

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 29581

Appellee

v.

JOVONTA MOORE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 19 04 1369

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 16, 2023

FLAGG LANZINGER, Judge.

{¶1} Jovonta Moore moved to reopen his appeal from the judgment of the Summit County Court of Common Pleas after this Court affirmed his convictions in *State v. Moore*, 9th Dist. Summit No. 29581, 2021-Ohio-54 (“*Moore I*”). We granted the application to reopen, and this matter is now before us for decision. For the following reasons, we confirm our prior decision.

I.

{¶2} In *State v. Graves*, this Court explained its obligations in a reopened appeal as follows:

Under Rule 26(B)(9) of the Ohio Rules of Appellate Procedure, “[i]f th[is] [C]ourt finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, [it] shall vacate its prior judgment and enter the appropriate judgment. If th[is][C]ourt does not so find, [it] shall issue an order confirming its prior judgment.” Deficient performance by a lawyer is a performance that falls below an objective standard of reasonable representation. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, at ¶ 204 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). A defendant is prejudiced by the deficiency if there is a reasonable probability that, but for his lawyer’s errors, the result of the proceeding would have been different. *Id.* (citing *Strickland v. Washington*, 466

U.S. 668, 694 (1984)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

(Alterations sic.) 9th Dist. Lorain No. 08CA009397, 2011-Ohio-5997, ¶ 9. With those obligations in mind, we turn to the facts underlying the instant appeal.

{¶3} There was no dispute at trial that Mr. Moore shot and killed the victim in this case on March 31, 2019. According to Mr. Moore, he shot the victim in self-defense. According to the State, Mr. Moore did not shoot the unarmed victim in self-defense. This Court previously set forth the factual and procedural background of this case as follows:

Mr. Moore has two children with K.L., his former girlfriend. During their relationship, K.L.’s mother, S.H., treated Mr. Moore like a son. When K.L. and Mr. Moore broke up, Mr. Moore continued to visit his children at S.H.’s house, and S.H. continued to treat him like a son.

K.L. then started dating the victim, who was also dating A.T. The victim had a daughter from a previous relationship. At the time of the shooting, Mr. Moore and the victim had known each other for about a month. There was no dispute that they did not get along. According to Mr. Moore, the victim seemed to have a problem with the fact that he (Mr. Moore) would visit his kids at S.H.’s house while K.L. was there. According to the witnesses’ interviews with the police and/or their testimony at trial, each man had threatened to harm the other at one point prior to the fatal shooting.

At trial, witnesses primarily testified as to events that occurred on three separate dates: March 23, 2019, March 25, 2019, and March 31, 2019. Each event involved an altercation between the victim and Mr. Moore. We will address each event in turn.

On March 23, 2019, one of S.H.’s neighbors heard several gunshots while she was making breakfast in her kitchen. When the neighbor looked outside, she saw a man standing in the middle of the street arguing with someone who was standing on the front porch of S.H.’s house. The neighbor did not recognize either person, nor did she see who fired the shots. The man in the street then got into his car and sped off. The police arrived shortly thereafter. S.H. denied that her house was involved in the incident, and the police made no arrests.

Mr. Moore initially told the police that the victim had been the person in the street on March 23, 2019, and that he (the victim) had fired several shots into the air. At trial, however, Mr. Moore admitted that he had been the person in the street, and that he had fired the shots. More specifically, he testified that the victim was

standing on the front porch of S.H.'s house, that he (Mr. Moore) was standing outside of his car that was stopped in the street, and that they were arguing back and forth. He testified that the victim was threatening him and that, although he was not sure whether the victim had a gun on him, he looked like he was clutching something. Mr. Moore testified that he fired the shots into the air to startle the victim and allow him (Mr. Moore) time to get back into his car and leave. We now turn to the events that occurred on March 25, 2019.

