**[Cite as *State v. Powell*, 2023-Ohio-2770.]**

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT**
**COUNTY OF CUYAHOGA**

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | No. 111672 |
| v. | : | |
| CORDELL POWELL, | : | |
| Defendant-Appellant. | : | |

JOURNAL ENTRY AND OPINION

**JUDGMENT:** AFFIRMED
**RELEASED AND JOURNALIZED:** August 10, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-643685-A

***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kristin M. Karkutt and Nora C. Bryan Assistant Prosecuting Attorneys, *for appellee*.

Joseph V. Pagano, *for appellant*.

EMANUELLA D. GROVES, J.:

**{¶ 1}** Defendant-appellant Cordell Powell ("Powell") appeals his convictions and sentence for murder and other charges. For the reasons that follow, we affirm.

**Factual and Procedural History**

**{¶ 2}** On September 16, 2019, a grand jury returned an indictment against Powell for eight counts in the death of Kellen May ("May"), including two counts of aggravated murder (Counts 1 and 2); murder (Count 3); aggravated robbery (Count 4); felonious assault (Count 5); discharge of firearms on or near prohibited premises (Count 6); and two counts of having weapons while under disability (Counts 7 and 8). Counts 1 through 6 each included one- and three-year firearm specifications.

**{¶ 3}** After several pretrials, the case was scheduled for trial on April 25, 2022. Prior to trial, Powell filed a motion in limine to exclude "any mention by the state, in the presence of the jury that [Powell] was shot on August 5, 2019 or that drugs were found in his car on said date." Powell argued that the information was not relevant and highly prejudicial. The state countered that relevant evidence was collected as a result of the incident and that it should be admissible. The motion was argued before the court on the morning of the trial, April 25, 2022. Although the trial court was persuaded that the evidence of drugs should be excluded, it was not persuaded as to the other evidence. The defense ultimately argued that if the court was unwilling to exclude the shooting, the court should deny the motion, and they would adjust their presentation at trial. Accordingly, the trial court denied the motion.

**{¶ 4}** Trial commenced on April 25, 2022. Prior to the start of testimony, the defense objected to the admission of a taped telephone conversation between Sonia Rosado ("Sonia") and Powell that occurred on March 5, 2022. The state had

provided the tape to the defense the day before the trial. After listening to the arguments of counsel, the trial court overruled the objection and started the trial. The facts that were introduced are described below.

**{¶ 5}** In approximately July 2019, Sonia was living in Parma with the daughter she shared with Powell. Powell and Sonia had been in a relationship for over ten years; however, they had separated approximately a year prior to the events in this case. Powell and Sonia did not have a formal visitation schedule, but Sonia allowed Powell to see his daughter at her parents' home whenever he liked.

**{¶ 6}** Sonia had recently begun dating a man she knew as "Kells," who she later learned was the decedent, May. On August 2, 2019, Sonia and May were planning to meet. They were using Facebook messenger to communicate. May did not have a car, so Sonia agreed to pick him up near W. 97th and Denison. Prior to her leaving, Powell came to Sonia's parents' home. He wanted to take pictures with their daughter. Sonia agreed and took the pictures on her phone. The pictures were introduced at trial and show Powell wearing a white shirt, white pants with a dark stripe, and black flip-flops. Also, a portion of the car can be seen in the pictures Sonia took that day. Powell asked to see the pictures, and Sonia gave him her phone. While he had the phone, Sonia observed a message from May appear. Sonia tried to get her phone back, but Powell took it and then left in a car Sonia described as blue or gray. Sonia wanted to follow Powell immediately because she was worried about what he might do, but her mother persuaded her to wait. However, after several

minutes, Sonia left and went to 97th and Denison, where she was supposed to meet May.

**{¶ 7}** Laura Rosado ("Laura"), Sonia's mother, testified via Zoom from the hospital. She was unable to see the courtroom clearly and could not identify Powell. She testified that Powell was at her home on August 2, 2019, taking pictures with her granddaughter. She was inside the house during this time. She was, however, close enough to the window to see and hear what was happening outside. She remembered Powell was driving a little gray car. Powell stayed approximately 20-30 minutes. At some point, Laura heard Powell yell at Sonia. She went to the window and saw him take Sonia's phone, cross the street, and get into the gray car. Laura indicated that it was not unusual for Powell or Sonia to take the other's phone. Laura persuaded Sonia not to immediately follow Powell. However, she saw Sonia leave a few minutes later.

**{¶ 8}** When Sonia arrived at W. 97th and Denison, she saw May on the ground. A woman was on the phone with 911 and administering CPR. May had been shot in the back.[1] Sonia stayed until the police and EMS arrived. She hoped to go to the hospital with May but was not allowed. She eventually went home, where her mother informed her that Powell had returned her phone, told his daughter that he loved her, and left.

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[1] Joseph Felo from the Cuyahoga County Medical Examiner's Office testified that May was shot from the back, the bullet entered from the left of his spine and exited right above his belly button.

**{¶ 9}** Sonia was shown messages on her phone at trial. These messages were sent and received after Powell took her phone. Some of those messages suggested May was responding to messages from Sonia. Some of the replies from Sonia's phone were deleted. Sonia denied deleting any messages on her phone. Detective David Borden ("Det. Borden") obtained records from Facebook that contained the messages from Sonia's phone, including some of the deleted messages. Whoever was interacting with May during that time sought to confirm the time and place of their meeting. Messages from May indicate that he was waiting for Sonia, got frustrated when Sonia did not show up after ten minutes, and threatened to leave. Messages sent from Sonia's phone asked May to meet her on "Medison," then on W. 89th. May responded that he was at W. 97th and Denison and that Sonia was aware of the meeting place.

**{¶ 10}** The state also played the audio recording the defense had objected to prior to trial that consisted of a telephone conversation between Powell and Sonia while Powell was in jail. The conversation occurred on March 5, 2019. Sonia identified the voices on the call as herself and Powell. When asked, Sonia agreed that in the call Powell asked her not to come to court. Later Sgt. Brian Williams ("Sgt. Williams") with the Cuyahoga County Sheriff's Office identified the exhibit as a recording from the jail. The defense renewed its objection, which was overruled. Sgt. Williams testified that the personal identification number ("PIN") used to make the call was from another inmate. He also testified that it was common for inmates to use someone else's PIN to make phone calls so that the calls could not be traced

to that inmate. Sgt. Williams reviewed jail calls to Sonia Rosado's number and determined the only other PIN used to call her number was the PIN assigned to Powell. On cross-examination, Sgt. Williams acknowledged that inmates sometimes used other inmates' PINs when they did not have money to make calls. However, on redirect, he pointed out that Powell called Sonia using his own PIN both before and after the call where a different PIN was used.

**{¶ 11}** Rebekah Oesterreich ("Rebekah") had been seeing Powell for approximately three months as of August 2, 2019. She did not recall seeing Powell on August 2 but remembered speaking to him over the phone. She remembered that he was crying and kept telling her that she would not have to deal with him anymore. When she asked him what was wrong, he would not tell her. Rebekah saw him the next day on August 3, 2019. He was driving what she thought was a gray Ford. She had seen him drive it before. She knew he did not own the car and believed that he had obtained it from someone in a suburb.

