

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	No. 111837
IRAKOZE ABUDU,	:	
Defendant-Appellant.	:	

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: AFFIRMED**

**RELEASED AND JOURNALIZED: July 6, 2023**

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Criminal Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CR-19-645527-B

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Alicia Paolucci and Poula Hanna, Assistant Prosecuting Attorneys, *for appellee*.

Cullen Sweeney, Cuyahoga County Public Defender, and Francis Cavallo, Assistant Public Defender, *for appellant*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Irakoze Abudu, appeals from the trial court's judgment entry of conviction entered after a jury trial. For the reasons that follow, this court affirms his convictions.

**{¶ 2}** On June 17, 2019, Abudu was named in an 11-count indictment filed in Cuyahoga C.P. No. CR-19-640875-A, charging him with attempted murder, felonious assault, and aggravated robbery. The charges stemmed from two incidents that both occurred on June 4, 2019 — one involved a physical assault and robbery that occurred on West 84th Street; the other involved a shooting on Detroit Avenue.

**{¶ 3}** On November 26, 2019, Abudu was re-indicted in Cuyahoga C.P. No. CR-19-645527-B, charging him with 8 counts — attempted murder (Count 1); aggravated burglary (Counts 2 and 3); felonious assault (Counts 4, 5, and 7); aggravated robbery (Count 6); and vandalism (Count 8).<sup>1</sup> Counts 1-5 contained both one- and three-year firearm specifications.

**{¶ 4}** The case against Abudu was delayed because of the Covid-19 pandemic and continuances received for requesting an expert witness and completing competency evaluations. The case was further delayed because of hearings on pretrial motions requesting separate trials and challenging speedy trial, suppression of eyewitness identification, and admissibility of evidence. On May 31, 2022, trial commenced, where the jury heard the following evidence regarding both incidents.

## **I. Jury Trial**

**{¶ 5}** On June 4, 2019, Muzamil Islow (“Muzamil”) was celebrating his birthday at his aunt’s house on West 84th Street in Cleveland. Abudu, a person

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<sup>1</sup> On January 8, 2020, the state dismissed without prejudice the indictment filed in CR-19-640875-A.

Muzamil had known since 2013 and whom he considered “like a brother to him,” arrived unexpectedly. According to Muzamil, he was concerned when Abudu arrived because his brother, Abdullahi Islaw (“Abdullahi”), was expected to attend the party and there was an ongoing “situation” between his brother and Abudu.

#### **A. The Attack on Edward Ginley**

**{¶ 6}** Around 8:15 p.m. that evening, Edward Ginley (“Ginley”) drove a commercial vehicle down West 84th Street to clean the gutters on a friend’s home. A residential surveillance camera captured the entirety of the events as they unfolded; the video was played for the jury and admitted into evidence.

**{¶ 7}** The video shows Ginley driving past a group of individuals and attempting to park along the curb of the street where a white vehicle was already parked. Muzamil testified about the video and identified himself and Abudu as the individuals standing next to Abudu’s blue Dodge, which was also parked along the curb. He stated that he saw the truck hit the white car and that he, Abudu, and others immediately approached the driver when he got out of the truck.

**{¶ 8}** Ginley testified that he did not know the individuals that approached him but identified Abudu as the person who put his arm around him and stated, “you better have some money.” Ginley testified that Abudu then knocked him down and started punching him. As the video showed, the violent assault against him lasted for approximately 15 minutes. Both Ginley and Muzamil testified that Abudu was the primary aggressor but that he ordered others in the group to hold Ginley down and strike him. Ginley stated that Abudu and other members of the group

rifled through his truck and pockets — stealing his cell phone and money. Ginley testified that he attempted to get help by knocking on doors and windows of neighboring houses but was unsuccessful.

**{¶ 9}** During Ginley's attempts to get help, Abudu got into Ginley's truck, drove it down the street, and crashed it into a telephone pole. Another residential surveillance camera captured this incident, which was also played for the jury and admitted into evidence. Ultimately, Ginley was able to flee the area in his crashed truck. He subsequently went to the hospital, where he was treated for four broken ribs, a punctured lung, a broken clavicle, a fractured patella, scrapes, and trauma to his head, including some missing teeth. He was hospitalized for four days.

**{¶ 10}** During his initial interview with police, Ginley described his attacker as wearing a white t-shirt and hat. On June 6, 2019, Detective Daniel Zola, acting as a blind administrator, presented Ginley with a photo array to identify his attacker. Ginley identified Abudu with 90 percent certainty as the person who physically assaulted him and crashed his truck. At trial, Ginley positively identified Abudu as the person who attacked him.

