[Cite as *State v. Freeman*, 2023-Ohio-3150.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 112098

v. :

MARIO FREEMAN, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: September 7, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-660860-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Margaret Graham, Assistant Prosecuting Attorney, *for appellee*.

Cullen Sweeney, Cuyahoga County Public Defender, Rick L. Ferrara, Assistant Public Defender, *for appellee*.

ANITA LASTER MAYS, A.J.:

{¶ 1} In this delayed appeal, defendant-appellant, Mario Freeman ("Freeman") appeals his jury trial convictions on multiple charges. We affirm in part, reverse in part, and remand.

I. Procedural History

{¶ 2} Freeman was indicted on July 13, 2021, for an incident that occurred the morning of June 18, 2021, on the following counts:

1. Felonious assault, R.C. 2903.11(A)(1) (cause serious physical harm), a second-degree felony, with one-, three-, and five-year firearm specifications under R.C. 2941.141, 2941.145, and 2941.146 respectively, victim Clayton Dukes;

2. Felonious assault, R.C. 2903.11(A)(2) (cause or attempt to cause physical harm), a second-degree felony, with one-, three-, and five-year firearm specifications under R.C. 2941.141, 2941.145, and 2941.146 respectively (same victim);

3. Felonious assault, R.C. 2903.11(A)(2), a second-degree felony, with one-, three-, and five-year firearm specifications under R.C. 2941.141, 2941.145, and 2941.146 respectively, victim E.C.;

4. Discharge of a firearm on or near prohibited premises (discharge of a firearm upon or over a public road or highway), a third-degree felony under R.C. 2923.162(A)(3), with one- and three-year firearm specifications under R.C. 2941.141 and 2941.145 respectively;

5. Having weapons while under disability, a third-degree felony, R.C. 2923.13(A)(3), with one- and three-year firearm specifications; and

6. Having weapons while under disability, a third-degree felony, R.C. 2923.13(A)(2).

{¶ 3} The state dismissed the five-year firearm specifications and Count 3 of the indictment. Freeman rejected a plea agreement that would have resulted in a three-year term, after deducting jail time served of 8 months and 13 days, and elected to go to trial. The remaining counts were submitted to the jury.

{¶ 4} Freeman was found guilty of all charges. The trial court ruled that Counts 1 and 2 did not merge. Freeman was sentenced to 10 to 12 years per S.B. 201

as follows: Count 1, three years on the firearms specification plus four years with a maximum term of six years under S.B. 201 and on Count 2, three years on the firearms specification plus two years on the underlying offense. The sentences for Counts 4, 5, and 6 were 36 months each. The three-year firearm specifications in Counts 1 and 2 are to be served consecutive to one another and the terms for the underlying offenses concurrent with the underlying offense in Count 1.

II. Facts

{¶ 5} Trial began on March 10, 2022. The state called four witnesses: victim Clayton Dukes ("Dukes") and three members of the Cleveland Police Department ("CPD"). The defense called no witnesses. The parties stipulated to the admission of Dukes's medical records and two certified journal entries for Freeman's prior convictions underlying the having a weapon while under disability charges.

{¶ 6} Attired in prison orange, Dukes explained that he had been residing at the Northeast Correctional Center for the past eight months and was present to testify that he was shot by Freeman on the morning of June 18, 2021. Dukes arrived at a small four-unit apartment building on Lakeview Avenue in Cleveland between 5:00 a.m. and 6:00 a.m. where he stated he operated a car cleaning business from his van.

{¶ 7} Dukes said he did not reside at the building but subleased the front of an apartment from Fay ("Fay"), a drug user. Fay allowed Dukes to use the electricity

to vacuum the cars he serviced. Dukes said the front of the apartment was separated by a locked security door from Fay's area in the rear.

{¶ 8} Dukes had been operating the business for about four months, after serving a ten-year prison term for drug trafficking in the area where the building was located. Dukes arrived to find Fay in her room and Freeman on the sofa though Freeman did not reside at the building.

