[Cite as *State v. Baker*, 2020-Ohio-7023.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DASHONTI BAKER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0080

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17 CR 720

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Judges, and Stephen W. Powell, Judge of the Twelfth District Court of Appeals, Sitting by Assignment.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Kimberly Kendall Corral, *Atty. Megan M. Patituce,* Patituce & Associates, LLC, 16855 Foltz Industrial Parkway, Strongsville, Ohio 44149 for Defendant-Appellant.

Dated: December 30, 2020

Robb, J.

{¶1} Defendant-Appellant Dashonti Baker appeals after being convicted in the Mahoning County Common Pleas Court of murder with a firearm specification and having a weapon while under disability. Appellant sets forth six assignments of error, raising issues with: the admissibility of a detective's testimony on cell phone location evidence; the denial of a mistrial motion alleging juror bias; the admissibility of firearm-related evidence found during a search; speedy trial; the sufficiency of the evidence; and the manifest weight of the evidence. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On June 23, 2017, at 12:27 in the afternoon, the police were summoned to Oneta Avenue on the west side of Youngstown after multiple shots were fired inside a vehicle parked on the road. Raevenne Faircloth Thomas was found dead in the driver's seat with gunshot wounds to the right side of her body. She had been shot six times. Neighbors saw a man exit the victim's vehicle after the shooting and flee to a car that quickly pulled into a driveway near the scene.

{¶3} After the shooter entered the vehicle, the car pulled away, turned the corner, and entered the nearby freeway. (Tr. 691-692, 747). The car was described as a silver-gray Chevrolet Impala from the early-2000's; in addition, the rear passenger side door was dented, the window above that door was missing (or down), and a patterned blanket or rug was covering the opening. (Tr. 691-697, 717, 721, 738, 747-748, 754, 820-821).

{¶4} The shooter was described by the three witnesses as follows: (A) short and stocky black male with a beard, estimated at 5'8" and 200 pounds, wearing a red shirt and black pants; (B) heavyset black male, estimated at over 6' and 230-240 pounds, wearing a gray "spring jacket" and pants (viewed from behind and from a second story window); and (C) "real stocky" black male, estimated at 5'7"-5'8" and 160-170 pounds, wearing a red shirt and dark jeans with a large cuff. (Tr. 691, 719, 721, 726-727, 731,

748-749). Witness B watched the shooter alight from the SUV and wipe the interior passenger door with a red "rag" before the shooter fled. (Tr. 716, 720). The driver of the get-away car was described by Witness C as a heavyset black female with shoulder-length hair. (Tr. 752-753).

{¶5} A police dispatch describing the shooter and the silver Impala caused a Youngstown police officer to think about a prior experience he had with Appellant and his vehicle. (Tr. 834). Around 3:00 p.m., the officer drove to Appellant's address on Millet Avenue, which was less than a mile from the scene of the shooting. Parked in the driveway was a silver Impala with a missing rear passenger window and a dented rear passenger door. (Tr. 840, 1571; St.Ex. 113). A blanket patterned in red, white, and black was on the back seat. (Tr. 1535, 1540). Witness A identified Appellant's vehicle and the blanket as matching what he saw at the scene of the shooting. (Tr. 696-697; St.Ex. 113).

{¶6} Appellant exited the house while the officer was walking up the driveway. (Tr. 835). The officer noticed Appellant's official record reported his height as 5'7", and a detective described Appellant as "heavy" in appearance. (Tr. 858, 1535). Appellant was wearing black pants and a red shirt and had a beard. (Tr. 1535, 1685). Barraya Hickson, who was Appellant's girlfriend, was detained as she quickly attempted to walk away from the house; a detective said she was heavyset with shoulder-length hair. (Tr. 844-845, 1534, 1537).

{¶7} The trunk of Appellant's silver Impala was almost completely filled with clothes; much of the clothing was red. As there were no clothes on hangers inside the house and the trunk was messily packed, the detective formed the impression that Appellant quickly filled the car with all of his clothing. (Tr. 1541). The glove compartment contained a property deed from the victim to Appellant for a house on East Warren Avenue. (Tr. 1544).

{¶8} Appellant said he owned the house on Millet, the vehicle, and the clothes in the trunk. (Tr. 836, 842, 1536, 1554). Appellant also said: he owed the victim money for a house; he considered the victim to be a sister; he did not see or communicate with the victim that day; the vehicle had not been driven that day; the rear passenger window of his car was broken; and it had been a long time since he last fired a gun. (Tr. 1554-1557). Appellant and the victim grew up together as her mother dated his father. (Tr. 663).

{¶9} The detective who interviewed Appellant on video left the room to notify the crime lab technician that Appellant consented to a gunshot residue (GSR) test. While the detective was out of the room, Appellant seemed to be licking and sucking his fingers, and this could be heard on the video; he then wiped his right hand on his shirt. (Tr. 1563-1565). The sample taken from Appellant's left hand tested positive for gunshot residue. (Tr. 1312-1314). Because a GSR test can affect the availability of DNA, Appellant's shirt was not subjected to a GSR test as the lab would test the shirt for DNA if blood was discovered on it. (Tr. 1570). DNA swabs from casings, the car door, and the victim's fingernails showed DNA was not suitable for comparison, was not present, or belonged to the victim. (Tr. 1189-1195, 1202).

{¶10} Appellant was arrested the same day as the shooting. A few days later, a person fishing by a trail in Mill Creek Metroparks found a bag containing a gun in the water and called the police. A park police officer recovered the gun which was a Smith & Wesson 9mm. (Tr. 1111). An expert at the Ohio Bureau of Criminal Investigation (BCI) matched the marks on a cartridge test-fired from this firearm to those on the six 9mm casings found at the scene of the shooting and matched a test-fired bullet to the bullets recovered from the victim's body. (Tr. 1270-1271, 1274).

{¶11} Appellant and Barraya Hickson were jointly indicted on August 3, 2017 for aggravated murder and murder, both with firearm specifications. Appellant was also indicted for having a weapon while under disability, and Hickson was additionally indicted for obstructing justice. Appellant's case was tried to a jury in April 2019.

{¶12} In addition to the above information, the state presented the testimony of an attorney who prepared a deed transferring the house on East Warren Avenue to the victim in May 2017. (Tr. 1355). On June 6, 2017, the victim returned to the attorney's office with Appellant, requested a deed transferring the property to Appellant, and signed the deed before a notary. (Tr. 1357; 1359). An hour later, the victim successfully sought a refund of the $140 she paid the attorney. She did not ask for the deed, and the attorney retained it in his file. (Tr. 1357). An hour after that, Appellant appeared at the attorney's office and was upset when he learned about the refund; he asked, "how could she do me like that[?]" (Tr. 1358-1359). Appellant then paid $80 to have the deed recorded, and the attorney had it recorded the next day. (Tr. 1359).

{¶13} The victim's boyfriend testified that the victim grew up with Appellant and referred to him as her brother. (Tr. 1379). He said the victim was upset because Appellant still owed $2,000 for her grandmother's house which she agreed to sell to Appellant for $10,000. (Tr. 1383-1385, 1428-1431). Appellant complained about appliances not working and opined the victim "was trying to play me." (Tr. 1432).

{¶14} On the day she was killed, the victim's boyfriend heard her on a phone call around noon. He said the victim left their house on the west side at approximately 12:15 p.m. to stop at her sister's house (on the same side of town). (Tr. 1386-1387, 1430). At 12:20 p.m., the victim texted her boyfriend "need two more" and sent a mad emoji face at 12:26 p.m. (after he asked "two more what"). (Tr. 1390-1391, 1494). Around 3:00 p.m., this witness learned that his girlfriend had been killed. He called Appellant, who did not ask any details and said he would call him back as he was on his way to a waterpark. (Tr. 1394-1395).

{¶15} Appellant's self-reported phone number (matching the phone seized on his arrest) was saved in the victim's phone under the name "Big Bra." (Tr. 1550, 1552-1553). On the day before her death, the victim texted this number asking, "So when you gone bring me the rest of that money[?]" (Tr. 1468).

{¶16} On the day of her death at 12:07 p.m., the victim texted a number saved in her phone under the name "Deshawnte." (Appellant's first name is Dashonti.) The call lasted 19 seconds, and it was not established whether the call was answered by the recipient. (Tr. 1462-1463; 1689). The detective heard a recorded jail call wherein Appellant mentioned he had two phones before he was arrested. (Tr. 1551).

{¶17} Upon subpoenaing cell phone records, the detective learned Appellant's self-reported phone number was not communicating with the provider's towers between 11:59 a.m. and 1:12 p.m. The detective testified that this led him to conclude Appellant's phone was turned off at the time (or on airplane mode). (Tr. 1597). He also recited some location data as to where Appellant's phone was located before and after this time and where Hickson's phone and the victim's phone were generally located around the time of shooting. (Tr. 1592, 1594, 1612-1616).

{¶18} A video from a business on Steel Street captured a silver Impala heading north toward the scene of the crime at 12:23 p.m., four minutes before the shooting was

reported to 911. (Tr. 1622-1625). The detective noted the car in the video matched the silver Impala seized from Appellant as it had a cloth in the window, a dent below the window, and a missing hubcap. (Tr. 1625). The jury viewed the video and a still-shot of the vehicle taken from the video. (St.Ex. 171, 216).

