[Cite as *State v. Bender-Adams*, 2024-Ohio-4897.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 113366
v.	:	
SIRTRUCE BENDER-ADAMS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 10, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-22-673864-B

Appearances:

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

Edward M. Heindel, *for appellant*.

EILEEN A. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Sirtruce Bender-Adams, appeals his convictions for aggravated murder and having weapons while under disability. For the reasons that follow, we affirm.

I. Factual Background and Procedural History

{¶ 2} On August 30, 2022, a Cuyahoga County Grand Jury returned a 14-count indictment charging Bender-Adams with multiple counts of aggravated murder and murder, two counts of aggravated burglary, burglary, two counts felonious assault and one count of having weapons while under disability. With the exception of the having weapons while under disability charges, all counts included one- and three-year firearm specifications.

A. Self-Representation at the Suppression Hearing

{¶ 3} On March 16, 2023, Bender-Adams filed a "demand for fundamental right for propria persona," seeking to dismiss the lawyers who had been appointed to represent him and requesting that he be permitted to represent himself and proceed pro se (as he had done previously in other, unrelated cases). At a March 23, 2023 hearing, the trial court discussed the issue with Bender-Adams and the following exchange occurred:

> THE COURT: Mr. Bender, before — you've already been through the process, you know it is a process to represent yourself?
>
> THE DEFENDANT: Yes.
>
> THE COURT: It's a little bit different, it's an aggravated murder.
>
> THE DEFENDANT: Correct.
>
> THE COURT: So I want to make sure that — first of all, let me ask you, is that what you would like to do in this case? I know that you're representing yourself in the other cases, do you want to represent yourself in the aggravated murder case?
>
> THE DEFENDANT: Clearly I would like to represent myself pro se in the murder case.

. . .

> THE COURT: You don't have a choice of counsel, particularly when you're representing yourself, standby counsel is standby counsel, they cannot help you. They cannot help you in any way, shape or form.
>
> THE DEFENDANT: That would be hybrid representation.

{¶ 4} Bender-Adams was referred to the court psychiatric clinic for an evaluation as to his competency to proceed pro se. In its April 27, 2023 report, the clinicians found him to be competent to proceed pro se and the parties stipulated to that report. The trial court then engaged in a colloquy with Bender-Adams, explaining the risks of self-representation and ensuring that Bender-Adams understood those risks in waiving his right to counsel. As part of that colloquy, the trial court explained the role of standby counsel as follows:

> The purpose of standby counsel is to aid you if and when you request help and to be available to represent you in the event that termination of your self-representation is necessary or if you were unable to act on your own behalf or you were no longer able to represent yourself.
>
> Standby counsel will not be able to act as what we call hybrid counsel or co-counsel, meaning that they cannot take some of the work and you do some of the work and you do some of the questioning and they do some of the questioning. That is not permitted.
>
> Do you understand?
>
> THE DEFENDANT: Correct, Your Honor.
>
> THE COURT: So during the middle of trial you can't lean over to them and ask them for advice because they can't give you advice. They're specifically here only to step in, in the event that, again, for whatever reason you are unable to represent yourself.
>
> Do you understand that?

THE DEFENDANT: Right, Your Honor.

. . .

THE COURT: . . . There are many perils to proceeding pro se. The exposure to a lengthy prison sentence in proceeding pro se is great. There are many dangers inherent in self-representation. You'll be re[qu]ired to fully comply, follow all applicable legal requirements. You'll be required to follow all the rules of evidence and procedure just as any attorney would be required to do.

Do you understand that?

THE DEFENDANT: Correct, Your Honor.

THE COURT: You will not have an attorney to help you comply with those rules of evidence, procedure, or any other requirement in the courtroom.

Do you understand that?

THE DEFENDANT: Correct, Your Honor.

. . .

THE COURT: You can't lean over to your attorneys and they can't write down for you a better way to ask because they can't give you any advice.

Do you understand?

THE DEFENDANT: Yes, Your Honor.

{¶ 5} After Bender-Adams executed a written waiver of his right to counsel and the trial court determined that Bender-Adams had knowingly, intelligently and voluntarily waived his right to counsel in open court on the record, the trial court granted Bender-Adams' motion to represent himself and indicated that Bender-Adams would proceed pro se with standby counsel.

{¶ 6} Bender-Adams, pro se, filed two pretrial motions to suppress evidence (1) a motion to suppress evidence obtained from a black iPhone that was seized on

August 4, 2022 when Bender-Adams was arrested in connection with another, unrelated case[1] and (2) DNA evidence from a buccal sample Bender-Adams was ordered to provide pursuant to a search warrant.

{¶ 7} On June 12, 2023, the trial court held an evidentiary hearing on the motions to suppress. Bender-Adams appeared pro se, along with standby counsel, at the hearing. During the suppression hearing, when cross-examining the State's witnesses, Bender-Adams sought to consult with, or ask questions of, his standby counsel; however, the trial court precluded him from doing so:

> THE COURT: You can't ask him any questions. You cannot ask him any questions. He cannot help you.
>
> Q. Is it reasonable to state for the record your findings of probable cause for that crime scene?
>
> [THE STATE]: Objection.
>
> Q. No robbery.
>
> THE COURT: Hold on. Just let me rule on the objection, but when I say you can't ask him any questions, I mean your standby counsel, not the witness.
>
> THE DEFENDANT: No problem.
>
> THE COURT: Ask your question again.
>
> . . .
>
> THE COURT: Mr. Bender-Adams, again, I'm going to make your standby counsel sit in the back if you don't stop asking them questions. You are representing yourself. You cannot ask for advice, they cannot help you. Do you understand?

[1] The parties later stipulated that this phone belonged to Bender-Adams.

> THE DEFENDANT: I'm not asking for advice.
>
> THE COURT: I don't know what you are or not asking for. I can't hear your conversation, so, you know, you want to represent yourself, you have to represent yourself. You can't ask them for assistance. Go ahead.[2]

{¶ 8} Bender-Adams did not object to the trial court's refusal to allow him to speak with standby counsel while questioning witnesses during the suppression hearing. After hearing the evidence and the parties' arguments, the trial court denied the motions to suppress.

{¶ 9} The following day, on which trial had been scheduled to begin, Bender-Adams, after discussions with his standby counsel, reported to the court that he wanted to "withdraw being pro se" and have his standby counsel represent him at trial. The trial court granted his request, and trial was rescheduled for October 2, 2023.

{¶ 10} Prior to trial, the State filed a notice of intent to introduce "other acts" evidence to which the defense filed an opposition. It was the State's desire to introduce the evidence "that the Defendant assaulted someone and threatened the Victim at the Victim's residence a few weeks prior to the homicide."

{¶ 11} It was the State's position that these "other acts" were relevant to demonstrate that Bender-Adams had prior knowledge of the victim's residence and would, potentially, provide a possible motive for the murder. Further, it was the

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[2] There is nothing in the record to indicate what Bender-Adams said to, or inquired of, standby counsel at the suppression hearing.

State's position that the use of other acts evidence would show "Defendant's motive and identity."

{¶ 12} The State opined that the probative value of such "other acts" evidence was "not substantially outweighed by the danger of confusion of the issues or misleading the jury."

{¶ 13} A hearing was conducted on this matter and the State related facts of an incident that occurred several months prior to the murder that involved Bender-Adams and James Randolph at a location other than that of the victim's residence and that a second encounter between the two men occurred approximately one month later and yet several weeks prior to the homicide. That encounter, it was alleged by the State, took place on the victim's property and the victim instructed Bender-Adams to leave the property after Bender-Adams physically assaulted Randolph. According to the State, Bender-Adams then told the victim, "Mr. Leonard, he would quote 'f*** him up, too.'"

{¶ 14} The State suggested to the trial court that the information, for purpose of Evid.R. 404(B), was admissible to prove "[m]otive and identity, Judge. It puts the Defendant — gives him knowledge of the incident — of the house, the scene of the crime and also knowledge of the victim in this case, which he says he has no idea who he is."

{¶ 15} The trial court concluded that the State met its burden to introduce the evidence and that "it would not override the prejudicial effect . . . and the fact that the evidence goes to the motive, identification, knowledge and that the nature of the

incident is not so inflammatory that it would overwhelm the passion of the jury to create prejudice to the Defendant."

{¶ 16} In response, Bender-Adams argued that the evidence "doesn't go to either one of the reasons [the State] cited under 404(B) to introduce this evidence." With respect to motive, Bender-Adams pointed out that the dispute was allegedly between Bender-Adams and Randolph — not between Bender-Adams and Quemonte Leonard — and "had nothing to do with the victim." Defense counsel explained: "Apparently, it may have happened at [Leonard's] home and he just wanted the two combatants to leave, to break up" but it "certainly wouldn't show any motive or any animosity between the person that broke up the fight just because they are having a fight with a dispute that had nothing to do about him." With respect to identity, defense counsel argued that there was no indication that Bender-Adams would know who Leonard was "from that brief interaction as it's been described to us."

{¶ 17} The trial court determined that Randolph's testimony would be admissible under Evid.R. 404(B), concluding that the State "met its burden," that "the evidence sought to be introduced goes to . . . motive, identification [and] knowledge" and that "the nature of the incident is not so inflammatory that it would overwhelm the passion of the jury and create prejudice to the Defendant."

{¶ 18} The defense, then, requested that a voir dire of the witness, James Randolph, be conducted prior to him testifying before the jury.