{¶ 9} A man and a woman named Netta, also a drug user, arrived and asked to see Fay. Netta and Freeman began arguing. Dukes testified he went outside to get into his blue Ford Focus that was parked in front of the building to drive around the corner and pick up his van. Netta and the male exited behind him. Freeman "came around the building mean mugging with a gun in his hand" and "I dropped down to the ground in a fetal position" and Freeman shot him. (Tr. 128.)

{¶ 10} Dukes continued:

> In my leg, my knee. Then I don't know if his gun jammed or had one bullet and didn't have a clip or something, but he went back on the side of the house. I went in my bag, grabbed my gun. He came back around, I shot him.
>
> I thought I shot him in the stomach. He went back up against the car, pointed at me, shot again, and I shot two more times. And then he went in the back, and I started saying help, help, help.

(Tr. 128.) Dukes testified he carried a .40 caliber Smith & Wesson that he was not allowed to have because he was on parole after serving ten years for drug trafficking. He purchased the gun illegally from an acquaintance the month before the incident and kept it loaded in his backpack.

{¶ 11} After the shooting, Dukes was assisted by his friend Ernest ("Ern"). "Ern came over and helped me get into the car. * * * Ern is an addict, too, that be over at Fay's house." Dukes was taken to University Hospitals. He suffered a broken femur in his left thigh that was subsequently secured with a rod and screws. Dukes told police that Freeman shot him and later identified Freeman in a photo lineup. Dukes had known Freeman for over 20 years from the neighborhood. They were friends as teenagers who used to "run together." (Tr. 136.)

{¶ 12} Dukes testified Freeman told Dukes he did not have electricity at his place so he gave Freeman $100 and told him he could come down to the apartment. Freeman was at the apartment selling drugs and allegedly paid Fay. Addicts would also pay Fay to allow them to come to the apartment. Dukes said that Fay was "out of control," and he told her that she would have to go by the end of the month. Dukes also told Freeman that Fay had to leave. Dukes stated others in the apartment were "scared" of Freeman.

{¶ 13} Dukes left the gun at the scene. After Dukes met with police, he was incarcerated for violating parole but expected to be released soon.

{¶ 14} During cross-examination, Dukes testified that his daily routine was to go to the apartment and make sure Fay was not out of control, study his Bible, and go to his mother's house to pick up his van if he had not left it at the building. Dukes added that when Netta and the male arrived, Freeman told Netta she could not "come back up." (Tr. 144.) Netta told Freeman that the place was not his; it was Dukes's. Dukes walked out of the apartment followed by Netta and her male friend

and the shooting sequence ensued. Dukes said he did not carry the gun regularly but decided to bring it that day.

{¶ 15} Dukes set up the car washing business at the building because of the empty lots on both sides so that noise would not be a problem and because he knew the area. Dukes also commented that he thought that Freeman was in love with Netta. Dukes denied that he had ever kicked a door in and threatened to evict Freeman or Netta. He also denied telling police that his firearm had been destroyed.

{¶ 16} Detective Heather Bruner ("Det. Bruner") of the CPD was a patrol officer at the time of the incident and interviewed Dukes at the hospital. Dukes told her that Freeman shot him. The detective also recalled Dukes stating he was outside of the building preparing his van for cleanup services when Freeman fired a shot towards him, and he fell to the ground "in defense." Somehow Dukes "reached for a book bag inside his van to grab his firearm" and fired toward Freeman. (Tr. 161.) Dukes told the detective he dropped the gun on the sidewalk and that his blood should also be there. Ern transported Dukes to the hospital but was not there when Det. Bruner arrived. Det. Bruner did not visit the site but requested that CPD send a vehicle to the location.

{¶ 17} CPD sergeant Barry Bentley ("Sgt. Bentley") oversaw the Crime Gun Intelligence Center unit, a plain clothes group formed about one year prior to trial. Sgt. Bentley reported to the scene with three detectives. The unit checked for reports of shootings that they could investigate and discovered the instant case where there was no evidence of the crime located at the scene but other information was

available. They decided to investigate since it was "relatively soon after the crime had occurred." (Tr. 169.) The unit members looked for shell casings and talked with witnesses.

