[Cite as *State v. Cortez*, 2020-Ohio-5429.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 109169
v.	:	
CORTEZ YOUNG,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: November 25, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-627836-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Blaise Thomas, Assistant Prosecuting Attorney, *for appellee*.

Mark A. Stanton, Cuyahoga County Public Defender, and Francis Cavallo, Assistant Public Defender, *for appellant*.

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Cortez Young ("Young") appeals his convictions and sentences on multiple counts for a total incarceration term of 39 years to life. We affirm.

I. Background and Facts

{¶ 2} Young and L.R. began a relationship in 2015 but Young grew increasingly possessive over time. In January 2018, Young was convicted of domestic violence against L.R. Young encountered L.R. in the park with her male friend O.M. Young choked L.R., pointed a firearm at O.M. and threatened to kill him. Young entered a guilty plea to attempted abduction and misdemeanor domestic violence. The couple subsequently ended the relationship.

{¶ 3} On Sunday, April 1, 2018, Young and his new girlfriend went to the casino in downtown Cleveland. Young dropped his girlfriend off at home and drove her Jeep to the Racino in North Randall, Ohio, to continue gambling. Young changed his mind and decided to pick up food at Wendy's located at the corner of Northfield Road and Emery Road and returned to his girlfriend's house near East 116th Street and Harvard Avenue. This occurred shortly after 2:00 a.m.

{¶ 4} L.R. sometimes performed nighttime janitorial services for her sister's company until two in the morning. The night of April 1, 2018, L.R. invited O.M. to work with her at a Beachwood restaurant. L.R. and O.M. left the restaurant and were headed west on Harvard Avenue in a Ford Hybrid C-Max owned by L.R.'s father.

{¶ 5} Young pulled up on the driver's side of L.R.'s vehicle and fired several rounds into the Ford. L.R. was shot in the stomach and arm but continued westbound on Harvard with Young in pursuit. Near the intersection of East 123rd Street and Harvard, Young rammed the back of the Ford, which spun out of control,

hit two trees, then struck a third tree and a chain link fence. O.M. was ejected from the Ford. Young remained briefly and left the scene without calling 911.

{¶ 6} A witness called police and ran to assist the victims. Police recovered spent bullet slugs from L.R.'s clothing and observed bullet entry holes in the Ford. O.M. was located on the ground by the fence bleeding and unconscious. He died about 16 hours later. The cause of death was blunt impact to the head due to ejection from the Ford at a high rate of speed. There was no evidence of bullets fired from the Ford and there were no guns located. All bullet holes entered the Ford through the driver's side. According to the state, a warrant was issued for Young's arrest and he was apprehended at his probation appointment.

{¶ 7} Young's trial account of the events differs. Young stated he was driving west on Harvard Avenue when he noticed the Ford to his right and "started laughing to myself." (Tr. 1164-1165.) "[O]ut my peripheral I seen a muzzle flash" and heard a "gunshot." *Id.* Young explained that he "went into defense mode," retrieved his .45 caliber handgun from the glovebox and returned fire in fear for his life. *Id.*

{¶ 8} Young said that the Jeep "came around me" and he "veered to the left and I hit a telephone pole." (Tr. 1166.) Young estimated his speed to be 45 to 50 miles per hour. The Jeep suffered two flat tires, damage to the front left fender and driver's side mirror, and a creased driver's door. Young drove the damaged Ford to his girlfriend's home on East 116th Street near Harvard Avenue, about a three-minute drive from the incident. Young told his girlfriend that he hit a pothole so

that her migraine headaches would not be triggered by a true account of what transpired.

{¶ 9} On August 28, 2018, Young was indicted on nine counts. As to O.M.:

Count 1 Aggravated murder, R.C. 2903.01(A) with one-three-five-year firearm specifications;

Count 2 Murder, unclassified felony, R.C. 2903.02(B) with one-three-five-year firearm specifications;

Count 3 Felonious assault, felony 2, R.C. 2903.11(A)(2) with one-three-five-year firearm specifications;

Count 4 Felonious assault, felony 2, R.C. 2903.11(A)(1) with one-three-five-year firearm specifications; and

Count 5 Discharge of firearm on or near prohibited premises, felony 1, R.C. 2923.162(A)(3), with one-three-five-year firearm specifications.

{¶ 10} As to L.R.:

Count 6 Attempted murder, felony 1, R.C. 2923.02/ 2903.02(A) with one-three-five-year firearm specifications;

Count 7 Felonious assault, felony 2, R.C. 2903.11(A)(2) with one- and three-year firearm specifications;

Count 8 Felonious assault, felony 2, R.C. 2903.11(A)(1) with one-three-five-year firearm specifications; and

Count 9 Discharge of firearm on or near prohibited premises, felony 1, R.C. 2923.162(A)(3), with one-three-five-year firearm specifications.

{¶ 11} The jury trial commenced on August 28, 2019. The jury determined that Young was guilty of Counts 2, 3, 4, 6, 7, 8, and 9, and not guilty of Counts 1 and 5 as well as the three- and five-year firearm specifications on Counts 2, 3, and 4.

{¶ 12} On October 8, 2019, Young was sentenced to life in prison with the possibility of parole after thirty-nine years. Young was sentenced on Count 2, murder, to life with the possibility of parole after 15 years, a one-year firearm specification to run concurrent with the other imposed firearm specifications in the case. For Count 6, attempted murder, ten years with a one-year firearm specification to run concurrent to the three-year and five-year specification to run consecutive to each other prior to the ten years. The attempted murder and murder sentences were ordered to run consecutively.

{¶ 13} On Count 9, discharge of a firearm, Young was sentenced to three years with one year for the first firearm specification and three years for the second firearm specification. The three years for discharging a firearm and three-year firearm specification were run consecutively. The one-year firearm specification runs concurrent to the three-year firearm specification.