B. Trial

{¶ 19} On October 2, 2023, the case proceeded to trial. Bender-Adams waived his right to a jury trial on the having weapons while under disability count. That count was tried to the bench; the remaining counts were tried to a jury. Bender-Adams' codefendant, Edward Harris, entered into a plea agreement with the State shortly before trial.

{¶ 20} Lisa Przepyszny, a forensic scientist in the Trace Evidence Department at the Cuyahoga County Regional Forensic Science Laboratory, testified that she took swabs of DNA samples from a pair of grey sweatpants that had been cut from Leonard's body at the crime scene or the hospital and were forwarded to the DNA department for testing. She testified that she also visually examined the sweatpants and noted a bullet defect and the presence of blood on the sweatpants. She stated that she then examined the clothing and performed chemical testing for the presence of gunshot residue that would help her determine a muzzle-to-target distance. Przepyszny testified that she was unable to determine, based on her examination and testing alone, whether the bullet defect was an entrance or exit defect but that it was her understanding that the defect corresponded to an entrance wound on the victim. Przepyszny opined, to a reasonable degree of forensic certainty, that if it was an entrance defect, either the gun was "a distance" from the victim when it discharged or the bullet passed through some intervening object due to a lack of fouling or powder grains.

{¶ 21} Haleigh Shingary, a patrol officer with the Cleveland Police Department, testified that, on July 8, 2022, she and her partner, Xavier Quinones, responded to a call at a residence on Wendy Drive in Cleveland, Ohio of a "male shot." She indicated that, upon arrival at 9:23 a.m., a male was observed laying in the front yard of the home. The front door was "wide open" and officers observed a "blood trail." She reported that the male had been shot in the back four times.

{¶ 22} Emergency personnel arrived at the scene as officers were checking on the man, and they, then, attended to the man while the officers went inside the house to determine if there were additional victims or a suspect in the house. Shingary testified that the house appeared to be "ransacked," (e.g., "couches were flipped over"), and that there appeared to have been "some sort of fight, struggle" inside. Shingary stated that the officers observed spent shell casings and a blood trail in the home. The State played a portion of her body camera footage for the jury that demonstrated what she had observed.

{¶ 23} Shingary testified that officers and detectives later canvassed the neighborhood for evidence and found multiple homes on Wendy Drive that had cameras from which police obtained video surveillance footage of the area.

{¶ 24} Sergeant Michael Schroeder, a supervisor in the Violent Crimes Unit and the Detective Bureau in the Cleveland Police Department's Fourth District, assisted in the execution of an arrest warrant for Bender-Adams, a search warrant for a residence connected with him and a "ping warrant" for a phone number associated with him. He testified that, on August 4, 2022, police used the ping

warrant to obtain the real-time location of Bender-Adams' phone, tracked the phone and arrested Bender-Adams, without incident, in a vehicle on the east side of Cleveland. The State showed the jury Schroeder's body camera footage of the arrest. The phone, for which the ping warrant had been obtained, was located on the center console on the vehicle in which Bender-Adams was seated at the time of his arrest.

{¶ 25} Dr. Thomas Gilson, the Cuyahoga County Medical Examiner and Director of the Crime Laboratory, performed an autopsy on Leonard and investigated the cause and manner of his death. According to Gilson, Leonard had two gunshot wounds in his left flank towards his back. There was stippling from unburned gunpowder around the wounds, indicating that the gun was more than seven inches but less than 24 inches away from the victim when it discharged. The bullets traveled "back to front, left to right . . . in a downward direction" exiting through the front side of his abdomen. Based on his examination, Gilson concluded, to a reasonable degree of scientific certainty, that Leonard died as a result of the gunshot wounds and that the manner of death was homicide. Gilson testified that postmortem toxicology testing revealed that there was a .072 blood alcohol concentration in Leonard's system when he died but that there was no detection of any narcotics.

{¶ 26} Shawn Wohl, a detective with the Cleveland Police Department, also responded to the Wendy Drive crime scene on July 8, 2022. Wohl testified that he and other detectives canvassed the area seeking witnesses and other evidence and located four or five homes that had surveillance cameras. Detectives reviewed video

surveillance footage they received from residents and, according to Wohl, two cameras were determined to contain video footage considered to be of evidentiary value and one captured a relevant photograph.

{¶ 27} The first video presented as evidence began at 9:05 a.m. on July 8, 2022 and captured a white car pulling up to the residence where the homicide occurred. An individual, wearing grey sweatpants and a grey sweatshirt, walked out the front door of the home and entered the passenger's side of the white vehicle after which the vehicle traveled northbound on Wendy Drive. A photograph captured by a Ring camera showed the white car from the first video parked "a couple houses south" of the scene of the shooting at 8:49 a.m. on the day of the shooting. A second video captured the white car at 8:37 a.m. on the day of the shooting, "com[ing] off of East 183rd Street northbound, and then ma[king] a westbound turn onto Kares Avenue, and ma[king] a northbound turn onto Wendy Drive."

{¶ 28} Wohl testified that he could not confirm that the timestamps shown on the video footage were accurate. He acknowledged it was not possible to see into the back seat of the white vehicle in any of the video footage he obtained.

{¶ 29} Jeffrey O'Block, testified that he is employed as a scientist in the DNA Unit of the Cuyahoga County Regional Forensic Science Laboratory and performed DNA analysis in the case. The parties stipulated that O'Block was an expert in the field of forensic science. O'Block testified that a buccal swab was collected from Bender-Adams and submitted for comparison with various items of evidence collected in the case. He stated that a swab taken from the steering wheel, gearshift

and the driver's interior door handle of a Toyota vehicle revealed a mixture of DNA. He stated a female contributed 75 percent of the DNA in the sample with three unknown persons contributing less than ten percent each. He indicated that there was no statistical support for a match to either Harris or Bender-Adams in that sample. He testified that a swab taken from the interior passenger's side door handle revealed the presence of human DNA, a mixture most likely from five contributors. The sample was inconclusive when compared with Bender-Adams' DNA. He indicated that no human DNA was detected on swabs taken from a license plate or fired cartridge casings submitted for analysis.

{¶ 30} Police also submitted a portion of a blue latex glove, i.e., "one blue finger of a rubber glove," that had been recovered at the scene of the homicide, to the laboratory for analysis. O'Block testified that he swabbed the inside and outside of the finger of the glove and that human DNA was found on the glove, likely a mixture of DNA from three contributors. He indicated that there was statistical support for a DNA match to Leonard and Harris on the glove but no statistical support for Bender-Adams being the third contributor. O'Block stated that he would normally expect the wearer of a latex glove to leave DNA inside the glove, as the gloves are tight-fitting and "very easy to sweat in."

{¶ 31} O'Block also testified that a swab taken from inside of a pair of boots located in Bender-Adams' residence contained a mixture of DNA from three contributors. There was strong match support for Bender-Adams's DNA on that

swab; the other two contributors were unknown. O'Block indicated that no foreign DNA was found from swabs of Leonard's fingernails.

{¶ 32} Thomas Lascko, a detective with the Cleveland Police Department's Crime Scene and Records Unit, responded to the scene of the shooting on Wendy Drive, photographed the scene (both the interior and exterior of the residence) and, along with another detective, collected potential evidence, including swabs of suspected blood and suspected touch DNA, fired cartridge casings, ammunition, a fired bullet with suspected blood, a black and silver Magnum Research MR9 Eagle 9 mm pistol (later determined to be registered to Leonard) found on the passenger's side floorboard of Leonard's Toyota Prius that was parked in his driveway and a finger from a blue rubber glove. According to Detective Lascko, although the living room appeared to be in "a bit of disarray" and bedroom dresser drawers were opened, police did not find any signs of forced entry into the victim's residence.

{¶ 33} Harris testified that he is 31 years old and has known Bender-Adams (a.k.a. "Truce") since 2010 and that they were "close friends." Harris made an in-court identification of Bender-Adams.

{¶ 34} Harris testified that, on July 8, 2022, he went to Bender-Adams' house at approximately 7:00 a.m. to "front him some weed," i.e., Harris gave Bender-Adams the weed "on consignment like without the money up front." Harris was driving a white Toyota Camry that belonged to a female friend, QuiShonti Trent, with whom he was involved. Harris testified that Bender-Adams asked him to take him "around the corner" to meet someone else who "wanted to check out some

weed." It was Harris' understanding that the person would buy the weed and then send Harris "some money" through a mobile cash-exchanging application. Harris drove Bender-Adams to a nearby residence as Bender-Adams directed.

{¶ 35} Harris testified that Trent was working as a state-tested nurse aide and kept blue latex gloves in her car. Bender-Adams requested a pair of gloves, and Harris gave him a pair of gloves from the car. Harris stated that he did not think this was "weird" because "like people be dealing with drugs sometimes they have stuff on their hands." Harris testified that Bender-Adams had the weed in his hands as he walked up to the house but Harris did not see Bender-Adams in possession of a firearm.

{¶ 36} Harris testified that the person to whom Bender-Adams was "showing the weed" allowed Bender-Adams entry into the house. While Bender-Adams was inside the house, Harris heard two gunshots. Harris stated that Bender-Adams came out of the house, told Harris that "they had gotten into a physical altercation" and that "he feel like he did what he had to do." Harris did not ask any questions and the two men did not discuss the matter further. Harris indicated that Bender-Adams was still in possession of the weed when he returned to the car.

{¶ 37} That same day, Harris received a $1000 Cash App transaction from Leonard. He testified that Bender-Adams asked him, "Did you get that Cash App?" Harris stated that, at the time, he did not know Leonard's name but deduced the funds were from Leonard "[b]ecause that's the only place we went to, so that's how I knew."

