[Cite as *State v. Owens*, 2023-Ohio-113.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

RAYMOND OWENS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0111

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2020 CR 00385

BEFORE:
Gene Donofrio, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Edward A. Anthony Czopur, Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Rhys Brendan Cartwright-Jones, 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated:
January 5, 2023

Donofrio, P. J.

{¶1} Defendant-Appellant, Raymond Owens, appeals from a Mahoning County Court of Common Pleas judgment convicting him of two counts of discharging a firearm on or near prohibited premises, felonious assault, and improperly discharging a firearm at or into an occupied structure that is a permanent or temporary habitation. Each count carried a three-year and five-year firearm specification, and appellant was convicted of the three-year specifications. After the bench trial, appellant was sentenced to an aggregate term of 7-9 years of imprisonment.

{¶2} On June 10, 2020, appellant was driving on the east side of Youngstown and passed Nikitas Smaragdas's ("Smaragdas") house. There, Christina Carrion's ("Carrion") car was parked on the street. Appellant and Carrion have a three-year-old daughter together, who was with Carrion. They have a standard order of visitation in place concerning their daughter, but the co-parenting relationship was strained. Emmanuel Lopez ("Lopez") and Carrion are engaged and also have children together. Lopez and appellant have a history of threatening gun violence against each other.

{¶3} As appellant was driving, he saw Carrion and Lopez on the porch of Smaragdas's house. Appellant testified that he stopped near the house because he saw Carrion's car parked outside and wanted to speak to her about denying him the right to visit with their daughter.

{¶4} Shots erupted between appellant and Lopez. Video surveillance from a neighboring home showed an additional unknown car driving behind appellant at the time, and a large puff of smoke appeared to come from this car, which had not been identified. Appellant then drove away, and Lopez was taken to the hospital for a gunshot wound to the chest.

{¶5} Lopez was the first witness to testify at trial. He stated that he used to live at Smaragdas's house and was there on June 10, 2020 for a cookout. (Tr. at 49-51). Lopez testified that he was sitting on the steps of the porch, Carrion was sitting in a chair on the porch, and the children were playing in the front yard. (Tr. at 52). He stated that he saw appellant drive by an hour after he arrived at Smaragdas's house, saw him drive by

again 20 minutes later, and saw him drive by a third time and park in front of the house. (Tr. at 53-55). Lopez testified that the first time that appellant drove by; he saw appellant smiling at him. (Tr. at 55). He stated that after the second time, things did not feel right, so he retrieved his registered gun out of the safe inside the house. (Tr. at 56). He explained that the gun was there because he used to live with Smaragdas and the gun was registered to that address. (Tr. at 112). Lopez testified that he went back out onto the porch because his children were out there. (Tr. at 58).

{¶6} Lopez stated that after appellant drove by the third time, he felt nervous and knew appellant was up to something. (Tr. at 58). Lopez testified that he saw appellant pull up slowly in front of the house and park his car diagonally in front of the house. (Tr. at 58-59). He then saw appellant begin shooting out of the sunroof of his car. (Tr. at 58-59). Lopez stated that he did not fire until after appellant fired first. (Tr. at 59). Lopez testified that he was on the porch when he started shooting and came off the porch once appellant fired shots. (Tr. at 59). He testified that when appellant got out of his car, he told everyone to get into the house. (Tr. at 59). He estimated that he emptied an entire magazine and appellant shot more than ten bullets. (Tr. at 60). Lopez stated that he reloaded his gun and was then shot in the chest, but he continued shooting until appellant left the scene. (Tr. at 61). Lopez saw no one else in appellant's car when he drove by the house and he would not have fired if he thought that children were in the car. (Tr. at 62-63).

{¶7} On cross-examination, Lopez stated that he knew that appellant had court-ordered visitation with his daughter, but appellant rarely saw her. (Tr. at 67-68). Lopez testified that he tried to be cordial with appellant, but appellant had a problem with him. (Tr. at 70). Lopez stated that appellant threatened to “blow his brains” out a year ago and told him that he was going to “kick his ass.” (Tr. at 72). He further testified that he and appellant physically fought eight years ago. (Tr. at 73). Lopez also acknowledged sending a threatening Facebook message to appellant. (Tr. at 92-93).

{¶8} Carrion testified that she stopped giving appellant her contact information because of the drama regarding visitation. (Tr. at 148-149). She noted that Lopez and appellant did not get along and she blamed appellant. (Tr. at 149). She stated that she told appellant to take her to court if he wanted visitation. (Tr. at 149).

{¶9} Carrion recalled that they went to Smaragdas's house in the afternoon and were on the porch. (Tr. at 154). She saw appellant drive by the house ten minutes after she arrived there. (Tr. at 155). She stated that she saw appellant drive by twice before the shooting. (Tr. at 155). She remembered Lopez telling her that he felt uneasy as appellant drove by the house. (Tr. at 187).

{¶10} Carrion testified that when appellant drove by, she could see his face and he was looking at her and smiling. (Tr. at 157). She stated that appellant shot first and they started panicking because the children were on the porch screaming and she could hear appellant yelling. (Tr. at 159). She recalled that she and Smaragdas grabbed the children and ushered them into the house, and as she looked back outside, she saw Lopez get shot and she could see blood splashing. (Tr. at 159). She stated that Smaragdas did not have a gun and after he helped her get the children into the house, he put pressure on Lopez's chest wound after he was shot. (Tr. at 159).