{¶ 14} Young appeals.

II. Assignments of Error

{¶ 15} Young presents six assigned errors:

I. There was insufficient evidence produced at trial to support a finding of guilt on all counts.

II. The jury went astray by finding the defendant guilty against the manifest weight of the evidence.

III. The trial court erred in admitting improper character and prior bad acts evidence under Evid.R. 404(B), violating Young's right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution.

IV. The trial court erred in denying the defendant's motion for a mistrial in light of repeated late disclosures of evidence by the state of Ohio that violated his right to a fair trial under the Fifth, Sixth and Fourteenth Amendment to the United States Constitution and Article I Section 10 of the Ohio Constitution.

V. The cumulative errors committed during the trial deprived the appellant of a fair trial.

VI. The trial court erred when it ordered consecutive sentences without support in the record for the requisite statutory findings under R.C. 2929.11, 2929.12 and 2929.14.

III. Discussion

A. Sufficiency of the Evidence

1. Standard of Review

{¶ 16} Accordingly,

> [w]ith respect to sufficiency of the evidence, "'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *Black's Law Dictionary* 1433 (6th Ed.1990). *See also* Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida*, 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652, 663 (1982), citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

State v. Thompkins, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997).

{¶ 17} In reviewing a sufficiency challenge,

> [t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

2. Discussion

{¶ 18} Young argues that the state failed to sustain its burden to defeat Young's self-defense claim under R.C. 2901.05 which was amended effective March 28, 2019. The incident in this case occurred on April 1, 2018. Trial commenced on August 28, 2019.

{¶ 19} The amended form of R.C. 2901.05 provides:

> A person is allowed to act in self-defense, defense of another, or defense of that person's residence. 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, defense of another, or defense of that person's residence, the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense, defense of another, or defense of that person's residence, as the case may be.

{¶ 20} Ohio courts have determined that the burden-shifting amendment does not apply retroactively to acts committed prior to the amendment. *State v. Zafar*, 10th Dist. Franklin No. 19AP-255, 2020-Ohio-3341, ¶ 31, citing *State v. Ward*, 10th Dist. Franklin No. 19AP-266, 2020-Ohio-465, ¶ 15 (because the defendant committed the offense prior to amendment, the former version of R.C. 2901.05(A) applied), *State v. Whitman*, 5th Dist. Stark No. 2019CA00094, 2019-Ohio-4140, ¶ 11 ("Changes to R.C. 2901.05, effective March 28, 2019, do not apply retroactively to appellant's case" and, therefore, "[t]he statute as amended does not provide for retroactive application."); *State v. Koch*, 2d Dist. Montgomery

No. 28000, 2019-Ohio-4099, ¶ 103 (rejecting appellant's reliance on Griffith in holding he was "not entitled to retroactive application of the burden-shifting changes made by the legislature to Ohio's self-defense statute, R.C. 2901.05, as a result of H.B. 228").

{¶ 21} The pre-amendment version of R.C. 2901.05(B)(1) applicable here provides:

> Subject to division (B)(2) of this section, a person is presumed to have acted in self-defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.* * *

{¶ 22} R.C. 2901.05(B)(2)(a)-(b) provides:

> (a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.
>
> (b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

{¶ 23} In the state of Ohio,

> self-defense is an affirmative defense that a defendant must prove by a preponderance of the evidence. R.C. 2901.05(A); *State v. Williford*, 49 Ohio St. 3d 247, 249, 551 N.E.2d 1279 (1990). To succeed on a claim of self-defense, a defendant must establish the following three elements: (1) no fault in creating the situation giving rise to the affray; (2) a bona fide belief that he or she was in imminent danger of death or great bodily harm and that the only means of escape from such danger was in the use of force; and (3) no violation of any duty to retreat or avoid the danger. *State v. Barnes*, 94 Ohio St.3d 21, 24, 2002 Ohio 68, 759 N.E.2d 1240 (2002).

State v. Callahan, 2016-Ohio-2934, 65 N.E.3d 155, ¶ 25 (8th Dist.)

{¶ 24} Ohio law demonstrates that an affirmative defense such as self-defense may not be reviewed for sufficiency of the evidence because a sufficiency review "'does not consider the strength of defense evidence.'" *Zafar*, 10th Dist. Franklin No. 19AP-255, 2020-Ohio-3341, ¶ 42, quoting *State v. Gripper*, 10th Dist. Franklin No. 12AP-396, 2013-Ohio-2740, ¶ 24. *See also State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 37, and *State v. Colon*, 8th Dist. Cuyahoga No. 106031, 2018-Ohio-1507, ¶ 16 ("the manifest-weight standard is the proper standard" to review a claim of self-defense).

{¶ 25} The first assigned error is without merit.

B. Manifest Weight

1. Standard of Review

{¶ 26} A manifest weight of the evidence standard is properly applied to a claim of self-defense. "[A] defendant claiming self-defense does not seek to negate an element of the offense charged but rather seeks to relieve himself from culpability." *Colon* at ¶ 16, citing *Cleveland v. Williams*, 8th Dist. Cuyahoga No. 81369, 2003-Ohio-31, ¶ 10, citing *State v. Martin*, 21 Ohio St.3d 91, 488 N.E.2d 166 (1986).

{¶ 27} Manifest weight is a question of fact. *Thompkins*, 78 Ohio St. 3d 380, 387, 678 N.E.2d 541 (1997). In a manifest weight analysis, an appellate court "reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and * * * resolves conflicts in the evidence." *Id*.

2. Discussion

{¶ 28} There is no evidence to support Young's claim that he acted in self-defense. L.R. testified that she and O.M. were at a red light at the Lee Road and Harvard Avenue intersection when the shooting started. L.R. observed that Young was the shooter. There was no evidence that shots were fired from the Ford or indication that bullets were fired at or into the Jeep as confirmed by Young's girlfriend. Young also lied to his girlfriend about the source of the vehicle damage. Young's girlfriend also testified that there were no broken windows, bullet holes, or any evidence indicative of shots fired into the Jeep.