{¶ 38} After Bender-Adams returned to the car, Harris drove to Bender-Adams' house. When they arrived at Bender-Adams' house, Harris went into the house to relieve himself and, upon exiting the home, Bender-Adams stated, "I got to put the plate on the car." Harris testified that the vehicle had only a rear license plate and that he had not noticed earlier that that the license plate had been removed. Harris stated that he believed that Bender-Adams must have removed the license plate while Harris was urinating near Bender-Adams' garage earlier in the day when he picked up Bender-Adams. Harris then drove home.

{¶ 39} Harris identified photographs of Leonard's house as the residence to which he drove Bender-Adams and into which Bender-Adams entered on the morning of July 8, 2022. Harris also identified the white vehicle captured in surveillance footage as Trent's vehicle, i.e., the Toyota Camry he was driving that day. He identified himself as the driver of the vehicle, wearing a "plain white t-shirt," as seen in a still image from surveillance footage and he identified Bender-Adams as the person seen walking in front of Leonard's home in surveillance footage.

{¶ 40} Harris testified that he was originally charged as a codefendant in the case and pled guilty to involuntary manslaughter and complicity in aggravated burglary as part of a plea agreement pursuant to which the State agreed to recommend a prison sentence of no more than eight years, when he originally faced "a significantly higher sentence." The plea agreement was reached a few days before trial was scheduled to begin. Harris testified that he had also pled guilty to aggravated robbery and carrying concealed weapons in 2013.

{¶ 41} Under cross-examination Harris admitted that in a statement he gave to a prosecutor approximately five days earlier, he had "talked about seeing a gun." However, he stated that, at the time of trial, he did not "remember" seeing Bender-Adams with a firearm on the day of the shooting.

{¶ 42} Randolph was the next witness scheduled to testify. Prior to his testimony, Bender-Adams renewed his objection to Randolph's testimony relating to Bender-Adams' dispute with Randolph, once again arguing that the testimony was improper "other acts" evidence prohibited under Evid.R. 404(B). The parties conducted a voir dire of Randolph outside the presence of the jury in relation to the Rule 404(B) evidence.

{¶ 43} During his voir dire, Randolph testified that he had known Leonard for more than 20 years before Leonard was killed, that Leonard (whom he called "Que") was his "best friend" and that he was acquainted with Bender-Adams.

{¶ 44} According to Randolph, Bender-Adams came to his home at the invitation of Randolph's brother to assist Randolph with a move. Randolph testified that he found Bender-Adams in his garage looking at his lawn mower and Bender-Adams asked Randolph about the machine. Randolph knew Bender-Adams was in the landscaping business. He testified that Bender-Adams left the property without providing any assistance with the move. Randolph indicated that he left the property at 9:00 p.m. and when he returned the next morning at 8:30 a.m., the lawn mower was gone. Randolph testified that he than called Bender-Adams and asked

him, “What happened to the lawn mower? What’s going on?” In response, Bender-Adams stated, “I didn’t do anything. I didn’t steal it.”

{¶ 45} Approximately one month after that conversation, Randolph was a passenger in Que’s automobile and they encountered Bender-Adams driving a dirt bike on Que’s street. Que had entered his home and Bender-Adams approached Randolph at which point “we got into an argument in front of the house for like five minutes and after the argument, (which included reciprocal pushing), I walk away. I am about to go in the house and as I’m walking away he punched me in the back of the head. Then Que came out, and broke it up, and he (Bender-Adams) left.” He also testified that Que was saying “he was going to f*** him up if he get in-between this, me and him I guess, I don’t know.”

{¶ 46} After the voir dire of James Randolph concluded, the defense renewed their objection to the purported 404(B) evidence. The trial court denied the motion and the trial continued.

{¶ 47} Randolph then testified before the jury. His testimony was consistent to that which he testified to in voir dire but for his description of that which occurred in the front yard of the victim’s home between himself and Bender-Adams. In that testimony Randolph stated, “He was basically just screaming and hollering saying ‘I will f*** you up.’ Things like that.” Under cross-examination, with respect to the words of Bender-Adams, Randolph was asked, “Yelling in the direction that you were, right?” To that question Randolph responded, “Well, me and Que was right there, so, yeah.”

{¶ 48} James Kooser testified that he is employed at the Cuyahoga County Forensic Science Laboratory as a firearm and tool mark examiner. Without objection, Kooser was qualified as an expert witness in the area of firearm and tool mark examination. Kooser examined multiple 9 mm handguns that were submitted to him for analysis as well as multiple 9 mm cartridge casings and he test fired the multiple 9 mm handguns. It was Kooser's conclusion, to a reasonable degree of scientific certainty, that none of the cartridge casings were fired from any of the handguns submitted to him for analysis.

{¶ 49} Michael Asbury testified that he is currently employed by the City of Rocky River but works collaboratively with "regional partners" due to his extensive training and certification. He was qualified, without objection, as an expert in the field of criminal investigation using cellular technology. After a lengthy discussion of cell phone technology, Asbury was able to state that the cellular phone associated with Bender-Adams was in the area of 3977 Wendy Drive on July 8, 2022 at 8:42 a.m. and that if left the area at approximately 9:05 a.m.

{¶ 50} Timothy Cramer, a detective in the Cleveland Police Department's Homicide Unit, was the lead detective assigned to investigate Leonard's homicide. Cramer testified that he was off-duty and called in to respond to the scene on Wendy Drive on July 8, 2022. Upon his arrival, he first spoke to detectives who were already there, then "[took] over the scene." He then immediately began canvassing the neighborhood for surveillance video.

{¶ 51} Cramer explained the methodology police employed to identify a vehicle in the area of 3977 Wendy Drive between 8:38 a.m. and 9:05 a.m. that included examining the Ring camera videos obtained from the area, the use of realtime crime street camera through which distinguishing characteristics of the vehicle at issue, the license plate number (which in some of the video was not present on the vehicle), and Vigilant, a system that is used by the auto recovery business to locate vehicles for purpose of repossession. Through Vigilant, detectives were able to ascertain the address near which the vehicle was located. The owner of the vehicle was identified as the person to whom the license plates were registered.

{¶ 52} On cross-examination, Cramer acknowledged that during his investigation, he had also discovered that Leonard had received a threatening text message from someone who was unhappy about a car he or she had purchased but that he did not try to ascertain the identity of that individual. Cramer also acknowledged that a comment had been posted on the Cleveland Remembrance page relating to Leonard's death, stating, "Karma. . . . [S]hot my pregnant daughter car up while she was driving. After he shot her fiancé. Yeah, it's real. Live by the sword, definitely die by it."

{¶ 53} On July 13, 2022, detectives traveled to the site where the automobile was located and spoke with the owner. The owner related to the detectives that codefendant, Edward Harris, was driving her automobile on July 8, 2022. The vehicle was towed for processing and, on July 28, 2022, Harris was arrested.

Ultimately, Bender-Adams was arrested and charged with the homicide of Quemonte Leonard and attendant offenses.

{¶ 54} According to Detective Cramer, he interviewed Bender-Adams and during that interview showed to him two photographs — one of the victim and one of Edward Harris. The testimony with respect to that fact was of great contention between the parties, outside the hearing of the jury. Bender-Adams made no verbal response when asked if he recognized Harris or the victim but did have a nonverbal reaction that the defense suggested was meant to indicate that he did not want to answer any questions. Ultimately, Cramer was permitted to answer questions only as to Bender-Adams reaction to the photograph of Harris.

{¶ 55} The jury acquitted Bender-Adams of one count of aggravated murder. It found him guilty on the remaining counts, as well as the firearm specifications attached to those counts. The court found Bender-Adams guilty of having weapons while under disability.

{¶ 56} On October 23, 2023, the trial court sentenced Bender-Adams. The parties agreed that all counts merged for sentencing except the aggravated murder and having weapons while under disability counts, that all one-year firearm specifications merged into the three-year firearm specifications and that the sentences on at least two of the three-year firearm specifications must run consecutively pursuant to R.C. 2929.14(B)(1)(f)-(g). The trial court sentenced Bender-Adams to an aggregate prison sentence of life without the possibility of parole plus nine years, i.e., three years each on the three-year firearm specifications

in Counts 2 and 4, to be served consecutively to one another and prior to and consecutive to life imprisonment without the possibility of parole on Count 2 (aggravated murder), and 36 months on Count 14 (having weapons while under disability), to be served consecutively.

{¶ 57} Bender-Adams appealed, initially raising the first five assignments of error for review and, later, raising the sixth assignment of error in a supplemental appellate brief he was granted to leave to file:

> Assignment of Error 1: The trial court erred when it admitted other acts evidence regarding Bender-Adams stealing a lawnmower and assaulting another person.
>
> Assignment of Error 2: The trial court erred when it did not permit defense counsel to fully cross-examine Edward Harris about the benefits he received from his plea bargain.
>
> Assignment of Error 3: The trial court inhibited Bender-Adams from exercising his right to self-representation when it would not allow him to ask standby counsel for advice during the suppression hearing.
>
> Assignment of Error 4: The convictions were not supported by sufficient evidence.
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> Assignment of Error 5: The convictions were against the manifest weight of the evidence.
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> Assignment of Error 6: Bender-Adams was denied his right to the effective assistance of counsel as guaranteed to him by the United States and Ohio constitutions.

