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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

STATE OF OHIO — COURT OF APPEALS NO. {48}L-22-1183

APPELLEE — TRIAL COURT NO. CR0202101678

V.

BRANDEN ALEXANDER — **DECISION AND JUDGMENT**

APPELLANT

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Andrew S. Pollis and Ashley E. Mueller, for appellant.

* * * * *

ZMUDA, J.

{¶ 1} Appellant, Branden Alexander, appeals the July 12, 2022 judgment of the Lucas County Court of Common Pleas, sentencing him to a prison term of 7 to 10-1/2 years, following a jury trial in which he was found guilty of felonious assault in violation of R.C. 2903.11(A)(1) and (D), a felony of the second degree. For the reasons that follow, we affirm.

1.

I. Introduction

{¶ 2} On May 13, 2021, Alexander was indicted on one count of rape in violation of R.C. 2907.02(A)(2) and (B), a felony of the first degree, and two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (D), each a felony of the second degree. The indictment alleged that Alexander assaulted his girlfriend, M.C., on or about April 24, 2021, and assaulted and raped M.C. on April 27, 2021.

{¶ 3} On May 19, 2021, Alexander appeared for arraignment and entered a plea of not guilty to the indictment.

{¶ 4} On May 15, 2022, the matter proceeded to a jury trial. The state called M.C. as a witness, along with Detective Raynard Cooper, Officer Scott Histed, forensic nurse Natalie Jones, BCI forensic scientist Lindsay Nelson-Rausch, Laurie Renz, the Toledo Police supervisor of the crimes against persons unit, and Detective Theresa Talton, the lead detective assigned to the case for the domestic violence unit. For the defense case, Alexander called some of M.C.'s medical providers: residents Kevin Serdahely and Natalie Sirianni, and Dr. Kevin Nguyen. Alexander also called Aaron Nolan, the director of inmate services for the Lucas County Sheriff's Department, to challenge whether Alexander received a visit from an investigator from children services while he was in custody awaiting trial. As the final defense witness, Alexander testified.

{¶ 5} The jury returned a verdict of not guilty for the rape charge, charged in count one of the indictment. As to the remaining charges of felonious assault in counts two and three, the jury advised it was unable to reach a unanimous verdict and the trial court

declared a mistrial on these charges. The trial court scheduled the matter for a new trial on June 6, 2022.

{¶ 6} On June 6, 2022, a second trial commenced on the two felonious assault charges, counts two and three of the indictment. In the second trial, the state opted not to call all of the witnesses from the first case. The state again presented testimony of M.C., Detective Cooper, Officer Histed, and forensic nurse Jones. The state also called new witnesses, Julia Bomia, a children services caseworker who interviewed M.C. in the hospital, Allen County Probation Officer Doug DeWeise, assigned to supervise E.K. after his release from prison, and M.A., Alexander's ex-wife.

{¶ 7} After deliberations, on June 10, 2022, the jury returned a verdict of not guilty as to count 2, felonious assault arising from the incident of April 24, 2021, and a verdict of guilty as to count 3, felonious assault arising from the incident of April 27, 2021.

{¶ 8} On July 5, 2022, the trial court held a sentencing hearing. The court found Alexander had been found guilty of felonious assault in violation of R.C. 2903.11(A)(1) and (D), a felony of the second degree, and, after addressing the statutory factors under R.C. 2929.11 and 2929.12, determined he was not amendable to community control and imposed a stated minimum prison term of 7 years with a maximum indefinite prison term of 10 1/2 years. The trial court imposed mandatory post release control of not less than 18 months and not more than 3 years, and provided notice pursuant to R.C. 2929.19(B)(2)(c) and 2967.271.

{¶ 9} Alexander filed a timely appeal from the trial court's judgment.

II. Assignments of Error

{¶ 10} In his appeal, Alexander raises the following assignments of error:

1. Mr. Alexander's trial counsel rendered constitutionally ineffective assistance by failing to object to improper and highly prejudicial questioning and testimony of Mr. Alexander's ex-wife and by failing to cross-examine her.

2. The trial court erred in admitting Exhibit 35, which contained inadmissible character evidence.

3. The trial court erred in denying defense counsel's request for curative instruction regarding inadmissible character evidence.

4. The cumulative effect of the above errors deprived Mr. Alexander of a fair trial.

5. The trial court erred in sentencing Mr. Alexander to an indefinite term under the unconstitutional Reagan Tokes Act.

III. Analysis

{¶ 11} Alexander challenges his conviction and sentence, arguing ineffective assistance of counsel in failing to cross-examine M.A., error in the admission of character evidence, error in the jury instruction, and error in imposing a sentence under the Reagan Tokes Law, which Alexander argues is unconstitutional. In addressing the issues raised

on appeal, we first consider the relevant evidence adduced in Alexander's trial, followed by consideration of Alexander's argument relative to that evidence.

A. The Trial

{¶ 12} Alexander argues that the crucial difference in the second trial was the addition of testimony from M.A., Alexander's ex-wife. Otherwise, he argues, the two trials "largely mirrored each other." A thorough review of the trial transcripts reveals additional differences in the two trials, beyond the addition of M.A. as a witness.

{¶ 13} In the second trial, the rape charge was no longer at issue, based on the jury's acquittal in the first trial. Furthermore, the state opted not to call some witnesses who testified in the first case, including a forensic scientist and two of the investigating officers. The state also called two other new witnesses, in addition to M.A. The state called Julia Bomia, a children services caseworker who interviewed M.C. in the hospital in Alexander's presence. The state also called Allen County probation officer Doug DeWeise, who was assigned to supervise E.K. after his release from prison.

{¶ 14} In the second trial, M.C. testified first in the state's case in chief. She testified that she moved in with Alexander, at his invitation, in January 2021, after a few months of dating. Alexander and M.C. were the primary residents in Alexander's apartment. M.C. has a young son from a prior relationship, but her son lived in Lima with his father, E.K., spending only weekends with M.C. in Toledo. Alexander has a daughter from a prior marriage, but Alexander's ex-wife, M.A., has custody of the child and lives with her in Michigan.

{¶ 15} M.C. described her relationship with Alexander after they first began dating, as well as the change in the relationship after she moved in with Alexander and learned more about him. M.C. testified that she learned that Alexander misrepresented things about himself, claiming to be a college graduate when he never finished school or that he was financially secure when he relied on an ex-girlfriend to help him pay his bills. M.C. testified that money became a problem in the relationship, as she was not working and relied on her family for financial support.

{¶ 16} Soon after moving in with Alexander, the couple experienced conflict in their relationship, and verbal fights became physical in early March. In April, 2021, M.C. sustained injuries as a result of two, separate incidents, requiring hospitalization for the latter injuries. M.C. was admitted with a lacerated liver, a broken rib, a collapsed lung, and a ruptured disc in her neck, and underwent surgery to replace a ruptured disc on May 1, 2021. After M.C. was released from the hospital, she returned to Alexander's home and on May 5, 2021, the couple had another argument that M.C. claimed ended with Alexander pushing her into a wall. When Alexander left the home to pick up his daughter, M.C. packed her car to leave Alexander. M.C. testified that she drove a short distance from Alexander's apartment and called 911.

{¶ 17} M.C. had initially blamed E.K. for assaulting her on April 24 and blamed her injuries of April 27 on others when she sought medical treatment. After the argument of May 5, 2021, M.C. reported Alexander as her assailant to Officer Histed and his partner when they responded to her 911 call. M.C. accused Alexander of assaulting her

on both occasions, and further alleged that Alexander raped her on April 27, 2021. Police arrested Alexander shortly after M.C.'s report.

{¶ 18} Regarding the first assault, M.C. testified that on April 24, 2021, she attended a funeral in Napoleon, Ohio, and joined Alexander at a friend's home that night after returning to Toledo. At that gathering at their friend's home, M.C. and Alexander argued, Alexander became angry and began calling M.C. names, and M.C. left for home with her son. M.C. testified that Alexander arrived home about 45 minutes later, woke her to continue the argument, and then then assaulted her. She testified that Alexander struck her face repeatedly and then choked her until she passed out. She testified that, as a result of the assault, she could not open her left eye, had marks on her face, and her body and head ached, with the headache described as severe. M.C. indicated that she did not call the police because she was scared and she and her son had no other place to stay. After the assault, M.C. testified that Alexander showed remorse, apologized, and tended to her.

{¶ 19} After M.C.'s headache did not improve, she scheduled an appointment with her doctor. On April 26, 2021, M.C. saw her doctor, who photographed M.C.'s injuries. M.C. testified that Alexander instructed her to blame her ex, E.K., and M.C. complied. She initially accused E.K. as the perpetrator in seeking medical care but did not report the incident to police. E.K. had previously served a prison term for committing domestic violence against M.C., and M.C. saw E.K. each weekend she had visitation with their son. Her doctor recommended that M.C. go to the E.R. for a scan to rule out a

concussion. At the emergency room, M.C. repeated her accusation against E.K. as the perpetrator. M.C. testified that Alexander accompanied her on the doctor and emergency room visits.

{¶ 20} On April 27, 2021, the date of the second assault, M.C. testified that she was feeling much better and planned to attend Taco Tuesday at a restaurant with two of her female friends. M.C. covered the bruises on her face with make-up and dressed for a night out. She encouraged Alexander to do something with his friends and have a guys' night out. After dinner, M.C. and her friends went to Evolution Bar for drinks. Many of the bar patrons were outside in the parking lot, enjoying the weather and showing off their vehicles, and M.C. and her friends joined others for an impromptu party in the parking lot. M.C. returned home between 10:00 and 11:00 p.m.

{¶ 21} M.C. testified that she arrived home first, and Alexander was intoxicated when he arrived home sometime after. M.C. testified that she received a phone call from an unknown male, a wrong number, and Alexander became enraged and accused her of cheating on him. Alexander hit her and choked her until she briefly lost consciousness. M.C. testified that she awoke to Alexander's continued assault, which had transitioned to kicking and punching her torso as she lay on the floor, pinned against some furniture. After calming down a bit, Alexander attempted to engage in sex by putting his penis in her mouth, but stopped after noticing M.C. was not breathing. M.C. testified that Alexander helped her change out of her bloody clothing and took her to the hospital. On the way to the hospital, Alexander told M.C. to explain her injuries in a manner that did

not implicate him. M.C. testified that she initially told a story about a bar fight at Evolution, explaining she was knocked down by the crowd and injured in the melee.

{¶ 22} In explaining her initial false reports, blaming E.K. or a bar fight for her injuries, and her delay in naming Alexander as her assailant, M.C. testified that she feared Alexander because he threatened to kill her if she implicated him. M.C. also testified that Alexander was present throughout her hospital stay, with uncertainty as to where he was or when he would reappear in her room. After a hospital chaplain gave her literature that contained resources for domestic violence victims, she planned to seek assistance and move out after her release from the hospital.

{¶ 23} On cross examination, M.C. acknowledged her memory lapse in the first trial regarding the earlier incident, in which she did not remember her son was present. She also admitted she did not save any of her blood-spattered clothing and police did not secure bedding that she claimed was bloody. M.C. acknowledged she lied to her family after the incident of April 27, and told them she was in the hospital because of a car accident. Additionally, M.C. testified that she and Alexander had sex the night she returned home from the hospital, the day before she left, claiming Alexander initiated sex as his usual way of making amends after beating her. After leaving Alexander, M.C. testified that she spent the next nine months in a shelter where she received therapy and counseling, and later found work.

