[Cite as *State v. Johnson*, 2023-Ohio-4734.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LUIS JOHNSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0068

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 20 CR 664

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Edward A. Czopur*, Assistant Prosecutor, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Rhys B. Cartwright-Jones, 42 North Phelps Street, Youngstown, Ohio 44503-1130, for Defendant-Appellant

Dated: December 20, 2023

WAITE, J.

{¶1} Appellant Luis Johnson appeals a June 3, 2022 Mahoning County Court of Common Pleas judgment entry convicting him of attempted murder, felonious assaults, and multiple firearm specifications. Appellant argues that the trial court improperly allowed the state to treat two of their witnesses as hostile without satisfying the statutory requirements. Appellant also challenges his convictions under a manifest weight of the evidence standard. For the reasons that follow, Appellant's arguments are without merit and are overruled.

Factual and Procedural History

{¶2} Appellant and his co-defendant at trial, Tyree Robinson, met through Appellant's brother, Eric. Appellant lived with his mother, Elena Colon. Appellant had previously dated Starla Clark and had one child with Ms. Clark. The child is approximately four or five years old. After Appellant and Ms. Clark ended their relationship, she began dating Tevin Gregory, the victim in this case. Appellant began a relationship with a woman named Payton Mraz.

{¶3} Appellant and Ms. Clark dated for approximately four and one-half years, living together for roughly half of that time. They ended their relationship after an argument. Appellant had found several dating apps on her phone, where she apparently had romantically messaged other men. Appellant was also upset at his belief she had a romantic relationship with her manager at a local Taco Bell restaurant. When Appellant confronted Ms. Clark her about this, she ended her relationship with Appellant.

{¶4} Appellant became what several people close to him describe as "unhinged" after the breakup. Appellant showed the jury a large tattoo bearing the name "Starla" on

his neck. He explained that he was tattooed with her name and their daughter's name sometime after the breakup. Ms. Clark testified that she eventually blocked his number in her cell phone, as he continually texted her attempting to get her to resume their relationship. At one point, Ms. Clark and Appellant's mother became concerned that he was suicidal, particularly after his mother found what she believed to be a suicide note. Ms. Clark called the police, who took Appellant to a hospital for mental health treatment.

{¶5} When their relationship ended, Ms. Clark entered a relationship with the victim, which progressed quickly. Her new relationship upset Appellant. At some point Appellant sent the victim a video apparently depicting a sex act between Ms. Clark and Appellant. This was to persuade the victim that Ms. Clark was dating both men at the same time. Ms. Clark became angry and refused to speak to Appellant, stating that Appellant's constant attempts to resume their relationship had angered her to the point that she decided to limit their communication solely to issues regarding their daughter.

{¶6} In the weeks before the shooting, Ms. Clark and the victim spent most nights together at her parent's residence, where she lived. On at least one occasion, Ms. Clark saw Appellant drive past the house. She informed the victim, who thought this was odd.

{¶7} Both Appellant's mother and Appellant's friend, Ms. Mraz, told police that Appellant knew the victim often stayed at Ms. Clark's house. He also knew the victim had a distinct routine every morning to allow him to get to work on time. Ms. Mraz told police that Appellant was a "stalker" who had been tracking the victim and Ms. Clark. (Trial Tr., p. 453) Appellant's mother made several similar statements to police regarding Appellant's knowledge of where and when he could find the victim.

{¶8} Eric, Appellant's brother, voluntarily contacted police and informed them that after Appellant returned from his mental health related hospital stay, Appellant said he wanted to kill the victim.

{¶9} On October 12, 2020, the victim woke up and exited Ms. Clark's residence around 5:40 a.m. as was his typical routine. He walked to his car, which was parked on the street about halfway between Ms. Clark's residence and the neighbor's. As the victim checked his phone for the time he noticed a burgundy vehicle pull around a bus and drive towards him. Shortly thereafter, shots were fired from the vehicle, striking the victim several times. The next-door neighbor, Juan Salinas, heard the gunshots as he was getting into his own car. He observed a four door burgundy car drive away and testified that he could see only one person in the car, the driver, who was ducking down. (Trial Tr., p. 252.)