For ease of discussion, we address Bender-Adams' assignments of error out of order and together where appropriate.

II. Law and Analysis

A. Suppression Hearing

{¶ 58} We address Bender-Adams' third assignment of error first. In his third assignment of error, Bender-Adams contends that the trial court "inhibited Bender-Adams from exercising his right to self-representation" when it "would not allow him to ask standby counsel for advice during the suppression hearing."

{¶ 59} As detailed above, the trial court did not permit Bender-Adams to consult with, or ask questions of, standby counsel during the suppression hearing. Bender-Adams contends that by "completely prohibit[ing]" Bender-Adams "from seeking any assistance while on the record" and "insinuat[ing] that they were merely there to watch and replace him if Bender-Adams no longer wanted to continue pro se," the trial court "went too far" and "violated his basic right to represent himself."

{¶ 60} A criminal defendant has a constitutional right to self-representation. *State v. Hackett*, 2020-Ohio-6699, ¶ 9, citing *Faretta v. California*, 422 U.S. 806, 819 (1975) ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."). "'The right to appear pro se exists to affirm the dignity and autonomy of the accused.'" *State v. McAlpin*, 2022-Ohio-1567, ¶ 63, quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176-177 (1984). A timely request to waive a right to counsel and self-represent "must be granted 'when [a defendant] voluntarily, and knowingly and intelligently elects to do so.'" *McAplin* at ¶ 47, quoting *State v. Gibson*, 45 Ohio St.2d 366 (1976), paragraph one of the syllabus.

{¶ 61} Where a criminal defendant elects to proceeds pro se and validly waives the right to counsel, a trial court may "'appoint standby counsel to assist the otherwise pro se defendant.'" *Hackett* at ¶ 9, quoting *State v. Martin*, 2004-Ohio-5471, ¶ 28; *see also Faretta* at 834, fn. 46 (where a defendant chooses to represent himself, the trial court may "appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary"). When a court appoints standby counsel, there are limits on how actively standby counsel can be involved while assisting a self-represented defendant. *McAlpin* at ¶ 63-64; *Hackett* at ¶ 10.

{¶ 62} A criminal defendant who chooses to represent himself or herself, however, has no Sixth Amendment right to any assistance from standby counsel. *Hackett* at ¶ 8. "The Sixth Amendment guarantees a defendant the right 'to have the Assistance of Counsel for his defense.' A defendant who chooses to represent himself must explicitly waive this right." *Id.* at ¶ 12, citing *State v. Schleiger*, 2014-Ohio-3970, ¶ 18. Because there is no Sixth Amendment right to any assistance from standby counsel, "limiting the role of standby counsel, in and of itself, cannot violate the Sixth Amendment." *Hackett* at ¶ 8, 15 ("Given that there is no Sixth Amendment right to standby counsel, it is hard to see how a court could violate the Sixth Amendment by appointing standby counsel but limiting counsel's role. Without a constitutional right to standby counsel at all, there is no constitutional entitlement that could ground a claim that standby counsel provide a certain level of

assistance."); *see also Cleveland v. McCoy*, 2023-Ohio-3792, ¶ 33 (8th Dist.) ("It is well established that a criminal defendant has the right to counsel or the right to act pro se; however, a defendant does not have the right to both, simultaneously, or hybrid representation.").

{¶ 63} Bender-Adams does not explain precisely how the trial court's limitation of standby counsel's role allegedly "inhibited [him] from exercising his right to self-representation" and cites no legal authority supporting his claim that the trial court violated his right to self-representation when it limited the role of standby counsel. Prior to waiving his right to counsel, the trial court made it clear to Bender-Adams that if he were to proceed pro se, he could not "lean over to [standby counsel] and ask them for advice" when questioning witnesses "because they can't give you advice." Bender-Adams raised no objection to this and indicated that he understood. Likewise, Bender-Adams did not object when the trial court told him that "when you're representing yourself, standby counsel is standby counsel, they cannot help you . . . in any way, shape or form." Once again, he indicated that he understood. Accordingly, we review his claim for plain error.

{¶ 64} To establish plain error, Bender-Adams must show that an error occurred, that the error was obvious, and that there is "a reasonable probability that the error resulted in prejudice," i.e., that the error affected the outcome of the trial. (Emphasis deleted.) *McAlpin*, 2022-Ohio-1567, at ¶ 66, citing *State v. Rogers*, 2015-Ohio-2459, ¶ 22. Plain-error review is reserved for "'exceptional circumstances'" and "'only to prevent a manifest miscarriage of justice.'" *State v.*

Barnes, 94 Ohio St.3d 21, 27 (2002), quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. No such showing has been made here. Bender-Adams does not even make a plain-error argument.

{¶ 65} Even if the trial court had unduly limited the role of standby counsel during the suppression hearing, Bender-Adams has made no showing that he was prejudiced as a result, i.e., that there is a "reasonable probability" any such error affected the outcome of the trial. On appeal, Bender-Adams does not challenge the trial court's denial of his motions to suppress. Indeed, in his appellate brief, Bender-Adams acknowledges that (1) there were "valid warrants" for both his phone and contents, (2) given Bender-Adams' denial (at that time) that he owned the phone at issue, Bender-Adams would have had "no privacy interest in it" and (3) when the phone was "found in Bender-Adams[']s possession," there was an "outstanding warrant for his arrest in an unrelated case."[3] Accordingly, we overrule Bender-Adams' third assignment of error.

B. Other-Acts Evidence

{¶ 66} In his first assignment of error, Bender-Adams contends that the trial court erred when it admitted Randolph's testimony that Bender-Adams allegedly stole a lawnmower from him and then later assaulted Randolph (punching him in the head) "over the dispute" before Leonard "inserted himself and broke up the fight." Bender-Adams contends that the trial court's admission of Randolph's

[3] Bender-Adams does not mention his motion to suppress DNA evidence in his argument in his appellate brief. Accordingly, we do not address it further here.

testimony violated Evid.R. 404(B)(1), constituting the improper use of "other acts" evidence "to show propensity."

{¶ 67} Pursuant to Evid.R. 404(B)(1), "[e]vidence of any other crime, wrong or act is not admissible to prove the person's character in order to show that on a particular occasion the person acted in accordance with the character." However, evidence of other crimes, wrongs, or acts may be admissible "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Evid.R. 404(B)(2).

{¶ 68} "The key is that the evidence must prove something other than the defendant's disposition to commit certain acts. Thus, while evidence showing the defendant's character or propensity to commit crimes or acts is forbidden, evidence of other acts is admissible when the evidence is probative of a separate, nonpropensity-based issue." *State v. Hartman*, 2020-Ohio-4440, ¶ 22.

{¶ 69} For other-acts evidence to be admissible: (1) the other-acts evidence must be relevant under Evid.R. 401; (2) the other-acts evidence must be introduced for a purpose other than proving propensity, such as one or more of the permitted purposes set forth in Evid.R. 404(B)(2) and (3) the probative value of the other-acts evidence must not be substantially outweighed by the risk of unfair prejudice, confusion of the issues or misleading the jury under Evid.R. 403(A) (the "*Williams* test"). *State v. Knuff*, 2024-Ohio-902, ¶ 116, citing *State v. Williams*, 2012-Ohio-5695, ¶ 19-20; *Hartman* at ¶ 24-33. The admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law. *Hartman* at ¶ 22. Courts are

precluded from admitting improper character evidence under Evid.R. 404(B) but have discretion to admit other-acts evidence that is admissible for a permissible purpose. *Id.*, citing *Williams* at ¶ 17; *State v. Miller*, 2023-Ohio-1141, ¶ 89 (8th Dist.).

{¶ 70} Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. In the Evid.R. 404(B) context, however, "the inquiry is not whether the other-acts evidence is relevant to the ultimate determination of guilt." *Hartman* at ¶ 26. The proffered evidence must relevant to a legitimate nonpropensity purpose and the nonpropensity purpose for which the evidence is offered "must go to a 'material' issue that is actually in dispute between the parties." *Id.* at ¶ 26-27; *see also State v. Smith*, 2020-Ohio-4441, ¶ 37 ("[T]he relevance examination asks whether the proffered evidence is relevant to the particular purpose for which it is offered, as well as whether it is relevant to an issue that is actually in dispute.").

{¶ 71} Bender-Adams argues that Randolph's testimony should have been excluded because "[t]he incident regarding the theft [of the] lawnmower was just an uncorroborated allegation" that had "nothing to do with the alleged murder" and "was not a similar act to shooting someone." He further argues that the State introduced the testimony as proof of "a propensity to commit violence," that the testimony was "high prejudicial" and that it "improperly made Bender-Adams appear to be a thief and to have a short temper."

{¶ 72} The State responds that the trial court properly admitted Randolph's testimony under Evid.R. 404(B)(2) because it had "significant probative value," it "established that Bender-Adams knew where Leonard lived and that he had made threats against him prior to his death" and the probative value was not substantially outweighed by the danger of unfair prejudice, danger of confusion, or misleading the jury because "[t]here is no indication that the jury would confuse the incident involving Randolph and the incident in which Leonard was subsequently killed." We disagree.

{¶ 73} Based upon the State's representations that his testimony would establish motive and rebut Bender-Adams' alleged claim, during a police interview, that he did not know Leonard, the trial court allowed Randolph's testimony to be presented to the jury under Evid.R. 404(B)(2). However, the State's representations did not come to fruition when witnesses testified before the jury. The evidence the State presented to the jury at trial did not ultimately support its theory of admissibility for this "other acts" evidence under Evid.R. 404(B)(2).