{¶ 18} No firearms were recovered but several shell casings were discovered. Sgt. Bentley and another detective conducted the photo lineup at Dukes's girlfriend's house where Dukes identified Freeman.

{¶ 19} Fellow unit member CPD detective Nathan Gobel ("Det. Gobel") also reported to the scene and testified about clips from his body cam. One spent .40 caliber casing was located in front of the apartment building near the curb. A 9 mm casing was located in front of the driveway apron located immediately to the left of the building. A second .40 caliber casing was located across the street and to the left of the apartment building when facing in that direction.

{¶ 20} Det. Gobel confirmed that Dukes owned a .40 caliber Smith & Wesson. The week prior to trial, the detective received a National Integrated Ballistic Information Network ("NIBIN") report that a Smith & Wesson .40 caliber gun that matched a shell casing from the scene was recently recovered during an arrest in Independence, Ohio.

{¶ 21} Det. Gobel accompanied Sgt. Bentley to the meeting with Dukes for the photo lineup where Dukes identified Freeman. The interview was recorded on body cam but was not part of the trial evidence. Regarding Dukes's possession of a firearm, Sgt. Bentley stated Dukes did not want to cooperate further because he was on parole. Dukes said the firearm had been destroyed.

{¶ 22} During cross-examination, Det. Gobel confirmed the bullet casings discovery and the presence of vehicles that were parked in the field at the apartment to the left of the building property and a second vehicle, owner unknown. The blue Ford Focus had been towed and processed by CPD prior to the crime unit's arrival. No evidence was recovered.

{¶ 23} Det. Gobel was also involved with interviewing "Ern" who transported Dukes to the hospital and "some other residents in the house * * * A female. I don't recall her name." (Tr. 199.) The detective was unable to establish whether Dukes resided at or leased the apartment and could not recall who owned the building. Excerpts of the body cam evidence taken at the scene were played in court.

{¶ 24} During the redirect examination, Det. Gobel said he was "not aware of any leads pertaining to this case involving the 9mm shell casing." (Tr. 200.) Drawing from his police experience, the detective explained that it was not unusual that the casings were not tested for DNA because the "success rate for recovering viable DNA off a shell casings is very low." (Tr. 201.)

{¶ 25} The parties stipulated to the body cam and photographic exhibits of the shell casings that were lying on the cement. There were no placards marking the locations. The state rested. The defense moved for judgment of acquittal under Crim.R. 29: "Even when the Court reviews the evidence in the light most favorable to the State of Ohio, I do not believe they have met their burden where reasonable minds can convict my client." (Tr. 205-206.)

{¶ 26} The trial court responded, "There has been some corroboration by the" CPD bureau of the victim's testimony. "So it would seem to me that this is ultimately a question of credibility. There is a legally sufficient basis for a conviction of the Defendant if the alleged victim's testimony is accepted by this jury." (Tr. 206.) The trial court did not believe it "should take the issue of credibility out of the hands of the jury" and denied the motion. (Tr. 206.) Freeman was convicted of all counts and sentenced to 10 to 12 years per S.B. 201.

{¶ 27} Freeman appeals.

III. Assignments of Error

{¶ 28} Freeman presents six assignments of error for review:

I. The manifest weight of the evidence did not support Freeman's convictions.

II. The trial court committed plain error in failing to instruct the jury on self-defense.

III. Defendant counsel provided constitutionally ineffective assistance at trial by failing to request a self-defense instruction.

IV. The state of Ohio presented insufficient evidence of discharge of a firearm on or near a prohibited premises.

V. The trial court committed plain error in failing to merge both counts of felonious assault.

VI. The trial court erred when it found S.B. 201 to be constitutional and imposed an indefinite sentence pursuant to S.B. 201.

IV. Discussion

A. Manifest Weight

{¶ 29} "The manifest-weight-of-the-evidence standard concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support

one side of the issue rather than the other.'" *State v. Walker*, 8th Dist. Cuyahoga No. 111656, 2023-Ohio-810, ¶ 17, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A reviewing court

> "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."