{¶19} The medical examiner testified the victim was shot six times: three times in the head, once in the neck, and twice in the shoulder. (Tr. 1762-1763). She confirmed from stippling that the victim was shot from a close range of three feet or less. (Tr. 1762).

{¶20} The defense stipulated to a prior offense prohibiting Appellant from having a firearm (but challenged whether Appellant possessed a firearm). (Tr. 1977). The jury found Appellant not guilty of aggravated murder but guilty of murder with a firearm specification and having a weapon while under disability. The court sentenced Appellant to fifteen years to life for murder, three years for the firearm specification, and three years for having a weapon while under disability to run consecutively. Appellant filed a timely notice of appeal from the June 17, 2019 sentencing entry.

ASSIGNMENT OF ERROR ONE: PHONE LOCATION TESTIMONY

{¶21} Appellant sets forth six assignments of error. Appellant's first assignment of error contends:

"THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION IN LIMINE BECAUSE THE INTRODUCED TESTIMONY DID NOT MEET THE STANDARDS SET FORTH IN *DAUBERT* OR EVID.R. 702."

{¶22} Appellant filed a motion in limine on April 3, 2019, which asked for a hearing on the admissibility of various types of expert testimony. In pertinent part, Appellant asked to exclude the detective's testimony on GPS data to establish Appellant's location relative to the homicide scene. The defense suggested this testimony would improperly rely on the results of potentially unreliable telecommunications software. The motion was heard on April 8, 2019, a week before jury selection began. Appellant argued there was a *Daubert* issue because the detective could not testify as to whether the data he received was reliable. The court overruled the motion in limine, opining the detective would not be giving expert testimony by presenting the data he received in a records request and was not required to have knowledge about the software or methods used to create or maintain the records.

{¶23} At trial, a Verizon representative confirmed that a state's exhibit contained the business records provided to the detective after the search warrant was issued. (Tr. 960). The detective then testified about GPS location data he received from Verizon for the phone Appellant said belonged to him. The detective said: the provider's records contained GPS plot points (latitude and longitude) estimating the phone's location at certain times; the provider labeled each point with a level of confidence; and a legend in the records explained that the level of confidence corresponded to a radius around the plot point. (Tr. 1578-1579, 1583, 1598-1600). From these records, the detective generated a map of the area to show each plot point with a surrounding potential radius (using Microsoft Streets and Trips). The detective had experience and training on the process but said anyone could do it. (Tr. 1582, 1585).

{¶24} The detective recited that at 11:59 a.m. on the day of the shooting, the reported plot point placed Appellant's phone near the corner of Belle Vista and Mahoning Avenue with a potential radius of .67 of a mile. (Tr. 1592, 1601). Appellant's number was not communicating with his provider's towers between 11:59 a.m. and 1:12 p.m., which led the detective to conclude Appellant's phone was turned off during that time (or in airplane mode). (Tr. 1597). At 1:12 p.m., the reported plot point placed Appellant's phone near South Lakeview Avenue (not far from the section of Mill Creek Metroparks where the gun was located) with a potential radius of .72 of a mile. (Tr. 1594, 1601). The shooting occurred around 12:27 p.m. The detective noted the scene was within the potential radius from Appellant's phone 28 minutes before the shooting and 45 minutes after the shooting. (Tr. 1601).

{¶25} Appellant claims the court erred in permitting the detective to testify as to this data and his analysis of the data. He says the detective not only recited information from the records but interpreted it and explained how the towers worked, which was beyond the knowledge of a lay person. Appellant says he was prejudiced by the state's presentation of this data by a non-expert because the defense could not cross-examine the detective on the unreliability of the location evidence if the detective did not have the pertinent knowledge.

{¶26} Appellant relies on Evid.R. 702, which states a witness may testify as an expert if: (A) the testimony either relates to matters beyond the knowledge or experience

possessed by lay persons or dispels a misconception common among lay persons; (B) the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education on the topic; and (C) the testimony is based on reliable scientific, technical, or other specialized information.

{¶27} Appellant includes the second part of division (C), which states if the witness "reports the result of a procedure, test, or experiment," then the testimony is only reliable if: "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) The design of the procedure, test, or experiment reliably implements the theory; [and] (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result." Evid.R. 702(C).

{¶28} Appellant notes the factors which can be considered in evaluating the reliability of scientific evidence, including whether the theory or technique: (1) has been tested, (2) has been subjected to peer review, (3) has a known or potential rate of error, and (4) has gained general acceptance. *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 611, 687 N.E.2d 735 (1998), citing *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 593-594, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (the factors are not prerequisites).

{¶29} A determination as to the admissibility of expert testimony is generally a decision within the discretion of the trial judge which will not be disturbed absent an abuse of discretion. *Miller*, 80 Ohio St.3d at 616. The abuse of discretion standard of review asks whether the decision was unreasonable, unconscionable, or arbitrary. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶30} The state claims Appellant failed to properly preserve the cell phone GPS issue by raising the matter at trial when the detective testified about the cell phone location data. A decision on a motion in limine is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of an evidentiary issue and is not a final determination as the trial court can change its mind at trial where the issue is presented in full testimonial context. *State v. Grubb*, 28 Ohio St.3d 199, 201-202, 503 N.E.2d 142 (1986). *See also State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 59. The preliminary issue presented in a motion in limine must be renewed at trial when the evidence is actually presented or the argument made therein is waived for purposes

of appeal. *State v. Hill*, 75 Ohio St.3d 195, 202-203, 661 N.E.2d 1068 (1996); *State v. Brown*, 38 Ohio St.3d 305, 311-312, 528 N.E.2d 523 (1988).

{¶31} Where no objection is entered at a time when the error can be corrected, the court may recognize plain error if substantial rights are affected. Crim.R. 52(B). Plain error is a discretionary doctrine to be used only with the utmost care by the appellate court in exceptional circumstances to avoid a manifest miscarriage of justice. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 62. The doctrine can be employed only where there was an obvious error affecting substantial rights so that the error was outcome determinative. *Id.*

{¶32} The detective was permitted to testify, with no objection, about how the information was reported, how he generated the map, and other topics. After the detective explained how he generated the map and before he testified to Appellant's locations, defense counsel said, "Note my continuing objection." The trial court responded, "Objection noted. Overruled." (Tr. 1586). Counsel also generally objected to the detective's testimony about how a reported level of confidence was assigned a distance, which the detective explained was provided by the phone provider in a legend. (Tr. 1598).

{¶33} If these objections preserved some of the arguments, the state alternatively argues the court did not err in allowing a detective to testify about cell phone location data as a skilled lay witness who is permitted to provide lay opinions as well as report information from business records obtained via a subpoena. The state points to Evid.R. 701, which provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶34} This court has noted the opinion of a lay person uses a reasoning process familiar in everyday life, as opposed to the opinion of an expert using a reasoning process that is mastered by a specialist in the field. *State v. Johnson*, 7th Dist. Jefferson No. 13 JE 5, 2014-Ohio-1226, ¶ 56 (allowing a police officer to testify as a lay witness or as an expert on gang tattoos). We explained how appellate courts characterize some testimony offered by a police officer as lay testimony even though it is based on the officer's

specialized knowledge. *Id.* at ¶ 57, citing, *e.g*., *State v. McClain*, 6th Dist. Lucas No. L-10-1088, 2012-Ohio-5264, ¶ 13 (although based on experience, the detective can give a lay opinion under Evid.R. 701 that the amount of drugs suggested they were for sale rather than personal use); *State v. Williams*, 9th Dist. Summit No. 25716, 2011-Ohio-6604, ¶ 11 (the officer was permitted to give opinion under Evid.R. 701 that the establishment was a methamphetamine lab based on his observation of items in the house and garbage).

{¶35} The Ohio Supreme Court has accepted the trend toward allowing lay witnesses to express their opinions in areas in which it would ordinarily be expected that an expert must be qualified under Evid.R. 702. *State v. McKee*, 91 Ohio St.3d 292, 296, 744 N.E.2d 737 (2001). The Court explained:

> Although these cases are of a technical nature in that they allow lay opinion testimony on a subject outside the realm of common knowledge, they still fall within the ambit of the rule's requirement that a lay witness's opinion be rationally based on firsthand observations and helpful in determining a fact in issue. These cases are not based on specialized knowledge within the scope of Evid.R. 702, but rather are based upon a layperson's personal knowledge and experience.

Id. at 297 (a drug user can identify drugs if a foundation is laid).

{¶36} In ruling the introduction of non-testimonial cell phone location data by an officer would not be a confrontation clause violation, the Ohio Supreme Court observed: "The culling and configuration of cell-phone records does not require the undertaking of a scientific process or an interpretation of results from experimentation. It reflects only a formatting of information that already exists as a part of the company's day-to-day business." *State v. Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, 984 N.E.2d 1057, ¶ 38. The *Hood* Court initially said it was not proper for the state to use the officer to lay the foundation for the business record hearsay exception. *Id.* at ¶ 39. (Here, the Verizon representative laid the foundation as the Supreme Court instructed.) Regardless, of the hearsay issue in *Hood*, the Court found the admission of the location data without a proper foundation was harmless as "the cell towers do not place him in the vicinity at the crucial

time" since there was an absence of location data for the time period surrounding the crime (similar to the situation with Appellant's phone). *Id.* at ¶ 43, 47. Issues with expert testimony were not raised or addressed in *Hood*.

