Article IV, Section 5(C). Therefore, this court is "without authority to pass upon disqualification or to void the judgment of the trial court upon that basis." *Beer v. Griffith*, 54 Ohio St.2d 440, 441-442, 377 N.E.2d 775 (1978). Accordingly, we cannot consider whether the alleged conflict required disqualification of the trial court judge.

{¶ 37} Next, we turn to defense counsel's purported conflict. Effective assistance of counsel, as guaranteed by the Sixth Amendment, secures two distinct rights to criminal defendants: (1) the right to competent representation and (2) the right to representation that is free from conflicts of interest. *State v. Hale*, 8th Dist. Cuyahoga No. 107646, 2019-Ohio-3276, ¶ 64 citing *State v. Dillon*, 74 Ohio St.3d 166, 167, 657 N.E.2d 273 (1995) ("Where there is a right to counsel, the Sixth Amendment to the United States Constitution also guarantees that representation will be free from conflicts of interest."). A "conflict of interest" is described as a "struggle to serve two masters." *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *State ex rel. Ogle v. Hocking Cty. Common Pleas Court*, 167 Ohio St.3d 181, 2021-Ohio-4453, 190 N.E.3d 594, ¶ 23; *Solon v. Depew*,

8th Dist. Cuyahoga No. 111463, 2023-Ohio-304, ¶ 19. "Both defense counsel and the trial court are under an affirmative duty to ensure that a defendant's representation is conflict-free." *Dillon* at 167-168.

{¶ 38} In reviewing a conflict-of-interest claim we must first determine whether the trial court had a duty to investigate the potential conflict. "Where a trial court knows or reasonably should know of an attorney's possible conflict of interest in the representation of a person charged with a crime, the trial court has an affirmative duty to inquire whether a conflict of interest actually exists." *State v. Gillard*, 64 Ohio St.3d 304, 311, 595 N.E.2d 878 (1992) ("*Gillard II*"). "The possibility of a conflict of interest exists when counsel has reason to further or serve interests that are different from those of his client." *Depew* at ¶ 18, citing *Ogle* at ¶ 23; *State v. Gillard,* 78 Ohio St.3d 548, 552, 679 N.E.2d 276 (1997) ("*Gillard III*") (holding a possible conflict of interest exists in instances of multiple representations where "'the interests of the defendants *may* diverge at some point as to place the attorney under inconsistent duties'") (emphasis sic), quoting *Dillon* at 168, and *Cuyler* at 356, fn. 3. "If the trial court's affirmative duty arose but it did not inquire, the case must be remanded to the trial court with instructions to conduct a hearing to determine whether an actual conflict of interest existed." *State v. Williams*, 166 Ohio St.3d 159, 2021-Ohio-3152, 184 N.E.3d 29, ¶ 7, citing *Gillard II* at 311-312.

{¶ 39} Here, the record reflects that the trial judge's counsel asked "a number of attorneys" for character references after the Office of Disciplinary Counsel filed a formal complaint against him. Defense counsel was not directly

approached by the trial court judge to draft the letter and the record does not indicate that defense counsel represented the trial judge or was otherwise involved in his disciplinary proceedings. Defense counsel wrote a character reference letter on behalf of the trial judge for use in an unrelated matter, and the trial judge was simply being transparent by discussing it on the record. We further note that no objection was made by the state, Jackson, who previously filed a pro se motion to terminate defense counsel for ineffective assistance, or defense counsel, who was in the best position professionally and ethically to determine whether a conflict of interest existed. These circumstances create no opportunity for divergent interests or inconsistent duties. Nor do they create any reasons for defense counsel to further or serve any interests different from those of Jackson. Therefore, we find that there is no possible conflict of interest, the trial court had no duty to inquire whether such a conflict actually existed, and the matter need not be remanded for further determination.