Thompkins at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the trier of fact." *Walker* at ¶ 17, citing *Eastley* at ¶ 21.

{¶ 30} The sole evidence connecting Freeman to the shooting is the testimony of Dukes. The exhibits introduced consisted of: (1) the photo lineup array; (2) Dukes's hospital records; (3) judgment entries for Freeman's two prior convictions underlying the having a weapon while under disability counts; (4) a Google map street view photo of the apartment building and lot; and (5) the state's body cam footage at the scene, excerpts of which were played during trial.

{¶ 31} The state argues that Dukes provided competent and credible testimony that Freeman exited the building and shot him and the CPD provided competent and credible evidence that confirmed Freeman discharged his firearm on or near prohibited premises. Freeman argues that Dukes, a convicted drug

trafficker, was still a drug trafficker and frequented the apartment building where several users resided. Freeman points out multiple conflicts in the testimony.

{¶ 32} Dukes testified that he arrived at the building between 5:00 a.m. and 6:00 a.m. to set up his mobile car washing business operated from his van. Dukes did not drive the van to the building but drove a Ford Focus that he parked in front of the building though he stated during the CPD hospital interview that he was preparing his van at the building.

{¶ 33} Ern stated on the body-cam video that he heard shots and observed a vehicle "come back around and start shooting again." "Whoever was in the car came back shooting." Ern did not know who was driving the vehicle and could only say it was a dark car. Ern dropped to the ground to avoid the gunfire and afterwards wrapped Dukes's leg. Ern also said that Dukes's work van was parked on the building side lot the day before the incident.

{¶ 34} Dukes's medical report was also introduced into evidence by stipulation. The report provides, "Patient states that he was walking toward his car when he heard gunshots and experienced pain in the left lower extremity." The records confirm that a bullet passed through [Dukes's] left thigh with several bullet fragments in the femoral soft tissue.

{¶ 35} Dukes's bookbag was not recovered. As CPD testified, the Smith & Wesson .40 caliber gun that matched the casings at the scene showed up on NIBIN the week before the trial. Except for Dukes's testimony, there is no evidence that

Freeman possessed a gun, what type of gun he may have possessed, or what type of bullet caused Freeman's injury.

{¶ 36} "[A] defendant is not entitled to reversal on manifest weight grounds merely because certain aspects of a witness' testimony are inconsistent or contradictory." *State v. Flores-Santiago*, 8th Dist. Cuyahoga No. 108458, 2020-Ohio-1274, ¶ 40. See, e.g., *State v. Nitsche*, 2016-Ohio-3170, 66 N.E.3d 135, ¶ 45 (8th Dist.); *see also State v. Wade*, 8th Dist. Cuyahoga No. 90029, 2008-Ohio-4574, ¶ 38 ("A conviction is not against the manifest weight of the evidence solely because the [factfinder] heard inconsistent testimony."); *State v. Mann*, 10th Dist. Franklin No. 10AP-1131, 2011-Ohio-5286, ¶ 37 ("'While [a factfinder] may take note of the inconsistencies and resolve or discount them accordingly, * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence.'").

{¶ 37} "It is well settled, however, that the credibility of witnesses is a matter for the trier of fact to determine." *State v. Miller*, 5th Dist. Licking No. 2019-CA-00022, 2019-Ohio-5024, ¶ 21.

> Although we consider the credibility of witnesses in a manifest weight challenge, we are mindful that the determination regarding witness credibility rests primarily with the trier of fact because the trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections — observations that are critical to determining a witness's credibility.

State v. Jackson, 8th Dist. Cuyahoga No. 100125, 2014-Ohio-3583, ¶ 37, citing *State v. Clark*, 8th Dist. Cuyahoga No. 94050, 2010-Ohio-4354, ¶ 17.

{¶ 38} The trier of fact is free to accept or reject any or all of the testimony of any witness. *Id.*, citing *State v. Smith*, 8th Dist. Cuyahoga No. 93593, 2010-Ohio-4006, ¶ 16. In this case, the jury found Dukes to be credible.

