[Cite as *State v. Gillilan*, 2024-Ohio-4603.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Appellee/Cross-Appellant	:	C.A. No. 29901
	:	
v.	:	Trial Court Case No. 2019 CR 01470/3
	:	
CHAZ GILLILAN	:	(Criminal Appeal from Common Pleas Court)
	:	
Appellant/Cross-Appellee	:	
	:	

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O P I N I O N

Rendered on September 20, 2024

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WELBAUM, J.

{¶ 1} Appellant/cross-appellee Chaz Gillilan appeals from his convictions in the Montgomery County Court of Common Pleas after he pled guilty to two counts of having weapons while under disability and after a jury found him guilty of several counts each of felony murder, felonious assault, aggravated robbery, aggravated burglary, and single

counts of possessing criminal tools and tampering with evidence. In support of his appeal, Gillilan contends that his convictions for felony murder, felonious assault, and aggravated robbery were against the manifest weight of the evidence. Gillilan also contends that the trial court erred by failing to instruct the jury on voluntary manslaughter as an inferior-degree offense to felony murder and that his trial counsel was ineffective for failing to request such an instruction at trial. The State, on cross-appeal, argues that the trial court erred by giving a self-defense jury instruction on Gillilan's aggravated burglary and aggravated robbery charges. For the reasons outlined below, Gillilan's judgment of conviction will be affirmed. Although we find merit in the State's legal argument, it has no effect on the judgment of conviction.

Facts and Course of Proceedings

{¶ 2} On May 21, 2019, a Montgomery County grand jury returned a 20-count indictment charging Gillilan with six counts of felony murder, four counts of felonious assault, four counts of aggravated robbery, two counts of aggravated burglary, two counts of having weapons while under disability, and single counts of possessing criminal tools and tampering with evidence. Each of the counts for felony murder, felonious assault, aggravated robbery, and aggravated burglary included a three-year firearm specification. The charges stemmed from allegations that, on the night of December 30, 2018, Gillilan and an accomplice trespassed into the apartment of 18-year-old Noah Kinser in Miamisburg, Ohio, and commenced a robbery therein. It was also alleged that Gillilan fired gunshots that struck Kinser and Kinser's 14-year-old girlfriend, which caused them

serious physical harm and Kinser's eventual death. It was further alleged that Gillilan disposed of his firearm and coordinated the destruction of the vehicle that he had been traveling in on the night of the robbery/shooting. The 20 counts arising from these allegations were broken down as to each victim as follows.

Noah Kinser (12 Counts):

6 Counts - **Felony Murder** R.C. 2903.02(B) - Unclassified Felony • proximate cause felonious assault via deadly weapon • proximate cause felonious assault via serious physical harm • proximate cause aggravated robbery via serious physical harm • proximate cause aggravated robbery via deadly weapon • proximate cause aggravated burglary via physical harm • proximate cause aggravated burglary via deadly weapon
1 Count - **Felonious Assault** via deadly weapon R.C. 2903.11(A)(2) - F2
1 Count - **Felonious Assault** via serious physical harm R.C. 2903.11(A)(1) - F2
1 Count - **Aggravated Robbery** via serious physical harm R.C. 2911.01(A)(3) - F1
1 Count - **Aggravated Robbery** via deadly weapon R.C. 2911.01(A)(1) - F1
1 Count - **Aggravated Burglary** via physical harm R.C. 2911.11(A)(1) - F1
1 Count - **Aggravated Burglary** via deadly weapon R.C. 2911.11(A)(2) - F1

Kinser's Girlfriend (4 Counts):

1 Count - **Felonious Assault** via serious physical harm R.C. 2903.11(A)(1) - F2
1 Count - **Felonious Assault** via deadly weapon R.C. 2903.11(A)(2) - F2
1 Count - **Aggravated Robbery** via serious physical harm R.C. 2911.01(A)(3) - F1
1 Count - **Aggravated Robbery** via deadly weapon R.C. 2911.01(A)(1) - F1

No Victim (4 Counts):

1 Count - **Possessing Criminal Tools** R.C. 2923.24(A) - F5
1 Count - **Tampering with Evidence** R.C. 2921.12(A)(1) - F3
1 Count - **Having Weapons While Under Disability** with prior offense of violence R.C. 2923.13(A)(2) - F3
1 Count - **Having Weapons While Under Disability** with prior drug conviction R.C. 2923.13(A)(3) - F3

{¶ 3} Gillilan pled not guilty to the foregoing charges. In May 2021, a jury trial was held on all the charges, excluding the two charges for having weapons while under disability, which were tried before the bench a month later. Following the jury and bench trials, Gillilan was found guilty of all the indicted charges. The trial court then sentenced him to an aggregate term of 30 years to life in prison.

{¶ 4} Gillilan appealed from his convictions and argued, among other things, that the trial court gave an erroneous self-defense jury instruction during his trial. After reviewing the matter, this court agreed with Gillilan and found that the trial court's self-defense instruction had incorrectly "allocated the burden of proof on self-defense to Gillilan and had omitted the State's burden to disprove, beyond a reasonable doubt,

Gillilan's claimed use of self-defense." *State v. Gillilan,* 2023-Ohio-325, ¶ 13 (2d Dist.). As a result of this error, we reversed Gillilan's judgment of conviction and remanded the matter for a new trial. *Id*. at ¶ 17.