{¶ 40} "[I]f the reviewing court determines that the trial court's affirmative duty to inquire into a possible conflict * * * did not arise, the defendant must show that an actual conflict of interest adversely affected defense counsel's performance." *Williams* at ¶ 8, citing *State v. Manross*, 40 Ohio St.3d 180, 182, 532 N.E.2d 735 (1988); accord *Dillon*, 74 Ohio St.3d at 169, 657 N.E.2d 273. "An actual conflict of interest exists when counsel is actively representing, furthering, or serving interests that are different from those of his client." *Depew*, 8th Dist. Cuyahoga No. 111463, 2023-Ohio-304, at ¶ 18, citing *Ogle*, 167 Ohio St.3d 181, 2021-Ohio-4453, 190

N.E.3d 594, at ¶ 23; *Gillard III* at 553 (in instances of multiple representation, an actual conflict of interest exists when "'the defendants' interests *do* diverge with respect to a material factual or legal issue or to a course of action.'") citing *Dillon* at 169, quoting *Cuyler*, 446 U.S. at 356, fn. 3, 349, 100 S.Ct. 1708, 64 L.Ed.2d 333. Thus, a possible conflict is insufficient to establish a violation of a defendant's Sixth Amendment right to effective assistance of counsel. *State v. Getsy*, 84 Ohio St.3d 180, 187, 702 N.E.2d 866 (1998). To demonstrate an actual conflict of interest based on what an attorney has failed to do, two elements must be shown by an appellant: (1) "'some plausible alternative defense strategy or tactic might have been pursued'" and (2) "'the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'" *Gillard III* at 553, quoting *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir.1985). "[R]eversal is mandated only if an actual conflict is found." *Gillard III* at 552.

{¶ 41} Based on the record before us, we find that defense counsel's writing of a character reference letter on behalf of the trial judge created no actual conflict of interest. As previously discussed, defense counsel was not actively representing, furthering, or serving interests different from those of Jackson. Nor did any divergence of interests occur with respect to a material factual or legal issue or to a course of action. Moreover, Jackson failed to demonstrate any plausible alternative defense strategies or tactics that were inherently in conflict with or not undertaken due to defense counsel's alleged other loyalties or interests.

{¶ 42} Accordingly, we find Jackson's Sixth Amendment right to conflict-free counsel was not violated and we overrule Jackson's first assignment of error.

B. Evidence Not Admitted at Trial

{¶ 43} In his second assignment of error, Jackson argues that "'evidence' not presented at trial was [im]properly before the court for the purpose of determining James Jackson's guilt." Jackson asserts that when the trial court judge delivered the verdict and presided over Jackson's sentencing hearing, he improperly noticed and referred to facts not in evidence or other acts evidence not properly admitted at trial. Jackson claims that testimony was not offered that Jackson made "numerous calls to get [Allen] to recant" and "no evidence was presented to establish James's possession of a firearm at his arrest or the firearm's prior history." Jackson argues that the trial court relied on "bare allegations in a prior State's motion to convict James Jackson of the indicted offenses." Jackson also argues the trial court relied on "other acts evidence" to prove Jackson acted in conformity therewith and that there was "a backdrop indicating potential bias." Because Jackson believes his constitutional rights to due process and a fair trial were violated, he claims his convictions must be reversed.

{¶ 44} The state argues that trial court's findings regarding the jail calls between Jackson and Allen were supported by testimony contained within the record and, therefore, the trial court did not err in referencing them at the close of trial. The state "concedes that there was no testimony relating to the details surrounding Jackson's arrest presented at trial." Rather, these facts were asserted

in the state's response to Jackson's motion to reduce bond. The state argues that while the trial court's reliance on facts outside of the record is error, such an error is harmless because other, independent evidence was presented at trial that was sufficient to establish Jackson's guilt.

{¶ 45} As conceded by the state, "[c]onsideration of evidence outside the record is inappropriate and can constitute reversible error." *In re Estate of Visnich*, 11th Dist. Trumbull No. 2005-T-0128, 2006-Ohio-5499, ¶ 15, citing *Boling v. Valecko*, 9th Dist. Summit No. 20464, 2002-Ohio-449. "However, where there is ample evidence within the record to uphold the determination by the trial court, the consideration of evidence outside the record is not necessarily prejudicial." *Id.*, citing *Keith v. Keith*, 11th Dist. Portage No. 1844, 1988 Ohio App. LEXIS 2308, 3 (June 17, 1988).