{¶ 24} The next witness for the state was Detective Raynard Cooper. Detective Cooper's testimony addressed the "bar fight" story, initially told by M.C. and later

recanted. He testified that he was a 28-year police veteran who worked off-duty, projecting at the Evolution Bar. He worked the night of April 27, 2021, and testified that the night was "very uneventful." On cross-examination, Cooper reiterated there were no fights at the bar the night of April 27, based on his own observation and subsequent questioning of other witnesses in response to the investigating detective's inquiry. He acknowledged that people often gathered in the parking lot when weather was nice, but these crowds cleared by 10:30 p.m. at the latest.

{¶ 25} Next, Officer Scott Histed testified about responding to M.C.'s 911 call on May 5, 2021. He testified that he met with M.C. at a car wash parking lot and she had visible bruises. Both Histed and his partner, Officer Andy Wrosek, were equipped with body cameras, and the video was published to the jury without objection. Histed testified that M.C. made no mention of a bar fight or her son's presence for either incident, and he acknowledged, on cross-examination, that M.C. was upset that children services was now involved with her son.

{¶ 26} Natalie Jones testified next. She testified as an expert in forensic nurse examinations, without objection. Jones was called to examine M.C. because the trauma team had concerns regarding possible domestic violence, based on M.C.'s initial story of the assault which "was bizarre" and prompted additional questions. Jones went through all the injuries sustained by M.C., and concluded the injuries were not consistent with being trampled in a bar fight. On cross-examination, Jones admitted she reviewed only a

portion of M.C.'s medical record and could not state with certainty how any of the injuries to M.C. occurred.

{¶ 27} The final three witnesses to testify for the state in the retrial were new witnesses. Children services investigator Julia Bomia testified regarding an interview she conducted with M.C. following a call regarding M.C.'s child. Bomia testified about her observations from that interview, indicating Alexander was present for the interview, holding M.C. in the hospital bed. She testified that Alexander informed her that he was M.C.'s main source of income and support.

{¶ 28} The next new witness was Probation Officer Doug DeWeise. He testified regarding E.K.'s possible role in an assault against M.C., indicating he supervised E.K., and E.K. seemed to be a model probationer. DeWeise received no reports of any misconduct until a Toledo detective called him in May, indicating an altercation in Toledo weeks before. E.K. had been checking in as required, and DeWeise had no knowledge of any incidents outside Allen County. DeWeise conducted an unannounced home visit on April 16 and an in-person check-in with E.K. on April 23, 2021, and DeWeise believed that E.K. was in compliance, reporting for drug screening, and maintaining employment.

{¶ 29} The final new witness, Alexander's ex-wife, M.A., testified regarding her history with Alexander, generally, and events on April 28, 2021, specifically. Much of her testimony described her relationship with Alexander. The couple dated for many

years before marrying, and M.A. described their life after the divorce was finalized in September 2020. When asked to describe the relationship, M.A. testified:

> Tumultuous. Aggressive. I would say that he was more worried about his reputation than – than anything. He's angry, and that caused a lot of problems in our relationship.

{¶ 30} M.A. met Alexander when she was 22, and at the time, she believed Alexander was a student at the University of Toledo. She indicated Alexander was "released as a student" at some point, but she was unsure of the exact date. She also stated, "There was not always truths given." Alexander portrayed himself as a college football player, but M.A. later learned he was kicked off the team and kicked out of school.

{¶ 31} Alexander and M.A. had a young daughter and agreed to meet at a neutral site in Sylvania to facilitate Alexander's weekend visitation. M.A. testified that she requested the meeting point as a change from a more remote location picked by Alexander, and because communications via phone did not work, she and Alexander began using an app recommended by family court that kept a record of their conversations, to ensure they limited their contact to co-parenting matters. M.A. indicated "using this app made me feel safer."

{¶ 32} After Alexander told M.A. about his girlfriend, M.A. asked to meet M.C., and Alexander brought M.C. to one of the exchanges. M.A. wanted to introduce herself

to M.C., as someone who would be spending time with her daughter on Alexander's weekends. M.A. had no other contact with M.C.

{¶ 33} M.A. then testified regarding the scheduled pickup on April 28, 2021. Alexander communicated to M.A. "at 3:36 p.m. on Wednesday the 28th that he would not be able to get our daughter for the arranged pickup time." M.A. was already on the way to the meeting place because pickup was scheduled at 4:00 p.m. M.A. testified that she was frustrated about the late notice because she had awakened their daughter from a nap to meet Alexander on time. M.A. then referenced her conversations with Alexander, printed out from the app, for April 28, and read Alexander's message, which stated:

> I am at the hospital. [M.C.] and I were in a car accident. I won't be able to get her. I am waiting to be discharged and don't know how long it's going to take.

M.A. responded with disbelief, and Alexander responded, "yeah, a car accident. It is ridiculous. You a piece of work. I couldn't even find my phone." M.A. then started asking Alexander questions, seeking details of his car accident, asking three times where the accident occurred. Instead of providing details, Alexander responded with insults and called M.A. crazy.

{¶ 34} M.A. continued to question Alexander regarding the accident, asking if it was caused by drunk driving. Alexander responded by pointing out M.A.'s family members who drink and drive, and then sent a photograph of himself wearing a hospital

visitor sticker on his shirt. M.A. asked Alexander about the visitor sticker, and questioned why he was not wearing a wristband. Alexander did not respond.

{¶ 35} The next communication recorded by the app occurred much later, at 10:16 p.m. The context of that message indicated a phone call to Alexander's daughter, earlier in the evening. M.A. testified that, during the phone call, he yelled at M.A. "saying how dare you tell my daughter that I was in a car accident. How dare you tell my daughter that. I didn't want to get her." M.A. testified she never did "those things." She did not believe Alexander had been in an accident.

{¶ 36} M.A. testified that she responded as she often did when Alexander yelled at her in front of their daughter, asking him to stop and telling him the yelling was not good for their child. She also testified that she told Alexander she prays he will change, because their daughter deserves better. The trial court admitted the printout of the messages from the app, which recorded all messages between April 7 and May 5, 2021, over the objection of Alexander's trial counsel. The text messages were not published to the jury at that time, however, with the jury hearing only the testimony of M.A. regarding the text messages related to the missed visitation of April 28.

{¶ 37} Alexander's trial counsel asked no questions on cross-examination.

{¶ 38} The state rested without calling any of the remaining witnesses identified on their witness list. Alexander moved for acquittal pursuant to Crim.R. 29, and the trial court denied the motion.

{¶ 39} Alexander was the first witness to testify for the defense. He testified he saw the injuries on M.C. but did not cause them. He noticed the first set of injuries after she dropped her son off to her ex, E.K., either on April 17 or April 24, 2021. He also claimed M.C. got into fights and bar fights, and she fought men and women. Much of Alexander's testimony portrayed M.C. as an unstable and aggressive person, contrasted with his own qualities of stability and calm.

{¶ 40} Alexander testified that he had M.C.'s son on April 24, 2021, while she attended a funeral, although he questioned where she really was that day. Alexander and M.C.'s child spent time at the house of Alexander's friend, and when M.C. joined them around 10 p.m., he and M.C. got into an argument before M.C. took her son and left for home. Alexander stated he got home later and went to bed. He indicated he was "checked out" of the relationship at that point but M.C. insisted she could not be kicked out; she had lived there too long and got her mail there. Alexander testified that he asked M.C. to leave, and in March she did leave for a few hours before breaking a window on the door to get back in. Alexander testified that, although he asked M.C. to move in with him in January, M.C. never had her own key to the home the entire time she stayed with him.

{¶ 41} Alexander testified that his relationship with M.C. was a physical one, and M.C. liked to be choked during sex and they always started out with oral sex. "That's all she ever wanted to do, and at times I didn't want it and she would get mad at me for it." On the night of April 27, 2021, Alexander testified he was the first to arrive home and he

was not drunk. He testified that he was already in bed when M.C. came in, they had sex, and then he fell back asleep. Sometime later he awoke to M.C. sitting on the edge of the bed, saying she could not breathe or catch her breath. He thought she was having a panic attack and tried to calm her. M.C. then went into the bathroom and Alexander lay back down. He next remembered waking to the sound of M.C. coughing loudly and roughly, begging to be taken to the hospital. He testified he changed her into gray sweats and a yellow hoodie, collected M.C.'s phone and keys, and drove her to the hospital. He called off work to be with M.C.

{¶ 42} Alexander acknowledged that M.C. was seriously hurt. He claimed he took two days off from work to be with her but was never in the room when doctors or nurses spoke to her. He was present when the children services caseworker interviewed M.C. He slept some nights in a chair next to M.C.'s bed, and other nights in the car in the hospital parking lot.

{¶ 43} The state sought to question Alexander regarding why he left college, his felony charges, and his history of domestic violence in relationships, based on Alexander's own testimony on direct examination. The trial court noted the careful articulation of questions, specifically asking about convictions and not conduct, found no doors clearly opened on any of the topics, and denied the state's request.

{¶ 44} On cross examination, Alexander testified M.C. was not injured when she left for the funeral or wherever she went on April 24, then testified she was likely injured on April 17, 2021, by E.K., and covered the bruises with makeup. Alexander also

testified that on April 27, 2021, it was dark when M.C. came home and he did not see any injuries. He testified he and M.C. had sex and she woke him up some time after indicating she could not breathe. Alexander attributed the delay between M.C.'s injuries and her complaint of pain to M.C.'s intoxication that night.

{¶ 45} Alexander also testified he was trying to get rid of M.C. and did not consider her a girlfriend anymore, but he stayed with her two days at the hospital. Although Alexander admitted that staying with M.C. resulted in two unexcused absences from work, adding to his infractions at work and risking his job, Alexander also claimed that he had smoothed it over with his supervisor and planned to use FMLA leave to avoid termination. In response to M.A.'s testimony, Alexander admitted he lied to M.A. about being in a car accident or being injured and in the hospital for treatment.

{¶ 46} The prosecutor challenged Alexander about contradictions in his testimony. For example, Alexander was questioned regarding his assertion that he was through with M.C. but also devoted to her during her hospital stay, or that he took unauthorized time off from work, but the absences were permitted. As to the injuries of April 27, the prosecutor challenged Alexander's claim that M.C. was already injured when she returned home, referencing his testimony in the first trial.

> Q: You testified previously that when [M.C.] came home she was having trouble breathing. So she was already having trouble breathing when she got home?
>
> A: No.

Q: On April 27th?

A: No.

Q: She wasn't?

A: No, she was not.

Q: [M.C.] wasn't injured when she arrived home on April 27, 2021?

A: She was already injured previously, but I don't know other injuries, because when she came in that night it was dark, and she just came in, and we had sex.

Q: She was fine when she got home, is that your testimony?

A: I'm not going to say she was fine but –

Q: But she wasn't struggling to breathe?

A: She wasn't struggling to breathe.

Q: Her lung wasn't collapsed yet when she arrived home April 27th?

A: No. What I think was I think her alcohol started to wear off and the pain started to arise.

Q: That's what you think, Mr. Alexander.

A: Yes.