{¶ 5} On remand, the trial court held a second jury trial during which the State called several witnesses and played video-recorded testimony that had been given at Gillilan's first trial. Gillilan did not call any witnesses or testify in his defense, although he had testified during his first trial. The State played Gillilan's video-recorded trial testimony as part of its case-in-chief. The following is a summary of relevant information that was presented during Gillilan's second trial.

Nathaniel Preston Visited Kinser's Apartment Prior to the Shooting

{¶ 6} On the night in question, Kinser's friend, Nathaniel Preston, went to Kinser's apartment to buy some marijuana from Kinser. During the previous four months, Preston had seen Kinser every other week, and Preston was aware that Kinser had recently acquired two to three pounds of marijuana. When Preston arrived at Kinser's apartment, Preston saw that Kinser was holding a handgun. Preston observed Kinser lay the handgun on a desk next to Kinser's bed shortly after his arrival. Preston also observed an AK-47 lying on Kinser's bed.

{¶ 7} During his visit, Preston watched Kinser weigh out two grams of marijuana for him to purchase while they were in Kinser's bedroom. Preston was aware that Kinser had previously scaled out individual ounces of marijuana and packaged the individual ounces into plastic bags. Preston saw Kinser weigh out the two grams he was

purchasing from one of the individual-ounce bags that Kinser had previously prepared. Preston then smoked a joint with Kinser at the apartment. Kinser's girlfriend arrived at the apartment later and smoked with Preston and Kinser. While they were smoking, Kinser informed Preston that he had "big play coming" that night, which Preston explained meant that Kinser was expecting a large-quantity drug deal. Trial Tr., Vol. II, p. 236-237.

{¶ 8} After being at Kinser's apartment for 30 to 50 minutes, Preston advised Kinser that he was leaving and asked Kinser whether he wanted him to lock the entryway door to his apartment on the way out. According to Preston, Kinser instructed him to keep the door unlocked. As a result, Preston left Kinser's apartment without locking the entryway door. Preston thereafter walked to his cousin's house, which was approximately 15 minutes away from Kinser's apartment. After Preston reached his cousin's house, he and his cousin sat on the front porch and smoked the marijuana that Preston had just purchased from Kinser. While doing so, Preston and his cousin heard several gunshots coming from the area of Kinser's apartment.

Kinser's Girlfriend Observed Two Masked Individuals Barge into Kinser's Apartment with Firearms

{¶ 9} Kinser's girlfriend, who was in the eighth grade, went to Kinser's apartment around 9:00 p.m. on the night in question. When she arrived, Kinser was in his bedroom with Preston rolling a joint. She joined Preston and Kinser and noticed that Kinser's AK-47 was lying on his bed. She also observed 16 small bags of marijuana lying on Kinser's bed. Kinser's girlfriend was aware that Kinser had at least a pound of marijuana in his apartment that night.

{¶ 10} When Preston left Kinser's apartment, Kinser's girlfriend heard Preston ask Kinser whether he should lock the entryway door on his way out. According to Kinser's girlfriend, Preston did not lock the door. After Preston left, Kinser's girlfriend remained in the bedroom with Kinser; they were sitting on Kinser's bed with the bedroom door closed.

{¶ 11} As Kinser's girlfriend was sitting on the bed playing with her cellphone, she suddenly saw the bedroom door fly open, and two individuals dressed in black barged into the room. The two individuals were wearing ski masks and had guns in their hands that were pointed toward her and Kinser. Kinser's girlfriend recalled that one of the individuals said something to them in an aggressive, threatening tone. Although she could not remember what the individual said, she did remember that the individual had a male's voice. Due to the aggressive tone of the male's voice and the fact that the masked individuals were pointing guns at her and Kinser, Kinser's girlfriend believed that she and Kinser were being robbed. According to Kinser's girlfriend, the two masked individuals never had a discussion with Kinser about purchasing marijuana from him.

{¶ 12} After the two individuals barged into the bedroom, Kinser's girlfriend became scared and curled up in a ball at the end of the bed. Although she covered her eyes during most of the incident, she heard gunshots and felt a bunch of air hit her chest, which left her unable to breathe for a second. At one point, she looked up and saw one of the individuals come near Kinser at the top of the bed. She tried kicking at the individuals but made no contact with them. She then heard more gunshots. The next time she looked up, she saw Kinser on the floor lying on his side holding his AK-47, which

was pointed out the bedroom doorway toward the stairs that led to Kinser's apartment. Kinser's girlfriend then saw Kinser get up and lock the bedroom door. She also saw him fall down a couple of times. Thereafter, Kinser instructed her to call his mother. As Kinser's girlfriend called Kinser's mother, she noticed that Kinser had been shot in the chest and that she had been shot in the hand. Kinser's girlfriend also had through and through gunshot wounds on her jaw and on the side of her breast and armpit. When the police arrived, she went down the stairs and tried to tell them what had happened. She was then taken to the hospital for medical treatment. She was treated at the hospital for three days and then went back later for reconstructive surgery on her hand.

The Criminal Investigation

{¶ 13} Responding law enforcement officers found Kinser lying motionless on the floor of his bedroom. Medics pronounced Kinser dead at the scene. The coroner who examined Kinser's body ruled his death a homicide caused by gunshot wounds to his chest and arm.

{¶ 14} Investigating officers collected several shell casings from the crime scene. A firearms expert confirmed that, of the shell casings collected, 10 were fired from Kinser's AK-47, 15 were fired from an unknown nine-millimeter firearm, and three were fired from an unknown .40-caliber firearm. DNA forensic analysis on the shell casings revealed that Gillilan could not be excluded as a DNA contributor on the nine-millimeter shell casings.