{¶ 46} We note that Jackson does not claim any evidence presented at trial regarding the calls he made to Allen was inadmissible, rather he claims that "these 'facts' do not appear in the trial record." But our review of the record reveals that most of the "other evidence" considered by the trial court was admitted at trial, specifically, that "there was testimony from the witnesses * * * that during the pendency of the case, James Jackson made numerous calls to [Allen] to try to get her to recant. He may have made as many as 34 phone calls, sometimes using another defendant's PIN to make those calls." (08/04/22, tr. 422.) Testimony was, in fact, offered by Allen that Jackson called her "[a] lot probably" while he was incarcerated. Det. Hayduk also testified that he listened to a few of the calls and was

aware that Jackson asked Allen to recant. Det. Hayduk further testified that the calls were made from another inmate's PIN number. Most of the testimony offered regarding Jackson's calls to Allen did not draw an objection from Jackson, and some of the information was developed even further through cross-examination. Moreover, while discussing the stipulation that Jackson and Allen were communicating after Jackson's arrest, defense counsel mentioned Jackson would call Allen from jail and 43 calls were made. Thus, we cannot say the trial court relied on facts outside of the trial record with respect to these issues.

{¶ 47} However, Jackson correctly asserts that the trial court inappropriately considered evidence outside the trial record in making *some* of its many findings of "facts and circumstances that lead to the verdict in this case." (08/04/22, tr. 423.) Specifically, we find that no evidence was presented at trial regarding the following facts not in evidence: (1) Jackson "directed his brother * * * to confront [Allen] to force her to recant her previous statements"; (2) "[Jackson] was arrested * * * with a 9mm pistol and 19 live rounds"; (3) "[Jackson's] DNA had been determined to be present on the grip, the trigger, the barrel and the magazine of the pistol"; and (4) "the weapon has been determined to be a ballistic match to an unsolved shooting, improperly discharging of a firearm outside the very same apartment complex * * *." (08/04/22, tr. 423.)

{¶ 48} We agree with the state's argument that these errors were harmless. An error is considered harmless when there is remaining overwhelming evidence of the defendant's guilt and there is no reasonable possibility that the trier of fact would

have acquitted the defendant had the erroneous evidence not been admitted. *State v. Heyward*, 8th Dist. Cuyahoga No. 76838, 2000 Ohio App. LEXIS 4178, 6-7 (Sept. 14, 2000), citing *State v. Bidinost*, 71 Ohio St. 3d 449, 464, 644 N.E.2d 318 (1994), and *State v. Brown*, 65 Ohio St. 3d 483, 605 N.E.2d 46 (1992); *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983), paragraph six of the syllabus ("Where constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt.").

{¶ 49} In support of its argument, the state cites *Cleveland v. Reynolds*, 8th Dist. Cuyahoga No. 105546, 2018-Ohio-97. In *Reynolds* this court found that the trial court referenced a statement from an affidavit for an arrest warrant that was not put into evidence when it reached its verdict. *Id.* at ¶ 8-9. This court held, "With there being no testimony concerning this statement, nor the admission of any document containing the statement, the court erred by referencing it when announcing its verdict." *Id.* at ¶ 10. However, we found that the error was harmless under Crim.R. 52(A) because it was cumulative; evidence was presented that, by itself, formed a sufficient basis for finding the defendant guilty. *Id.*

{¶ 50} Jackson asserts that "*Reynolds* is inapposite to the instant case as the defendant raised a sufficiency error, not a claim that consideration of evidence outside the record violated the defendant's constitutional rights to due process and a fair trial, the error raised herein." However, the Ohio Supreme Court held:

> [T]he Ohio Rules of Criminal Procedure do not specifically use the words "constitutional" or "nonconstitutional" to divide the standard of review in this way. Crim.R. 52(A) defines harmless error in the context of criminal cases and provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." During a harmless-error inquiry, the state has the burden of proving that the error did not affect the substantial rights of the defendant. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 15. Furthermore, if there is "a '[d]eviation from a legal rule,'" courts undertake a "'harmless error' inquiry — to determine whether the error 'affect[ed] substantial rights' of the criminal defendant." *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 7, quoting *United States v. Olano*, 507 U.S. 725, 732-733, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The term "substantial rights" has been interpreted to require that "'the error must have been prejudicial.' (Emphasis added.)" *Id.*, quoting *Olano* at 734. If a court determines that the error did not affect the defendant's substantial rights, then the error is harmless and "'shall be discarded.'" *Id.*, quoting Crim.R. 52(A).
>
> Thus Crim.R. 52(A), the harmless-error rule, was created in essence to forgive technical mistakes. But rather than distinguish between constitutional and nonconstitutional rights, the rule asks whether the rights affected are "substantial."

State v. Morris, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 23-24.

{¶ 51} Based on the foregoing, we find the trial court's errors are harmless because the outcome of the trial would not have been different in their absence. In reaching its verdict, the trial court judge explicitly mentioned the trial notes, testimony, and exhibits he considered before finding Jackson guilty beyond a reasonable doubt. Indeed, overwhelming evidence was presented at trial to support the trial court's decision, including eyewitness testimony and Jackson's statement to police identifying himself in stills of the surveillance video footage. Therefore, we cannot say Jackson was prejudiced; the trial court's reference to "other evidence" not admitted at trial was harmless and did not affect Jackson's substantial rights

because there is no reasonable possibility that the trier of fact would have acquitted Jackson in its absence.[1]

{¶ 52} Accordingly, Jackson's second assignment of error is overruled.

C. Unknown Author's Note

{¶ 53} In his third assignment of error, Jackson argues the trial court committed plain error by admitting and relying upon the note received by Officer Tango, which violated the hearsay rule and his right to confront the witnesses against him. Jackson asserts that the note was prejudicial since the trial court relied on its contents to find Jackson guilty of the indicted offenses.

{¶ 54} Our review of the record reveals that Jackson did not object to the state's admission of the note into evidence or to any of the testimony offered about the note, some of which was elicited through cross-examination. Therefore, we review for plain error pursuant to Crim.R. 52(B). Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Notice of plain error under this rule is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. In order to establish plain error, Jackson must demonstrate that, but for the error, the outcome of the trial would have been

[1] We note that Jackson's contentions regarding the comments made by the trial court during the sentencing hearing are improper under this assignment of error; they have no bearing on the trial court's determination of Jackson's guilt.

different. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 17, citing *State v. Hill*, 92 Ohio St.3d 191, 749 N.E.2d 274 (2001).

{¶ 55} Even assuming arguendo that Unknown Author's note was inadmissible hearsay, Jackson has not demonstrated that but for the error, the outcome of trial would have been different. As discussed above, overwhelming evidence of Jackson's guilt was presented, including eyewitness testimony and his self-identification in statements to police. Therefore, admission of the note was not prejudicial.

{¶ 56} Accordingly, we decline to find plain error and overrule Jackson's third assignment of error.

D. Sufficiency of the Evidence

{¶ 57} In the fourth assignment of error, Jackson argues that his conviction for felonious assault was unsupported by legally sufficient evidence. Jackson argues that Franklin "conceded he couldn't say from his own personal knowledge who hit him or killed [Crosby]" and "simply identified [Jackson] as the person who wore a red jacket at a party." Jackson further argues that "[Franklin] was unaware of the manner of injury and no evidence was submitted to establish the injury resulted from a handgun." Jackson also asserts that Allen did not know what happened to Franklin. Therefore, James claims no competent, credible evidence was introduced to prove he committed felonious assault against Franklin.

{¶ 58} We begin our analysis by discussing the two characterizations of evidence presented at trial: direct evidence and circumstantial evidence. "Direct

evidence exists when 'a witness testifies about a matter within the witness's personal knowledge such that the trier of fact is not required to draw an inference from the evidence to the proposition that it is offered to establish.'" *State v. Wachee*, 8th Dist. Cuyahoga No. 110117, 2021-Ohio-2683, ¶ 36, quoting *State v. Cassano*, 8th Dist. Cuyahoga No. 97228, 2012-Ohio-4047, ¶ 13. Conversely, "circumstantial evidence requires 'the drawing of inferences that are reasonably permitted by the evidence.'" *Id.*, quoting *id.* "'Circumstantial evidence is proof of facts by direct evidence from which the trier of fact may infer or derive by reasoning other facts in accordance with the common experience of mankind.'" *Id.*, quoting *State v. Hartman*, 8th Dist. Cuyahoga No. 90284, 2008-Ohio-3683, ¶ 37. "Circumstantial evidence and direct evidence inherently possess the same probative value." *State v. Jenks*, 61 Ohio St.3d 259, 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus. And "the elements of an offense may be established through circumstantial evidence and, in particular, the use of a gun can be inferred from the facts and circumstances surrounding an incident." *State v. Ivory*, 8th Dist. Cuyahoga No. 102415, 2015-Ohio-4373, ¶ 15, citing *State v. Walker*, 8th Dist. Cuyahoga No. 94490, 2011-Ohio-456, ¶ 23; *State v. Knight*, 2d Dist. Greene No. 2003CA14, 2004-Ohio-1941, ¶ 19.

{¶ 59} A challenge to the sufficiency of the evidence questions whether the state has met its burden of production. *State v. Swanson-Reed*, 8th Dist. Cuyahoga No. 110724, 2022-Ohio-1401, ¶ 12, citing *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to support a conviction is a question of law. *Thompkins* at 386. "[A] conviction based on legally

insufficient evidence constitutes a denial of due process." *Id.* When reviewing a sufficiency challenge, the reviewing court must examine the evidence admitted at trial and determine "whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus. "[T]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Thompkins* at 386. The question is not "'whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.'" *Swanson-Reed* at ¶ 12, quoting *Thompkins* at 390.

{¶ 60} A felonious assault conviction under R.C. 2903.11(A)(2) requires proof that the assailant caused or attempted to cause physical harm to the victim by means of a deadly weapon or dangerous ordnance. Here, Allen testified that Jackson left her apartment shortly after Crosby and Franklin. Franklin testified that after he and Crosby exited the apartment, he recalled a "flash, light, and a sound." Franklin further testified that he believed he was dead, his ears were ringing, there was a cloud of smoke, and blood was coming down his face. Det. Hayduk also offered testimony that Franklin believed he was shot that day. Franklin testified that he "made it outside, touching the walls" and identified himself stumbling and falling on the sidewalk outside of the Apartment Complex. Blood was located on the wall and floor by the doorway of Allen's apartment, coming down the stairs, through the Apartment Complex's Lobby, and onto the sidewalk outside. Allen testified that she

opened the door to her apartment after being told there was fighting in the hallway. Allen further testified that she only saw Jackson and Crosby "tussling" in the hallway, just prior to witnessing Jackson shoot Crosby in her living room. Ultimately, it was determined that Franklin suffered a laceration to his forehead and Franklin testified that he was "grazed."

{¶ 61} Moreover, Jackson told Det. Hayduk he was wearing a red hoodie, black jacket, and blue pants and identified himself in a still photograph of surveillance footage during his interview with police. Det. Hayduk testified that he believed Jackson was carrying "an object that's consistent with a handgun sticking out of his pocket" in this footage and theorized that other footage showed him"[getting] rid of the gun most likely" while interacting with a car that pulled into the Apartment Complex's parking lot. Allen and Det. Hayduk identified Jackson throughout the surveillance video footage based on what he was admittedly wearing that evening: a red hoodie, black jacket, and blue pants. Franklin also identified Jackson as "the dude with the red jacket."

{¶ 62} Viewing this circumstantial evidence in a light most favorable to the prosecution, we find that a rational trier of fact could draw reasonable inferences and conclude beyond a reasonable doubt that Jackson caused physical harm to Franklin by means of a deadly weapon.