{¶ 74} First, no evidence was presented to the jury that Bender-Adams denied knowing Leonard during his police interview. During his trial testimony, Cramer initially testified that, when he interviewed Bender-Adams, he showed Bender-Adams two photographs — one of Harris and one of Leonard. He further testified that when he showed the photographs to Bender-Adams, Bender-Adams responded as follows:

> Q. When you showed those photographs to Mr. Bender, what was his physical reaction?
>
> A. Initially there was sort of just staring at the photos, and just sort of a long sort of pause of activity, and just looking, and he sort of just ended in a nod indicating "No, I don't know these two individuals."
>
> Q. That was the response? That response you said to those photographs was what? I'm sorry.
>
> A. The response was an — I believe I said a head nod, shaking "no" in response to my question, "Do you know these individuals?"

{¶ 75} However, after reviewing the video of the interview, Cramer modified his testimony and acknowledged that Bender-Adams did not, in fact, respond to Cramer's question as it related to the photo of Leonard. Cramer clarified his testimony before the jury:

> THE COURT: Now that you have had an opportunity to review everything, did you only show [Bender-Adams] just the picture of Mr. Harris?
>
> THE WITNESS [Cramer]: Yes.
>
> THE COURT: So your prior testimony regarding his reaction to showing him the picture of Mr. Harris, that applies to Mr. Harris, is that correct?
>
> THE WITNESS: Yes.

The trial court then instructed the jury:

> THE COURT: So there was the picture of just Mr. Harris only that was shown. His testimony relating to the Defendant's reaction and response is related to Mr. Harris.
>
> Any answer that related to Mr. Leonard, you should erase from your mind. Same thing. Take that scalpel. Erase it from your mind. You are to disregard it because it was only Mr. Harris that was shown.
>
> Is that understood?

JURORS: Yes.

Accordingly, the State did not establish that there was a dispute as to whether Bender-Adams knew Leonard or knew where he lived.

{¶ 76} Likewise, Randolph's testimony did not establish a motive on the part of Bender-Adams to kill Leonard. Randolph told the jury that Bender-Adams' prior interaction with Leonard occurred more than a month before Leonard was shot, i.e., "[s]omewhere around" "the end of May, maybe the beginning of June" 2022. It was Randolph, not Leonard, who had been arguing with Bender-Adams. According to Randolph, Leonard was inside his house taking a shower when the argument between Randolph and Bender-Adams began. Although the State claimed that Bender-Adams had "threatened" Leonard after Leonard came out of the house and told Bender-Adams to leave, the testimony the State elicited from Randolph during voir dire was not the same as his testimony before the jury. Randolph told the jury, with regard to alleged "threats" made by Bender-Adams, that Bender-Adams was not specific as to whom his words were directed. Randolph testified that Bender-Adams was "basically just screaming and hollering, saying 'I will f*** you up.' Things like that," "[n]ot to anyone in particular," but "yelling towards" him and Leonard.

{¶ 77} Following a thorough review of the record, we find that the State did not establish the admissibility of Randolph's "other acts" testimony under Evid.R. 404(B)(2). Randolph's testimony regarding his dispute with Bender-Adams and prior interaction with Leonard did not satisfy the *Williams* test. It was not shown

to be relevant to a legitimate nonpropensity purpose, "go[ing] to a 'material' issue that is actually in dispute between the parties," *Hartman*, 2020-Ohio-4440, at ¶ 26-27, and was, therefore, improperly admitted by the trial court.

{¶ 78} Nevertheless, we find that the trial court's error in admitting this testimony was harmless. Crim.R. 52(A) provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." *See also* R.C. 2945.83(C) ("No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of . . . [t]he admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby."); *State v. Morris*, 2014-Ohio-5052, ¶ 24 ("Not every error requires that a conviction be vacated or a new trial granted."). Under the harmless error standard of review, the State bears the burden of demonstrating that the error did not affect the defendant's substantial rights. *State v. Graham*, 2020-Ohio-6700, ¶ 55; *State v. Perry*, 2004-Ohio-297, ¶ 15.

{¶ 79} To determine whether an alleged error in the admission of evidence affected the substantial rights of the defendant and requires a new trial, the reviewing court must ascertain (1) whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict, (2) whether the error was not harmless beyond a reasonable doubt, and (3) whether, after the prejudicial evidence is excised, the remaining evidence establishes the defendant's guilt beyond a reasonable doubt. *State v. Harris*, 2015-Ohio-166, ¶ 36-37, citing *State v. Morris*,

2014-Ohio-5052, ¶ 24-29, 33; *see also State v. Boaston*, 2020-Ohio-1061, ¶ 63. Error in the admission of evidence is harmless beyond a reasonable doubt when "'there is [no] reasonable possibility that the improperly admitted evidence contributed to the conviction.'" *State v. McKelton*, 2016-Ohio-5735, ¶ 192, quoting *Schneble v. Florida*, 405 U.S. 427, 432 (1972).

{¶ 80} Applying this analysis here, we find that Bender-Adams was not prejudiced by the admission of Randolph's "other acts" testimony. Based on our review of the record, the testimony had no impact on the verdict and there is no reasonable possibility that the improperly admitted evidence contributed to Bender-Adams' convictions. That Bender-Adams was alleged to have stolen Randolph's lawnmower (for which no proof was provided) and may have punched Randolph once (after the two had been arguing about the issue for five-to-ten minutes and pushing each other in the chest), was not reasonably likely to have influenced the jury's decision as to whether Bender-Adams murdered Leonard (and committed the related offenses of which he was found guilty) more than a month later. Further, Bender-Adams' theory of defense was that someone other than him killed Leonard. Whether Bender-Adams "appear[ed] to be a thief and to have a short temper" would have no bearing on that issue. Excising Randolph's testimony, the remaining evidence admitted at trial, in particular Harris' testimony, coupled with and corroborated by the location data and other evidence extracted from Bender-Adams' cell phone, established Bender-Adams' guilt beyond a reasonable doubt.

{¶ 81} Accordingly, Bender-Adams first assignment of error is overruled.

C. Scope of Cross-Examination

{¶ 82} In his second assignment of error, Bender contends that the trial court erred when it did not permit defense counsel to fully cross-examine Harris regarding the benefits he received from his plea bargain. Bender-Adams asserts that he should have been permitted inform the jury — to show bias — that Harris had been "charged identically" to Bender-Adams and "faced the rest of his life in prison" when he reached his plea agreement with the State and that "[i]f he did not plead guilty, he could well have received the same sentence as Bender-Adams."

{¶ 83} The issue as to what the jury would be permitted to hear regarding Harris' original charges and the potential sentence he could have received were it not for his plea deal first arose during Bender-Adams' opening statement. During his opening statement, Bender-Adams told the jury: "Ed Harris, until this past Friday, was charged virtually identically to [Bender-Adams]; aggravated murder, murder, burglary amongst other charges." Bender-Adams then sought to inform the jury of the maximum penalty Harris had originally faced based on those charges, i.e., life without the possibility of parole, as compared with the maximum sentence Harris faced following his plea agreement.

{¶ 84} The trial court was concerned that such statements would have the result of informing the jury what sentence Bender-Adams could receive — particularly, given that defense counsel had already asserted that their charges were "virtually identical." After hearing brief arguments on the issue, the trial court prohibited defense counsel from referencing the specific maximum sentence Harris

could have received had he not entered a plea deal in his opening statement, but indicated that the issue would be researched and more fully addressed prior to Harris' trial testimony.

{¶ 85} Before Harris testified, the trial court again heard arguments, outside of the presence of the jury, as to whether Harris could be questioned regarding "the specific maximum penalties" Harris had faced before his plea agreement. The trial court asked the parties to address the issue "whether or not you could elicit information or provide information to the jury about the maximum penalty for a co-defendant where the defendant is on trial . . . and we said they are essentially the same exact charges." Bender-Adams argued that he had "a constitutional right to confront witnesses and to attack bias" that "trump[s] any rule against informing the jury of punishment," that "[t]he plea of the co-defendant does go directly to his credibility" and that "[w]ith respect to actual numbers," given the "enormous difference between the likely penalty and the penalty perceived," Bender-Adams "should be allowed to get into it" when cross-examining Harris.

{¶ 86} After hearing argument from the parties, the trial court ruled that although Bender-Adams could question Harris, in general terms, regarding the significant benefit had Harris received, in terms of a reduction of his possible sentence, by pleading guilty, Bender-Adams could not reference "the specific maximum penalties" Harris had avoided by entering into a plea agreement:

> Again, I have no problem with explaining that you can use whatever phraseology. I think the word used was maybe "substantial

difference" or there's a difference in "You got a deal here." You are absolutely allowed to explain that . . . .

However, I have never allowed a jury to know what the maximum penalty is in any case. That's why I had — that's why I don't think there was an objection. I think I stopped the statement because I didn't want that to prejudice the jury.

In my opening instructions, I always explain to the jury that no thought of punishment should ever cross their mind in their jury deliberations and that's the basis for why we don't allow the jury to know what the maximum penalties are.

. . .

[T]he default is not to inform the jury and I don't see any overriding purpose or principle to inform the jury of the maximum penalties for the Defendant in this case because they are identical charges to the co-defendant. I will absolutely allow discussion about "It's a good deal" and that type of nature of questioning. The fact that there's a recommendation by the State for a specific sentence, that he was looking at a substantially longer period of incarceration and the motive behind that, but to use the specific maximum penalties for the jury to consider I think would be inappropriate. So that's my ruling.