{¶ 39} After a thorough review of the record, we cannot determine that the jury clearly lost its way and created a manifest miscarriage of justice.

{¶ 40} The first assignment of error is overruled.

B. Ineffective Assistance of Counsel

{¶ 41} We take the second and third assigned errors out of order. In the third assignment of error, Freeman argues that counsel was ineffective for failing to request a self-defense jury instruction. We disagree.

{¶ 42} "A claim of ineffective assistance of counsel is judged using the standard announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." *State v. Sims*, 8th Dist. Cuyahoga No. 109335, 2021-Ohio-4009, ¶ 21, citing *State v. Bradley*, 42 Ohio St. 3d 136, 538 N.E.2d 373 (1989). "'Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance.'" *Id.*, quoting *Bradley*, at paragraph two of the syllabus.

{¶ 43} In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999). Freeman must overcome the presumption that, under the circumstances, the challenged action "'might be considered sound trial strategy.'" *Strickland* at 689, quoting

Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955). We also consider whether the actions by counsel were "outside the wide range" of behaviors demonstrating "professionally competent assistance." *Strickland* at 690.

{¶ 44} Freeman argues that the evidence supported a jury instruction for the affirmative offense of self-defense pursuant to R.C. 2901.05 as the law at the time permitted a person to act in self-defense particularly in their home. Specifically, Freeman states that Dukes "clearly invokes his own right to self-defense by stating that Freeman came out of the house, unprovoked and shot at him." Appellant's brief, p. 14. Since Dukes's credibility was crucial to the issue of whether Freeman shot first, "[d]isbelieving Dukes meant believing it was *Freeman* who acted in self-defense." (Emphasis sic.) *Id.* Freeman contends that if the jury had been instructed that the state had to disprove that Freeman acted in self-defense, it would have had to consider whether Dukes shot first beyond a reasonable doubt.

{¶ 45} The self-defense statute provides that "a defendant charged with an offense involving the use of force has the burden of producing legally sufficient evidence that the defendant's use of force was in self-defense." *State v. Messenger*, Slip Opinion No. 2022-Ohio-4562, ¶ 25.

{¶ 46} Where a defendant presents a claim of self-defense, the state must demonstrate beyond a reasonable doubt that one of the self-defense elements does not apply. *Id.* at ¶ 1, R.C. 2901.05(B)(1). Those elements are:

> (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he [or she] was in imminent danger of death or great bodily harm and that

> his [or her] only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger.

Id. at ¶ 14, quoting *State v. Barnes*, 94 Ohio St.3d 21, 24, 2002-Ohio 68, 759 N.E.2d 1240.

{¶ 47} In deciding whether a self-defense instruction should be given, the trial court must view the evidence in a light most favorable to the defendant without regard to credibility in deciding whether a self-defense instruction should be given. *State v. Ratliff*, 8th Dist. Cuyahoga No. 111874, 2023-Ohio-1970, ¶ 28, citing *State v. Davidson-Dixon*, 2021-Ohio-1485, 170 N.E.3d 557, ¶ 20 (8th Dist.). The instruction must be given to the jury if there is conflicting evidence on the issue of self-defense. *Id*., citing *id*. However, "'if the evidence generates only a mere speculation or possible doubt, the evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted.'" *Id*., quoting *id*., quoting *State v. Melchior*, 56 Ohio St.2d 15, 381 N.E.2d 195 (1978).

{¶ 48} According to the testimony, Freeman initiated the exchange, walked around the building for several seconds, returned with his firearm, Dukes fired first, Freeman returned the fire, and Dukes fired again. Therefore, a jury instruction from the trial court was unwarranted. Coupled with the dearth of evidence against Freeman other than Dukes's testimony, we do not find that Freeman has overcome the presumption that, under the circumstances, counsel's decision not to request a self-defense jury instruction "'might be considered sound trial strategy.'"