{¶11} On cross-examination, Carrion acknowledged the visitation order that she had with appellant and she affirmed that she did not notify him of her address changes, as she did not want him to know where she lived. (Tr. at 175-176). She stated that appellant did not have her phone number and he had reached out to her through Facebook on Mother's Day. (Tr. at 177). Carrion acknowledged that Lopez had responded with a very aggressive message to appellant. (Tr. at 178-179).

{¶12} Carrion also testified that appellant was shooting his gun while halfway over the rooftop of his car and he was smiling while shooting. (Tr. at 188-189). She recalled that the children were on the porch when appellant began shooting and appellant could clearly see them. (Tr. at 189). Carrion also stated that appellant said nothing to her, but just pulled out his gun and started shooting. (Tr. at 191).

{¶13} Smaragdas testified that he suffered a recent head injury at work and had memory problems. (Tr. at 197). He testified that he did not remember the day of the shooting, but he recalled living at the address where the shooting occurred and that Lopez had been a good friend for over 15 years. (Tr. at 198-199). He remembered putting pressure on Lopez's gunshot wound while they were on the porch of his house. (Tr. at 199). On cross-examination, Smaragdas acknowledged that he was a felon and was not allowed to own a firearm. (Tr. at 204).

{¶14} Appellant testified that he had custody of two of his children and had an order of companionship for the daughter that he shared with Carrion. (Tr. at 246). He testified that he sought custody, but agreed with Carrion before a custody hearing to a custody and visitation order. (Tr. at 249). He stated that Carrion then cut off his visitation and he had no address or phone number to contact his daughter. (Tr. at 250).

{¶15} Appellant testified that June 10 was the day before his daughter's birthday and he took his other children to his cousin's house to play. (Tr. at 251). He picked his children up two hours later and stated that as he was driving down the street, he saw Frank, his children's grandfather, on the porch of his house, so he stopped to talk. Appellant testified that Frank asked if his children wanted to play with the other grandchildren who were at his house. (Tr. at 252). Appellant testified that he took his children back home to get dressed to play and set out to return to Frank's house. (Tr. at 252). Frank lives on the same street as Smaragdas. (Tr. at 253).

{¶16} Appellant testified that he never made it to Frank's house because he saw Carrion’s car as he was driving down the street and saw her on the porch. (Tr. at 253). He testified that he stopped his car, got out and shut his door, and took two steps toward the rear of his car. (Tr. at 253). He wanted to talk to Carrion about his daughter and her birthday, since he had not had visitation with her in some time. (Tr. at 258).

{¶17} Appellant testified that as soon as he exited his car, he called Carrion's name. (Tr. at 253). He testified that, "I'm like, Christina. As soon as I look in their direction, bullets is already on with his hand out, and I hear boom, boom, boom, boom. So I immediately duck for cover. I duck behind my car. I still like right by the car." (Tr. at 254). He stated that his children were in his car and he was terrified that they would be shot. (Tr. at 255). Appellant testified that he ducked and screamed at his children to get down. (Tr. at 255).

{¶18} Appellant further testified that he:

> kind of froze for a second. I realize I had my firearm on me, and I hear kind of - - like a sound. It was rapid. It was like boom, boom, boom, boom, boom. And as soon as I heard the silence, I came up, and I left off three to four shots I thought I let off, and Mr. Lopez runs up the steps. And when Mr. Lopez runs up the steps, I get in

> my car. That was my time to get my children out of there. That's the time to leave.

(Tr. at 256). He recalled someone still shooting as he turned the corner in his car. (Tr. at 256). He stated that he was going to drive home, but stopped at his cousin's and asked her to take his children. (Tr. at 257).

{¶19} Appellant recalled receiving a Facebook post from Lopez stating that Lopez was "going to blow [his] F'ing brains out." (Tr. at 259). He also testified that two weeks prior, he saw Lopez near his apartment and shooting a gun into the air. (Tr. at 259).

{¶20} Appellant recalled driving on Lopez's street twice that day, once to visit Frank, and the next time to drop off his children, which he did not do because of the shooting. (Tr. at 261). He testified that he shot back at Lopez to protect his children. (Tr. at 263).

{¶21} On cross-examination, appellant admitted that he had his gun on his person at the time. (Tr. at 266). He stated that he did not call the police when he saw Lopez shooting a gun near his house before this incident. (Tr. at 270). He also testified that he did not call the police after the instant shooting, but he called a lawyer. (Tr. at 270). He explained that he went to see his mother after the shooting to ask her what to do and he then called a lawyer. (Tr. at 270-272). He also stated that he did not have a concealed carry permit even though he had taken the test. (Tr. at 273).

{¶22} Appellant further testified that upon taking his children to his cousin's house after the shooting, he did not tell his cousin about the shooting because it was none of her business. (Tr. at 275). Appellant's cousin had testified briefly, merely stating that when appellant dropped off his children, he was frantic. (Tr. at 275).