{¶ 87} During direct examination, Harris testified that he had pled guilty to involuntary manslaughter and complicity in aggravated burglary as part of a plea agreement and that, in exchange for his cooperation and guilty pleas, the State had agreed to recommend a prison sentence of no more than eight years. He testified that he originally faced "a significantly higher sentence" and that the plea agreement was reached a few days before trial was scheduled to begin.

{¶ 88} On cross-examination, Bender-Adams further questioned Harris regarding his plea agreement as follows:

Q. You went over on direct that . . . [y]ou negotiated a plea deal, right?

A. Yes.

Q. And that there's going to be a recommended sentence. They're going to recommend a sentence of not more than eight years —

A. Yes.

Q. — right? And actually you can get a lot less than that, can't you?

A. Yes.

Q. All right. What you were facing was enormous compared to the deal that you struck —

A. Yes.

Q. — correct? You made a great deal after you have had the advice of counsel for about a year —

A. Yes.

. . .

Q. . . . Now, you make this deal and this deal . . . is for you to come in here and testify consistent to what you said last week, correct?

A. Yes.

Q. What you told the Prosecutor, right?

A. Yes.

Q. And if you testify consistent to that, you have got this great, you know, this enormous benefit, correct?

A. I mean, I wouldn't say it's an enormous benefit, but, yes.

Q. We went over what you were facing and how little of a sentence you could get comparative, right?

A. Yes.

{¶ 89} "'[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678-679 (1986), quoting *Davis v. Alaska*,

415 U.S. 308, 316-317. The Sixth Amendment to the United States Constitution gives a defendant the right "to be confronted with the witnesses against him." *See also* Ohio Const., art I, § 10 ("In any trial, in any court, the party accused shall be allowed . . . to meet the witnesses face to face"). However, a defendant's right to cross-examination "guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (Emphasis deleted.) *State v. Lang*, 2011-Ohio-4215, ¶ 83, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Trial courts have "wide latitude" to impose "reasonable limits" on cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679.

{¶ 90} Similarly, Evid.R. 611(B) requires that trial courts to permit "[c]ross-examination . . . on all relevant matters and matters affecting credibility." *But see* Evid.R. 611(A)(A trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.").

{¶ 91} When a defendant challenges a trial court's limitation of cross-examination on appeal, "the standard of review turns on the nature of the limitation." *McKelton*, 2016-Ohio-5735, at ¶ 172. Limitations that deny a defendant

the opportunity to establish that a witness may have had a motive to lie infringe on core Sixth Amendment rights and are reviewed de novo. *Id.* If, on the other hand, the trial court allowed cross-examination "'to expose a motive to lie,' then 'it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point home to the jury.'" *Id.*, quoting *United States v. Nelson*, 39 F.3d 705, 708 (7th Cir. 1994). "Under those circumstances, the extent of cross-examination is within the sound discretion of the trial court." *McKelton* at ¶ 172.

{¶ 92} Here, as detailed above, the jury heard the details of Harris' plea agreement, including the offenses to which he had pled guilty and the recommended sentence he would receive in exchange for cooperating with the State. Additionally, the jury heard that Harris had been facing "a significantly higher sentence" before his plea agreement. Because the jury heard Harris' motive to lie, this case does not implicate Bender-Adams' "core Sixth Amendment rights," and our review is for abuse of discretion. *Id.*; *see also State v. Montgomery,* 2024-Ohio-2520, ¶ 23-24 (3d Dist.). A trial court abuses its discretion where its decision is unreasonable, arbitrary or unconscionable.

{¶ 93} Here, we find no abuse of discretion by the trial court in limiting Bender-Adams' cross-examination of Harris. A review of the record shows that Bender-Adams had a full and fair opportunity to question Harris regarding about his plea agreement and to demonstrate Harris' motivation and potential bias in testifying against Bender-Adams. Harris testified regarding the charges that he had pled guilty and defense counsel specifically asked Harris about the sentence the

State agreed to recommend as part of the plea agreement. Harris acknowledged that the amount of time he had been facing was "enormous compared to the deal that [he] struck" and that his plea agreement was a "great deal."

{¶ 94} Where, as here, a defendant faces the same charges as the witness faced, "'to inform the jury of the specific penalties available against the witnesses before and after their pleas would also inform the jury of the penalties the [defendant] faced,'" could potentially lead to the danger of unfair prejudice. *State v. Price*, 2017-Ohio-4167, ¶ 6 (9th Dist.), quoting *State v. Gresham*, 2003-Ohio-744, ¶ 12 (8th Dist.). Under such circumstances, courts have held that a trial court does not err or abuse its discretion in prohibiting testimony regarding a witness' potential penalty. *See, e.g., State v. Lundgren*, 73 Ohio St.3d 474, 487 (1995) (the trial court did not abuse its discretion where it allowed cross-examination of codefendants regarding their plea agreements, including questions about the offenses originally charged, the offenses to which each witness pled guilty, the conditions of the plea arrangements and the maximum sentences to be recommended under the plea bargains but precluded cross-examination on "speculative issues"); *Montgomery*, 2024-Ohio-2520, at ¶ 30 (3d Dist.) (where defense counsel asked witness whether he was "facing significant prison time if he did not make the plea deal," trial court did not abuse its discretion in "restricting cross-examination into the specific amount of prison time [witness] may have saved with his plea deal"); *State v. Montgomery*, 2023-Ohio-4472, ¶ 28-30 (3d Dist.) (no abuse of discretion where trial court did not allow the defense to mention that by reaching plea agreement,

witness potentially avoided a sentence of 15 years to life in prison and, instead, "limited the defense to saying that by accepting the plea offer, he 'avoided some significant and substantial prison time'"); *State v. Welninski*, 2018-Ohio-778, ¶ 54-55 ("The fact that a witness pled guilty to lesser charges and [agreed] to testify against the defendant is sufficient to demonstrate the witness' potential to misrepresent the facts"; where trial court did not prohibit defendant from eliciting testimony about the existence of a plea deal, it properly prohibited and struck defense counsel's question as to the number of years witness faced in prison); *Price* at ¶ 4-8 (no abuse of discretion where trial court did not allow defense counsel to question codefendant about the specific sentence he faced without the plea deal and codefendant acknowledged "the plea agreement provided a 'significantly reduced' potential sentence"); *State v. Reed*, 10th Dist. Franklin No. 09AP-84, 2009-Ohio-6900, ¶11 ("The trial court did not abuse its discretion by limiting trial counsel's attempt to further hammer home [witness'] motive by questioning her in greater detail about the possible penalties she faced, especially in light of the fact that appellant was charged with the same offenses.").

{¶ 95} As this court explained in *Gresham*:

> While we agree that a plea bargain may provide a motive to misrepresent the facts, and therefore is a proper subject of cross-examination, *cf.* Evid.R. 616(A), the specific extent of the benefit the plea bargain provided to the witness is not relevant to this purpose. The fact that the witnesses agreed to plead guilty to lesser charges and to testify against appellant is sufficient to demonstrate the witness' potential motive to misrepresent the facts. A comparison of the potential penalties under the plea agreement versus the original charges does not add to this demonstration.

> Furthermore, . . . the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. Evid.R. 403(A). The charges these witnesses originally faced were the same as those pending against appellant; the charges to which they plead guilty were lesser included offenses as to which the jury would likely be instructed. Thus, to inform the jury of the specific penalties available against the witnesses before and after their pleas would also inform the jury of the penalties the appellant faced. The potential that the jurors would improperly consider the available sentence in assessing appellant's guilt or innocence outweighs the minimal probative value of this specific information in assessing the witnesses' motive to misrepresent the facts.

Id. at ¶ 11-12. A similar conclusion is warranted here.

{¶ 96} Because defense counsel had an opportunity to question Harris about the terms of his plea agreement and was able to demonstrate the benefits Harris received as a result of the plea agreement and his potential bias in testifying against Bender-Adams, the trial court did not abuse its discretion by precluding defense counsel from cross-examining him about the specific potential sentence Harris might have received if he had not gotten his plea deal and was convicted of the original charges.

{¶ 97} We overrule Bender-Adams' second assignment of error.

D. Sufficiency of the Evidence and Manifest Weight of the Evidence

{¶ 98} In his fourth and fifth assignments of error, Bender-Adams contends that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. Although sufficiency and manifest weight challenges involve different standards of review, because, here, they are based on virtually the same arguments and evidence, we address them together.

{¶ 99} The relevant inquiry in a sufficiency challenge is "'whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Leonard*, 2004-Ohio-6235, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. The court examines all the evidence admitted at trial to determine whether such evidence, if believed, would convince a reasonable juror of the defendant's guilt beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 390 (1997) (Cook, J., concurring); *see also State v. Bankston*, 2009-Ohio-754, ¶ 4 (10th Dist.) (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime").

{¶ 100} A manifest weight challenge attacks the credibility of the evidence presented. "'[W]eight of the evidence involves the inclination of the greater amount of credible evidence.'" *State v. Harris*, 2021-Ohio-856, ¶ 32 (8th Dist.), quoting *Thompkins* at 387. When considering an appellant's claim that a conviction is against the manifest weight of the evidence, the appellate court functions as a "thirteenth juror" and may disagree "with the factfinder's resolution of . . . conflicting testimony." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). The appellate court examines the entire record, weighs the evidence and all reasonable inferences that may be drawn therefrom, considers the witnesses' credibility and determines 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.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). Reversal on manifest weight grounds is reserved for the "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins* at 387, quoting *Martin* at 175.