Q: So when she gets home, no sign of injury. Everything is fine. The two of you have sex. Correct?

A: That's correct.

Q: That's what you're telling us? You testified previously that [M.C.] performed oral sex on you on April 27th and was struggling to breathe while she did so, correct?

A: That's correct.

Q: [M.C.] was having a hard time breathing while you had your penis in her mouth?

A: That's correct. I don't think so, but yes. That's correct.

Q: And it was soon after that [M.C.] was struggling to breathe so much that she needed to go to the hospital, correct?

A: Not soon after, but awhile after, yes.

Q: Awhile after. How long?

A: Hour or two.

Q: An hour or two into the beating?

A: I never touched her.

Q: Never touched her. But you want the jury to believe that [M.C.] was home for several hours with you with these significant injuries, with a lacerated liver, and a collapsed lung, before it became clear that she needed medical treatment?

A: I never seen or knew anything about it. I never knew where she went. I never knew who she was with. I never knew she went to a parking lot party.

All she told me she went to Don Juan's. I don't know anything about what happened to her.

Q: You don't know anything. All I know is she's home for a couple hours. Everything seems fine. She is struggling to breathe while we have oral sex, but it takes several hours for those significant of injuries to really take effect, for the alcohol to wear off if there is a pain to settle in, is that right?

A: Alcohol and maybe drugs.

After cross-examination, trial counsel asked no questions on re-direct.

{¶ 47} The defense next presented two witnesses to corroborate Alexander's claims related to his work situation and property damage he claimed M.C. caused when she broke into the home, both issues unrelated to the injuries M.C. received on April 27. He called a human resources representative from the Toledo office of his employer and the property manager for his rental. The human resources witness had no knowledge of the documents the defense sought to introduce regarding Alexander's absences. The property manager brought a dated work order for repair of the door's window, a document never produced in discovery, and no other testimony placing the broken window on a timeline to demonstrate relevance. Neither document was admitted into evidence.

{¶ 48} The defense then called the emergency room doctor who treated M.C., Dr. Alisa Roberts. Dr. Roberts acknowledged that the injuries M.C. sustained would be

painful, but the pain could be dulled by intoxication. On cross examination, the doctor noted in M.C.'s chart that there was no indication of intoxication.

{¶ 49} The defense rested after Dr. Roberts' testimony, and the state called no rebuttal witnesses.

{¶ 50} The trial court then addressed any pending motions before finalizing the jury instructions with counsel. Alexander's trial counsel indicated a request for a limiting instruction regarding prior acts, sent by email to the trial court's staff attorney and opposing counsel. Alexander's trial counsel acknowledged they did not file a requested jury instruction, but instead orally requested the trial court to give the standard jury instruction regarding prior acts. Trial counsel argued that this instruction was necessary due to the text exchange within Exhibit 35 that referenced a prior history of domestic violence between Alexander and his ex-wife, M.A. The trial court had previously admitted Exhibit 35, over a defense objection to the hearsay contained within the document, but had not published the contents of the exhibit to the jury. M.A.'s testimony, furthermore, did not address prior domestic violence committed by Alexander against her.

{¶ 51} The following exchange then occurred between the trial court and Alexander's trial counsel:

> The Court:
>
> There is a couple ways of handling this. The whole document is marked as State's Exhibit 35 and it is part of the record, and when any

record that we admit many times there is areas that should just be blacked out or censored or edited. That could be one of those. If I give an instruction other prior convictions the language in that is evidence was received about the commission of crimes, wrongs, or other acts, so that is articulating that we received some sort of evidence in connection to that, meaning there was put in front of the jury evidence of other crimes, wrongs, or acts other than the offenses charged here.

It doesn't seem to me that that actually occurred unless we put this document in without editing, and if I give that instruction then I'm calling attention to something that didn't occur and saying that Mr. Alexander had evidence about his prior crimes, wrongs, or bad acts put into the record, which I don't think that's accurate.

So I mean you're asking for an instruction that seems like it is out of place. I'm not sure of the strategy on that, but if you look at it the way I am articulating that what are you really looking for?

[Trial Counsel]:

I would prefer the redaction of Mr. – of [M.A.'s] statement of that and his response regarding you know you hit me. You slapped me around. You are a big girl. And then goes on to that response.

The trial court then asked the prosecution regarding redaction, and directed Alexander's trial counsel to note all the instances in Exhibit 35 counsel believed should be redacted.

{¶ 52} After lengthy discussion off the record, the trial court addressed the matter further.

The Court:

We have been talking about adding instruction for other acts or prior convictions. We've been on the record and off the record throughout that, but that was largely because we're going through State's Exhibit 35, which is a copy of communications on a communication app for shared parenting from Mr. Alexander and his ex-wife, [M.A.].

There were three entries that were lines from both of the two engaged in this conversation that were being objected to and causing concern, which caused the Defense to request the other acts and prior convictions instruction.

After reading [O.J.I] 401.251 the Court's feeling was that draws more attention to the concerns that the Defense has than simply excising the lines out of Exhibit 35 that have not been read into the record by either side and have not been presented to the jury.

There was initial objection by the State. I believe there is still objection on that. However, I indicated a resolution could be the excising of those lines that had not been utilized in testimony nor presented to the jury.

> We have decided that there are three such entries, and the parties have agreed that if the Court is going to excise anything that the entire sentence of that entry, whether it be sent by [M.A.] or Mr. Alexander, should just be excised as opposed to editing the concerning portions of the sentence out of that entry.

The prosecution and defense both agreed on the record to admit a redacted version, Exhibit 35A, for the jury to consider during deliberation.

{¶ 53} Alexander's trial counsel, however, maintained a request for the instruction, based on the testimony that was adduced at trial from M.A. regarding Alexander's aggressive character despite counsel's lack of contemporaneous objection to this testimony. After the close of testimony, trial counsel noted, "[M.A.]'s not the victim in this case. The only relevant testimony was the lying about the car crash." Counsel suggested the trial court could instruct, "Any character testimony by the witness – particular witness who testified as to Defendant's character – not to be weighed in deciding the guilt or innocence of this case against [M.C.]."

{¶ 54} In response, the trial court noted the lack of "an appropriate copy of a requested instruction" in advance, such as the day before when the jury was released so such matters could be addressed, and the fact "the jury is in the jury room waiting to come out for closing arguments." The trial court denied the request for a potential jury instruction, noting the time had passed and trial counsel failed to submit a proposed instruction in writing.

{¶ 55} After addressing the defense objection and denying the request for a limiting instruction, the defense formally rested in front of the jury. The case then proceeded to closing argument.

{¶ 56} In closing, the state stressed M.C.'s testimony and the acknowledged evidence of serious injury following the second incident. The state also pointed out the many contradictions exhibited by Alexander's testimony and Alexander's attempts to portray M.C. as the cause of her own injuries. The state referenced Exhibit 35A in closing, noting that M.A. called Alexander on his lie about being admitted to the hospital, followed by "pages and pages" of an exchange in which Alexander tried to "make his ex-wife look like the liar and the bad guy when he was the one lying in the first place."

{¶ 57} The defense emphasized the many stories M.C. told before accusing Alexander, blaming both assaults on her ex, E.K. Defense counsel argued that the first injuries were caused by E.K., "no question," and the later injuries were likely also his fault, too. The defense also argued that M.C. exaggerated her injuries in her testimony, and that the police did not conduct a proper investigation into each assault charge with insufficient investigation to corroborate all of M.C.'s claims regarding the assaults.

{¶ 58} The jury acquitted Alexander of count two, felonious assault arising from an incident on or about April 24, 2021. The jury found Alexander guilty of count three, felonious assault arising from the incident on April 27, 2021.

B. Admission of Evidence

{¶ 59} In challenging the conviction for felonious assault in count three, Alexander argues his trial counsel was ineffective for failing to cross-examine his ex-wife, M.A. He also argues that the trial court erred in admitting the redacted Exhibit 35. We address each argument in turn.

1. Ineffective Assistance of Counsel

{¶ 60} In his first assignment of error, Alexander argues his trial counsel was ineffective in failing to object to M.A.'s testimony or to cross examine her. He argues that "[a] reasonable probability existed that [M.A.]'s testimony, the key difference between the trials, changed the outcome."

{¶ 61} The right to counsel, under the Sixth Amendment, exists "to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> "When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Lytle* [48 Ohio St.2d 391, 396–397, 358 N.E.2d 623 (1975)]. This standard is

> essentially the same as the one enunciated by the United States Supreme Court in [*Strickland*].

State v. Bradley, 42 Ohio St.3d 136, 141-42, 538 N.E.2d 373 (1989).

{¶ 62} Pursuant to *Strickland*, a claim of ineffective assistance of counsel first requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Bradley* at 142, quoting *Strickland* at 687-688. Trial counsel is entitled to "a strong presumption" that their "conduct falls within the wide range of reasonable professional assistance," with a "highly deferential" scrutiny of counsel's representation. *Bradley* at 142, quoting *Strickland* at 689. "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." *Bradley* at 142.

{¶ 63} Once an error by counsel is demonstrated, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bradley* at 146, quoting *Strickland* at 694. In other words, "the deficient performance must have been so serious that, 'were it not for counsel's errors, the result of the trial would have been different.'" *State v. Welninski*, 2018-Ohio-778, 108 N.E.3d 185, (6th Dist.) ¶ 69, quoting *Bradley* at 141–142.

{¶ 64} Alexander argues that the testimony of M.A., except for testimony regarding his lie about being in the hospital, constituted improper character evidence under Evid. R. 404(B)(1). In the alternative, Alexander argues that Evid.R. 608(A)

precludes evidence regarding his credibility through specific instances of conduct or extrinsic evidence. In response, the state argues that M.A.'s testimony was introduced to address Alexander's lie about being admitted to the hospital, with the lie demonstrating consciousness of guilt.

a. Character and Other Acts Evidence

{¶ 65} Character evidence is addressed under Evid.R. 404(A), which "is essentially a rule of relevancy." *Toledo v. Schmiedebush*, 192 Ohio App.3d 402, 2011-Ohio-284, 949 N.E.2d 504, ¶ 39 (6th Dist.), citing *State v. Horsley*, 10th Dist. No. 05AP–350, 2006-Ohio-1208, ¶ 18. Pursuant to Evid.R. 404(A)(1), an accused is permitted to introduce character evidence, "but only when such evidence is pertinent to the crime at issue," and refers to character traits "that are inconsistent with commission of the alleged offense." *Id.*, citing *State v. Hale*, 21 Ohio App.2d 207, 215, 256 N.E.2d 239 (10th Dist.1969) (additional citations omitted). The prosecution may introduce character evidence "to rebut the same." *See* Evid.R. 404(A)(1).

{¶ 66} Other acts evidence is addressed under Evid.R. 404(B)(1), which precludes admission of evidence of other acts "to prove a character trait in order to demonstrate conduct in conformity with that trait." *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 16, citing *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994) (additional citation omitted.). However, pursuant to Evid.R. 404(B)(2), such evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

{¶ 67} Alexander refers to character evidence and other acts evidence as if they are interchangeable, but M.A.'s testimony referenced her experience with Alexander's aggressive and angry behavior during their marriage, and after the divorce, as part of M.A.'s interactions with Alexander concerning their daughter. Alexander argues that the state "took great pains to draw parallels between Mr. Alexander's relationship with [M.A.] and his relationship with M.C., thereby seeking improperly to demonstrate actions in conformity." There was no testimony, however, that Alexander assaulted M.A. or was physically abusive, and the trial court excised all references to such conduct from the state's Exhibit 35A. The trial court, furthermore, prevented the state from inquiring into Alexander's prior felony charges or his exit from college amidst allegations of domestic violence.