{¶23} The Mahoning County Grand Jury indicted appellant on five counts:

> Count 1- discharging a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3) and R.C. 2923.162(C)(4) with a three-year firearm specification under R.C. 2941.145(A) and a five-year "drive by shooting" firearm specification under R.C. 2941.146(A) (felony of the first degree);

Count 2- felonious assault in violation of R.C. 2903.11(A) and R.C. 2903.11(D)(1)(a), with the same three-year and five-year firearm specifications as Count 1 (felony of the second degree);

Count 3- discharging a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3) and R.C. 2923.162(C)(2), with the same three-year and five-year firearm specifications as above (felony of third degree);

Count 4- improperly discharging a firearm at or into a habitation or a school safety zone in violation of R.C. 2923.161(A)(1) and R.C. 2923.161 (C), with the same firearm specifications as above (felony of the second degree); and

Count 5- improperly discharging a firearm at or into a habitation or a school safety zone in violation of R.C. 2923.161(A)(1) and R.C. 2923.161 (C) with the same firearm specifications as above (felony of the second degree).

{¶24} Appellant waived his right to a jury trial and proceeded to a bench trial on October 14, 2021.

{¶25} On October 19, 2021, the trial court issued a judgment entry finding appellant guilty on all counts, except for Count 5, and all of the five-year firearm specifications. The court held a hearing and on November 22, 2021, sentenced appellant to an aggregate of 7-9 years of imprisonment, which consisted of: an indefinite term of imprisonment of 4-6 years on Count 1, with an additional 3-year consecutive prison term for the firearm specification; merger of Count 2 with Count 1 for conviction and sentence purposes as the State elected to proceed on Count 1; 3 years of imprisonment on Count 3 to run concurrent to the sentence in Count 1 with merger of the firearm specification; and an indefinite term of 4-6 years on Count 4 to run concurrently with the sentence in Count 1, and merger of the firearm specification.

{¶26} Appellant timely filed this appeal. He raises two assignments of error.

{¶27} Appellant's first assignment of error states:

The trial court erred in entering a guilty verdict.

{¶28} Appellant asserts that no sufficient evidence supports his convictions and they are against the manifest weight of the evidence. He sets forth the standards of review

and cites a number of cases where appellate courts have applied the manifest weight of the evidence standard and reversed trial court bench verdicts.

{¶29} In particular, appellant contends that sufficient evidence existed of self-defense aggravated assault rather than felonious assault. He asserts that Lopez had threatened his life before the shooting and Lopez fired first at him on the day of the incident. Appellant cites the trial court's opinion stating "* * *after reviewing all of the evidence, the defendant has certainly presented evidence that may tend to support that he used the force of self-defense and the defense of others." (Tr. at 286). Appellant submits that the trial court therefore found evidence of self-defense.

{¶30} Appellant asserts that the verdict was also against the manifest weight of the evidence because the trial court found that Carrion's testimony was credible even though it contained a number of lies and she was protecting Smaragdas, a known felon, from a weapons charge. Appellant asserts that the trial court made no statement of credibility as to the testimony of Lopez or Smaragdas, so the court must have attributed the most credit to Carrion's testimony. He submits that Carrion lied about:

> (1) their history in court regarding their parenting arrangement; (2) hiding her location from him in violation of a parenting order; (3) children on the porch when the shooting started;(4) seeing him drive by the house a number of times; and (5) whether Lopez left the porch to shoot. Appellant also contends that the video shows that the first shot came from Lopez's porch, not from appellant, and his shots were defensive shots.

{¶31} Sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997); *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386. In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements proven beyond a reasonable doubt. *Smith* at 113. A sufficiency of the evidence challenge tests

the burden of production while a manifest weight challenge tests the burden of persuasion. *State v. K.A.T.,* 7th Dist. Mahoning No. 20 MA 0097, 2021-Ohio-4293, ¶14. Therefore, when reviewing a sufficiency challenge, the court does not evaluate witness credibility. *State v. Yarbrough*, 95 Ohio St.3d 516, 543, 2002-Ohio-2126, 747 N.E.2d 216, ¶ 79. Instead, the court looks at whether the evidence is sufficient if believed. *Id.* at ¶ 82.

{¶32} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine 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. *Thompkin*s at 387. This standard is equally applicable when reviewing a manifest weight challenge from a bench trial. *K.AT.* at ¶ 24. "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.'" *Id*. (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all the evidence produced at trial. *Thompkins* at 390. A reviewing court will not reverse a judgment as against the manifest weight of the evidence in a bench trial where the trial court could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Hill*, 7th Dist. Mahoning No. 09-MA-202, 2011-Ohio-6217, 49, citing *State v. Eskridge*, 38 Ohio St.3d 56, 59, 526 N.E.2d 304 (1988).

{¶33} However, granting a new trial is only appropriate in extraordinary cases where the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of fact who sits in the best position to judge this evidence by observing witness gestures, voice inflections, and demeanor. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), syllabus; *State v. Rouse*, 7th Dist. Belmont No. 04-BE-53, 2005-Ohio-6328. Thus, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Carroll No. 99-CA-149, 2002-Ohio-1152.

{¶34} Appellant challenges only that his felonious assault conviction lacked sufficient evidence. He contends that the evidence established self-defense aggravated assault because he was defending himself and his children from Lopez, who previously threatened his life and fired first while appellant's children were in the backseat of his car. In his reply brief, appellant adds that the State failed to present sufficient evidence of his mental state in order to convict him of felonious assault.

{¶35} R.C. 2903.11 (A)(l) provides that "[n]o person shall knowingly* * * (1) [c]ause serious physical harm to another or to another's unborn." Self-defense is an available defense to felonious assault. *State v. Sims*, 7th Dist. Columbiana No. 19 CO 0035, 2021-Ohio-2334, ¶ 9.

{¶36} Prior to March 28, 2019, self-defense was an affirmative defense which required that the defendant prove each element of the defense by a preponderance of the evidence. On March 28, 2019, a new law in Ohio placed the burden on the prosecutor to prove that the defendant did not act in self-defense. R.C. 2901.05 was amended to shift the burden of proof to the state to "prove beyond a reasonable doubt that the accused person did not use the force in self-defense, defense of another, or defense of that person's residence, as the case may be." R.C. 2901.05(B)(1).

{¶37} Ohio law provides for two types of self-defense: (1) self-defense against danger of bodily harm, or non-deadly force self-defense; and (2) self-defense against danger of death or great bodily harm, or deadly force self-defense. *State v. Italiano*, 7th Dist. Mahoning No. 19 MA 0095, 2021-Ohio-1283, ¶ 18, citing *Struthers v. Williams*, 7th Dist. Mahoning No. 07 MA 55, 2008-Ohio-6637, ¶ 13. Accordingly, when a defendant raises self-defense, the State must prove the following beyond a reasonable doubt in order to convict a defendant of felonious assault: (1) the defendant was at fault in creating the situation giving rise to the incident; (2) the defendant did not have a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was the use of force; and (3) the defendant violated the duty to retreat or avoid danger. *Italiano*, at ¶ 18, citing *State v. Jackson*, 8th Dist. Cuyahoga No. 108493, 2020-Ohio-1606, ¶ 17. Although the burden has shifted to the state, the elements remain cumulative. *Id*.

{¶38} In the instant case, the trial court found that "after reviewing all of the evidence, the defendant has certainly presented evidence that may tend to support that he used the force of self-defense and the defense of others." (Tr. at 286). However, the court went on to state that the burden was then on the State to prove beyond a reasonable doubt that appellant did not use the force in self-defense or in the defense of others. (Tr. at 286). After its review of the witness testimony and surveillance video, the court then stated: "I also find that the state proved beyond a reasonable doubt that Raymond Owens on or about June 10, 2020, in Mahoning County, did knowingly cause serious physical harm to Emmanuel Lopez and did knowingly cause or attempt to cause physical harm to Emmanuel Lopez by means of a deadly weapon, and additionally find that the state proved beyond a reasonable doubt that the defendant did not use the force in self-defense or in the defense of another, and therefore, find the defendant guilty of felonious assault in Count Two." (Tr. at 292-293). Accordingly, the court found that the State had met its burden of proving beyond a reasonable doubt that appellant did not act in self-defense or defense of others.

{¶39} Sufficient evidence supports the felonious assault conviction and rejection of the defense of self-defense and/or defense of others. The court reviewed the surveillance video and cited to relevant parts of the trial testimony of Carrion, Lopez, Smaragdas, and appellant. The court specifically found Carrion's testimony credible based upon observing the emotion and trauma she showed during her testimony. (Tr. at 286-287). Witness credibility is not reviewed in evaluating sufficiency of the evidence, so the trial court's view of these testimonies as credible is accepted. *See Yarbrough*, 95 Ohio St.3d at 543, 2002-Ohio-2126, 747 N.E.2d 216.

{¶40} The court found that Carrion and Lopez saw appellant drive by the house multiple times before he stopped and Lopez became so concerned that he went into the house to retrieve his gun. Carrion and Lopez both testified that they saw appellant shoot first from his car. (Tr. at 1 12, 158-159). The court cited portions of appellant's testimony that it found significant and questioned his actions. The court questioned why appellant did not stop the first time that he drove past the house or the second time if he had recognized Carrion's car, as he had testified. (Tr. at 288).

{¶41} The court also questioned appellant's testimony that he did not realize that he had a gun on his person until after he stopped his car, saw Carrion, saw Lopez coming down the steps, and heard gunshots, (Tr. at 289). The court found that an individual would know and feel whether he was carrying a gun on his person as appellant acknowledged that the gun weighed more than a cell phone. (Tr. at 289-290). The court further questioned why appellant did not get back into his car and drive away in order to protect himself and his children if it was Lopez who fired first, as appellant's car could have protected him from gunfire. (Tr. at 290). This, coupled with the testimony of Carrion and Lopez, establishes that appellant was at fault for creating the situation from which the shooting arose.

{¶42} The fact that appellant did not get back into his car and drive away also establishes that he did not meet the second and third elements of self-defense or defense of others. His only means of escape from such danger was not the use of force as appellant had the cover of his car for protection from gunfire. He could have driven away from the scene. Instead, appellant chose to either fire his weapon first, if the testimony of Carrion and Lopez is believed, or he continued to engage in gunfire despite an ability to drive away, and leave the scene.