{¶ 101} The only element Bender-Adams challenges in this case is the element of identity. He contends that "[t]he police arrested the wrong person." He does not dispute that the State presented sufficient competent, credible evidence to prove the other elements of aggravated murder, murder, aggravated burglary, burglary, felonious assault and having weapons while under disability offenses of which he was convicted beyond a reasonable doubt. We, therefore, limit our review to a determination of (1) whether the evidence was sufficient to establish, beyond a reasonable doubt, that Bender-Adams was the person who committed the crimes at issue and (2) whether the factfinder's determination that Bender-Adams was the person who committed these crimes was against the manifest weight of the evidence.

{¶ 102} Bender-Adams argues that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence because (1) there was no physical evidence, such as fingerprints or DNA, linking Bender-Adams to the crimes, (2) Harris' testimony — the only identification testimony at trial — was biased and self-serving, (3) the video surveillance footage from the area "did not affirmatively spot" Bender-Adams, (4) the "firearms did not match," (5) police "never recovered the gun" and (6) Bender-Adams never confessed.

{¶ 103} There is no question that, to support a conviction, the evidence must establish beyond a reasonable doubt that defendant was the person who actually committed the crime. *State v. Williams*, 2023-Ohio-2296, ¶ 85 (8th Dist.); *State v. Brown*, 2013-Ohio-2690, ¶ 30 (8th Dist.); *State v. Collins*, 2013-Ohio-488, ¶ 19 (8th Dist.), citing *State v. Lawwill*, 2008-Ohio-3592, ¶ 11 (12th Dist.). However, physical evidence linking a defendant to a crime is not necessary to support a conviction. *See, e.g., State v. Collins*, 2019-Ohio-1239, ¶ 21 (8th Dist.); *State v. Patterson*, 2015-Ohio-873, ¶ 44 (8th Dist.); *see also State v. Glover*, 2023-Ohio-1153, ¶ 55 (1st Dist.) ("[T]he state is not required to present physical evidence to meet its burden of proof."); *State v. Flores-Santiago*, 2020-Ohio-1274, ¶ 37 (8th Dist.) ("Physical evidence is not required to sustain a conviction against a manifest weight challenge.").

{¶ 104} Specifically, the lack of DNA or fingerprint evidence connecting Bender-Adams to the July 8, 2022 shooting does not preclude a determination that his convictions were supported by sufficient evidence. DNA or fingerprint evidence is not required to sustain a conviction. *See, e.g., State v. Nicholson*, 2022-Ohio-2037, ¶ 153 (8th Dist.); *State v. Wells*, 2013-Ohio-3722, ¶ 131 (8th Dist.) (fact that defendant's DNA was not found at the crime scene was "not fatal to the state's case" because "the state was not required to provide DNA or fingerprint evidence linking [defendant] to the crime"); *State v. English*, 2020-Ohio-4682, ¶ 29 (1st Dist.) (the State was not required to present DNA evidence connecting defendant to the crime or to recover the murder weapon from him to meet its burden of proof). Nor does

the lack of video footage "affirmatively" capturing Bender-Adams, the lack of a confession by Bender-Adams or the failure on the part of police to recover the firearm that killed Leonard preclude a determination that Bender-Adams' convictions were supported by sufficient evidence.

{¶ 105} A conviction may rest solely on the testimony of a single witness, if believed, and there is no requirement that a witness' testimony be corroborated to be believed. *See, e.g., Nicholson* at ¶ 180; *State v. Jones*, 2020-Ohio-3367, ¶ 71 (8th Dist.); *Flores-Santiago* at ¶ 38.

{¶ 106} As detailed above, Harris testified that on July 8, 2022, he picked up Bender-Adams from his house and drove him "around the corner" to Leonard's house to meet someone who "wanted to check out some weed." Harris testified that, at Bender-Adams' request, he gave Bender-Adams some blue latex gloves and Bender-Adams went inside Leonard's house. Harris stated he heard two gunshots while Bender-Adams was inside the house and that when Bender-Adams came back out, he told Harris that he and the person inside "had gotten into a physical altercation, and he feel like he did what he had to do."

{¶ 107} Harris' unrebutted testimony, leading to the inference that Bender-Adams was the person who shot and killed Leonard, was corroborated, in part, by video surveillance footage that captured the movements of the white Toyota Camry as described by Harris. It was also supported or corroborated, in part, by location data extracted from Bender-Adams' cell phone that placed the cell phone near the scene of the crime at the time Leonard was killed, by Instagram messages in which

Bender-Adams discusses "Que" a few hours after Leonard was killed, by evidence that Bender-Adams had saved a screenshot from the Cleveland Remembrance Instagram page that referenced Leonard's death on his cell phone and the fact that, two days after Harris was arrested, Bender-Adams had conducted multiple internet searches regarding when police "dust for fingerprints."

{¶ 108} When viewed in the light most favorable to the State, the evidence presented at trial was sufficient for a rational jury to find, beyond a reasonable doubt, that Bender-Adams shot and killed Leonard and was sufficient to convict Bender-Adams of each of the crimes of which he was convicted.

{¶ 109} In support of his manifest weight challenge, Bender-Adams further asserts that "[n]o reasonable fact-finder could find that [he] was identified as the perpetrator of these crimes" and that Harris' testimony could "be easily disregarded as coming from a known liar whose freedom was saved by telling one more lie." However, a defendant is not entitled to reversal on manifest weight grounds simply because a witness may be "biased," may have been motivated by self-interest in testifying or may have previously lied. *See, e.g., Nicholson* at ¶ 181; *State v. Abdul-Hagg*, 2016-Ohio-7888, ¶ 33-37 (8th Dist.); *State v. Holloway*, 2015-Ohio-1015, ¶ 18, 39-44 (8th Dist.).

{¶ 110} We acknowledge Harris' potential bias and motive to lie based on his plea agreement and the fact that he had not yet been sentenced. However, Harris' testimony was not "unworthy of belief" simply because of his plea agreement with the State. *See, e.g., State v. Brightwell*, 2019-Ohio-1009, ¶ 39, 42-44, 50 (10th

Dist.) (jury was not required to disbelieve witness' testimony against defendant because testimony was procured pursuant to a plea agreement that permitted witness to plead guilty to a lesser charge and avoided a lengthy prison term); *State v. Fields*, 2021-Ohio-1880, ¶ 27-29 (8th Dist.) (defendant's convictions were not against the manifest weight of the evidence; where jury was aware of accomplice's role in the robbery and her plea deal, it could weigh witness' credibility and determine whether or not they believed her testimony about defendant's role in the robbery); *State v. Person*, 2017-Ohio-2738, ¶ 51-54 (10th Dist.) (fact that the testimony of three codefendants who took plea deals constituted the primary evidence against appellant did not render his convictions against the manifest weight of the evidence); *State v. Berry*, 2011-Ohio-6452, ¶ 17-18 (10th Dist.) (rejecting defendant's claim that his convictions were against the manifest weight of the evidence because accomplice was not a reliable witness and because State failed to present physical evidence linking him to the crime scene).

{¶ 111} Harris explained, during his direct examination, why he chose to cooperate with police and testify against Bender-Adams. The jury was informed of the crimes with which Harris had been charged, of the reduced charges to which he had pled guilty pursuant to his plea deal and that, as of the time of his trial testimony, Harris had not yet been sentenced (but that the State had agreed to recommend a prison of no more than eight years). Defense counsel fully cross-examined Harris regarding his decision to enter a plea agreement and his motivation to testify against Bender-Adams. The trial court gave the jury appropriate cautionary instructions

regarding Harris' role as an alleged accomplice, his potential motive in testifying and the impact on his credibility. Specifically, the trial court instructed the jury:

> Testimony of accomplice. You have heard testimony from Edward Harris, an alleged accomplice. An accomplice is one who purposely or knowingly assists or joins another in the commission of a crime. Whether he was an accomplice and the weight to be given to his testimony are matters for you to determine.
>
> The testimony of a person you find to be an accomplice should be viewed with grave suspicion and weighed with great caution.
>
> The testimony of an accomplice does not become inadmissible because of his complicity, moral [turpitude] self-interest, but the admitted or claimed complicity of a witness may affect his credibility and may make his testimony subject to grave suspicion, and require that it be weighed with great caution.
>
> It is for you, as jurors, in light of all of the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.

See also R.C. 2923.03(D).

{¶ 112} The jury, having heard Harris' testimony and the other evidence presented at trial, was free to believe all, part or none of Harris' testimony. *See, e.g., Jones*, 2020-Ohio-3367, at ¶ 85 (8th Dist.).

{¶ 113} Bender-Adams has not shown that Harris' testimony was so inherently incredible or unreliable to preclude a reasonable factfinder from believing him. Following a thorough review of the record, weighing the strength and credibility of the evidence presented at trial and the reasonable inferences to be drawn therefrom, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice such that Bender-Adams' convictions must be reversed. This is not the "'exceptional case'" in which the evidence weighs heavily

against Bender-Adams' convictions. *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175 (1st Dist.). Accordingly, we overrule Bender-Adams' fourth and fifth assignments of error.

