[Cite as *State v. Gaines*, 2023-Ohio-2243.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-22-1102
Appellee	Trial Court No. CR0201802986
v.	
Rashad Gaines	**DECISION AND JUDGMENT**
Appellant	Decided: June 30, 2023

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

DUHART, P.J.

{¶ 1} This is an appeal filed by appellant, Rashad Gaines, from the March 24, 2022 judgment of the Lucas County Court of Common Pleas. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} Appellant sets forth two assignments of error:

1. The trial court erred by denying Mr. Gaines's motion *in limine*[1] to introduce evidence pursuant to Ohio Evid. R. 804(b)(3) at trial.
2. The trial court erred by denying Mr. Gaines's motion to suppress positive identifications made as a result of an unduly suggestive photo array.

Background

{¶ 3} This case involves the murder of Martrece Dobson ("the victim"). The victim and appellant were cousins.

{¶ 4} On the afternoon of October 24, 2018, the victim left the house on Bronson Avenue in Toledo, Ohio, that he shared with his girlfriend, Dominique Black ("the girlfriend"), their children, and others. The victim, who was carrying a sweatshirt that was too big for him, took his girlfriend's van and drove off. At approximately 3:30 p.m. that same day, a shooting occurred in the van the victim was driving, near the corner of Franklin Avenue and Oakland Street, in Toledo, Ohio. Witnesses called 911, while people attempted to help the victim. Toledo Police responded. The victim died as a result of the shooting. That same day, appellant was questioned and arrested.

{¶ 5} On November 2, 2018, the Lucas County Grand Jury issued a three-count indictment against appellant: Count One, murder in violation of R.C. 2903.02(A) and

[1]We note no motion in limine was filed or denied. Rather, appellant filed a notice of intent to use Evid.R. 804(B)(3) evidence at trial. Thus, we will refer to the filing as a notice to use Evid.R. 804(B)(3) evidence.

2929.02; Count Two, murder in violation of R.C. 2903.02(B) and R.C. 2929.02; and Count Three, having weapons while under disability in violation of R.C. 2923.13(A)(2) and (B). Attached to Counts One and Two were firearm and repeat offender specifications. Appellant pled not guilty to the charges.

{¶ 6} Appellant filed a motion to suppress witness identifications, claiming the identifications of him made by witnesses were the result of a photo array which was conducted in an inherently suggestive manner. On July 15, 2019, a suppression hearing was held where two detectives testified; the trial court announced that it was denying the motion to suppress. On July 25, 2019, the court issued an opinion and judgment entry.

{¶ 7} On February 24, 2020, appellant's first trial commenced, and after the first day of trial, appellant's defense counsel received information from Reverend Kate Crenshaw that her son, Olajidai Crenshaw ("her son" or "the son"), confessed to shooting and killing the victim. The son was then killed. Defense counsel sought to have this evidence admitted at trial; the request was denied.

{¶ 8} Appellant's first trial resulted in a hung jury. Due to the COVID-19 pandemic, the date for a second trial was continued numerous times. On February 18, 2022, defense counsel filed a notice to use Evid.R. 804(B)(3) evidence. Following a hearing, the trial court excluded the evidence.

{¶ 9} On February 28, 2022, the second trial commenced, and on March 7, 2022, the jury found appellant guilty of all counts and specifications contained in the indictment.

{¶ 10} On March 24, 2022, appellant's sentencing hearing was held. Appellant was sentenced to prison. Appellant timely appealed.

{¶ 11} We will examine appellant's assignments of error in reverse order.

Second Assignment of Error

{¶ 12} Appellant argues the trial court erred when it denied his motion to suppress the positive identifications by witnesses, which were made as a result of an unduly suggestive photo array.

Facts Relevant to the Motion to Suppress

{¶ 13} Three eyewitnesses to the October 24, 2018 shooting came forward: C, B, and F.[2] According to the transcript from the suppression hearing, a photo array was created by Toledo Police Detective Paul Marchyok, based on the girlfriend's statement that the victim left the house that afternoon to see his cousin (appellant). According to Marchyok, the witnesses could look at the array to include or exclude appellant as the person they saw.

{¶ 14} Marchyok used a computer lineup program to compile the array, and used a BMV photo of appellant. The parameters used by the detective were race, gender, facial hair, hair or bald and hair color. He could not control the hair styles, clothing or the background. Marchyok focused on the size of appellant's forehead, as it was the most prominent trait, and he also concentrated on the scruffy facial hair and heavy-set face. Marchyok stated the witnesses described the shooter's hair as unkempt or nappy.

[2] The witnesses will be referred to using just an initial to protect their identities.

{¶ 15} The array was blindly administered to the three witnesses by Detective Anthony Sosko. C identified appellant as being the shooter, as did F, but F qualified his identification saying he was only 70% sure it was correct. B did not make any identifications when shown the photo array.

Appellant's Arguments

{¶ 16} Appellant argues Marchyok failed to notice appellant's unibrow, so the unibrow was not considered when the detective selected the other photographs in the array, and appellant was the only person in the array with a unibrow. With respect to hair style, appellant contends his hair was in tight, freshly braided cornrows while the other five men had longer, thicker braids or short twists, not as tight or well-kept as appellant's hair.

{¶ 17} Appellant also asserts the weight and height of the men were not taken into account when setting the parameters, and the backgrounds of the photographs varied, as appellant's photo was white, four of the photos were dark blue, and one was light blue.

{¶ 18} Concerning clothing, appellant submits all of the men were dressed differently; he was pictured in a hoodie sweatshirt, so was another man, one man could have been wearing a hoodie but the photo was too dark to be sure, and the other three men were in white undershirts or tank tops. Appellant maintained Marchyok did not consider clothing in making his selections for the array.

{¶ 19} Appellant further argues that while C identified appellant as being the shooter, before C made this determination, he stated to Sosko that appellant looked like the shooter but the hair was off. Sosko responded that hair and facial hair can change

over time, so focus on things about a person that do not change like their eyes, nose, mouth and ears. Appellant observed that F gave a qualified identification of appellant, and B did not make any identifications, as she indicated the faces were too fat and the shooter had an afro, unlike any of the men in the array.

State's Arguments

{¶ 20} The state counters the evidence fails to demonstrate that the identification was either unduly suggestive or unreliable. The state argues Marchyok and Sosko testified at the suppression hearing that the photographs in the array were compiled by entering parameters for physical characteristics into a database, reviewing the photos generated, and selecting filler photos which most closely fit the suspect's appearance.

{¶ 21} The state notes Marchyok testified height was not usually used as a parameter because the photos in the array were only of heads and shoulders. Marchyok said the filler photos are already in the system, so the suspect's hair is often different than the hair in the photos generated in response to the query, but Marchyok tried to match the suspect's hairstyle as depicted in the photo in the array. Marchyok acknowledged the suspect was described as having nappy hair, but the detective did not have a photo of appellant looking that way. Marchyok stated that in compiling the array, he viewed appellant's forehead as his most prominent feature, so the detective tried to ensure that all of the men in the array had a large forehead. Marchyok said appellant was the only person in the array with a unibrow, as Marchyok had not noticed before the suppression hearing that appellant had a unibrow. Marchyok mentioned that B did not make an identification after viewing the array, but at a later point, she did identify appellant.

{¶ 22} The state contends Sosko testified he administered the array and did not know who the suspect was. Sosko described the department's procedure when administering the array, which involved three pages: the first was a statement, read to the witness; the second was the array; and the third was a parameter sheet. Sosko stated he complied with the procedures when showing the array to C, who viewed the array on the day of the shooting and made the identification within a minute of seeing the array. Sosko also showed the array to B, read the form to her, but she was unable to identify anyone in the array, as she said the suspect had a fat face and an afro. Last, F viewed the array and selected appellant, stating he was 70% certain of the identification.