{¶37} Appellate courts have rejected similar claims under Evid.R. 702 and have allowed non-experts to testify about a cell phone's utilization of a tower to ascertain where a phone was located at a specific time. "Typically, cell phone tower mapping by a lay person permits an inference to be drawn by the factfinder that the cell phone owner was in the area at the listed time, to corroborate other evidence of the defendant's presence at a crime scene." *State v. Bradford*, 2018-Ohio-1417, 101 N.E.3d 710, ¶ 86 (8th Dist.). Finding Evid.R. 702 inapplicable, the Eighth District held: "the location of cellular towers used by appellant's phone in relation to other locations relevant to the crime * * * does not require 'specialized knowledge, skill, experience, training or education' regarding cellular networks." *State v. Daniel*, 2016-Ohio-5231, 57 N.E.3d 1203, ¶ 69 (8th Dist.) (where the witness created a map of locations).

{¶38} This was confirmed in a later case where a crime analyst with the Cleveland Police Department viewed cell phone records and testified that the cell towers "hit" by the defendant's cell phone were located near the crime scene at the time of the murder. The court held: "Because his testimony was primarily lay witness testimony and he was competent to testify, the trial court properly allowed his testimony regarding Johnson's cell phone activity and location at the time of the murder." *State v. Johnson*, 2018-Ohio-1389, 110 N.E.3d 800, ¶ 27 (8th Dist.).

{¶39} The Eleventh District found that a witness testifying about cell phone towers did not offer independent findings or opinions but merely "explained the contexts of the complex and detailed phone records." *State v. Perry*, 11th Dist. Lake No. 2011-L-125, 2012-Ohio-4888, ¶ 65. The court subsequently reiterated: "evidence relayed regarding the mapping of cell site data is capable of being generally performed by a layperson, and thus, it does not require an expert to testify." *State v. Parks*, 11th Dist. Lake No. 2019-L-097, 2020-Ohio-4524, ¶ 102.

{¶40} Based on *Daniel* and *Perry*, the Sixth District found the failure to evaluate the validity of a detective's cell phone tower testimony would not be recognized as plain error "as various courts have found that testimony concerning cell phone towers need not

come from an expert witness." *State v. Boaston*, 2017-Ohio-8770, 100 N.E.3d 1002, ¶ 65 (6th Dist.). The Fourth District adopted this case law as well. *State v. Robinson*, 4th Dist. Washington No. 16CA22, 2017-Ohio-8273, ¶ 8, 66 ("courts have permitted the admission of similar lay testimony using a defendant's cell phone records to compare the location of cellular towers used by the defendant's phone to the location of the specific crimes").

{¶41} Here, there was no objection to the detective's initial testimony explaining the phone company's tracking or reporting of data or his comments about the relevance of the provider's reporting as to which side of a cell tower was communicating with a phone. (Tr. 1575-1586). The detective did not attest to the science behind towers, GPS, hardware, or location software. Appellant objected before the detective provided Appellant's location data but did not specify the objection. To the extent the objection was based on the detective's lack of expert knowledge on the accuracy of the hardware or software used by the phone company to track locations or assign confidence levels, there would be no error in finding the detective was not testifying as an expert by relaying the information which he read from business records and placed on his map.

{¶42} The detective did not conduct an expert analysis of the information merely because he plotted GPS points he received into a mapping program and entered a radius using the distance which was provided in a legend by the cell phone provider. This was a matter of data entry, which he received training on and had experience performing but which he said anyone could do with the information. *See Parks*, 2020-Ohio-4524 at ¶ 99 ("although [the officer] has a level of expertise [on cell phone locations], a high degree of expertise was not required to generate a map based on admitted cell phone records, and as such, it was lay testimony"). A person need not be an expert on GPS technology in order to read GPS coordinates generated by a tracking device. *See United States v. Brooks*, 715 F.3d 1069, 1078 (8th Cir.2013) ("Courts routinely rely on GPS technology").

{¶43} Appellant says the admission of the detective's testimony deprived him of the right to cross-examine a witness about how the level of confidence is assigned as the detective was not an expert on this topic. It was explained that the level of confidence with each specific plot point was reported by the phone company on a legend which associated the level with a potential distance away from the plot point.

{¶44} The detective read the confidence level reported and applied the distance associated with the level. The detective did not express a personal opinion and portrayed the individual plot points as having high accuracy as Appellant claims. The fact that a cell phone's location is an estimate with a radius attached to a plot point goes to the weight of the testimony. *See Daniel*, 2016-Ohio-523 at ¶ 70. Again, an expert is not required to explain the technology behind cell phone tower communication and GPS tracking in order to admit locations recorded in the regular course of business. *See id.*; *Bradford*, 2018-Ohio-1417 at ¶ 86; *Johnson*, 2018-Ohio-1389 at ¶ 27; *Perry*, 2012-Ohio-4888 at ¶ 65.

{¶45} As to the detective's testimony on the period during which there was a lack of communication with the phone, there was no specific objection. His opinion, that this lack of communication suggested that the phone was off or in airplane mode, was not improper expert testimony. A lay person will commonly and typically own a cell phone and most have a general awareness that there is a lack of communication to some extent when a phone is off. Any additional knowledge gained by the detective from training and experience did not mean he had to be qualified as an expert to provide an opinion he formulated as he conducted his investigation in this case. Although there may be other reasons for a lack of communication, these were not elicited.

{¶46} A lay witness can give "opinions or inferences" if they are: "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *See* Evid.R. 701. The detective's testimony presenting this opinion and the cell location data for Appellant's phone satisfied this test. Consequently, an expert was not required before the phone location evidence could be used to create an inference of Appellant's location based on his phone's location or before an opinion was elicited on the period without communication between the phone and the provider. Even if other portions of the detective's testimony could be seen as exceeding the bounds of a lay witness with special knowledge, there was no prejudice as the incriminating portions were admissible (and not very incriminating) and there was substantial evidence of guilt (as discussed supra and infra). In accordance, this assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: MISTRIAL MOTION

{¶47} Appellant's second assignment of error states:

"THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A MISTRIAL AFTER MULTIPLE IRREGULARITIES IN THE PROCEEDINGS OCCURRED, RANGING FROM THE CO-DEFENDANT ENTERING A PLEA AFTER JURY SELECTION BEGAN, TO EIGHTEEN POTENTIAL JURORS DEFYING THE COURT'S ORDER, AND CULMINATING IN A JUROR BEING DISMISSED DURING THE TRIAL WHO HAD ALSO DEFIED THE COURT'S ORDER."

{¶48} The decision on a mistrial motion lies within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001). The mere existence of error or irregularity does not warrant a mistrial. *Id.* "The granting of a mistrial is necessary only when a fair trial is no longer possible." *Id.*, citing *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991) ("Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible.").

{¶49} Appellant believes his constitutional right to an impartial jury was compromised in violation of Article I, Section 10 of the Ohio Constitution and the Sixth Amendment to the United States Constitution (applicable to the states through the Fourteenth Amendment). Defense counsel moved for a mistrial during jury selection and renewed the motion during trial. Appellant combines three occurrences in support of his contention that the right to an impartial jury was violated and a mistrial was warranted: co-defendant Barraya Hickson entered a plea after the first day of jury selection; multiple jurors heard news about the plea, despite being instructed to avoid news on the trial; and a juror was dismissed mid-trial. Appellant says his case was prejudiced by the abrupt absence of the co-defendant and the news about her plea because the jury may have improperly considered the co-defendant's plea as evidence of Appellant's guilt. We review the particular facts on these events.

{¶50} On April 15, 2019, at the end of the first day of jury selection, the court stated: "you're instructed not to read, view or listen to any reports in the newspaper, radio or television on the subject of this trial. * * * try to avoid any reports regarding this particular matter. If you hear it just tune it out or shut it off. You should absolutely not try to get information from any other source such as family members * * * [or] social media." (Tr. 293). The next day, the venire was sent home without explanation. Barraya Hickson

accepted a plea, which she had previously rejected, while Appellant rejected a new plea offer. (Tr. 30, 297-298). Hickson did not thereafter testify in Appellant's case.

{¶51} On April 17, the defense filed a written motion for mistrial, arguing Hickson's absence would be prejudicial. Defense counsel orally added a concern that jurors may have learned about Hickson's plea in the news. The court overruled the motion, saying it would instruct the jurors not to consider Hickson's absence and would allow the attorneys to question the jurors on the matter. (Tr. 316-317).

{¶52} When the venire was called back to the courtroom, the court stated: "I'm sure you will notice that Ms. Hickson is not here. What I can tell you about that is that we decided to resolve her matter separately. So this trial is now going to be captioned State of Ohio versus Dashonti Baker and you're not to consider anything about Ms. Hickson * * *." (Tr. 319). The court explained the lawyers would inquire "as to whether or not you can set aside the fact that Ms. Hickson's not here." (Tr. 320). The venire was then asked about hearing or seeing any news about the case. Based on the responses, nineteen potential jurors were individually questioned in chambers before regular voir dire resumed. (Tr. 325-511).