{¶10} Ms. Clark heard the shots and phoned the victim to check on him. He was able to answer her call and informed Ms. Clark that he had been shot and needed help. Ms. Clark called 911 and police arrived at the residence. Sergeant Michael Marciano was the first to arrive at the scene. Although the injuries were so severe Sgt. Marciano was concerned for the victim's life, the victim was transported to the hospital where, after multiple surgeries, he survived. Ms. Clark told the responding officers she believed Appellant was involved. She showed the neighbor, Mr. Salinas, a photograph of a burgundy Lincoln owned by Appellant's friend and co-defendant, Robinson. Mr. Salinas agreed it was the vehicle he saw at the scene. Ms. Clark then called Appellant's mother and said her son and Robinson had shot her boyfriend. Appellant's mother ran into Appellant's room, where he appeared to be sleeping. When she asked him about Ms.

Clark's claims, he denied involvement and made a joke. Appellant later said that he and his mother did not have a good relationship and she forced him out of her house.

{¶11} Cell phone records introduced at trial indicated that Appellant made a series of phone calls to Robinson's phone the morning of the shooting. The shooting occurred at approximately 4:50 a.m. and the first group of calls occurred prior to the shooting: 1:09 a.m., 1:10 a.m., 1:29 a.m., 1:38 a.m., 1:45 a.m., 4:05 a.m., and 4:20 a.m. The next call occurred at 6:54 a.m., an hour after the shooting and twenty minutes after Ms. Clark's phone call to Appellant's mother in which she accused Appellant and Robinson of being involved in the shooting. (Trial Tr., p. 605.)

{¶12} In the days after the shooting, several witnesses were interviewed by police. Some came to the police station voluntarily without being asked. Others were asked to visit the police station. Appellant's mother voluntarily appeared at the police station two days after the shooting. Sergeant Michael Cox and Detective David Sweeney were present and she gave them a statement which was videotaped. According to the officers, during her statement, Appellant's mother was "-- very, very much crying, very upset. She basically explained that, you know, she couldn't really believe that she was there and that she was doing what she was doing but she had to protect her son and that the boy -- or the male I think she referred to his as -- the boy didn't deserve what happened to him." (Trial Tr., p. 496.) Although Appellant had initially denied involvement to his mother, she told police that he later confessed he was involved in the shooting. He told her that an unnamed woman had helped he and Robinson by washing their clothes and Robinson had wiped the vehicle clean.

{¶13} Appellant's mother expressed concern for his mental state, explaining that he had been devastated by the breakup and Ms. Clark's new relationship, had lost his job, left a suicide note weeks earlier, and had been hospitalized due to mental illness. She informed officers that Appellant had spent an increasing amount of time with Robinson. During her statement, Appellant's mother told the officers that she had taken a prescribed medication but had just driven from work, showed no impairment, and coherently answered questions. (Trial Tr., p. 499.)

{¶14} Investigators also talked to Ms. Clark and Ms. Mraz. Ms. Clark informed police that Appellant repeatedly sent her text messages attempting to get her to resume their relationship and that she eventually was forced to block his cell phone number. While she allowed him to pick up their child for visitation, she did not otherwise maintain contact with him. She knew Appellant, Robinson, and Eric to possess guns, and knew Robinson drove a burgundy vehicle.

{¶15} Ms. Mraz also provided a statement to police. In her statement, she described her relationship with Appellant as "best friends" with "benefits." She initially told police that Appellant spent the night with her and that she dropped him off at this mother's house at 6:30 a.m. Later, she admitted that he did not actually stay with her, but he had asked her to lie to police and provide him with an alibi. She then told police that Appellant was involved in the shooting and his friend Robinson drove him to Ms. Clark's residence and shot the victim. When asked how Appellant knew the victim would be there, she replied "he's a stalker. That's what he's been doing. He's been tracking. He asked his friends late at night to see where [the victim] is at." (Trial Tr., pp. 453-454.)