{¶ 68} Propensity evidence, introduced to "prove the character of a person in order to show action in conformity therewith," is not admissible. *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 21, citing *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994); Evid.R. 404(B). Here, Alexander argues that M.A.'s testimony introduced propensity evidence, but he fails to connect that testimony to the two felonious assault charges addressed at trial. Instead, Alexander focuses on M.A.'s depiction of Alexander as argumentative, with no support for the argument that M.A.'s testimony demonstrated a propensity for physical assault. Considering the record, we do not find M.A.'s testimony introduced any evidence regarding Alexander's propensity to commit felonious assault.

b. Credibility Evidence

{¶ 69} In the alternative, Alexander argues that the state introduced M.A.'s testimony to preemptively attack his credibility. Evid.R. 608(A) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

{¶ 70} In reviewing M.A.'s testimony, it is clear she indicated Alexander has a reputation for lying in the context of her challenge to a specific assertion made by Alexander on April 28, 2021, which M.A. believed to be untruthful. M.A. immediately questioned Alexander's reason for canceling the pickup of their daughter, based on her experience with Alexander. Alexander stuck to his lie of a car accident, but later admitted he lied, ostensibly to spare M.C. embarrassment by telling M.A. why she was really in the hospital. The rest of M.A.'s testimony, referencing his reputation, was admitted without objection by his trial counsel.

{¶ 71} Whether M.A.'s testimony constituted improper character evidence or other acts evidence or acted as a preemptive impeachment of his credibility, Alexander appears to agree that the testimony demonstrating Alexander lied about a car accident was properly admitted. We have consistently found lies or deceptive conduct by an accused,

relative to the charged conduct, to be admissible as consciousness of guilt. *See, e.g., State v. Zimbeck*, 195 Ohio App.3d 729, 2011-Ohio-2171, 961 N.E.2d 1141, ¶ 63 (6th Dist.), citing *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001) (attempting to establish a false alibi "strongly indicates consciousness of guilt."); *State v. Knight*, 6th Dist. Erie No. E-21-017, 2022-Ohio-1787, ¶ 51 (the defendant, accused of sex offenses, did not immediately open the door to police and denied there was a child in his home, admissible as consciousness of guilt).

{¶ 72} In reviewing the record, the remainder of M.A.'s testimony falls somewhere between the overwhelming attack on Alexander's reputation and credibility, as claimed by Alexander, and the negligible reference to bad character, as argued by the state. Considering M.A.'s testimony in its entirety, M.A. opined on Alexander's reputation for telling lies and addressed his anger issues and his need to always be right and protect his reputation. Trial counsel did not object and chose not to cross examine M.A.

{¶ 73} As an initial matter, "whether to cross-examine witnesses and the extent of that cross-examination is a tactical matter committed by the discretion of trial counsel and cannot form the basis for an ineffective assistance of counsel claim." *State v. Ellison*, 6th Dist. Lucas No. L-02-1292, 2003-Ohio-6748, ¶ 33, citing *State v. Flors*, 38 Ohio App.3d 133, 139, 528 N.E.2d 950 (8th Dist.1987). We presume the decision to forgo cross- examining M.A. was part of trial counsel's sound trial strategy; Alexander must overcome this presumption to justify a finding of ineffective assistance of counsel. *State*

v. Mohamed, 151 Ohio St.3d 320, 2017-Ohio-7468, 88 N.E.3d 935, ¶ 18, citing *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995), citing *Strickland* at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 74} In this case, Alexander admitted to the lie about a car accident, the most pertinent aspect of M.A.'s testimony, and M.A.'s testimony clearly established that she and Alexander were dealing with custody issues following a recent divorce. Alexander presents no argument that negates a presumption of sound trial strategy, arguing instead that the state must identify a reasonable trial strategy in order to defeat a claim of ineffective assistance based on the failure to cross-examine M.A. The law requires Alexander to overcome the presumption, however. *See Mohamed* at ¶ 18.

{¶ 75} Additionally, even if Alexander demonstrated that trial counsel was ineffective in failing to object to M.A.'s testimony, Alexander must also show that such failure affected the outcome of the trial to merit reversal based on ineffective assistance of counsel. The failure to demonstrate either deficiency or prejudice will defeat a claim for ineffective assistance of counsel. *Strickland* at 687. Thus, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. * * * If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland* at 697.

{¶ 76} Alexander argues that counsel's failure to object to testimony bolstered the credibility of M.C. Such a failure to object, bolstering credibility, has been deemed as

ineffective assistance of counsel "where resolution of factual issues turns solely upon the credibility of those witnesses." *State v. Nichols*, 116 Ohio App.3d 759, 765, 689 N.E.2d 98 (10th Dist.1996). M.A.'s testimony did match the testimony of M.C. in some aspects, in that both women described identical lying behavior of Alexander. Considering the record, however, we do not find the case rested solely on M.C.'s versus Alexander's credibility.

{¶ 77} At trial, there was no dispute that M.C. had sustained serious injuries; the dispute concerned the identity of the assailant, or how M.C. sustained her injuries. M.C. testified that she reported her ex, E.K. as the assailant in the first assault and attributed her later injuries to being caught in a bar fight. She subsequently accused Alexander of both assaults and testified at trial regarding each incident. The jury had more evidence, however, than M.C.'s testimony.

{¶ 78} Here, the jury clearly weighed M.C.'s credibility and Alexander's credibility, along with the rest of the evidence, and found Alexander guilty of only the second assault on April 27, 2021. The jury resolved the factual issues based on M.C.'s credibility and also Alexander's credibility, considering credibility in the context of all the evidence, including the medical record that all parties acknowledged demonstrated painful injuries. The fact that deliberations produced a different verdict as to each count, moreover, is indicative of a jury that weighed the testimony and evidence, with no indication that Alexander was actually prejudiced by the admission of the M.A.'s testimony, considering the jury's acquittal on count two. *See State v. Ridley*, 6th Dist.

Lucas No. L-10-1314, 2013-Ohio-1268, ¶ 40 (evidence of past acts did not prejudice jury where they returned a guilty verdict on only one of three counts); *see also State v. Sergent*, 3d Dist. Seneca No. 13-19-20, 2019-Ohio-4717, ¶ 32 ("the split verdict in the instant case supports the conclusion that the jury critically weighed the testimony and evidence, accepting some and rejecting others.").

{¶ 79} Considering the record, we find Alexander's first assignment of error not well-taken.[1]

2. Admission of Exhibit 35

{¶ 80} In his second assignment of error, Alexander argues that the trial court improperly admitted the state's Exhibit 35, containing inadmissible character evidence. Alexander contends the messages within the exhibit were inflammatory and prejudicial, and could lead to inference of domestic violence between Alexander and M.A.

{¶ 81} We review the trial court's admission of evidence under an abuse of discretion standard. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 22. An abuse of discretion connotes that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

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[1] We note that Alexander attempted to assert additional assignments of error, with supplemental argument, relegated to footnotes throughout his brief. We limit our review to the assignments of error asserted according to App.R. 16(A)(3), as provided by App.R. 12(A)(2) ("The court may disregard an assignment of error presented for review if the party raising it * * * fails to argue the assignment separately in the brief, as required under App.R. 16(A).").

{¶ 82} Alexander challenges the trial court's admission of Exhibit 35. During trial, Alexander's trial counsel raised an objection to that exhibit, but was overruled. The trial court, however, revisited its ruling in response to Alexander's request for a curative instruction, addressing specific references to conduct within the unredacted Exhibit 35. The trial court carefully reviewed the unredacted Exhibit 35 and suggested alternatives to counsel, as follows:

> There is a couple ways of handling this. The whole document is marked as State's Exhibit 35 and it is part of the record, and when any record that we admit many times there is areas that should just be blacked out or censored or edited. That could be one of those. If I give an instruction other prior convictions the language in that is evidence was received about the commission of crimes, wrongs, or other acts, so that is articulating that we received some sort of evidence in connection to that, meaning there was put I front of the jury evidence of other crimes, wrongs, or acts other than the offenses charged here.
>
> It doesn't seem to me that that actually occurred unless we put this document in without editing, and if I give that instruction then I'm calling attention to something that didn't occur and saying that Mr. Alexander had evidence about his prior crimes, wrongs, or bad acts put into the record, which I don't think that's accurate.

> So I mean you're asking for an instruction that seems like it is out of place. I'm not sure of the strategy on that, but if you look at it the way I am articulating that what are you really looking for?

In response to the trial court's query, Alexander's trial counsel opted for the redactions and the prosecutor consented to a redacted Exhibit 35A. The trial court then confirmed with the parties, as follows:

> THE COURT: Before doing that we will have to make sure everyone is in agreement that this Exhibit 35 as amended is acceptable to both parties.
>
> PROSECUTOR: Yes, Your Honor.
>
> TRIAL COUNSEL: Yes, Your Honor.

{¶ 83} Because Alexander ultimately agreed to admission of Exhibit 35A, and the jury never viewed Exhibit 35, Alexander has waived all but plain error relative to admission of Exhibit 35A.[2] *State v. Pelmear*, 6th Dist. Fulton Nos. F-21-003, F-21-006, 2022-Ohio-1534, ¶ 43, citing *State v. Rios*, 6th Dist. Williams No. WM-13-004, 2014-Ohio-341, ¶ 32 (additional citations omitted.). Plain error is error "affecting substantial rights." Crim.R. 52(B). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest

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[2] In his appellant's brief, Alexander consistently identifies Exhibit 35 as the improperly admitted exhibit, despite the fact his trial counsel later consented to admission of a redacted Exhibit *35A*. In his reply brief, Alexander argues that, even with redactions, the exhibit contained improper character evidence. However, Alexander fails to address the lack of objection prior to admission, or application of the plain error standard on appeal.

miscarriage of justice." *Pelmear* at ¶ 43, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶ 84} Alexander argues that the text messages contained within the redacted exhibit were inflammatory and portrayed Alexander as a bad father and hinted at domestic abuse. Similar to his argument concerning M.A.'s testimony, Alexander argues that the text messages introduced improper character evidence that was "especially prejudicial when the case turns on the jury's assessment of the defendant's and complainant's relative credibilities." However, as we noted in resolving Alexander's first assignment of error, the case did not rest solely on M.C.'s versus Alexander's credibility.

{¶ 85} Alexander testified in both trials, and his testimony was often contradictory. He was checked out of the relationship with M.C. but also so devoted to her while she was in the hospital that he missed work to stay with her, risking his job. Most significantly, however, Alexander testified that M.C. was already injured when she returned home after Taco Tuesday, and despite the admittedly painful injuries she had incurred, he did not notice any injury and engaged in sex with M.C., only to notice her distress hours later. While Alexander explained this unawareness of prior injury based on M.C.'s intoxication, the record demonstrated M.C.'s medical providers on the 27th did not note intoxication in her medical chart. Considering this record, there was additional evidence, besides the testimony of M.C. and Alexander, for the jury to consider in resolving any credibility issues regarding the assault on April 27. We, therefore, do not find the necessary "exceptional circumstances" meriting reversal for plain error.