{¶43} The court further questioned why appellant did not call the police after the incident, citing appellant's testimony that he called his mother for advice and she told him to call a lawyer. (Tr. at 290). While understanding that appellant may be fearful of calling the police, the court also questioned why appellant failed to tell his cousin what happened when he dropped his children off at her house following the incident. (Tr. at 290-291). The court could have believed from the testimony that it was because appellant was the aggressor.

{¶44} The court concluded, after considering all of the evidence and the applicable law, that the State proved beyond a reasonable doubt that appellant discharged a firearm on or about June 10, 2020 and caused serious physical harm to Lopez. (Tr. at 291). The court further found that the state proved beyond a reasonable doubt that appellant knowingly caused serious physical harm to Lopez by means of a deadly weapon and appellant did not use the force in self-defense or in the defense of

others. (Tr. at 292-293). We find that sufficient evidence supports the trial court's conclusion that appellant was guilty of felonious assault.

{¶45} We further find that the felonious assault conviction was not against the manifest weight of the evidence. Again, a reviewing court will not reverse a judgment as against the manifest weight of the evidence in a bench trial where the trial court could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *Hill*, 7th Dist. Mahoning No. 09-MA-202, 2011-Ohio-6217, ¶ 49, citing *Eskridge,* 38 Ohio St.3d at 59, 526 N.E.2d 304.

{¶46} The court, as trier of fact, was presented with two theories and concluded that the State's theory, supported by the testimony of Carrion and Lopez, was more credible. As to assertions of Carrion's alleged lies in her testimony, the trial court heard all of the testimony, including defense counsel's cross-examination of Carrion, and chose to believe Carrion's testimony. The evidence supports the court's findings.

{¶47} The cases cited by appellant regarding self-defense and manifest weight are distinguishable. In *State v. Coleman*, 8th Dist. Cuyahoga No. 80595, 2002-Ohio-4421, 2002 WL 1980806, the appellate court held that the trial court erred by finding that the defendant had not acted in self-defense. The appellate court found the verdict to be against the manifest weight of the evidence because the evidence established that Coleman was not at fault in creating the situation, had a bona fide belief that he was in danger, and violated no duty to retreat. *Id.* at ¶ 35. The appellate court cited testimony establishing that the victim was highly intoxicated in the defendant's home, was arguing with the defendant's niece, and the defendant was in his basement while the victim threatened the defendant that he was going to "kick his old ass" and pointed a finger at him with his other hand behind his back. *Id.*

{¶48} Contrarily here, appellant was in front of the home where Lopez used to live and was visiting. He had threatened Lopez before and had strained relations with Carrion over co-parenting. Appellant drove by the home at least twice and smiled at Carrion and Lopez, creating a feeling in them that something bad was about to happen. Appellant stopped his car in front of the house and, according to Lopez and Carrion, fired the first shot. He continued to fire even though he could have gotten back into his car by

using his car as a shield from gunfire, and he could have driven away from the scene. Appellant did not do so.

{¶49} Appellant also cites to our decision in *State v. Kartman*, 7th Dist. Belmont No. 01 BA 65, 2002-Ohio-5189. There, we reversed a domestic violence and disorderly conduct conviction as against the manifest weight of the evidence. A park security officer arrested the defendant for beating his girlfriend. The officer testified that he witnessed Kartman beating his girlfriend and she had visible injuries as her face was red and her shirt was ripped. However, the officer changed his testimony on cross-examination, stating that he assumed Kartman was beating his girlfriend because of how they were positioned when he saw them and based upon witnesses who told him Kartman was beating her, although he could not recall any witness's name. The officer testified that he actually saw no visible injuries on the victim, but her face was red. The victim testified that she was drunk, angry, and violent, and Kartman was trying to pull her out of his truck. She testified that he did not cause her physical harm and she actually kicked him. She further testified that she ripped her shirt earlier in the day while riding a four-wheeler.

{¶50} In finding that the domestic violence conviction was against the manifest weight of the evidence, we noted there were no witnesses to the alleged beating, the victim requested that the appellant not be charged, and the victim stated that she may have been the aggressor. *Id* at ¶ 22-24. We further noted that while the security guard stated that numerous witnesses told him that Kartman was beating his girlfriend, he did not take their statements and none of them were called to testify. *Id*. at ¶ 23. In light of these considerations, we found the trial court clearly lost its way in finding the appellant guilty of domestic violence.

{¶51} The instant case involves no change in testimony concerning the shooting. Carrion and Lopez both testified that appellant shot first and continued to shoot. Moreover, the trial court even considered the possibility that appellant did not fire first. (Tr. at 290). However, the trial court questioned why appellant did not use his car as a shield and get back into his car and drive away, even if he did not fire first when his children were in the backseat of his car. (Tr. at 290). The trial court also questioned why appellant did not go to the police. (Tr. at 290). The court pointed out that appellant instead went to his mother and then called a lawyer. (Tr. at 291).

