[Cite as *State v. Jones*, 2015-Ohio-4694.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102318

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRANDON JONES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-586116-B

BEFORE: E.T. Gallagher, J., McCormack, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: November 12, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Brandon Jones ("appellant"), appeals from his convictions, raising the following assignments of error for review:

> 1. The trial court erred and abused its discretion in the admission of hearsay evidence and testimonial statements prejudicial to appellant thereby depriving him of his right to confront his accusers, guaranteed by the Sixth Amendment of the United States Constitution, and Article 1, Section 10 of the Ohio Constitution.
>
> 2. The trial court erred in depriving appellant of his right to due process and right to a fair trial by entering a judgment of conviction which was against the manifest weight of the evidence, in violation of the Fourteenth Amendment of the United States Constitution and Article 1, Section 16 of the Ohio Constitution.
>
> 3. The jury's affirmative finding that appellant committed the offenses is not supported by evidence sufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.
>
> 4. Appellant's trial counsel rendered ineffective assistance of counsel because his performance was deficient, and that deficient performance prejudiced appellant so as to deprive him of his right to due process and right to a fair trial.
>
> 5. The trial court erred when it denied all of appellant's suppression motions, thereby depriving him of his right to due process and right to a fair trial, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, and Article 1, Section 14 of the Ohio Constitution.
>
> 6. The trial court erred when it denied appellant's motion for a mistrial.
>
> 7. The trial court erred when it entered the guilty verdicts despite the cumulative errors in the trial.

{¶2} After careful review of the record and relevant case law, we affirm appellant's convictions.

I. Factual and Procedural History

{¶3} In March 2014, appellant was named in a six-count indictment, charging him with aggravated murder in violation of R.C. 2903.01(A), murder in violation of R.C. 2903.02(B), felonious assault in violation of R.C. 2903.11(A)(1), felonious assault in violation of R.C. 2903.11(A)(2), having weapons while under disability in violation of R.C. 2923.13(A)(3), and

having weapons while under disability in violation of R.C. 2923.13(A)(2). The aggravated murder, murder, and felonious assault counts contained one- and three-year firearm specifications.

{¶4} In June 2014, the state re-indicted the case to include codefendant, Michael McCaulley ("McCaulley"). The amended indictment charged appellant with aggravated murder in violation of R.C. 2903.01(A), murder in violation of R.C. 2903.02(B), felonious assault in violation of R.C. 2903.11(A)(1), felonious assault in violation of R.C. 2903.11(A)(2), improperly handling firearms in a motor vehicle in violation of R.C. 2923.16(B), having weapons while under disability in violation of R.C. 2923.13(A)(3), and having weapons while under disability in violation of R.C. 2923.13(A)(2). The aggravated murder, murder, and felonious assault counts contained one- and three-year firearm specifications.

{¶5} Prior to trial, appellant filed three motions to suppress, requesting the trial court to exclude (1) the introduction of surveillance video footage, (2) evidence seized from a 2004 Acura MDX, and (3) identification evidence. Following a hearing, the trial court denied each of appellant's motions. Appellant elected to bifurcate the weapons while under disability counts, trying those charges to the bench. The remaining counts were tried before a jury where the following relevant evidence was presented.

{¶6} Appellant's indictment arose from the shooting death of Thomas Hall ("Hall"). On January 24, 2014, Hall's mother, Kim Williams ("Kim"), purchased crack cocaine from appellant. Later that evening, Kim contacted appellant to purchase additional crack cocaine. Kim testified that appellant agreed to meet her at her residence, located in the Westropp Apartment complex in Cleveland, Ohio. When appellant arrived at Kim's apartment, he encountered Hall; Hall's girlfriend, Kiera Williams ("Kiera"); and Hall's cousin, Dominique Williams ("Dominique"), who arrived at Kim's residence after an evening out. Once inside the

apartment, Kim and appellant went into the back bedroom to complete their drug transaction, while Hall, Kiera, and Dominique remained in the living room. At some point, Hall got up and went into the bedroom to check on his mother. Moments later, a conversation between appellant and Hall escalated into a "heated argument" over issues of reputation and respect. Dominique testified that he went to investigate and saw Hall and appellant facing each other, "sizing each other up," while Kim attempted to defuse the situation.