{¶ 29} The evidence indicates that the sole weapon involved belonged to Young and that Young acted alone. Eyewitness E.R. testified that he heard shots and observed the Ford attempting to flee from the Jeep. E.R. did not believe that any shots were fired from the Ford. Young points to discrepancies in the testimony of eyewitness E.R. primarily regarding E.R.'s testimony that L.R. and O.M. were at a bar that E.R. patronized earlier that day. We agree with the state that the testimony was consistent on key points and corroborated the testimony of L.R. regarding the shooting as well as the physical evidence.

{¶ 30} Young cites the failure of police to conduct a search of the Ford for evidence of guns and to conduct gunshot residue tests on O.M. Based on the record, we do not find that the police acted improperly, prejudiced Young, or failed to conduct a proper investigation. *State v. Lawshea*, 8th Dist. Cuyahoga No. 101895, 2015-Ohio-2391, ¶ 51-52.

{¶ 31} A defendant's failure to prove any of the elements required to establish self-defense by a preponderance of the evidence equals a failure to establish that the defendant acted in self-defense. *State v. Hill*, 8th Dist. Cuyahoga No. 85320, 2005-Ohio-3569, ¶ 16, citing *State v. Williford*, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279, quoting *State v. Jackson*, 22 Ohio St. 3d 281, 284, 490 N.E.2d 893 (1986).

{¶ 32} Young failed to support entitlement to the affirmative defense of self-defense.

> The state need not disprove an affirmative defense unless evidence is presented that is sufficient to raise that defense. "A bare assertion by the defendant that he acted in self-defense will not bring the affirmative defense of self-defense into issue in the trial." *State v. Gideons*, 52 Ohio App.2d 70, 73, 368 N.E.2d 67 (8th Dist.1977). "Coupled with such an assertion must be supporting evidence from whatever source introduced of a nature and quality sufficient to raise the defense and which '* * * if believed, would under the legal tests applied to a claim of self-defense permit a reasonable doubt as to guilt * * *.'" *Gideons* at 73, quoting *State v. Robinson*, 47 Ohio St.2d 103, 113, 351 N.E.2d 88 (1976).

State v. Jacinto, 8th Dist. Cuyahoga No. 108944, 2020-Ohio-3722, ¶ 47.

{¶ 33} Young's testimony "lacked credibility and was incompatible with the evidence presented in the case." *Colon*, 8th Dist. Cuyahoga No. 106031, 2018-Ohio-1507, ¶ 20. We cannot say that the jury, who was in the best position to weigh the credibility of the other witnesses and resolve the conflicts in the evidence, clearly lost its way. *Id*., *Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 54. The record does not demonstrate that "such a manifest miscarriage of justice"

occurred in this case "that the conviction must be reversed and a new trial ordered." *Cleveland v. Clunk*, 8th Dist. Cuyahoga No. 97889, 2012-Ohio-4059, ¶ 13.

{¶ 34} The second assigned error is overruled.

C. Evid.R. 404(B)

{¶ 35} Young argues that he was prejudiced by the admission of his prior bad acts under Evid.R. 404(B) and that the admission violated his right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10, of the Ohio Constitution. The state counters that the evidence was admissible to demonstrate Young's motive and intent.

1. Hartman and Smith

{¶ 36} On September 22, 2020, the Ohio Supreme Court released *State v. Hartman*, Slip Opinion No. 2020-Ohio-4440, and *State v. Smith*, Slip Opinion No. 2020-Ohio-4441. The court decided to use *Hartman* and *Smith* to "provide trial courts with a road map for analyzing the admission of other-acts evidence and guidance as to appropriate instructions for the jury when such evidence is admitted" and "to help clear up some of the confusion that exists regarding the use of other-acts evidence." *Hartman* at ¶ 19. "The key is that the evidence must prove something other than the defendant's disposition to commit certain acts." *Hartman* at ¶ 22.

a. Hartman

{¶ 37} The issue in *Hartman* was whether evidence that Hartman had previously molested his former stepdaughter in 2012 was admissible as other acts evidence during the trial for the alleged 2015 rape of E.W. E.W. testified that she

was asleep when Hartman, an acquaintance of friends, entered her hotel room and initiated oral sex. E.W. initially thought that her boyfriend had returned to the hotel room and acquiesced, but she screamed when she opened her eyes and realized it was Hartman. Hartman said, "'[w]hat, you're not going to finish?'" *Id*. at ¶ 5.

{¶ 38} Former stepdaughter B.T. testified that she had been victimized by Hartman as a 12-year-old and on several nights, Harman would enter her bedroom when she was asleep at night and molest her. At one point, Hartman forced B.T. to touch his penis. B.T. asked what he was doing, and Hartman mockingly repeated her statement and left. *Id*. at ¶ 15.

{¶ 39} The state argued that both assaults occurred while the victims were sleeping that "amounted to a 'behavioral fingerprint,'" and the evidence "was probative of Hartman's 'motive, intent, plan or scheme and absence of mistake.'" *Id*. at ¶ 12. The state also argued that the evidence rebutted Hartman's claim that the act was consensual.

{¶ 40} The defense argued that "the purpose of the evidence was to create an impermissible character inference that Hartman has a propensity to assault sleeping females." *Hartman,* Slip Opinion No. 2020-Ohio-4440, at ¶ 14. The preliminary ruling of the trial court allowed the evidence to be presented.

> The court concluded that because both allegations involved "vulnerable, asleep victims," B.T.'s testimony was probative to show absence of mistake, Hartman's plan or scheme, and that he acted with criminal intent in this instance. The court considered the prejudicial effect of the evidence but determined that its impact could be reduced by limiting both the scope of B.T.'s testimony and the purposes for which the jury could consider the evidence.