According to K.L., S.H., and Mr. Moore, they went to Save-A-Lot on March 25, 2019 to buy groceries. S.H. was driving, and Mr. Moore was in the passenger's seat. As Mr. Moore was stepping out of the car, S.H. noticed that the victim had pulled up in a car behind them. S.H. immediately pulled Mr. Moore back into the car and started to drive off. According to S.H., the victim had a gun on him. The victim then chased S.H.'s car, and S.H. ran several red lights and made a U-turn in order to avoid him. The victim later showed up at S.H.'s house and started yelling for Mr. Moore to come outside and fight. The victim had friends with him, one of whom appeared to have a gun. Mr. Moore stayed inside, and the victim and his friends eventually left.

According to A.T., she had been with the victim on March 25, 2019, and he did not have a gun on him. A.T. testified that – through a video call between Mr. Moore and the victim that day – she saw Mr. Moore waving a gun saying he was going to kill the victim and his daughter. K.L. also recalled that Mr. Moore had threatened to kill the victim and his daughter. According to S.H. and another witness (whom S.H. had asked to testify and who previously lied to the police about knowing Mr. Moore), they heard the victim say that he was going to kill Mr. Moore. We now turn to the night of the fatal shooting.

On March 31, 2019, Mr. Moore shot and killed the victim. While that fact was not in dispute, the witnesses at trial provided varying versions of the events leading up to the shooting. Many of the versions of the events also varied from the previous versions those witnesses had told the police. Certain facts, however, were not in dispute.

There was no dispute that Mr. Moore was at S.H.'s house on March 31, 2019 for a family dinner. K.L. and her children (whom she shares with Mr. Moore) were also there. According to A.T., she and the victim drove to S.H.'s house because K.L. had not been answering the victim's calls, and he wanted to see if K.L. was there. When they arrived, the victim exited the car and knocked on the back door of S.H.'s house. A.T. stayed in the car. When no one answered the back door, the victim ran around to the front of S.H.'s house and entered through the front door. While inside, Mr. Moore and the victim began arguing, and S.H. eventually told both of them to leave. The victim exited the house first, and Mr. Moore followed closely behind. What happened next varied between the witnesses.

According to A.T., she heard K.L. calling for her so she got out of the car. When she did, she saw Mr. Moore standing on the porch talking on his cell phone and pointing a gun at the victim, who was standing on the front porch steps. A.T. testified that the victim was unarmed, but that she could tell he wanted to fight Mr. Moore. The victim then made a movement toward Mr. Moore. Mr. Moore fired several shots at the victim as the victim was ascending the front porch steps. A.T. testified that the victim appeared to raise his arm over his chest to shield himself immediately prior to Mr. Moore shooting him.

According to K.L.'s initial interview with the police on the night of the shooting, the victim and Mr. Moore had been arguing inside of her mother's (S.H.) house. She and S.H. tried to diffuse the situation, but Mr. Moore eventually got out his gun. K.L. then went outside to get A.T., who was still in the car, so that A.T. could also help diffuse the situation. The victim then exited S.H.'s house, and Mr. Moore was right behind him talking on his cell phone. Mr. Moore then pointed the gun at the victim. K.L. stated that the victim moved his arm over his chest to protect himself and tried to push the gun away from Mr. Moore. Mr. Moore then "opened fire" and began shooting at the victim while he (Mr. Moore) was still on the phone.

At trial, however, K.L. provided a different version of the events. She testified that she previously lied to the police because she and Mr. Moore did not get along, and she wanted him to look bad. She testified that, after the victim went down the front porch steps, he turned and shoved her into the yard, leapt over the steps, and charged at Mr. Moore. She testified that Mr. Moore was holding his cell phone when he shot the victim, but was not on it. The video of K.L.'s interview with the police was played at trial, and the State highlighted the numerous inconsistencies between her initial statement to the police and her testimony at trial. We now turn to the statements and testimony of K.L.'s mother, S.H.