**{¶ 12}** That day Powell showed Rebekah an image of May on the Cleveland Remembrance page on Instagram and told her that May was his cousin. She later learned that May was not his cousin. Powell also had his gun with him that day and asked her if she knew anyone who would want to buy it. He slipped the gun into her dresser like he always did. Rebekah testified that that day was the last time she saw the gun and she did not know what happened to it. However, after reviewing her video statement to refresh her recollection, Rebekah acknowledged that she told the police that Powell had sold the gun.

**{¶ 13}** During cross-examination of Rebekah, the defense attempted to ask questions about portions of her video statement where Rebekah allegedly said Powell told her he did not shoot May. Rebekah denied that Powell said he did not do it. She also denied that she asked him if he had anything to do with the shooting. At a conference with the attorneys, the defense indicated they wanted to impeach Rebekah by presenting her prior inconsistent statement. The state objected on the basis that Powell could not introduce his exculpatory statements. The trial court sustained the objection.

**{¶ 14}** Amberley Oesterreich ("Amberly"), Rebekah's mother, also testified. She did not recall seeing Powell on August 2, 2019; however, she remembered him telling her he was going to sell a gun around the time of May's murder.

**{¶ 15}** Ashley Spencer ("Spencer"), May's girlfriend and mother of one of his children, was with May on the morning of August 2, 2019. They were living together in an apartment at W. 97th and Denison. She was not aware of May's plans but did see him receive a text from Sonia around 5:00 p.m. May left the apartment approximately 20 minutes later. Shortly after he left, she heard a gunshot. She tried to call May several times, but he did not respond. She went outside but did not see anything. Later a police officer came to the home and told Spencer that May had been shot. Subsequently, Sonia came to see her. Sonia told Spencer that Powell shot May but she did not know why. Spencer acknowledged that she told police that she thought Sonia set May up.

**{¶ 16}** Police arrived at the scene of May's shooting at approximately 5:32 p.m. They recovered a bullet fragment in close proximity to May's body. They also found a 9 mm shell casing near the driver's side door under what was later identified as Sonia's car. According to police, witnesses at the scene described the shooting suspect as a black male wearing white and driving a silver SUV. No eyewitness to the shooting testified at trial. Officers also checked the area for video cameras.

**{¶ 17}** Tom Ciula ("Ciula"), a civilian employee of the Cleveland Police Department, collected and examined videos associated with the investigation. The defense did not object to his testimony. Ciula obtained videos from three locations in the area of the shooting: 9707 Lorain, 3128 W. 78th, and 9501 Denison. The video systems at the three locations each had time discrepancies, i.e., the time on the videos did not reflect actual time. Ciula analyzed the videos to determine the actual time and then compiled them together. In the compiled video, he included captions with the accurate time. The video showed the path of a gray/silver car through the area shortly after the shooting. Ciula was not familiar with cars, so he could not identify the type of car. However, he thought someone who was familiar with cars might be able to discern the make and model from the video. Neither the driver nor the license plate of the car was visible in the video; however, the wheels were. Det. Borden testified that the car in the video belonged to Karen Bellomy ("Bellomy") and could be seen driving northbound on West 97th around 5:25 p.m. on August 2, 2019.

**{¶ 18}** On August 5, 2019, police were called to a shooting on West 91st Street. On arrival, officers observed a small group of people around a gray Hyundai Elantra. Powell was in the driver's seat and had been shot multiple times. Officers recognized the car as the one identified as a suspect vehicle in the shooting of May three days earlier. Officers secured Powell's cell phone at the scene. They also collected 9 mm shell casings.

**{¶ 19}** Bellomy owned a Hyundai Elantra in the summer of 2019. She would often let other people borrow her car. Most often she lent it to a friend who lived in her apartment building, another neighbor, and family members. Her boyfriend, Mark, would use the car as well. Bellomy and Mark would lend the car to "D" in exchange for marijuana. Bellomy did not know D's actual name. She identified Powell as D at trial. The longest period of time that Powell had the car prior to August 2019 was five days. In August 2019, the police came to Bellomy and asked if she knew where her car was. She testified that she thought it was parked in the parking lot. It wasn't until later that she learned that her car was involved in a shooting and was in the impound lot. Bellomy identified the car that Powell was driving when he was shot as her car. She gave police permission to search the car.

**{¶ 20}** Det. David Borden obtained a search warrant for Powell's cell phone. He discovered that text messages were exchanged between Powell and a phone number associated with Bellomy between July 31, 2019, and August 3, 2019. In those messages, Bellomy and Mark asked Powell to return Bellomy's car.

**{¶ 21}** Data on Powell's phone established that the day after the murder, he had searched the internet multiple times for information on a shooting at Denison and W. 97th. Additional relevant searches included the following: "can u be charged without evidence"; "does hear say stand in court"; "does the justice system need the gun to convict with gun"; "if there is no evidence, can you still be convicted or charged"; "is finding the murder weapon that important"; and "can you be charged with murder without a weapon."

**{¶ 22}** At the end of testimony and prior to jury deliberation, the state moved to dismiss Count 6, discharge of a firearm at or near prohibited premises. After deliberating, the jury found Powell guilty of Count 3 murder via felonious assault and guilty of Count 5 felonious assault. The jury also found him guilty of the one- and three-year firearms specifications associated with those counts. The court found Powell guilty of Counts 7 and 8, having weapons while under disability. The jury found Powell not guilty of Counts 1, 2, and 4. At sentencing, the court determined that Count 5 merged with Count 3 and that Count 8 merged with Count 7. However, the court found that the three-year firearm specifications associated with Counts 3 and 5 did not merge and that consecutive sentences were required for the specifications. The court then sentenced Powell to 3 years on each firearm specification for a total of 6 years, to be served consecutively and prior to life with the possibility of parole after 15 years on Count 3; and 36 months on Count 7 to run consecutively to the sentence on Count 3 for an aggregate term of 24 years to life.

**{¶ 23}** Powell appeals assigning the following errors for our review:

## Assignment of Error No. 1

The trial court erred when it denied appellant's motion for acquittal under Crim.R. 29 because the state failed to present sufficient evidence to establish beyond a reasonable doubt the elements necessary to support the convictions.

## Assignment of Error No. 2

Appellant's convictions are against the manifest weight of the evidence.

## Assignment of Error No. 3

The trial court erred by denying the motion in limine to exclude inadmissible other acts evidence and by admitting other acts evidence throughout the trial in violation of Evid.R. 401, 402, 403, and 404, which deprived appellant of his constitutional rights to due process and a fair trial.

## Assignment of Error No. 4

The trial court erred by admitting testimony and Ex. 162 over defense objection where the disclosure was delayed and it contained hearsay and other acts evidence in violation of Crim.R. 16, Evid.R. 801 and violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

## Assignment of Error No. 5

The trial court erred by limiting the cross-examination of Rosado which is contrary to Evid.R. 401, 402, 403, 803, and 901, and in violation of appellant's state and federal constitutional rights to due process and a fair trial.

## Assignment of Error No. 6

Appellant received ineffective assistance of counsel and plain error occurred where counsel failed to object or move to strike the testimony of Tom Ciula who was not qualified as or declared an expert witness.

## Assignment of Error No. 7

Appellant's sentence is contrary to law because the court imposed separate sentences for allied offenses and because consecutive

sentences are not supported by the record and because it is unconstitutional pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Ohio Constitution.

**Assignment of Error No. 8**

The remote testimony of Laura Rosado violated appellant's confrontation rights under the Sixth Amendment to the United States Constitution and Article I, Sec. 10 of the Ohio Constitution.