**{¶ 11}** Muzamil corroborated Ginley's account of what occurred and identified Abudu in the surveillance videos as the person wearing the white t-shirt and hat, leading the attack, and crashing Ginley's truck. Muzamil admitted that he participated in the assault and robbery. He further admitted that he was charged for offenses associated with the attack but entered into a plea agreement with the state in exchange for testifying against Abudu. Finally, he admitted that as a result

of these offenses and prior convictions, he could be deported back to Kenya. He denied, however, that he was motivated to be untruthful about the attack or blame Abudu because of the subsequent incident when Abudu shot Abdullahi.

### **B. The Shooting of Abdullahi Islaw**

{¶ 12} Following the brutal group attack of Ginley, the group rejoined the party. Muzamil's brother, Abdullahi, arrived later that night. According to Muzamil, Abudu "stared down" Abdullahi, who remained seated in his vehicle with his wife, Miriam Ibrahim ("Miriam"), who was pregnant. As a result, a verbal altercation occurred between Abudu and Abdullahi. Muzamil testified that Abudu acted "aggressively like he wanted some problems." (Tr. 1017.) Muzamil stated that he tried to diffuse the situation by telling Abudu that Miriam was pregnant, and "you're not doing anything here." *Id.* According to Muzamil, Abudu continued to antagonize Abdullahi and when Abudu attempted to open the car door, Muzamil punched Abudu, causing them to fight. When Abdullahi attempted to break up the fight, Abudu then punched Abdullahi. Muzamil testified that after the fight ended, Abudu threatened them, stating that he was "going to shoot the house up." (Tr. 1020.)

{¶ 13} Abdullahi testified that he and Abudu had known each other since 2013, when they were both young. According to Abdullahi, they were at one time "like family," but on this date, there was an ongoing and unresolved conflict between them. Abdullahi testified that he discovered that Abudu was at his mother's house on West 84th Street and he wanted to go there to confront Abudu. When he arrived,

he parked along the curb and asked Abudu to come over to his vehicle so they could talk. According to Abdullahi, Abudu started acting violently by trying to pull him out of the car to fight. He stated that Muzamil intervened, causing a fight between Abudu and Muzamil. Abdullahi testified that he tried to break up the fight, but he kept getting punched by both men. According to Abdullahi, the fight stopped but Abudu threatened to shoot up the house and kill Abdullahi and his family. (Tr. 1209.)

**{¶ 14}** Abdullahi said that he left the party but believed that Abudu was following him because he saw Abudu's blue vehicle nearby. Accordingly, he was not surprised when Abudu arrived in the parking lot of his apartment complex, which was only two miles away from West 84th Street. Abdullahi testified that Abudu acted "violently," pulled out a gun, and pointed it at him. Even though Abdullahi retreated up to his apartment, Abudu followed him and kicked in the apartment door. Once inside the apartment, Abudu pointed a revolver at Abdullahi and fired the weapon, striking him on the left side of his body. Abdullahi testified that he believed he was going to die.

**{¶ 15}** Hassan Mohamed ("Hassan"), an acquaintance, and Miriam both testified that they saw Abudu confront Abdullahi in the parking lot of the apartment building. They both stated that Abudu then followed them upstairs, and although they locked the apartment door, Abudu kicked in the door, confronted Abdullahi, and shot him. Miriam called 911; the recording was played for the jury.

{¶ 16} EMS responder, Gregory Hyde, testified that he found Abdullahi in critical condition after sustaining a gunshot wound to the left side of his body. Responders transported Abdullahi to the hospital where he remained hospitalized for months due to complications from the gunshot wound.

{¶ 17} The jury found Abudu not guilty of vandalism as charged in Count 8, but guilty of the remaining seven offenses, including the attendant firearm specifications. Following merger and the application of the Reagan Tokes Law, the trial court sentenced Abudu to a stated minimum term of 16 years with a maximum term of 19 years in prison.

{¶ 18} Abudu now appeals, raising eight assignments of error.

## **II. Speedy Trial**

{¶ 19} In his first assignment of error, Abudu contends that the “trial court’s excessive pretrial delays during the Covid-19 pandemic violated [his] constitutional right to a speedy trial under the Sixth and Fourteenth Amendments to the U.S. Constitution and [Article I, Section 10] of the Ohio Constitution.”

{¶ 20} The Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee a defendant the constitutional right to speedy trial. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 32. To determine whether there has been a denial of a defendant’s constitutional right to a speedy trial, the court balances the four factors identified in *Barker v. Wingo*, 407 U.S. 514, 530-533, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *State v. Long*, 163 Ohio St.3d 179, 2020-Ohio-5363, 168 N.E.3d 1163, at ¶

14. Those factors are “(1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of his speedy trial right; and (4) prejudice to the defendant.” *Long at id.*, quoting *State v. Hull*, 110 Ohio St.3d 183, 2006-Ohio-4252, 852 N.E.2d 706, ¶ 22, citing *Barker* at 530. However, no single factor controls the analysis. *Long at id.* Standing alone, none of the four factors is “either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Barker* at 533.

{¶ 21} A defendant, however, must meet the “threshold requirement” of a “presumptively prejudicial” delay to trigger a *Barker* analysis. *State v. Duncan*, 8th Dist. Cuyahoga No. 97208, 2012-Ohio-3683, ¶ 8. “Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.” *Long at id.*, quoting *Barker* at 530. Courts have generally held that a delay approaching one year becomes “presumptively prejudicial.” *Long at id.*, citing *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), fn. 1.

{¶ 22} Abudu makes a general statement that “he remained in pretrial detention for years” while the court delayed his case. This statement is insufficient to meet the threshold requirement of a “presumptively prejudicial” delay to trigger a *Barker* analysis. Even if this court finds that the statement is sufficient when compared with the record, Abudu has failed to demonstrate any error.

**{¶ 23}** Abudu recognizes that a defendant’s right to speedy trial “must be judged on a case-by-case basis, in which the conduct of the prosecution and that of the defendant are weighed,” and that “this calculation requires certain factors to be considered, including the length and reasons for the delay, the defendant’s assertion of his right to a speedy trial and the prejudice to the defendant caused by the delay.” Despite this recognition of the requisite factors, he does not independently address them or discuss their application to the facts of his case. Rather, he merely concludes that the delays were “extensive” and that he “objected” to the delays. Accordingly, this court summarily overrules first Abudu’s assignment of error as permitted pursuant to App.R. 12 and 16.

### **III. Crim.R. 14**

**{¶ 24}** Abudu contends in his second assignment of error that the trial court erred by permitting the state to proceed with an indictment that should have been severed under Crim.R. 14, thereby prejudicing his right to a fair trial.

**{¶ 25}** This court reviews a trial court’s decision on joinder for an abuse of discretion. *State v. Wilson*, 2016-Ohio-2718, 51 N.E.2d 676, ¶ 21 (8th Dist.) An abuse of discretion occurs when the court’s decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶ 26}** Crim.R. 14 permits joining multiple offenses of the same or similar character in a single trial unless joinder would prejudice the defendant. *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990); *State v. Diar*, 120 Ohio St.3d

460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 95. The defendant bears the burden of proving prejudice and that the trial court abused its discretion in denying severance. *Diar* at *id.*

{¶ 27} In this case, Abudu requested separate trials regarding the two incidents because the evidence from the shooting incident would be inadmissible in the assault incident and trying them together would be unfairly prejudicial because his codefendant in the assault case was the brother of the shooting victim.<sup>2</sup> On appeal, he contends that a risk existed that the jury would not be able to keep the evidence of each allegation segregated and, because both incidents alleged that he engaged in acts of violence, a danger existed that the jury would infer a criminal disposition and combine the evidence to find him “guilty of something.”

{¶ 28} The state can refute a defendant’s claim of prejudicial joinder in two ways: (1) a showing that the evidence of each crime is simple and direct (the “joinder test”), or (2) evidence of the other crimes would be admissible even if the counts were severed (the “other acts” test). *State v. Anderson*, 2017-Ohio-931, 86 N.E.3d 870, ¶ 25 (8th Dist.), citing *Lott* at 163. When the evidence is “simple and direct,” an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of the crimes as other acts under Evid.R. 404(B). *Lott* at *id.* Thus, if the state can meet the requirements of the “joinder test,” it need not meet the requirements of the stricter “other acts test.” *State v. Peterson*, 8th Dist. Cuyahoga

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<sup>2</sup>He did not make a Crim.R. 8(A) challenge in the trial court regarding charging the two incidents in the same indictment. Accordingly, any argument raised on appeal asserting a Crim.R. 8(A) challenge is waived.

Nos. 100897 and 100899, 2015-Ohio-1013, ¶ 66, citing *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991).

**{¶ 29}** “Simple and direct” evidence means that the evidence of each crime is “so clearly separate and distinct as to prevent the jury from considering evidence of [some crimes] as corroborative of the other.” *State v. Belle*, 8th Dist. Cuyahoga Nos. 107046 and 107300, 2019-Ohio-787, ¶ 25, citing *State v. Quinones*, 11th Dist. Lake No. 2003-L-015, 2005-Ohio-6576, ¶ 48. Evidence is “simple and direct” if the trier of fact is capable of segregating the proof required for each offense. *Belle* at *id.*, citing *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, 937 N.E.2d 136, ¶ 39 (10th Dist.). “The very essence of the rule is that the evidence be such that the jury is unlikely to be confused by it or misuse it.” *Id.* Thus, as this court has stated, “Ohio appellate courts routinely find no prejudicial joinder where the evidence is presented in an orderly fashion as to the separate offenses or victims without significant overlap or conflation of proof.” *State v. Echols*, 8th Dist. Cuyahoga No. 102504, 2015-Ohio-5138, ¶ 16, citing *State v. Lewis*, 6th Dist. Lucas Nos. L-09-1224 and L-09-1225, 2010-Ohio-4202, ¶ 33.

**{¶ 30}** During the hearing on Abudu’s motion to sever, the state and defense counsel agreed “that the shooting took place and that \* \* \* led to the identification in the prior [assault] incident \* \* \* that led to a name which led to a photo array which led to someone being selected.” (Tr. 67.) The trial court found that based on this agreement and the allegations of the case, the investigations into both incidents were intertwined, involving some of the same witnesses to both incidents that

occurred very close in time and place. The court denied the motion to sever, concluding that the information obtained from the shooting led to the identification of the person who attacked Ginley. (Tr. 70-74.)

**{¶ 31}** We find that the state satisfied its burden of demonstrating that the evidence was simple and direct. The two incidents were distinct from each other in terms of evidence, but not in terms of investigation and conduct. The attack on Ginley occurred on West 84th Street only a few hours before Abdullahi was shot at his apartment approximately two miles away on Detroit Avenue. The first incident involved a physical assault in the street resulting in Abudu stealing Ginley's truck and crashing it into a pole. The second incident involved a shooting inside Abdullahi's apartment after Abudu kicked in the door. Ginley testified about the physical attack, which was captured by surveillance camera. Abdullahi testified about Abudu shooting him in the chest after kicking in the apartment door. Accordingly, the evidence was separate and distinct, and not confusing.

**{¶ 32}** Based on the foregoing, we find that the trial court did not abuse its discretion in denying Abudu's motion to sever because the evidence regarding the two incidents was simple and direct and thus satisfied the joinder test; accordingly, the other acts test need not be considered. *See Lott*, 51 Ohio St.3d at 163, 555 N.E.2d 293; *Peterson*, 8th Dist. Cuyahoga Nos. 100897 and 100899, 2015-Ohio-1013, at ¶ 66. The second assignment of error is overruled.

#### **IV. Motion to Suppress**

**{¶ 33}** Abudu contends in his third assignment of error that the trial court erred in denying his motion to suppress two photographic lineups prepared by law enforcement, violating his right to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution.

**{¶ 34}** 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. Consequently, we give deference to the trial judge's factual findings, but we review the application of law to fact de novo. *Id.*; see also *State v. Davis*, 8th Dist. Cuyahoga No. 83033, 2004-Ohio-1908.

**{¶ 35}** In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the United States Supreme Court held that an identification derived from unnecessarily suggestive procedures, which have a likelihood of leading to a misidentification, violates a defendant's right to due process.

**{¶ 36}** In determining the admissibility of challenged identification testimony, a reviewing court applies a two-prong test: (1) did the defendant demonstrate that the identification procedure was unduly suggestive; and, if so (2) whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *State v. Bryson*, 8th Dist. Cuyahoga No. 98298, 2013-Ohio-934, ¶ 42, citing *State v. Harris*, 2d Dist. Montgomery No. 19796, 2004-Ohio-3570, ¶ 19.

{¶ 37} If the defendant fails to meet the first part of his or her burden, the court need not consider the totality of the circumstances under the second prong. *State v. Tate*, 2016-Ohio-5622, 70 N.E.3d 1056, ¶ 31 (8th Dist.), citing *State v. Green*, 117 Ohio App.3d 644, 691 N.E.2d 316 (1st Dist.1996). If the pretrial procedures were not suggestive, any remaining questions as to reliability go to the weight of the identification, not its admissibility. *Tate* at *id.*, citing *State v. Wills*, 120 Ohio App.3d 320, 325, 697 N.E.2d 1072 (8th Dist.1997), citing *United States v. Sleet*, 54 F.3d 303, 309 (7th Cir.1995).

#### **A. Ginley Identification**

{¶ 38} Regarding Ginley's identification, Abudu generally contended in his motion to suppress that the officers failed to follow R.C. 2933.83(A)(5) (use of fillers)<sup>3</sup> and (6) (use of the folder system) or (B) (adoption of standards and policies), and thus utilized a "flawed process" in creating the photo array. He maintained that failure to follow these guidelines exacerbated the inherent problems associated with cross-racial identification.<sup>4</sup>

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<sup>3</sup> "Filler" means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure. R.C. 2933.83(A)(5).

<sup>4</sup> During the suppression hearing, counsel advised the court that he did not "have any objection to the arrays themselves," but "as to the results and who actually administered the photo arrays." (Tr. 176.) He further stated that he had "no objection how they were put together and testified to, but the ultimate identification, I do [object]." (Tr. 178.) During summation of his arguments following witness testimony, counsel retracted his position, contending that the arrays were unduly suggestive based on certain physical characteristics Abudu possessed, but not the fillers. This change caused confusion for the state in its defense of the motion and for the court in its determination of what challenge counsel was actually making about the array.

**{¶ 39}** R.C. 2933.83 requires any law enforcement agency that conducts photo lineups to adopt specific procedures for conducting the lineups, including the use of a blind administrator to conduct a photo lineup. R.C. 2933.83(B).

**{¶ 40}** Regarding the photo array shown to Ginley, Detective Dymphna O'Neill testified that she created the six-pack photo array line by using a database through the Attorney General's office — OHLEG's Lineup Wizard.<sup>5</sup> She explained the process:

If I knew a suspect or an alleged perpetrator, I would run their information through the lineup. It autopopulates that person's information, and then you find other similar suspects that they give you a range, do you want plus or minus two years all the way up to 10 years. There is a range on age, height, their age, height, there is a third one, weight. So you put in what your parameters are. I go plus or minus 2 years, 2 inches and a few years. So it populates pictures.

(Tr. 144-145). According to Detective O'Neill, she followed the proper protocol used by the city of Cleveland in creating the six-pack photo array.

**{¶ 41}** Detective Zola testified that he acted as the blind administrator in presenting the photo array to Ginley at Fairview Hospital two days after the attack. He testified that

Detective O'Neill gave me the photo array, I showed it to the victim, I explained there are 6 photos, if the suspect is in there who committed this crime. It would be documented by the numbers underneath the photos. I explained to him that I was not the detective in this case, I couldn't help him pick anybody.

(Tr. 200.) He further testified about his advisement to Ginley:

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<sup>5</sup> "OHLEG" is an acronym for Ohio Law Enforcement Gateway. It is an electronic information network that allows Ohio law enforcement agencies to share criminal justice data.

I explained to the victim that this photo lineup is a photo lineup of 6 males, these males may have different hair styles in the photos, facial hair might be changed, some of the photos might be older or newer than others just to kind of see if he could pick the suspect out of there. Sometimes they can't. Sometimes they pick nobody.

(Tr. 202.) Detective Zola testified that Ginley looked at the array for a few minutes before identifying Abudu as the person who attacked him. (Tr. 209-210.) He stated that the procedures used were in compliance with Cleveland Police policy and the Ohio Revised Code. (Tr. 202.) On cross-examination, Detective Zola explained that the Revised Code permits the use of a folder system, but the Cleveland Police Department utilizes a blind administrator in a substantially similar process.

**{¶ 42}** Contrary to Abudu's assertion, R.C. 2933.83 does not require the use of the folder system. *State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2013-Ohio-3722, ¶ 77 (the statute does not require the use of the "folder system;" it is one system that can be used by law enforcement for photo lineups). Accordingly, the trial court properly rejected Abudu's challenge to the photo array on this basis. After reviewing the testimony, we cannot conclude that the procedure used by the police detective was impermissibly suggestive.

**{¶ 43}** As for the make-up or creation of the array, counsel contended that the hairstyles of only two of the fillers were similar to Abudu's hairstyle and that Abudu's skin tone was darker than the others in the photo array. He appeared to assert that only people who share Abudu's skin tone — that of others from the same geographical region in Africa — should have been used in the photo lineup.

{¶ 44} Generally, “[w]here the men depicted in the photo array with the defendant all appear relatively similar in age, features, skin tone, facial hair, dress, and photo background, the photo array is not impermissibly suggestive.” *Wells* at ¶ 69, citing *State v. Jacobs*, 7th Dist. Mahoning No. 99-CA-110, 2002-Ohio-5240, ¶ 18. Moreover, “[a] defendant in a lineup need not be surrounded by people nearly identical in appearance.” *State v. Murphy*, 91 Ohio St.3d 516, 534, 747 N.E.2d 765 (2001), quoting *State v. Davis*, 76 Ohio St.3d 107, 112, 666 N.E.2d 1099 (1996) (photo array upheld where all individuals had facial hair, but none had the defendant’s bushy, curly hairstyle, and whose skin tones varied).

{¶ 45} A distinction in skin tone, however, can taint a photo array, but the difference must be significant to be prejudicial. In *State v. Cox*, 11th Dist. Trumbull No. 95-T-5279, 1997 Ohio App. LEXIS 2244, 25 (May 23, 1997), the court held that “the fact that appellant was arguably the darkest skinned African American individual in the photo array did not render the identification unreliable since there was not such a significant difference in skin tones to make the distinction prejudicial.” In upholding the photo array, the *Cox* Court noted that the victim had “ample opportunity to view the assailant before the shooting occurred,” thus lending to the reliability of the identification. *Id.* See also *State v. Garner*, 7th Dist. Columbiana No. 11 CO 1, 2012-Ohio-6271 (array upheld where defendant’s lighter skin tone was similar to some of the others in the 18-person photo array); *State v. McDade*, 11th Dist. Lake No. 97-L-059, 1998 Ohio App. LEXIS 4533, (Sept. 25, 1998) (photo array upheld where skin tones varied among individuals).

**{¶ 46}** In this case, the trial court correctly noted that the detective instructed Ginley to “[k]eep in mind that this photo may not be current, and that hairstyles, facial hair (beards and moustaches) may be easily changed. Also pay no mind to the background colors and size of photos as they may not all be similar in color or size.” (Tr. 254.) The court also noted that “photographs may not always depict the true complexion of the person. It may be lighter or darker than shown in the photo.” (Tr. 255.) The trial court remarked that the officers inputted the suspect’s characteristics into a computer-generated system and the computer generated the five other photos that met the same criteria. (Tr. *id.*) Finally, the trial court aptly pointed out that during the attack on Ginley, the primary aggressor wore a ball cap; thus, the style of hair was irrelevant to Ginley’s identification of Abudu as the attacker.

**{¶ 47}** Our review of the photo array reveals that the five filler photographs are all reasonably close to Abudu’s photograph in appearance, showing no significant variations in hair length, complexion, age, features, or dress. Admittedly, Abudu’s skin tone appears darker than the other five filler photographs, but not so significantly as to taint Ginley’s identification or render the photo array overly suggestive. The attack lasted for 15 minutes; thus Ginley was able to view his attacker for a significant period of time, including the fact that Abudu approached Ginley first, placed his arm around him, and walked with him. Also, as the trial court correctly pointed out, Abudu was wearing a ball cap during the assault; thus his hairstyle was not a factor in Ginley’s identification of Abudu. Based on the

foregoing, Abudu has failed to demonstrate that the creation of the photo array was flawed or overly suggestive.

{¶ 48} Because neither the photo array itself nor the procedure used by the police detective was impermissibly suggestive, for purposes of our review of the trial court's denial of defendant's suppression motion, we need not address Abudu's claims that Ginley's identification from the photo array was unreliable. *See State v. Lee*, 10th Dist. Franklin No. 06AP-226, 2007-Ohio-159, ¶ 13, citing *Wills*, 120 Ohio App.3d at 325, 697 N.E.2d 1072.

### **B. Abdullahi Identification**

{¶ 49} Abudu contends that the single photo presented to Abdullahi was inherently unreliable.<sup>6</sup> In support, Abudu cites to cases involving identifications made by victims who did not know their attackers. *See State v. Henderson*, 2d Dist. Montgomery No. 28241, 2020-Ohio-6 (stranger rape); *State v. Green*, 2d Dist. Montgomery No. 28614, 2020-Ohio-5206 (stranger burglary); *State v. Martin*, 127 Ohio App.3d 272, 712 N.E.2d 795 (2d Dist.1998) (stranger robbery). These cases, however, are clearly distinguishable because Abdullahi and Abudu were not strangers — they had known each other since they were young.

{¶ 50} This court has found that the showing of a single photograph is not impermissibly suggestive when the witness knew the suspect and identified him by name prior to seeing the photograph. *State v. Lennon*, 8th Dist. Cuyahoga No.

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<sup>6</sup> Although he challenged in the trial court Hassan's pretrial identification, Abudu makes no argument on appeal regarding Hassan's identification.

104344, 2017-Ohio-2753, ¶ 54 (identification not suggestive when witness knew of defendant and his street name prior to the crime), citing *State v. Huff*, 145 Ohio App.3d 555, 763 N.E.2d 695 (1st Dist.2001) (a strong showing of reliability can arise from the fact that a victim knew the perpetrator of a crime before the crime was committed).

{¶ 51} In this case, Abdullahi testified that he and Abudu had known each other since 2013, when they were both young. In fact, Abdullahi stated that at one time they were “like family.” (Tr. 1199.) Accordingly, any challenge to Abdullahi’s identification of Abudu goes to the weight of the evidence, not to its admissibility. *See Lennon* at ¶ 61.

{¶ 52} Abudu’s third assignment of error is overruled.

## **V. Prejudicial and Irrelevant Evidence**

{¶ 53} In his fourth assignment of error, Abudu contends that the trial court erred by admitting a still photograph taken from a screenshot of a video that showed him holding a purported handgun.

{¶ 54} A review of the record reveals that the state did not introduce this exhibit during trial or publish the photograph to the jury, and thus, the trial court did not admit the photograph into evidence. No error occurred. The assignment of error is overruled.

## **VI. Sufficiency of the Evidence**

{¶ 55} Abudu contends in his fifth assignment of error that his convictions are not supported by sufficient evidence.