E. Ineffective Assistance of Counsel

{¶ 114} In his sixth assignment of error, Bender contends that he was denied his right to the effective assistance of counsel as guaranteed to him by the United States and Ohio Constitutions. Bender-Adams claims that his trial counsel was ineffective because they "failed to investigate the case thoroughly," did not hire an investigator and did not (1) "subpoena the [R]ing doorbell [footage]" from cameras near Leonard's house, (2) interview Leonard's neighbors about their "door-bell cameras" or (3) seek "the detective's notes" to see if the police had interviewed "surrounding witnesses." He also contends that his trial counsel was ineffective because they did not obtain "expert services" given that (1) "the DNA [evidence] was not conclusive," (2) "[t]he firearm and tool mark expert offered nothing incriminating" and (3) Asbury's testimony regarding the location data extracted from Bender-Adam's cell phone, "placing Bender-Adams' phone in the vicinity of the crime at the relevant time," was "hardly convincing."

{¶ 115} A criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984). As a general matter, to establish ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel's performance fell below an objective standard of reasonable representation, and (2) that counsel's errors

prejudiced the defendant, i.e., a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Id.* at 687-688, 694; *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraphs two and three of the syllabus. "Reasonable probability" is "probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶ 116} Bender-Adams has not met his burden here. Bender-Adams has failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced by any alleged errors on the part of trial counsel.

{¶ 117} First, there is nothing in the record to suggest that Bender-Adams' defense counsel did not attempt to obtain surveillance video footage from neighbors' cameras, interview neighbors or obtain any "detective's notes" about interviews. However, even if trial counsel had failed to do so, Bender-Adams has not shown that any such efforts would have produced any evidence beyond that which was already gathered and presented at trial — or that any such additional evidence would have been favorable to Bender-Adams' defense. Wohl and Cramer testified that they personally canvassed the area to determine what surveillance footage existed and that several neighbors provided surveillance footage to police in response to these efforts. "'[A] claim of ineffective assistance of counsel on direct appeal cannot be premised on decisions of trial counsel that are not reflected in the record of proceedings . . . [and] [s]peculation regarding the prejudicial effects of counsel's performance will not establish ineffective assistance of counsel.'" *Cleveland v.*

Bryant, 2017-Ohio-7246, ¶ 21 (8th Dist.), quoting *State v. Zupancic*, 2013-Ohio-3072 (9th Dist.).

{¶ 118} Likewise, Bender-Adams does not explain how or why he contends trial counsel was deficient for failing to obtain "expert services" to analyze the DNA evidence, the firearms evidence and cell phone data and has not shown a reasonable probability that the outcome of the proceeding would have been different if trial counsel had retained experts to address these issues.

{¶ 119} In Ohio, a properly licensed attorney is presumed to be competent. *State v. Black*, 2019-Ohio-4977, ¶ 35 (8th Dist.), citing *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). Because there are "countless ways to provide effective assistance in any given case," a court must give great deference to counsel's performance and "indulge a strong presumption" that counsel's performance "falls within the wide range of reasonable professional assistance." *Strickland* at 689; *see also State v. Powell*, 2019-Ohio-4345, ¶ 69 (8th Dist.) ("'A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'"), quoting *State v. Pawlak*, 2014-Ohio-2175, ¶ 69 (8th Dist.). Thus, "'[t]rial strategy or tactical decisions cannot form the basis for a claim of ineffective counsel.'" *Powell* at ¶ 69, quoting *State v. Foster*, 2010-Ohio-3186, ¶ 23.

{¶ 120} The decision whether to retain an expert is generally considered to be a strategic decision or "'debatable trial tactic'" that does not amount to ineffective assistance of counsel. *See, e.g., State v. Sims*, 2021-Ohio-4009, ¶ 22 (8th Dist.); *see*

also State v. Krzywkowski, 2004-Ohio-5966, ¶ 22 (8th Dist.) ("Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if a better strategy had been available . . . . In many criminal cases, trial counsel's decision not to seek expert testimony 'is unquestionably tactical because such an expert might uncover evidence that further inculpates the defendant.'"), quoting *State v. Glover*, 2002-Ohio-6392, ¶ 25 (12th Dist.).

{¶ 121} In this case, O'Block testified that results of DNA testing were either inconclusive or that there was no statistical support for a DNA match to Bender-Adams on any of the items he tested from the crime scene. Kooser testified that there was no connection between Bender-Adams and the firearms and spent cartridge casings recovered by police. Accordingly, it is unclear how retention of a defense expert in these areas could have had any meaningful impact on the outcome of the case in a way favorable to Bender-Adams.

{¶ 122} With respect to the cell phone location data, Bender-Adams offers nothing beyond mere supposition and speculation that he would have been "well served" if defense counsel had retained a defense expert to review that data and/or testify in the case. He fails to articulate any basis upon that we could conclude, based on the record before us, that not securing an expert with respect to this data constitutes deficient performance and has not shown that, were it not for counsel's alleged errors in failing to secure such an expert, the outcome of the proceeding would have likely been different. *See, e.g., State v. Nicholas*, 66 Ohio St.3d 431, 436 (1993) (Standing alone, "the failure to call an expert and instead rely on cross-

examination does not constitute ineffective assistance of counsel."); *State v. Foust*, 2004-Ohio-7006,¶ 97-99 (Trial counsel's failure to request funds for experts did not amount to ineffective assistance of counsel because defendant's need for experts was "purely speculative" and trial counsel's decision to rely on cross-examination of the State's expert was a "legitimate tactical decision," "particularly since the results of defense DNA testing might not have turned out to be favorable to the defense."); *see also State v. Powell*, 2020-Ohio-3887, ¶ 37 (8th Dist.) (in rejecting claim that trial counsel was ineffective for failing retain an expert to refute the State's expert, noting that "without an expert report upon which to rely, any argument about what the expert would have said is speculation, and speculation is insufficient upon which to base an appellate argument").

{¶ 123} Based on the record before us, we cannot say that Bender-Adams' trial counsel was deficient for the reasons claimed or that there is a reasonable probability that the outcome of the trial would have been different if his trial counsel had conducted a more thorough investigation or obtained "expert services." Accordingly, we overrule Bender-Adams sixth assignment of error.

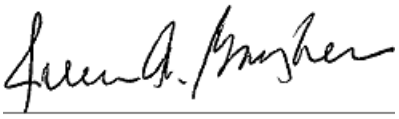
{¶ 124} Judgment affirmed.

The court finds there were reasonable grounds for this appeal.

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

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated.

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



EILEEN A. GALLAGHER, PRESIDING JUDGE

EMANUELLA D. GROVES, J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS IN PART AND CONCURS IN JUDGMENT ONLY IN PART (WITH SEPARATE OPINION)

SEAN C. GALLAGHER, J., CONCURRING IN PART AND CONCURRING IN JUDGMENT ONLY IN PART:

{¶ 125} I concur with the majority's analysis and resolution of all but the first assignment of error, upon which I concur in judgment only.

{¶ 126} In reviewing the first assignment of error, the majority sets forth the three-step analysis for determining whether "other-acts" evidence is admissible. However, I believe the majority's review of the admissibility of the other-acts evidence in this case, set forth in in paragraphs 73-77 of the majority opinion, misses the mark.

{¶ 127} With regard to the first step for determining admissibility, which requires that the other-acts evidence must be relevant under Evid.R. 401, the

Supreme Court of Ohio has clarified that "[i]n the Evid.R. 404(B) context, the relevance examination asks whether the proffered evidence is relevant to the particular purpose for which it is offered, as well as whether it is relevant to an issue that is *actually in dispute*." (adding emphasis), *State v. Nicholson*, 2024-Ohio-604, ¶ 99, quoting *State v. Smith*, 2020-Ohio-4441, ¶ 37. In *Nicholson*, the Supreme Court found other-acts evidence about prior incidents of threats and violence that tended to show hostility towards the victims was relevant to the issue of the defendant's motive for killing the victims, which was a fact actually in dispute because the defendant claimed to have acted in self-defense. *Id.* at ¶ 99. Further, the Supreme Court found "the relative recency of the incidents affects the persuasiveness of the evidence, not its admissibility." *Id.* at ¶ 100, citing *State v. White*, 2015-Ohio-3512 (2d Dist.).

{¶ 128} Likewise, in this case, the other-acts evidence challenged by appellant was offered to establish his motive for killing the victim and his identity as the perpetrator, not because it demonstrated propensity or bad character. To this end, the State sought to introduce the evidence to show that Bender-Adams knew Leonard, had an altercation with someone at Leonard's house in which Leonard intervened, was told by Leonard to leave his house, and made a threatening statement as he was leaving Leonard's house a few weeks prior to Leonard's homicide. Not only was appellant's motive for killing the victim a material issue in dispute, but his identity as the perpetrator was squarely at issue. *See Nicholson* at ¶ 101 (finding testimony of prior threats and violence toward the victims were

probative of motive to kill); *State v. Worley*, 2021-Ohio-2207, ¶ 118 (finding identity was squarely at issue where the defendant disputed he was the perpetrator). Additionally, the probative value of the other-acts evidence was substantially outweighed by any danger of unfair prejudice. Accordingly, the trial court's decision to permit the challenged testimony was not an abuse of discretion. Even had there been error, as suggested by the majority, I would agree that the error was harmless. For these reasons, I would overrule the first assignment of error.

{¶ 129} I further recognize that although an appellate court is required to review the entire record when conducting a manifest-weight review, this does not necessarily require that an opinion include an overly exhaustive review of the factual history of the case with an extensive summary of testimony that is in the record before us. Nonetheless, the majority opinion exemplifies the thorough review that has been conducted in this matter. I fully concur with the majority decision on the remaining assignments of error.