## Law and Analysis

### Admissibility of Evidence

**{¶ 24}** For ease of analysis, we will examine the assignments of error out of order and in combination when feasible. Therefore, before addressing whether Powell's convictions were supported by the weight and sufficiency of the evidence, we look at Powell's challenges to the admission of some and the exclusion of other evidence. In the third assignment of error, Powell argues that the trial court erred when it allowed the state to introduce evidence regarding a shooting three days after the murder into evidence. In the fourth assignment of error, Powell argues that the trial court erred when it allowed the state to introduce into evidence a telephone call that was not provided to the defense until the day before trial. Finally, in the fifth assignment of error, Powell argues the trial court erred when it refused to allow the defense to cross-examine a witness regarding statements she made to the police that might exculpate Powell.

### Standard of Review

**{¶ 25}** We review a trial court's decision about the admission or exclusion of evidence under the abuse of discretion standard. *State v. Gay,* 8th Dist. Cuyahoga

No. 86944, 2006-Ohio-3683, ¶ 41. An abuse of discretion describes conduct that is "unreasonable, arbitrary or unconscionable." *State v. Hill*, Slip Opinion No. 2022-Ohio-4544, ¶ 9 citing, *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

*Evidence of the August 5, 2019 Shooting*

**{¶ 26}** On August 5, 2019, three days after May's homicide, Powell was shot multiple times while driving Bellomy's car on West 91st Street. Police had identified Powell as a suspect in May's killing by that time. They had also linked Powell to Bellomy's car and had instructed officers to be on the lookout for the car. At trial, the details of Powell's shooting were not discussed in detail and established that Powell was paralyzed as a result of the shooting and that police were able to obtain his cell phone. Additionally, shell casings, drugs, and pictures of the scene were collected and introduced into evidence at Powell's trial.

**{¶ 27}** Prior to trial, Powell filed a motion in limine to exclude the introduction of the August 5, 2019 shooting. While Powell acknowledged that relevant evidence was collected at the crime scene, he argued that the probative value of his shooting was outweighed by the prejudicial effect. Specifically, counsel noted that there was no evidence that linked Powell to May's shooting; however, ballistic evidence was collected at Powell's shooting that led to a NIBIN[2] match with a gun. Drugs were also found in the car. Counsel was concerned that the

[2] NIBIN is an acronym for the National Integrated Ballistic Information Network.

introduction of that evidence could confuse the jury, suggest that Powell was shot in retaliation, and/or suggest Powell was a drug dealer. Additionally, the same caliber bullets were used in both shootings and counsel worried that that information would confuse the jury into believing Powell was involved in May's murder even though none of the bullets linked Powell to May.

**{¶ 28}** The state countered that Powell's phone was recovered in the August 5, 2019 evidence and contained a lot of relevant evidence. The state acknowledged that none of the ballistic evidence collected on August 5, 2019, nor the gun that was subsequently obtained, linked Powell to May's shooting. The court pointed out that testimony would probably clarify that Powell was not paralyzed on August 2, 2019, and that he was shot sometime later. However, Powell's counsel argued the only evidence that should be admitted was that Powell was arrested while in a car possibly linked to May's homicide and that his phone was found in the car.

**{¶ 29}** While the trial court was willing to consider excluding the evidence of drugs that were found in the car, it found that evidence of the arrest and evidence found in the arrest was relevant, including pictures of Powell's phone that was covered in his blood. Powell's counsel argued that if the shooting was going to be introduced, excluding the drug evidence would be of little benefit. The trial court denied the motion and permitted introduction of the challenged evidence.

**{¶ 30}** On appeal, Powell argues that the trial court's decision allowed the admission of other acts evidence in violation of Evid.R. 404(B) and that it also violated the tenets of Evid.R. 401, 402, and 403.

**{¶ 31}** Evid.R. 404(B)(1) establishes that

> [e]vidence of any other crime, wrong or act is not admissible to prove the person's character in order to show that on a particular occasion the person acted in accordance with the character.

**{¶ 32}** Such evidence may be admissible to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Evid.R. 404(B)(2).

**{¶ 33}** However, Evid.R. 404(B) is limited to "other acts" that are "extrinsic" to the crime charged.

> Evid.R. 404(B) only applies to limit the admission of so-called "other acts" evidence that is "extrinsic" to the crime charged. *State v. Stallworth*, 11th Dist. Lake No. 2013-L-122, 2014-Ohio-4297, ¶ 37. In other words, "Evid.R. 404(B) does not apply when the acts are intrinsic as opposed to extrinsic, i.e., the acts are part of the events in question or form part of the immediate background of the alleged act which forms the basis for the crime charged." *State v. Crew*, 2d Dist. Clark No. 2009 CA 45, 2010-Ohio-3110, ¶ 99. Thus, "evidence of other crimes or wrongs may be admitted when such acts are so inextricably intertwined with the crime as charged that proof of one involves the other, explains the circumstances thereof, or tends logically to prove any element of the crime charged." *State v. Davis*, 64 Ohio App.3d 334, 341, 581 N.E.2d 604 (12th Dist.1989), citing *State v. Wilkinson*, 64 Ohio St.2d 308, 415 N.E.2d 261 (1980); *State v. Long*, 64 Ohio App.3d 615, 582 N.E.2d 626 (9th Dist.1989).

*State v. Jones*, 2018-Ohio-498, 105 N.E.3d 702, ¶ 140 (8th Dist.).

**{¶ 34}** Our review of the trial court's decision on admissibility is not based on whether we would have made the same decision. When applying the abuse of discretion standard of review, "an appellate court is not free to substitute its judgment for that of the trial judge." *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559

N.E.2d 1301 (1990). We look solely to see whether the decision was unreasonable, arbitrary, or unconscionable.

**{¶ 35}** This case is entirely circumstantial and accordingly, the potential for prejudicial effect was higher. No eyewitness to May's murder testified at trial. No one testified that they saw: Powell at the scene; Bellomy's car at the scene; or Powell shoot May. A witness or witnesses allegedly told an officer that the shooter was driving a silver SUV, but no one testified to this information. The video of a car submitted at trial, which did not appear to be an SUV, did not contain images of the driver or the license plate of the vehicle. Consequently, the admission of Powell's shooting, which linked him to both gun violence and drug activity, had the potential to prejudice the jury.

**{¶ 36}** Nevertheless, the court opined that Powell did not become paralyzed until after May's murder, which was a relevant fact likely to be addressed at trial. The parties did not dispute the court on that issue. Evid.R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Given the circumstances, whether Powell was physically capable of committing the crime was relevant when the jurors were faced with Powell's physical condition at trial. Under Evid.R. 402, relevant evidence is generally admissible; however, under Evid.R. 403, even relevant evidence may be inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R.

403(A). "In order for the evidence to [be] deemed inadmissible, its probative value must be minimal and its prejudicial value great." *State v. Harding*, 2d Dist. Montgomery No. 20801, 2006-Ohio-481, ¶ 22 citing *State v. Morales*, 32 Ohio St.3d 252, 257-258, 513 N.E.2d 267 (1987). "[R]elevant evidence, challenged as being outweighed by its prejudicial effects, should be viewed in a light most favorable to the proponent of the evidence, maximizing its probative value and minimizing any prejudicial effect to one opposing admission." *State v. Frazier*, 73 Ohio St.3d 323, 333, 652 N.E.2d 1000 (1995).