Strickland, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

{¶ 49} Further, the failure of counsel to perform what may reasonably be deemed a futile act cannot serve as the basis for ineffective of counsel claims nor could the failure be deemed prejudicial. *State v. Ford*, 8th Dist. Cuyahoga Nos. 88946 and 88947, 2007-Ohio-5722, ¶ 9, citing *State v. Henderson*, 8th Dist. Cuyahoga No. 88185, 2007-Ohio-2372.

{¶ 50} The third assignment of error is overruled.

C. Self-defense plain error

{¶ 51} Freeman asserts in the second assignment of error that the trial court's failure to instruct the jury on self-defense constitutes plain error. Our finding that counsel was not ineffective for failure to request a self-defense instruction renders this error moot. App.R. 12(A)(1)(c).

D. Discharge of firearm

{¶ 52} In the fourth assignment of error, Freeman argues the evidence was insufficient to support the conviction for discharging a firearm on or near a prohibited premises. Specifically, that Freeman discharged a firearm upon or over a public road or highway. We vacate the conviction.

{¶ 53} "'An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to 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.'" *State v. Bradley*, 8th

Dist. Cuyahoga No. 108983, 2020-Ohio-3460, ¶ 6, quoting *State v. Driggins*, 8th Dist. Cuyahoga No. 98073, 2012-Ohio-5287, ¶ 101, citing *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541.

{¶ 54} "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." *Id.* at ¶ 7, citing *State v. Vickers*, 8th Dist. Cuyahoga No. 97365, 2013-Ohio-1337, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).

{¶ 55} R.C. 2923.162(A)(3) provides that no person shall "discharge a firearm upon or over a public road or highway." The testimony and a review of the body cam video supports that a .40 caliber casing was located at the curb in front of the building. A 9 mm shell casing was located about three feet from the driveway apron that was immediately to the left of the building. No other 9 mm shell casing was located. The Ford Focus was parked in front of the house and had been towed for investigation earlier in the day. Individuals were walking around the area. The officers who initially responded to the scene were unable to locate crime scene evidence due to darkness so understandably they would not have been able to preserve the scene. Neither the evidence nor Dukes's testimony placed Freeman or Dukes on a public roadway.

{¶ 56} The fourth assignment of error is sustained.

E. Failure to Merge

{¶ 57} Freeman's fifth claim is the trial court committed plain error by failing to merge the felonious assault counts.

> "[A] reviewing court's analysis is generally limited to reviewing issues raised on appeal solely for plain error or defects affecting a defendant's substantial rights pursuant to Crim.R. 52(B). *State v. Tisdale*, 8th Dist. Cuyahoga No. 74331, 1998 Ohio App. LEXIS 6143 (Dec. 17, 1988). The plain error doctrine should be invoked by an appellate court only in exceptional circumstances to prevent a miscarriage of justice. *State v. Cooperrider*, 4 Ohio St.3d 226, 227, 448 N.E.2d 452 (1983). Plain error will be recognized only where, but for the error, the outcome of the case would clearly have been different. *Id.*"

State v. Bell, 8th Dist. Cuyahoga No. 106842, 2019-Ohio-340, ¶ 61, quoting *State v. King*, 184 Ohio App.3d 226, 2009-Ohio-4551, 920 N.E.2d 399, ¶ 8 (8th Dist.).

{¶ 58} An appellate court applies a de novo standard of review to review whether two offenses are allied offenses of similar import. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28; *State v. Anthony*, 2015-Ohio-2267, 37 N.E.3d 751, ¶ 14 (8th Dist.). The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution, and the Ohio Constitution, Article I, Section 10, protect a defendant against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250, ¶ 7; *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). *Id.* at ¶ 15. R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, prohibiting

multiple punishments for the same offense. *State v. McCarty*, 2015-Ohio-4695, 47 N.E.3d 515, ¶ 13 (8th Dist.).

