

Before the Ohio Supreme Court
Case No.

On Appeal from the Seventh District Court of Appeals
From Case No. 22 MA 68

The State of Ohio

Plaintiff-Appellee

-vs-

Luis Johnson

Defendant-Appellant

Memorandum in Support of Jurisdiction

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Jurisdictional Statement

This is a case of great public and/or general interest that involves a substantial constitutional question.

The case before us presents an opportunity for the Ohio Supreme Court to address substantial constitutional questions that resonate deeply within the framework of criminal jurisprudence and the broader public interest. At the heart of the appeal lies a critical examination of the sufficiency and the manifest weight of the evidence against Mr. Luis Johnson, whose convictions for attempted murder and felonious assault under Ohio law are contested on grounds that strike at the core of due process rights under the Fourteenth Amendment. This appeal, therefore, not only challenges the veracity of the evidence but also the foundational principles governing the rights of the accused and the integrity of judicial proceedings.

The appellate review process in this case underscores a constitutional quandary that demands the highest court's attention—whether the evidentiary standards applied at trial and affirmed by the appellate court align with the rigorous demands of fairness, objectivity, and justice as enshrined in our constitution. The discrepancies in eyewitness testimony, the absence of direct physical evidence linking Mr. Johnson to the crime, and the contested credibility of key witnesses raise significant concerns about the trial's outcome. These concerns are not merely

procedural but go to the heart of ensuring that convictions rest on solid, incontrovertible evidence, reflecting a commitment to justice and due process.

Furthermore, the application of the hostile witness rule in this context presents a nuanced constitutional issue, inviting the Supreme Court to clarify the boundaries within which trial courts may exercise discretion in admitting testimony. This aspect of the case touches upon the Sixth Amendment's confrontation clause and its interplay with the rules of evidence, highlighting the delicate balance between the state's interest in prosecuting criminal behavior and the protection of individual rights against unfounded or unjust convictions.

The Ohio Supreme Court's jurisdiction over this matter offers a vital platform for reaffirming the principles of justice and due process in the context of criminal law. By scrutinizing the evidentiary and procedural issues raised in this appeal, the Court has the opportunity to reinforce the safeguards that protect individuals against wrongful convictions, ensuring that the state's prosecutorial powers are exercised within the bounds of fairness and constitutional propriety.

In urging the Ohio Supreme Court to assume jurisdiction, we highlight the broader implications of this case for the criminal justice system and the public's confidence in the judicial process. The questions at stake transcend the immediate parties involved and touch upon the very essence of constitutional governance and the protection of fundamental rights. It is within this high court's purview to

address these substantial issues, setting precedents that uphold the integrity of the legal system while safeguarding the liberties that define our society.

Statement of the Case and Facts

In the early morning hours of October 12, 2020, Mr. Tevin Gregory found himself, though alive, the victim of a shooting. [Trial Tr. at 247, 314.] As Mr. Gregory was leaving the home of Ms. Starla Clark, he spotted a vehicle approaching. According to Mr. Gregory, the vehicle was a red Ford. [Trial Tr. at 232, 377.] However, the only eyewitness to the incident, Mr. Juan Salinas, remembered the vehicle as a burgundy sedan. [Trial Tr. at 251, et seq.]

At the heart of this case, we find Luis Markeal Johnson, the accused. Mr. Johnson stood charged with attempted murder, pursuant to Ohio Revised Code sections 2923.02(A) and 2903.02(A)(D), and felonious assault, in violation of Ohio Revised Code sections 2903.11(A)(1)(2)(D). Adding to the severity of these charges, the State included the firearm specification under Ohio Revised Code sections 2941.145(A) and 2941.146(A). [See, e.g., Indictment, R.E. 1.]

After much anticipation, the jury returned their verdict on May 19. They found Mr. Johnson guilty of attempted murder and felonious assault, along with the associated firearm specifications. [Trial Tr. at 681.]

Two weeks later, on June 2, Mr. Johnson was sentenced to prison by Judge Donofrio of the Mahoning County Court of Common Pleas. [Sen.Tr. at 1 – 17.] The court entered the guilty disposition the following day and marked the case status as “Closed.” [See, e.g., Judgement Entry]. However, the conclusion of the case in the trial court marked the beginning of this appeal. Mr. Johnson timely noticed his appeal and now seeks reversal on the grounds below.

The Seventh District Court of Appeals' affirmation of Luis Johnson's conviction merits critique, particularly regarding its approach to the manifest weight of the evidence. [Opinion pgs. 2 – 17.] The court's reliance on circumstantial evidence and prior inconsistent statements, without a comprehensive examination of their credibility and reliability, underscores a significant concern. By not adequately addressing the inconsistencies in witness testimony, the unclear identification of the vehicle involved, and the absence of direct physical evidence linking Johnson to the crime, the court fails to uphold the stringent standard of proving guilt beyond a reasonable doubt. This methodological shortfall not only casts doubt on the conviction's integrity but also risks establishing a precarious precedent for the reliance on circumstantial or contested evidence in future cases. [Id. at 2 – 7]

Furthermore, the appellate court's acceptance of the trial court's designation of witnesses as hostile without rigorous justification raises critical questions about

the fairness of the trial process. [Id. at 7 – 17.] The decision to overlook the circumstances under which the witnesses' prior statements were made, particularly without considering the potential impact of health conditions or external pressures, potentially compromises the principles of due process and the accused's right to a fair trial. This practice of allowing for the potential manipulation of witness testimony without stringent scrutiny undermines the foundation of justice and due process.

Lastly, the appellate court's dismissal of Johnson's challenges concerning the trial court's rulings and the evidence's sufficiency reflects a broader issue with appellate review standards. The court's deference to the trial court's judgments, absent a thorough investigation of the constitutional and evidentiary underpinnings of the conviction, indicates a reluctance to delve into complex legal and factual disputes. Such reticence detracts from the appellate system's critical role as a check against wrongful convictions and injustices, eroding trust in the judiciary's capacity to uphold fairness, justice, and adherence to the rule of law.

It is against this backdrop that we set forth our arguments challenging the sufficiency and weight of the evidence supporting Mr. Johnson's convictions. The state's evidence, riddled with inconsistencies and insufficient to support the charges, should not have been enough to convict Mr. Johnson beyond a reasonable doubt.

Law and Discussion

Proposition of Law No. 1: Under the manifest weight standard, if the government does not present evidence to establish one or more elements of an offense, then a unanimous reviewing court should reverse. In this case, the government failed to establish the identity element of the offenses, and remand is appropriate. Ohio Constitution, Article IV, Section 3(B).

The term "manifest weight of the evidence" relates to persuasion as per *Eastley v. Volkman*, 132 Ohio St.3d 328 (2012). It 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, according to *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541 (1997). When conducting a manifest-weight review, the appellate court 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" as per *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). The appellate court's role in a manifest-weight review is that of a "thirteenth juror" who may disagree with the factfinder's resolution of the conflicting evidence according to *Tibbs v. Florida*, 457 U.S. 31, 42; *State v. Martin*, Slip Opinion No. 2022-Ohio-4175, ¶ 26. One should note, too, manifest weight invites Constitutional review under the Fourteenth Amendment as a "...manifest weight challenge is essentially a due process concern. See, e.g., *State v. Cureton* (Jan. 8, 1997), 6th Dist. No. L-93-047, 1994 Ohio App. LEXIS 243, establishing this point.

This Court set forth the standard that an appellate court must use to review a claim that a conviction is against the manifest weight of the evidence:

The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witness, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

State v. Thompkins, 78 Ohio St.3d 380, 387 (1997). The Ohio Constitution, Article IV, Section 3(B) provides that: “No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.” So if all three judges of the appellate court agree that the judgment is against the manifest weight of the evidence, the conviction must be reversed, and the defendant given a second chance to seek an acquittal through a new trial. See *Thompkins*, 78 Ohio St.3d at 387.

In this case, the convictions of attempted murder, in violation of Ohio Revised Code 2923.02(A) and 2903.02 (A)(D), and felonious assault, in violation of Ohio Revised Code 2903.11(A)(1)(2)(D) along with the firearm specification under Ohio Revised Code 2941.145(A) and 2941.146(A), must be reversed because the evidence did not support the elements of the crimes.

R.C. 2923.02(A) states that, "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense". RC 2903.1(A) states that, "No person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another's unborn; (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

Although it is undisputed that Mr. Gregory was shot, this alone does not suffice to prove the required elements of the offenses. The evidence adduced at trial established that on October 12, 2020, around 5:30am-5:45am, Mr. Gregory was shot while exiting the home of Ms. Scarla Clark. [Tr. at 359, 12-18.] Mr. Gregory testified that he could see a car coming down the street and saw someone from the passenger side of the car shooting at him. [Tr. at 363, 1-3; Tr. 366, 14-18.] He stated that he could tell there were probably two people in the vehicle. [Tr. at 366, 2-7.] However, Mr. Juan Salinas, the only "eye witness" to the scene, testified to seeing a single occupant in the vehicle. [Tr. at 256, 19-23.]

The color and the make of the vehicle were never established. Mr. Gregory told Detective-Sergeant Mike Marciano, who was the first to the scene [Tr. at 264, 4-9], that "they rolled up through the cut and shot me[.]" [Tr. at 276, 17-23.] Scarla Clark testified that Mr. Gregory told her immediately after being shot that it

was a red Ford with a Ford sticker on the back. [Tr. at 322, 6-7; Tr. at 337 5-7.] Mr. Gregory then testified at trial that it was a maroon Lincoln. [Tr. at 365, 3-7.] Mr. Salinas stated it was a burgundy vehicle but never gave the make of the vehicle.