Id. at ¶ 13.

{¶ 41} In response to the renewed objection posed prior to the trial testimony, the trial court ruled that "the evidence was probative of virtually every one of the permissible purposes listed in Evid.R. 404(B)." *Id.* at ¶ 14. Also, that the evidence was relevant to "the defendant's motive, opportunity, intent, absence of mistake, purpose, preparation, plan to commit the offense, [and] knowledge of the circumstances surrounding the offense." *Id*.

{¶ 42} Before B.T. testified, the court warned the jury that the "testimony could not be considered as evidence of Hartman's character or that he acted in conformity with that character." *Id.* at ¶ 14. The trial court reminded the jury after B.T.'s testimony that the "testimony was offered for a limited purpose" and offered a cautionary final jury instruction.

{¶ 43} This court reversed Hartman's convictions for rape by force and by impairment under R.C. 2907.02(A)(2) and (A)(1)(c) respectively. We determined that the evidence was inadmissible under Evid.R. 404(B) and observed that other acts evidence "is typically applied to questions of identity." *State v. Hartman*, 8th Dist. Cuyahoga No. 105159, 2018-Ohio-2641, ¶ 39.

{¶ 44} The Ohio Supreme Court accepted the following proposition of law on appeal: "whether other acts evidence offered to prove the intent of the offender or the offender's plan is admissible pursuant to Evid.R. 404(B), even when the identity of the offender is not at issue." *Hartman,* Slip Opinion No. 2020-Ohio-4440, at ¶ 18. The court agreed that "other-acts evidence can be admitted for

purposes other than identity, so we acknowledge that the proposition is a correct statement of law." *Id.* However, "because the other-acts evidence in this case was not relevant to any proper purpose, we affirm the judgment of the court of appeals that the other-acts evidence was improperly admitted." *Id.*

b. The Framework

{¶ 45} The court explained the importance of the rule and the standard of review:

> "A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime." *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975), citing 1 *Underhill's Criminal Evidence*, Section 205, at 595 (6th Ed.1973). That philosophy is premised on our understanding of human nature: the typical juror is prone to "much more readily believe that a person is guilty of the crime charged if it is proved to his satisfaction that the defendant has committed a similar crime." *State v. Hector*, 19 Ohio St.2d 167, 174-175, 249 N.E.2d 912 (1969).
>
> This common-law principle is embodied in Evid.R. 404(B). *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994). That rule provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." This type of evidence is commonly referred to as "propensity evidence" because its purpose is to demonstrate that the accused has a propensity or proclivity to commit the crime in question. *See Curry* at 68. Evid.R. 404(B) categorically bars the use of other-acts evidence to show propensity.

Id. at ¶ 20-21.

{¶ 46} Evid.R. 404(B) permits "evidence of the defendant's other crimes, wrongs, or acts to be admitted '*for other purposes*, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident.'" (Emphasis added.) *Id*. at ¶ 22. "The key is that the evidence must prove something other than the defendant's disposition to commit certain acts." *Id*.

c. Standard of Review

{¶ 47} The court advised that the question of admissibility of the evidence is a question of law that is reviewed de novo.

> Thus, while evidence showing the defendant's character or propensity to commit crimes or acts is forbidden, evidence of other acts is admissible when the evidence is probative of a separate, nonpropensity-based issue. The admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law. *See* Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events*, Section 4.10 (2d Ed.2019) (because "[d]etermining whether the evidence is offered for an impermissible purpose does not involve the exercise of discretion * * *, an appellate court should scrutinize the [trial court's] finding under a de novo standard" of review); *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 17 (the trial court is precluded by Evid.R. 404(B) from admitting improper character evidence, but it has discretion whether to allow other-acts evidence that is admissible for a permissible purpose).

Id. at ¶ 22.

d. Analytical Roadmap

{¶ 48} "Courts have long struggled with differentiating between" improper character evidence and other acts evidence that may be admitted for permissible purposes. *Hartman*, Slip Opinion No. 2020-Ohio-4440, at ¶ 23. Evid.R. 404(B). "The rule is concerned * * * with the ultimate justification for admitting evidence" as well as "'the chain of reasoning that supports the non-propensity purpose for admitting the evidence.'" *Id*., quoting *United States v. Gomez*, 763 F.3d 845, 855-

856 (7th Cir.2014) (en banc) (applying Fed.R.Evid. 404(b), which is substantively analogous to Ohio's Evid.R. 404(B)).

{¶ 49} It is true that "other acts evidence is usually capable of being used for multiple purposes, one of which is propensity." *Hartman,* Slip Opinion No. 2020-Ohio-4440, at ¶ 23, citing *United States v. Gomez*, 763 F.3d 845, 855 (7th Cir.2014) (en banc) (applying Fed.R.Evid. 404(b), which is substantively analogous to Ohio's Evid.R. 404(B)).

{¶ 50} Therefore, a proponent may not "simply * * * point to a purpose in the 'permitted' list and assert" that the proffered evidence is relevant. *Id*., citing *Gomez* at 856. Both the "ultimate justification for admitting the evidence" and the "chain of reasoning that supports the non-propensity purpose for admitting the evidence" must be considered. *Id*. at *id*. Proper application of the rule requires that the court "scrutinize the proponent's logic to determine exactly how the evidence connects to a proper purpose without relying on any intermediate improper-character inferences." *Id*. at *id*.

i. First Stop — Relevance

{¶ 51} Is there substantial proof that the evidence is relevant for the particular non-propensity purpose for which it is offered? "[I]s the evidence relevant" under Evid.R. 401? *Id*. at ¶ 24. "'Evidence which is not relevant is not admissible'" under Evid.R. 402.