{¶ 15} In addition to collecting shell casings, investigating officers took several

photographs of the crime scene. The photographs showed that Kinser's apartment was located in a two-story residence that had stairs leading up to Kinser's apartment. *See* State's Exhibit Nos. 18-20, 80, and 192. The photographs also showed that money and plastic bags of marijuana were strewn along the entryway and stairs that led to Kinser's apartment. *See* State's Exhibit Nos. 90, 91, 194-197, 249-250.

{¶ 16} Although law enforcement initially had no leads on any suspects, a week after the shooting, an abandoned cellphone was discovered in West Carrollton that had a cache of memory showing a large search history for news articles related to the shooting at Kinser's apartment. The searches for the news articles began at 10:35 p.m. on the night of the shooting and continued into the early morning hours of December 31, 2018. The cellphone's memory also contained a Google Maps image depicting the area of Kinser's apartment.

{¶ 17} Investigating officers determined through the cellphone's service provider that the cellphone was linked to an individual named Jason Churchill. The officers researched Churchill's call history and determined that Churchill had contacted a cellphone associated with an individual named Daniel Simone around the time of the shooting. The officers also researched Simone's call history and determined that Simone had contacted a cellphone associated with Gillilan around the time of the shooting. It was also later discovered that Gillilan had contacted a cellphone associated with an individual named Dante English around the time of the shooting. Churchill, Simone, Gillilan, and English were all persons of interest due to cellphone analysis data showing that their cellphones had been in the vicinity of Kinser's apartment at the time of

the shooting.

Dante English Admitted to Driving Gillilan to Miamisburg on the Night of the Shooting and to Burning his Vehicle at Gillilan's Request

{¶ 18} Dante English testified at Gillilan's trial and admitted to driving Gillilan from Columbus to Dayton in his vehicle on the night in question so that English could purchase a pound of marijuana. English testified that he and Gillilan went to various locations in Dayton looking for marijuana. After a fruitless search, English and Gillilan met up with two other men and followed them to a neighborhood in downtown Miamisburg. While in Miamisburg, English pulled his vehicle over on a side street and gave Gillilan $2,000 to purchase a pound of marijuana for him. English claimed that he waited in his vehicle while Gillilan went to purchase the marijuana.

{¶ 19} After waiting 10 or 15 minutes, English heard several gunshots and then saw Gillilan and another individual "fast-walking" toward his vehicle. Trial Tr., Vol. II, p. 283-284. A panicked Gillilan got inside his vehicle. English testified that Gillilan then directed him where to drive with a sense of urgency. English claimed that he had dropped Gillilan off somewhere in Columbus. According to English, Gillilan never told him what had happened that night and never gave him any marijuana or his $2,000 back. English testified, however, that Gillilan called him later and instructed him to burn his vehicle. English admitted that he followed Gillilan's instruction and burned his vehicle in Kentucky.

Gillilan's Version of Events

{¶ 20} Gillilan testified that he and English had followed his trusted associate, Daniel Simone, to Kinser's apartment on the night in question so that he and English could each purchase a pound of marijuana. Gillilan claimed that Simone had communicated with Kinser on Facebook Messenger about purchasing marijuana before their arrival. According to Gillilan, English stayed in the vehicle while he and Simone went to purchase the marijuana from Kinser. Gillilan claimed that he and Simone had knocked and announced themselves when they arrived at Kinser's apartment. Gillilan testified that he and Simone walked up the stairs to Kinser's apartment, and then Kinser led them into a bedroom where the marijuana was located.

{¶ 21} Gillilan testified that when he went to Kinser's bedroom, he saw several small plastic bags of marijuana that did not look like two pounds. Gillilan and Kinser eventually got into an argument about the amount of marijuana that Kinser was trying to sell him. Gillilan claimed that Kinser pointed a rifle at him during the argument and that he (Gillilan) grabbed the rifle by the barrel and shoved it toward the ground. According to Gillilan, Kinser fired the rifle twice as they struggled over it. Gillilan testified that he got scared and angry when the rifle fired. Gillilan also testified that he feared for his life and pulled out his own nine-millimeter firearm from the back of his pants and began shooting at Kinser several times in self-defense. Gillilan testified that his sole purpose in doing so was to stop Kinser from shooting at him, as Gillilan claimed he "didn't want to die" and was "in a fight for survival." Trial Tr., Vol. IV, p. 540-541 and 571. Gillilan claimed that he did not see anyone else in the bedroom during the shooting incident.

{¶ 22} During his testimony, Gillilan admitted that he disposed of the nine-

millimeter firearm he used to shoot Kinser by wrapping it up and throwing it in a dumpster. Gillilan also admitted to instructing English to get rid of his vehicle because he did not want them to get into trouble. Gillilan admitted to lying to law enforcement in several respects. For example, Gillilan admitted that he had lied to investigating detectives by telling them that he did not know English and had not been in contact with Simone in years. He also admitted that he had lied when he told detectives that he was not at Kinser's apartment and had no knowledge of the shooting. In addition, Gillilan admitted that he did not the detectives or his family the version of events he testified to at trial.

{¶ 23} Based on his testimony, Gillilan requested a self-defense jury instruction. It was the State's position that a self-defense instruction only applied to Gillilan's felony murder and felonious assault charges. However, over the State's objection, the trial court also instructed the jury on self-defense as to Gillilan's charges for aggravated burglary and aggravated robbery.