{¶ 86} Accordingly, we find Alexander's second assignment of error not well-taken.

C. Curative Instruction

{¶ 87} In his third assignment of error, Alexander argues the trial court erred in denying trial counsel's renewed request for a curative instruction regarding character testimony. Based on the record, trial counsel did not submit a proposed instruction in writing, but instead made an oral request for the following:

> That any character testimony by the witness – particular witness who testified as to Defendant's character should be limited and not to – not to be weighed in deciding the guilt or innocence of this case against [M.C.]

In response, the trial court noted the late hour, considering proposed instructions had been distributed to counsel the day before and the case was poised for closing argument. The trial court also took issue with the lack of specific citations for the proposed instruction. In denying inclusion of trial counsel's character instruction, the trial court also questioned the relevance of the instruction, stating:

> If someone is going to base a decision on whether or not Mr. Alexander committed two acts of felonious assault to [M.C.] because of his salty relationship with his ex-wife I think that's stretching it to a point that's not realistic.

> So right now I am going to deny the addition of a proposed jury instruction that is not even fully articulated, and that's just the fact of the record right now.

{¶ 88} A trial court must "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Roberts*, 2023-Ohio-142, 206 N.E.3d 144, ¶ 93 (6th Dist.), quoting *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. We review a trial court's decision, denying a requested instruction, for an abuse of discretion. *Roberts* at ¶ 93, citing *State v. Adams*, 144 Ohio St.3d 428, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240 (additional citation omitted.).

{¶ 89} Here, the record demonstrated that the trial court considered the possible effect of providing Alexander's character instruction, and in its sound discretion, declined to include the proposed instruction in the jury charge. Considering the evidence adduced at trial, we find no abuse of discretion by the trial court. Appellant's third assignment of error, accordingly, is not well-taken.

D. Cumulative Error

{¶ 90} In his fourth assignment of error, Alexander argues that the cumulative effect of trial errors deprived him of a fair trial. The cumulative error doctrine requires reversal of a conviction "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." *State v. Alliman*, 2023-Ohio-206,

206 N.E.3d 765, ¶ 105 (6th Dist.), quoting *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 321 (additional citation omitted.).

{¶ 91} In order to find cumulative error, "there must first be a finding that multiple errors were committed at trial." *Alliman* at ¶ 105, quoting *State v. Moore*, 6th Dist. Wood No. WD-18-030, 2019-Ohio-3705, ¶ 87. Where no instances of harmless error are found, however, as in this case, the cumulative error doctrine does not apply. *State v. Leu*, 2019-Ohio-3404, 142 N.E.3d 164, ¶ 56, citing *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). Accordingly, Alexander's fourth assignment of error is not well-taken.

E. Reagan Tokes Law

{¶ 92} In his fifth and final assignment of error, Alexander argues the trial court erred in sentencing him to an indefinite prison term under the Reagan Tokes Act, R.C. 2967.261. Alexander does not argue specific error regarding his sentence, but instead notes that we have determined the law is constitutional and the Ohio Supreme Court has accepted review of all three constitutional challenges previously argued in other cases: that Reagan Tokes violates the separation of powers doctrine, violates the right to a jury trial, and violates the right to due process. *See State v. Simmons*, 163 Ohio St.3d 1492, 2021-Ohio-2270, 169 N.E.3d 1273; *State v. Hacker*, 161 Ohio St.3d 1449, 2021-Ohio-534, 163 N.E.3d 585. Alexander asserts "these same constitutional challenges to preserve these issues in the event that the Supreme Court holds the [Reagan Tokes law] is unconstitutional."

{¶ 93} On July 26, 2023, after briefing was complete in the appeal, the Ohio Supreme Court issued its decision in *State v. Hacker*, Slip Opinion 2023-Ohio-2535, finding the Reagan Tokes law constitutional, and determining the law does not violate the separation of powers doctrine, the right to a jury trial, and the right to due process. *Hacker* at ¶ 41. Considering this ruling, as well as the lack of argument relative to any specific error not otherwise addressed by the Supreme Court, we find Alexander's fifth and final assignment of error not well-taken.

IV. Conclusion

{¶ 94} Based on the foregoing, we affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs of the appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____ JUDGE

Christine E. Mayle, J. _____ JUDGE

Gene A. Zmuda, J. _____ JUDGE
CONCUR

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

STATE OF OHIO	COURT OF APPEALS NO. {48}L-22-1183
APPELLEE	TRIAL COURT NO. CR0202101678
V.	
BRANDEN ALEXANDER	**DECISION AND JUDGMENT**
APPELLANT	

* * * * *

This matter is before the court on the application for reconsideration filed by appellant, Branden Alexander on August 14, 2023. Appellee, the state of Ohio, filed a memorandum in opposition on September 1, 2023, and Alexander filed a reply brief on September 15, 2023. The motion is now decisional.

Alexander seeks reconsideration of the August 4, 2023 decision, affirming his conviction for one count of felonious assault in violation of R.C. 2903.11(A)(1) and (D). *State v. Alexander*, 2023-Ohio-2708, -- N.E.3d --, (6th Dist.). In support, Alexander argues we found error in the admission of evidence and failed to apply the appropriate

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standard, articulated by *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153. In opposing the motion, the state argues that the decision addressed appropriate law, and the *Morris* standard does not apply to the issues raised on appeal, and even if *Morris* did apply, the result would be the same.

An application for reconsideration is permitted by App.R. 26(A). To warrant reconsideration, however, an applicant must identify an obvious error in the court's decision or identify an issue "that was either not considered at all or not fully considered by the court when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278 (10th Dist.1981), paragraph two of the syllabus.

In the direct appeal, Alexander raised the following assignments of error:

> 1. Mr. Alexander's trial counsel rendered constitutionally ineffective assistance by failing to object to improper and highly prejudicial questioning and testimony of Mr. Alexander's ex-wife and by failing to cross-examine her.
>
> 2. The trial court erred in admitting Exhibit 35, which contained inadmissible character evidence.
>
> 3. The trial court erred in denying defense counsel's request for curative instruction regarding inadmissible character evidence.
>
> 4. The cumulative effect of the above errors deprived Mr. Alexander of a fair trial.

Alexander at ¶ 10.

In seeking reconsideration, Alexander argues we applied the incorrect standard to his first assignment of error, arguing resolution of his claim of ineffective assistance of counsel required a "harmless beyond a reasonable doubt" determination, as stated in *Morris*. On appeal, we addressed the claim of ineffective assistance of counsel according to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). Considering the facts in Alexander's case, the standard in *Strickland,* as adopted by the Ohio Supreme Court, was the proper standard for review. The facts in *Morris,* moreover, concerned properly preserved claims of error in the admission of evidence and not ineffective assistance of counsel.

In *Morris,* the defense objected to testimony under Evid.R. 404(B), arguing testimony of other acts by the victim's sister and mother was inadmissible as proof the defendant raped the victim. *Morris* at ¶ 9-11. On appeal, the Ninth District Court of Appeals determined the trial court erred in admitting this testimony and additionally found the error was not harmless beyond a reasonable doubt. The Ninth District reversed the judgment of the trial court. *Morris* at ¶ 20. The Ohio Supreme Court accepted the state's appeal and addressed the standard for harmless-error review under Crim.R. 52(A). *Id.* at ¶ 23. The Court held:

> In determining whether to grant a new trial as a result of the erroneous admission of evidence under Evid.R. 404(B), an appellate court

> must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record.

Morris at the syllabus. In *Morris,* the Ohio Supreme Court set forth a three-part analysis that remains the test applied in determining error in the admission of evidence.

In *State v. Boaston,* 160 Ohio St.3d 46, 2020-Ohio-1061, 153 N.E.3d 44, the Supreme Court reiterated the three-part analysis that should guide appellate review of error in the admission of evidence. The Court restated the test, first addressed in *Morris,* as follows:

> In *State v. Harris,* 142 Ohio St.3d 211, 2015-Ohio-166, 28 N.E.3d 1256, we set out the three-part analysis, established previously in *Morris,* 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, that should guide appellate courts in determining whether the erroneous admission of certain evidence affected the defendant's substantial rights so as to require a new trial or whether the admission of that evidence was harmless error under Crim.R. 52(A):
>
> > First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. [*Morris*] at ¶ 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. *Id.* at ¶

> 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt. *Id.* at ¶ 29, 33.

Boaston at ¶ 63-64, quoting *Harris* at ¶ 37 (additional citation omitted.).

In the present case, Alexander's trial counsel did not object to the testimony he now argues was erroneously admitted by the trial court. On appeal, he raised no error based on the admission of the testimony, having waived the issue for appeal, and instead argued his trial counsel was ineffective in failing to object and failing to cross-examine M.A. during trial. "To establish ineffective assistance of counsel, an appellant must show '(1) deficient performance of counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different.'" *State v. Walls*, 2018-Ohio-329, 104 N.E.3d 280, ¶ 74 (6th Dist.), citing *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 204, citing *Strickland* at 687-88.

In seeking reconsideration, Alexander suggests this court found error in the admission of the evidence as an indication his trial counsel provided deficient performance, and therefore we were required to apply the harmless-beyond-a-reasonable-doubt standard to the admission of that evidence. We disagree. First, we did not address deficiency of counsel, finding Alexander failed to demonstrate prejudice that resulted from his counsel's performance. Specifically, we noted that "[t]he failure to demonstrate

either deficiency or prejudice will defeat a claim for ineffective assistance of counsel[.] Thus, 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. * * * If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" *Alexander* at ¶ 75, quoting *Strickland* at 687; 697.

Second, the harmless-beyond-a-reasonable-doubt standard concerns error in the admission of evidence in cases in which that issue was preserved for appeal through timely objection, as addressed in *Morris* and *Boaston.* Alexander references no authority that requires us to abandon the analysis under *Strickland* and apply *Morris* to an ineffective assistance of counsel claim. Furthermore, in pursuing this argument, Alexander merely revisits his contention that M.C. was not a credible witness, and but-for the testimony of M.A., the jury had no other evidence to find him guilty of one of the felonious assault charges, but would have acquitted him as to both charges. We addressed and rejected this same argument on appeal. *Alexander* at ¶ 85.

"'An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. App.R. 26 provides a mechanism by which a party may prevent' a miscarriage of justice." *Perrysburg Tp. v. City of Rossford*, 6th Dist. Wood No. WD-02-010, 2002-

Ohio-6364, ¶ 4, quoting *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996).

Applying the standard set forth in *Matthews*, Alexander's application for reconsideration does not call attention to an obvious error in the court's decision, or raise an issue for consideration that was not fully considered by the court when it should have been. We therefore find Alexander's Application for reconsideration not well-taken and his motion is denied.

It is so ordered.

Thomas J. Osowik, J.

JUDGE

Christine E. Mayle, J.