{¶ 52} The trial court must "evaluate whether the evidence is relevant to the *particular purpose* for which it is offered" and "not whether the other acts evidence

is relevant to the ultimate determination of guilt." (Emphasis added.) *Id.* at ¶ 26. "[I]n 404(B) cases, the inquiry is not whether the other-acts evidence is relevant to the ultimate determination of guilty." *Id.*

{¶ 53} "The non-propensity purpose for which the evidence is offered must go to a 'material' issue that is actually in dispute between the parties." *Hartman*, Slip Opinion No. 2020-Ohio-4440, at ¶ 27, citing *Huddleston v. United States*, 485 U.S. 681, 686, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). "[I]t is not enough" for a trial court to say "that the evidence is relevant to a non-propensity purpose." *Id.*

{¶ 54} "[T]here must [also] be 'substantial proof that the alleged similar act was committed by the defendant.'" *Id.* at ¶ 28, citing *State v. Carter*, 26 Ohio St.2d 79, 83, 269 N.E.2d 115 (1971). Since relevance under Evid.R. 104(B) "is conditioned on the existence of a fact," "there must be some threshold showing that the act for which the evidence is offered [actually] occurred." *Id.* at ¶ 28, citing *Huddleston* at 689-690 (applying Fed.R.Evid. 104(b)).

ii. Second Stop — Probative

{¶ 55} Is the non-propensity evidence more prejudicial than probative? An appellate court applies an abuse of discretion standard to review to the "highly fact-specific and context-driven" nature of the balancing analysis that requires the exercise of the trial court's judgment. *Id.* at ¶ 30. We "'defer to the trial court's judgment of the weight of the various dangers as applied to each piece of evidence.'" *Id.*, quoting Leonard at Section 4.10. The trial court "is in the best position to observe the demeanor of the witnesses and jurors." *Id.*

{¶ 56} "The trial court's analysis under this rule should be robust." *Id.* at ¶ 29. Where the "probative value 'is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury,'" the evidence must be excluded. *Id.*, quoting Evid.R. 403(A).

{¶ 57} The court should "also consider whether the prosecution is able to * * * prove the same facts by less prejudicial means." *Hartman*, Slip Opinion No. 2020-Ohio-4440, at ¶ 32. "[C]ourts should be mindful of '[t]he natural and inevitable tendency * * * to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge." 1A Wigmore, Section 58.2, at 1212. *Id.* at ¶ 29.

{¶ 58} "The probative value of the evidence" and "whether the prejudice is unfair, will generally depend on the degree to which the fact is actually contested." *Hartman* at ¶ 31. A fact that is not material or is not "genuinely disputed * * * has little probative value and the risk of prejudice is high." (Citations omitted.) *Id.* The probative value increases and risk of prejudice decreases "[a]s the importance of the factual dispute for which the evidence is offered" increases. *Id.*

iii. Third Stop — Unfair Prejudice

{¶ 59} "[A] court should explain both the specific purpose for which the evidence may be considered and the rationale for its admission on the record * * *" "to ensure the trial participants" and "reviewing courts — are aware of the permitted use." *Hartman* at ¶ 34. "An appropriate jury instruction geared toward the specific

purpose for which the evidence has been admitted will help reduce the risk of confusion and unfair prejudice." *Id*.

{¶ 60} The state claimed and the trial court agreed that the evidence of Hartman's conduct with E.W. in 2015 and former stepdaughter in 2012 was probative of Hartman's motive, intent, absence of mistake, plan or scheme and modus operandi. The *Hartman* court addressed each ground and concluded

> that the other-acts evidence introduced in this case was not admissible for any proper purpose under Evid.R. 404(B). Each of the purported rationales relied upon by the trial court either invited an improper character inference or was irrelevant to a material issue in the case. Further, the jury instructions provided did not mitigate the prejudicial effect of the evidence. We therefore affirm the judgment of the Eighth District Court of Appeals.

Hartman, Slip Opinion No. 2020-Ohio-4440, ¶ 73.

e. *Smith* Case

{¶ 61} The Ohio Supreme Court issued *Smith* the same date as the *Hartman* case to demonstrate application of the *Hartman* roadmap to different facts. Smith was charged with the sexual abuse of his granddaughter. The state introduced other acts evidence that Smith had been previously charged in 1986 with the sexual battery of his daughter from her childhood until her teen years. Smith was subsequently acquitted. The court considered two propositions of law. First, whether "allowing the state to present evidence related to crimes for which a defendant has been acquitted violates the defendant's rights under the Double Jeopardy Clause of the Ohio Constitution." *Smith*, Slip Opinion No. 2020-Ohio-4441, at ¶ 2. The court noted that there is no per se violation and "[b]ecause we find

nothing in the text or history of our Constitution that would support such a conclusion, we reject this challenge." *Id*. at ¶ 2.

{¶ 62} Secondly, the court considered whether the other acts evidence was admissible under Evid.R. 403 and more specifically as to 404(B)

> whether the acquitted-act evidence in this case was admitted for a proper purpose under Evid.R. 404(B) — which prohibits the use of evidence related to other acts of the defendant to show his character or propensity to commit crimes — as well as whether the evidence was relevant and not unduly prejudicial.

Id. at ¶ 3.

{¶ 63} The state argued that the evidence was admissible to show the absence of mistake and common scheme or plan. Following *Hartman,* the court rejected the common scheme or plan position. The court accepted the ground of absence of mistake. "[A]bsence-of-mistake evidence is often closely linked to intent; to be probative of intent, such evidence must be sufficiently similar to the crime charged." *Id*. at ¶ 45, citing *Hartman*, Slip Opinion No. 2020-Ohio-4440, at ¶ 53.