{¶ 56} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Cottingham*, 8th Dist. Cuyahoga No. 109100, 2020-Ohio-4220, ¶ 32. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*

#### **A. The Attack on Ginley**

{¶ 57} Abudu was convicted of aggravated robbery (infliction of serious physical harm during the commission of a theft offense (R.C. 2911.01(A)(3))) and felonious assault (knowingly causing serious physical harm (R.C. 2903.11(A)(1))). He contends that the evidence was insufficient to support his convictions because although surveillance video captured the assault and subsequent crash of the truck, the evidence did not establish that he was the assailant or involved in the assault. Viewing the evidence in favor of the state, we disagree because both Ginley and Muzamil testified that Abudu was the person seen in the video assaulting Ginley and stealing the truck, and then crashing it into the telephone pole. Ginley further testified that Abudu and the group of individuals took his money and cell phone from his pockets during the course of the assault. Finally, Ginley testified that he

was hospitalized following the attack and suffered multiple broken bones, contusions, head trauma, and broken teeth. Accordingly, under the *Thompkins* standard, a rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt.

### **B. The Shooting of Abdullahi**

{¶ 58} Regarding the shooting of Abdullahi, Abudu was convicted of attempted murder (purposely attempting to cause death of another (R.C. 2923.02/2903.02(A))), and aggravated burglary (trespassing by force into an occupied structure to purposely commit a criminal offense and recklessly inflicting physical harm (R.C. 2911.11(A)(1))).<sup>7</sup> He contends that the evidence was insufficient to support these convictions because no physical evidence connected him to the crime. Viewing the evidence in favor of the state, we find that, if believed, the testimony of Abdullahi, taken together with the facts and other testimony, was sufficient to prove each element of the offenses beyond a reasonable doubt. Abdullahi testified that Abudu was the person that kicked in his apartment door, pointed a gun at his chest, and shot him.<sup>8</sup> Any argument regarding the lack of physical evidence linking Abudu to the crime is more suited for a challenge to the manifest weight of the evidence.

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<sup>7</sup> Counts 1, 4, and 5 merged for sentencing, with the state electing a sentence on Count 1, attempted murder. Counts 2 and 3 merged for sentencing, with the state electing a sentence on Count 2, aggravated burglary.

<sup>8</sup> Abudu stipulated that Abdullahi suffered serious physical harm. (Tr. 1225, 1311, 1396.)

{¶ 59} Abudu's fifth assignment of error is overruled.

## VII. Manifest Weight of the Evidence

{¶ 60} In his sixth assignment of error, Abudu contends that his convictions are against the manifest weight of the evidence.

{¶ 61} 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. \* \* \* Weight is not a question of mathematics, but depends on its effect in inducing belief." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12, quoting *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. In a manifest-weight analysis, the reviewing court sits as a "thirteenth juror" and reviews "the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed, and a new trial ordered." *Thompkins* at *id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. *Thompkins* at 386.

### A. The Attack on Ginley

{¶ 62} Abudu contends that his convictions are against the manifest weight of the evidence because although surveillance video captured the assault and subsequent crash of the truck, the evidence did not establish that he was the

assailant or involved in the assault. He contends that the identification made by Ginley was flawed because the process was inherently suggestive, and it involved cross-racial identification, rendering it unreliable. Moreover, he contends that Muzamil's testimony was suspect because (1) he was a codefendant in the case who struck a plea deal with the state to testify against Abudu; (2) his credibility was questionable because he did not identify any other individuals involved in the attack; and (3) he had motivation to blame Abudu because it was alleged that Abudu also shot his brother.

**{¶ 63}** This court previously discussed and rejected Abudu's argument that the photo array was inherently suggestive. We now reject his challenge regarding the reliability of Ginley's identification. Consideration of the following factors is used to determine the reliability of an identification: (1) the opportunity of the witness to view the perpetrator at the time of the offense, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401.

**{¶ 64}** Ginley's opportunity to observe Abudu at the time of the crime was significant because Abudu placed his arm around Ginley and walked with him to his truck — they were mere inches apart from each other. The attack lasted approximately 15 minutes, thus affording Ginley significant time to observe Abudu both during the attack and then as Abudu got into the truck, drove away, and

crashed it into a pole. Additionally, Ginley's degree of attention was high based on his specific description and confidence in his identification that there was "no question" Abudu was the one who attacked him. (Tr. 965.) Moreover, his prior description of Abudu was wholly accurate — describing the primary aggressor as wearing a white t-shirt and a hat. Muzamil identified Abudu as the person in the video wearing a white t-shirt and a hat. Finally, Ginley confidently identified Abudu two days after the attack with 90 percent certainty in the photo lineup. Accordingly, the weight of the factors and evidence reveal that Ginley's identification of Abudu was reliable.