JUDGE

Gene A. Zmuda, J.
CONCUR

JUDGE

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

STATE OF OHIO	COURT OF APPEALS NO. {48}L-22-1183
APPELLEE	TRIAL COURT NO. CR0202101678
V.	
BRANDEN ALEXANDER	**DECISION AND JUDGMENT**
APPELLANT	

* * * * *

This matter is before the court on the motion to certify a conflict to the Ohio Supreme Court filed by appellant, Branden Alexander, on November 6, 2023. Appellee, the state of Ohio, filed a memorandum in opposition on November 16, 2023, and Alexander filed a reply brief on November 24, 2023. The motion is now decisional.

Alexander seeks to certify a conflict on the following question of law:

> "When evaluating an ineffective-assistance-of-counsel claim based on counsel's failure to object to improper character evidence, must Ohio courts use the harmless-beyond-a-reasonable-doubt standard set forth in

1.

> *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153 to evaluate prejudice?"

Alexander argues that our failure to apply the standard articulated in *Morris* is in conflict with the decisions of the Third District Court of Appeals in *State v. Stein*, 3d Dist. Logal No. 8-17-39, 2018-Ohio-2621, the Eight District Court of Appeals in *State v. Marshall*, 8th Dist. Cuyahoga No. 109633, 2022-Ohio-2666, and the Fifth District Court of Appeals in *State v. Bond*, 5th Dist. Richland No. 2019CA0033, 2023-Ohio-2361.

Alexander filed his motion according to App.R. 25, which requires filing within ten days after service of the decision that creates a conflict with the decision of another court of appeals. Alexander identified our decision, denying his motion for reconsideration, as the decision creating a conflict.

Article IV, Section 3(B)(4) of the Ohio Constitution provides:

> Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

To certify a conflict pursuant to Article IV, Section 3(B)(4), we must find three conditions are met, as set forth by the Ohio Supreme Court in *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 613 N.E.2d 1032 (1993).

> First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Whitelock at 596. Considering the issues raised on appeal, and our determination of the motion for reconsideration based on those issues, we find neither the first nor second condition is met in this case, and decline to certify a conflict.

In his appeal, Alexander asserted the following as one of his assignments of error:

> Mr. Alexander's trial counsel rendered constitutionally ineffective assistance by failing to object to improper and highly prejudicial questioning and testimony by Mr. Alexander's ex-wife and by failing to cross-examine her.

In addressing this claim, we applied the standard articulated in *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See State v. Alexander*, 2023-Ohio-2708, -- N.E.3d --, (6th Dist.), ¶ 62-63.

Pursuant to *Strickland*, Alexander had to demonstrate error by his counsel and also that, but for the error, "the result of the proceeding would have been different."

Alexander at ¶ 63, quoting *State v. Bradley*, 42 Ohio St.3d 136, 146, 538 N.E.2d 373 (1989). We found Alexander failed to demonstrate the prejudice prong under *Strickland*, or that "the deficient performance must have been so serious that, 'were it not for counsel's errors, the result of the trial would have been different.'" *Alexander* at ¶ 63, quoting *State v. Welninski*, 2018-Ohio-778, 108 N.E.3d 185, ¶ 69 (6th Dist.)[1], quoting *Bradley* at 141-142. Because Alexander's failure to demonstrate prejudice was dispositive of the error raised on appeal, we found the assignment of error not well-taken. *See Strickland* at 687 (failure to demonstrate either prong will defeat a claim of ineffective assistance of counsel).

Following our decision, Alexander filed a motion for reconsideration, arguing we erroneously failed to the apply the "harmless-beyond-a-reasonable-doubt" analysis in *Morris* to the prejudice prong of his ineffective assistance of counsel claim. We denied the motion, finding the *Strickland* standard properly applied to adjudication of the ineffective assistance of counsel claim.

Alexander now seeks to certify a conflict, based on our denial of his motion for reconsideration, arguing we failed to incorporate the *Morris* analysis to the prejudice prong of his assignment of error, a decision in conflict with decisions of the Third,

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[1] *Welninski*, which applied the law regarding costs pursuant to R.C. 2947.23 and *State v. Joseph*, 125 Ohio St.3d 75, 2010-Ohio-954, 926 N.E.2d 278, has been superseded by statute on that issue only, as noted by *State v. Braden*, 158 Ohio St.3d 462, 2019-Ohio-4204, 145 N.E.3d 235, ¶ 20-23.

Eighth, and Fifth District Courts of Appeal. Because we find that Alexander misconstrues the holding in *Morris*, his proposed conflict presents no conflict of law, and our decision is not in conflict with decisions of the Third, Eighth, and Fifth District Courts of Appeal, Alexander's motion to certify a conflict must be denied.

1. *Morris* and its progeny address harmless error review concerning admission of evidence and not ineffective assistance of counsel.

In *Morris*, the Ohio Supreme Court dispensed with the distinction between constitutional and non-constitutional errors under Crim.R. 52(A) and adopted a three-part test to determine whether the erroneous admission of certain evidence was harmless or affected a defendant's substantial rights, requiring a new trial. *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153 at ¶ 26. *Morris* specifically addressed error in the admission of evidence, and held that a new trial is necessary only where all of the following is present: (1) a determination of prejudice as a result of improper evidence; (2) declaration of a belief that the error was not harmless beyond a reasonable doubt; and (3) after excising the improper evidence, a determination that a new trial is necessary due to the impact of the erroneously admitted evidence. *Morris* at ¶ 27-29.

The Court provided further guidance, as follows:

> Appellate judges upon review determine these issues and decide which trial errors are harmless and which instead necessitate the remedy of reversal and new trial. Although the language used by the courts may vary,

> the principles themselves are clear: That is, technical error will be ignored under Crim.R. 52(A); structural error will result in automatic reversal, [*State v.*]*Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222; and evidence errors that are prejudicial because they improperly affect the verdict will be excised from the record with the remaining evidence weighed to see if there is evidence beyond a reasonable doubt of the appellant's guilt, [*State v.*]*Rahman*, 23 Ohio St.3d [146,] 150, 492 N.E.2d 401 [(1986)]. Therefore, we hold that in determining whether to grant a new trial as a result of the erroneous admission of evidence under Evid.R. 404(B), an appellate court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record.

Morris at ¶ 33.

Shortly after *Morris*, the Court again addressed the criminal, harmless error standard, noting its recent decision in *Morris* involving "the harmless-error rule in the context of a defendant's claim that the erroneous admission of certain evidence required a new trial." *State v. Harris*, 142 Ohio St.3d 211, 2015-Ohio-166, 28 N.E.3d 1256, ¶ 37, citing *Morris* at ¶ 22-24. In *Harris*, the Court restated the three-part test as follows:

> First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. [*Morris*] at ¶

> 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. [*Morris*] at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt. [*Morris*] at ¶ 29, 33.

Harris at ¶ 37. This standard was reiterated in *State v. Arnold*, 147 Ohio St.3d 138, 2016-Ohio-1595, 62 N.E.3d 153, concerning error in the admission, over objection, of a written statement.

Most recently, the Court considered whether error in the admission of evidence required a new trial in *State v. Boaston*,160 Ohio St.3d 46, 2020-Ohio-1061, 153 N.E.3d 46. In applying the harmless-error analysis of *Morris*, the Court found the trial court erred in admitting expert testimony when a written report was not disclosed as required under Crim.R. 16(K). *Boaston* at ¶ 60. However, the Court then found that there was no prejudice as a result of the admission of this evidence. *Id.* at ¶ 64. The Court noted the evidence "did little more than connect dots that were all too readily apparent[,]" and that the "remaining evidence adduced by the state established [the defendant's] guilt beyond any reasonable doubt." *Boaston* at ¶ 64, 70.

In each of these cases in which the Ohio Supreme Court addressed the harmless-error analysis, the application of the test established by *Morris* was addressed to error in the admission of evidence, properly preserved for review by objection in the trial court.

In his motion to certify a conflict, Alexander suggests the analysis applies to the "erroneous" admission of evidence in his case, asserted within his ineffective assistance of counsel claim, without any authority that would support applying the analysis of *Morris* to a claim that was not preserved for purposes of appeal.

2. Harmless error review does not apply to Alexander's ineffective assistance of counsel claim.

In his assignment of error, Alexander raised the issue of ineffective assistance of counsel, based on the claim that trial counsel failed to object to Alexander's ex-wife's testimony, which he argues was "improper and highly prejudicial questioning and testimony." In his appeal, Alexander argued his ex-wife's testimony constituted character evidence, propensity evidence, or was introduced to preemptively attack his credibility. However, because his trial counsel failed to object to the admission of the testimony, he did not preserve his evidentiary challenge for appeal. Despite this failure to preserve the issue on appeal, Alexander continues to seek harmless error review of his evidentiary challenge to his ex-wife's testimony.

On appeal, Alexander characterized his ex-wife's testimony as "improper and highly prejudicial," but he also acknowledged that some of that testimony was properly admitted. Specifically, Alexander admitted to lying to his ex-wife about being in the hospital and acknowledged that the testimony regarding his lie was admissible to demonstrate consciousness of guilt. Based on his assignment of error, however,

Alexander's argument of prejudice was limited to ineffective assistance of counsel, placing the burden on Alexander to demonstrate that his deficient trial counsel caused prejudice meriting a new trial. *See Bradley*, 42 Ohio St.3d at 144, 538 N.E2d 373 (appellant has the burden of demonstrating prejudice by showing that "but for counsel's actions, the result of the case would have been different."). In reviewing the assigned error, we determined that Alexander failed to demonstrate the requisite prejudice. *Alexander* at ¶ 76-78. This determination was not unlike the initial step of the *Morris* analysis, in which a court must first determine whether prejudice exists.

In seeking reconsideration, Alexander argued as if error and prejudice were presumed, maintaining the issue on appeal was whether the presumed error was harmless-beyond-a-reasonable doubt. In this sense, Alexander misconstrues the holding in *Morris*, skips past the first step of the analysis, and seeks to extend harmless error review to a claim of ineffective assistance of counsel. In doing so, Alexander would shift the burden of demonstrating prejudice arising from ineffective assistance of counsel away from the defendant, contrary to precedent, s*ee Alexander*, 2023-Ohio-2708, -- N.E.3d – , at ¶ 63, and require the reviewing court to rule out harmless error before the defendant identified any prejudice. This is not the mandate of *Morris.*

In considering Alexander's assigned error, ineffective assistance of counsel, we found that Alexander failed to demonstrate prejudice based on his ex-wife's testimony, or in other words, that Alexander demonstrated that his trial counsel's performance in

failing to object to the testimony or cross-examine his ex-wife had any effect on the outcome of his case. Therefore, applying the appropriate review, and not the harmless error review argued by Alexander, *Morris* did not apply to Alexander's assigned error regarding ineffective assistance of counsel.

3. The proposed conflict cases are distinguishable.

In addition to misconstruing the applicability of *Morris*, Alexander proposes conflict cases that are not truly in conflict.

In *State v. Stein*, 3d Dist. Logan No. 8-17-39, 2018-Ohio-2621, the Third District Court of Appeals reversed a conviction where the admission of evidence at trial, suggesting Stein was a drug dealer, had "no rational relationship" to the charged offenses. *Stein* at ¶ 34. Applying the test in *Morris*, the Third District found the evidence was prejudicial and, combined with the state's argument that Stein "was not entitled to the self-defense verdict because he was a drug dealer who was going to retrieve his drugs," the evidence could not be deemed as having no effect on the verdict. *Id.* at ¶ 36. After excluding the improper evidence, the Court determined the error was harmless beyond a reasonable doubt. *Id.*

At Alexander's trial, his ex-wife testified regarding a lie Alexander told to explain his girlfriend's injuries, introduced to demonstrate consciousness of guilt. Alexander also testified regarding this lie. As part of her testimony, Alexander's ex-wife testified regarding the extent to which Alexander maintained the lie, arguing with his ex-wife that

she was the one who was wrong and unreasonable. This testimony of the lie was relevant and admissible, as acknowledged by Alexander's counsel.

While Alexander's ex-wife also testified that she believed Alexander was argumentative and always needed to prove he was right, she gave no testimony of prior bad acts that could have caused the jury to convict based on conduct unrelated to the offenses charged. *Alexander* at ¶ 68. Furthermore, the state did not argue prior bad acts in closing arguments, as was the case in *Stein.* Significantly, the court in *Stein* applied the harmless-beyond-a-reasonable-doubt standard of Morris only after determining admission of the evidence was erroneous and resulted in prejudice. We did not find Alexander's trial counsel was deficient, leading to admission of improper evidence. Instead, we found Alexander could not prevail on the prejudice prong, based on the actual testimony of his ex-wife, which was largely limited to evidence tending to show consciousness of guilt. *Alexander* at ¶ 75.

In *State v. Marshall,* 8th Dist. Cuyahoga No. 109633, 2022-Ohio-2666, the Eighth District Court of Appeals considered an application for reopening the direct appeal, based on ineffective assistance of appellate counsel. After raising the erroneous admission of Evid.R. 404(B) evidence in the direct appeal and the Eighth District determining such error did not merit a new trial, Marshall argued that his appellate counsel was deficient in not asserting additional error regarding other evidence and in not objecting to the prosecutor's statements about evidence deemed inadmissible in his direct appeal.

Marshall at ¶ 1. The Eighth District denied reopening, noting it "has already found that Marshall's conviction was supported by overwhelming evidence when addressing his Evid.R. 404(B) argument in the direct appeal." *Id.* at ¶ 16, citing *State v. Marshall*, 8th Dist. Cuyahoga No. 109633, 2021-Ohio-4434, ¶ 65-66.

In Alexander's case, he identified no Evid.R. 404(B) evidence that was admitted through his ex-wife, arguing instead that his trial counsel should have objected to her testimony despite also noting some of that testimony was relevant. Like the court in *Marshall*, we did not find the ex-wife's testimony to be the sole basis for conviction and rejected the notion that the verdict relied only on a credibility determination between Alexander and his girlfriend, M.C. Instead, we noted the jury had additional evidence, including the medical record, and the jury entered an acquittal as to one of the two incidents for which Alexander stood trial, indicating the jury weighed the testimony and evidence in resolving the credibility issues. *Alexander* at ¶ 78.

Finally, in *State v. Bond*, 5th Dist. Richland No. 2109CA0033, 2023-Ohio-2361, the Fifth District Court of Appeals addressed a case on remand from the Ohio Supreme Court, after reversal, to address assignments of error previously deemed moot. *Bond* at ¶ 1. On remand, the Fifth District addressed Bond's evidentiary challenge to other acts evidence, including a rap song, inadmissible under Evid.R. 404(B). In rejecting the claim of error, the Fifth District found "any error in the admission of the rap lyrics and music video to be harmless beyond a reasonable doubt." *Bond* at ¶ 54.

As previously iterated in Alexander's case, his ex-wife's testimony concerned the lie he told regarding the injuries sustained by his girlfriend, introduced as consciousness of guilt. *Alexander* at ¶ 71. The ex-wife's testimony was limited, and did not address prior bad acts. At most, Alexander's ex-wife portrayed the former couple's relationship as contentious, with all references to domestic violence redacted from the exhibit later admitted as evidence, with the approval of Alexander's trial counsel. *Alexander* at ¶ 82. Furthermore, the jury acquitted Alexander of one of the assault charges, and found him guilty of only the charge for which he offered up the lie to his ex-wife. *Alexander* at ¶ 78.

Unlike the proposed conflict cases, the analysis in Alexander's case was limited to ineffective assistance of counsel, with Alexander failing to demonstrate prejudice under the test articulated in *Strickland.* Thus, the proposed conflict cases are wholly dissimilar from the present case, and Alexander fails to demonstrate a conflict in the application of the law, based on these cases.

4. Certification requires a conflict in the application of the law.

In order to certify a conflict to the Ohio Supreme Court, we must first find "some conflict in a rule of law" between our district and another district. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 598, 513 N.E.2d 1032 (1993). We applied *Strickland* to the ineffective assistance of counsel claim raised by Alexander in his direct appeal, and reiterated this standard in denying reconsideration. The proposed conflict cases concern

harmless error review of erroneously admitted evidence, applying *Morris*, and not ineffective assistance of counsel. While both *Strickland* and *Morris* require consideration of prejudice, the review under *Strickland* does not presume prejudice followed by harmless error review, pursuant to *Morris*.

Based on the foregoing, we find no conflict between districts in the application of law. Alexander's motion to certify a conflict, accordingly, is found not well-taken and denied.

It is so ordered.

Thomas J. Osowik, J. _____ JUDGE

Christine E. Mayle, J. _____ JUDGE

Gene A. Zmuda, J. _____ JUDGE
CONCUR

Supreme Court of Ohio Clerk of Court - Filed February 20, 2024 - Case No. 2023-1571

The Supreme Court of Ohio

State of Ohio

v.

Branden Alexander

Case No. 2023-1571

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Lucas County Court of Appeals; No. L-22-1183)

Sharon L. Kennedy
Chief Justice

Supreme Court of Ohio Clerk of Court - Filed April 30, 2024 - Case No. 2023-1571

The Supreme Court of Ohio

State of Ohio	Case No. 2023-1571
v.	RECONSIDERATION ENTRY
Branden Alexander	Lucas County

It is ordered by the court that the motion for reconsideration of decision not to accept appeal for review in this case is denied.

(Lucas County Court of Appeals; No. L-22-1183)

Sharon L. Kennedy
Chief Justice

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

STATE OF OHIO Plaintiff,	*	CASE NO: G-4801-CR-0202101678-000
v.	*	JUDGMENT ENTRY
BRANDEN ALEXANDER Defendant.	*	JUDGE GARY G COOK

* * * * * * *

On July 05, 2022 defendant's sentencing hearing was held pursuant to R.C. 2929.19. Court reporter KELLY WINGATE, defense attorney SARAH THOMAS KOVOOR and the State's attorney JENNIFER DONOVAN and REBECCA FACEY were present as was the defendant BRANDEN ALEXANDER, who was afforded all rights pursuant to Crim.R. 32. The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness, recidivism and other relevant factors under R.C. 2929.12.

Matter heard regarding Defendant's Motion of Indigency filed on behalf of the Defendant on JULY 5, 2022. Motion well taken and Granted the same.

Matter heard regarding the Defendant's Motion for an Order to Seal Multiple Records for Appellate Review filed on JULY 5, 2022. Motion taken under advisement with the State of Ohio granted a period of 2 weeks to file a written response.

The Court finds on JUNE 10, 2022 the defendant was found guilty by A JURY of FELONIOUS ASSAULT, COUNT 3, a violation of R.C. 2903.11 (A)(1)&(D), a felony of the 2nd degree.

The Court further finds the defendant is not amenable to community control and that prison is consistent with the purposes of R.C. 2929.11.

It is ORDERED that defendant serve a term of a stated minimum prison term of 7 years with a maximum indefinite prison term of 10 1/2 years. Pursuant to R.C. 2929.19(B)(2)(f), Defendant must not ingest or be injected with a drug of abuse and must submit to random drug-

testing, the results of which must be negative.

Defendant notified he/she may be eligible to earn days of credit under the circumstances specified in R.C. 2967.193, and that these days of credit are not automatic, but must be earned in the manner provided for in R.C. 2967.193. The aggregate days of credit under this section shall not exceed 8% of the total number of days of the stated prison term.

Defendant notified that under federal law 18 USC 922(g) and state law, as a result of a felony conviction or a misdemeanor offense of violence conviction against a family or household member, defendant shall never be able to ship, use, receive, purchase, own, transport, or otherwise possess a firearm or ammunition and violation is punishable as a felony offense.

It is further ORDERED the defendant is subject to not less than 18 months. but not more than 3 years mandatory post release control as to count 3, after the defendant's release from imprisonment pursuant to R.C. 2967.28 and 2929.14.

Defendant given notice of appellate rights under R.C. 2953.08. Defendant notified of not less than 18 months. but not more than 3 years mandatory post release control as to count 3,

Defendant notified that if post release control conditions are violated the adult parole authority or parole board may impose a more restrictive or longer control sanction or return a defendant to prison for up to nine months for each violation, up to a maximum of 50% of the minimum stated term originally imposed. Defendant further notified that if the violation of post release control conditions is a new felony, a defendant may be both returned to prison for the greater of one year or the time remaining on post release control, plus receive a prison term for the new felony.

Defendant advised of the following pursuant to Senate Bill 201 and R.C. 2929.19(B)(2)(c) and 2967.271: That there is a rebuttable presumption the defendant shall be released from service of the sentence at expiration of their minimum term or presumptive early release date, whichever is earlier; That DRC may rebut presumption if, at a hearing held under 2967.271, DRC makes specified determinations regarding the offender's conduct while confined, the offender's threat to society, the offenders restrictive housing, if any, while confined, and the offenders security classification; That if, as described in (ii), DRC at the hearing makes the specified determinations and rebuts the presumption, they may maintain the offender's incarceration after the expiration of that minimum term or after that presumptive earned early release date for the length of time DRC determines to be reasonable, subject to the limitation specified in section 2967.271; That the department may make the specified determinations and maintain the offender's incarceration under the provisions described in divisions (B)(2)(c)(i) and (ii) of this section more than one time, subject to the limitation specified in section 2967.271; That if the offender has not been released prior to the expiration of the offender's maximum prison term imposed as part of the sentence, the offender must be released upon the expiration of that term.

Defendant found ineligible for shock incarceration under R.C. 5120.031 or intensive

program prison under R.C. 5120.032. If found eligible, the Court made no recommendation regarding placement.

Defendant is ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Corrections. Credit for 426 days is granted as of this date along with future custody days while defendant awaits transportation to the appropriate state institution.

Defendant found not to have nor reasonably may be expected to have the means to pay the costs of prosecution as authorized by law. All costs, including the costs of prosecution ordered waived.

Defendant ordered remanded into custody of Lucas County Sheriff for immediate transportation to appropriate state institution.

JUDGE GARY G COOK

STATE OF OHIO)
COUNTY OF LUCAS)

ORIGINAL

LUCAS COUNTY COURT OF COMMON PLEAS

STATE OF OHIO,

Plaintiffs,

Vs. Case No.CR21-1678

BRANDON ALEXANDER, VOLUME III

Defendant.

- - -

Transcript of proceedings held and testimony taken in the above-entitled cause before the Honorable Gary G. Cook on the 8th day of June, 2022.

- - -

APPEARANCES:

On behalf of the State of Ohio:

Rebecca Facey

Jennifer Donovan

On behalf of the Defendant:

Sarah Kovoor

Rory Biggins

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WITNESS	DE	CE	FDE	FCE
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Natalie Jones	468/15	493/24	506/20	508/19
Raynard Cooper	515/12	521/17		
Scott Histed	525/24	530/7	535/23	537/6
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MS. DONOVAN: Thank you.