{¶ 64} The court applied the *Hartman* analysis and concluded that the evidence of molestation of the granddaughter under similar circumstances was admissible to refute Smith's claim made "as part of his defense that if he touched his granddaughter inappropriately, it was an accident and not done with sexual intent." *Smith,* Slip Opinion No. 2020-Ohio-4441, at ¶ 3. "On the facts of this case," the court "conclude[d] that because Smith placed his intent at issue by claiming that his actions were accidental and not done with sexual intent, the trial court properly admitted evidence of the prior sexual-assault allegations." *Id.* at ¶ 52.

{¶ 65} On the issue of unfair prejudice under Evid.R. 403(A), further guided by *Hartman*, the court noted that the jury was informed of Smith's acquittal and "was free to believe or disbelieve the testimony of" the witness and the victim. *Id.* at ¶ 50.

> "As the importance of the factual dispute for which the evidence is offered to the resolution of the case increases, the probative value of the evidence also increases and the risk of *unfair* prejudice decreases." (Emphasis sic.) [*Hartman*] at ¶ 31. Given the highly probative nature of the other-acts evidence in this case, we cannot say that the evidence was unduly prejudicial or the trial court's decision to admit the evidence was unreasonable.

Id.

{¶ 66} Finally, the court observed that the jury instruction was "overly broad, in that it listed multiple purposes for which the evidence could be considered that were not relevant to the case." *Smith* at ¶ 51. "[G]oing forward courts should tailor their instructions to the particular uses that are relevant to the case" and must also "explain to jurors in plain language the permissible and impermissible inferences that may be drawn from the other-acts evidence." *Id.*, citing *Hartman* at ¶ 70.

2. The Instant Case

{¶ 67} In the instant case, the state argues that admission was proper to prove intent and motive. "Motive evidence establishes that an accused had a specific reason to commit a crime." *Hartman*, Slip Opinion No. 2020-Ohio-4440, at ¶ 48. "[S]imilarity between the other-acts evidence and the crime charged under a motive theory is not required." *Id.* "'[A] dissimilar prior act is just as feasible in supplying

a motive for committing a crime as is a similar prior act.'" *Id*., quoting Weissenberger, *Federal Evidence,* Section 404.16 (7th Ed. 2019). The state also asserts that the other acts evidence was relevant to motive and admissible because it demonstrated that Young was violent toward the victims just a few months prior to the incident, and to Young's claim that he acted in self-defense.

{¶ 68} L.R. testified to the history of jealously during the relationship that sometimes lead to violence, and Young confirmed that he experienced jealousy. This testimony demonstrates that evidence of Young's jealousy was relevant to show motive and intent and was admissible under Evid.R. 404(B). Though jealousy is an emotion, the overt acts of violence by Young serve as a physical manifestation of that emotion. *State v. Gaines*, 8th Dist. Cuyahoga No. 82301, 2003-Ohio-6855, ¶ 17.

{¶ 69} The question regarding a defendant's intent "is not whether the act occurred but whether the defendant acted with criminal intent."

> [C]ourts should use caution when evaluating whether to admit other-acts evidence for the purpose of showing intent or absence of mistake. To determine whether other-acts evidence is genuinely probative of the intent of the accused to commit the charged crime, rather than merely the accused's propensity to commit similar crimes, the question is whether, "*under the circumstances, the detailed facts* of the charged and uncharged offenses strongly suggest that an innocent explanation is implausible." (Emphasis in original.) [*Leonard*] at Section 7.5.2. Or to put it another way, the other-acts evidence "must be so related to the crime charged in time or circumstances that evidence of the other acts is significantly useful in showing the defendant's intent in connection with the crime charged." 1 Wharton's Criminal Evidence at Section 4:31.

Hartman, Slip Opinion No. 2020-Ohio-4440, at ¶ 58.

{¶ 70} The court warned,

> Intent is an element of most crimes, but it typically is not a material issue for other-acts purposes unless it is genuinely disputed — in most cases, "the act speaks for itself." *Leonard* at Section 7.5.3. Thus, intent evidence is not admissible when "the requisite intent is presumed or inferred from proof of the criminal act itself," or when intent is not in issue at all, such as when the defense theory is that the act never occurred. 1 Wharton's Criminal Evidence, Section 4:31 (15th Ed.2019).

Hartman at ¶ 55.

{¶ 71} Young genuinely disputed the issue of intent when he claimed that he acted in self-defense as to all counts of the indictment. The evidence established that Young did not act in self-defense. The trial court properly admitted evidence of the events surrounding the attempted abduction and misdemeanor domestic violence. *See Smith*, Slip Opinion No. 2020-Ohio-4441, at ¶ 52.

{¶ 72} Focused on the facts of this case, we begin with the "threshold question" of "whether the evidence is relevant" to a "noncharacter based issue that is material to the case." *Id.* at ¶ 37-38, citing *Hartman* at ¶ 24, Evid.R. 401, and *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶ 73} In this case the state introduced evidence of the prior altercation between Young, L.R., and O.M. that resulted in Young's plea to misdemeanor domestic violence and attempted abduction. "In order to be admissible, the other acts used must not be too remote in time, and must be closely related in nature, time, and place to the offense charged." *State v. Sawyer*, 8th Dist. Cuyahoga No. 79197, 2002-Ohio-1095, ¶ 22, citing *State v. Henderson*, 76 Ohio App.3d 290, 294, 601 N.E.2d 596 (12th Dist.1991).

{¶ 74} The prior relationship between Young and L.R. was tumultuous. L.R. testified and Young confirmed that he was very jealous. The January 2018 plea involved violence by Young against L.R. and O.M. Young wielded a weapon during the encounter. The plea was entered just three months before the incident in this case.

{¶ 75} On the issue of unfair prejudice under Evid.R. 403(A), the jury heard testimony from the victim and the police officer involved in both cases and Young also testified. The jury "was free to believe or disbelieve the testimony of" the witness and the victim. *Smith* at ¶ 50. As *Hartman* advises,

> "the probative purpose value of the evidence increases and the risk of unfair prejudice decreases, * * * and [a]s the importance of the factual dispute for which the evidence is offered to the resolution of the case increases, the probative value of the evidence also increases and the risk of unfair prejudice decreases."