{¶7} Kim testified that she stood between Hall and appellant and "felt" appellant reach for his gun. However, Kim stated that she managed to escort appellant out of the apartment and to his SUV before the situation turned violent. Once outside, Kim gave appellant $40 in cash for the crack cocaine she previously agreed to purchase, although appellant did not give her the drugs in exchange. At that time, appellant stated, "that [$]40 dollars just saved your son's life" as he removed his gun from his waistband and placed it on the passenger seat of his vehicle.

{¶8} According to Kim, appellant was wearing Timberland boots, a black jacket, jeans, and a winter hat she referred to as a "Snoopy hat" because it had flaps that came down over his ears. Similarly, Dominique testified that he recalled appellant wearing a long black coat, a "furry hat," and snow boots.

{¶9} Shortly after appellant was escorted out of the building, Hall and Kiera left the apartment to drive Dominique home for the evening. Kim also left the apartment to purchase crack cocaine from another dealer. While she was away from her apartment, Kim contacted appellant on his cell phone. During their conversation, appellant stated that Hall had "crossed the line" and abruptly hung up.

{¶10} When Hall and Kiera returned to the apartment, Hall dropped Kiera off at the front door and went to park the car. Minutes later, Kim pulled into the parking lot of the apartment complex and observed Hall lying on the ground. Hall was shot in his abdomen.

{¶11} Hall was transported to MetroHealth Hospital where he underwent emergency surgery. Ultimately, Hall's health took a turn for the worse, and he died on February 6, 2014. Following an autopsy, the examining doctor determined that the cause of death was a single gunshot wound to the abdomen and the manner of death was a homicide.

{¶12} Thomas McGee testified that he lives on the ground level of the Westropp Apartment complex. On the night in question, McGee was watching television when he heard an unusual "poof sound." When he got up to look out his window, McGee observed "the victim crawling past his window." McGee testified that he was able to see the shooter. According to McGee, the shooter had a goatee and was wearing glasses, a winter hat, a black sweater, and camouflage pants. McGee described the winter hat "as gray with like flipped, the top of it black."

{¶13} Denise Maclin testified that she was friends with Kim and appellant, whom she referred to as "BJ" or "Nino." Maclin testified that on the night in question, she was driving past the Westropp Apartment complex when she observed appellant and McCaulley pulling out of the apartment parking lot with the vehicle's headlights off. Maclin testified that McCaulley was driving, and appellant was in the passenger seat of the vehicle. Maclin explained that she was familiar with the Acura MDX McCaulley was driving because he frequently parked the SUV in her driveway. Maclin testified that Kim later contacted her and told her that Hall had been shot.

{¶14} Based on her conversation with Kim, Maclin testified that she contacted appellant the following morning. She indicated that appellant denied having any involvement in Hall's shooting. However, Maclin testified that she also spoke with McCaulley who stated, "[appellant] shot him, and he [McCaulley] is not going to go down for that stuff."

{¶15} Detective Michael Benz ("Det. Benz") of the Cleveland Police Department, testified that he was assigned to investigate Hall's shooting. In the course of his investigation, Det. Benz received a phone tip that an individual with the nickname "Nino" or "BJ" was involved in the shooting. Det. Benz testified that he input the nicknames into the police database and learned that appellant went by both "BJ" and "Nino."

{¶16} Subsequently, Det. Benz obtained video surveillance footage of the apartment complex from the manager of Westropp Apartments, Jessie Powers ("Powers"). In addition, Det. Benz interviewed Kim and obtained her statement in which she detailed the events leading up to the shooting. Following her interview, Kim identified appellant in a six-person photo array as being the individual she referred to as "BJ" or "Nino" in her statement. Using this information, Det. Benz obtained a warrant for appellant's arrest.

{¶17} On February 4, 2014, Det. Betz went to MetroHealth Hospital to obtain a statement from Hall. Det. Betz testified that Hall was conscious, but was placed on a ventilator rendering him unable to speak. Under these circumstances, Det. Benz decided to present Hall with a photo array, using the assistance of MetroHealth officer Shawn Polocy, who served as a blind administrator. Det. Benz testified that Hall positively identified appellant as his shooter. Following Hall's death, the case was turned over to the homicide unit.