{¶ 23} The state notes *State v. Germany*, 6th Dist. Lucas No. L-07-1087, 2008-Ohio-374, sets forth a two-part test: whether the identification is (1) unduly suggestive and (2) unreliable. *Id.* at ¶ 50. The state submits that appellant meets neither prong of the test.

Trial Court's Verbal Findings

{¶ 24} Following the July 15, 2019 suppression hearing, the trial court announced the decision from the bench. The court found appellant failed to meet his burden that the photo array was unduly suggestive. The court stated it did not notice appellant had a unibrow until defense counsel brought it up, it did not see "some of the descriptions that defense attempted to use via the witnesses in distinguishing [appellant] from the others," and it was a "matter of splitting hairs as it relates to many of these identifications."

Trial Court's Opinion and Judgment Entry

{¶ 25} In its July 25, 2019 opinion, the trial court noted the photo array set forth six photos of African American men selected using the "line up program," and out of about 100 photos of individuals, five were selected and used. The court found the six photos show very little distinction except for different shading in the background. The court concluded the photo array was not unduly suggestive, and the procedure used complied with R.C. 2933.83.

Standard

{¶ 26} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When considering a motion to suppress, the trial court is the trier of fact, and is in the best position to resolve factual issues and evaluate the credibility of the witnesses. *Id.* Thus, "an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.* If the findings of fact are accepted as true, "the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.*

Law

{¶ 27} When a witness has been confronted with a suspect before trial, due process requires a court to suppress an identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances. *Germany* at ¶ 49-50, citing *Neil v. Biggers*, 409 U.S. 188, 196-198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). *See also Simmons v. United States*, 390

U.S. 377, 384-386, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968). Photo array evidence is only suppressed if the identification or the method of identification is unduly suggestive and unreliable. *State v. Heflin*, 6th Dist. Lucas No. L-10-1268, 2011-Ohio-4134, ¶ 17.

{¶ 28} In order to determine whether the identification was unreliable, the following factors should be considered:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil at 199-200. *See also Germany* at ¶ 50-51.

{¶ 29} It is the burden of the defendant to establish the identification procedure was unduly suggestive. *Heflin* at ¶ 17. "If the defendant meets his * * * burden, the court must then consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character." *Id.*

Analysis

{¶ 30} Appellant contends the photo array was unduly suggestive because he is the only person with a unibrow, he is the only person with tight, well-kept, freshly braided cornrows, his photo is the only one with a white background, and only he and one other man, maybe two men, were pictured in hoodie sweatshirts.

{¶ 31} Upon review, the transcript of the suppression hearing reflects that Marchyok prepared the photo array and Sosko administered the array, without knowing if

the array included the suspect. The three witnesses were shown the array on the day of the shooting. C identified appellant after about a minute of seeing the array, and F was 70% sure that appellant was the shooter. B could not identify the shooter from the array, but she subsequently identified appellant as the shooter. The transcript does not indicate the witnesses' opportunity to view the shooter during the crime, or the degree of the witnesses' attention, or the accuracy of the witnesses' prior description of the shooter.

{¶ 32} The photo array itself depicts six African American men, who appear to be about the same age, who have the same eye color and hair color, and who have similar skin tones, foreheads and facial hair. The photos in the array are all in color and the photos are the same size, but with different background colors, save two which are the same blue color. The men in the photos are all wearing different clothing, except two men who are wearing white t-shirts. The men's hairstyles are also all different, although all of the hairstyles are shorter and off of the face. Four of the men in the photos seem to have full, somewhat round faces. The photo of appellant is the only one with a white background, and appellant is the only man who has thick eyebrows.

{¶ 33} Based upon our review of the trial court judgment denying the motion to suppress, we accept the trial court's findings of fact, as we find the trial court's findings of fact are supported by competent, credible evidence in the record.