(Citations omitted.) *Hartman*, Slip Opinion No. 2020-Ohio-4440, at ¶ 31.

{¶ 76} In addition, the trial court advised the jury immediately prior to and after the other acts evidence, as well as during the jury instruction, about the limited purpose for which the evidence should be used.

> Court: I am giving you an instruction on the use of a prior conviction. Evidence was received that the defendant was convicted of an attempted abduction and of domestic violence. That evidence was received only for two limited purposes. It was not received and you may not consider it to prove the character of the defendant in order to show that he acted in conformity with that character.
>
> If you find that the defendant was convicted of attempted abduction and domestic violence, you may consider the evidence only for the following purpose: To test the

> defendant's credibility and the weight to be given to the defendant's testimony and to decide whether it proves the defendant's motive, opportunity, intent or purpose, preparation or plan to commit the offense charged in this trial.

(Tr. 1383-1384.)[1]

{¶ 77} The instructions do not conform to *Hartman's* directive for more tailored instructions. However, *Hartman* specified that trial courts should conform "going forward" and defense counsel did not object to the instruction. *Hartman* at ¶ 70; *Smith* at ¶ 51.

{¶ 78} We find that Young placed his intent in issue by claiming that he acted in self-defense. Therefore, the trial court properly admitted the other acts evidence of the prior conviction.

D. Mistrial

{¶ 79} Young challenges the denial of his Crim.R. 33 mistrial motion posed due to repeated late disclosures of evidence by the state in violation of Crim.R. 16. We affirm the trial court's judgment.

1. Standard of Review

{¶ 80} "The granting or denying of a motion for mistrial under Crim.R. 33 rests within the sound discretion of the trial court." *State v. Lindsey*, 8th Dist. Cuyahoga No. 106111, 2019-Ohio-782, ¶ 41, citing *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001). "A trial court should only declare a mistrial when

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[1] We presume that the jury followed the trial court's instructions. *State v. Walker-Curry*, 8th Dist. Cuyahoga No. 106228, 2019-Ohio-147, ¶ 35. The third assignment of error is overruled.

'the ends of justice so require and a fair trial is no longer possible.'" *Id*., quoting *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

{¶ 81} Discovery matters in criminal proceedings are governed by Crim.R. 16.

> The purpose of this rule is "to provide the parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system, the rights of defendants, and the well-being of witnesses, victims, and society at large."

Middleburg Hts. v. Lasker, 2016-Ohio-5522, 76 N.E.3d 372, ¶ 12 (8th Dist.), quoting Crim.R. 16(A).

{¶ 82} The Ohio Supreme Court determined that the admission of nondisclosed evidence is not an abuse of discretion unless it is demonstrated that: "(1) the prosecution's failure to disclose was willful, (2) disclosure of the information prior to trial would have aided the accused's defense, and (3) the accused suffered prejudice." *State v. Lindsey*, 8th Dist. Cuyahoga No. 106111, 2019-Ohio-782, ¶ 48, citing *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 131, citing *State v. Parson*, 6 Ohio St.3d 442, 445, 453 N.E.2d 689 (1983).

2. Discussion

{¶ 83} Young cites an excerpt from defense counsel's statement to describe the discovery deficiencies:

> But just as an overview, Judge, we got Facebook records on the morning of trial. We got a disk with a phone dump on the morning of trial. We got an Accident Investigation Unit report once trial had begun. We got insurance, and I don't know if we put this on the record properly yesterday. We agreed to a stipulation yesterday regarding the fact that Progressive had denied the insurance claim on the Jeep due to

> the fact that they determined that the damage sustained was not done by a pothole. And we agreed to that.
>
> But what happened just prior to that, was that the insurance fella, Mr. Sokolowski came in and he had a whole new batch of photographs that were taken at the auto body repair collision center. And those photographs were never turned over.

(Tr. 748.)

{¶ 84} The state denied the delayed disclosure was willful. Defense counsel stated on the record that the disclosure delays were not intentional. "I understand Mr. Thomas is not intending to use this." (Tr. 747.) "Once again, I am not suggesting that any one of these things was done intentionally by any of the prosecutors, by Detective Fischbach, or anybody. We have said that in each step." (Tr. 748-749.)

{¶ 85} A number of the late discovery items were excluded at trial such as Facebook records, an accident investigation unit report, photos of the Jeep, and a phone dump report. Though the defense stated that Young was prejudiced and his defense compromised, Young has not demonstrated how or why. In addition, we have already concluded that the evidence was sufficient and convictions were not against the manifest weight.

{¶ 86} We do not find that the denial of Young's mistrial motion was an abuse of discretion. The fourth assigned error is overruled.

E. Cumulative Error

{¶ 87} Young also charges that the cumulative effect of the cited errors deprived him of a fair trial.

> The Ohio Supreme Court has recognized the doctrine of cumulative error. *See State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256

> (1987), paragraph two of the syllabus. Under this doctrine, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal. *Id*. at 196-197. *See also State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 132. Moreover, "errors cannot become prejudicial by sheer weight of numbers." *State v. Hill*, 75 Ohio St.3d at 212, 661 N.E.2d 1068 (1996).

State v. Singleton, 8th Dist. Cuyahoga No. 98301, 2013-Ohio-1440, ¶ 64.

{¶ 88} We have already determined that Young's arguments do not constitute an error. "[W]here it is found that the trial court did not err, cumulative error is simply inapplicable." *Id*. at ¶ 66.

F. Consecutive Sentences

{¶ 89} Young's final assigned error asserts that the term of the sentence is so excessive that it violates the purposes and principles of felony sentencing. Also, Young argues that the trial court handed down consecutive sentences without the requisite factual support in the record or consideration of mitigating factors.