{¶ 63} Therefore, Jackson's felonious assault conviction is supported by sufficient evidence and we overrule Jackson's fourth assignment of error.

E. Manifest Weight of the Evidence

{¶ 64} In the fifth assignment of error, Jackson argues that the greater weight of the evidence indicates the trier of fact clearly lost its way and created a manifest miscarriage of justice. Jackson claims that his conviction for the felonious assault of Franklin is against the manifest weight of the evidence because only Franklin's testimony, which was not based on personal knowledge, links Jackson to the assault. Jackson also argues that his convictions for the murder and felonious assault of Crosby and for HWWUD are against the manifest weight of the evidence because "[g]iven the conflicting stories, the lack of detail for the shooting itself, the dispute over [Jackson's] possession of a firearm, and the out-of-order video surveillance, the weight of the evidence favors acquittal."

{¶ 65} Unlike a sufficiency challenge, which questions whether the state has met its burden of production, a manifest-weight challenge questions whether the state has met its burden of persuasion. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13, citing *Thompkins,* 78 Ohio St.3d at 390, 678 N.E.2d 541. "'[W]eight of the evidence involves the inclination of the greater amount of credible evidence.'" *State v. Harris*, 8th Dist. Cuyahoga No. 109060, 2021-Ohio-856, ¶ 32, quoting *Thompkins* at 387. "Under the manifest weight-of-the-evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive — the state's or the defendant's?" *State v. Williams*, 8th Dist. Cuyahoga No. 108275, 2020-Ohio-269, ¶ 86, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25. A reversal on the basis that a verdict is against

the manifest weight of the evidence is granted "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). When reviewing a challenge to the manifest weight of the evidence following a bench trial, we recognize the trial court is serving as factfinder:

> "Accordingly, to warrant reversal from a bench trial under a manifest weight of the evidence claim, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered."

State v. Ferguson, 8th Dist. Cuyahoga No. 108603, 2020-Ohio-3119, ¶ 22, quoting *State v. Bell*, 8th Dist. Cuyahoga No. 106842, 2019-Ohio-340, ¶ 41.

{¶ 66} Here, the state presented direct evidence that Jackson shot and killed Crosby through the testimony of Allen. Allen testified that on the night of the shooting, she did not tell the truth or provide an accurate description of the shooter because she was scared. Allen further testified that she later called Det. Hayduk because she wanted to tell him what really happened. Testimony was offered by Allen and Det. Hayduk that during her subsequent interview, Allen identified Jackson as the shooter. Allen further testified that she told Det. Hayduk that Jackson shot Crosby "[b]ecause he did it." As discussed above, circumstantial evidence was also introduced that Jackson was in possession of a gun on the night of the shooting and feloniously assaulted Franklin.

{¶ 67} Based on the record before us, we cannot say the trial court lost its way in finding Jackson guilty beyond a reasonable doubt and the verdict resulted in a miscarriage of justice. This is not the exceptional case in which the evidence weighs heavily against Jackson's convictions.

{¶ 68} Therefore, Jackson's fifth assignment of error is overruled.

E. Speedy Trial

{¶ 69} In his sixth assignment of error, Jackson argues he was not brought to trial within 90 days after his arrest. Jackson claims his accounting of speedy-trial time indicates 128 days passed between his arrest and trial. The state argues 56 days had elapsed. In his reply, Jackson claims, without conceding to the state's calculations, that 91 days had passed according to the state's theory. In so calculating, Jackson claims he is "entitled to 12 days, from his arrest on December 2, 2020 to the filing of this Motion for Discovery on December 14, 2020" but incorrectly adds 14 days, instead of 12, to reach 91.

{¶ 70} R.C. 2945.71 designates the specific time requirements for the state to bring an accused to trial while R.C. 2945.72 establishes the circumstances that may extend those time limits. When reviewing a speedy-trial question, this court must construe these speedy-trial statutes strictly against the state, count the number of delays chargeable to each side, and then determine whether the number of days not tolled exceeded the time limits prescribed by R.C. 2945.71. *State v. Ferrell*, 8th Dist. Cuyahoga No. 93003, 2010-Ohio-2882, ¶ 20, citing *State v. Barnett*, 12th Dist.