When the police arrived after the fatal shooting, S.H. denied seeing the shooting or knowing Mr. Moore's real name; she only identified him by his street name, Woo. The next day, however, she went to the police and acknowledged that she initially did not tell the whole truth. S.H. told the police that she had told the victim and Mr. Moore to get out of her house because they were arguing. The victim left through the front door and ran down the front porch steps, all while threatening to beat up Mr. Moore. The next thing she knew, the victim hopped and/or ran back up the porch steps and went to attack Mr. Moore. At that point, Mr. Moore drew his gun from his pocket and shot the victim. S.H. acknowledged that she did not see the victim with a gun that night. At no point during that interview did S.H. indicate that the victim had threatened to kill Mr. Moore. At trial, however, S.H. testified that she had heard the victim threaten to kill Mr. Moore on a previous occasion, and that the victim tried to attack Mr. Moore while they were still inside her home on March 31, 2019.

After his arrest for murder, a detective with the Akron Police Department interviewed Mr. Moore. Mr. Moore initially denied knowing anything about the

fatal shooting. After the detective told him that other witnesses had identified him as the shooter, he acknowledged that he shot the victim, but claimed he acted in self-defense. According to Mr. Moore, the victim charged at him and, because he did not know what the victim was about to do to him, he shot him. He then panicked, got into his car, and fled the scene. At no point during that interview did Mr. Moore indicate that the victim had threatened to kill him. At trial, however, Mr. Moore stated for the first time that he thought his life was in danger, and that the victim told him he was a dead man, and that he (the victim) was going to kill him. Mr. Moore also stated for the first time that, while he was inside S.H.'s house, the victim had used his hand to make a shooting gesture toward him. Mr. Moore acknowledged, however, that the victim was unarmed. When the State presented Mr. Moore with the transcript of his initial interview with the police during his cross-examination, Mr. Moore acknowledged that he had lied several times during that interview. Mr. Moore insisted, however, that he shot the victim out of fear that the victim would hurt or kill him.

The jury ultimately found Mr. Moore guilty of one count of felony murder under Revised Code Section 2903.02(B), one count of felonious assault under Section 2903.11(A)(1), and one count of felonious assault under Section 2903.11(A)(2), all with accompanying firearm specifications. The jury found Mr. Moore not guilty of murder under Section 2903.02(A).

Moore I at ¶ 3-17.

{¶4} In his direct appeal, Mr. Moore raised five assignments of error, asserting that: (1) the State failed to present sufficient evidence to support his convictions for murder and felonious assault; (2) the convictions for murder and felonious assault were against the manifest weight of the evidence; (3) the trial court erred by not granting defense counsel's motion for acquittal under Crim.R. 29; (4) defense counsel rendered ineffective assistance by failing to request jury instructions on manslaughter and aggravated assault; and (5) the trial court committed plain error by not instructing the jury on manslaughter and aggravated assault. This Court overruled each of Mr. Moore's assignments of error and affirmed his convictions. *Moore I*, 2021-Ohio-54, at ¶ 39. In doing so, this Court declined to address Mr. Moore's self-defense argument, which he made in support of his challenges to the sufficiency and manifest weight of the evidence, because Mr.

Moore erroneously relied upon the prior version of the self-defense law (i.e., the version in effect prior to the March 28, 2019, amendments to R.C. 2901.05). *Id.* at ¶ 23-24, 29-30.

{¶5} Mr. Moore then filed an application to reopen his direct appeal, arguing, in part, that his appellate counsel rendered ineffective assistance by using outdated self-defense law. This Court granted Mr. Moore’s application to reopen, holding that a genuine issue existed as to whether his appellate counsel rendered ineffective assistance. In his reopened appeal, Mr. Moore raised four assignments of error. This Court then stayed the appeal pending the resolution of two cases pending before the Ohio Supreme Court. Once the Ohio Supreme Court released those decisions, this Court ordered the parties to file new appellate briefs.

{¶6} In his amended brief, Mr. Moore acknowledges that the Ohio Supreme Court’s decisions resolved his first and fourth assignments of error from his initial brief in favor of the State. As a result, Mr. Moore has conceded those assignments of error. While the “Argument” section of Mr. Moore’s amended brief no longer includes the first and fourth assignments of error from his prior brief, he has elected to keep the numbering of his remaining two assignments of error consistent with his prior brief. As a result, Mr. Moore’s remaining assignments of error in the “Argument” section of his amended brief are labeled as his second and third assignments of error. This Court will label Mr. Moore’s assignments of error accordingly. Additionally, pursuant to Appellate Rule 26(B)(7), Mr. Moore has addressed the claim that his prior appellate counsel rendered ineffective assistance.