{¶52} Appellant also cites to *State v. Williams*, 8th Dist. Cuyahoga No. 107429, 2019-Ohio-992, where the appellate court affirmed an assault conviction, but overturned an aggravated burglary conviction as against the manifest weight of the evidence. The appellate court found that competent, credible evidence was lacking that Williams entered the home of the victim. In the instant case, there is no lack of evidence since Carrion and Lopez both testified.

{¶53} Finally, appellant cites to *State v. Andre*, 8th Dist. Cuyahoga No. 101023, 2015-Ohio-17, where the court found that while sufficient evidence supported the defendant's felonious assault conviction, it was against the manifest weight of the evidence. The appellate court agreed that "the weigh of the evidence, i.e., the greater amount of credible evidence, fails to support the trial court's determination that Andre knowingly caused or attempted to cause physical harm to Candow beyond a reasonable doubt." [emphasis in original]. *Id.* at ¶41. The appellate court acknowledged that it is primarily for the trier of fact to determine credibility and weight the evidence. *Id*. at ¶42. However, that court held that the videotape surveillance in the case differed from both the testimony of the victim and the evidence presented by the state such that reversal was warranted. *Id.* The court held that the videotape established facts that were inconsistent with the defendant knowingly causing or attempting to cause physical harm to the victim with his vehicle. *Id.* at ¶ 44.

{¶54} In this case, the videotape does not negate a finding that appellant caused or attempted to cause physical harm to Lopez. Even if it is unclear who fired first, it does not raise an interpretation other than that appellant knowingly fired his gun in order to cause physical harm to Lopez and/or Carrion. Appellant presents no evidence or assertion that he intended to do anything other than inflict harm by firing his gun toward Smaragdas's house and appellant did not need to use such force when he could have driven away from the scene.

{¶55} Appellant cites to page 174 of the transcript concerning Carrion’s alleged lie about their visitation agreement. However, Carrion testified that she and appellant had an agreement that the court put into an order concerning companionship. (Tr. at 174). She even stated that she had a copy of the order and they were following the order for a period of time. (Tr. at 174). Later, on cross-examination, Carrion denied receiving a 2018

notice of hearing on appellant's motion for change in parental rights where he was seeking custody. (Tr. at 181). She stated that she did not receive the notice. (Tr. at 181-182). The court chose to believe her testimony.

{¶56} Further, Carrion did not lie about whether she hid her location from appellant in violation of the parenting order. When defense counsel asked Carrion if she sent notices to the court when she changed addresses, Carrion responded, "No, because the case was closed." (Tr. at 176). She further stated that she did not want appellant to know where she was living and defense counsel was correct in stating that appellant did not know where she lived. (Tr. at 176-177).

{¶57} Carrion also testified that the children were on the porch until she and Smaragdas ushered them into the house when the shooting began. (Tr. at 184-185). Appellant refers to page 183 of the transcript where Carrion responds yes when asked if she had testified at the preliminary hearing that the children were on the porch. (Tr. at 183). This appears consistent with the testimony given at the trial. Lopez also testified that the children were on the porch when the shooting began. (Tr. at 1 12-1 15, 135). The court could choose to believe this testimony.

{¶58} Appellant's assertion that the videotape shows that Carrion lied when she claimed that he had driven by Smaragdas's house prior to the time when shots were fired. Carrion testified that appellant drove by one time and passed, and then went around and came down the street, stopped in front of Smaragdas's house, and the shooting began. (Tr. at 156). Carrion's testimony is actually consistent with appellant's own testimony that he drove by once when he left Frank's house and then came back to drop his children off, but never made it because the gunfight occurred. (Tr. at 261).

{¶59} Carrion and Lopez testified similarly concerning Lopez leaving the porch. Carrion testified that, "[h]e [appellant] stops, starts shooting, and that's when Emmanuel [Lopez] got up and got down the stairs and started shooting back and started screaming at us saying 'Get inside. Get inside.' " (Tr. at 188). Lopez testified that he came down the stairs of the porch and stood on the platform at the top of the second set of stairs descending to the sidewalk. (Tr. at 132). While Carrion testified that she remembered telling the police that Lopez was on the porch and started shooting from the porch, she admitted that she was confused at the time of the interview because things had happened

so fast. (Tr. at 193). She testified that she did remember Lopez coming down off of the porch, shooting, and then coming back onto the porch, where he was hit and fell to the floor, bleeding. (Tr. at 193-194). She also stated that she could have told the police that Lopez was on the porch when he started shooting as she was nervous and in shock at that time because there was so much blood. (Tr. at 194).

{¶60} Even if Carrion was mistaken about whether Lopez left the porch, this had little impact on her credibility, as it is reasonable for her to have been in shock when she spoke to the police and Lopez testified where he was during the shooting. Moreover, appellant himself testified that Lopez was on the platform above the second set of steps when the shooting started. (Tr. at 261).

{¶61} Further, we find no appearance that Carrion's testimony was aimed to protect Smaragdas from charges of a felon in possession of a weapon. She testified that Smaragdas did not have a gun, he helped her get the children into the house when the shooting began, and he helped her after Lopez was shot. (Tr. at 192-193). Lopez also testified that Smaragdas did not possess or use a firearm. (Tr. at 82, 138). Further, appellant himself testified that he did not even see Smaragdas. (Tr. at 262). In any event, appellant does not claim that Smaragdas instigated or was involved in the shooting and he fails to present argument that protecting him would require lying about appellant's conduct.