{¶53} Appellant uses the number of potential jurors exposed to the news of Hickson's plea in support of his mistrial argument. He complains about the individuals from this group who were retained after questioning and suggests some became jurors. However, three of the nineteen separately questioned venire members asked to be dismissed for various personal reasons, and their requests were granted. (Tr. 325-327, 346-347, 356). (As to their news of the case: one said a person mentioned the plea to him that morning, the second heard about the plea on the radio, and the third did not mention she heard about the case.)

{¶54} Four more potential jurors were jointly challenged for cause by both sides. The court sustained these challenges and excused these four venire members due to comments they made after being further questioned. Thus, seven of the nineteen venire members were removed in chambers.

{¶55} Six of the remaining twelve venire members *were not challenged for cause by the defense* after the in chambers questioning about the news they heard on Hickson's plea. Plus, *only one* of these six ended up sitting on the jury.

{¶56} Where a defendant claims outside contact with a juror caused the juror to be biased, the defense must establish actual bias at the hearing on the topic. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 160. Here, the juror was not even challenged for cause. (Tr. 511).

{¶57} In any event, the court's decision to keep this juror was not an abuse of discretion. She heard a news story about Hickson entering a plea, but she insisted she would: set that information aside; consider Appellant's case to be a separate matter; vote only on the evidence presented; and remain a fair and impartial juror. (Tr. 505-510, 517).

{¶58} The last six potential jurors (of the nineteen questioned in chambers) were unsuccessfully challenged for cause by the defense. *However, only one of these* challenged venire members *remained on the jury* (and one was an *unused* alternate). (Tr. 391, 607). This venire member who became a juror explained in chambers that she did not normally watch the news but fell asleep watching a show; when she then briefly saw Hickson on the screen and heard the trial would proceed the next day with only Appellant. (Tr. 367, 370-371). She did not hear why the trial would proceed without Hickson. (Tr. 373).

{¶59} This juror attested: she was capable of putting aside the fact that Hickson was originally a co-defendant but the trial would now proceed without her; the co-defendant's absence would have no bearing on Appellant's case and would not affect her decision; she would decide the case against Appellant based solely on the evidence presented; and she could be fair and impartial in evaluating the evidence presented against Appellant. (Tr. 368-369, 375, 377). Defense counsel challenged this juror for cause because, upon his questioning, she would not say she was "absolutely certain" Hickson's absence would not affect her "in the slightest bit" once she heard evidence at trial; however, she also said, "I think I can be certain" and "I believe it is not going to affect me at all that she's not here." (Tr. 375-379).

{¶60} Although Appellant's brief does not specifically challenge the court's ruling as to this juror, there was no error in denying counsel's challenge for cause. "A juror's belief in his or her own impartiality is not inherently suspect and may be relied upon by the trial court." *State v. Phillips*, 74 Ohio St.3d 72, 89, 656 N.E.2d 643 (1995). "The trial judge was in the best position to observe the jurors as they were being questioned and

determine whether the incident affected their ability to remain impartial." *State v. Henderson*, 7th Dist. Mahoning No. 16 MA 0057, 2019-Ohio-1760, ¶ 17, citing *Conway*, 108 Ohio St.3d 21 at ¶ 163. The challenged juror's response did not require a finding of actual bias. *See Conway*, 108 Ohio St.3d 214 at ¶ 160 (if there is an allegation that outside contact with a juror caused the juror to be biased, then the defense must establish actual bias at the hearing on the topic).

{¶61} After the jury was empaneled, the court instructed the jurors they were not to acquire any news on television, radio, or social media. (Tr. 608-609, 862). The court also repeated the instruction given during voir dire saying the jury was not to consider the fact that Hickson was no longer part of the case. (Tr. 609-610, 980, 1956, 1963). There was no objection to the instructions on Hickson's absence.

{¶62} The reason for her absence was not elicited by the state in testimony or commented upon by the state. As to the fact that she was a co-defendant but was now absent, the jury is presumed to follow the court's curative instruction to disregard an item. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 190. "A jury is also presumed to follow their oath and to be capable of separating the impermissible considerations from the permissible." *State v. Smith*, 7th Dist. Mahoning No. 11 MA 120, 2013-Ohio-756, ¶ 115, citing *State v. Zuern*, 32 Ohio St.3d 56, 59, 512 N.E.2d 585 (1987).

{¶63} We turn to the juror dismissed during trial. After testimony by the three witnesses who lived on Oneta Avenue, a juror informed the court he occasionally golfed with one of these witnesses a couple of years ago. (Tr. 774-775). The juror felt conflicted and was not sure he could set aside this relationship in order to impartially assess the witness's credibility. (Tr. 775, 777, 780-781). The state asked the court to dismiss the juror, and the defense agreed.

{¶64} At this point, defense counsel renewed the mistrial motion (initially filed after Hickson pled guilty). He claimed the issue with the juror knowing a witness was a remnant of the prior problem encompassed by jurors being exposed to news reports on Hickson's plea. The court disagreed, stating this was a separate issue. (Tr. 782). The court replaced the jointly contested juror with an alternate juror and denied the renewed mistrial motion, finding the issue raised in the mistrial motion was remedied during the in chambers voir dire. (Tr. 783). Notably, the replaced juror was not one of the nineteen

venire members who heard news on the case, and the alternate who replaced him was not one of the nineteen either. Thus, as the trial court ruled, the issue with the juror knowing a witness was unrelated to the prior issue about news on Hickson's plea. The issue with this juror does not contribute to Appellant's arguments set forth when originally moving for mistrial.

{¶65} As to those arguments, the trial court did not abuse its discretion in finding a mistrial was not warranted because some potential jurors heard news about Hickson taking a plea. The court reasonably relied on the individual, in chambers voir dire to evaluate the effect on those potential jurors and to eliminate certain members of the venire where their answers were questionable and where challenges were made. The court heard their answers, could judge their credibility first hand, issued curative instructions, and could presume the instructions were followed. As to the entire jury panel, the fact that jury selection begins with a co-defendant but the co-defendant is eliminated from the proceedings after the first day of jury selection (and before a jury is seated) does not per se require a mistrial.[1]

{¶66} This is consistent with the precedent in other appellate districts. *See State v. Hollins*, 8th Dist. Cuyahoga No. 107642, 2020-Ohio-4290, ¶ 1, 28-34 (mistrial motion need not be granted where the co-defendant's attorney mentioned in closing argument that a second, non-testifying co-defendant pled guilty mid-trial); *State v. Davis*, 10th Dist. Franklin No. 18AP-921, 2019-Ohio-4692, ¶ 25-34 (mistrial not required where a co-defendant pled guilty shortly after the jury was seated and a second co-defendant pled guilty after first witness testified); *State v. Handley*, 6th Dist. Erie No. E-07-022, 2008-Ohio-2485, ¶ 6-10 (mistrial not required where the co-defendant entered a guilty plea after voir dire and opening remarks); *State v. Allen*, 5th Dist. Stark No. 1995 CA 00307 (July 1, 1996) (mistrial not required where the prosecutor told the jury the co-defendant pled guilty). *See also State v. Gervin*, 2016-Ohio-8399, 79 N.E.3d 59, ¶ 209-211 (3d Dist.)

[1] We also note defense counsel later attempted to use Hickson's plea strategically, asking the detective: "And you also know that Ms. Hickson's matter was resolved and she -- aggravated murder charges were dismissed against her?" (Tr. 1646). The court sustained the prosecutor's objection and instructed the jury to disregard the comment. (Tr. 1646-1647). The comment prompted the court to mention Hickson's plea in the final instruction to disregard her absence from the trial. (Tr. 1963). In any event, this closing instruction was not contested below or on appeal.

(counsel was not ineffective by failing to move for mistrial during voir dire after a prospective juror told other prospective jurors the co-defendant pled guilty).

{¶67} Under the circumstances in this case, there was no abuse of discretion in denying the mistrial motion as the court reasonably relied on corrective measures, and material prejudice to a fair trial was not apparent. For all of these reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR THREE: FIREARM-RELATED EVIDENCE

{¶68} Appellant's third assignment of error contends:

"THE INTRODUCTION OF IMPROPER CHARACTER EVIDENCE CONSTITUTED PLAIN ERROR AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO HIGHLY PREJUDICIAL CHARACTER EVIDENCE THAT WAS NOT POSSIBLY RELEVANT TO ANY ISSUE OF MATERIAL FACT."

{¶69} In the victim's vehicle, the police found six 9mm casings and two semi-automatic pistols that were both registered in the victim's name. (Tr. 1726). Her .40 caliber firearm was on the driver's side floor near her feet. (Tr. 892, 1265-1266; St.Ex. 40). Her 9mm firearm (Smith & Wesson Luger M&P 9 Shield) was under the passenger seat. (Tr. 907, 1266; St.Ex. 163).