{¶ 24} After deliberating, the jury found Gillilan guilty of all the charges for which he was tried. Following his jury trial, Gillilan pled guilty to the two charges for having weapons while under disability. At sentencing, the trial court merged several of Gillilan's offenses and firearm specifications and imposed the following prison terms:

Offense	Prison Term
Felony Murder of Kinser (proximate cause felonious assault via serious physical harm)	15 years to life in prison plus 3 additional years for attendant firearm specification

Aggravated Robbery of Kinser (deadly weapon)	3 years in prison plus 3 additional years for attendant firearm specification
Felonious Assault of Kinser's Girlfriend (serious physical harm)	8 years in prison plus 3 additional years for attendant firearm specification
Aggravated Robbery of Kinser's Girlfriend (deadly weapon)	5 years in prison plus 3 additional years for attendant firearm specification
Possessing Criminal Tools	12 months in prison
Tampering with Evidence	36 months in prison
Having Weapons Under Disability (prior offense of violence)	12 months in prison

{¶ 25} The trial court ordered the prison terms imposed for felony murder, felonious assault, and having weapons while under disability to be served consecutively to one another, and all remaining prison terms to be served concurrently to the felony murder prison term. Therefore, the trial court once again sentenced Gillilan to an aggregate term of 30 years to life in prison (15 years + 3 years + 8 years + 3 years + 12 months).

{¶ 26} Gillilan now appeals from his convictions, raising three assignments of error for review. The State has also filed a cross-appeal from the trial court's decision to apply the self-defense jury instruction to the aggravated burglary and aggravated robbery charges. We will first address each of Gillilan's assignments of error and then address the State's cross-appeal.

First Assignment of Error

{¶ 27} Under his first assignment of error, Gillilan raises a manifest weight claim that challenges all of the felony murder, felonious assault, aggravated robbery, and aggravated burglary offenses of which he was found guilty. Because several of those offenses were merged at sentencing, we need not consider each of them when reviewing Gillilan's manifest weight claim; " '[w]hen a trial court dispatches with a count through merger, any error in the jury's verdict on the merged count is rendered harmless beyond a reasonable doubt.' " *State v. Stargell*, 2016-Ohio-5653, ¶ 57 (2d Dist.), quoting *State v. Wolff*, 2009-Ohio-2897, ¶ 70 (7th Dist.), citing *State v. Powell*, 49 Ohio St.3d 255, 263 (1990). *Accord State v. Adkins*, 2020-Ohio-3296, ¶ 8 (2d Dist.); *State v. Rodgers*, 2023-Ohio-734, ¶ 85 (2d Dist.). Therefore, this court need only consider the challenged counts for which Gillilan was convicted and sentenced, i.e., the felony murder of Kinser proximately caused by felonious assault via serious physical harm, the felonious assault of Kinser's girlfriend via serious physical harm, and the aggravated robberies of Kinser and Kinser's girlfriend via a deadly weapon.

Standard of Review

{¶ 28} "A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." (Citation omitted.) *State v. Wilson*, 2009-Ohio-525, ¶ 12. When evaluating whether a conviction was against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable

inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact " 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). "The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence." *State v. Adams*, 2014-Ohio-3432, ¶ 24 (2d Dist.), citing *Wilson* at ¶ 14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin* at 175.

{¶ 29} "Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses." *Adams* at ¶ 24, citing *State v. Lawson*, 1997 WL 476684, *4 (2d Dist. Aug. 22, 1997). It is well established that " 'the fact finder is free to believe all, part or none of the testimony of each witness appearing before it.' " *State v. Lewis*, 2024-Ohio-756, ¶ 12 (2d Dist.), quoting *State v. Petty*, 2012-Ohio-2989, ¶ 38 (10th Dist.). (Other citation omitted.) "This court will not substitute its judgment for that of the trier of fac[t] on the issue of witness credibility unless it is patently apparent that the factfinder lost its way." (Citation omitted.) *State v. Bradley*, 1997 WL 691510, *4 (2d Dist. Oct. 24, 1997). " '[A] conviction is not against the manifest weight of the evidence simply because the trier of fact believed the prosecution testimony.' " *State v. Sutherland*, 2022-Ohio-3079, ¶ 47 (2d Dist.), quoting *In re M.J.C.*, 2015-Ohio-820, ¶ 35 (12th Dist.); *accord State v. Pheanis*, 2015-Ohio-5015, ¶ 36 (2d Dist.). " 'Mere disagreement over the

credibility of witnesses is not [a] sufficient reason to reverse a judgment.' " *Lewis* at ¶ 12, quoting *Petty* at ¶ 38, citing *State v. Wilson*, 2007-Ohio-2202, ¶ 24.

Felony Murder of Kinser and Felonious Assault of Kinser's Girlfriend

{¶ 30} Gillilan contends that the weight of the evidence established that the felony murder of Kinser and felonious assault of Kinser's girlfriend were committed as the result of his acting in self-defense and that the jury lost its way and created a manifest miscarriage of justice by finding otherwise. We disagree.

{¶ 31} "If, at the trial of a person who is accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense, . . . the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense[.]" R.C. 2901.05(B)(1). To prove that the defendant did not use force in self-defense, "the State must disprove beyond a reasonable doubt at least one of the elements of self-defense." (Citation omitted.) *State v. Bowen*, 2024-Ohio-1079, ¶ 12 (2d Dist.). "The elements of self-defense in the use of deadly force are: (1) the defendant was not at fault in creating the situation giving rise to the affray; [and] (2) the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such a danger was in the use of such force." *State v. Tunstall*, 2024-Ohio-2376, ¶ 16 (2d Dist.), citing *State v. Cunningham*, 2023-Ohio-157, ¶ 14 (2d Dist.).