**{¶ 37}** Given the foregoing, we cannot say that the court abused its discretion when allowing the admission of Powell's shooting into the record. The testimony was limited to Powell being shot, the car he was located in, and the evidence that was gathered. Additionally, the ballistics expert testified that none of that evidence linked Powell to May's murder. The DNA expert testified that Powell's DNA was on the packet of drugs that was found, but also that it was likely his blood from the shooting. Powell's DNA was not found on any of the evidence associated with May's shooting. The two incidents were distinct and presented in a way as to limit the jury's confusion. Consequently, we cannot say that the trial court's decision was unreasonable, arbitrary, or unconscionable.

**{¶ 38}** Accordingly, the third assignment of error is overruled.

*Evidence of the March 5th Telephone Call*

**{¶ 39}** In the fourth assignment of error, Powell argues that the trial court erred when it allowed the state to admit into evidence, over objection, a jail call

between Powell and Sonia that was provided to the defense the day before the first day of testimony at trial.

**{¶ 40}** After jury selection, the defense notified the court that they were provided a copy of the recorded jail call the night before. The defense argued that the state had ample time to provide it earlier and objected to its introduction. The state responded that the call was under another inmate's PIN and, therefore not easily located. Further, the state alleged they sent the call as soon as they found it and texted Powell's counsel immediately. The defense countered that the call was also inadmissible hearsay and Evid.R. 404(B) evidence of alleged witness tampering and should not be admitted. The trial court overruled the objection.

**{¶ 41}** Powell reiterates his arguments below and argues that the trial court should have ruled the evidence inadmissible as a sanction for a discovery violation under Crim.R. 16. Under Crim.R. 16(A), "once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures." If the court becomes aware that a party has violated their duty under the rule, "the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances." Crim.R. 16(L).

**{¶ 42}** When the state violates Crim.R. 16, the error is reversible only when "there is a showing that '(1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefited the

accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect.'" *State v. Gardner*, 8th Dist. Cuyahoga No. 107573, 2019-Ohio-1780, ¶ 49, quoting *State v. Joseph*, 73 Ohio St.3d 450, 458, 653 N.E.2d 285 (1995).

**{¶ 43}** We do not reach a reversible error analysis here however because the record does not support a finding that the state violated Crim.R. 16. The jail call occurred less than two months prior to trial. Furthermore, the evidence suggests that Powell attempted to conceal the call by using another inmate's PIN. The state represented that they discovered the call the day before trial and sent it to the defense immediately. Nothing in the record refutes the state's representation. The state, therefore, complied with its obligation of continued disclosure.

**{¶ 44}** As for Powell's argument that the call was either hearsay or Evid.R. 404(B) evidence, we disagree. This court has noted that statements made by a defendant in a jail call may qualify as an admission of a party opponent under Evid.R. 801(D)(2)(a). "Admissions" have been defined to include when a defendant attempts to prevent a witness from testifying. Even though not an admission to the ultimate issue, it was an admission of a party-opponent for the purposes of Evid.R. 801(D)(2). *State v. Womack*, 8th Dist. Cuyahoga No. 108422, 2020-Ohio-574, ¶ 21, citing *State v. Hampton*, 5th Dist. Stark No. 2018 CA 00123, 2019-Ohio-2555. Powell's call to Sonia falls into this category. He suggested to her several times that she and her parents should try to avoid receiving their subpoenas for trial or, in the alternative, that they testify that they did not know anything.

**{¶ 45}** Furthermore, the tape does not constitute impermissible other acts evidence under Evid.R. 404(B). As discussed, Evid.R. 404(B) covers other acts that are extrinsic to the original crime, not acts that are intrinsic or tied to the original crime. Powell's attempts to persuade Sonia not to testify can be construed as an attempt to avoid conviction for the underlying offense. Courts have found that such an attempt establishes a defendant's consciousness of guilt and is an admission and, therefore, not "other acts." *See Cleveland v. McNea*, 158 Ohio St. 138, 107 N.E.2d 201 (1952); *State v. Richey*, 64 Ohio St.3d 353, 357, 595 N.E.2d 915 (1992). Accordingly, the trial court's decision was not an abuse of discretion.

**{¶ 46}** The fourth assignment of error is overruled.

*Limited Cross-Examination of State's Witness*

**{¶ 47}** In the fifth assignment of error, Powell alleges that the trial court erred in limiting his cross-examination of a state's witness. Although Powell references Sonia Rosado in this assignment, based on his citations to the record he is referencing testimony by another witness, Rebekah Oesterreich. Rebekah provided a statement to the police during the investigation that was captured on video. At the trial, the state was permitted to introduce statements from Powell through Rebekah that he got rid of his gun shortly after May's murder; however, the state did not include portions of the statement that the defense argued would have explained Powell's rationale. When the defense attempted to ask Rebekah about Powell proclaiming his innocence, she denied that he did so. When the defense asked Rebekah whether she asked Powell if he was involved, Rebekah denied asking him

that question. As a result of Rebekah's responses, the defense wanted to introduce Rebekah's statement, both to impeach her trial testimony and to establish Powell's "state of mind when he came to the conclusion [he] better get rid of [his] gun." (Tr. 555.)

**{¶ 48}** Based on the argument of counsel, the trial court cautioned that if the defense wanted to introduce the statement then everything else comes in.

> Defense: * * * It would be our argument that the statement of the defendant as it were is not being elicited for the truth of the matter, but it's rather in response to the state's questions about disposal of the gun. And that's what the questions were directed toward. We believe that the court could give the jury a cautionary instruction that any statement of defendant was not offered for * * * truth of the matter, but it's impeachment of this witness whether —
>
> Court: Well, it's an impeachment of a statement that you are seeking to elicit from her. So I think the problem is * * * how in the world is the state supposed to be able to cross-examine — the whole point of it is how is the state supposed to cross-examine if that person is not testifying. And so, I mean, imagine if he had an entire interview with the police. If you wanted to put only one part of that in, you are saying the state wouldn't be able to put in the rest of it.
>
> Court: So I mean the thing is if you put in a defendant's statement, then everything else comes in. If you only want to put one statement on out of a two-hour interview, the state would be able to put in everything else. So what they're saying is that if you want that statement in, everything else comes in because they don't have the opportunity to cross-examine him.
>
> Defense: Well, it would be our position that if the jury is cautioned that it's not offered for the truth of the matter, then there's no need for cross-examination.
>
> Court: I mean, I think that there's more than one principle here. It's not just hearsay, but it's also — if you understand, I think what they were saying yesterday — I'm not sure if it was on the record, but that if you do elicit that, then they can bring in everything else as if he did testify. And that's actually a choice that you can make if you want to

> pursue that line of questioning. And I think that that's why there's parity in the rule. If you put in a defendant's statement, [the state gets] to put in everything else.
>
> * * * But I am going to sustain the objection and let the witnesses [sic] know again that questions of counsel are not evidence. And then you can move on to the next topic. Okay?

**{¶ 49}** The defense chose not to question Rebekah further.

**{¶ 50}** On appeal, Powell argues that he should have been permitted to impeach Rebekah's trial testimony by introducing her prior inconsistent statement. Powell suggests that even if the statements were inadmissible hearsay, he was permitted to use them to impeach Rebekah's trial testimony. However, he argues that his statements to Rebekah were admissible even if they were hearsay because they were either present sense impressions or excited utterances and therefore admissible exceptions to the hearsay rule.