**{¶ 65}** Regarding Muzamil's testimony and identification of Abudu as the person who assaulted Ginley, Muzamil admitted that he entered into a plea deal with the state for a reduction in his charges. And the jury considered Muzamil's motivations to testify against Abudu — "here for my brother" who was shot. (Tr. 1072-1073.) In fact, Abudu's counsel brought any inconsistencies, questionable testimony, and self-serving motivations to the jury's attention. "The jury was free to believe all, part, or none of the testimony of each witness." *State v. Colvin*, 10th Dist. Franklin No. 04AP-421, 2005-Ohio-1448, ¶ 34. Accordingly, the jury was able to assess what weight, if any, it would attribute to Muzamil's testimony. Even without Muzamil's testimony, the jury heard Ginley's account of the attack and saw the attack through video evidence as it occurred.

## **B. Shooting of Abdullahi**

**{¶ 66}** Abudu contends that his convictions are against the manifest weight of the evidence because no physical evidence connected him to the shooting of Abdullahi.

**{¶ 67}** Courts have repeatedly held that a lack of physical evidence, standing alone, does not render a conviction against the manifest weight of the evidence. *State v. Conner*, 10th Dist. Franklin No. 12AP-698, 2013-Ohio-2773, ¶ 12, citing *State v. Berry*, 10th Dist. Franklin No. 10AP-1187, 2011-Ohio-6452, ¶ 20. In *State v. Jackson*, 7th Dist. Jefferson No. 09 JE 13, 2009-Ohio-6407, the court held that physical evidence was unnecessary to link the defendant to the crime because the victim identified the defendant as the perpetrator, whom she knew because he was her neighbor. *Id.* at ¶ 15. “If [the victim’s] testimony is believed, then the lack of fingerprints, DNA, footprints or any other type of physical evidence does not render the conviction against the manifest weight of the evidence.” *Id.* at ¶ 16.

**{¶ 68}** Here, despite the lack of physical evidence — i.e., fingerprints, a firearm, or shell casings — Abdullahi testified that Abudu threatened to kill him when they were on West 84th Street earlier that night. He identified Abudu as the person who then confronted him in the parking lot of his apartment building, followed him up to his apartment, kicked in the apartment door, pointed a gun at his chest, and shot him. Testimony from Muzamil, Hassan, and Miriam corroborated Abdullahi’s testimony. Finally, the jury heard the frantic 911 call made by Miriam crying for help while she provided emergency medical assistance to her

husband. During the call, Miriam stated that the person who shot her husband “busted” through the door — again corroborated by the testimony and photographs of the door’s appearance.

{¶ 69} Accordingly, this is not the exceptional case where the jury clearly lost its way and created such a manifest miscarriage of justice that requires this court to reverse Abudu’s convictions and order a new trial. His sixth assignment of error is overruled.

### **VIII. Cumulative Error**

{¶ 70} Abudu contends in his seventh assignment of error that the cumulative effect of trial-court errors denied him his right to a fair trial.

{¶ 71} Under the cumulative-error doctrine, “a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal.” *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223. We have found no error. Thus, the doctrine of cumulative error does not apply to this case, and we overrule this assignment of error.

### **IX. Reagan Tokes Law**

{¶ 72} Abudu contends in his final assignment of error that the trial court erred when it sentenced him to an indefinite sentence under S.B. 201, commonly referred to as the Reagan Tokes Law, because the law is unconstitutional under the

United States and Ohio constitutions because it violates due process, the separation-of-powers doctrine, and the right to trial by jury.<sup>9</sup>

{¶ 73} Abudu does not cite to this court's en banc decision of *State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536, ¶ 17-51 (8th Dist.), wherein this court rejected most of the arguments he raises challenging the constitutionality of the Reagan Tokes Law. This court in *State v. Pierce*, 8th Dist. Cuyahoga No. 111605, 2023-Ohio-528, ¶ 51-54, also addressed and rejected Abudu's additional argument challenging the Reagan Tokes Law as violating his substantive due process rights. Accordingly, based on the authority of *Delvallie* and *Pierce*, this court summarily overrules Abudu's challenges to the Reagan Tokes Law and his assignment of error.

{¶ 74} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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<sup>9</sup> Neither party has raised any issue as to the imposed terms of Abudu's sentence; therefore, any determination as to the validity of the sentence other than challenges raised herein, is beyond the scope of this direct appeal. *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, ¶ 26; *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 27.

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KATHLEEN ANN KEOUGH, JUDGE

ANITA LASTER MAYS, A.J., and  
LISA B. FORBES, J., CONCUR

N.B. Administrative Judge Anita Laster Mays is constrained to apply *Delvallie*'s en banc decision. For a full explanation of her analysis, see *State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.) (Laster Mays, J., concurring in part and dissenting in part).

Judge Lisa B. Forbes is constrained to apply *Delvallie*. For a full explanation, see *State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.) (Forbes, J., dissenting).