{¶ 32} "The state's burden of disproving the defendant's self-defense claim beyond a reasonable doubt is subject to a manifest-weight review on appeal." *State v. Bierma*,

2024-Ohio-2089, ¶ 70 (2d Dist.), citing *State v. Messenger*, 2022-Ohio-4562, ¶ 27 and *State v. Knuff*, 2024-Ohio-902, ¶ 208. A self-defense claim is generally an issue of credibility that is best resolved by the trier of fact. *State v. Jamii*, 2023-Ohio-4671, ¶ 78 (10th Dist.), citing *State v. Lawrence*, 2023-Ohio-3419, ¶ 41 (11th Dist.). "When weighing witness testimony supporting a claim of self-defense, the trier of fact is 'free to believe or disbelieve the testimony of the witnesses' and 'is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible.' " *Lawrence* at ¶ 41, quoting *State v. Bentley*, 2023-Ohio-1792, ¶ 24 (11th Dist.), citing *State v. Haney*, 2013-Ohio-2823, ¶ 43 (11th Dist.).

{¶ 33} Here, Gillilan argues that the jury lost its way and created a manifest miscarriage of justice by failing to credit his testimony indicating that that he had fired shots at Kinser in self-defense during a marijuana sale gone wrong. The jury, however, was free to disbelieve Gillilan's testimony and to instead rely on the plethora of evidence provided by the State indicating that Gillilan did not act in self-defense. For example, the jury was free to believe the testimony of Kinser's girlfriend indicating that the shooting did not occur as the result of a marijuana sale gone wrong, but due to two masked individuals bursting through Kinser's bedroom door, pointing guns at her and Kinser, and firing multiple gunshots that severely injured them and resulted in Kinser's death. Because the investigating officers determined that Gillilan and Simone's cellphones were located in the area of Kinser's apartment at the time of the shooting, and because Gillilan admitted that he and Simone were at Kinser's apartment during the shooting, the testimony of

Kinser's girlfriend suggests that Gillilan and Simone were the two masked individuals in question. From this evidence, the jury could have reasonably determined that Gillilan and Simone were the aggressors who created the situation leading to the affray, which negated Gillilan's claim of self-defense.

{¶ 34} In addition, Gillilan's admissions to disposing of his firearm in a dumpster after the shooting and to instructing English to burn the vehicle that they had used to drive to Kinser's apartment could have led the jury to believe that Gillilan had not acted in self-defense, because such conduct indicates a knowledge of wrongdoing. Also indicating a knowledge of wrongdoing were the facts that Gillilan lied to investigating detectives when he told them that he did not know English, had not seen Simone in years, had never been to Kinser's apartment, and knew nothing about the shooting. It was not until Gillilan was formally charged and had access to the State's discovery materials, which included his cellphone's location data, that he decided to claim self-defense at trial. For all the foregoing reasons, the jury could have reasonably found that Gillilan's self-defense claim was disingenuous and thus decided to discredit it.

{¶ 35} For all the foregoing reasons, we cannot say that the jury lost its way and created a manifest miscarriage of justice by rejecting Gillilan's claim that he had acted in self-defense during the felony murder of Kinser and the felonious assault of Kinser's girlfriend. Accordingly, Gillilan's convictions for those offenses were not against the manifest weight of the evidence.

Aggravated Robbery as to Kinser and Kinser's Girlfriend

{¶ 36} Gillilan also contends that the weight of the evidence did not establish that he had committed aggravated robbery via a deadly weapon. One commits aggravated robbery via a deadly weapon when, during a theft offense or an attempted theft offense, the offender has a deadly weapon on or about the offender's person or under their control and either displays the weapon, brandishes it, indicates that the offender possesses it, or uses it. R.C. 2911.01(A)(1). A theft occurs when a person knowingly exerts control over the property of another without consent. R.C. 2913.02(A)(1).

{¶ 37} Here, the testimonies of Preston, Kinser's girlfriend, and Gillilan all established that Kinser had bags of marijuana in his bedroom on the night in question. Kinser's girlfriend testified that neither of the masked individuals who barged into Kinser's bedroom with firearms engaged in any conversation with Kinser about purchasing the bags of marijuana. Rather, she testified that the two individuals pointed their firearms at them and spoke in an aggressive, threatening tone that led her to believe that she and Kinser were being robbed. Also, photographs of the crime scene showed that there were multiple plastic bags of marijuana and some money strewn along the stairs and entryway leading to Kinser's apartment. *See* State's Exhibit Nos. 90, 91, 194-197, 249-250. Preston, Kinser's girlfriend, and Gillilan all testified that the money and bags of marijuana were not present on the stairs and entryway before the shooting incident. From this evidence, the jury could have reasonably concluded that Gillilan and Simone attempted to steal the bags of marijuana from Kinser's bedroom during the shooting incident and dropped the bags as they were fleeing the scene. The jury was free to disbelieve Gillilan's claim that he went to Kinser's apartment to purchase marijuana from Kinser, not

to rob him, and that he ended up shooting Kinser in self-defense.

{¶ 38} Based on the foregoing evidence and Gillilan's credibility issues, we do not find that the jury lost its way or created a manifest miscarriage of justice by finding Gillilan guilty of the two counts of aggravated robbery via a deadly weapon. As previously discussed, a verdict is not against the manifest weight of the evidence simply because the jury chose to believe the State's version of events. For these reasons, we cannot say that Gillilan's two aggravated robbery convictions were against the manifest weight of the evidence.