**{¶ 51}** Evid.R. 801(C) defines hearsay as "a statement other than one made by the declarant while testifying * * *, offered to prove the truth of the matter asserted." At trial Powell's counsel told the court that he wanted to introduce Powell's statements through Rebekah to establish his reasons for getting rid of his gun. Accordingly, the intention was to introduce the statements to prove the matter asserted, i.e., that Powell had reasons other than hiding evidence for disposing of his gun, which is inadmissible hearsay under Evid.R. 801(C). The statement was inadmissible unless an exception to the rule applied or it was permissible for Powell to use the statements to impeach Rebekah.

**{¶ 52}** "Generally, 'prior inconsistent statements constitute hearsay evidence and thus are admissible only for the purpose of impeachment.'" *State v. Harrison*, 2d Dist. Montgomery No. 29345, 2022-Ohio-4627, ¶ 25 quoting *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 128, quoting 1 Gianelli, Evidence, Section 607.4 at 482-83 (3d Ed.2010). If a prior inconsistent statement is offered for the purpose of impeachment, the jury may only consider the prior statement as substantive evidence if it is not inadmissible hearsay. *Id.* at *id.* If the statement is inadmissible hearsay, the court may provide a limiting instruction to the jury that the prior inconsistent statements are only to be considered for impeachment purposes. *Id.*, citing Evid.R. 105.

**{¶ 53}** Clearly, the trial court could have allowed the defense to impeach the witness but there were other considerations. The decision to admit or exclude evidence is solely in the discretion of the trial court. *Gay,* 8th Dist. Cuyahoga No. 86944, 2006-Ohio-3683, at ¶ 41. Here, the trial court determined that Powell's primary purpose in introducing Rebekah's prior inconsistent statement was to introduce Powell's exculpatory statements that he did not commit May's murder. As the court noted, to allow this statement would have essentially allowed Powell to claim his innocence without taking the witness stand and would prevent the state from cross-examining his assertions. The trial court's decision was within its discretion.

**{¶ 54}** Powell also asserts that the statements were independently admissible as either a present sense impression or an excited utterance. We disagree. The

defense did not proffer Rebekah's statement so it is not part of the record before this court. Additionally, the circumstances under which Powell talked to Rebekah were not placed on the record. A present sense impression is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness." Evid.R. 803(1). We do not have Powell's statements in the record nor do we have the context within which they were made. Where the record does not establish some evidence of the event or condition that prompted the statement, we cannot conclude that it is descriptive or explanatory as required for the rule. *See State v. Lackey*, 1st Dist. Hamilton No. C-890682, 1990 Ohio App. LEXIS 5282, ¶ 6 (Dec. 5, 1990).

**{¶ 55}** We similarly cannot find that the statement was an excited utterance. An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." Evid.R. 803(2). The startling event or condition that led to Powell's statement is not part of the record.

**{¶ 56}** Given the foregoing, we find that the court did not abuse its discretion in excluding the evidence. The decision was not unreasonable, arbitrary, or unconscionable.

**{¶ 57}** Accordingly, the fifth assignment of error is overruled.

**Sufficiency and Weight of the Evidence**

**{¶ 58}** In the first and second assignments of error, Powell challenges the sufficiency and weight of the evidence supporting his convictions.

*Sufficiency of the Evidence*

**{¶ 59}** Powell argues that the trial court erred when it denied his motion for acquittal pursuant to Crim.R. 29 because the state failed to present sufficient evidence to support his convictions. Crim.R. 29(A) allows for the dismissal of one or more charges "if the evidence is insufficient to sustain a conviction." The denial of a motion under Crim.R. 29 is evaluated the same as we would evaluate a challenge to the sufficiency of the evidence to support a conviction. *State v. Macalla*, 8th Dist. Cuyahoga No. 88825, 2008-Ohio-569, ¶ 38.

**{¶ 60}** We must

> examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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.

*State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, *superseded by constitutional amendment on other grounds as stated in State v Smith,* 80 Ohio St.3d 89, 102, 684 N.E.2d 668 (1997), fn. 4.

**{¶ 61}** The question is whether the state met its burden of production at trial. *State v. Toby*, 8th Dist. Cuyahoga No. 106306, 2018-Ohio-3369, ¶ 19, citing *State v. Givan*, 8th Dist. Cuyahoga No. 94609, 2011-Ohio-100, ¶ 13. To meet the burden of

production a party must "produce sufficient evidence to make out a prima facie case." *State v. Petway*, 2020-Ohio-3848, 156 N.E.3d 467, ¶ 47 (11th Dist.). "Circumstantial evidence and direct evidence inherently possess the same probative value." *Brook Park v. Gannon*, 2019-Ohio-2224, 137 N.E.3d 701, ¶ 25 (8th Dist.). "A reviewing court is not to assess 'whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.'" *State v. Nelson*, 8th Dist. Cuyahoga No. 100439, 2014-Ohio-2189, ¶ 14, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

**{¶ 62}** A conviction may not be overturned under this standard "unless we find that reasonable minds could not reach the conclusion [made] by the trier of fact." *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

**{¶ 63}** Retrial is barred if it is determined that a conviction is based on legally insufficient evidence. *State v McFarland*, 162 Ohio St.3d 36, 2020-Ohio-3343, 164 N.E.3d 316, ¶ 23. A reversal based on the insufficiency of the evidence has the same effect as a verdict of not guilty "because it means that no rational factfinder could have voted to convict the defendant." *Id.* at ¶ 23, quoting *Thompkins* at 387.

**{¶ 64}** Powell argues that the evidence was insufficient to establish he was the shooter in this case and had a weapon while under disability. The remaining facts are not in dispute. Powell was convicted of murder pursuant to R.C. 2903.02(B) felonious assault, and two counts of having weapons while under disability. He was also convicted of one- and three-year gun specifications.

**{¶ 65}** The sole issue is whether the evidence presented links Powell to the shooting. This is a circumstantial case because no direct evidence was presented that identified Powell as the shooter. Circumstantial evidence is defined as "proof of facts or circumstances by direct evidence from which the trier of fact may reasonably infer other related or connected facts that naturally or logically follow." *State v. Seals,* 8th Dist. Cuyahoga No. 101081, 2015-Ohio-517, ¶ 32. The evidence established that investigation into the shooter's identity began with a witness statement that the shooter was a black male driving a silver SUV and wearing a white shirt. Sonia was present at the crime scene because she feared Powell was going to show up where she agreed to meet Mays. It can be inferred from the testimony that Sonia was concerned that Powell was the shooter.

**{¶ 66}** Sonia's testimony established that Powell learned of her relationship with May on the day of the shooting when he saw a text message. There was a subsequent argument because Laura heard Powell yelling at Sonia. Also, per Laura and Sonia, Powell took Sonia's phone and drove away in a gray car.

**{¶ 67}** Text messages between Powell and Bellomy established that he had her gray Hyundai Elantra from at least July 31, 2019, when she asked him to return the car, until after the homicide on August 2, 2019, when they had their final exchange. The final messages between Bellomy and Powell occurred between 8:26 p.m. and 9:35 p.m. on August 2, 2019. In them, Powell indicated he was on his way to return the car. Bellomy or Mark responded and asked if he was really on his way and that they wanted to "do business with" him. Finally, someone from Bellomy's

number stated, "You take care of me and I'll take care of you"; and Powell responded, "OK deal." Powell was still in possession of the car on August 5, 2019, the day he was shot.