{¶18} Tom Ciula ("Ciula") testified that he is a forensic video specialist for the Cleveland Police Department. Ciula testified that he was presented with two discs containing video surveillance footage from outside the Westropp Apartment complex. After reviewing the entirety of the video, Ciula formatted the surveillance footage from several different cameras that captured the shooting. At trial, Ciula described the contents of the video because it was played for the jury. Labeled as "person of interest movie," the footage depicts, beginning at 11:37:11 p.m., a dark colored SUV pull into the parking lot of the Westropp Apartment complex.

Subsequently, the person of interest exits the passenger side of a parked SUV and walks up to the victim. After a brief conversation, the person of interest pulls a firearm from his waistband and shoots the victim at approximately 11:38:42 p.m. The video then depicts the victim flee from the shooter on his hands and knees.

{¶19} Ciula also formatted footage from earlier in the evening. Beginning at 10:49:07 p.m., the video depicts a male and a female exiting the apartment complex together. The female escorts the male to his dark colored SUV and then reenters the apartment complex. The male leaves that apartment complex in his vehicle at approximately 10:52:08 p.m.

{¶20} After reviewing the two sequences, Ciula testified that "there was nothing between [the male shooter in the person of interest movie and the male in the video sequence beginning at 10:49 p.m.] that would rule them out as being the same person."

{¶21} Milan Wilder ("Wilder") testified that in January 2014, he contacted appellant and asked to borrow a vehicle for a period of time. Thereafter, appellant allowed Wilder to use a 2004 Acura MDX, which police later learned was registered to McCaulley. In June 2014, the Cleveland police seized the vehicle from Wilder's driveway. Wilder testified that he had no knowledge that the police were searching for the SUV while it was in his possession.

{¶22} Det. Melvin Smith (Det. Smith") of the Cleveland Police Department, Homicide Unit, testified that he and his partner, Det. Rhonda Gray ("Det. Gray"), were assigned to investigate Hall's death. Det. Smith testified that in August 2014, he and Det. Gray executed a search warrant issued for the Acura MDX seized from Wilder's property. Inside the vehicle, the detectives discovered photographs of appellant, various documents containing appellant's name, and a brown winter hat with ear flaps on its sides. Subsequent DNA analysis confirmed that the hat was worn by appellant.

{¶23} At the conclusion of trial, the jury found appellant guilty of aggravated murder, murder, two counts of felonious assault, and improperly handling firearms in a motor vehicle. Further, the trial court found appellant guilty of each count of having weapons while under disability. In November 2014, the trial court ordered appellant to serve a total term of imprisonment of life with the possibility of parole after 33 years.

{¶24} Appellant now appeals from his convictions.

II. Law and Analysis

A. Suppression of Evidence

{¶25} For the purposes of judicial clarity, we review appellant's assignments of error out of order. In his fifth assignment of error, appellant argues the trial court erred by denying each of his motions to suppress. In his first assignment of error, appellant argues the trial court erred and abused its discretion by admitting hearsay evidence and testimonial statements into evidence. Because appellant's first and fifth assignments of error raise related arguments, we consider them together.

{¶26} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Dunlap*, 73 Ohio St.3d 308, 314, 652 N.E.2d 988 (1995). A reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. *Burnside* at ¶ 8. However, once an appellate court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. *Id*. at ¶ 9. In other words, the application of the law to the trial court's findings of fact is subject to a de novo standard of review. *Id*.

{¶27} In this case, appellant filed three separate motions to suppress, independently challenging (1) the introduction of surveillance video, (2) evidence seized from a 2004 Acura MDX, and (3) identification evidence.

1. Surveillance Video Evidence

{¶28} In his first motion to suppress, appellant challenged the introduction of surveillance video from the Westropp Apartment complex, arguing the video was not properly authenticated pursuant to Evid.R. 901 and was not the best evidence as required under Evid.R. 1002.

{¶29} Pursuant to Evid.R. 901, authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. The rule suggests several ways in which the general requirement of authentication can be accomplished using various types of evidence. Evid.R. 901(B)(1) is applicable to the video offered here, and provides that material may be authenticated by a "witness with knowledge" who testifies that "a matter is what it is claimed to be." Evid.R. 901(B)(1).