II.

ASSIGNMENT OF ERROR II

MR. MOORE’S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT
OF THE EVIDENCE.

{¶7} In his second assignment of error, Mr. Moore argues that his convictions were against the manifest weight of the evidence. Mr. Moore also argues that his prior appellate counsel rendered ineffective assistance by using outdated self-defense law when challenging the manifest weight of the evidence in his prior appeal. For the following reasons, this Court disagrees.

{¶8} When considering a challenge to the manifest weight of the evidence, this Court is required to consider the entire record, “weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Otten*, 33 Ohio App.3d 339, 340 (9th Dist.1986). Weight of the evidence pertains to the greater amount of credible evidence produced in a trial to support one side over the other side. *State v. Thompkins*, 78 Ohio St.3d 380, 387. An appellate court should only exercise its power to reverse a judgment as against the manifest weight of the evidence in exceptional cases. *State v. Carson*, 9th Dist. Summit No. 26900, 2013-Ohio-5785, ¶ 32, citing *Otten* at 340.

{¶9} R.C. 2901.05(B)(1), which was amended effective March 28, 2019, and was in effect at the time of Mr. Moore’s trial (i.e., in September 2019), provides that:

If, at the trial of a person who is accused of an offense that involved the person’s use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense * * * the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense[.]

Unlike the prior version of the statute in which self-defense was an affirmative defense that the defendant had the burden to prove, the amendments “shifted the burden from the defendant to the state to prove beyond a reasonable doubt that the accused did not use force in self-defense.” *State v. Brooks*, 170 Ohio St.3d 1, 2022-Ohio-2478, ¶ 6. Thus, to prevail on a manifest-weight challenge

under the amended statute, Mr. Moore must establish that “the evidence weighed heavily against a conclusion that the State disproved one of the elements of self-defense beyond a reasonable doubt[.]” *Moore I*, 2021-Ohio-54, at ¶ 30. These elements include:

- (1) the [defendant] was not at fault in creating the situation giving rise to the affray;
- (2) the [defendant] has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the [defendant] must not have violated any duty to retreat or avoid the danger.¹

State v. Robbins, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus.

{¶10} “In Ohio, there is both an objective and a subjective aspect involved in determining whether a defendant had a bona fide belief that he was in imminent danger of death or great bodily harm: an individual’s belief that he was in imminent danger must be objectively reasonable, and the individual must have an honest subjective belief to that effect.” *State v. Williams*, 9th Dist. Summit No. 29444, 2020-Ohio-3269, ¶ 11. “Both aspects of the ‘bona fide belief’ element require this Court to consider all of the surrounding circumstances.” *Id.* In addition, “[t]he privilege to defend oneself is limited to ‘that force which is reasonably necessary to repel the attack.’” *State v. Huguley*, 9th Dist. Summit No. 28322, 2017-Ohio-8300, ¶ 35, quoting *State v. Williford*, 49 Ohio St.3d 247, 249 (1990). Furthermore, “[i]f deadly force is used in self-defense there exists a duty to retreat before exercising that deadly force.” *State v. Davis*, 10th Dist. Franklin No. 19AP-521, 2020-Ohio-4202, ¶ 31. “‘Deadly force’ is ‘any force that carries a substantial risk that it will proximately result in the death of any person[.]’ which includes the use of a gun.” *Id.*, quoting R.C. 2901.01(A)(2).

¹ While not relevant to this appeal given the timing of the trial (i.e., in September 2019), we note that R.C. 2901.09(B), effective April 6, 2021, eliminated the duty to retreat, providing that “a person has no duty to retreat before using force in self-defense, defense of another, or defense of that person’s residence if that person is in a place in which the person lawfully has a right to be.”

{¶11} In his amended merit brief, Mr. Moore challenges the State’s failure to disprove each of the elements of self-defense. First, he argues that he was not at fault in creating the situation giving rise to the affray because the evidence indicated that the victim showed up to S.H.’s with the intention of fighting Mr. Moore, and that the victim blocked Mr. Moore from leaving the house. Second, Mr. Moore argues that he had a bona fide belief that he was in imminent danger of death or great bodily harm, and that his only means of escape from such danger was the use of deadly force. In support of his argument, Mr. Moore summarizes the events that occurred on March 23, 2019, March 25, 2019, and March 31, 2019 (which this Court summarized above in our recitation of *Moore I*), and concludes that “[g]iven a week of threats, [the victim’s] near-stalking behavior, [the victim’s] refusal to leave, and [the victim’s] lunge up the stairs, Mr. Moore reasonably feared that he faced at least great bodily harm if he didn’t defend himself.” Third, Mr. Moore argues that he did not violate a duty to retreat because no witnesses testified that he could have retreated into S.H.’s home—which S.H. had asked him to leave—before the victim reached the top of the stairs.

{¶12} Mr. Moore’s arguments are premised upon his version of the events, as well as witnesses who changed their version of the events to his benefit at trial. As noted above, the State highlighted the inconsistencies between the witnesses’ prior statements and their testimony at trial, as well as the numerous times Mr. Moore admittedly lied during his initial interview with the police. As the Ohio Supreme Court has noted, “the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts.” *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. This is because “[t]he trier of fact is in the best position to judge the credibility of the witnesses.” *State v. Curry*, 9th Dist. Summit No. 23104, 2007-Ohio-238, ¶ 19. Thus, a jury is “free to believe all, some, or none of [the witnesses’] testimony.” *State v. Slater*, 9th Dist. Summit No. 28049, 2016-Ohio-7766, ¶ 24. As this Court and others have

acknowledged, a defendant’s credibility is central to a jury’s determination of whether the defendant acted in self-defense. *State v. Sommerville*, 9th Dist. Summit No. 25094, 2010-Ohio-3576, ¶ 7 (“In light of [the defendant’s] assertion that he acted in self-defense on the night in question, his credibility was central to the jury’s determination in this case.”); *State v. Terry*, 1st Dist. Hamilton No. C-220379, 2023-Ohio-2074, ¶ 9 (“Often, self-defense claims turn on issues of credibility.”); *State v. Smith*, 8th Dist. Cuyahoga No. 109221, 2021-Ohio-1185, ¶ 21 (“Self-defense claims are generally an issue of credibility.”).

{¶13} Here, the State presented evidence indicating that the victim showed up unarmed to S.H.’s house, and that Mr. Moore shot the victim while Mr. Moore stood on a front porch several steps above the victim. Mr. Moore’s assertion that the victim lunged at him is based upon his own version of the events, as well as K.L.’s (his former girlfriend and the mother of his children) version of the events, which K.L. changed to Mr. Moore’s benefit at trial after previously telling the police that Mr. Moore “opened fire” and began shooting at the victim while he (Mr. Moore) was on his phone. Mr. Moore’s assertion is also based upon S.H.’s (K.L.’s mother) version of the events at trial, who treated Mr. Moore like her own son, and who initially told the police that she did not see the shooting and did not know Mr. Moore’s real name.

{¶14} Even if the victim started the fight, the jury was free to reject Mr. Moore’s testimony that he shot the victim because he feared for his life and/or that he feared he would suffer great bodily harm. The jury was also free to conclude that Mr. Moore’s use of a gun was not reasonably necessary under the circumstances. *Huguley*, 2017-Ohio-8300, at ¶ 35; *Terry*, 2023-Ohio-2074, at ¶ 15, quoting *State v. Johnson*, 6th Dist. Lucas No. L-08-1325, 2009-Ohio-3500, ¶ 12 (“[T]he use of deadly force in self-defense must be reasonably proportionate—self-defense ‘is not available unless the defendant shows that the force used to repel the danger was not more than

the situation reasonably demanded.”). This is especially so considering the fact that: (1) the victim was unarmed; (2) Mr. Moore admittedly lied to the police about shooting the victim; (3) despite being interviewed by the police after the shooting, Mr. Moore claimed that he feared for his life for the first time at trial; and (4) witnesses who provided testimony favorable to the defense admittedly lied to the police and/or changed their version of the events to Mr. Moore’s benefit at trial. Additionally, while Mr. Moore emphasizes the fact that the victim had threatened him on the days leading up to the fatal shooting, the evidence also indicated that Mr. Moore threatened to kill the victim and his daughter prior to the shooting.