{¶62} Finally, a review of the surveillance video does not clearly demonstrate from where the first shot came. Thus, appellant fails to present evidence that the trial court clearly lost its way and created a manifest miscarriage of justice in convicting him. As a result, appellant's conviction is not against the manifest weight of the evidence.

{¶63} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶64} In his second assignment of error, appellant's asserts:

> **The trial court erred in not dismissing the cause on prosecutiroal[sic] misconduct grounds**.

{¶65} Appellant asserts that the prosecution committed misconduct during its cross-examination of him and in its closing argument. He contends that the State violated

his Fifth and Sixth Amendment rights by repeatedly questioning why he called a lawyer rather than police after the shooting. Appellant also asserts that the State violated these rights in its closing argument.

{¶66} Appellant cites three cases in support of his assertion. He cites *State v. Harris*, 9th Dist. Lorain No. 11CA009991, 2012-Ohio-2973, ¶16, as instructive. The appellate court there found that Harris was denied a fair trial when the prosecution repeatedly and flagrantly elicited testimony about his post-*Miranda* silence during direct examination and commented on it in closing. The prosecution referred to Harris's silence on cross-examination, repeated the lone statement Harris made to the police, commented on the credibility of the witnesses and the quality of the defense, and repeatedly questioned whether an innocent person would have said more to police.

{¶67} Appellant also relies upon a comment that we made in *State v. Jarrell*, 7th Dist. Mahoning No. 18 MA 0119, 2021-Ohio-2333, ¶ 68, where we remanded the case based upon evidentiary issues and found that the defendant's assignment of error concerning prosecutorial misconduct was moot. *Id.* However, we cautioned:

> We must note, however, that the state repeatedly made comments regarding Appellant and his counsel that were disturbing, disrespectful and improper. Even after being chided by the court, the state continued to make such comments until the court was forced to call a sidebar conference. At its conclusion, the state made yet one more such comment. While we are disturbed by the record in this regard, we are certain that on remand, the issue will not be capable of repetition. Therefore, this assignment of error is moot.

Id. Appellant asserts that the prosecution in his case was also repeatedly warned about its comments.

{¶68} He also relies on our decision in *State v. Chaney*, 7th Dist. Mahoning No. 08 MA 171, 2010-Ohio-1312, where we held that the State violated the defendant's Fifth and Fourteenth Amendment rights by commenting on Chaney's post-arrest silence during his cross-examination and in its closing argument. *Id*. at ¶3. Chaney's counsel had objected and the State conceded that its remarks were improper, but argued that it was

harmless error because its remarks were brief and the strength of the evidence against the defendant was great. *Id*.

{¶69} While we agreed that prosecution comments on post-arrest silence can be harmless in some circumstances, we found that they were not harmless beyond a reasonable doubt as to Chaney. *Id.* at ¶ 3. We held that the evidence against Chaney was not overwhelming and the remarks of the prosecution about Chaney's post-arrest silence may have been brief in cross-examination, but the prosecution returned to it in closing and in the instructions of law prior to jury deliberation. *Id*. at ¶ 3.

{¶70} Appellant in the instant case likens the State's actions in his case to those of the prosecution in the above cases. He quotes portions of the prosecution's cross-examination of him and closing argument. (Tr. at 270, 277).

{¶71} Alternatively, appellant sets forth a plain error argument and asserts the ineffective assistance of counsel. He cites Crim. R. 52 and S*tate v. Mohamed*, 151 Ohio St.3d 320, 2017-Ohio-7468, 88 N.E.2d 935, stating that a defendant must show the following in order to establish plain error: “(1) there was an error or deviation from a legal rule; (2) the error was plain and obvious; and (3) the error affected the outcome of the trial." Appellant also sets forth the requirements for establishing an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984): (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense." Appellant concludes that:

> if necessary, analysis under the ambit of either plain error or ineffective assistance provides an avenue of relief. If this Court found that, for example, the issues concerning analysis under aggravated assault or an objection on the issue of prosecutorial misconduct were not properly preserved, this Court could make a finding under either *Strickland* or Crim. R. 52 in order to grant the relief sought here.

(Appellant’s Br. at 23).

{¶72} Appellant’s challenge of prosecutorial misconduct during his cross-examination concerns the following exchange:

> Q: [Prosecution] So you have been shot at before?

A: [Appellant] By Booderz [Lopez], yes.

Q: Did you call the police?

A: No

Q: Why not?

A: I never called the police.

Q: You never called the police that day when people tried to kill.

A: I didn't do it. He shot in the air.

Q: I thought you said he shot at your house?

A: I never said he shot my house. Mr. Engler said that by mistake, but I never said he shot my house.

Q: So he shot in the air when he's at your house?

A: No. When he came to my house?

Q: Yes.

A: He seen me. He came back around and he shot in the air.

Q: He shot at you?

A: Yes, in the air.

Q: But you just said at you?

A: I said in the air.