While several photos were taken at the scene and later of the vehicle believed to be involved, no physical evidence was collected, which was unusual according to the crime scene unit, Anthony Marzullo. [Tr. at 275, 15-17; Tr. pg 287, 18-23; Tr. at 289, 9-10, 293, 9-13, 290, 1-4.] No gun was ever recovered, which, according to Detective-Sergeant Michael Cox, was unusual. [Tr. at 536, 15-23.] There was no evidence in the vehicle believed to be involved, that would indicate that a gun was shot from inside the vehicle. [Tr. at 531, 21-23; Tr. at 532, 1; Tr. at, 20-23; accord 533, 1.] The vehicle was registered to Tyree Robinson, not Mr. Johnson, and he was never identified as the shooter or driver. [Tr. at 484, 14-16.]

Yes, Mr. Johnson and Ms. Clark had been engaged in a long-term relationship, and they did share a child together. [Tr. at 301, 16-23.] Mr. Johnson and Ms. Clark were co-parenting their child, the child would frequently stay with Mr. Johnson, and even after Mr. Gregory was shot, they continued to co-parent, maintaining a good and trusting co-parenting relationship. [Tr. at 571, 5-15.] Ms. Clark never believed that Mr. Gregory was involved in the shooting of Mr.

Gregory. Immediately after the shooting, Ms. Clark called Ms. Colon (the mother of Mr. Johnson and Eric Johnson), and told her that she thought Eric and Tyree just shot Mr. Gregory; she didn't even mention Mr. Johnson being involved. [Tr. at 340, 17-22; TR pg 500, 16-23.] However, she then changed her testimony at trial, stating that there was no reason that Eric would be involved in this. [Tr. at 326, 18-22.]

The only testimony that points to Mr. Johnson being involved is the testimony of Ms. Colon, a witness who, at the time of testifying, may or may not have been under the influence of prescription drugs. Several days after the shooting, Ms. Colon went down to the Youngstown Police Station to make a statement regarding the incident. Detective Cox testified that Ms. Colon, at the time of her interview, indicated that she was on some prescription drugs. [Tr. at 529, 1-8.] He also admitted that he never inquired what medication she was on, the side effects of those medications, or how those medications might affect her memory or ability to accurately depict to them what had occurred. [Tr. at 529, 11-18.] During Ms. Colon's testimony, she was never asked if she was under the influence of these medications, which she did testify affect her memory and make her feel "a little bit high[.]" [Tr. at 423, 11-14.] She stated that she only remembers bits and pieces of what she told police because she was "high", and on Klonopin. [Tr. at pg 392, 9-15.]

Ms. Colon told officers that Tyree pulled the trigger, and that her son Mr. Johnson was with him. [Tr. at pg 393, 4-7; 394, 17-19.] However, she was not present at the scene, she didn't see Mr. Gregory get shot, didn't see a car, and didn't see a gun. [Tr. at 414, 16-23; Tr. at 415, 1-5.] Furthermore, she states that the entire police report she wrote was a lie. [Tr. at 396, 21-22.]

At the time Ms. Clark called Ms. Colon, immediately following the shooting, Ms. Colon checked Mr. Johnson's room, where he was asleep. [Tr. at 389, 17-22.] Ms. Mraz told police that Mr. Johnson was with her on the night of October 11, 2020, and on the morning of October 12, 2020, around 6:30am, she took him back to his house. [Tr. at 449, 16-22.] She then states this was a lie and states that Mr. Johnson told her to say this and told her that "his dude" drove there and pulled the gun. [Tr. at 450, 16-19; Tr. at 452, 17-23.]

In this case, the convictions of attempted murder, in violation of Ohio Revised Code 2923.02(A) and 2903.02 (A)(D), and felonious assault, in violation of Ohio Revised Code 2903.11(A)(1)(2)(D), and the firearm specification under Ohio Revised Code 2941.145(A) and 2941.146(A) must be reversed because the evidence did not support the elements of the crimes. There was not sufficient evidence adduced to show that Mr. Johnson purposely or knowingly engaged in conduct that would constitute or result in the murder of Mr. Gregory. There also was not sufficient evidence to show that Mr. Johnson knowingly caused or

attempted to cause physical harm to Mr. Gregory by means of a deadly weapon. Assumption of jurisdiction is appropriate.

Proposition of Law No. 2: Under the Rules of Evidence and the Sixth Amendment Right to confrontation, a court can only declare a witness hostile if the government proves, *inter alia*, surprise. Here, the government made no such showing such that reversal is appropriate. U.S. Const. Amends. VI, XIV.