{¶ 34} Upon review of the transcript of the suppression hearing, the photo array, and the applicable law, and accepting the trial court's findings of fact as true, we find the photo array shown to the eyewitnesses of the shooting was not unduly suggestive. We further find the method of identification was not unduly suggestive or unreliable. As

such, we find appellant has not met his burden of establishing the identification procedure was unduly suggestive. Therefore, we find the trial court did not err when it denied appellant's motion to suppress the positive identifications made as a result of the photo array. Accordingly, appellant second assignment of error is not well-taken.

First Assignment of Error

{¶ 35} Appellant argues the trial court erred when it denied his notice to use Evid.R. 804(B)(3) evidence at trial.

Facts Relevant to the Notice to Use Evid.R. 804(B)(3) Evidence

{¶ 36} On February 24, 2020, after the first day of appellant's first trial, defense counsel discovered a voicemail message at his office from Kate Crenshaw. In her message, she indicated she had information relative to the murder trial, and that she had also left a message for the prosecutor. Defense counsel informed the prosecutor about the message.

{¶ 37} Defense counsel and an investigator met Crenshaw at her home and Crenshaw shared the following. On or about February 4, 2020, she and her son were in the front yard of her home, when they spoke with appellant's mother, Marge Ezell. The son asked Ezell how appellant was doing, Ezell said he is hanging in there, doing the best that he can. After talking briefly, Ezell left. Crenshaw and her son went into her home, when her son broke down and said appellant did not kill that man, he (the son) shot him six times and killed him, he (the son) was wearing a hoodie, took it off and threw it down in the alley, and they don't have a gun and never will. The son also said when he was

locked up in West Virginia, detectives came to see him, and while in the Lucas County jail, an investigator came to see him, and he fooled them all.

{¶ 38} On February 6, 2020, the son was killed in an unrelated homicide. After her son was buried, Crenshaw contacted attorneys, who advised her to call the prosecutor and defense counsel.

{¶ 39} On the second day of the first trial, defense counsel advised the court that he had received a message from Crenshaw, he met with her and relayed what Crenshaw said, including that her son had been held in jail with appellant and her son had told other inmates that [the son] had committed the offense and appellant had nothing to do with it.

{¶ 40} The trial court was also made aware that defense counsel had previously heard suggestions that the son was the killer, and two inmates said to counsel that the son "did say these things * * * but I'm not getting involved in it." Defense counsel provided the information he had received from the inmates along with "a small note purported to be from [the son] to Detective Marchyok. The detective went to West Virginia and talked to [the son], who denied the statements" and denied writing the note or having anything to do with the shooting. In addition, the prosecutor informed the court that he showed one eyewitness a photograph of the son the week before trial, and the eyewitness said "it's not him, it's not even close."

{¶ 41} The trial court found that the statement did not meet the requirements of Evid.R. 804, and excluded the evidence of the son's statement to his mother.

{¶ 42} Prior to the second trial, defense counsel filed a notice to use Evid.R. 804(B)(3) evidence, outlining the same facts offered during the first trial, and arguments

concerning corroborating circumstances. Appellant asserted, inter alia, that the circumstances surrounding the son's statement, and the statement itself, corroborate its trustworthiness, as the son made the statement spontaneously to his mother immediately after encountering the mother of "wrongly-accused" appellant. Appellant also argued that the son provided an incredibly detailed account of the victim's murder, which was eerily similar to the accounts given by the two eyewitnesses, to the police and at trial.

{¶ 43} The state filed a response, and offered some additional facts. The state detailed that the three eyewitnesses to the shooting revealed that: the shooter was described as a heavy-set, African American man wearing dark clothes; and the shooter ran down the alley off of Oakland. The state noted two of the witnesses described the shooter's hair as unkempt and nappy, while one witness saw the shooter discard a gray hoodie. The state also noted the detectives collected seven shell casings from the scene.