{¶70} The murder weapon, found in the water in Mill Creek Metroparks, was a Smith & Wesson 9mm Luger semiautomatic pistol, model M&P 9. (Tr. 1266; St.Ex. 165). The six 9mm casings found in the victim's vehicle and the two projectiles recovered from her body were fired from this gun. (Tr. 1270-1271, 1274).

{¶71} The police executed a search warrant at Appellant's house on Millet Avenue (where the silver Impala was located) and at the neighboring house (which was also associated with Appellant). From the first house, the police confiscated an empty box for a .40 caliber Smith & Wesson semi-automatic pistol and a bag containing .45 caliber ammunition (44 loose rounds). (Tr. 1077-1081, 1565-1566; St.Ex. 91, 93-96). (The detective originally wrote in his notes that the bag contained 9mm rounds, but he did not open the bag in case a DNA test was needed.) From the second house, they recovered one 9mm shell casing (from a shelf in a bedroom closet). (Tr. 1084; St.Ex. 100-101).

{¶72} In addition to contesting these three seized items, Appellant's brief also contests the admission of a .40 caliber firearm that he suggests was found in executing

the search warrant at his house. (Apt.Br. 11-12). Since he was charged with having a weapon while under disability, it is difficult to understand Appellant's argument contesting the admission of a firearm as evidence associated with him. Regardless, if a firearm was found during the execution of the search warrant, the jury was not informed about it.

{¶73} The only .40 caliber firearm introduced as evidence was the one registered to the victim and recovered from the driver's side floor of the victim's vehicle by her feet. There is no argument about the admission of the victim's two firearms found in her vehicle where she was shot. Clearly, the gun near the victim's feet was relevant to the scene of the crime and was not other acts evidence related to Appellant or showing his character. In fact, testimony that the victim's .40 caliber firearm was found by her body could benefit a defendant. (A juror could wonder if the victim had her gun in hand when she was shot and dropped it or could wonder if she was shot because she was reaching for her gun). In any event, the argument set forth in the brief concerns evidence associated with Appellant because it was seized *during the execution of the search warrant* at his associated houses. Accordingly, the victim's firearm recovered from her vehicle is not part of the analysis in addressing Appellant's argument about the items seized from his houses.

{¶74} Appellant says the three items seized from his houses and the testimony about their discovery was irrelevant character evidence. As to the empty gun box, he notes the murder weapon was a 9mm semiautomatic, not a .40 caliber semi-automatic. Regarding the bag of ammunition, it was conceded that the .45 caliber rounds would not fit the 9mm murder weapon and the fired shell casings in the victim's vehicle were 9mm. (Tr. 1566, 1677-1678). As for the 9mm casing found on a shelf, the BCI agent testified that it was not fired from the murder weapon (or from the victim's weapons). (Tr. 1272, 1295, 1729).

{¶75} Relevant evidence is evidence which 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. Evidence which is not relevant is not admissible. Evid.R. 402. Even if relevant, evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 403(A).

{¶76} Rather than cite these rules, Appellant relies on Evid.R. 404(B), which states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." This rule further states the evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B).

{¶77} This is a non-exhaustive list of exceptions. *State v. Hartman*, __ Ohio St.3d __, 2020-Ohio-4440, __ N.E.2d __, ¶ 26 (where the defense objected to the state's evidence showing the defendant previously sexually abused his step-daughter to show propensity to commit a subsequent sexual offense against a different person, the Court found the trial court's admission of the evidence was erroneous and affirmed the appellate court's decision finding the evidence was highly prejudicial). The rule "categorically prohibits evidence of a defendant's other acts when its only value is to show that the defendant has the character or propensity to commit a crime." *State v. Smith*, __ Ohio St.3d __, 2020-Ohio-4441, __ N.E.2d __, ¶ 36 (finding the trial court properly overruled the defendant's objection to testimony on prior sexual assault allegations as the defendant placed his intent at issue)

{¶78} Appellant concludes the seized evidence represented prior acts that were improperly used to show his character or to show he had a proclivity toward owning firearms spanning three different calibers. The state says the evidence was merely introduced to show the extent of the investigation and the results of the ballistics testing. Appellant relies on the Supreme Court's *Thomas* case to conclude the unrelated "other weapons evidence" was inadmissible and prejudicial other acts evidence.

{¶79} First, it must be emphasized: error may not be predicated upon a ruling that admits evidence unless the party opposing the admission timely objects. Evid.R. 103(A)(1) (and substantial rights are affected). As Appellant recognizes, defense counsel did not object to admission of the items found during the execution of the search warrant or to the presentation of testimony about the discovery. (Tr. 1077-1085, 1272, 1565-1566, 1776-1778). Appellant therefore resorts to arguing (1) ineffective assistance of counsel in failing to object to the evidence or (2) plain error on the part of the trial court in admitting the evidence.

{¶80} A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the performance was not deficient, then there is no need to review for prejudice and vice versa. *See State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). In evaluating an alleged deficiency in performance, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142-143, 538 N.E.2d 373 (1989) (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689. A court should not second-guess the strategic decisions of counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶81} On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Carter*, 72 Ohio St.3d at 558. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142, fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding was fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶82} Under Crim.R. 52(B), where no objection was entered at a time when the error could have been corrected by the trial court, the reviewing court may recognize plain error if substantial rights were affected. Plain error is a discretionary doctrine to be used only with the utmost care by the appellate court in exceptional circumstances to avoid a manifest miscarriage of justice. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 62. The doctrine can be employed only where there was an obvious error and that obvious error affected substantial rights, meaning the alleged obvious error was outcome determinative. *Id.* at ¶ 62.

{¶83} Appellant compares the evidence introduced in his case to the weapons evidence discussed in the Supreme Court's *Thomas* case and urges the prejudicial effect was similar. In *Thomas*, the defendant's knife collection was introduced as evidence in a

capital case even though it was unrelated to the crime; the victim was stabbed, but none of the knives admitted at trial was the murder weapon. *State v. Thomas*, 152 Ohio St.3d 15, 2017-Ohio-8011, 92 N.E.3d 821. The Court reversed the conviction and death sentence and remanded for a new trial. *Id.* at ¶ 49 (O'Donnell, J., writing for the plurality and joined by O'Connor, J. and O'Neill, J.) (French, J., concurring in judgment only without opinion).

{¶84} The plurality first opined the knife evidence was not relevant and was used to portray the defendant as a person of violent character who acted in conformity with his propensity, which was a prohibited use of other acts evidence. *Id.* at ¶ 1, 48. As there was no objection to the evidence at trial, the plurality relied on the plain error doctrine to reverse, concluding: the unrelated weapons evidence was highly prejudicial; there was a reasonable probability it affected the outcome of the trial; and reversal was necessary to prevent a manifest miscarriage of justice. *Id.* at ¶ 48 (refusing to address 23 other assignments of error).

{¶85} The three dissenting justices said the relevancy of the knife collection was a close question but any error was not obvious and the evidence had no appreciable impact on the jury verdict. *Id*. at ¶ 50, 60, 64.

{¶86} Notably, the judgment in *Thomas* entailed a reviewing court exercising its *discretion* to recognize plain error *in a capital case*. *Id.* at ¶ 32-34 (plurality). Although there was no review by an intermediate appellate court due to the death sentence, the plurality specifically noted that an appellate court is not required to correct a plain error. *Id.* at ¶ 34.

{¶87} Both the plurality and the dissent relied on two prior Supreme Court cases upholding convictions even after finding unrelated weapons evidence was irrelevant and erroneously introduced. *Id.* at ¶ 40, 60-61, citing *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112 and *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242. In the cited cases, the Court found harmless error in allowing unrelated weapons evidence as there was substantial other evidence to support the conviction.

{¶88} In *Trimble*, the Court said other firearms are not admissible merely to show a defendant had access to guns where none of those guns was alleged to be the murder

weapon. *Trimble*, 122 Ohio St.3d 297 at ¶ 106-107, 110 (but finding merit to the state's contention, in response to an objection at trial, that a cache of weapons from a suspect's home can be introduced to show familiarity with weapons in order to rebut a claim that he accidentally pulled the trigger). After assuming arguendo the evidence of unrelated firearms should not have been admitted, the *Trimble* Court found the evidence harmless in a death penalty case due to the remainder of the state's evidence demonstrating the defendant's guilt and concluded the jury was not influenced by the fact that the defendant owned many firearms. *Id.* at ¶ 111.

{¶89} In *Neyland*, the murder weapon was identified as a 9mm firearm and was admitted into evidence. The Court said the trial court erred in admitting evidence of unrelated weapons and ammunition (found in the defendant's motel room and storage unit) which had no connection with the murders and was not relevant to prove prior calculation and design as argued to the trial court by the state. *Neyland*, 139 Ohio St.3d 353 at ¶ 157. However, the Court concluded admission of the evidence was harmless. *Id.* at ¶ 159. Notably, the defense objected in both *Trimble* and *Neyland*.

{¶90} In the case at bar, there was no objection to the seized evidence. As explained supra, the evidence introduced as a result of the search warrant executed at Appellant's houses did not include an actual weapon. Rather, the evidence seized from Appellant's houses that was introduced at trial was merely an empty box which previously contained a .40 caliber firearm, a bag of .45 caliber ammunition, and a lone 9mm casing.

