[Cite as *State v. Watkins*, 2023-Ohio-2757.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. NIKEEYA WATKINS Appellant	C.A. No. 30430 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 20 06 1536

DECISION AND JOURNAL ENTRY

Dated: August 9, 2023

CARR, Judge.

{¶1} Defendant-Appellant Nikeeya Watkins appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Following the shooting of an 18-year-old woman on June 5, 2020, Watkins was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(2), (D)(1)(a). The charge was accompanied by a firearm specification. Ultimately, the matter proceeded to a jury trial. The jury found Watkins guilty of the charge and specification. The trial court sentenced Watkins thereafter.

{¶3} Watkins has appealed, raising three assignments of error for our review. The assignments of error will be addressed out of sequence to facilitate our review.

II.

ASSIGNMENT OF ERROR III

> THE VERDICT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]

{¶4} Watkins argues in her third assignment of error that the verdicts were against the manifest weight of the evidence. Watkins argues that the witnesses' testimony was not credible and that the surveillance video could not be interpreted absent that witness testimony.

> In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine 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.

State v. Otten, 33 Ohio App.3d 339, 340 (9th Dist.1986).

{¶5} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact[-]finder's resolution of the conflicting testimony." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). An appellate court should exercise the power to reverse a judgment as against the manifest weight of the evidence only in exceptional cases. *Otten* at 340. "[W]e are mindful that the [trier of fact] is free to believe all, part, or none of the testimony of each witness." (Internal quotations and citations omitted.) *State v. Gannon*, 9th Dist. Medina No. 19CA0053-M, 2020-Ohio-3075, ¶ 20. "This Court will not overturn a conviction on a manifest weight challenge only because the [trier of fact] found the testimony of certain witnesses to be credible." *Id.*

{¶6} The victim testified that, that evening, she and a group of friends were having a girls' night. They were going to be staying at a local hotel but had gone to a friend's apartment

building to cook some food to take back to the hotel. Surveillance video of the time period discloses a group of approximately 10-15 people in the parking lot area. While the women were outside in a parking area of the apartment complex, one of the women, U.M., got a phone call from Robert, the father of one of her children. The two were arguing and then Robert's girlfriend Destiny, and Destiny's mother, Watkins, also joined in the argument. U.M. testified that she and Robert continued to have an intimate relationship even though Robert was then dating Destiny. This formed the basis for an ongoing feud between U.M. and Destiny and Watkins. The group on the phone told U.M. that they were going to "pull up" to where the women were "to fight[.]" U.M.'s mother testified that U.M. called her to say that Destiny and Watkins were planning to come to the apartments to fight. U.M. asked her mother if she could come to the apartments. U.M.'s mother agreed to do so. Before that night, the victim had never met Watkins and only knew her as Destiny's mom. The victim testified that she had no issues with Watkins before the shooting.

{¶7} Watkins, Destiny, Robert, and another individual did arrive at the parking lot. The victim described Watkins as immediately jumping up and down when she got out of the car. Ultimately, according to the victim, Watkins came over towards the women and started arguing with U.M. and then started a fight with U.M.'s mother. The fight got physical after Watkins threw a brick or rock towards U.M.'s sister's friend. U.M. testified that after Watkins threw the brick, U.M.'s sister's friend and U.M.'s sister started fighting with Watkins first. U.M. averred that Watkins then tried to spit on U.M.'s mother and U.M.'s mother started fighting Watkins. Both U.M. and U.M.'s sister joined the fight, as did Destiny. Robert did not get involved in the fight. U.M.'s sister and mother confirmed many of the details of the fight testified to by U.M.

{¶8} The victim was not part of the fight but testified to trying to help Watkins off the ground. The victim was unable to succeed as she was being pushed around by the individuals trying to fight with Watkins. U.M. testified that Watkins went to the car, got a gun, and shot in the air first. Watkins was the only person U.M., U.M.'s sister, and U.M.'s mother saw with a gun that night. U.M. believed that Watkins was trying to shoot U.M. and U.M.'s mother. The victim saw Watkins walking away from the fight and then the victim heard someone screaming, "She got a gun, she got a gun." The victim heard a "pow, pow" and everyone started running. U.M. and her mother took cover behind a nearby dumpster. U.M.'s sister hid behind a building. The victim looked down and saw that she was bleeding badly from her leg. The victim started to grab on to car doors to try to escape and Watkins came around the car and was pointing a gun at the victim. The victim begged Watkins, saying, "Please don't sho[o]t me in my head[.]" Watkins told the victim to get on her knees and the victim complied. Watkins pointed the gun to the victim's head and started to pistol whip the victim on the right side of her head. Before walking away, Watkins told the victim to "lay there and die[.]" Watkins then left in a car with Destiny and Robert. U.M. testified that she and her mother then heard the victim scream, "She shot me."

{¶9} When first responders arrived, the victim was taken to the hospital and had to undergo surgery for the gunshot wound to her leg. On the way to the hospital, the victim informed police that Destiny's mother had shot her. At the hospital, on June 7, 2020, police presented the victim with a photo lineup. The victim picked out a photo of Watkins and indicated that she was 100% certain that Watkins had shot the victim.