{¶16} However, at trial both she and Appellant's mother changed their statements. Ms. Mraz recanted, and claimed that police pressured her into lying and implicating Appellant. When asked if watching her video statement would help her memory, she said that she did not want to watch the video, regardless.

{¶17} We note that this matter has been greatly delayed due largely to Appellant's own actions. He has requested several extensions on appeal, some filed after the briefing deadlines had passed. Additionally, the transcripts in this matter were also delayed. Nonetheless, in the interests of justice we have allowed Appellant to have certain leeway in regard to the deadlines for filing.

{¶18} Because Appellant's second assignment of error leads to his first, his arguments will be addressed in reverse order for ease of understanding.

ASSIGNMENT OF ERROR NO. 2

> The trial court erred in admitting hostile witness testimony of two witnesses, Mraz and Colon.

{¶19} Appellant argues that the trial court erroneously deemed Appellant's mother, Elena Colon, and friend, Payton Mraz, both called by state, to be hostile witnesses without a proper showing of surprise and affirmative damage by the state. Appellant argues that there is no surprise that his mother's testimony had changed because the effect of her medication on her memory would explain her change of testimony. As to Ms. Mraz, Appellant argues that the questions posed by the state did not elicit testimony prejudicial to its case. Appellant also briefly refers to a confrontation

clause error, but as he does nothing more than mention that argument, it will not be addressed, here.

{¶20} The state responds that the elements to request the two witnesses be considered hostile were met when it showed that the witnesses contradicted their prior statements to police, the witnesses never attempted to recant their statements prior to trial, and the state had no knowledge that the witnesses intended to contradict their earlier statements at trial. The state notes that affirmative damage can be shown by a contradiction or denial that harms the case of the party who called the witness.

{¶21} "A 'hostile witness' is one who surprises the calling party at trial by turning against that party while testifying." *State v. Black*, 7th Dist. Belmont No. 15 BE 0076, 2017-Ohio-4136, ¶ 30, citing *State v. Darkenwald*, 8th Dist. Cuyahoga No. 83440, 2004-Ohio-2693, ¶ 15. "The decision as to whether a witness is a 'hostile' witness, which includes whether the elements of surprise and affirmative damage have been established, is entrusted to the broad, sound discretion of the trial court." *Id.,* citing *State v. Diehl*, 67 Ohio St.2d 389, 391, 423 N.E.2d 1112 (1981).

{¶22} Pursuant to Evid.R. 607, a witness may be impeached and declared a hostile witness "by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage." Evid.R. 607(A). "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." Evid.R. 611(C). "A leading question is 'one that suggests to the witness the answer desired by the examiner.' " *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 149, citing 1 McCormick, Evidence (5th Ed.1999) 19, Section 6.

{¶23} Both witnesses initially gave videotaped statements to police implicating Appellant. Neither witness attempted to recant their statement in the eighteen months between making their statements and their appearance at trial. At trial, both claimed to have lied when making their earlier statements.

{¶24} At trial Appellant's mother claimed that, although she never notified police, her son had received what she perceived to be death threats, and her earlier statement was solely aimed at getting her son to be arrested in order to save his life. She lied when she implicated her son because she believed the victim's family would be satisfied that someone had been arrested for the crime and was being held responsible, thus the alleged death threats would stop and her son would be protected while in jail. She said: "I figured that [the truth] would come out and he couldn't be charged because there's no evidence. It was -- I don't know. Like, I wasn't even thinking honestly. Now in hindsight I'm, like, obviously, like I should have, I don't know, drove him far away. I don't know. I have a job and a child here. As a mother I was just trying -- I was freaking out." (Trial Tr., pp. 427-428.) Ms. Mraz claimed that she had initially tried to tell the truth, although she concedes she lied when she said Appellant spent the night with her. She blames her change in testimony by saying the officers pressured her into lying and implicating Appellant.