{¶91} Defense counsel strategically questioned the witnesses about these items. He criticized the part in the detective notes saying the bag contained 9mm ammunition (when it was actually .45 caliber) in order to suggest poor observational and investigative skills. Defense counsel emphasized the inability to use a .45 caliber bullet in the 9mm murder weapon. He also pointed out the murder weapon was not whatever .40 caliber weapon formerly occupied the empty box. Counsel highlighted the fact that the single 9mm casing found on a shelf was not fired from the 9mm murder weapon as scientifically proven by the state. The evidence discovered as a result of the search was portrayed by the defense as exculpatory.

{¶92} Assuming Appellant could have successfully challenged the seized items as inadmissible gun-related evidence on the grounds that it was irrelevant or it was used

to suggest he had a past proclivity to own weapons, this would still not mean counsel was ineffective or the trial court committed plain error. Defense counsel could have *reasonably weighed the value of evidence to the defense and concluded that it outweighed any potential prejudice*. For instance, he could have rationally believed the particular seized evidence would not lead a jury to infer that a homeowner with these items in their house had a propensity to commit murder by purposely shooting another person. As for the weapon under disability conviction, counsel could hope the jury considered the seized evidence as suggesting Appellant was following the restriction against having a weapon as the gun box was empty. The existence of ammunition in his house was not alleged to be illegal, and the amount of ammunition was 44 rounds, which was noted to be less than the amount in a standard box (50).

{¶93} It was clearly a tactical decision to allow the jury to hear that although this ammunition and an empty .40 caliber gun box was found in Appellant's house, he had no firearm or 9mm ammunition. We will not second guess this strategical decision. The failure to object to the admission of the three items found during the execution of the search warrant was not ineffective assistance of counsel as counsel's tactic was not a serious error outside the realm of reasonable representation.

{¶94} Additionally, prejudice is lacking as there was not a reasonable probability the result would have been different if the three items found in executing the search warrant were not disclosed to the jury. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142, fn. 1, quoting *Strickland*, 466 U.S. at 693. There was substantial evidence connecting Appellant with the shooting as discussed in the Statement of the Case and under Appellant's sufficiency and weight assignments of error. Circumstantial evidence inherently possesses the same probative value as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001). "A conviction can be sustained based on circumstantial evidence alone." *State v. Franklin*, 62 Ohio St.3d 118, 124, 580 N.E.2d 1 (1991). Moreover, informing the jury that Appellant's houses contained an unrelated empty gun box, a bag of 44 unrelated bullets, and an unrelated casing was not inflammatory. We note the jury found Appellant not guilty of aggravated murder. We cannot say the results were unreliable or the proceeding was fundamentally unfair due to

counsel's failure to contest the evidence. *See Carter*, 72 Ohio St.3d at 558, citing *Lockhart*, 506 U.S. at 369.

{¶95} In addition to affecting his ineffective assistance of counsel claim, the lack of prejudice also affects Appellant's plain error claim. That is, the admission of the evidence did not affect Appellant's substantial rights as the disclosure of the seized evidence was not outcome determinative. Furthermore, the alleged error was not obvious under the circumstances of the case, a manifest injustice is not apparent, and we are not presented with exceptional circumstances justifying the use of our discretion to recognize plain error.

{¶96} This assignment of error is overruled.

ASSIGNMENT OF ERROR FOUR: SPEEDY TRIAL

{¶97} Appellant's fourth assignment of error alleges:

"APPELLANT'S RIGHTS TO A SPEEDY TRIAL WERE VIOLATED WHEN HE WAS NOT BROUGHT TO TRIAL IN THE TIME REQUIRED BY LAW AND HIS COUNSEL WAS INEFFECTIVE FOR NOT JOINING IN APPELLANT'S MOTION TO DISMISS."

{¶98} The right to a speedy trial is granted by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, and it is codified at R.C. 2945.71 to 2945.73. An appellate court's review of a speedy trial claim is a mixed question of law and fact; a reviewing court gives due deference to the trial court's factual findings that are supported by competent, credible evidence and independently reviews whether the correct law was applied to the facts of the case. *State v. Taylor*, 7th Dist. Columbiana No. 08 CO 36, 2011-Ohio-1001, ¶ 5.

{¶99} Appellant was arrested on June 23, 2017. The day of arrest is not utilized in the count of days for speedy trial purposes. *State v. Devine*, 2019-Ohio-778, 132 N.E.3d 161, ¶ 20 (7th Dist.), citing *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, fn. 7. A person charged with a felony must be brought to trial within 270 days *after* his arrest. R.C. 2945.71(C)(2).

{¶100} However, "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E). Consequently, an accused felon jailed solely on the pending charge at issue must be tried within 90 days

after his arrest, subject to certain tolling events. *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 15. These tolling events include: any period of delay necessitated by the defendant's motion (including a discovery demand); the period of any continuance granted on the defendant's own motion; and the period of any reasonable continuance granted other than upon the defendant's motion. R.C. 2945.72(E),(H). *See also State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, syllabus.

{¶101} The parties do not dispute Appellant remained in jail solely on the charges in this case from his arrest through trial (and thus the triple-count provision initially applied). Nevertheless, an accused may waive his constitutional and statutory rights to a speedy trial. *State v. O'Brien*, 34 Ohio St.3d 7, 9, 516 N.E.2d 218 (1987).

{¶102} Appellant's speedy trial time waiver was date-stamped August 30, 2017, but it was verbalized in open court and signed by him on August 28, 2017. *See State v. King*, 70 Ohio St.3d 158, 1994-Ohio-412, 637 N.E.2d 903 (1994) ("To be effective, an accused's waiver of his or her constitutional and statutory rights to a speedy trial must be expressed in writing or made in open court on the record."). Appellant acknowledges he validly waived his statutory and constitutional speedy trial rights before 90 days passed.

{¶103} Still, we outline some of the events occurring after Appellant waived his speedy trial rights: the defense demanded specific additional discovery on September 11, 2017, which the state provided on September 18, 2017; an October 4, 2017 pretrial was continued on joint request; the date for the jury trial was chosen at the rescheduled pretrial; the February 26, 2018 agreed trial date was continued on joint request; and the April 23, 2018 trial date was continued upon the request of defense counsel.

{¶104} Thereafter, the state was granted: a continuance of the June 18, 2018 trial date (due to a detective's participation in a two-week course); a continuance of the October 15, 2018 trial date (due to the vacations of two BCI witnesses); and a continuance of the December 3, 2018 trial date (due to the entire BCI participating in mandatory training). In granting this last request, the court set a pretrial for November 9, 2018, at which time the parties were to choose a mutually agreeable trial date. The trial was then set for April 8, 2019.

{¶105} On November 19, 2018, Appellant filed a pro se motion "to withdraw his speedy trial waiver." He cited the Supreme Court's *O'Brien* case and said a speedy trial

waiver can be revoked when an accused files a written objection. On December 21, 2018, Appellant filed a pro se petition again declaring that he wished to exercise his right to withdraw his speedy trial waiver.

{¶106} At the March 22, 2019 pretrial, the court filed an entry explaining the trial was being pushed back one week to April 15, 2019 due to a schedule conflict. On April 3, Appellant's counsel filed a motion in limine with a request for a hearing, and the motion was heard on April 8. The jury trial commenced on April 15, 2019. The verdict was rendered on April 26, 2019, and the case was set for a June 14 sentencing hearing.

{¶107} Thereafter, on June 5, 2019, Appellant filed a pro se motion to dismiss on speedy trial grounds. This was an untimely motion under R.C. 2945.73(B), which provides: "Upon motion *made at or prior to the commencement of trial*, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." (Emphasis added). *See also State v. Trummer*, 114 Ohio App.3d 456, 470, 683 N.E.2d 392 (7th Dist.1996) ("Speedy trial provisions are not self-executing but must be asserted by a defendant in a timely fashion to avoid such rights being waived.").

{¶108} Appellant therefore raises his constitutional rights and claims he received ineffective assistance of counsel by the failure to file a motion to dismiss before trial. Appellant claims his speedy trial rights had been violated before the start of trial due to his motion to withdraw his speedy trial waiver and the subsequent delay. He relies on the following *O'Brien* holding: "following an express written waiver of unlimited duration by an accused of his speedy trial rights the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection to any further continuances and makes a demand for trial, following which the state must bring him to trial within a reasonable time." *O'Brien*, 34 Ohio St.3d at 9 (rejecting the sufficiency of an oral objection made over the phone to an assistant prosecutor).

{¶109} The state claims Appellant's motion to withdraw his speedy trial waiver was insufficient because although he voiced a written objection, he did not specifically demand trial, pointing out that *O'Brien* calls for a written objection *and* a demand for trial. *Citing State v. Love*, 7th Dist. Mahoning No. 02 CA 245, 2006-Ohio-1762, ¶ 134 ("Although Appellant clearly indicated that he wanted to revoke his speedy trial waiver in

the instant cause, his attempt to withdraw the waiver did not include a demand for trial."). Appellant replies by noting he specifically cited *O'Brien* for his objection and asked to withdraw his speedy trial waiver, and if this was insufficient, then his attorney was ineffective for failing to supplement Appellant's withdrawal of the time waiver.