**{¶ 68}** However, at trial, Bellomy claimed that she did not know who had her car during that period. While the car is gray it does not appear to be an SUV. The pictures introduced into evidence establish it has a hatchback trunk that is similar to an SUV. Videos near the crime scene captured a car that looked like the one owned by Bellomy. The video does not show the driver or the license plate, but the wheels appear to be similar to the wheels of Bellomy's car as shown in pictures Sonia took of Powell and their daughter on August 2, 2019. Sonia identified a picture of Bellomy's car as the car Powell was driving on August 2, 2019. Det. Borden identified a video of a car driving near W. 97th Street shortly after the murder as Bellomy's car.

**{¶ 69}** The evidence introduced, if believed, established that Powell was trying to determine May's location. Although Sonia had already discussed picking May up at W. 97th and Denison, subsequent text messages from Sonia's phone sought to establish where the meeting was. Sonia claimed that Powell had the phone, and she denied deleting any messages. If believed, the evidence established that Powell used Sonia's phone to determine May's location and then deleted messages to hide this fact. After the shooting, Powell allegedly called Rebekah upset about something that had happened. The following day, Powell showed her an Instagram post about the shooting and claimed May was his cousin, which was

untrue. He also brought a gun to Rebekah's house and asked her if she knew anyone who would want to buy it. Rebekah told police that he sold the gun. This evidence establishes Powell disposed of a gun shortly after May's murder.

**{¶ 70}** Records obtained from Powell's cell phone established that on August 3, 2019, he did multiple internet searches to look for information on the shooting and the prospects of being prosecuted without a gun or with no evidence. Finally, a little over a month before trial, while using another inmate's PIN, Powell called Sonia from the jail to discuss her and her parents' appearance in court. Powell used his own PIN number on other calls before and after that call to Sonia. The jury could assume that Powell was trying to hide that specific conversation.

**{¶ 71}** On the call, Powell suggested that the police had no evidence and, if neither she nor her parents testified, the state would have nothing. He also suggested that she could stay elsewhere to avoid receiving a subpoena but, if she did come to court, all she had say was that he did not do anything. He reiterated to her "if you don't come, I get to come home." A jury could assume that Powell planned this conversation to persuade Sonia not to appear in court. Further, they could assume that he did so because he thought if Sonia testified he would be found guilty.

**{¶ 72}** Based on the foregoing, there was sufficient evidence presented at trial to establish Powell's identity as the perpetrator. Accordingly, the trial court did not err when it denied Powell's motion for acquittal under Crim.R. 29.

**{¶ 73}** The first assignment of error is overruled.

**The Manifest Weight of the Evidence**

**{¶ 74}** In the second assignment of error, Powell argues that his convictions were not supported by the manifest weight of the evidence. A weight of the evidence analysis requires that we consider all of the evidence in the record, the reasonable inferences that can be made from it, and the credibility of the witnesses to determine "'whether in resolving conflicts in the evidence, the factfinder clearly lost its way and created such a miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins,* 78 Ohio St.3d 380 at 380, quoting *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

**{¶ 75}** The weight of the evidence

> "indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief."

*Id.* at 387, quoting *Black's Law Dictionary* 1433 (6th Ed.1990).

**{¶ 76}** In this assignment of error, Powell focuses again on what he suggests is the lack of evidence establishing that he murdered May while having a weapon while under disability. In addition to arguing that the evidence of his involvement was "circumstantial and weak," he argues that evidence that was introduced regarding his subsequent shooting confused the jury and misled them into finding him guilty.

**{¶ 77}** Circumstantial evidence and direct evidence possess the same probative value, and they are of equal weight. *Gannon*, 2019-Ohio-2224, 137 N.E.3d

701, at ¶ 25. "'Since circumstantial evidence and direct evidence are indistinguishable so far as the * * * fact-finding function is concerned, all that is required of the [factfinder] is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt.'" *Id.* quoting, *Jenks*, 61 Ohio St.3d 259, at 259.

**{¶ 78}** This is a circumstantial case. No direct evidence links Powell to May's murder. However, the circumstantial evidence links him to the crime. Powell had been in an off-again, on-again relationship with Sonia for several years. As of August 2, 2019, Sonia had just started seeing May and had not told Powell of the relationship. Powell showed up for a visit with his daughter and saw a message from May on Sonia's phone. Per both Sonia and Laura, her mother, May became angry, took Sonia's phone, and left. Sonia identified the car he was driving as Bellomy's based on pictures of the car taken after Powell was shot on August 5, 2019.

**{¶ 79}** Powell, using Sonia's phone, attempted to determine May's location. He also attempted to conceal the conversation by deleting some of those messages. Video evidence show a car similar to Bellomy's driving in the area near the shooting shortly after it occurred. After the shooting, Powell searched the internet for information on May's murder and on what evidence was necessary to prove a crime. There were more than 60 searches on his phone. Sometime that day, Powell called Rebekah upset and told her that she would not have to deal with him anymore. The next day, he talked to her about selling his gun. Rebekah told the police that he later sold the gun. Rebekah's mother, Amberly, also recalled Powell telling her he was

going to sell his gun. Finally, Powell called Sonia from jail. He attempted to hide the call by using another inmate's PIN. During the call he clearly told her that if she did not show up, he could go home, suggesting he knew her testimony could incriminate him.

**{¶ 80}** Based on the foregoing, the greater weight of the evidence established that Powell was the perpetrator of these crimes.

**{¶ 81}** Accordingly, the second assignment of error is overruled.

**Ineffective Assistance of Counsel**

**{¶ 82}** In the sixth assignment of error, Powell argues that he received ineffective assistance of counsel when his lawyer failed to object or move to strike the testimony of Tom Ciula ("Ciula") who was not qualified as or declared an expert witness.

**{¶ 83}** Ineffective assistance of counsel is established when an appellant demonstrates "(1) deficient performance by counsel, namely that counsel's performance fell below an objective standard of reasonable representation, and (2) that counsel's errors prejudiced the party, or a reasonable probability that but for counsel's errors, the outcome would have been different." *State v. Moore*, 2022-Ohio-522, 185 N.E.3d 216, ¶ 29 (8th Dist.), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A 'reasonable probability' is one 'sufficient to undermine confidence in the outcome.'" *Id.,* citing *State v. Khoshknabi*, 2018-Ohio-1752, 111 N.E.3d 813, ¶ 29 (8th Dist.), quoting *Strickland* at 694.

**{¶ 84}** Powell argues that trial counsel's failure to object to the admission of Ciula's expert testimony prejudiced him because Ciula's evidence was critical to the state's case. If counsel had objected, Powell believes the outcome would have been different. Specifically, Powell alleges that Ciula was not qualified or declared an expert at trial, that the state did not comply with Crim.R. 16(K), and that no testimony was presented to establish the reliability of Ciula's testimony under Evid.R. 702(C). Arguably, had counsel objected to Ciula's qualifications to testify, his testimony would have been excluded, which would have changed the outcome of the trial.

*Qualification as an Expert*

**{¶ 85}** In the instant case, the state did not ask the trial court to recognize Ciula as an expert. Nevertheless, during the course of his testimony, the trial court stated that Ciula was an expert in the "presentation" of the video and not in explaining what the video showed. Tr. 790-791. While Evid.R. 702 allows a witness to testify as an expert, a trial court must first make a threshold determination concerning the qualification of the witness to testify as an expert. *McConnell v. Budget Inns of Am.*, 129 Ohio App.3d 615, 624, 718 N.E.2d 948 (8th Dist. 1998), citing Evid.R. 104(A). A trial court's decision allowing the admission of expert testimony will not be disturbed absent an abuse of discretion. *State v. Thompson*, 8th Dist. Cuyahoga No. 99846, 2014-Ohio-1056, ¶ 15. An expert witness is someone who possesses knowledge in a relevant subject area that is superior to an ordinary person. *State v. Primeau,* 8th Dist. Cuyahoga No. 97901, 2012-Ohio-5172, ¶ 57. The

expert is qualified due to "specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Evid.R. 702(B).

**{¶ 86}** Although the court did not explicitly qualify Ciula as an expert, if "'the record indicates that the trial court did not abuse its discretion, we will not disturb a decision to allow a witness to offer expert opinion testimony simply because "magic" words do not appear on the face of the record.'" *Primeau* at ¶ 58, quoting *State v. Skinner*, 2d Dist. Montgomery No. 11704, 1990 Ohio App. LEXIS 4178 (Sept. 26, 1990).

**{¶ 87}** In the instant case, Ciula testified to his 30 years of experience in audio and video. He began specializing in forensic video and audio issues in 2008 and, as of trial, had attended over 750 classroom hours and had worked on over 1,500 cases. He also testified in detail about his methodology in examining video evidence in general and the specifics of his work on this case. The testimony established that Ciula had knowledge beyond that of a layperson and that he had specialized knowledge, training, and education in the area of video and audio forensics. Consequently, the trial court did not abuse its discretion by allowing Ciula's testimony.

*Compliance with Crim.R. 16(K)*

**{¶ 88}** Preliminarily, we note that Powell did not develop his argument with respect to this issue. He alleges that the state violated Crim.R. 16(K) but does not indicate how. "An appellate court is not obliged to construct or develop arguments to support a defendant's assignment of error and 'will not "guess at undeveloped

claims on appeal."'" *State v. Jacinto*, 2020-Ohio-3722, 155 N.E.3d 1056, ¶ 56 (8th Dist.); citing *State v. Piatt*, 9th Dist. Wayne No. 19AP0023, 2020-Ohio-1177, ¶ 39, quoting *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. Summit No. 21499, 2003-Ohio-7190, ¶ 31.

**{¶ 89}** Crim.R. 16(K) requires an expert witness for either party to "prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications." Ciula's written report was part of the record. Additionally, the record reflects that the state provided the defense with the raw footage of the videos collected from the surrounding area as well as a compilation of those videos. Ciula's conclusions in this context were the time adjustments that he made to the video. The record is unclear as to whether the state provided Ciula's curriculum vitae to the defense.

**{¶ 90}** Based on the foregoing, we cannot find that the state violated Crim.R. 16(K). Accordingly, we do not find that Powell's counsel erred by failing to raise noncompliance with the rule.

*Reliability of Ciula's methods*

**{¶ 91}** Finally, Powell argues that the record did not establish the reliability of Ciula's methodology in creating the compilation video. The trial court functions as the gatekeeper to the admission of expert witness testimony. To determine whether an expert opinion is reliable, "'a trial court examines whether the expert's conclusion is based on scientifically valid principles and methods.'" *Turker v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 87890, 2007-Ohio-985, ¶ 17, quoting *Valentine*

*v. Conrad,* 110 Ohio St.3d 42, 2006-Ohio-3556, 850 N.E.2d 863, ¶ 16. Courts must also determine the reliability of technical and other knowledge; therefore, it is recognized that "[t]he reliability inquiry is a flexible one." *State v. Rozikov*, 3d Dist. Wyandot No. 16-19-07, 2020-Ohio-4884, ¶ 18, citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147-149, 150-151, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Accordingly, scientific studies are not the only way to establish reliability. Relevant reliability "may focus upon personal knowledge or experience." *Kumho* at 150. In determining whether to admit evidence, "[a] court should not focus on whether the expert opinion is correct or whether the testimony satisfies the proponent's burden of proof at trial[;] * * * [the] focus is on how the experts arrived at their conclusions." *Id.*

**{¶ 92}** Ciula testified that videos he collects are given a 64-digit identifying number. If anyone alters the video after it is collected and coded, that original 64-digit number would change. He also reviews the video to clarify it, addressing where it is too dark or too light and enlarging the images when necessary. In this case, the homicide was not caught on camera, so Ciula worked with the detectives to determine what to look for in the video. When he collected the video, at each location,

> [t]he first thing that's done is to check the time of the DVR, the digital video recorder, against the real time. I have an app that has the atomic clock, exact accurate time. Because much like in the days of the VCR, where everyone had a VCR that flashed 12, oftentimes these are not set to the correct time.

> So the first thing that needs to be done is to see if there's any time offset between real time and the time it was recorded on the device. At that stage a flash drive is ordinarily inserted into the unit and the native files — the proprietary native files are downloaded from that player so they can be taken back to the lab.

Tr. 764-765.

**{¶ 93}** Ciula determined that the three videos he collected all had time offsets, the longest being 57 minutes and 34 seconds slow. Utilizing the tools he identified during his testimony, he created the compilation video that traced a suspect vehicle through areas near the time scene. In it, he included the accurate time as determined by these tools.

**{¶ 94}** At trial, the defense did not challenge Ciula's methods. Before the trial court, and here, the defense challenges the video's clarity, i.e., whether it clearly displayed the images. However, the jury determines what it may discern from the video. The trial court specifically noted that Ciula's testimony was intended to establish how the video was created, not the contents of the video. The trial court has broad discretion to determine the admissibility of expert testimony, and its decision will not be reversed absent an abuse of discretion. *Lucsik v. Kosdrosky*, 2017-Ohio-96, 79 N.E.3d 1284, ¶ 16 (8th Dist.). Here the defense did not challenge Ciula's methods in creating the compilation video. Accordingly, we cannot say that the trial court erred or abused its discretion when it allowed Ciula's testimony to be heard.

**{¶ 95}** Additionally, we cannot say, on this record, that Powell's trial counsel erred by not objecting to the testimony. As Powell's brief noted, Ciula has been

qualified as an expert previously, and there are several cases from this court that either affirm those decisions to qualify Ciula as an expert or note that he has been qualified. *See State v. Fields*, 8th Dist. Cuyahoga No. 107971, 2020-Ohio-4740; *State v. George*, 8th Dist. Cuyahoga No. 103708, 2016-Ohio-7886. Powell's trial counsel could have determined that challenging Ciula's credentials was unwarranted, or unlikely to succeed. The decisions of counsel are entitled to "a strong presumption that * * * [they fall] within the wide range of reasonable, professional assistance." *State v. Sallie*, 81 Ohio St.3d 673, 675, 693 N.E.2d 267 (1998). "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

**{¶ 96}** Accordingly, the sixth assignment of error is overruled.

**Imposition of Consecutive Sentences**

**{¶ 97}** In the seventh assignment of error, Powell makes a two-part argument. First, he argues that the trial court erred in imposing a three-year term on each of the two three-year firearm specifications because one of the underlying counts merged into the other. Powell believes that firearms specifications should have also merged. Secondly, he argues that the record did not support consecutive sentences under R.C. 2929.14(C)(4).