{¶ 44} The state submitted that when appellant was interviewed the evening of the murder, appellant said he was supposed to meet the victim but the victim never showed up, so appellant went to the bathroom and then drove to a friend's house, although appellant could not provide the address for his alibi. The state noted the address of appellant's alibi was subsequently furnished. The state observed that Investigator Jay Gast (who would testify at trial), analyzed appellant's cellphone and found the phone used cell towers in the area of the murder and not near the address of appellant's alibi, and phone records showed the victim's last cellphone contact was with appellant.

{¶ 45} The state maintained that at the time of the "confession," the son was a 32-year old man who had been to state and federal prisons, and who had several felony

convictions, including: aggravated riot, aggravated burglary, aggravated robbery and a felon in possession of a firearm. The state further argued that the son's "confession" was not made spontaneously or shortly after the shooting, as it was made over a year after the murder, to his mother. The state submitted the son's "confession" to his mother was the only circumstance the defense had to demonstrate the statement's trustworthiness.

Appellant's Arguments on Appeal

{¶ 46} Appellant observes that Evid.R 804 addresses hearsay exceptions when the declarant is unavailable, and according to Evid.R.804(A)(4), "[u]availability as a witness includes any of the following situations in which the declarant * * * is unable to be present or to testify at the hearing because of death * * *." Appellant argues since the son's death was not "due to the procurement or wrongdoing of * * * [appellant] * * * for the purpose of preventing the witness from attending or testifying," the son qualified as an unavailable witness under Ohio law.

{¶ 47} Appellant submits Evid.R. 804(B)(3) generally provides that when a hearsay declarant is unavailable as a witness at trial, statements made against the declarant's interest are excluded from the hearsay rule and are admissible as evidence at trial to prove the truth of the matter asserted, if certain conditions are met. He notes Evid.R. 804(B)(3) defines a statement against interest as "[a] statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to the subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true."

{¶ 48} Appellant contends the son's statement met the statutory requirements of a "statement against interest" as defined in Evid.R. 804(B)(3), as the confession was self-incriminatory and unquestionably against interest.

{¶ 49} Appellant observes that Evid.R. 804(B)(3) further provides that a statement against interest is "[a] statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." He asserts that this rule sets an incredibly low standard for the admissibility of statements against penal interest, and all that is required is there be corroborating circumstances and those circumstances clearly corroborate the trustworthiness of the declarant's statement.

Cases Cited by Appellant

{¶ 50} Appellant cites to numerous cases including: *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216 (declarant "was speaking to his wife, not to police; he was at home, not in custody; his statement was spontaneous, and he had nothing to gain by incriminating appellant. These are corroborating circumstances that render his statement worthy of belief." *Id.* at ¶ 54); *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151 (declarant's "statements admitting his involvement in murdering Hand's wives * * * were voluntarily made to family and friends * * * [declarant] did not attempt to shift blame from himself, because he admitted his role as the shooter in multiple killings. * * * [T]he circumstances surrounding [declarant's] statements did render [declarant] particularly worthy of belief." *Id.* at ¶ 97); and the concurring opinion in *State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837, 895 N.E.2d

821 ("Particular circumstances make certain types of corroborating evidence more persuasive in bolstering the trustworthiness of a statement against penal interest. For example, statements made spontaneously shortly after the crime to a close acquaintance support the trustworthiness of a statement against interest. * * * Statements to close family members generally have "'particularized guarantees of trustworthiness.'" * * * "'Even to people we trust completely, we are not likely to admit serious fault of which we are innocent * * *.' * * * Thus, where a declarant makes a statement to someone with whom he has a close personal relationship, such as a spouse, child, or friend, courts usually hold that the relationship is a corroborating circumstance supporting the statement's trustworthiness."" (Citations omitted.) *Id.* at ¶ 34.)

Further Arguments by Appellant

{¶ 51} Appellant argues both the circumstances surrounding the making of the statement, as well as the statement itself, corroborate its trustworthiness, as the son "made his statement spontaneously to his own mother, inside their home, in the emotional aftermath immediately after an encounter with the wrongly-accused defendant's mother." Appellant contends the son's "catharsis, understood within the context under which it was exhibited, represented a truthful purgation of a guilty conscience * * * [and the son] provided an incredibly detailed account of Martrece's murder in his statement to his mother."