Fayette No. CA2002-06-011, 2003-Ohio-2014, ¶ 7, and *Brecksville v. Cook*, 75 Ohio St.3d 53, 661 N.E.2d 706 (1996).

{¶ 71} R.C. 2945.71(C)(2) provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after the person's arrest. For purposes of computing time under R.C. 2945.71(C)(2), each day the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. R.C. 2945.71(E). Generally, when computing how much time has run against the state under R.C. 2945.71, we begin with the day after the accused was arrested. *State v. Broughton*, 62 Ohio St.3d 253, 260, 581 N.E.2d 541 (1991). Jackson was arrested on December 2, 2020, therefore, Jackson's speedy-trial time began to run on December 3, 2020.

{¶ 72} "A defendant's demand for discovery tolls the speedy trial time until the state responds to the discovery or for a reasonable time, whichever is sooner." *State v. Garner*, 8th Dist. Cuyahoga No. 102816, 2016-Ohio-2623, ¶ 21, citing *State v. Shabazz*, 8th Dist. Cuyahoga No. 95021, 2011-Ohio-2260, ¶ 26, 31; R.C. 2945.72(E) (providing an extension of speedy-trial time for "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused"). Therefore, 11 days of speedy-trial time accrued from December 3, 2020, until December 14, 2020, when Jackson filed his demand for discovery and bill of particulars.

{¶ 73} Speedy-trial time is also tolled by "[a]ny period of delay necessitated by the accused's lack of counsel" and "[t]he period of any continuance granted on

the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." R.C. 2945.72(C) and (H). The docket notes that the pretrial originally scheduled December 16, 2020, was continued three times until January 28, 2021, at Jackson's request due to ongoing discovery and the withdrawal of the defense counsel. Consequently, those days were tolled and no speedy trial time accrued.

{¶ 74} On January 28, 2021, the pretrial was again continued. The docket is silent until February 18, 2021, and does not attribute the continuance to either party. "Where we find ambiguity, we construe the record in favor of the accused." *State v. Stevens*, 8th Dist. Cuyahoga No. 87693, 2006-Ohio-5914, ¶ 32, citing *State v. Mays*, 108 Ohio App.3d 598, 609, 671 N.E.2d 553 (8th Dist.1995); *State v. Singer*, 50 Ohio St.2d 103, 109, 362 N.E.2d 1216 (1977). Therefore, 21 days of speedy-trial time accrued, bringing the total to 32.

{¶ 75} From February 18, 2021, through December 13, 2021, numerous pretrials were continued at Jackson's request due to ongoing discovery and Jackson's motion to terminate defense counsel. Trial was also set and rescheduled on four occasions at the request of Jackson. Therefore, no speedy-trial time accrued.

{¶ 76} The docket is silent from December 13, 2021, until January 4, 2022. Because ambiguity is construed in favor of Jackson, 22 days of speedy-trial time accrued, bringing the total to 54 days.

{¶ 77} On January 4, 2022, trial was reset for February 23, 2022, at the request of Jackson due to ongoing discovery. Therefore, speedy-trial time was

tolled. The February 23, 2022 trial was reset for March 28, 2022, at the request of the state because the prosecutor was trying another case. The parties disagree as to whether this time was tolled. We note that this court held that "[m]otions to continue that are filed by the prosecution may also toll speedy trial time so long as the trial record affirmatively demonstrates the necessity for a continuance and the reasonableness thereof." *Cleveland v. Collins*, 2018-Ohio-958, 109 N.E.3d 208, ¶ 56 (8th Dist.), citing *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, and *Shabazz* at ¶ 29. In *Collins*, this court further held that "scheduling and docketing conflicts are reasonable grounds for extending an accused's trial date beyond the speedy trial time." *Id.*, citing *State v. Gibson*, 8th Dist. Cuyahoga No. 100727, 2014-Ohio-3421, ¶ 19.