{¶25} When seeking to have them declared hostile at trial, the state explained that, as to Appellant's mother: "I realize that it's the defendant's mother; however, we did not expect that she would come in and -- I mean, it was a videotaped statement. We did not anticipate that she come in and completely go contrary to --." (Trial Tr., p. 402.) Essentially, the state's position is that despite her relationship with the defendant, they

did not expect the witness to contradict her voluntary, videotaped statement, particularly as no attempt had been made in the year and a half before trial to recant that statement. While Appellant insists the state should have known that she was medicated when she made her videotaped statement and should have known it was not reliable, the law simply looks to whether the earlier statement is inconsistent with trial testimony and does not look to the reason behind the inconsistencies. Regardless of Appellant's argument that the state should have inquired whether his mother's earlier statement was impacted by medication, the fact remains that Appellant's mother voluntarily provided her earlier damaging statement and the state had no notice of her changed story, and so did not expect her to change her testimony at trial. Hence, the record supports the trial court's determination the state demonstrated surprise.

{¶26} As to Ms. Mraz, the exchange regarding her status as a hostile witness was not recorded by the court reporter. We can, however, glean from the record that the same rationale would apply. Despite her relationship with Appellant, she gave a videotaped statement to police implicating Appellant in the crimes. She gave no notice she had a change of heart and made no attempt to recant prior to trial. The record supports the trial court's decision to declare her a hostile witness.

{¶27} Regarding both witnesses, the state contends the damage is apparent. Both implicated Appellant and provided a blueprint for how he was able to accomplish the shooting. Without the earlier testimony from either of these witnesses, the state's case regarding identity would be strongly hampered, if not completely unprovable. The court's decision here did not amount to an abuse of discretion. Appellant's second assignment or error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 1

The manifest weight of the evidence did not support the convictions.

{¶28} Appellant challenges only whether the state proved the element of identity as to all charges – attempted murder, felonious assault, and the attendant firearm specification. He claims that the manifest weight of the evidence does not support the state's case in this regard. Appellant bases his argument on various issues relating to witness testimony. He claims that as multiple witnesses described the vehicle differently there is no evidence linking any particular vehicle to the shooting. He argues that this undermines the state's contention that he was involved, particularly as the vehicle the state claims is linked to the shooting is registered to Robinson, not Appellant. Appellant argues that his mother was under the influence of prescription medication at the time she gave her statement to police and no efforts were made to determine whether the medications affected her memory, thus her statements cannot be found to be credible.

{¶29} The state responds by arguing multiple people (including Appellant's mother and his friend Ms. Mraz) told police that Appellant "stalked" the victim to learn his routines, drove past Ms. Clark's house to canvass the area, and carried out the shooting because he was angry that his former girlfriend and mother of his child had left him for the victim. Appellant also told these witnesses that he was in the vehicle with Robinson, who fired the shots. He told them that the victim was standing just outside of his car when hit by the shots. The state urges that it is clear the jury believed the statements the witnesses originally gave to the police and were not swayed by their changed testimony.

{¶30} 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." (Emphasis deleted.) *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id.* Weight of the evidence involves the state's burden of persuasion. *Id.* at 390, 678 N.E.2d 541 (Cook, J. concurring). An appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, at 387, 678 N.E.3d 541, 678 N.E.2d 541. This discretionary power of the appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

{¶31} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. No. 09 JE 15, 2010-Ohio-3282, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 N.E.2d 650 (1971). When there are two fairly

reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶32} Appellant challenges only the element of identity. "In addition to the elements of the crime, the state is required to prove the identity of the perpetrator of the crime beyond a reasonable doubt." *State v. Harrison*, 7th Dist. Jefferson No. 19 JE 0009, 2020-Ohio-3624, ¶ 65, citing *State v. Heigley*, 11th Dist. Lake No. 2007-L-122, 2008-Ohio-1688, ¶ 26; *State v. Cook*, 65 Ohio St.3d 516, 526, 605 N.E.2d 70 (1992).

{¶33} There is no real physical evidence in this case. While the state asserted that the recovered burgundy four door Lincoln belonging to Robinson should be viewed as evidence, nothing can be gleaned from that vehicle, other than its description, linking it to the crime. Thus, while it does match the physical description of the vehicle carrying the perpetrators, its evidentiary value is limited.