{¶30} The best evidence rule is set forth in Evid.R. 1002 and provides, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules[.]" Evid.R. 1002. The best evidence rule rests on the fact that an original writing is more reliable, complete, and accurate as to its contents and meaning. *United States v. Holton*, 116 F.3d 1536, 1545 (D.C.Circ.1997).

{¶31} Evid.R. 1001(3) defines an original "writing or recording" as "the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it." Evid.R. 1001(4) provides that

> A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical

> reproduction, or by other equivalent techniques which accurately reproduce the original.

{¶32} Here, the videos and still-frame photographs presented at trial were duplicates of the original recording. Evid.R. 1003 governs the admissibility of duplicates, and provides

> [a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

{¶33} Further, the party seeking to exclude a duplicate has the burden of demonstrating that the duplicate should be excluded. *State v. Tibbetts*, 92 Ohio St.3d 146, 160, 749 N.E.2d 226 (2001). The party seeking to exclude a duplicate cannot rely on mere speculation as to its authenticity. *See* Evid.R. 1003 and *State v. Easter*, 75 Ohio App.3d 22, 27, 598 N.E.2d 845 (4th Dist.1991). Furthermore, "the decision to admit duplicates, in lieu of originals, is one that is left to the sound discretion of the trial court." *Id*.

{¶34} In this case, appellant argues the trial court erred in admitting the duplicated videos because they only depicted the portions of the original surveillance video deemed relevant to the police investigation by apartment manager, Powers. Thus, appellant contends that the "selected" portions of the video footage were not the best evidence available and that issues surrounding the footage cast doubt on its authenticity and reliability. We disagree.

{¶35} At the suppression hearing, Powers testified about her personal knowledge of the surveillance system and the positioning of the cameras around the apartment building where the incident occurred. Powers stated that once she was contacted by the Cleveland police, she reviewed the surveillance video and discovered the portion of the footage depicting the shooting. At the request of Det. Benz, Powers downloaded that portion of the video onto a flash drive and transferred it to the Cleveland police in the form of a compact disc. Subsequently, Powers was asked by the police to download and copy the portion of the video showing appellant and Kim

exiting the apartment complex earlier that evening. Again, Powers copied the relevant portions of the video and transferred it to the Cleveland police.

{¶36} Relevant to the mandates of Evid.R. 901 and 1003, Powers testified that the sections of the video she duplicated were not altered in any way and that she knew of no method to alter the video. Further, Powers attested that the footage she provided to the police was a "fair, accurate depiction of what the system captured." As such, the state provided sufficient testimony to establish the authenticity of the duplicated videos and demonstrated that the footage was not altered or tampered with such that it should have been deemed unreliable. Powers had personal knowledge regarding both the original video and the duplicate and was able to state that the duplicate correctly reproduced the original.

{¶37} Accordingly, we find the trial court did not err in denying appellant's motion to suppress the surveillance video footage.

2. Search of Vehicle

{¶38} In challenging the evidence seized from the Acura MDX, appellant argues the search warrant was improperly issued because it was supported by an affidavit that relied on "stale evidence." As such, appellant contends the trial court erred in denying his motion to suppress the evidence seized as a result of the search.

{¶39} The Fourth Amendment to the U.S. Constitution, applied to the states by way of the Fourteenth Amendment, pertinently provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 14, of the Ohio Constitution contains an almost identical provision.

{¶40} "A neutral and detached magistrate may issue a search warrant only upon the finding of probable cause." *State v. Gilbert*, 4th Dist. Scioto No. 06CA3055, 2007-Ohio-2717, ¶ 13, citing *United States v. Leon*, 468 U.S. 897, 914-915, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); CrimR. 41(C). An affidavit in support of a search warrant must "particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located." Crim.R. 41(C).

{¶41} In evaluating an affidavit for the sufficiency of probable cause, an issuing magistrate must apply a "totality-of-the-circumstances" test. *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), paragraph one of the syllabus, citing *Illinois v. Gates*, 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The magistrate must "make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id*. at 329, quoting *Gates* at 238-239.