The State's Arguments

{¶ 52} The state notes the trial court's decision to admit the hearsay statement of an unavailable declarant pursuant to Evid.R. 804(B)(3) is reviewed for an abuse of

discretion that resulted in material prejudice to the accused. The state contends the court does not abuse its discretion by excluding testimony that another person confessed to the crime, before dying, when the court determines the corroborating circumstances do not clearly demonstrate the reliability of the statement.

{¶ 53} The state also argues that Evid.R. 804(B)(3) requires corroborating circumstances which "clearly indicate" the trustworthiness of the statement. The state, citing to *State v. Sumlin*, 69 Ohio St.3d 105, 108, 630 N.E.2d 681 (1994), submits that, contrary to appellant's characterization of Ohio law imposing "an incredibly low standard for admissibility of statements against penal interest," when evidence is offered to exculpate the accused, the corroborating circumstance requirement provides "significant hurdles which must be overcome by the proponent of the statement" due to "'the obvious suspicion with which the drafters of the Rule regarded a statement exposing "the declarant to criminal liability" while "exculpating the accused.'"

{¶ 54} The state contends for purposes of assessing the trustworthiness of evidence offered by the accused pursuant to Evid.R. 804(B)(3), a trial court may weigh all the circumstances involved in the statement and other evidence in the case.

{¶ 55} The state submits factors which support the trial court's finding of insufficient corroborating circumstances include: (1) only Crenshaw reportedly heard the statement; (2) the son made contradictory statements, as he previously denied being involved in the murder; (3) the son's delay in making the statement, weeks before the first trial and over a year after the murder; (4) inconsistency with other evidence, such as: Crenshaw reported her son confessed to firing six shots yet seven shell casings were

discovered at the scene, and the coroner testified to twelve separate wounds caused by twelve separate shots; the suggestion that the son was wearing a sweatshirt that he discarded in the alley is undercut by the lack of DNA on the sweatshirt other than the victim's; two eyewitnesses identified appellant in court as the shooter; appellant admitted he was supposed to meet the victim minutes before the murder; the victim's last cellphone contact was with appellant; and witness C stated the son was not the shooter; (5) the son had a motive to assist the accused, based on Crenshaw's relationship with appellant's mother, as the women knew each other and appellant's mother knew the son; and (6) the potential existence of privilege, as the defense attorney indicated Crenshaw was concerned that she could not disclose the information provided by her son due to her role as a cleric.

{¶ 56} The state observes the trial court did not require defense counsel to be bound by the rulings made in the first trial, as to Crenshaw's potential testimony, as the court allowed defense counsel to re-brief and re-argue the admissibility of the son's statement. The state maintains the court's careful consideration of the arguments and authorities in support of and in opposition to the admission of the evidence does not reveal anything suggestive of an arbitrary, unreasonable, or unconscionable attitude.

Trial Court's Ruling Before the Second Trial

{¶ 57} Following a hearing, the trial court excluded the evidence. The court observed that Evid.R. 804(B)(3) starts with the idea that the statement is not admissible unless circumstances clearly indicate trustworthiness. The court found that there was no evidence to support the trustworthiness of the son's statement, except that he told his

mother. The court noted there is no real evidence as to the relationship between appellant's mother and Crenshaw, or appellant, the son and their mothers. The court also noted there was no evidence that the son had anything to do with the crime, except for the statement. The court found that it mattered that the son originally denied the statement, that the new statement happened over a year later, and that Crenshaw did not come forward until the afternoon of the first day of appellant's trial.