Q: All right. I will stop beating that dead horse. Now, you don't call the police when that happens, right?

A: No, sir.

Q: And then he shoots at you and your children?

A: Yes.

Q: And you don't call the police then either?

A: Well, I called the lawyer.

Q: Well, why would you call a lawyer? Do they arrest people for trying to kill you?

A: I mean, I just got into a shootout.

Q: Yeah.

A: So he shot at me, so I called a lawyer to see what to do.

Q: You don't know to call the police after you've been shot at?

A: I mean, well, like I didn't get hurt. Why would I call the police? I called a lawyer to talk to see what should I do.

Q: All right. So the simple answer is you don't call the police after you were shot at with your children? You don't?

A: No.

Q: Now, I guess you call an attorney, correct?

A: Yes.

Q: And I don't want to violate attorney/client privilege; but since you are using self-defense, and I am sure you talked to your attorney about that. Who was the attorney?

A: What attorney?

Q: That you called.

A: Mr. Engler.

Q: You called Attorney Mr. Engler that day?

A: Yes. That day on - - my mom helped me look for a lawyer. I called him that day.

Q: So you didn't call him immediately after the shooting. You went and talked with your mother, and then she suggested, hey, maybe we should get an attorney, right?

A: Yes.

Q: So your first response wasn't to call an attorney after you were shot at, and it wasn't to call the police. It was to go and confer with your mother on what you should do next, correct?

A: You could say that, yes.

Q: Well, I did say that.

(Tr. at 270-272).

{¶73} Upon completion of the cross-examination, the State presented the following two-sentence closing argument: “Your Honor, if you and your children are shot at, you call the police. If you shoot, you don't.” (Tr. at 277). No objections were raised in cross-examination and defense counsel did not object to closing argument. Moreover, no motion to dismiss was filed.

{¶74} In general, the failure to object to prosecutorial questioning at trial waives all but plain error. *State v. Whitaker*, --- Ohio St.3d---, 2022-Ohio-2840, --- N.E.3d---, ¶ 85, citing *State v. Hartman*, 93 Ohio St.3d 274, 293, 754 N.E.2d 1150. Crim. R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Courts must exercise notice of plain error with great caution, “under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Landrum*, 53 Ohio St.3d 107, 111, 559 N.E.2d 710, 720 (1990), quoting *State v. Long*, 53 Ohio St.2d 91, 98, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶75} When reviewing a claim of prosecutorial misconduct, this Court evaluates whether the remarks were improper and, if so, whether they prejudicially affected the defendant's substantial rights*. State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293

(1990). The prosecution is afforded wide latitude during closing argument. *Id.* The challenged statements are not viewed in isolation but are read in context of the entire closing argument and the entire case. *State v. Treesh*, 90 Ohio St.3d 460, 466, 739 N.E.2d 749 (2001); *State v. Rahman*, 23 Ohio St.3d 146, 154, 492 N.E.2d 401 (1986) (noting that if the Court were to find that "every remark made by counsel outside of the testimony were grounds for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced of counsel are occasionally carried away by this temptation.").

{¶76} Further, due process analysis where prosecutorial misconduct is alleged looks to “the fairness of the trial, not the culpability of the prosecutor." *Lott*, 51 Ohio St.3d at 166, 555 N.E.2d 293, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Where there are improper remarks, "it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty." *State v. Smith*, 14 Ohio St.3d 13, 15, 470 N.E.2d 883 (1984).

{¶77} In a bench trial, the trial court is presumed to rely on only relevant, material evidence and is aware that closing arguments are not evidence. *State v. Williams,* 3d Dist. Auglaize No. 2-19-04, 2020-Ohio-3616, ¶ 117*,* citing *State v. Curry,* 3d Dist. Allen No. 1-15-05, 2016-Ohio-861, ¶ 85 (citing *State v. Post*, 32 Ohio St.3d 380, 384 (1986) (*overruled on other grounds*, *State v. Drain*, 2022-Ohio-3697, ---N.E.3d---(Preliminary Copy, Subject to Further Editing)). Since the court is presumed to only consider relevant evidence, the impact of remarks is lessened when they are heard by a court. *State v. Wiles*, 59 Ohio St. 3d 71, 87, 571 N.E.2d 97 (1991).

{¶78} In the instant case, the prosecution’s questions of appellant on cross-examination do not involve remarks on his post-arrest silence or right to counsel. Rather, they were directed at his decision to not call the police when he saw Lopez shooting a gun near his apartment two weeks before the instant shooting. They were also directed at appellant’s decision not to first call the police after the shootout, but rather to first consult with his mother and then counsel.

{¶79} Even if the prosecution's remarks were improper, it is clear beyond a reasonable doubt that absent those comments, the court could have found appellant guilty based upon the testimony of Carrion and Lopez. This is even clearer when we

presume that the trial court considered only relevant and material evidence and was aware that closing arguments are not evidence.

{¶80} Accordingly, appellant's second assignment of error also lacks merit and is overruled.

{¶81} Based on the foregoing, the judgment of the trial court is hereby affirmed.

Waite, J., concurs.
D'Apolito, 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 to be taxed against the Appellant.

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.