THE COURT: Within the context of Redirect.

MS. KOVOOR: I'm sorry, Your Honor?

THE COURT: Within the context of Redirect.

MS. KOVOOR: Right.

FURTHER CROSS EXAMINATION

BY MS. KOVOOR:

Q. Just briefly, Officer, you mentioned injuries that can lead to death, correct, that could escalate in a domestic violence case, and it could lead to death?

A. Yes, ma'am.

Q. You don't have any other information but what McKenzie Chalfant gave to you as to who did these injuries, correct?

A. That's correct.

Q. All you know is that they were severe injuries.

A. Yes, ma'am.

Q. Okay.

THE COURT: Thank you. Sir, you can step down. If you are ready with the next witness you can go ahead.

MS. FACEY: The State calls Megan Angerer.

(Whereupon, Megan Angerer was sworn by the Court Reporter.)

DIRECT EXAMINATION

BY MS. FACEY:

Q. Good morning.

A. Morning.

Q. Could you please introduce yourself to the jury.

A. Yes. My name is Megan Angerer.

Q. How old are you, Megan?

A. I am -- I will be 38 tomorrow, 37.

Q. What do you do for a living?

A. I am a teacher at Monroe High School. I teach 10th grade civics and economics.

Q. Do you know the Defendant, Brandon Alexander?

A. I do. He is my ex-husband.

Q. How long with the two of you married?

A. Three years.

Q. And you are now divorced?

A. Correct.

Q. When did you get divorced?

A. I think it was finalized in September of 2020.

Q. Do you share any children together?

A. Yes, we have a four-year old Camden.

Q. And Camden is a daughter?

A. Yes.

Q. Okay. Megan, how would you describe your relationship with Brandon Alexander overall?

A. Tumultuous. Aggressive. I would say that he was

more worried about his reputation than -- than anything. He's angry, and that caused a lot of problems in our relationship.

Q. Okay. And you said aggressive. Brandon Alexander was aggressive?

A. Correct.

Q. How old were you when the two of you got together?

A. 22.

Q. Okay. And how did the two of you meet?

A. It was at Eclipse nightclub downtown Toledo.

Q. Okay. And was Brandon a student at the University of Toledo at the time?

A. I believe so.

Q. You say you believe so. Help us to understand.

A. I'm not sure of the dates, but Brandon was at one point released as a student from the University of Toledo.

Q. Okay.

A. So I'm not sure the exact date in which he -- we met, and he was not a student anymore. There was not always truths given.

Q. Brandon Alexander wasn't always truthful with you?

A. Correct.

Q. When you met he put himself out to be a football player at the University of Toledo?

A. Correct.

Q. You later came to find out that was not in fact true?

A. Correct.

Q. That he had been kicked off the football team?

A. Correct.

Q. And kicked out of school.

A. Correct.

Q. You said the two of you share a four-year old daughter. Can you tell us about the co parenting arrangements you have with the Defendant?

A. I initiated -- I got a lawyer and initiated a parenting agreement with the Court in Monroe County. This -- because things were tumultuous, not going well without an agreement with the Court.

So the agreement that we have in court now is every other weekend and Wednesday for two hours was the agreement that was decided.

Q. Okay. So just to be clear, Camden lives with you full-time?

A. Correct.

Q. But there is an agreement through the Court that Brandon, as Camden's father, would see her every other

weekend and every Wednesday evening?

A. Correct.

Q. Okay. And where would you and the Defendant meet to exchange your daughter?

A. I would drive 23 South to Sylvania. We met at a BP gas station. That was -- that was changed after Brandon picked kind of a remote location. I didn't feel safe meeting him there, so I changed it to BP in Sylvania, Ohio right off 23 off the exit.

Q. A more well traveled spot.

A. Yeah.

Q. And how would you and Brandon communicate about exchanges for your daughter or any information you need to share regarding Camden?

A. There were phone calls and text messages, but that wasn't working well. And when we went to Family Court they suggested -- well, my attorney suggested using an app called AppClose. It's specifically for parenting. You can put schedules in there. Conversations are logged like in pdf form in case I needed to bring any documentation to Family Court. So we were going through that other than phone calls that he made to our daughter, Camden.

Q. Okay. And that app that you just referenced that is something that the Court suggested as a way to keep

track of all communications?

A. Yes. As well as keep the conversations about Camden. Brandon was having some trouble staying on topic of our daughter, and using this app made me feel safer.

Q. Okay. Megan, do you know McKenzie Chalfant?

A. I know who she is.

Q. Okay. Did you have occasion to meet her while she was dating Brandon?

A. Yeah, he let me know he had a girlfriend. And one day she was with him at drop off at the BP when I was dropping Camden off, and I asked him if I could introduce myself, and I did.

Q. Okay. Why did you want to introduce yourself to McKenzie?

A. She was around my daughter and I thought that's appropriate. We're adults. That's what you do when someone -- she was living with him, with Brandon, and I thought it was appropriate for me to introduce myself as the mother, and just, you know, know who she is. I mean I should know her.

Q. Sure. And did you and McKenzie get along well?

A. We didn't have any conversations other than that. There were no other times I spoke to her after that.

Q. Okay.

A. So during parenting time or the time that I was parenting with Brandon no, we didn't have any relationship other than that was his girlfriend.

Q. Got you. Thank you.

A. You're welcome.

Q. I want to direct your attention to April 28, 2021, that was a Wednesday?

A. Uh-huh.

Q. If you will recall, did the Defendant meet you at your regularly scheduled time at BP in Sylvania to pick up your daughter?

A. He did not.

Q. Why not?

A. Brandon communicated to me at 3:36 p.m. on Wednesday the 28th that he would not be able to get our daughter for the arranged pickup time.

Q. And 3:36. What time were you expected to be meeting him there at the BP?

A. 4:00 that day.

Q. Okay. Were you already en route to the BP when you received his message?

A. Correct. In fact I woke our daughter up from a nap so it was kind of like -- this is not good.

Q. Frustrated?

A. Frustrated because I woke up a three-year old

from a nap, and so, yes, I was on the way there.

Q. And Brandon contacted you through that CloseApp that you previously described to us?

A. Correct.

MS. FACEY: Your Honor, may I approach the witness?

THE COURT: You may.

BY MS. FACEY:

Q. Handing you what has been previously marked State's Exhibit 35, if you want to take a look at that. Do you recognize that?

A. Yes.

Q. What is it?

A. The first page here? Is that correct?

Q. The entire document.

A. The entire document. Okay. This is the pdf print off of the AppClose conversations with Brandon.

Q. And those include conversations between you and Brandon on April 28, 2021?

A. Correct.

Q. Including the message that you just mentioned?

A. Correct.

Q. Are these a fair and accurate representation of the messages between you and Brandon?

A. Yes.

Q. There is no one else included in these messages, correct?

A. Correct.

Q. You have not made any changes or alterations to these messages?

A. No.

MS. FACEY: Your Honor, at this time the State moves for admission of Exhibit 35.

THE COURT: Defense?

MS. KOVOOR: Object, Your Honor.

THE COURT: Objection is overruled. Be received.

MS. FACEY: Thank you, Your Honor.

BY MS. FACEY:

Q. Megan, I want to -- I tabbed one of the pages since the pages aren't numbered in this document. There is one tab that I believe starts the conversation on April 28, 2021. Can you please read that first message for us from Brandon Alexander?

A. It says Brandon Alexander on 4-28, 2021, 3:36 p.m. texted. I am at the hospital. McKenzie and I were in a car accident. I won't be able to get her. I am waiting to be discharged and don't know how long it's going to take.

Q. How did you respond when Brandon Alexander told

you that he had been in a car accident with McKenzie?

A. Frustrated. I responded, what? Really?

Q. And you go on to explain that you had woken your daughter up from a nap?

A. Correct.

Q. You in fact are frustrated. On the following page, three quarters of the way down, there is a message from Brandon 4-28 at 3:42 p.m.?

A. Okay.

Q. Can you please read that for us, that exchange?

A. Brandon Alexander on 4-28, 2021, 3:42 p.m. texted yeah, a car accident. It is ridiculous. You a piece of work. I couldn't even find my phone.

Q. How do you respond one minute later -- or excuse me, within the same minute?

A. When was the accident?

Q. How does he respond within the same minute?

A. Get off here with that BS. I could be dead or not texted you at all.

Q. Little dramatic for somebody that we know was not in fact in a car accident, right?

A. Correct.

Q. How did you respond to that message?

A. When was the accident?

Q. And in fact you asked Brandon three times in this

exchange when the car accident happened.

A. Uh-huh.

Q. Did he ever give you an answer?

A. No.

Q. Instead he responded with insults and calling you crazy?

A. Correct.

Q. Further down on that second page after the tab, there is a message from Brandon on April 28, 2021, at 3:51 p.m. Can you please read that for the jury.

A. Brandon Alexander, on 4-28, 2021, 3:51 p.m. texted, and I literally have been pissed and going crazy because I couldn't leave to get her. I thought I would be out on time so goodbye.

Q. Brandon is telling you that he's so upset, going crazy at the hospital, because he can't possibly leave to get his daughter, is that right?

A. Correct.

Q. But we know he was not in fact in a car accident.

A. Correct.

Q. He had not been admitted to the hospital.

A. Correct.

Q. And if he wanted to he could have left to get your daughter?

A. Yes.

Q. And you call him out about not actually being admitted to the hospital, don't you?

A. Correct.

Q. Tell us about that.

A. So Brandon -- I asked him at first if it was drunk driving that caused this accident. And then he goes on to talk about -- about family members of mine that he says are drunk -- that they drink and drive, and then he sends me a photograph of himself.

Q. And that photograph is actually on the very first page of State's Exhibit 35, correct?

A. Correct.

Q. What is that a photograph of?

MS. KOVOOR: Objection.

THE COURT: Overruled.

A. It is a photograph Brandon -- a photograph of Brandon.

Q. He has a tag on his shirt, doesn't he?

A. Correct.

Q. What do you say about a tag?

A. I say, that's a visitor sticker.

Q. You were calling him out for actually not being admitted but instead being a visitor at the hospital?

A. Correct.

Q. Does Brandon acknowledge you are right about

that?

A. No.

Q. And that final text exchange on the afternoon of April 28, 2021, ends with you saying where is your wrist band? That looks like a visitor sticker.

You're not buying what Brandon Alexander is selling, are you, Megan?

A. Not at all.

Q. And then there's a break in communication there, that last text was at 4:05 p.m. The next text is from you at 10:16 p.m. that same night, April 28, 2021. And it sounds like there has been a phone call conversation in between based on your text. Can you tell us about that phone call.

A. Yes. So Brandon would call Camden, our daughter, each evening before bed to talk to her, and he did this night as well on the 28th.

And he yelled at me most of the phone call because he -- our daughter was asking him why didn't you get me. And he then proceeded to yell at me saying how dare you tell my daughter that I was in a car accident. How dare you tell my daughter that. I didn't want to get her. And in fact I didn't do those things.

Q. How did you respond to Brandon?

A. Like I often respond with please don't yell at me