{¶10} The victim also narrated the surveillance video of the events for the jury. Unfortunately, the footage is very grainy and it is difficult to see small details; however, the victim was able to identify herself and Watkins in it. The surveillance video was also admitted into

evidence. Detective Edward Michael Hornacek, the lead investigator, also discussed the surveillance video and pointed out various people in the video for the jury. He testified that what the victim and U.M. told him was consistent with the video footage.

{¶11} Police found two 9 mm cartridge casings at the crime scene. No DNA was recovered from the casings. Detective Patrick Mazzi with the Akron Police Department interviewed Watkins. Watkins indicated that her daughter Destiny had an ongoing feud with U.M. and that U.M. had been harassing Destiny. Watkins described driving her gray Pontiac to the apartments in order to drop off her niece. At some point, something hit Watkins' car. She got into a fight with U.M.'s mother and Destiny was also involved in the fight. The fight escalated and Watkins was getting "stomped down[.]" Then at some point shots were fired and Watkins fled. After Detective Mazzi told Watkins that police had evidence that led them to believe that Watkins fired the shots, Watkins asked to speak to an attorney.

{¶12} A jail call involving Watkins was also played for the jury and admitted into evidence. Detective Mazzi's interpretation of the jail call was that the feud escalated in part because the police failed to act and "that things leveled up because [Watkins] wanted to defend herself." Detective Mazzi stated that he used the phrase "leveled up" to mean going from a physical altercation to introducing a weapon.

{¶13} After a thorough and independent review of the record, we cannot say that Watkins has demonstrated that the verdicts were against the manifest weight of the evidence. Watkins essentially argues that the eyewitnesses were biased against Watkins and that the video is too grainy to provide sufficient evidence without the testimony of the witnesses. While the victim knew and/or was friends with several of the witnesses who were involved in the fight with Watkins, the victim herself was not involved in the fight. The victim, in fact, testified to trying to help

Watkins. The victim had never met Watkins prior to that evening and had no issues with Watkins before the shooting. The victim identified Watkins as the shooter as she was being transported to the hospital for surgery; at that point in time, there would have been little time for any of the other witnesses to attempt to influence the victim's identification. Watkins has not shown that the jury lost its way in finding her guilty.

{¶14} Watkins' third assignment of error is overruled.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO THE ADMISSION OF IRREL[E]VANT EVIDENCE[.]

{¶15} Watkins argues in her first assignment of error that the trial court abused its discretion and/or committed plain error in admitting State's exhibits 5-8, which represented communications on Facebook between U.M. and Watkins.

{¶16} "[A] trial court has broad discretion in the admission or exclusion of evidence and this Court will not disturb a trial court's ruling on the admission of evidence absent an abuse of discretion and material prejudice to the defendant." *State v. Mitchell*, 9th Dist. Medina No. 21CA0071-M, 2022-Ohio-3176, ¶ 30, quoting *Drew v. Marino*, 9th Dist. Summit No. 21458, 2004-Ohio-1071, ¶ 8. An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶17} Prior to the admission of these exhibits, U.M. read the communications to the jury. No objections to that testimony itself were made. U.M. testified that she had posted on Facebook on June 3, 2020, about getting a car. Watkins responded to the post prior to the shooting saying, "Pull up, b*tch." U.M. testified that the remaining responses were made after the shooting. The

messages after the shooting appear to be Watkins threatening U.M. and urging U.M. to fight with Watkins.

{¶18} When the State later moved to admit the exhibits into evidence, defense counsel objected arguing that they were irrelevant as the messages were posted after the shooting and so were not relevant to the shooting. The trial court admitted the exhibits over objection.

{¶19} On appeal, Watkins argues that the exhibits should have been excluded because they were irrelevant. In addition, she argues that the trial court committed plain error in admitting them because they were more prejudicial than probative, they were not properly disclosed to trial counsel, and were not properly authenticated.

{¶20} "When a defendant fails to contemporaneously object to the testimony, identification, and publication of photographs [and other items introduced as exhibits] to the jury, and only later objects, after the close of the State's evidence when the photographs [and other items] are being admitted into evidence, [s]he forfeits the matter for review on appeal." (Internal quotations and citation omitted.) *State v. Henry*, 9th Dist. Summit No. 27758, 2016-Ohio-680, ¶ 10. Given Watkins' failure to object to the testimony concerning the exhibits, we conclude that she also forfeited her argument that the exhibits were irrelevant. Thus, all of Watkins' arguments are subject to plain error review.

{¶21} "To prevail under the plain-error doctrine, [Watkins] must establish that an error occurred, that the error was obvious, and that there is a reasonable probability that the error resulted in prejudice, meaning that the error affected the outcome of the trial." *State v. Bailey*, Slip Opinion No. 2022-Ohio-4407, ¶ 8. Here, Watkins has developed no argument explaining how any error affected the outcome of the trial. Accordingly, she has failed to meet her burden to demonstrate that the trial court committed plain error in admitting the exhibits. *See id.*

{¶22} Watkins' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO CONTINUE THE TRIAL FOR ADDITIONAL TIME TO LOCATE A MATERIAL WITNESS[.]