{¶15} Under the State’s version of the events, Mr. Moore did not have a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force. The weight of the evidence supports this conclusion, which is all the State needed to prove to defeat Mr. Moore’s claim of self-defense. *State v. Walter*, 9th Dist. Wayne No. 20AP0020, 2022-Ohio-1982, ¶ 23, quoting *State v. Williams*, 9th Dist. Summit No. 29444, 2020-Ohio-3269, ¶ 10 (“[T]he State must disprove one of the elements of self-defense beyond a reasonable doubt.”). Mr. Moore’s challenge to the manifest weight of the evidence, therefore, lacks merit. *Moore I*, 2021-Ohio-54, at ¶ 30 (stating that to prevail on a manifest-weight challenge under the amended self-defense statute, an appellant must establish that “the evidence weighed heavily against a conclusion that the State disproved one of the elements of self-defense beyond a reasonable doubt[.]”).

{¶16} This Court has reviewed the merits of Mr. Moore’s manifest-weight argument in support of his claim that he received ineffective assistance of appellate counsel. Our resolution of this argument demonstrates that Mr. Moore would not have been successful had his first appellate attorney adequately raised this issue on direct appeal. “Since this Court has reopened [Mr.

Moore's] appeal and addressed his additional arguments on the merits, he has received an adequate remedy for any alleged error by counsel and cannot demonstrate prejudice." *State v. Powell*, 9th Dist. Lorain No. 12CA010284, 2017-Ohio-4030, ¶ 30. Accordingly, Mr. Moore's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT COMMITTED PLAIN ERROR BY INSTRUCTING THE JURY THAT IT COULD FIND MR. MOORE GUILTY OF FELONY MURDER BASED UPON THE PREDICATE OFFENSE OF FELONIOUS ASSAULT.

{¶17} In his third assignment of error, Mr. Moore argues that the trial court committed plain error by instructing the jury that it could find him guilty of felony murder based upon the predicate offense of felonious assault. Mr. Moore also argues that his prior appellate counsel rendered ineffective assistance by failing to raise this issue in his prior appeal. This Court disagrees.

{¶18} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B).

By its very terms, [Crim.R. 52(B)] places three limitations on a reviewing court's decision to correct an error that was not raised below. First, an error, i.e., a deviation from a legal rule, must have occurred. Second, the error complained of must be plain – that is, it must be an obvious defect in the * * * proceedings. Third, the error must have affected substantial rights. We have interpreted this * * * to mean that the trial court's error must have affected the outcome of the proceedings.

State v. Harris, 9th Dist. Summit No. 29583, 2020-Ohio-4365, ¶ 19, quoting *State v. Martin*, 154 Ohio St.3d 513, 2018-Ohio-3226, ¶ 28.

{¶19} Mr. Moore argues that his murder conviction cannot stand because it violates the common-law merger doctrine since it is based solely on a finding that he knowingly committed felonious assault against the victim, which caused the victim's death. In support of his position, Mr. Moore asserts, among other arguments, that: (1) the fact that the felony-murder statute

contradicts the common-law merger doctrine does not establish that the General Assembly intended to abrogate the common law; (2) when the General Assembly intends to abrogate the common law, it does so expressly in the statute, which the felony-murder statute does not do; (3) the lack of a common-law merger rule would render Ohio's purposeful murder statute superfluous since the State would never need to prove the purpose to kill, and would instead only need to prove that the defendant knowingly caused serious injury that lead to the death of the victim; (4) the fact that all crimes in Ohio are statutory does not abrogate common-law limitations on crimes; and (5) general statutes, like the "[o]ffense of violence" statute (as defined in R.C. 2901.01), do not abrogate a more narrowly focused provision of the common law like the common-law merger doctrine. For the following reasons, Mr. Moore's arguments lack merit.