{¶34} This case almost entirely rests on witness testimony, particularly that of Ms. Clark, Ms. Mraz, and Appellant's mother. While Appellant testified that he was not upset about his breakup with Ms. Clark, all of the testimony overwhelmingly showed otherwise. Appellant displayed a large tattoo of the name "Starla" (Ms. Clark's name) on his neck which he admitted he had done after the breakup. Ms. Clark and Appellant's mother both testified that he was so upset after the breakup that they feared he was suicidal, and had law enforcement assist with hospitalizing him. These two witnesses also both testified that he was upset with Ms. Clark's new relationship and knew who she was dating.

{¶35} During his mother's testimony, she admitted that she initially told police "[h]e did it because she broke up with him; he couldn't deal with the breakup with Starla; this

was the new guy and he didn't want his daughter around the guy[.]" (Trial Tr., p. 407.) She also told police that although Appellant initially denied involvement, he later admitted to her that he was involved in the shooting. He told her that a female friend of Robinson's had washed their clothes and Robinson had wiped the car clean.

{¶36} Ms. Mraz admitted Appellant had asked her to lie to police and provide him with an alibi for the morning of the shooting. She told police that "I wasn't any part of that; he did what he did." (Trial Tr., p. 450) When asked by police how Appellant knew where to find the victim, she responded that Appellant had been stalking the victim, tracking him, and had asked his friends to inform him of the victim's movements. (Trial Tr., pp. 453-454.)

{¶37} Sgt. Cox testified that officers were never told Appellant was the subject of alleged death threats. Appellant's brother, Eric, told Sgt. Cox that Appellant said he wanted to kill the victim after his release from the hospital. Sgt. Cox also testified about a series of phone calls to Robinson initiated by Appellant the morning of the shooting. Six calls were made between 1:09 a.m. and 4:05 a.m. The shooting occurred around 5:40 a.m. After Ms. Clark called Appellant's mother at 6:30 a.m., accusing Appellant of being involved in the shooting, Appellant made another call to Robinson at 6:54 a.m., an hour after the shooting.

{¶38} While two witnesses recanted their earlier statements to police at trial, raising credibility issues with these witnesses, the jury clearly believed the witnesses told the truth in their initial statements to police. This appears reasonable, as Appellant's mother testified that she implicated Appellant, who was innocent, only to keep him safe from death threats. However, she did not relay those threats to law enforcement and

bonded him out of jail a week after his arrest, which she conceded was as soon as possible given her circumstances. If her initial statement was a lie to support her goal of keeping him safe from threats by having him jailed, it appears counterproductive to quickly facilitate his release. Ms. Mraz claimed police pressured her into lying in her initial statement, but refused to watch the videotape of that statement. She admitted she first lied to police to provide a false alibi at Appellant's request during her initial interview, so the jury was aware that she lied at least once before to benefit Appellant. They were free to determine that her statements implicating Appellant were truthful and her recanting at trial was untruthful.

{¶39} While there is no question that the case was built on circumstantial evidence, "[c]ircumstantial evidence and direct evidence inherently possess the same probative value." *State v. Prieto*, 2016-Ohio-8480, 82 N.E.3d 450, ¶ 34 (7th Dist.), citing *In re Washington*, 81 Ohio St.3d 337, 340, 691 N.E.2d 285 (1998); *State v. Jenks*, 61 Ohio St.3d 259, 272-273, 574 N.E.2d 492 (1991), paragraph one of the syllabus. In fact, "[e]vidence supporting the verdict may be found solely through circumstantial evidence." *State v. Smith*, 7th Dist. Belmont No. 06 BE 22, 2008-Ohio-1670, ¶ 49.

{¶40} Based on this record, the jury had evidence of Appellant's guilt to support their decision to convict. Appellant's first assignment of error is without merit and is also overruled.

Conclusion

{¶41} Appellant argues that the trial court improperly allowed the state to treat two of their witnesses as hostile without satisfying the statutory requirements. Appellant also challenges his convictions under a manifest weight of the evidence argument. For the

reasons provided, Appellant's arguments are without merit and the decision of the trial court is affirmed.

Robb, J. concurs.

Hanni, J., concurs.

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

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

NOTICE TO COUNSEL

This document constitutes a final judgment entry.