*Merger and Firearm Specifications*

**{¶ 98}** Powell acknowledges that the Ohio Supreme Court has already ruled on this issue. In *State v. Bollar*, Slip Opinion No. 2022-Ohio-4370, the court

addressed a conflict within the appellate districts to answer the question of "whether an offender must receive separate prison terms for multiple firearm specifications when the criminal offenses to which those firearm specifications are attached have been merged as allied offenses." *Id.* at ¶ 1. The court determined that the plain language of R.C. 2929.14(B)(1)(g) requires the trial court issue sentences for each firearm specification regardless of whether the underlying offenses merge. Accordingly, Powell's challenge to the imposition of a sentence on each of the three-year firearm specifications in Counts 3 and 5 is overruled.

*Overall Imposition of Consecutive Sentences*

**{¶ 99}** Our review of felony sentences is governed by R.C. 2953.08(G)(2). *State v. Watkins*, 8th Dist. Cuyahoga No. 110355, 2022-Ohio-1231, ¶ 21, citing *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 16. Pursuant to R.C. 2953.08(G)(2), "the plain language of the statute requires appellate courts to review the record de novo and decide whether the record clearly and convincingly does not support the consecutive-sentence findings." *State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607, ¶ 1.

**{¶ 100}** There is a presumption that prison sentences will be served concurrently. R.C. 2929.41(A). However, that presumption may be overcome pursuant to R.C. 2929.14(C)(4) and consecutive sentences ordered if a court finds that consecutive sentences are "necessary to protect the public from future crime or to punish the offender," "not disproportionate to the seriousness of the offender's

conduct and to the danger the offender poses to the public," and any one or more of the following three factors:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction * * *, or was under postrelease control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4); *State v. Gipson*, 8th Dist. Cuyahoga No. 112097, 2023-Ohio-2302, ¶ 7.

**{¶ 101}** Preliminarily, we note that Powell's argument does not apply to the firearm specifications. Pursuant to R.C. 2929.14(C)(1), the trial court was required to sentence Powell to prison for three years on each firearm specification and impose those sentences consecutively to each other and to the underlying felony, i.e., murder. R.C. 2929.14(C)(1)(a); *see State v. Adkins*, 8th Dist. Cuyahoga Nos. 109184 and 109185, 2021-Ohio-1294, ¶ 15. The trial court was not required to make the R.C. 2929.14(C)(4) findings prior to imposing that sentence. Therefore, our focus is solely on whether the trial court erred when it required the sentence for murder to run consecutively to the sentence for having a weapon while under disability.

**{¶ 102}** Here, Powell acknowledges that the trial court recited all of the required findings under R.C. 2929.14(C)(4) to impose consecutive sentences but

argues that the court did not point to specific case information to support those findings. Powell suggests that the trial court did not sufficiently consider the mitigating factors in the record when determining his sentence. Specifically, he points to his mental health diagnoses, his IQ, and his eligibility for the mental health docket as documented in several competency evaluations submitted to the court. However, Powell acknowledges that the trial court referenced these reports during sentencing.

**{¶ 103}** Powell also argues that the trial court did not sufficiently consider his physical condition in determining his potential for future harm, noting that he was paralyzed from the waist down after the August 5 shooting. Powell claims that the court did not consider that he is a father or that he expressed condolences to May's family and maintained his innocence as mitigating factors.

**{¶ 104}** Finally, Powell argues that the record did not discuss "the proportionality of imposing a consecutive or explain why that much time is needed or why a concurrent sentence would not satisfy the principles and purpose of Ohio's felony sentencing laws." Appellant's brief p. 38. Further, per Powell, the court did not sufficiently explain the length of Powell's sentence or why concurrent sentences were not appropriate.

**{¶ 105}** With respect to the imposition of consecutive sentences, after briefly reviewing some of the facts established at trial, the court noted:

> I'm going to run that consecutively finding that they are necessary to punish the offender and or protect the public from future crime. Consecutive sentences are not disproportionate to the seriousness of

> your conduct, which I just explained, and to the danger that you pose to the public.
>
> Furthermore, I'm going to find that your criminal history demonstrates consecutive sentences are necessary to protect the public from future crime, although you are wheelchair-bound, I don't know what your prognosis is and it appears that you cannot handle your anger and you decided to take somebody's life to satisfy whatever anger that you had that your girlfriend was dating somebody. I can't think of a more ridiculous thing to kill and take somebody's life over.

**{¶ 106}** While the trial court is required to make the statutory finding at both the sentencing hearing and in its sentencing entry, the court is not required to state its reasons in support of those findings. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. To the extent that Powell argues that the trial court did not support its findings by facts from the record, the assignment is overruled. Additionally, Powell's contention that the trial court did not explain why concurrent sentences were not imposed is mistaken. Concurrent sentences are presumed unless the trial court makes the findings in R.C. 2929.14(C)(4). The findings in this case are sufficient to establish that concurrent sentencing is inappropriate.

**{¶ 107}** Accordingly, we confine our review to whether the trial court's findings in support of consecutive sentences were not clearly and convincingly supported by the record. The court found that consecutive sentences were necessary to protect the public from future harm and or to punish the offender. Powell takes issue with his ability to commit future harm; however, R.C. 2929.14(C)(4) requires evidence of one of those factors. In the instant case, the trial court noted that Powell's decision to murder May because May was dating Powell's girlfriend was a

ridiculous thing to kill over and deserving of punishment. We agree. Powell chose to kill someone who had done nothing to him other than date his ex-girlfriend.

**{¶ 108}** The court also found that the sentence was not disproportionate to Powell's conduct and to the danger he poses to the public. The court specifically acknowledged that Powell was in a wheelchair when making that determination. Although Powell argues here that he might never walk again, the court noted that it did not know his prognosis and given the nature of the crime and the way Powell committed it, Powell posed a danger to the public. Additionally, as noted, Powell took extreme measures to kill someone for dating his ex-girlfriend. The trial court's sentence is appropriate under the circumstances.

**{¶ 109}** Additionally, the trial court found that Powell's criminal history justified consecutive sentences to protect the public from future crime. Powell was a repeat offender whose record showed that he received a felony conviction roughly every two years between 2011 and 2017. Given Powell's past history and the nature of his current offense, the record supported the trial court's finding that his past criminal history necessitated consecutive sentences to protect the public from future crime. Based on the foregoing, the trial court's imposition of consecutive sentences is not clearly and convincingly unsupported by the record. Therefore, we have no basis to overturn the sentence as imposed.

**{¶ 110}** Accordingly, Powell's seventh assignment of error is overruled.

**Remote Testimony of Laura Rosado**

**{¶ 111}** Finally, Powell argues that it was error for the trial court to allow Laura Rosado to testify remotely from the hospital. Powell did not object to Laura Rosado's testimony. In fact, the trial court specifically asked the parties whether there was any objection to Laura testifying via Skype or Zoom. The defense indicated they had no objection. Additionally, the parties agreed to coordinate their efforts together and to have a representative from both parties present in Laura's hospital room during her testimony.

**{¶ 112}** A failure to object waives all but plain error. Crim.R. 52(B); *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 28. In the instant case, Powell has not argued that the trial court committed plain error in allowing Laura to testify remotely. A court of appeals is not required to construct a plain-error argument on behalf of a party. *See Piatt*, 2020-Ohio-1177, 153 N.E.3d 573, at ¶ 24.

**{¶ 113}** We see no error here. The trial court sought the parties' permission before allowing the witness to testify remotely. Accordingly, the eighth assignment of error is overruled.

**{¶ 114}** Judgment 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 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.

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EMANUELLA D. GROVES, JUDGE

MICHELLE J. SHEEHAN, P.J., and
SEAN C. GALLAGHER, J., CONCUR