{¶110} We note a statement by the Ohio Supreme Court in the sentence immediately after the above *O'Brien* quote. After stating the defendant cannot be discharged unless he "files a formal written objection to any further continuances and makes a demand for trial", the Court reiterated: "The trial court is charged with the duty of scheduling trials, and it would seem to be reasonable to require the defendant to formally inform the court of an objection to a further continuance, and a reassertion of the defendant's right to a speedy trial." *O'Brien*, 34 Ohio St.3d at 9-10. One could argue the Court seemed to equate the reassertion of the right to a speedy trial with the demand for trial (required in the immediately preceding sentence).

{¶111} In any event, the state urges it was reasonable to hold the trial on April 15, 2019, which was 147 days after Appellant's November 19, 2018 motion to withdraw his speedy trial waiver. *Citing State v. Bandy*, 7th Dist. Mahoning No. 05-MA-49, 2007-Ohio-859, ¶ 23 (holding trial 138 days after the hearing on the motion to withdraw the speedy trial waiver was reasonable)*; Love*, 7th Dist. No. 02 CA 245 at ¶ 135 (reasonable to hold trial 116 days after the defendant's motion to withdraw the speedy trial waiver).

{¶112} To evaluate a speedy trial claim made after a defendant withdraws his time waiver, courts are to apply the reasonableness test which is used for determining whether the constitutional right to a speedy trial was violated. *O'Brien*, 34 Ohio St.3d at 10. Therefore, once a defendant revokes an unlimited time waiver, as in this case, the strict statutory times do not recommence. *See id.*

{¶113} The evaluation of the constitutional right to a speedy trial employs a balancing test, which considers factors including: the length of the delay, the reason for the delay, the defendant's assertion of his right, and any prejudice to the defendant. *Id.*, citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.E.2d 101 (1972). First, "the length of the delay is to some extent a triggering mechanism." *Barker*, 407 U.S. at 530. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *O'Brien*, 34 Ohio St.3d at 9,

quoting *Barker*, 407 U.S. at 530. "[T]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." *Barker*, 407 U.S. at 530-531 (e.g., the tolerable delay for an ordinary street crime is considerably less than for a serious, complex charge).

{¶114} As for the reason for delay, "different weights are assigned to different reasons," and the state's motive for delay is considered. *Id.* at 531 ("a more neutral reason such as negligence or overcrowded courts should be weighted less heavily" as should a missing witness). The factor relating to when and how the defendant asserted his right was more relevant in *Barker* where the Court rejected a strict rule requiring the defendant to demand trial (in a case without a pre-existing speedy trial waiver). *Id.* at 531.

{¶115} In considering the prejudice factor, a court can consider the following interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* at 532. The last interest is the most serious "because the inability of a defendant to adequately prepare his case skews the fairness of the entire system." *Id.*

{¶116} Appellant did not refer to an impairment of his defense from the delay. Although he was incarcerated during the entire proceedings, he waited more than a year after waiving his speedy trial rights to file his November 18, 2018 motion to withdraw the time waiver. Even if not dispositive, he did not specifically demand trial in his motion to withdraw his speedy trial waiver, and the general objection therein did not specifically object to further continuances. This was a murder case with more complex evidence than in a case involving "an ordinary street crime." *Id.* at 531.

{¶117} The length of delay after the motion to withdraw speedy trial rights, which the state calculates as totaling 147 days, was not inordinate. Moreover, as the state points out, the November continuance of the December trial date *was granted before Appellant filed the motion withdrawing his time waiver*, and the April 8, 2019 trial date was set as a mutually agreeable date. It is also noted that this trial date was thereafter continued by a mere week due to the court's scheduling conflict; this was journalized after a March 22 pretrial where Appellant voiced that he would be filing a motion in limine that

required a hearing. He was instructed to file the motion in limine by March 29, but he did not file it until April 3; the motion was heard on April 8, 2019.

{¶118} As for the reason for earlier delays, Appellant signed and voiced his speedy trial time waiver with a request for an indefinite continuance on August 28, 2017. Various delays were then on joint request. For instance, there was a *joint request* to continue the first pretrial. At the rescheduled pretrial, *the parties agreed* to set the trial for February 26, 2018. This trial date was continued on *joint request* to April 23, 2018. Then, *defense counsel* moved to continue the April 23, 2018 trial date, which was then rescheduled for June 18, 2018. Consequently, it is difficult to add any weight to the defendant's side of the reasonable-versus-unreasonable scale for the first year the case was pending.

{¶119} The state's delay thereafter was to ensure the presence of important witnesses who had commitments conflicting with the trial dates. The state's motive did not strongly weigh against reasonable delay. There is no indication defense counsel objected to these three state continuances. Plus, the state's requests were made during the time period when Appellant's speedy trial waiver was still in effect, and again, the final state's continuance was granted before Appellant moved to withdraw his time waiver.

{¶120} In sum, as we are assuming Appellant's motion to withdraw his speedy trial waiver was sufficient to demand trial, there was no prejudice in defense counsel's failure to supplement or join Appellant's withdrawal of his waiver. The statutory speedy trial times were not applicable after Appellant's time waiver, and the delay after Appellant's request to withdraw his time waiver was constitutionally reasonable. As the delay was reasonable, there was no serious error in counsel's failing to move for discharge before trial, and there was not a reasonable probability such a motion would have been granted.

{¶121} This assignment of error is overruled.

ASSIGNMENT OF ERROR SIX: SUFFICIENCY OF THE EVIDENCE

{¶122} Appellant's fifth assignment of error addresses the weight of the evidence, and his sixth assignment of error addresses the sufficiency of the evidence. He seems to incorporate various arguments from the argument on weight into the subsequent argument on sufficiency. We shall address sufficiency first because, as discussed infra,

insufficient evidence requires discharge (and requires the vote of two judges) while a weight of the evidence argument calls for a new trial (and requires the vote of all three judges where there was a jury trial). Appellant's sixth assignment of error on sufficiency provides:

"THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION."

{¶123} Whether the evidence is legally sufficient to sustain a conviction is a question of law dealing with adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The requirement of sufficient evidence is a due process protection. *Id.* We do not weigh the evidence or evaluate witness credibility in a sufficiency review as the question is whether the evidence, if believed, is sufficient to prove the elements of the offense. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79, 82.

{¶124} A conviction cannot be reversed on the grounds of insufficient evidence unless the reviewing court determines that no rational juror could have found the elements of the offense proven beyond a reasonable doubt after viewing the evidence in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). Rational inferences to be drawn from the evidence are also evaluated in the light most favorable to the state. *State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999). *See also Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (using reasonable inferences to ascertain both the basic and the ultimate facts in evaluating the due process requirement of sufficient evidence).

{¶125} Appellant states there was no evidence he possessed a firearm for his conviction of having a weapon while under disability. However, if he was the shooter, then he necessarily possessed a firearm. Thus, we focus on his claim contesting the sufficiency of the evidence showing he was the shooter. His arguments concern the element of identity.

{¶126} Appellant reiterates his complaints about the cell phone tracking evidence and the firearm paraphernalia evidence recovered from his residence. These issues were addressed in assignments of error one and three. All of the evidence offered by the state and admitted by the trial court, whether erroneously or not, can be considered to

determine whether the evidence was sufficient to sustain the guilty verdict. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 16-20; *Yarbrough*, 95 Ohio St.3d 227, at ¶ 80, citing *Lockhart v. Nelson*, 488 U.S. 33, 35, 38, 40-42, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988). This is true even in cases where the court finds a reversible evidentiary decision under another assignment of error because of the distinct remedies: the remedy for reversible evidentiary error is a new trial, while the remedy for insufficient evidence is discharge. *Thompkins*, 78 Ohio St.3d at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 41, 47, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

{¶127} Appellant points to the varying descriptions of the shooter provided by the eyewitnesses and the inability to specifically identify him as the person they saw fleeing from the scene of the shooting. Complaints of conflicting testimony will be discussed under the weight of the evidence assignment of error. *See State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001) ("Evidentiary conflicts are for the jury * * *; thus, the mere existence of conflicting evidence cannot make the evidence insufficient as a matter of law"); *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring) (sufficiency involves the state's burden of production rather than its burden of persuasion, which is relevant in the weight of the evidence evaluation).

{¶128} As to a lack of specific identification of a fleeing suspect, we point out that circumstantial evidence inherently possesses the same probative value as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001), citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus (when the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no longer a requirement for such evidence to be irreconcilable with any reasonable theory of innocence). We refer to our Statement of the Case supra for specific facts and citations to the transcript, and we review the highlights here.

{¶129} The combination of eyewitness testimony included statements that a heavyset and shorter black male with a beard, wearing a red shirt and dark pants, exited the victim's vehicle after multiple gunshots were heard and wiped the passenger door with red material before fleeing to a waiting vehicle. That car had quickly approached the scene, running a stop sign on the way. The driver was a heavyset black woman with shoulder-length hair. These descriptions matched Appellant's actual description and his

girlfriend's actual description that day. They were both at Appellant's house, which was within a mile from the scene.