{¶ 59} While,

> [u]nder R.C. 2941.25, Ohio's multicount statute, where the defendant's conduct constitutes two or more allied offenses of similar import, the defendant may be convicted of only one offense. R.C. 2941.25(A). A defendant charged with multiple offenses may be convicted of all the offenses, however, if (1) the defendant's conduct constitutes offenses of dissimilar import, i.e., each offense caused separate identifiable harm; (2) the offenses were committed separately; or (3) the offenses were committed with separate animus or motivation. R.C. 2941.25(B); *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 13. Thus, to determine whether offenses are allied, courts must consider the defendant's conduct, the animus, and the import. *Id.* at paragraph one of the syllabus.

State v. Clarke, 8th Dist. Cuyahoga No. 105047, 2017-Ohio-8226, ¶ 26.

{¶ 60} Freeman was convicted of R.C. 2903.11(A)(1) and 2903.11(A)(2), which provide:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance

{¶ 61} Defense counsel argued that the counts should merge. The state said:

> [W]e're going to defer to the Court because I think I did represent to defense counsel that I was not going to argue that they did not merge. But the argument there I believe would be the conduct where the defendant fired, walked away, came back, and fired again.

(Tr. 284.) The trial court commended the state for honoring its word but held that "from a legal standpoint, I say they do not merge, but I will not consecutively sentence him." (Tr. 284.)

{¶ 62} The trial court also explained for the record:

> Okay. Look, I want to put my reasoning on the record for purposes of the appeal. The testimony in the case is that he shot the victim with the first shot, broke the defendant's femur, and resulted in the defendant being immobile upon the ground.
>
> The testimony of the victim was that the defendant then ran behind the house for a period of time. I'm not sure what the time elapsed was, but for a period of time.

(Tr. 286.) Advised by the state that Dukes said Freeman disappeared for "a few seconds," and then came right back and fired the additional shots, the court maintained that the acts did not merge. "So I believe that those are two independent acts." (Tr. 287.)

{¶ 63} This court has observed that "'even gunshots separated by a very brief interval can be attributed to a separate animus for purposes of establishing distinct offenses and precluding application of the merger doctrine.'" *State v. Norris*, 8th Dist. Cuyahoga No. 102104, 2015-Ohio-2857, ¶ 15, quoting *State v. White*, 10th Dist. Franklin No. 10AP-34, 2011-Ohio-2364, ¶ 67, citing *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶ 24.[1]

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[1] In *Williams*, the defendant and victim argued, defendant fired two shots and, as the victim ran, a bullet hit him from behind. The bullet fractured the fifth thoracic vertebra, and the victim was immediately paralyzed. *Norris* at ¶ 18, quoting *id.* at ¶ 4. Williams was "indicted for two counts of attempted murder and two counts of felonious assault." *Id.* at ¶ 14. The court held "the offenses related to two gunshots that struck the victim, one count of attempted murder and one count of felonious assault were committed with a single act and animus." *Id.*, citing *id.* at ¶ 24. The court "also held that the offenses related to the gunshots that missed, one count of attempted murder and one count of felonious assault were committed with a single act and animus." *Id.*, citing *id.* at ¶ 27.

{¶ 64} The trial court stated that after Freeman shot Dukes who was disabled by the injury, Freeman went around the corner of the building for several seconds, returned, and shots were exchanged. We do not find that the trial court's refusal to merge the two assault convictions constitutes error.

{¶ 65} The fifth assignment of error is overruled.

F. S.B. 201

{¶ 66} In Freeman's sixth and final assignment of error, he challenges the constitutionality of the imposition of S.B. 201 also known as the Reagan Tokes Law. The Supreme Court has recently determined that the law is constitutional. *State v. Hacker*, Slip Opinion No. 2023-Ohio-2535.

{¶ 67} The sixth assignment of error is overruled.

V. Conclusion

{¶ 68} The conviction under R.C. 2923.162(A)(3) for discharging a firearm on or over a roadway is reversed. The remainder of the judgment is affirmed. The case is remanded to the trial court for further proceedings pursuant to this opinion.

It is ordered that appellee and appellant share equally 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.

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

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ANITA LASTER MAYS, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
SEAN C. GALLAGHER, J., CONCUR