[Cite as *State v. Venable*, 2025-Ohio-335.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MEKHI LAMIRE VENABLE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 24 MA 0059

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2022 CR 00679

BEFORE:
Cheryl L. Waite, Mark A. Hanni, Katelyn Dickey, Judges.

JUDGMENT:
Affirmed.

Atty. Lynn Maro, Mahoning County Prosecutor and *Atty. Edward A. Czopur*, Assistant Prosecutor, for Plaintiff-Appellee

Atty. James R. Wise, for Defendant-Appellant

Dated: January 29, 2025

WAITE, J.

{¶1} Appellant Mekhi Lamire Venable appeals his conviction and sentence for murder following jury trial. Appellant argues that the trial court should have allowed him to give evidence about two encounters between him and the victim that could support his self-defense claim. Appellant also urges that his conviction was against the manifest weight of the evidence because his evidence of self-defense was unrebutted. In Appellant's third and final argument he claims the court improperly sentenced him for two gun specifications, constituting a Double Jeopardy violation. Our review of this record reveals no error on the part of the trial court, and Appellant's three assignments of error are overruled. The judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} On September 29, 2022, Appellant shot and killed 21-year-old Jacob Moore ("J.M.") on the north side of Youngstown. Appellant was 20 years old at the time. The two had been arguing earlier in the day, and when they later met they continued this argument. Both had been carrying firearms, but they agreed to put down their weapons and engage in a "fist fight" to settle their differences. As J.M. then walked to Appellant's car, Appellant raised a gun and shot J.M. in the upper chest and abdomen and fled the scene. Others who witnessed the crime called the police. J.M. was taken to a hospital, but died from his injuries.

{¶3} On December 1, 2022, Appellant was indicted in Mahoning County on one count of aggravated murder pursuant to R.C. 2903.01(A), an unclassified felony; and one count of murder under R.C. 2903.02(A), an unclassified felony. Both counts carried a three-year firearm specification, R.C. 2941.145(A), and a five-year specification for

discharging a weapon from a vehicle (also known as a drive-by specification), R.C. 2941.146(A).

{¶4} Appellant requested a jury trial. At trial he claimed he shot the victim in self-defense. Prior to trial, Appellant filed a motion in limine requesting that he be permitted to testify about two prior incidents that had occurred between himself, the victim, and some of Appellant's friends and family members. One incident occurred about an hour before the shooting, the other allegedly occurred months earlier. Appellant sought to introduce the evidence to show his fearful state of mind at the time of the crime. The court allowed testimony about the incident that occurred the same day as the shooting, but denied Appellant's request regarding the earlier incident. (4/8/24 Tr., p. 8.)

{¶5} Trial took place on April 15, 2024. The first person to testify was Akasha Santana ("Akasha"). She stated that on the day of the murder she was with her boyfriend, Da'Juan Moore ("Da'Juan"), and his brother, Da'Breon Moore ("Da'Breon"). The three of them met with the victim at a house on 22 New York Avenue, Youngstown. She arrived in Da'Juan's black Ford Taurus, and the others were in a maroon Ford Taurus. The house was owned by the mother of "A.J.," a cousin of the Moores. Akasha's two children, one aged four months and the other two years, were also at the scene, as well as A.J.'s mother. Akasha, Da'Juan, Da'Breon, and J.M. discussed a "situation" in which "words were exchanged" between Appellant and J.M. (4/15/24 Tr., p. 172.) While this was happening, Appellant and a passenger drove up to the house in a silver Buick. (4/15/24 Tr., pp. 174, 675.)

{¶6} Akasha testified that Appellant remained in his car. Appellant and J.M. reengaged in the argument they had started earlier at Appellant's house. While J.M. was

carrying a gun, he and Appellant agreed to put down their weapons and resolve their argument with a “fist fight.” (4/15/24 Tr., p. 176.) She saw J.M. give his gun to Da'Juan. She said that J.M. normally had a gun, but she had never seen him use it. (4/15/24 Tr., p. 176.) Akasha testified that when J.M. walked toward Appellant's car, Appellant "pulled his gun out and shot [J.M.]." (4/15/24 Tr., p. 178.) Appellant immediately fled the scene, alone, in his vehicle. Akasha and the others called the police.

{¶7} On cross-examination, Akasha testified that the reason she and Da'Juan went to Appellant's house earlier in the day was because Appellant asked her to come. She was trying to get the phone number of a former girlfriend of Appellant. Akasha believed this former girlfriend had stolen money and marijuana from her. (4/15/24 Tr., pp. 187-188.) After she and Da'Juan arrived at Appellant's house, Da'Breon and J.M. arrived, but only she and Da'Juan exited their vehicle. Da'Breon and J.M. stayed in their car. (4/15/24 Tr., p. 195.) Appellant came out of the house to talk to them. Da'Juan was not armed at the time. (4/15/24 Tr., pp. 191-192.) She and Appellant had a discussion, which she called a "clarification." (4/15/24 Tr., p. 196.) She did not consider this encounter as an argument, but a discussion to clarify whether Appellant was involved in the incident with his girlfriend, D'Asia, when she stole money from Akasha. (4/15/24 Tr., p. 185.) Akasha also testified about another argument where Appellant threatened to rob J.M. (4/15/24 Tr., p. 207.)

{¶8} Da'Juan Moore was the next person to testify. He stated that J.M. had a concealed carry permit and regularly carried a gun. He corroborated Akasha's testimony regarding the persons who were present at the time of the shooting. He stated that the house at 22 New York Avenue belonged to a cousin named A.J. and his mother, and that

A.J. was present at the murder scene. Da'Juan testified that earlier in the day he and Akasha drove to Appellant's house. (4/15/24 Tr., p. 239.) J.M. and Da'Breon also drove there in Da'Breon's car. (4/15/24 Tr., p. 241.) Da'Breon exited his vehicle to talk to Appellant. During this discussion, Appellant said he was going to rob J.M., and J.M. overheard this statement. (4/15/24 Tr., p. 243.) Da'Juan and Akasha then left in their vehicle, and J.M. and Da'Breon left in the other vehicle. (4/15/24 Tr., p. 245.) Da'Juan noticed that Appellant also left in his vehicle. Da'Juan did not expect to see Appellant again that day. (4/15/24 Tr., p. 245.)

{¶9} He, Da'Breon, Akasha and J.M. met a short time later at a cousin's house on Kensington Avenue in Youngstown. After they left the Kensington Avenue home and were driving around, they happened to see A.J. outside the 22 New York Avenue residence. Da'Juan parked his car and got out. (4/15/24 Tr., p. 249.) Da'Breon and J.M. also exited their vehicle. They had a conversation about what Appellant said earlier about robbing J.M. (4/15/24 Tr., p. 250.) After about ten minutes, Appellant arrived in his vehicle.

{¶10} Appellant and J.M. began arguing while Appellant remained seated in his vehicle. (4/15/24 Tr., p. 253.) J.M. gave the gun he was carrying to Da'Juan, who put it on the seat of his car. As J.M. and Appellant had agreed to settle their differences in a fist fight, J.M. walked over to Appellant's car. (4/15/24 Tr., p. 256.) When J.M. approached Appellant's vehicle, Appellant fired two shots. (4/15/24 Tr., p. 259.) J.M. fell to the ground and Appellant immediately drove off. Three of the people standing nearby tried to get J.M. into the back of Da'Breon's car to take him to the hospital. Da'Juan drove the car to the hospital. He was later told that J.M. had died.

{¶11} Glenn Scott, Jr. was with Appellant on the day of the murder. Glenn is both a relative and a friend of Appellant. He testified that Appellant showed up at Glenn's home just before the murder, and the two of them left together in Appellant's car. Appellant said he was looking for someone because "[Appellant] was called out while he was with his mom, and I think his sister, and something like that." (4/15/24 Tr., p. 309.) Appellant drove to New York Avenue. Glenn exited the car to talk to his cousin A.J. and those who were with him, including Da'Breon, Da'Juan, Akasha, and J.M. (4/15/24 Tr., p. 312.)

{¶12} While Glenn was at A.J.'s house, he heard a discussion about a "friendly fight" that was not to include any guns, knives, or other weapons. He also called it a “fist fight” and a “family fight.” (4/15/24 Tr., pp. 315, 322.) Glenn testified that he saw J.M. go over to Appellant's car, but then turned his back. When he heard two gun shots, he turned around and saw J.M. falling to the ground. (4/15/24 Tr., pp. 324-325.) By the time Glenn saw J.M. falling, Appellant had already fled in his car. (4/15/24 Tr., p. 325.) Glenn could not remember if J.M. removed his gun before approaching Appellant's car. (4/15/24 Tr., p. 322.)

{¶13} The defense called Appellant's mother, who had no information directly pertaining to the murder. She testified that her house was shot at in the days after the murder when she was not at home. She also said the house caught fire when she was not home and was demolished.

{¶14} Alijah Cruz, Appellant's girlfriend, testified for the defense. She stated that she and Appellant had a child together, and she was living in Appellant's house. (4/15/24 Tr., pp. 595-596.) On the day of the murder, Appellant picked her up from work. They

drove to their house, and she saw two cars, one black and one maroon, parked near the house. (4/15/24 Tr., p. 604.) She saw Akasha, Da'Juan, Da'Breon, and J.M. exit these vehicles. She testified that she was unaware this meeting between Appellant and the others had been prearranged in text messages.

{¶15} As she and Akasha began to argue with each other, Appellant and Da'Juan were having a separate argument. (4/15/23 Tr., p. 607.) Da'Juan, Da'Breon, and J.M. were armed at the time. She said that J.M. entered the argument with Appellant and made threats, and that she and Appellant then went into the house. Shortly thereafter, Appellant left the house, got into his car, and drove away. He returned home sometime later. Subsequently, she and Appellant traveled to various relatives' homes before fleeing to Georgia "to be protected." (4/15/25 Tr., p. 614.)

{¶16} Appellant testified in his own defense. He stated he was twenty years old. Alijah Cruz was his girlfriend. At the time of the murder, Alijah was seven months pregnant and they were living at 2138 Logan Avenue in Youngstown, along with Appellant's mother, sister, and his mother's boyfriend. (4/15/24 Tr., p. 630.) He testified that he had a gun on the day of the murder and kept it under the driver's seat of his car. He said he kept a gun handy because he was afraid. He testified that he did not fear for his life due to any one person, but from multiple people. (4/15/24 Tr., p. 631.) However, he testified that he "[n]ever had a beef" with the Moore family. (4/15/24 Tr., p. 632.) The victim, J.M., is part of the Moore family.

{¶17} Appellant said he had seen a number of photos on social media of J.M. holding weapons, including an assault rifle. (4/15/24 Tr., p. 636.) The photo of J.M. with an assault rifle, however, did not cause him to be fearful. (4/15/24 Tr., p. 668.)

{¶18} Appellant testified that his best friend was Akasha Santana. On the day of the murder, he received a phone call from Akasha at about 4:55 p.m. He was on his way to pick up his girlfriend Alijah from work. At about this same time he received a text message from Da'Juan, stating that he and Akasha would be at his house when he arrived there with Alijah. (4/15/24 Tr., p. 641.) Appellant and Alijah arrived home soon after, and there were multiple vehicles at the house. Da'Juan, Da'Breon, J.M., Akasha, Alijah, and Appellant exited their vehicles. Appellant started arguing with Da'Juan and Da'Breon. (4/15/24 Tr., p. 643.) Appellant said threats were made during this argument, although he did not testify that J.M. made threats during this encounter. (4/15/24 Tr., p. 644.) He testified that Da'Juan, Da'Breon, and J.M. were armed, and that he also had a weapon, but it was under the seat of his car.

{¶19} At some point, Appellant and Alijah decided to get away from the argument and go into his house. A short time later, he came back out of the house. While the others were still outside of his home, they did not hinder him from leaving, so he got into his car and drove away. He testified that while he was not afraid that they would harm Alijah, he was afraid that they might shoot at his house if he remained inside. (4/15/24 Tr., p. 647.)

{¶20} Appellant drove, first, to his friend Glenn Scott's house and then headed to A.J.'s house. He testified that he arrived at 22 New York Avenue before Da'Juan, Da'Breon, and J.M. After he got out of his car to talk to A.J., J.M., Da'Juan, and Da'Breon drove up next to his car and stopped their vehicles. Appellant testified that when J.M. exited the vehicle, he was armed with an assault rifle. (4/15/24 Tr., p. 654.) At this point, the parties reengaged in their earlier argument. While J.M. put his assault rifle back into

one of the cars, Appellant testified that J.M. was still armed with another weapon, a tan gun, that was in a holster. Da'Juan and Da'Breon were also armed with black handguns, but had not drawn their guns. A.J.'s mother asked everyone to leave, and Appellant got back into his car. He said that J.M. drew his weapon, "rushed at my vehicle," and said he was going to kill Appellant. (4/15/24 Tr., p. 659.) Appellant grabbed the gun under his seat and shot at J.M. (4/15/24 Tr., p. 659.) He said he had seventeen bullets in his gun and shot at J.M. twice. He then fled the scene and picked up his girlfriend. After stopping at various relatives' homes, they fled to Georgia.

{¶21} After a day of jury deliberations, the jury found Appellant not guilty of aggravated murder, guilty of murder, and guilty of the gun specifications attached to count two. Appellant was sentenced on May 16, 2024, to 15 years to life in prison for murder, 3 years for the gun specification (to be served consecutively), and 5 years for discharging a firearm from a vehicle (to be served consecutively), for a total prison term of 23 years to life. This timely appeal followed on June 18, 2024. Counsel was appointed for appeal.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION IN LIMINE NOT ALLOWING EVIDENCE OF PRIOR ALTERCATIONS BETWEEN THE DEFENDANT AND VICTIM.

{¶22} Appellant contends that the trial court should have allowed the admission of testimony regarding an incident between Appellant and the victim that occurred several months prior to the murder. Appellant raised the matter in a motion in limine, and the motion was partially denied. The court did allow Appellant to raise evidence of an

encounter involving Appellant, his girlfriend, the victim, and three others that occurred about an hour before the murder. However, Appellant's request to be allowed to testify about a similar situation that happened a few months before the murder was denied.

{¶23} Appellant argued that he did not intend to introduce the evidence to establish the victim's character or to show that the victim was the aggressor. He intended to use the evidence to show Appellant's fearful state of mind at the time of the murder. The court disallowed evidence as to the earlier incident because too much time had passed between the incident and the murder. Appellant argues that was not a valid reason to disallow testimony that could have supported his self-defense theory.

{¶24} The issue under review in this assignment of error is a purely evidentiary matter. "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court". *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Evidentiary decisions are reviewed for an abuse of discretion. *State v. Morris*, 2012-Ohio-2407, ¶ 14. "Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon*, 2013-Ohio-2951, ¶ 21 (7th Dist.). Furthermore, "an error in the admission or exclusion of evidence is not reversible unless it is an abuse of discretion that is prejudicial to the defendant." *State v. Brletich*, 2000 WL 875325, *4 (7th Dist. June 28, 2000).

{¶25} Evid.R. 404 generally prohibits the introduction of character evidence at trial to prove that a person acted in conformity with a bad character trait. *State v. Williams*, 2012-Ohio-5695, ¶ 15. Evid.R. 404(B) more specifically prohibits the use of "other acts" evidence (also called "other bad acts" or "bad acts" or "bad character") to prove that a

person had a propensity to act in a certain bad way: "Evidence of any other crime, wrong or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Evid.R. 404(B)(2), though, provides a number of permissible uses of other crimes, wrongs, or acts: "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." This list is illustrative and non-exhaustive. *State v. Schmidt*, 2022-Ohio-4138, ¶ 29 (12th Dist.).

{¶26} Whether other acts evidence can be admitted is governed by a three-step test.

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. See Evid.R 403.

State v. Williams, 2012-Ohio-5695, ¶ 20.

{¶27} The Ohio Supreme Court has held that the victim's character is not an element in a claim of self-defense and "that specific instances of a victim's violent

propensities are not admissible to prove whether the victim was the initial aggressor in a particular instance." *State v. Barnes*, 94 Ohio St.3d 21, 24-25 (2002). Some Ohio appellate courts have held that a defendant may introduce evidence of specific acts of the victim's conduct to show the defendant's fearful state of mind at the time of the crime. *State v. Smith*, 2013-Ohio-746, ¶ 19 (3d Dist.); *State v. Herron*, 2019-Ohio-3292, ¶ 28 (2d Dist.). "These events are admissible in evidence, not because they establish something about the victim's character, but because they tend to show why the defendant believed the victim would kill or severely injure him." *State v. Carlson*, 31 Ohio App.3d 72, 73 (8th Dist. 1986). The exclusion of state of mind evidence by the trial court is not necessarily reversible error, as it is subject to the court's discretion, and is subject to harmless error review. *State v. Kryling*, 2023-Ohio-1921, ¶ 54 (6th Dist.). Harmless error is "any error, defect, irregularity, or variance which does not affect substantial rights[.]" Crim.R. 52(B). Errors that do not affect substantial rights are not prejudicial and will be disregarded. *State v. Morris*, 2014-Ohio-5052, ¶ 23.

{¶28} Appellee points out that other acts evidence "must have . . . a temporal, modal and situational relationship with the acts constituting the crime charged[.]" *State v. Burson*, 38 Ohio St.2d 157, 159 (1974). "Evidence of other acts must be temporally and circumstantially connected to the facts of the offense alleged." *State v. Cooperider*, 2003-Ohio-5133, ¶ 16 (3d Dist.). If the evidence is too far removed in time from when the crime occurred, it impacts the first and third steps of the *Williams* analysis above, i.e., whether the evidence is actually relevant and whether its probative value is substantially outweighed by the danger of unfair prejudice.

{¶29} It is not entirely clear what actual evidence Appellant intended to introduce, since no proffer was made at trial. The record reflects only that it was similar to the argument that occurred an hour or so before the murder and involved some or all of the same characters.

{¶30} The record shows that the trial court did allow testimony about the encounter between Appellant and the victim that happened the day of the murder. If the evidence of the earlier confrontation was similar to the testimony that was allowed, it is clear why it was excluded. The evidence of the encounter that was admitted is not consistent between the witnesses, and it is not altogether clear how or if it helped Appellant's self-defense argument.

{¶31} Akasha Santana testified that she was invited to Appellant's home an hour or so before the murder to get his former girlfriend's phone number and to clarify whether Appellant was involved in stealing money from Akasha. She testified that only she and her boyfriend Da'Juan exited their vehicle. Da'Juan was not armed, and J.M. and Da'Breon did not exit their vehicle. This evidence does not support any theory of self-defense as it related to J.M.

{¶32} Da'Juan testified that Akasha told him to drive her to Appellant's house. Da'Juan, Akasha, and their children got into the vehicle. Da'Juan texted Appellant while en route to see if Appellant was home. Appellant was not home but was headed there, and said he would text Da'Juan when he arrived. Da'Breon and J.M. were also headed to Appellant's house in another vehicle. After Da'Juan arrived, he and Akasha exited the vehicle to talk to Appellant. At some point in the conversation Appellant said he was going to rob J.M. J.M. overheard his statement. Appellant then got in his vehicle and left.

A short time later Da'Juan and the others left as well. Again, this evidence does not support a self-defense theory.

{¶33} Alijah Cruz testified that she was Appellant's girlfriend, she was seven months pregnant, and they were living on Logan Avenue with a number of other people, including Appellant's mother and sister. Alijah testified that on the day of the murder she was at work. Appellant came to pick her up after work. While they were driving home, Appellant received text messages, but she did not know the content of the messages. When they arrived at Logan Avenue there were two cars there. She and Appellant exited their car, and four people exited the other two vehicles. The four people were Akasha, Da'Juan, Da'Breon, and J.M. She and Akasha got into an argument. Appellant, Da'Breon, and J.M. also started arguing. She testified that Da'Breon had a pistol on his hip, Da'Juan had what looked like a pistol under his shirt, and J.M.'s hand was resting on a pistol that was in a holster. She heard J.M. make threats of violence, but could not specifically say what these were. (4/15/24 Tr., p. 612.) She testified that she was, generally, afraid. (4/15/24 Tr., p. 611.) She and Appellant left the group and went into the house. A short time later Appellant left the house and drove away. When Appellant later returned, he took Alijah to Appellant's uncle's house, and then they fled to Georgia.

{¶34} Alijah's testimony both supports and contradicts a self-defense theory with respect to Appellant. She made it clear that three armed men showed up at her residence, made unspecified threats, and that she was afraid. She did not testify that Appellant was afraid, and in fact, her testimony just as likely could be interpreted to show he was not.

{¶35} Appellant testified that he owned a gun and kept it in his car under the seat. He had the gun because he was afraid of "multiple people," but no one person in particular. (4/15/24 Tr., 631.) He testified that he "[n]ever had a beef" with anyone in the Moore family. (4/15/24 Tr., p. 632.) The victim is part of the Moore family. He stated that he had a phone call with Akasha, then went to pick up Alijah from work at about 5:00 p.m. He received text messages from Da'Juan and knew Da'Juan would be at this house when Appellant returned. When he got home there were two cars there. He and Alijah exited his vehicle. Four people exited the other two vehicles. Da'Juan came up to him and started yelling and swearing. J.M. entered the argument. Da'Juan, Da'Breon, and J.M. were armed. Appellant's weapon was under the driver's seat of his vehicle. Appellant could not specifically recall what was said, but testified it did make him afraid, so he and Alijah went into the house. Appellant then left Alijah in the house and drove away.

{¶36} This incident at Appellant's house occurred an hour before the murder. It was supported by the testimony of four people, but does not clearly support a theory of self-defense. Although Appellant and Alijah both testified that they were afraid when J.M., Da'Breon, and Da'Juan showed up at his house, other aspects of their testimony do not support that Appellant was in a fearful state of mind. Appellant said he had no "beef" with the Moores, and J.M. is a Moore. He testified that he was not fearful when he saw a social media post of J.M. holding an assault rifle. Appellant himself arranged for Da'Juan to come to his house an hour before the murder. If he was in a state of fear due to a prior incident involving J.M., Da'Juan, and Da'Breon, it is inconceivable that he would invite them to his house. Appellant failed to testify that he had a particular argument or fear of J.M., making evidence of some alleged encounter months earlier irrelevant. The fact that

Appellant argued with J.M., Da'Juan, and Da'Breon an hour before the murder, and then he just drove off, leaving his pregnant girlfriend and other family members at the house, does not evince he was in a fearful state of mind. Appellant did not call the police about the situation, which could also indicate that he was not afraid of what J.M. and the others might do.

{¶37} There is no question that Appellant shot J.M. and that his intended defense was self-defense. Evidence of prior encounters with the victim that show that the victim caused the defendant to be in a fearful state of mind at the time of the crime are admissible. Failure to allow such evidence could undermine a defendant's theory of self-defense.

{¶38} This case presents a very different factual situation. Appellant argues that two instances of the same prior bad acts evidence should have been permitted. This was clearly a matter for the trial court's discretion: he was asked to decide how many instances of the same evidence are enough. Additionally, the court needed to consider the temporal distance between the other acts evidence and the time of crime. The court determined that while the later encounter may be relevant to Appellant's contention he was in fear of the victim, the earlier alleged incident had occurred months before the shooting, and so its relevance was in doubt. Additionally, the evidence that was offered at trial was vague and contradictory, and did not appear to support any argument that Appellant was actually fearful of J.M. prior to the murder. The evidence that was introduced was, at best, marginally supportive of Appellant's self-defense claim. The record is clear the trial court did not abuse its discretion in excluding a similar marginally relevant alleged incident that happened months earlier.

{¶39} Based on this record, it was not error for the trial court to exclude evidence of an earlier encounter between Appellant and J.M. that occurred months before the murder. Even if the court erred in excluding this evidence, such error could only be harmless based on the evidence that was presented, and on Appellant's contradictory and vague testimony about whether, at the time of the shooting, he was in fear of J.M. sufficient to support a claim of self-defense. Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

THE VERDICT OF THE JURY FOR FELONY MURDER WAS AGAINST THE WEIGHT OF THE EVIDENCE.

{¶40} Appellant contends the jury verdict of guilty to the charge of murder was against the manifest weight of the evidence. Appellant concedes that he confessed to the killing and that his sole defense in this case was self-defense. Appellant believes that his evidence of self-defense was unrebutted by the state. He argues that the evidence showed that when police arrived after the murder, there was a black Ford parked in the middle of the road near 22 New York Avenue and Officer Gregory Tackett testified that he found three guns and an assault rifle in the vehicle. (4/15/24 Tr., p. 411.) Appellant testified that J.M. was armed when he approached Appellant, who was sitting in his car. Da'Juan and Da'Breon were also armed. He testified that J.M. drew his weapon and said he was going to kill Appellant. (4/15/24 Tr., p. 659.) When J.M. rushed at Appellant with his gun in his hand, Appellant was afraid he was going to die, so he grabbed the gun from under his seat and shot J.M. twice. (4/14/24 Tr., p. 660.)

{¶41} Appellant and his girlfriend Alijah also testified that on the day of the murder, about an hour before, J.M., Da'Juan, and Da'Breon came to Appellant's house. They were armed. They argued with Appellant and threatened him. Appellant and his girlfriend both testified that this encounter made them afraid.

{¶42} Appellant contends that this evidence should have been believed and that he should have been acquitted on the basis of self-defense.

{¶43} Appellee responds that this record shows Appellant voluntarily entered into the altercation between himself and the victim, that he shot J.M. without provocation, and that he used deadly force in a situation that did not call for it, since every witness except Appellant testified that the victim was unarmed. Appellee contends the weight of the evidence supports the verdict.

{¶44} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). It is not a question of mathematics, but depends on the overall effect of the evidence in inducing belief. *Id*. Weight of the evidence involves the state's burden of persuasion. *Id*. at 390. (Cook, J. concurring). An appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Lang*, 2011-Ohio-4215, ¶ 220, citing *Thompkins* at 387. This discretionary power of an appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶45} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 2011-Ohio-6524, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. "The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor." *State v. Vaughn*, 2022-Ohio-3615, ¶ 16 (7th Dist.), citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). To reverse a jury verdict as against the manifest weight of the evidence, a unanimous concurrence of all three appellate judges is required. *Thompkins* at 389; Ohio Const., art IV §3(B)(3).

{¶46} A major part of Appellant's argument is that his testimony about self-defense was unrebutted. The record, however, does not support this assertion. It is clear that, even though Appellant testified last, his testimony was rebutted. First, it was rebutted during Appellant's cross-examination. He admitted that, although J.M., Da'Jaun, and Da'Breon were armed when they came to Appellant's house, no shots were fired; Appellant had a gun in his car but did not take it when he got out of his vehicle; he abruptly drove away leaving his pregnant girlfriend alone with the three of them, even though his alleged fear was that they might hurt her rather than him; he did not call the police to report this incident; and he chose to later stop at A.J.'s house even though J.M., Da'Juan, and Da'Breon were already there and were armed. All of these facts rebut Appellant's theory that he was in fear of J.M. at the time of the shooting.

{¶47} Second, Appellant's testimony was rebutted by the earlier testimony of Akasha, Da'Juan, and Glenn. All of them testified that J.M. and Appellant agreed to settle an argument by means of a fist fight and that they would not use weapons, and Akasha

and Da'Juan testified that J.M. was not armed when Appellant shot him. Da'Juan testified that Appellant told J.M. that he was going to rob him, providing evidence that it was Appellant who provoked the encounter at 22 New York Avenue. Again, at no time did Appellant state that he was fearful of J.M., or that he believed J.M. intended to harm him. He did not claim that he was, in general, fearful. He did not at any time expound on this generalized claim or link it to J.M. As earlier discussed, any evidence of Appellant's alleged fearful state of mind at the time of murder was rebutted in numerous ways, including in Appellant's own testimony.

{¶48} Appellant seems to think the jury was required to believe Appellant's testimony and his version of the facts. However, it is apparent the jury did not find him credible. The jury, as the trier of fact, was in the best position to weigh the evidence and judge Appellant's credibility. *Seasons Coal Co.*, *supra*, at 80. A jury may believe any, all, or none of the testimony of a witness. *State v. Barnhart*, 2010-Ohio-3282, ¶ 42 (7th Dist.). If the jury did not believe Appellant's version of the facts, the remaining evidence showed beyond a reasonable doubt that the shooting was not in self-defense.

{¶49} Appellee submits that when two fairly reasonable views of the evidence are presented to a jury, an appellate court should not choose which is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201 (7th Dist. 1999). Evidence provided by Appellant and Alijah Cruz contrasts with the testimony of Akasha Santana, Da'Juan Moore, and Glenn Scott. The most significant difference was that Akasha and Da'Juan testified they saw Appellant shoot an unarmed man, while Appellant testified that the victim was armed. The jury believed Akasha and Da'Juan and did not believe Appellant. We will not overturn the jury’s credibility determination in this case.

{¶50} Courts have regularly stated that a defense of self-defense largely comes down to credibility. *State v. Lawrence*, 2023-Ohio-3419, ¶ 41 (11th Dist.); *State v. Campbell*, 2024-Ohio-1693, ¶ 32 (8th Dist.); *State v. Perez*, 2010-Ohio-3168, ¶ 13 (7th Dist.). "[A] conviction is not against the manifest weight of the evidence because the trier of fact believed the state's version of events over the defendant's version." *State v. Lipkins*, 2017-Ohio-4085, ¶ 39 (10th Dist.).

{¶51} Ohio's self-defense statute, R.C. 2901.05(B)(1), provides in relevant part:

> A person is allowed to act in self-defense, . . . If, at the trial of a person who is accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense, defense of another, . . . the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense, defense of another, . . . as the case may be.

{¶52} When an accused presents evidence that tends to support that he or she used force against another in self-defense, the state must disprove at least one of the elements of self-defense beyond a reasonable doubt. *State v. Carney*, 2020-Ohio-2691, ¶ 31 (10th Dist.).

> When deadly force is used, the state must disprove at least one of the following elements of a self-defense or defense of another claim: (1) the accused was not at fault in creating the situation giving rise to the affray, (2) the accused had a bona fide belief that he was in imminent danger of

> death or great bodily harm and that his only means of escape from such danger was in the use of such force, and (3) the accused did not violate any duty to retreat or avoid the danger. [*State v.*] *Messenger*[, 2022-Ohio-4562] at ¶ 14, citing *State v. Barnes*, 94 Ohio St.3d 21, 24 (2002). To state it in the affirmative, when deadly force is used, the state must prove beyond a reasonable doubt that the accused " '(1) was at fault in creating the situation giving rise to the affray, OR (2) did not have a bona fide belief that he was in imminent danger of death or great bodily harm for which the use of deadly force was his only means of escape, OR (3) did violate a duty to retreat or avoid the danger.' " (Emphasis sic.) *State v. Jamii*, 10th Dist. No. 21AP-330, 2023-Ohio-4671, ¶ 77, quoting *Messenger* at ¶ 36, quoting *Carney* at ¶ 31.

State v. Cumberlander, 2024-Ohio-2431, ¶ 43 (10th Dist.).

{¶53} A defendant cannot voluntarily start a confrontation and then claim self-defense. *State v. Italiano*, 2021-Ohio-1283, ¶ 19 (7th Dist.); *State v. Smith*, 2024-Ohio-2811, ¶ 12 (8th Dist.). "[A] defendant, having willingly advanced toward a volatile situation cannot rely on the affirmative defense of self-defense." *State v. Walker*, 2021-Ohio-2037, ¶ 19 (8th Dist.). In this appeal, the evidence showed that Appellant provoked the deadly encounter by threatening to rob J.M. earlier in the evening, then seeking out J.M. an hour later at A.J.'s house. Even Appellant's friend Glenn Scott testified that Appellant was looking for someone as he drove to A.J.'s house. When he arrived, Appellant exited his vehicle to continue the earlier argument. He and J.M. apparently agreed to settle their differences without the use of weapons. J.M. gave his gun to Da'Juan. Appellant,

however, returned to his car and shot J.M., who was not armed, twice in the chest. The evidence can reasonably be understood to show that Appellant provoked the confrontation, willingly participated in it, and deceptively lured J.M. into thinking that no firearms would be used, before fatally shooting him.

{¶54} A defendant cannot rely on self-defense if the evidence shows he was partially responsible for the confrontation. *Cumberlander* at ¶ 56. The circumstances of *Cumberlander* are somewhat similar to those in the instant appeal. In *Cumberlander*, the defendant was charged with felonious assault with a firearm specification. The defendant and the victim had known each other for years and had an "up and down" relationship. *Id.* at ¶ 5. The two had been involved in a fight a year earlier where the victim punched the defendant in the face multiple times. On the day of the shooting, the defendant went to the victim's house to pick up his daughter. The victim and his cousin came out and told the defendant to leave. Neither of them were armed. The defendant threatened to shoot the victim if he did not bring out his daughter. The victim then emptied his pockets and placed them on the front lawn in anticipation of a fight. The defendant responded by backing out of the driveway and parking in the street nearby. He yelled at the victim to "come down here and fight." *Id.* at ¶ 8. As the victim began walking toward the defendant, the defendant reached into his back pocket, pulled out a gun, and shot the victim in the upper thigh.

{¶55} At trial the defendant claimed the victim was armed and threatened to shoot him. The defendant said he stayed at the scene because he was concerned about his daughter who was in the victim's house. He said that he shot the victim because he was afraid of being shot first. He also called the police to report the shooting.

{¶56} On appeal, the Tenth District found that "the jury could have reasonably concluded that appellant was at least partially at fault for creating the situation giving rise to the shooting of Edwards." *Id*. at ¶ 56. The facts in *Cumberlander* were much more favorable to the defendant than the facts of this appeal. Here, there was no evidence of a prior physical fight between the victim and Appellant. There was also no justifiable reason for Appellant to go to 22 New York Avenue, whereas in *Cumberlander*, the defendant was at the victim's house to pick up his daughter, and he was concerned about the daughter's safety. The factual overlap is that only the defendant in both cases testified that the victim was armed, and in both cases the two parties agreed to engage in a fist fight rather than a gunfight. Regardless, as the shooter bore some fault, at least, in creating the situation, a reasonable juror could have determined the shooter did not act in self-defense.

{¶57} The second element of self-defense, i.e., a bona fide belief of imminent danger of death justifying the use of deadly force, involves both subjective and objective elements.

> [T]he jury first must consider the defendant's situation objectively, that is, whether, considering all of the defendant's particular characteristics, knowledge, or lack of knowledge, circumstances, history, and conditions at the time of the attack, she reasonably believed she was in imminent danger. . . . Then, if the objective standard is met, the jury must determine if, subjectively, this particular defendant had an honest belief that she was in imminent danger.

State v. Thomas, 77 Ohio St.3d 323, 330–31 (1997).

{¶58} Very little of Appellant's evidence supports his theory that he was in fear of J.M. when he killed J.M., whether subjectively or objectively. Appellant indicated that he was at times generally fearful and carried a gun, but stated that he was not afraid of any particular person. He testified that he was afraid for the safety of his girlfriend, his sister, and his mother, but none of these people were at 22 New York Avenue when the murder occurred. His testimony was equivocal as to whether he feared J.M. in the hour prior to the murder. His admitted actions do not appear to support his contention he was fearful at the time of the murder. He arrived after all the other participants arrived. He voluntarily exited his vehicle to join the others and argue with them. He voluntarily agreed to engage in a fist fight, using no weapons, to resolve a dispute. None of this reflects a fearful state of mind on his part.

{¶59} The second element also requires a showing that the defendant used only that force reasonably necessary to repel the attack. *State v. Lee*, 2024-Ohio-4498, ¶ 17 (10th Dist.). Put another way, the defendant cannot have used excessive force. *Id.* A defendant may only use deadly force if necessary to prevent death or great bodily injury. *Thomas* at 327. "Implicit in this second element of self-defense, i.e. that the defendant's use of deadly force was in 'good faith,' is the requirement that the degree of force used was 'warranted' under the circumstances and 'proportionate' to the perceived threat." *State v. Hendrickson*, 2009-Ohio-4416, ¶ 31 (4th Dist.), citing *State v. Palmer*, 80 Ohio St.3d 543 (1997).

{¶60} The credible evidence in this case shows J.M. was unarmed when he approached Appellant's vehicle. There is no evidence that anyone other than Appellant

fired a weapon before, during, or after the murder. Appellant had agreed to engage in a fist fight with J.M. without the use of weapons. Appellant's use of a gun was neither warranted nor proportionate.

{¶61} For the foregoing reasons, the manifest weight of the evidence supports this murder verdict, and does not support Appellant's self-defense theory. Appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 3

SENTENCING THE DEFENDANT TO CONSECUTIVE TERMS WITH REGARD TO THE GUN SPECIFICATION IS UNCONSTITUTIONAL.

{¶62} Appellant was convicted of two different types of gun specifications. The first is found in R.C. 2941.145(A), which adds a mandatory three-year prison term for having a firearm during an offense and for displaying, brandishing, possessing, or using the firearm. The second is under R.C. 2941.146(A), which adds a mandatory five-year prison term for committing the offense by discharging a firearm from a motor vehicle. Appellant contends that the trial court was prohibited from imposing sentences on both of these gun specifications due to the Double Jeopardy Clause of the U.S. and Ohio Constitutions. Appellant argues that the Double Jeopardy Clause prohibits multiple punishments for the same offense. Appellant asserts that the three-year gun specification is completely subsumed by the five-year specification and is, in essence, a lesser included offense of the five-year specification. Appellant thus concludes that he cannot be punished for both specifications.

{¶63} Appellee rebuts this argument by citing numerous cases in which this same argument was raised and rejected by at least four different appellate courts. Although not cited by Appellee, we have also rejected an identical argument in *State v. Fant*, 2016-Ohio-7429, ¶ 53 (7th Dist.).

{¶64} The Double Jeopardy protections are said to consist of three separate constitutional protections: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *State v. Mutter*, 2017-Ohio-2928, ¶ 15, citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Appellant alleges concerns with the protection against multiple punishments for the same offense.

{¶65} Appellant raises a sentencing error. Review of Appellant's challenge to his sentence is limited to determining whether his sentence is clearly and convincingly contrary to law as measured against the evidence in the record. R.C. 2953.08(G)(2); *State v. Marcum*, 2016-Ohio-1002, ¶ 7. The Ohio Supreme Court has interpreted *Marcum* and R.C. 2953.08(G)(2) a number of times since 2016 and has concluded that "R.C. 2953.08(G)(2)(b) therefore does not provide a basis for an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and 2929.12." *State v. Jones*, 2020-Ohio-6729, ¶ 39. "R.C. 2953.08(G)(2) does not permit an appellate court to conduct a freestanding inquiry like the independent sentence evaluation this court must conduct under R.C. 2929.05(A) when reviewing a death-penalty sentence. *See State v. Hundley*, 162 Ohio St.3d 509, 2020-Ohio-3775, 166 N.E.3d 1066, ¶ 128." *Id.* at ¶ 42. The only review that can be undertaken in Appellant's sentencing challenge is whether the trial court's sentence is

contrary to law, and we can only reverse the sentence if it is clearly and convincingly contrary to law. R.C. 2953.08(G)(2).

{¶66} Appellant's argument that R.C. 2941.145(A) is a lesser included offense of R.C. 2941.146(A) is incorrect, because neither statute actually constitutes a stand-alone offense. Both statutes set out sentencing enhancements. "[A] firearm specification is a penalty enhancement, not a criminal offense. Penalties for a specification and its predicate offense do not merge under R.C. 2941.25. Consequently, the sentences for discharging a firearm at or into a habitation and for the firearm specification are not merged." *State v. Ford*, 2011-Ohio-765, ¶ 19. "Initially, we note that specifications are penalty enhancements, not criminal offenses, and therefore are not subject to the same constitutional or statutory protections against double jeopardy." *State v. Rulong*, 2020-Ohio-4022, ¶ 81 (11th Dist.).

{¶67} In *State v. Phillips*, the Eighth District was presented with the same argument used by Appellant. The case involved a drive-by shooting in Cleveland. The court concluded that the two firearm specifications at issue prohibited different activities and required different proof. *State v. Phillips*, 2012-Ohio-473, ¶ 38 (8th Dist.). For these reasons, sentences for both specifications could be imposed.

{¶68} In *State v. Hill*, the Fifth District was presented with this same argument. The case involved a drive-by shooting of a sheriff's deputy. The local police and the county sheriff's department were investigating a major marijuana growing operation in Canton. Appellant shot at a sheriff deputy's van after the marijuana operation had been discovered. Appellant was charged with felonious assault, and the firearm specifications in R.C. 2941.145 and R.C. 2941.146 were attached to the charge. The Fifth District held

that the trial court was required to impose enhanced penalties for both of the gun specifications under R.C. 2929.14(B)(1)(c). *State v. Hill*, 2018-Ohio-3901, ¶ 43 (5th Dist.).

{¶69} *Hill* cited *State v. Bates*, 2004-Ohio-4224 (10th Dist.) in support, as does Appellee. Bates was convicted of murder along with the same two firearm specifications at issue in this appeal. In *Bates*, the defendant was sitting in his car when he shot the victim, who was standing outside the car. *Bates* also relied on R.C. 2929.14(E)(1)(a) to conclude that the state legislature intended the sentencing enhancements in R.C. 2941.145 and R.C. 2941.146 to be mandatory and to be served consecutively. *Id.* at ¶ 9.

{¶70} Appellee also cites *State v. Howard*, 2020-Ohio-3819 (2d Dist.) in support. *Howard* involved a shootout between two moving vehicles. The shooting occurred in a dispute about whether the victim broke into an apartment. Howard killed one person and severely injured another who was in the other vehicle. Howard was convicted of murder and felonious assault, along with multiple firearm specifications, but the court merged most of the specifications. The state appealed, and the Second District held that: "Because Howard was found guilty of firearm specifications under both R.C. 2941.145 and 2941.146 for the same murder offense, the trial court was required to impose both a three-year and a five-year prison term for the two specifications to that offense." *Id.* at ¶ 97.

{¶71} Generally, the only reason why multiple gun specifications would not result in multiple punishments is if the statutes providing for the specifications do not allow multiple punishments to be imposed.

{¶72} Every appellate court that has reviewed this issue has concluded that a gun specification for brandishing a weapon during a crime does not merge with a drive-by gun specification. Appellant's third assignment of error is overruled.

Conclusion

{¶73} Appellant appeals his conviction and sentence for murder on three grounds. First, he argues that the trial court erroneously prohibited him from testifying about an encounter between himself and the victim that happened months before the murder. He sought to present other acts evidence to support his claim that he was in a fearful state of mind at the time of the murder, to bolster his defense of self-defense. The trial court did allow similar evidence to be admitted of an event that occurred an hour before the murder. The trial court acted within its discretion to refuse admission of a second, duplicative, example of other acts evidence, particularly since it occurred long before the murder. Second, Appellant argues that the conviction was against the manifest weight of the evidence because he believes his evidence of self-defense was unrebutted. Appellant's evidence, however, was rebutted, particularly since the jury clearly found his testimony to be incredible. In addition, his defense failed because he was at fault in creating the confrontation and because he used deadly force when it was not warranted. Third, Appellant argues that the court improperly sentenced him for two gun specifications, constituting a Double Jeopardy violation. Since gun specifications are sentencing enhancements and are not part of the offense, the trial court properly sentenced Appellant to both a three-year gun specification as well as a five-year drive-by specification. Appellant's three assignments of error are overruled, and the judgment of the trial court is affirmed.

Hanni, J. concurs.

Dickey, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.