{¶130} In Appellant's driveway was Appellant's vehicle which had its trunk messily filled with what appeared to be all of the hanging clothing from the house. As for the get-away vehicle, it was not just the color, make, model, and approximate year that matched Appellant's vehicle; it was also specific features such as a dent in the rear passenger door and a patterned blanket hanging in the broken rear passenger window. The accuracy of the description was further confirmed by a video surveillance camera which captured the vehicle heading toward the scene four minutes before the shooting.

{¶131} Appellant knew the victim well. He was having issues with her over money and real estate. A deed, wherein the victim transferred property to Appellant, was in the glove compartment of the get-away vehicle. Twenty minutes before the victim's death, she called a person saved in her phone as "Deshawnte." Appellant's name is Dashonti. The day before her death, the victim texted a different number, which Appellant admits was his and which was saved in the victim's phone as "Big Bra." In that text, she asked Appellant: "So when you gone bring me the rest of that money[?]"

{¶132} Seven minutes before her death, the victim texted her boyfriend to tell him she still needed "two more" and sent a mad emoji face one minute before her death. Her boyfriend said she left their house approximately twenty minutes before her death after talking on the phone. He explained that Appellant still owed the victim $2,000 for the real estate sale and Appellant voiced displeasure with the victim over issues with the house she sold him. After the victim's death, Appellant told the victim's boyfriend he was on his way to a waterpark and hung up without speaking to him about the death.

{¶133} Appellant's phone was in the vicinity of the scene a half hour before the shooting and was not communicating with the provider's towers from that point until 45 minutes after the shooting when it appeared to be located closer to the park where the murder weapon was later discovered. Appellant seemed to noisily clean his hands with his mouth when a detective left him alone in the interview room to retrieve a technician for a GSR test. Although Appellant said it had been a long time since he last fired a gun, the test came back positive for gunshot residue on one hand.

{¶134} The question is merely whether "*any* rational trier of fact" could have found the defendant's identity as the shooter was proven beyond a reasonable doubt. (Emphasis original.) *State v. Getsy*, 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998). After viewing the evidence in the light most favorable to the state, some rational juror could find beyond a reasonable doubt that Appellant was the shooter. Accordingly, the state presented sufficient evidence on the element of identity and sufficient evidence of the offenses (murder with a firearm specification and having a weapon while under disability). This assignment of error is overruled.

ASSIGNMENT OF ERROR FIVE: WEIGHT OF THE EVIDENCE

{¶135} Appellant's fifth assignment of error, which we relocated in order to address his sufficiency argument first, contends:

"MR. BAKER'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶136} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other" and involves the persuasive effect of the evidence in inducing belief. *Thompkins*, 78 Ohio St.3d at 387 (but is not a question of mathematics). A weight of the evidence review considers whether the state met its burden of persuasion, as opposed to the burden of production involved in a sufficiency review. *See id.* at 390 (Cook, J., concurring).

{¶137} When a defendant claims a conviction is contrary to the manifest weight of the evidence, the appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, 78 Ohio St.3d at 387. The weight to be given the evidence is primarily for the trier of the facts. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶138} In a case tried by a jury, only a unanimous appellate court can reverse on the ground that the verdict was against the manifest weight of the evidence. *Thompkins*,

78 Ohio St.3d at 389, citing Ohio Constitution, Article IV, Section 3(B)(3). The power of the court of appeals to sit as the "thirteenth juror" is limited to the exceptional case in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses and the weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387, 389.

{¶139} On the topic of conflicting testimony, Appellant states the testimony of the three neighbors varied widely. The shooter was described by the three witnesses: (A) short and stocky black male with a beard, estimated at 5'8" and 200 pounds, wearing a red shirt and black pants; (B) heavyset black male, estimated over 6' and 230-240 pounds, wearing a gray "spring jacket" and gray pants; and (C) "real stocky" black male, estimated at 5'7"-5'8" and 160-170 pounds, wearing a red shirt and dark jeans with a large cuff.

{¶140} All three witness indicated the suspect was heavyset, which matched Appellant's actual appearance at the time. Witness C may have estimated the weight low, but she described the suspect as "real stocky." She also said he was "firmly built." Defense counsel elicited on cross-examination that this suggested muscles. Yet, this does not mean Appellant was not the shooter merely because Appellant was not actually muscular or was not considered muscular by the detective.

{¶141} The height estimates of witness A and witness C accurately matched Appellant's height. Witness B estimated a taller height but pointed out that he was in a second floor window looking down when he saw the suspect. This vantage point could account for his higher height estimation. "The positions and comparative elevation levels of the witness and the suspect at the time the suspect was observed are considerations for the jury in weighing the evidence." *State v. Thomas*, 7th Dist. Mahoning No. 18 MA 0132, 2020-Ohio-3637, ¶ 26 (where a sleeping homeowner had a fleeting impression as to a hooded burglar's height while the homeowner was lying on his bed in the dark in the middle of the night and suddenly had a flashlight beam shined into his eyes), citing *State v. Brand*, 1st Dist. Hamilton No. C-150590, 2016-Ohio-7456, ¶ 23 (the victim's estimation of an intruder's height could have been affected by the fact that she first encountered him while she was standing a few steps above him).

{¶142} Both witness A and witness C noticed the subject was wearing dark pants and a red shirt. Witness B mentioned gray pants and jacket. Yet, he only saw the subject

from the back; if the suspect wore a jacket (presumably with a shirt under it), then the shirt would not have been facing the direction of witness B. Notably, witness B saw the suspect wipe the car door with red material, which he assumed was a rag (but which could have been the suspect using the red shirt he was wearing). Witness B did not mention a beard as did witness A. However, Witness A viewed the suspect from the front and watched as the get-away car drove by him after retrieving the suspect. And again, witness B only saw the suspect from the back. It was for the jury to judge the import of the differences. *See id.*

{¶143} Contrary to Appellant's suggestion, the evidence strongly tied Appellant's vehicle to the get-away vehicle spotted at the scene of the crime. It was the same color, make, model, and approximate year with additional unique features, including a dent in the rear passenger door and a patterned blanket hanging in the broken rear passenger window. The descriptions of the vehicle by the witnesses and the identification by witness A of Appellant's vehicle as the one he saw at the scene were bolstered by the video from a nearby business showing these unique features of the vehicle heading in the direction of the scene four minutes before the shooting. The video also showed a hubcap was missing from the vehicle, and Appellant's car was missing the same hubcap. Appellant was found with his packed vehicle at his home within a mile of the scene.

{¶144} As for the evidence recovered during the execution of the search warrant, this evidence was an empty box for a gun that could not have been the murder weapon, a casing that was not fired from the murder weapon, and a bag of ammunition that was not the caliber used to kill the victim. Defense counsel's decision to refrain from objecting and to instead highlight the lack of connection with the shooting did not cause the jury to lose its way.

{¶145} Nor did the cell phone location testimony cause the jury to lose its way and create a manifest miscarriage of justice. Despite Appellant's statement to the contrary, the victim's call to "Deshawnte" before her death is relevant (due to the phonetic similarity to Appellant's name and due to Appellant's statement in a jail call that he had two phones). The significance of the testimony by the victim's boyfriend was also a matter within the jury's role of judging credibility and assigning weight.

{¶146} In reviewing the record, the thoroughness of the investigation is not concerning. The theory of an inadequate investigation was argued by defense counsel and rejected by the jury as was within their province. The detective did not open the bag of bullets because he did not want his DNA to contaminate it when he thought it may contain 9mm ammunition. He also explained his failure to test Appellant's shirt for gunshot residue was due to his concern the test would destroy DNA evidence. Gunshot residue was found on Appellant's hand in any event. Appellant believes this finding is not significant because many people walk around with gunshot residue on their hands. The jury heard defense counsel question the expert on this topic, and it was for the jury to assign weight to the evidence, just as it was for the jury to determine if Appellant was licking and sucking on his hands when the detective left the room before the test was administered.

{¶147} Appellant points out that his DNA was not found on the casings discovered by the victim's body or on the swabs from the victim's car door. We note some DNA was collected that was not suitable for comparison. Moreover, the expert noted that a fired casing does not tend to be a great source for DNA. As for the car door, it was raining, the suspect wiped the door down, and the technician taking the swab cannot see DNA (i.e., they cannot visually determine where to swab).

{¶148} The trier of fact occupies the best position from which to weigh the evidence and to judge credibility by observing the gestures, voice inflection, and demeanor of the witnesses. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). When more than one competing interpretation of the evidence is available and the one chosen by the jury is not unbelievable, we do not choose which theory we believe is more credible and impose our view over that of the jury. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Upon reviewing the entire record, there is no indication the jury clearly lost its way and created such a manifest miscarriage of justice that a new trial is required. *See Lang*, 129 Ohio St.3d 512 at ¶ 220, citing *Thompkins*, 78 Ohio St.3d at 387. In accordance, this assignment of error is overruled.

{¶149} For the foregoing reasons, the trial court's judgment is affirmed.

Waite, P.J., concurs.

Powell, J. concurs.

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

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

NOTICE TO COUNSEL

This document constitutes a final judgment entry.