{¶ 39} Gillilan's first assignment of error is overruled.

Second Assignment of Error

{¶ 40} Under his second assignment of error, Gillilan contends that the trial court erred by failing to give a jury instruction on voluntary manslaughter as an inferior-degree offense to felony murder. Gillilan concedes that his trial counsel did not request a voluntary manslaughter instruction at trial and that our review of the matter is limited to plain error under Crim.R. 52(B). *See State v. Hodge*, 2022-Ohio-1780, ¶ 24 (2d Dist.); *State v. Midkiff*, 2022-Ohio-4004, ¶ 11 (2d Dist.). "Plain error arises only when 'but for the error, the outcome of the trial clearly would have been otherwise.' " *Midkiff* at ¶ 11, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph two of the syllabus. "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 miscarriage of justice." *Id*. at paragraph three of the syllabus.

{¶ 41} "In a proper case, a jury may consider, in addition to the offense actually indicted, inferior degrees of the indicted offense." *State v. Beatty-Jones*, 2011-Ohio-3719, ¶ 20 (2d Dist.), citing *State v. Deem*, 40 Ohio St.3d 205 (1988), paragraph one of the syllabus. "An offense is of an inferior degree if its elements are 'identical to or contained within the indicted offense, except for one or more additional mitigating elements.' " *Id*., quoting *Deem* at paragraph two of the syllabus.

{¶ 42} Ohio's voluntary manslaughter statute provides that: "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another[.]" R.C. 2903.03(A). Ohio's felony murder statute provides that: "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree[.]" R.C. 2903.02(B). In contrast, Ohio's purposeful murder statute simply prohibits one from "purposely caus[ing] the death of another." R.C. 2903.02(A).

{¶ 43} "We have recognized that voluntary manslaughter is an inferior-degree offense to murder because it requires proof of an additional mitigating element: that the defendant acted under the influence of sudden passion or in a fit of rage brought about by serious provocation." *State v. Van Voorhis*, 2024-Ohio-1898, ¶ 35 (2d Dist.), citing *State v. Dixon*, 2022-Ohio-3157, ¶ 21 (2d Dist.). "Although voluntary manslaughter is an inferior[-]degree offense of *purposeful* murder, there is growing recognition that ' "[v]oluntary manslaughter is not an inferior-degree offense to felony murder via felonious

assault because its elements . . . are neither contained within nor identical to the elements of felony murder via felonious assault." ' " (Emphasis added.) *State v. Dixon*, 2022-Ohio-4454, ¶ 28, fn. 1 (4th Dist.), quoting *State v. Moody*, 2022-Ohio-2529, ¶ 34 (12th Dist.), quoting *State v. Hawthorne*, 2020-Ohio-756, ¶ 29 (5th Dist.). *Accord State v. Davis*, 2012-Ohio-1440, ¶ 23 (9th Dist.); *State v. Williams*, 2021-Ohio-443, ¶ 32 (5th Dist.).

{¶ 44} Even if voluntary manslaughter were an inferior-degree offense to felony murder, a jury instruction on voluntary manslaughter would only have been appropriate in this case if there was sufficient evidence presented at trial supporting both an acquittal of the felony murder charge and a conviction for voluntary manslaughter. *See State v. Shane*, 63 Ohio St.3d 630, 632 (1992). "[W]hen the evidence presented at trial does not meet this test, a charge on the [inferior-degree] offense is not required." *Id*.

{¶ 45} As previously discussed, to commit voluntary manslaughter, a defendant must have knowingly caused the death of another while acting "under the influence of sudden passion or in a sudden fit of rage" that "is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force." R.C. 2903.03(A). "The test for whether a serious provocation occurred and whether a defendant acted under the influence of sudden passion or in a fit of rage includes objective and subjective components. . . . The provocation must be sufficient to arouse an ordinary person beyond the power of his control, and the defendant in fact must have acted under the influence of sudden passion or in a fit of rage." (Citations omitted.) *Dixon,* 2022-Ohio-3157, at ¶ 21 (2d Dist.).

{¶ 46} " '[F]ear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage.' " *State v. Miller*, 2022-Ohio-213, ¶ 18 (2d Dist.), quoting *State v. Mack*, 82 Ohio St.3d 198, 201 (1998). (Other citations omitted.). Therefore, " '[e]vidence supporting the privilege of self-defense, i.e., that the defendant feared for his own personal safety, does not constitute sudden passion or fit of rage.' " *State v. Harding*, 2011-Ohio-2823, ¶ 43 (2d Dist.), quoting *State v. Stewart*, 201[1]-Ohio-466, ¶ 13 (10th Dist.); *accord State v. McClendon*, 2010-Ohio-4757, ¶ 23 (2d Dist.) (finding "there was insufficient subjective evidence that Defendant was actually acting under the influence of sudden passion or in a sudden fit of rage [where] Defendant shot [the victim] out of fear because he was afraid [the victim] might be retrieving a weapon out of his coat"), vacated in part on other grounds by *McClendon.*

{¶ 47} In this case, although Gillilan testified that he was "mad[,]" "angry[,]" and "irate" after Kinser fired his rifle, Gillilan also testified that he was "scared" and that his "sole intent" in firing his weapon at Kinser was to stop Kinser from shooting at him. Trial Tr., Vol. IV, p. 540. At no point did Gillilan's testimony indicate that he fired his weapon at Kinser as a result of being under the influence of a sudden passion or fit of rage. Rather, Gillilan's testimony indicated that he shot at Kinser because he was "in a fight for survival" and because he "didn't want to die." *Id*. at 540-541 and 571. In other words, Gillilan's testimony established that he shot Kinser out of fear and self-defense, which, as previously discussed, does not amount to acting under the influence of a sudden passion or fit of rage as required for a voluntary manslaughter conviction.