{¶ 78} The March 28, 2022 trial was reset on two occasions, once for May 2, 2022, and again for June 13, 2022, both at Jackson's request because defense counsel was trying other cases. Consequently, no speedy trial time accrued. The June 13, 2022 trial was continued to June 22, 2022, at the request of the trial court due to its unavailability. "[A] trial court's issuance of a sua sponte continuance is a tolling event pursuant to R.C. 2945.72(H) as long as the continuance is reasonable and the court states its reason therefore." *Stevens*, 8th Dist. Cuyahoga No. 87693, 2006-Ohio-5914,at ¶ 53, citing, *State v. Mincy*, 2 Ohio St.3d 6, 441 N.E.2d 571 (1982), *State v. Driver*, 7th Dist. Mahoning No. 03 MA 210, 2006-Ohio-494, and *State v. Barker*, 6th Dist. Lucas No. L-01-1290, 2003-Ohio-5417. The parties due not dispute the reasonableness of trial court's continuance. Therefore, Jackson's

speedy-trial time was tolled. Further tolling Jackson's speedy-trial time, the June 22, 2022 trial was continued to June 23, 2022, at the request of Jackson so he could consider a possible plea.

{¶ 79} All speedy-trial time considered, we calculate 54 days passed between Jackson's arrest and trial. Even if we construe the state's continuance of trial in Jackson's favor, adding 33 days, only 87 days of speedy-trial time accrued. Because Jackson was incarcerated, each day is multiplied by three, calculating to a total of 261 days, at most.

{¶ 80} Because Jackson's speedy-trial time is less than the 270 days prescribed by R.C. 2945.71, Jackson's sixth assignment of error is overruled.

F. Reagan Tokes

{¶ 81} In his seventh assignment of error, Jackson argues that the Reagan Tokes Law is unconstitutional because it violates the separation-of-powers doctrine and denies him the right to due process. The state argues that this court, and numerous other appellate courts, have found that the Reagan Tokes Law does not violate the Due Process Clause and the separation-of-powers doctrine.

{¶ 82} In *State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.), this court, sitting en banc, upheld the constitutionality of the indefinite sentencing provisions of the Reagan Tokes Law under Jackson's claimed constitutional challenges. Therein, we found that the Reagan Tokes Law does not violate the separation-of-powers doctrine or a defendant's rights to jury trial and due process of law. Therefore, Jackson's sixth assignment of error is overruled.

G. Cumulative Errors

{¶ 83} Finally, in Jackson's eighth assignment of error, he argues the cumulative effect of the erroneous admission of evidence resulted in the denial of his right to a fair trial.

{¶ 84} "Under the doctrine of cumulative error, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the errors does not individually constitute cause for reversal." *State v. Allen*, 8th Dist. Cuyahoga No. 102385, 2016-Ohio-102, ¶ 53, citing *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). "However, the doctrine of cumulative error is inapplicable when the alleged errors are found to be harmless or nonexistent." *Id.*, citing *id.*, and *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 48. Because our review of Jackson's assignments of error resulted in findings of harmless or nonexistent errors, the cumulative-error doctrine does not apply.

{¶ 85} Accordingly, Jackson's eighth assignment of error is overruled.

III. Conclusion

{¶ 86} Based on the foregoing, we find that (1) no possible or actual conflict of interest exists; (2) the trial court's reference to facts not in evidence when announcing its verdict constitutes harmless error; (3) the admission of Unknown Author's note did not amount to plain error; (4) Jackson's conviction for the felonious assault of Franklin was supported by sufficient evidence; (5) Jackson's convictions for the felonious assault of Franklin, murder and felonious assault of

Crosby, and HWWUD are supported by the manifest weight of the evidence; (6) Jackson's right to a speedy trial was not violated; (7) the Reagan Tokes Law does not violate the separation-of-powers doctrine or Jackson's right to due process; and (8) the cumulative error doctrine is inapplicable.

{¶ 87} Accordingly, judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

FRANK DANIEL CELEBREZZE III, P.J., and
SEAN C. GALLAGHER, J., CONCUR