{¶23} Watkins asserts in her second assignment of error that the trial court abused its discretion in failing to grant Watkins' motion to continue the trial in order to locate a material witness.

{¶24} "The grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial judge." *State v. Unger*, 67 Ohio St.3d 65, 67 (1981); *see also State v. Geib*, 9th Dist. Medina Nos. 21CA0019-M, 21CA0020-M, 21CA0021-M, 2022-Ohio-4037, ¶ 4, quoting *Unger* at syllabus. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Unger* at 67. "In evaluating a motion for a continuance, a court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." *Id.* at 67-68. Nonetheless, "*Unger* does not suggest that information will always be available about each of these factors or require a court to assign particular weight to any one factor." *Musto v. Lorain Cty. Bd. of Revision*, 148 Ohio St.3d 456, 2016-Ohio-8058, ¶ 23. "When the reasons for the delay are to secure the attendance of witnesses, it is incumbent upon the moving party to show that such witnesses would have given

substantial favorable evidence and that they were available and willing to testify." *State v. Meek*, 9th Dist. Lorain No. 96CA006454, 1997 WL 28110, *1 (Jan. 22, 1997), citing *United States v. Boyd*, 620 F.2d 129, 132 (6th Cir.1980).

{¶25} During trial, on August 2, 2022, defense counsel filed an affidavit stating that he had spoken to a witness during the week of July 25, 2022. The witness informed defense counsel of information that would exonerate Watkins of the charged crimes. Defense counsel averred that the witness no longer resided at the apartment referenced in the Akron Police Department report and that the witness was unwilling to attend trial and testify. Defense counsel indicated that the witness was a necessary and material witness. That same day, defense counsel moved the trial court to issue a material witness warrant for the witness. Defense counsel informed the trial court that when he went to the address listed in the report, it was vacant and when he spoke to the witness on the phone, the witness refused to provide defense counsel with a current address. The trial court then issued a material witness warrant.

{¶26} The following day, after the State finished presenting its case, defense counsel again brought up the material witness warrant. Defense counsel stated:

> Your Honor, we've made efforts to locate the witness before today.
>
> Again, I spoke with her on the phone recently here.
>
> She did not want to come to court, would not give me a correct mailing address for her, was not able to serve a subpoena.
>
> This Court graciously granted our request to issue a material witness warrant. My affidavit has the efforts I made to try to get her to come to court.
>
> We believe she's necessary for Ms. Watkins' defense. She gives a complete exculpatory statement of what happened with Ms. Watkins.
>
> I would ask the Court for some time to continue the efforts to try to find her. I know they looked for her at some point last night diligently and again today, but she's, again, necessary for Ms. Watkins to receive a fair trial and have her witness here who can testify about her non-involvement in this entire case.

> I would ask for some brief continuance for that, Judge.

{¶27} The prosecutor then informed the trial court that she

> had been in communication with Detective Hornacek concerning the attempts that were made on two different shifts to try to locate this individual and were not able to do so.
>
> He also indicated that, because she lacked some sort of a criminal history, they really didn't have much to go off of in terms of other residences.
>
> So, [the prosecutor was] not sure that a continuance would really get us anywhere.

{¶28} The trial court then concluded that, "[g]iven the attempts, both prior to the witness warrant, and through the pendency of this case, and the limited information that we had related to her whereabouts, I am in agreement with the State * * *." The trial court thus denied the motion for a continuance.

{¶29} Watkins argues that the trial court was unreasonable as there was no testimony on the efforts made to locate the witness and the trial court did not discuss the balancing test in ruling on the motion. While there was no testimony about the efforts made to locate the witness, the prosecutor did summarize what she knew of the efforts. In addition, defense counsel had knowledge that the witness did not want to appear in court even prior to the attempts made to locate the witness. It is also true that the trial court did not specifically discuss *Unger* in denying the motion. The trial court nonetheless did point to facts that would relate to the factors. Importantly, defense counsel did not seek a continuance until after the State had finished presenting testimony. It is also clear that no one could predict how long it would take to locate the unwilling witness or if the witness could ever be located. This Court has previously concluded under similar facts that the inconvenience that would be caused to the jury and the prosecution was sufficient to evidence that the trial court did not abuse its discretion in denying the motion for the continuance. *See State v. Beeler*, 9th Dist. Summit No. 27309, 2015-Ohio-275, ¶ 14, 16-17; *see*

also State v. Heggem, 2d Dist. Montgomery No. 27614, 2018-Ohio-1423, ¶ 17. Moreover, Watkins has not demonstrated that the witness was available and willing to testify. *See Meek*, 1997 WL 28110, at *1. In fact, what is in the record seems to indicate just the opposite.

{¶30} Given the foregoing, Watkins has not demonstrated that the trial court abused its discretion in denying her motion for a continuance. Watkins' second assignment of error is overruled.

III.

{¶31} Watkins' assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

SUTTON, P. J.
FLAGG LANZINGER, J.
CONCUR.

APPEARANCES:

ANGELA M. KILLE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.