{¶ 48} Because voluntary manslaughter is not an inferior-degree offense to felony

murder, and because a jury could not have reasonably found Gillilan guilty of voluntary manslaughter based on Gillilan's self-defense-themed testimony, the trial court did not err, plainly or otherwise, by failing to instruct the jury on voluntary manslaughter.

{¶ 49} Gillilan's second assignment of error is overruled.

Third Assignment of Error

{¶ 50} Under his third assignment of error, Gillilan contends that his trial counsel provided ineffective assistance by failing to request a jury instruction on voluntary manslaughter as an inferior-degree offense to felony murder. We disagree.

{¶ 51} This court reviews alleged instances of ineffective assistance of trial counsel under the two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which was adopted by the Supreme Court of Ohio in *State v. Bradley*, 42 Ohio St.3d 136 (1989). As stated in those cases, an ineffective assistance claim requires the defendant to show that his trial counsel rendered deficient performance which resulted in prejudice. *Strickland* at paragraph two of the syllabus; *Bradley* at paragraph two of the syllabus. To establish deficient performance, the defendant must show that his trial counsel's performance fell below an objective standard of reasonable representation. *Id*. To establish prejudice, the defendant must show that there is "a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." (Citations omitted.) *State v. Hale*, 2008-Ohio-3426, ¶ 204. The failure to make a showing of either deficient performance or prejudice defeats a claim of ineffective assistance of counsel. *Strickland* at 697.

{¶ 52} As discussed under Gillilan's second assignment of error, Gillilan was not entitled to have the jury instructed on voluntary manslaughter as an inferior-degree offense to felony murder. Gillilan, therefore, cannot establish that his trial counsel performed deficiently by failing to request a voluntary manslaughter instruction. He also cannot establish any resulting prejudice from counsel's failure, as the trial court would have likely denied any request for an instruction on voluntary manslaughter given that such an instruction was not warranted by the evidence. Accordingly, there is not a reasonable probability that the outcome of Gillilan's case would have been different had his trial counsel requested a voluntary manslaughter instruction. Therefore, Gillilan cannot satisfy either prong of the *Strickland* analysis, meaning that his ineffective assistance claim necessarily fails.

{¶ 53} Gillilan's third assignment of error is overruled.

Cross-Appeal

{¶ 54} For its cross-appeal, which the State previously sought and obtained leave to pursue under R.C. 2945.67(A), the State raises a single assignment of error challenging the trial court's decision to give a self-defense jury instruction on Gillilan's aggravated burglary and aggravated robbery charges.

{¶ 55} As a preliminary matter, we recognize that the issue of whether the trial court erroneously applied the self-defense jury instruction to the aforementioned charges has no effect on the outcome of this appeal. This is because the jury found Gillilan guilty of the aggravated burglary and aggravated robbery charges and thus necessarily found

that Gillilan had not acted in self-defense. Generally speaking, an appellate court will not render an advisory opinion on a moot question or rule on a question of law that cannot affect matters at issue in a case. *State v. Blankenship*, 2007-Ohio-3541, ¶ 50 (5th Dist.); *Devine-Riley v. Clellan*, 2011-Ohio-4367, ¶ 3 (10th Dist.); *State v. Miller*, 2018-Ohio-3197, ¶ 18 (2d Dist.). However, " '[a] moot issue may still be addressed if it is capable of repetition, but evades review.' " *Front St. Bldg. Co. v. Davis*, 2016-Ohio-7412, ¶ 20 (2d Dist.), quoting *Gara v. Gara*, 2015-Ohio-4401 (2d Dist.) (Froelich, P.J., concurring), citing *State ex rel. Plain Dealer Pub. Co. v. Barnes*, 38 Ohio St.3d 165 (1988). For example, in *State v. Rac*, 2019-Ohio-893 (2d Dist.), this court allowed the State to pursue a discretionary appeal under R.C. 2945.67(A) on the issue of whether the trial court's preliminary jury instructions contained an incorrect statement of law where there were concerns about the trial court using the preliminary instructions in the future, which the State believed made the issue " 'capable of repetition yet evading review.' " *Id*. at ¶ 12, quoting *State v. Bistricky*, 51 Ohio St.3d 157, 158 (1990) (noting a court of appeals retains discretion to accept or decline review of matters of substantive law that the state seeks to appeal in a criminal proceeding). Based on similar concerns about the trial court's future use of the self-defense jury instruction, we granted the State leave to file the instant cross-appeal and shall review whether the trial court erroneously applied the self-defense jury instruction to Gillilan's aggravated burglary and aggravated robbery charges.

{¶ 56} "Trial courts have a responsibility to give all jury instructions that are relevant and necessary for the jury to properly weigh the evidence and perform its duty as the factfinder." *State v. Shine-Johnson*, 2018-Ohio-3347, ¶ 25 (10th Dist.).