Standard

{¶ 58} The decision of whether or not to admit the hearsay statement of an unavailable declarant, pursuant to Evid.R. 804(B)(3), is within the discretion of the trial court. *Sumlin*, 69 Ohio St.3d at 108, 630 N.E.2d 681 (1994). An abuse of discretion occurs when the trial court's decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Law

{¶ 59} In *Sumlin*, the Supreme Court of Ohio set forth that under Evid.R. 804(B)(3), statements against interest made by an unavailable declarant are hearsay statements, which are admissible into evidence as an exception to the hearsay rule, if two conditions are met. *Id.* at 108. The first condition is the statement "tends to 'expose the declarant to criminal liability.'" *Id.*, quoting Evid.R. 804(B)(3). The second condition is the statement, "'is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.'" *Sumlin* at 108, quoting Evid.R. 804(B)(3).

{¶ 60} In *State v. Landrum*, 53 Ohio St.3d 107, 114, 559 N.E.2d 710 (1990), the Supreme Court of Ohio, observed that the "proponent of a statement against interest faces

a 'formidable burden.'" (Citation omitted.) Likewise, in *Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837, 895 N.E.2d 821, ¶ 24, the Supreme Court of Ohio, citing *Sumlin*, noted "Evid.R. 804(B)(3) contains 'significant hurdles which must be overcome by the proponent of the statement' because of "'the obvious suspicion with which the drafters of the Rule regarded a statement exposing "the declarant to criminal liability" but exculpating the accused.'" (Citations omitted.)

{¶ 61} The *Swann* court further noted that "[t]he 1972 Advisory Committee Notes to Fed.R.Evid. 804(b)(3) similarly observe a general 'distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. * * * The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.'" *Id.* at ¶ 24.

{¶ 62} The United States Supreme Court, in *Chambers v. Mississippi*, 410 U.S. 284, 300, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), stated that certain circumstances make specific types of corroborating evidence more persuasive in strengthening the trustworthiness of a statement against penal interest, like statements made spontaneously and shortly after the crime to a close acquaintance. The Ohio Supreme Court elaborated more on a declarant's disclosure to someone close, by noting that "where a declarant makes a statement to someone with whom he has a close personal relationship, such as a spouse, child, or friend, courts usually hold that the relationship is a corroborating

circumstance supporting the statement's trustworthiness." *Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, at ¶ 53.

Analysis

{¶ 63} Upon review of the record and application of Evid.R. 804(B)(3) to the facts of this case, it is apparent that there is no dispute that the son was unavailable to testify, and that his statement tended to subject him to criminal liability. At issue is whether appellant presented to the trial court corroborating circumstances which clearly demonstrate the trustworthiness of the son's statement.

{¶ 64} We are not convinced that the trial court abused its discretion in refusing to admit the statement into evidence pursuant to Evid.R. 804(B)(3).

{¶ 65} The record shows, and the trial court found, that the only evidence to support the trustworthiness of the son's statement was that he told his mother he shot the victim, yet the record does not include evidence regarding the relationships between appellant, the son and their mothers. Moreover, the record reveals the son confessed to his mother more than a year after the crime occurred, despite the son's initial denial to law enforcement that he shot the victim. Crenshaw was conflicted about disclosing the statement, but after her son was killed, she waited until the afternoon of the first day of appellant's trial to come forward with her son's statement. Other than uttering the admission to his mother, none of the circumstances surrounding the son's statement lend trustworthiness to the statement.

{¶ 66} In addition, the son's statement indicating how many times the victim was shot was wrong, and the lack of evidence actually connecting the son to the crime casts

doubt on the reliability of the statement. Furthermore, witness C definitively said the son was not the shooter.

{¶ 67} Based on the record, we find appellant failed in his burden of demonstrating the trustworthiness of the son's statement. We therefore find the trial court's decision to exclude Crenshaw's testimony and deny the admission of the son's statement was not unreasonable, arbitrary or unconscionable. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 68} The March 24, 2022 judgment of the Lucas County Court of Common Pleas is hereby affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Myron C. Duhart, P.J. _____
JUDGE

Charles E. Sulek, J. _____
CONCUR.
JUDGE