The trial court committed constitutional error by admitting the testimony of two witnesses, Mraz and Colon, deemed hostile. [Trial Tr. at 402, 11-14; Trial Tr. at 448, 7-18.] Under the Rules of Evidence and the Sixth Amendment Right to confrontation, a court may only declare a witness hostile if, *inter alia*, an element of surprise is proved by the government. In this case, the government made no such showing.

The case *State v. Irwin*, 184 Ohio App.3d 764, 2009-Ohio-5271, 922 N.E.2d 981, ¶ 1 (7th Dist.), differentiated between a hostile witness and an adverse witness. A “hostile witness” is one who surprises the calling party by contradicting them during testimony, whereas an “adverse witness” may be a party or a person whose interests align with a party. In this trial, the prosecution failed to establish any element of surprise from either Ms. Colon or Ms. Mraz, and furthermore, provided no justification as to why they requested to treat them as hostile witnesses. This represents a breach of Evidence Rule 607.

It is important to highlight that a witness is deemed hostile under Evid.R. 607 when their trial testimony is “materially inconsistent” with a previous statement, and the counsel had no reason to anticipate the repudiation of the prior statement. *State v. Travis*, 165 Ohio App.3d 626, 2006-Ohio-787, 847 N.E.2d 1237. The term “affirmative damage” signifies when a witness's trial testimony contradicts or harms the case of the party who called the witness. *State v. Johnson*, 2015-Ohio-5491, 55 N.E.3d 648, ¶ 33.

When declaring a witness hostile, leading questions may be used for interrogation according to Evid.R. 611 (C). The decision whether a witness is “hostile”, which includes the elements of surprise and affirmative damage, is typically left to the broad discretion of the trial court. *State v. Diehl*, 67 Ohio St.2d 389, 391, 423 N.E.2d 1112 (1981). In this instance, it appears the court misused its discretion.

The State had Ms. Colon declared a “hostile” witness, alleging her testimony a “surprise.” [Trial Tr. at 402, 11-14.] Detective Cox testified that during her initial statement, Ms. Colon was under the influence of prescription drugs. [Trial Tr. at 529, 1-8.] However, he never inquired about the potential effects of these medications on her memory or ability to accurately describe the incident. [Trial Tr. at 529, 11-18.] This is critical given that Ms. Colon, during her testimony, confirmed these medications could influence her memory. [Trial Tr. at 423, 11-14;

Tr. at 392, 9-15.] Therefore, it seems inappropriate to label her as a hostile witness considering her memory had been affected.

Additionally, the State declared Payton Mraz, a friend of the Defendant, as a “hostile” witness, again claiming her testimony as a “surprise[.]” [Trial Tr. at 448, 7-18.] Yet, even assuming the trial court had erred in allowing the State to treat Ms. Mraz as a hostile witness, it is not evident that the State suffered any prejudice as a result. The questions posed to Ms. Mraz after being declared a hostile witness did not yield any prejudicial evidence against the State. *State v. Spear*, 9th Dist. 9th Dist. No. 28181, 2017-Ohio-169; *State v. Foster*, 9th Dist. Summit No. 14277, 1990 Ohio App. LEXIS 2162, 1990 WL 72345, *2 (May 23, 1990).

As a final note relative to review, this issue, too, invites due process analysis under the Sixth and Fourteenth Amendments. This follows insofar as “[t]he Confrontation Clause of the Sixth Amendment guarantees the right to confront hostile witnesses.” Infra. Courts “...review, for plain error only, any Confrontation Clause issues that were not contemporaneously raised at trial. *Id.* And “[C]onfrontation Clause objections that were properly raised at trial are reviewed *de novo*, subject to harmless error analysis.” *United States v. Acosta*, 475 F.3d 677, 680 (5th Cir.2007). Assumption of jurisdiction is appropriate.

Conclusion

And so, case of the *State of Ohio versus Luis Markeal Johnson* highlights a departure from the core principles of justice, particularly through the inappropriate designation of hostile witnesses without just cause, undermining the integrity of the trial process and the cherished Sixth Amendment rights. Such misapplications cast a shadow over the verdict's legitimacy and threaten to erode public trust in the judicial system's fairness and respect for evidence rules. We implore this Court to assume jurisdiction, correct these deviations, and reinforce the judiciary's commitment to upholding justice and due process, thereby restoring confidence in the legal system's capacity to adjudicate with impartiality and adherence to the law.

Respectfully Submitted,

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Proof of Service

I caused to be delivered a copy of the foregoing to the Mahoning County Prosecutor at 21 W. Boardman St., in Youngstown, OH 44503 on the date of filing, by regular U.S. Mail, courtesy copy by fax, 330-740-2008, to Atty. Edward Czopur.

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