"Requested jury instructions should ordinarily be given if they are correct statements of law, if they are applicable to the facts in the case, and if reasonable minds might reach the conclusion sought by the requested instruction." (Citations omitted.) *State v. Adams*, 2015-Ohio-3954, ¶ 240. "A trial court's decision whether to give a jury instruction will be reversed only upon a showing of an abuse of discretion." (Citation omitted.) *State v. Davis*, 2007-Ohio-6680, ¶ 14 (2d Dist.). " 'A trial court abuses its discretion if no sound reasoning process supports the court's decision.' " (Citation omitted.) *State v. Tackett*, 2024-Ohio-1498, ¶ 10 (2d Dist.), quoting *State v. Stringer,* 2021-Ohio-2608, ¶ 14; *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990).

{¶ 57} With regard to the affirmative defense of self-defense, the Supreme Court of Ohio has explained that:

> Self-defense represents more than a "denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged[.]" [*State v. Poole,* 33 Ohio St.2d 18, 19 (1973)]. Rather, . . . this defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability. *Id*. Thus, the burden of proving self-defense by a preponderance of the evidence does not require the defendant to prove his innocence by disproving an element of the offense with which he is charged. The elements of the crime and the existence of self-defense are separate issues. Self-defense seeks to relieve the defendant from

culpability rather than to negate an element of the offense charged.

State v. Martin, 21 Ohio St.3d 91, 94 (1986).

{¶ 58} In *State v. Higgins*, 2002-Ohio-4679, (2d Dist.), the defendant argued that he was entitled to a self-defense jury instruction on a charge of aggravated burglary. This court disagreed and found that self-defense was not available as a defense to aggravated burglary for the following reasons:

> The defense of self-defense requires a defendant to establish, among other things, that he was not at fault in creating the situation giving rise to the affray. [*State v. Barnes*, 94 Ohio St.3d 21, 24 (2002)]. However, trespass is an essential element of the offense of Aggravated Burglary, as defined in R.C. 2911.11(A)(1), which provides, in pertinent part, as follows: "No person, by force . . . shall trespass in an occupied structure . . . when another person other than the accomplice of the offender is present, with purpose to commit in the structure [any criminal offense] . . . if . . . [t]he offender inflicts . . . physical harm on another." In order for the jury to find Higgins guilty as charged, it necessarily had to find that he was trespassing when he injured Mathews. This is inconsistent with the defense of self-defense, because it presupposes that Higgins was at fault in creating the situation that gave rise to the altercation. Thus, self-defense was not available as a defense[.]

Id. at ¶ 19.

{¶ 59} For the same reasons discussed in *Higgins*, we find that it was inappropriate

for the trial court to give a self-defense jury instruction on the aggravated burglary charges in this case. To find Gillilan guilty of aggravated burglary, the jury necessarily had to find that when Gillilan shot Kinser and Kinser's girlfriend, Gillilan was trespassing in Kinser's apartment with the purpose to commit a crime therein. That factual scenario was inconsistent with a self-defense claim because it presupposed that, by committing the initial trespass, Gillilan was at fault in creating the situation that led to the altercation. Similarly, Gillilan's aggravated robbery charges, which alleged that Gillilan had committed or attempted to commit a theft offense while either brandishing a deadly weapon or inflicting serious physical harm on another, *see* R.C. 2911.01(A)(1) and (3), were inconsistent with a self-defense claim because those offenses presupposed that, by committing or attempting to commit the theft offense, Gillilan had been at fault in creating the situation that led to the altercation.

{¶ 60} It was also inappropriate for the trial court to give a self-defense jury instruction on the aggravated burglary and aggravated robbery charges because Gillilan denied engaging in the conduct that was related to those offenses. As previously discussed, a claim of self-defense "admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability." *Martin*, 21 Ohio St.3d at 94. In other words, the defendant concedes that he committed the acts alleged, but asserts that he was justified in doing so. *See Higgins* at ¶ 17-18. Here, Gillilan did not concede to trespassing in Kinser's apartment for the purpose of committing a crime therein or to robbing either Kinser or Kinser's girlfriend. Rather, Gillilan testified that he and Simone knocked and announced their presence at

Kinser's apartment and that Kinser led them into his bedroom for purposes of engaging in a transaction for marijuana—a transaction that Gillilan claimed went awry when Kinser held up his rifle and fired it, causing Gillilan to fire back in self-defense. In other words, Gillilan's defense was not that he had burglarized or robbed Kinser in self-defense, which would have been illogical, but that he simply had not engaged in a burglary or robbery at all. Therefore, Gillilan's defense as to the aggravated burglary and aggravated robbery charges was one of denial, not self-defense. *See State v. Brooks*, 2010-Ohio-5886, ¶ 36-39 (2d Dist.).

{¶ 61} Because Gillilan's testimony did not support a self-defense claim for the aggravated burglary and aggravated robbery charges, it was an abuse of discretion for the trial court to give a self-defense jury instruction on those charges. *See State v. Palmer*, 2024-Ohio-539, ¶ 19 (in order to be afforded a self-defense jury instruction, the defendant has the burden of producing legally sufficient evidence to establish a self-defense claim). Although our determination in that regard has no effect on Gillilan's convictions, the State's argument on cross-appeal is well taken.

{¶ 62} The State's sole assignment of error is sustained.

Conclusion

{¶ 63} All three assignments of error raised in Gillilan's appeal are overruled. The sole assignment of error raised in the State's cross-appeal is sustained. Because the outcome of the State's cross-appeal does not affect the validity of Gillilan's convictions, the judgment of the trial court is affirmed.

. . . . . .

TUCKER, J. and LEWIS, J., concur.