{¶20} The merger doctrine "recognizes that an offender should be convicted of felony murder only if the collateral, or predicate, felony offense was independent of the lethal act." *State v. Owens*, 8th Dist. Cuyahoga No. 107494, 2019-Ohio-2221, ¶ 27; *State v. Cherry*, 9th Dist. Summit No. 20771, 2002-Ohio-3738, ¶ 22 ("According to this doctrine, only crimes that are independent of the conduct which kills can serve as the predicate offenses for felony murder."). "Because it requires no proof of intent to kill, the felony-murder rule has generated criticism." *State v. Mays*, 2d Dist. Montgomery No. 24168, 2012-Ohio-838, ¶ 7. "In those jurisdictions which have applied the independent-felony or merger rule, a felonious assault that is an integral element of the homicide cannot be the predicate felony to support the felony murder." *Id.* at ¶ 8. But, in 1998, "the Ohio General Assembly added the felony-murder provision, R.C. 2903.02(B), to Ohio's murder statute." *Id.* at ¶ 9. It provides that "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that

is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.” R.C. 2903.02(B).

{¶21} “While it may be that ‘most jurisdictions apparently follow some form of the ‘merger’ doctrine,’ * * * Ohio does not.” *Mays* at ¶ 10. “Unlike in some states, in Ohio all crimes are statutory.” *Id.*, citing R.C. 2901.03. This Court has already decided that, in adopting R.C. 2903.02(B) (the felony-murder statute), “the General Assembly rejected the independent felony/merger doctrine.” *Cherry*, 2002-Ohio-3738, at ¶ 27. This Court explained that “R.C. 2903.02(B) evidences a clear legislative intent to subject those who commit the most serious felonies to liability for murder, where commission of those felonies results in death.” *Id.* at ¶ 43. Other appellate districts have similarly rejected arguments regarding the applicability of the common-law merger doctrine to felony murder. *See Mays* at ¶ 10-12 (addressing holdings from other appellate districts); *Owens* at ¶ 27 (“We continue to adhere to the case law rejecting the independent-felony/merger doctrine in Ohio.”); *State v. Pickett*, 1st Dist. Hamilton No. C-000424, 2001 WL 1591318, *2-3 (Dec. 14, 2001) (rejecting the appellant’s challenge to the felony murder statute based upon the independent felony/merger doctrine).

{¶22} Despite Mr. Moore’s arguments to the contrary, he has not established that the trial court deviated from a legal rule by instructing the jury that it could find him guilty of felony murder based upon the predicate offense of felonious assault. Because “error * * * [is] the starting point for a plain-error inquiry[.]” Mr. Moore’s arguments are not well-taken. *State v. Gibson*, 9th Dist. Summit No. 30078, 2022-Ohio-1653, ¶ 15, quoting *State v. Hill*, 92 Ohio St.3d 191, 200 (2001) and citing Crim.R. 52(B).

{¶23} This Court has reviewed the merits of Mr. Moore’s argument that he received ineffective assistance of appellate counsel based upon his prior counsel’s failure to raise the merger

issue in his prior appeal. Our resolution of this argument demonstrates that Mr. Moore would not have been successful had his first appellate attorney adequately raised this issue on direct appeal. “Since this Court has reopened [Mr. Moore’s] appeal and addressed his additional arguments on the merits, he has received an adequate remedy for any alleged error by counsel and cannot demonstrate prejudice.” *Powell*, 2017-Ohio-4030, at ¶ 30. Accordingly, Mr. Moore’s third assignment of error is overruled.

III.

{¶24} Mr. Moore’s assignments of error are overruled. Pursuant to App.R. 26(B), this Court confirms its prior decision in *State v. Moore*, 9th Dist. Summit No. 29581, 2021-Ohio-54. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JILL FLAGG LANZINGER
FOR THE COURT

HENSAL, P. J.
STEVENSON, J.
CONCUR.

APPEARANCES:

STEPHEN P. HARDWICK, Assistant Public Defender, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and C. RICHLEY RALEY, JR., Assistant Prosecuting Attorney, for Appellee.