> R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court's standard is not whether the sentencing court abused its discretion; rather, if this court "clearly and convincingly" finds that (1) "the record does not support the sentencing court's findings under" R.C. Chapter 2929 or (2) "the sentence is otherwise contrary to law," then we may conclude that the court erred in sentencing. *See also State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231.

State v. Johnson, 8th Dist. Cuyahoga No. 107528, 2019-Ohio-4668, ¶ 6.

{¶ 90} Courts have "refused to find that a sentence is contrary to law when the sentence is in the permissible range and the court's journal entry states that it 'considered all required factors of the law' and 'finds that prison is consistent with

the purposes of R.C. 2929.11.'" *State v. Williams*, 8th Dist. Cuyahoga No. 100042, 2014-Ohio-1618, ¶ 17, quoting *State v. May*, 8th Dist. Cuyahoga No. 99064, 2013-Ohio-2697, ¶ 16.

{¶ 91} A trial court is also required to consider the principles and purposes of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. *See State v. McGowan*, 8th Dist. Cuyahoga No. 105806, 2018-Ohio-2930, ¶ 11-12. Review of R.C. 2929.11 and 2929.12 applies to the imposition of individual sentences and consecutive service may not be ordered until the trial court imposes a sentence for each individual count. *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169, ¶ 17.

{¶ 92} The sentence imposed in this case was within the statutory range for each charge. The sentencing entry provides, "The court considered all required factors of the aw. The court finds that prison is consistent with the purposes of R.C. 2929.11." Journal entry No. 110734553, p. 2 (Oct. 15, 2019).

{¶ 93} The trial court stated during sentencing:

> Before imposing sentence, the Court notes for the record that I have considered the record, I've considered the oral statements made here today on behalf of the [O.M.] family, on behalf of [L.R.]. I appreciate your presence and I appreciate your words.

(Tr. 1423.)

{¶ 94} The court continued:

> So many lives have been affected. I mean, look at the people behind you that love you, that were here every single day. That is not lost on me. It's not just this side of the room that's been affected. You. You're

> going to prison for life. You know that. For what? For what? It's a senseless crime. It's a senseless loss of life.
>
> The Court must and has formulated this decision based upon the overriding principles and purposes of felony sentencing; namely, to protect the public from future crime by Mr. Young and to punish Mr. Young using the minimum sanctions that the Court determines accomplishes those purposes without imposing an unnecessary burden on state or local government resources.
>
> I have considered the need for incapacitation, deterrence, rehabilitation. I've considered the seriousness and recidivism factors relevant to the offense and the offender, and I'm ensuring that the sentence being imposed does not demean the seriousness of the crime, the impact on the many victims, and is consistent with other similar offenses committed by like offenders.
>
> Finally, this sentence is not based upon any impermissible purposes; namely, the race, ethnic background, gender or religion of Mr. Young.

(Tr. 1424-1425).

{¶ 95} "Although a general presumption exists for the imposition of concurrent sentences, R.C. 2929.41(A) expressly recognizes certain exceptions, including when the record requires the imposition of consecutive sentences under R.C. 2929.14(C) for multiple offenses." *State v. Rice*, 8th Dist. Cuyahoga No. 102443, 2015-Ohio-3885, ¶ 9.

{¶ 96} A trial court must make specified findings pursuant to R.C. 2929.14(C)(4) before it imposes consecutive sentences. *State v. Magwood*, 8th Dist. Cuyahoga No. 105885, 2018-Ohio-1634, ¶ 62. Specifically, the court must find: (1) consecutive terms are required to protect the public from future crime or to punish the offender, (2) consecutive terms are not disproportionate to the seriousness of the conduct and danger posed to the public, and (3) either the

offender committed at least one offense while awaiting trial or sentencing, that multiple offenses were part of a course of conduct and the harm caused was so great or unusual that a single term does not adequately reflect the seriousness of the offender's conduct, or that the offender's criminal history is such that consecutive terms are necessary to protect the public. R.C. 2929.14(C)(4); *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 22, 26. In addition to making the findings at the sentencing hearing, the trial court must also "incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings." *Bonnell* at ¶ 37.

{¶ 97} To this end, the trial court stated:

> The Court must make the following findings to support the imposition of consecutive sentences: * * *
>
> So life in prison with the possibility of parole after 15 years. So the 15 years will run consecutive to the 10 years on the attempted murder, plus three years on the discharge of a firearm for a total of life in prison with the possibility of parole after 39 years.
>
> I make this finding because it is necessary to punish Mr. Young and to protect the public from future crime. This sentence is not disproportionate to the seriousness of the conduct and the danger imposed by Mr. Young, that one or more of the offenses were committed while Mr. Young was on community control sanctions and that two or more of the offenses are part of one or more course of conduct, and that the harm caused is so great and unusual that a single prison term would not adequately reflect the seriousness of the conduct.
>
> Mr. Young's criminal history also demonstrates that consecutive sentences are necessary to protect the public.

(Tr. 1427-1428.)

{¶ 98} The sentencing entry provides:

> The court imposes prison terms consecutively finding that consecutive service of the prison term is necessary to protect the public from future crime or to punish defendant; that the consecutive sentences are not disproportionate to the seriousness of defendant's conduct and to the danger defendant poses to the public; and that, the defendant committed one or more of the multiple offenses while the defendant was awaiting trial or sentencing or was under a community control or was under postrelease control for a prior offense, or at least two of the multiple offenses were committed in this case as part of one or more courses of conduct, and the harm caused by said multiple offenses 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 defendant's conduct.

Journal entry No. 110734553, p. 2 (Oct. 15, 2019).

{¶ 99} The sixth assignment of error is without merit.

IV. Conclusion

{¶ 100} The trial court's judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

_____
ANITA LASTER MAYS, JUDGE

MARY EILEEN KILBANE, J., CONCURS;
SEAN C. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY