[Cite as *State v. Thomas*, 2024-Ohio-2281.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. 22CA35
v.	:	
JOSHUA THOMAS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Max Hersch, Assistant State Public Defender, Columbus, Ohio, for appellant[1].

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Pamela C. Wells, Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:5-22-24
ABELE, J.

{¶1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. Joshua Thomas, defendant below and appellant herein, assigns three errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE PROSECUTION ENGAGED IN MISCONDUCT BY VOUCHING FOR ITS EXPERT WITNESSES. *STATE V. DAVIS*, 116 OHIO ST.3D 404, 2008-OHIO-2, 880

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[1] Different counsel represented appellant during the trial court proceedings.

N.E.2D 31; AUG. 31, 2022 TR. AT 20, 23."

SECOND ASSIGNMENT OF ERROR:

"TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY STIPULATING TO UNNECESSARY DETAILS SURROUNDING JOSHUA THOMAS'S PRIOR CONVICTION. *STRICKLAND V. WASHINGTON,* 466 U.S. 668, 104 S.CT. 2052, 2064, 80 L.ED.2D 674 (1984); *STATE V. CREECH,* 150 OHIO ST.3D 540, 2016-OHIO-8440, 84 N.E.3D 981; T. P. 195."

THIRD ASSIGNMENT OF ERROR:

"THE MULTIPLE ERRORS CUMULATIVELY DEPRIVED MR. THOMAS OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL. *STATE V. FROMAN,* 162 OHIO ST.3D 435, 2020-OHIO-4523, 165 N.E.3D 1198."

{¶2} In March 2022, a Ross County Grand Jury returned an indictment that charged appellant with one count of having weapons while under disability in violation of R.C. 2923.13, a third-degree felony. Appellant entered a not guilty plea.

{¶3} At trial, Felix Whited testified that late in the evening on January 20, 2022, he woke to "a commotion out towards the front of my house. As soon as I woke up I recognized the voices and knew who it was." Whited walked outside and observed the "couple across the street * * * I've had issues with them before." Whited identified the male as the appellant and explained that the apartment is directly across the street from him. Whited testified that he told appellant he "wasn't putting up with it again, he

mouthed off to me, they went around the side of the house to the back, disappeared, that's when I heard the gunshots." Whited soon heard a loud car leave the scene. Whited heard arguing after the gunshots and cruisers arrive in less than ten minutes. Whited spoke with an officer and gave a written statement.

{¶4} Edward Buckner, Jr. lives in a camper one block from the incident's location. While Buckner watched T.V. around 11:00 p.m., he heard what he thought to be three or four gunshots that came from the north part of Glencroft Avenue. Buckner walked outside and "overheard two people arguing and then I looked around and looked across the street and I seen two people coming between some houses." Buckner heard appellant say, "well, you know, I don't know why I did it, but I throwed it away." Appellant and the female "walked by [Buckner] * * * and they didn't even know I was standing there and they walked directly by me and then I heard him say well let's get the hell out of here before the police show up. They no sooner got past me and I was on the phone with 9-1-1." Buckner explained that appellant and the female walked "no more than ten feet away from" him.

{¶5} Chillicothe Police Officer Morgan Music testified that he arrived at the scene at 11:13 p.m. in response to a "shots fired" call. Music first spoke with Felix Whited and, based on his

information, crossed the street to a duplex where he knew Autalee Corcoran lived with her boyfriend, appellant. Music found no one in the apartment, but when he left, Music "observed three bullet holes; one side of the window and two through a table that was leaned up against the front porch." Music took a statement from Felix Whited and then spoke with Edward Buckner. Officers collected appellant's and Autalee Corcoran's shoes, and Music explained that Corcoran's matched the other set of footprints in the snow near the firearm. Music also retrieved bullet casings and explained that another officer conducted a gunshot residue test on appellant's hands.

{¶6} On cross-examination, counsel asked Officer Music about his familiarity with the apartment "because you had been called out to that house before for a stabbing, right?" Music stated that he had not been present on the stabbing call, but "had heard officers at the shift change talking about that house with them living there and that stabbing," of which appellant was the victim. Music acknowledged that Whited told him about "a silver four-door car that sped from the area, no idea who was in it or who it was or the number of people or anything like that." Music conceded that his written statement referred to it as a gray two-door vehicle and that he did not seek the car.

{¶7} Chillicothe Police Officer Shane Simmons testified that, after he arrived at the scene with his K-9, they searched for the suspects. Simmons noticed footprints in the snow and located the firearm with blood on it about a block from the scene in an alley underneath a couch cushion near two different sets of footprints. When later that evening Simmons came into contact with appellant, he noticed blood on appellant's hands and found appellant's shoes consistent with the prints in the snow near the firearm.

{¶8} Chillicothe Police Sergeant Micah Shanks testified that he found appellant and Autalee Corcoran "on Liberty Street near King Street, coming out of some bushes" about ten minutes after he received their descriptions. Appellant had fresh wounds and "was bleeding from his hand and had blood on his pants."

{¶9} Chillicothe Police Officer James Kight testified that he performed a photo lineup for witness Edward Buckner. Kight explained that the police department uses a service through the Ohio Attorney General's website that populates photos based on race, age, weight, and height that will approximate the suspect with other similar-looking people. Kight presented Buckner with the photo lineup and both times he chose appellant. Kight acknowledged that before he conducted the array at the scene, he had the impression that Buckner had previously seen the suspect's

photo.

{¶10} Chillicothe Police Sergeant Jeremy Tuttle testified that the black, nine-millimeter semi-automatic firearm seized in this case test-fired successfully. Ohio Bureau of Criminal Investigations DNA Forensic Scientist Nichole Augsback testified that she took 8-9 swabs from the firearm and compared the DNA to a sample from appellant. Augsback found "red, brown staining on the slide of the firearm" that tested positive for blood, and appellant is the major contributor in separate blood samples from the firearm's slide and trigger. Ohio Bureau of Criminal Investigation Analyst Ted Manasian performed a gunshot residue analysis (GSR) on March 9, 2022. Manasian testified that appellant's sample kit tested positive for GSR. The other sample from Autalee Corcoran tested negative for GSR. Manasian explained that identifying GSR on a sample means that "the person fired a gun and thus produced particles that fell on their hands. The person may have handled an item that has gunshot residue on it and those particles were transferred from that item to their hands; or they were in the vicinity of the gunshot when the gun was fired." At the conclusion of the state's evidence, the trial court overruled appellant's Crim.R. 29 motion for judgment of acquittal.

{¶11} Appellant called Autalee Corcoran, appellant's girlfriend

and incarcerated for a weapons under disability conviction after she entered a plea. When asked why she agreed to testify, Corcoran replied, "I'm the one that took the gun, possessed the gun and hid the gun." Corcoran testified that earlier in the evening on the day of the incident, she and appellant visited a hospital because they had Covid-19. The hospital admitted Corcoran, but she "left against medical advice," and they returned to her home. Corcoran stated that her "little brother" and his girlfriend wanted to visit, but appellant did not want company, so that "started an argument between me and him." Corcoran and appellant then went downstairs to "get some privacy" because they were arguing. When Corcoran's brother leaned over the top of the stairs, "that kind of set Joshua off you know, [my brother] being in my business," and eventually appellant and Corcoran's brother "got into an altercation, it started to get physical, it started inside and ended up outside on the porch." Corcoran continued, "Josh is on top of him. I'm worried about getting Josh off of him so my focus is more on him. Then out of no where there was, I think, three gun shots that went off." When asked if she saw anyone shooting, Corcoran replied, "I didn't, no. I just heard them."

{¶12} After that, Corcoran explained, "everybody jumps off, I see the gun on the porch, I pick it up, I put it in my purse * * *

I already had it on me." When asked if she had seen this gun before, Corcoran stated, "Yes. Earlier when my brother first got there, he pulled it out. I don't know if he was trying to show off for his girlfriend, or - I don't know, but yeah, I had seen it." Corcoran stated that after appellant and her brother fought, she saw blood on her brother's face.

{¶13} Corcoran testified that she wanted to "get rid of [the gun] as soon as possible. So, I seen a couch cushion, I put it underneath the couch cushion [in the alley]." When asked if she knew what her brother did, Corcoran stated, "[h]e sped off. The car was loud. As I was walking down the steps, he was getting in the car and by the time I reached the alley he, I mean, I heard the car speeding away." Corcoran did not see her brother's girlfriend leave and emphasized that she did not see appellant touch the gun. Corcoran did concede that she and appellant remain boyfriend girlfriend.

{¶14} After deliberation, the jury found appellant guilty of having a weapon while under disability in violation of R.C. 2923.13, a third-degree felony. The trial court sentenced appellant to (1) serve a 36-month prison term, (2) serve up to 2-year postrelease control term, and (3) pay costs. This appeal followed.

I.

{¶15} In his first assignment of error, appellant asserts that the prosecution engaged in misconduct when it vouched for its expert witnesses during closing argument. Specifically, appellant challenges appellee's closing statements that, "Ladies and gentleman you know what doesn't lie? Science. The defendant's DNA was on the trigger of this weapon," and then another reference, "Science doesn't lie, ladies and gentlemen. Science doesn't lie."

{¶16} As a threshold matter, appellant recognizes that he did not object to appellee's statements during the trial. Thus, appellant has forfeited all but plain error review as to this issue. *State v. Conant*, 4th Dist. Adams No. 20CA1108, 2020-Ohio-4319, ¶ 4. "We may review the trial court decision for plain error, but we require a showing that but for a plain or obvious error, the outcome of the proceeding would have been otherwise, and reversal must be necessary to correct a manifest miscarriage of justice." *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 16, citing *State v. Davis*, 127 Ohio St.3d 268, 2010-Ohio-5706, 939 N.E.2d 147, ¶ 29. "The burden of demonstrating plain error is on the party asserting it." *Id.*

{¶17} Crim.R. 52(B) provides appellate courts with discretion to correct "[p]lain errors or defects affecting substantial

rights." "To prevail under the plain-error standard, a defendant must show that an error occurred, that it was obvious, and that it affected his substantial rights," i.e., the trial court's error must have affected the trial's outcome. *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 62, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). "We take '[n]otice of plain error * * * with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Obermiller* at ¶ 62, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). "Reversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill*, 92 Ohio St.3d 191, 203, 749 N.E.2d 274 (2001).

{¶18} As a general matter, an attorney may not express a personal belief or opinion as to the credibility of a witness. *State v. Thompson*, 141 Ohio St.3d 254, 292, 2014-Ohio-4751, 23 N.E.3d 1096; quoting *State v. Williams*, 79 Ohio St.3d 1, 12, 679 N.E.2d 646 (1997). Improper vouching occurs when a prosecutor implies knowledge of facts outside the record or places her or his personal credibility in issue. *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 145, *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 117. Further, "the

state may not 'unfairly suggest[ ] that the defense's case was untruthful and not honestly presented.'" *Thompson* at 291, quoting *State v. LaMar*, 95 Ohio St.3d 181, 2002–Ohio–2128, 767 N.E.2d 166, ¶ 167.

{¶19} While a prosecutor cannot express an opinion concerning the credibility of evidence, they "can argue that the character, quality, or consistency of particular evidence or witnesses should be considered when assessing credibility." *State v. Hostacky*, 8th Dist. Cuyahoga No. 100003, 2014–Ohio–2975, ¶ 47; citing *State v. Cody*, 8th Dist. Cuyahoga No. 77427, 2002–Ohio–7055, ¶ 35; *State v. Canterbury,* 4th Dist. Athens No. 13CA34, 2015-Ohio-1926, ¶ 33, *State v. Mundt*, 115 Ohio St.3d 22, 2007–Ohio–4836, 873 N.E.2d 828, ¶ 119. Moreover, both the prosecution and the defense have wide latitude during opening and closing arguments. *State v. Waters,* 4th Dist. Vinton No. 13CA693, 2014-Ohio-3109, ¶ 33; citing *Sunbury v. Sullivan*, 5th Dist. Delaware No. 11CAC030025, 2012-Ohio-3699, ¶ 30. In general, to establish prosecutorial misconduct during closing argument, a defendant must show improper remarks that prejudicially affected the defendant's substantial rights *State v. Phillips*, 4th Dist., Scioto No. 18CA3832, 2018-Ohio-5432.

{¶20} In the case sub judice, the prosecutor's closing argument, when taken in the context of all the above testimony,

shows that rather than improperly vouching for the state's expert witnesses, the state argued that scientific evidence, such as DNA and gunshot residue evidence, supported appellant's conviction. For example, In *State v. Michaud,* 168 A.3d 802, 2017 ME 170, the Supreme Judicial Court of Maine considered a case in which the prosecutor made a closing argument that "science doesn't lie." The court noted that the statement, "science doesn't lie," was isolated, Michaud did not object to it, it did not involve vouching for a particular witness, and the prosecutor did not argue that Michaud was lying. Thus, the court held that viewed in context, the prosecutor's statement formed part of a proper argument designed to highlight discrepancies in the evidence and to appropriately address witness credibility. Therefore, the court held that the prosecutor's comment did not result in obvious error, and the court did not abuse its discretion when it denied the motion for a new trial. *Id.* at ¶ 13. *See also Nicholson v. State,* Court of Special Appeals of Maryland, 2019 WL 328431 (prosecutor used the phrase "[t]he science does not lie" three times during closing argument and defense counsel did not object, the prosecutor's challenged comments fell within the realm of permissible argument); *Com. v. Herbert,* Superior Court of Pennsylvania, 2013 WL 11255485 (prosecutor's comments, "Did he do

it? Did he tell anybody that? He tried to sell it to you. Science doesn't lie, the defendant lies" harmless in the face of overwhelming guilt).

{¶21} Appellant cites *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31 in support. In *Davis,* the Supreme Court of Ohio concluded that the prosecutor did not improperly vouch for the expert witnesses' credibility when he commented on the experts' years of experience in their fields, nor did the prosecutor express any personal belief about the experts' credibility, but simply responded to defense attacks. During rebuttal, the prosecutor said, "And I could spend a lot of time going through trying to explain to you folks the explanations you've got from the DNA experts * * *," "as long as DNA has been around and as many cases these folks have done—that is, [expert witnesses] and their degrees and stuff, they know these things more than we can hope to know, if we hope to know it at all." The court held no improper vouching occurred because the prosecutor did not express any personal belief about the experts' credibility. *Id.* at ¶ 241. Thus, we do not find *Davis* persuasive.

{¶22} Moreover, "mere improper conduct does not constitute prosecutorial misconduct unless it is the rare instance where the remark was so prejudicial that it deprived the defendant of a fair

trial. This is not the rare case where the assistant prosecutor's closing argument constituted prosecutorial misconduct." *State v. Phillips*, 4th Dist. Scioto No. 18CA3832, 2018-Ohio-5432, ¶ 35. In *Phillips*, we examined four factors in our analysis: (1) whether the statements were isolated, (2) whether the trial court instructed the jury that parties' counsel's statements and arguments were not to be considered as evidence in the case, (3) whether trial counsel cross-examined the witness in question, and (4) whether the evidence of guilt was overwhelming. *Id.* at ¶ 36-39. *See also State v. Dyer*, 4th Dist. Scioto No. 07CA3163, 2008-Ohio-2711, ¶ 48, quoting *State v. Treesh*, 90 Ohio St.3d 460, 464, 739 N.E.2d 749 (2001) (" 'An improper comment does not affect a substantial right of the accused if it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments' ").

{¶23} In the case at bar, (1) the two nearly identical statements were isolated, (2) the trial court instructed the jury that such statements and arguments were not to be considered as evidence in the case, (3) trial counsel cross-examined the two witnesses in question, and (4) the evidence of guilt is overwhelming. Although appellant's girlfriend testified on his behalf, the state presented nine witnesses. Two eyewitnesses

testified that they either observed or heard appellant make incriminating statements regarding possession or use of the firearm. The testimony from five law enforcement officers included footprints in the snow around the gun that matched appellant's shoes, appellant's blood-stained hands and clothes, and bullet holes in the home. DNA and gunshot residue experts identified appellant as the major DNA contributor on both the firearm's slide and trigger and appellant's hands contained gunshot residue.

{¶24} In the case sub judice, after our review of the record and considering the prosecution's statements within the context of the entire trial, we cannot conclude that appellee's statements constitute improper vouching. Moreover, even if we assumed arguendo the statements are improper, when reviewed under a plain error standard they do not rise to the level of prosecutorial misconduct and did not affect the trial's outcome.

{¶25} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II.

{¶26} In his second assignment of error, appellant asserts that his trial counsel rendered ineffective assistance of counsel when counsel stipulated to unnecessary details that surrounded

appellant's prior conviction. In particular, appellant contends it is "unnecessary to disclose the name and nature of the prior offense."

{¶27} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶28} To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 183; *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 85. "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Moreover, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52

(2000).

{¶29} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. Prevailing professional norms dictate that "a lawyer must have 'full authority to manage the conduct of the trial.' " *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270, ¶ 24, quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

{¶30} Further, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted). Further, when considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within

the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Additionally, "[a] properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, citing State v. Smith, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *e.g.*, *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶31} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that "but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *e.g.*, *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus; *accord State v. Spaulding*, 151 Ohio St.3d

378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 91 (prejudice component requires a "but for" analysis). " [T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. Further, courts ordinarily may not simply presume the existence of prejudice but, instead, must require a defendant to establish prejudice affirmatively. *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22.

{¶32} Moreover, we have recognized that speculation is insufficient to establish the prejudice component of an ineffective assistance of counsel claim. *E.g., State v. Tabor*, 4th Dist. Jackson No. 16CA9, 2017-Ohio-8656, ¶ 34; *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶ 22; *State v. Simmons*, 4th Dist. Highland No. 13CA4, 2013-Ohio-2890, ¶ 25; *State v. Halley*, 4th Dist. Gallia No. 10CA13, 2012-Ohio-1625, ¶ 25; *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009-Ohio-6191, ¶ 68; *accord State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 86.

{¶33} In the case sub judice, the state charged appellant with having weapons while under disability in violation of R.C. 2923.13:

> (A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

> * * *
>
> (3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse * * *.

{¶34} Appellant contends that pursuant to *State v. Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440, 84 N.E.3d 981, and *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), defense counsel should have stipulated to nothing more than appellant's prior felony conviction, and the jury's knowledge about the "name and nature" of the offense prejudiced appellant.

{¶35} In *Creech*, the defendant, charged with three weapons charges for three different disabilities, offered to stipulate to any of the three disabilities. The trial court denied the stipulation offer and found that the state could present evidence of all three disabilities to the jury and mention them in opening and closing arguments. Although the trial court gave a limiting instruction, the jury found the defendant guilty of all three weapons counts.

{¶36} The appellate court reversed and the Supreme Court of Ohio affirmed the decision. In doing so, the Supreme Court of Ohio relied on *Old Chief*, *supra*, holding:

> Pursuant to Evid.R. 403, in a case alleging a violation of

> R.C. 2923.13, when the name or nature of a prior conviction or indictment raises the risk of a jury verdict influenced by improper considerations, a trial court abuses its discretion when it refuses a defendant's offer to stipulate to the fact of the prior conviction or indictment and instead admits into evidence the full record of the prior judgment or indictment when the sole purpose of the evidence is to prove the element of the defendant's prior conviction or indictment.

Creech at ¶ 40.

{¶37} In *State v. Bradford,* 4th Dist. Adams No. 20CA1109, 2020-Ohio-4563, before trial defense counsel stipulated to Bradford's prior conviction and that the court could disclose to the jury the allegations in the indictment. The court noted on the record that appellant signed a stipulation that he has "a prior conviction in this court for felonious assault." Further, appellant stated on the record that he entered into the stipulation "knowingly, intelligently, and voluntarily." *Id.* at ¶ 4. In general, Bradford argued that counsel should have stipulated only to appellant's disability or to appellant's prior felony-offense-of-violence conviction rather than stipulate to appellant's prior felonious assault conviction. *Id.* at ¶ 27. This court explained:

> We fully recognize that "[t]he existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule." *State v. Allen*, 29 Ohio St.3d 53, 55, 506 N.E.2d 199 (1987). Nevertheless, "[w]hen a prior conviction is an element of the charged offense, it may be admitted into evidence for the purpose of proving that element." *State v. Halsell*, 9th Dist. Summit No. 24464,

2009-Ohio-4166, 2009 WL 2517137, ¶ 13.

R.C. 2923.13(A)(2), as charged in the case sub judice, required the state to prove that appellant previously had been convicted of a "felony offense of violence." *State v. Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440, 84 N.E.3d 981, 2016 WL 7645112, ¶ 35. A stipulation to this element under R.C. 2923.13(A)(2) "would necessarily include the fact that the defendant * * * had previously been convicted of a [felony offense of violence]." Id.

A stipulation that a defendant has a prior felony-offense-of-violence conviction "relieve[s] the state of its burden of proving the prior conviction element of the weapons-under-disability charge." *State v. McLaughlin*, 12th Dist. Clinton No. CA2019-02-002, 2020-Ohio-969, 2020 WL 1244797, ¶ 56. It does not, however, mean "that the jury must remain ignorant of that prior conviction." *State v. Varner*, 11th Dist. Portage No. 2019-P-0089, 2020-Ohio-1329, 2020 WL 1685338, ¶ 44, citing *State v. Nadock*, 11th Dist. Lake No. 2009-L-042, 2010-Ohio-1161, 2010 WL 1058356, ¶30. The effect of a prior-conviction stipulation is not to remove the prior conviction from the jury's knowledge, but instead to prevent the jury from hearing the specific facts underlying the prior conviction, not the bare fact of the prior conviction. *See Varner* at ¶ 44 (explaining that a prior-conviction "stipulation ensures that the jury would know only the fact of a prior felony conviction, which is admissible under Evid.R. 403, not the facts underlying that conviction, which are inadmissible under the rule"); see generally *Creech* at ¶ 36 and ¶ 41 (concluding that allowing jury to hear that defendant's felonious assault with a deadly weapon conviction involved the defendant shooting the victim is not proper, but allowing the jury to hear that the defendant had a prior felony-offense-of-violence conviction is proper); *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, 2016 WL 7386160, ¶ 153 (explaining that even when defendant stipulates to prior felony-drug offenses in an R.C. 2923.13(A)(3) weapons-under-disability case, "the jury still would have learned that [the defendant] had at least prior felony drug convictions"); *State v. Robinson-Bey*, 127 N.E.3d 417, 2018-Ohio-5224 (9th Dist.), ¶ 34 (noting that R.C. 2929.13(A)(2) offense requires jury "to be told that [the defendant] had

> at least one prior conviction for a felony offense of violence").

Id. at ¶ 30-32. Thus, this court held that we did not believe that the difference between "felonious assault" and "felony-offense-of violence" is vast enough to suggest that the jury found Bradford guilty upon an improper basis. *Id.* at ¶ 33.

{¶38} Similarly, in case the sub judice we do not believe that the difference between "a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse" and the same language with the addition of "to wit: Possession of Heroin" is vast enough to suggest that the jury found appellant guilty upon an improper basis. Trial counsel stipulated to one 2015 conviction, possession of heroin. Trial counsel's decision to stipulate to the fact of a defendant's prior conviction is generally considered a matter of trial strategy. *See, e.g., State v. Roy*, 10th Dist. Franklin No. 14AP-986, 2015-Ohio-4959, ¶ 22; *State v. Chin,* 10th Dist. Franklin No. 16AP-602, 2017-Ohio-8546, ¶ 23. As appellee points out, in this weapons under disability case the prosecution must prove to the jury that the defendant had been convicted of a prior felony drug offense. Moreover, the jury heard no details about that offense other than that appellant had not been relieved of the disability that resulted from that particular offense.

{¶39} Finally, appellee argues that even if trial counsel's stipulation constituted ineffective assistance, appellant failed to demonstrate how he has been prejudiced. We agree. Here, the state adduced overwhelming evidence at trial. Whited testified that he heard appellant's voice before he heard three gunshots. Buckner heard a male and female argue, heard gunshots, saw appellant and Corcoran walk past him, and heard appellant say he "throwed [the gun] away." Officer Shanks testified that he found appellant with fresh blood on his hands and clothes. DNA Forensic Scientist Nichole Augsback testified that she found appellant's DNA on the firearm's slide and trigger. Officer Simmons found the firearm and appellant's footprints in the nearby snow. BCI Gunshot Residue Analyst Ted Manasian found gunshot residue on samples taken from appellant.

{¶40} After our review, this court cannot conclude that the result of the trial would have been different had the jury not learned about appellant's prior heroin conviction. Accordingly, we overrule appellant's second assignment of error.

III.

{¶41} In his third assignment of error, appellant contends that multiple errors deprived him of his constitutional right to a fair

trial. Thus, appellant asserts that if this court finds that multiple errors occurred, but none individually warrant reversal, he urges us to reverse under the cumulative-error doctrine.

{¶42} Under the cumulative-error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995), citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus; *State v. Ruble*, 2017-Ohio-7259, 96 N.E.3d 792, ¶ 75 (4th Dist.); *State v. Fannon*, 2018-Ohio-5242, 117 N.E.3d 10, ¶ 124 (4th Dist.). "Before we consider whether 'cumulative errors' are present, we must first find that the trial court committed multiple errors." *State v. Smith*, 2016-Ohio-5062, 70 N.E.3d 150, ¶ 106 (4th Dist.), citing *State v. Harrington*, 4th Dist. Scioto No. 05CA3038, 2006-Ohio-4388, ¶ 57. However, because our review of the record did not find trial court error, the cumulative error doctrine does not apply. Thus, we overrule appellant's third assignment of error.

{¶43} Accordingly, for all the foregoing reasons, we affirm the trial court's judgment.

[Cite as *State v. Thomas*, 2024-Ohio-2281.]

JUDGMEN

T AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellee shall recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

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

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.