{¶42} In *George*, the Supreme Court of Ohio articulated the standard of review for a determination of probable cause based on an affidavit in support of a search warrant. A reviewing court should "ensure that the magistrate had a substantial basis for concluding that probable cause existed," and should not substitute its judgment for that of the magistrate. *Id*. at paragraph two of the syllabus. The reviewing court "should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *Id.*

{¶43} In this case, appellant argues the affidavit in support of the search warrant lacked probable cause because the information contained in the affidavit was stale given the period of

time between the commission of the crime, January 2014, and the submission of the affidavit after the vehicle was discovered by the police in June 2014.

{¶44} Generally, "[i]f a substantial period of time has elapsed between the commission of the crime and the proposed search, the magistrate must have presented to him sufficient underlying facts to believe that the items seized are still on the premises before a warrant may be issued." *State v. Yanowitz*, 67 Ohio App.2d 141, 147, 426 N.E.2d 190 (8th Dist.1980). There is no arbitrary time limit on how old information contained in an affidavit may be, so long as there are sufficient facts to justify a conclusion that the subject contraband is probably on the person or premises to be searched at the time the warrant is issued. *Id*.

{¶45} In her affidavit, Det. Gray averred that she had probable cause to believe that the vehicle possessed the following:

> Firearm(s); handgun(s); any and all ammunition; cellular telephone(s); camera(s); photograph(s); any blood or DNA evidence; fingerprint(s); items or articles of clothing; papers; documents or other evidence of persons in control of said vehicle, and any and all trace evidence pertaining to the violations of the laws of the State of Ohio, to wit: Chapter 2903 of the Ohio Revised Code.

{¶46} Given the nature of the vehicle's alleged involvement in the crime and the character of the evidence to be seized, we are unable to conclude that it was unreasonable for the trial court and issuing magistrate to conclude that there was a fair probability that contraband or evidence of a crime would be found in the subject vehicle at the time the warrant was issued. Unlike cases involving portable contraband, evidence relating to ownership or control of the subject vehicle, such as blood, DNA, or fingerprints, is not the type of evidence that would be immediately or easily removed. Accordingly, we find the trial court did not err in denying appellant's motion to suppress the evidence seized from the Acura MDX.

3. Identification Evidence

{¶47} Finally, appellant filed a motion to suppress challenging Hall's identification of appellant as his shooter from the photo array created by Det. Benz. At the suppression hearing, defense counsel argued the identification was (1) obtained in violation of the procedures set forth in R.C. 2933.83, and (2) violated appellant's Sixth Amendment right to confront his accusers. We address each of these arguments separately.

i. R.C. 2933.83

{¶48} First, appellant argues the trial court erred in overruling his motion to suppress the identification testimony of Hall because the procedure employed by Det. Benz was unduly suggestive.[1]

{¶49} 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. Harris*, 2d Dist. Montgomery No. 19796, 2004-Ohio-3570, ¶ 19; *State v. Thompson*, 8th Dist. Cuyahoga No. 90606, 2009-Ohio-615, ¶ 32.

{¶50} If a defendant meets the first prong, then the second part of the inquiry focuses upon five factors necessary to assess the reliability of the identification despite an unduly suggestive procedure (1) the witness's opportunity to view the defendant at the time of the crime, (2) the witness's degree of attention at the time of the crime, (3) the accuracy of the witness's description of the defendant prior to the identification, (4) the witness's level of certainty when

[1] For the purposes of this appeal, we limit our review to the photo array presented to Hall. While appellant also challenges the procedure used with Kim, the record reflects that her identification of appellant in the photo array was immaterial to the state's case, because it was not used to prove appellant's identity as the shooter, but was used to clarify that the individual she called "Nino" or "BJ" in her statement was in fact referring to appellant.

identifying the defendant at the confrontation, and (5) the length of time that has elapsed between the crime and the confrontation. *State v. Williams*, 172 Ohio App.3d 646, 2007-Ohio-3266, 876 N.E.2d 991 (8th Dist.).

{¶51} Thus, our first step is to determine whether appellant has established that the identification procedure employed by Det. Benz was unreasonably suggestive.

{¶52} R.C. 2933.83, effective July 2010, governs the administration of photo lineups and is aimed at preventing the use of unnecessarily suggestive procedures. R.C. 2933.83 requires any law enforcement agency that conducts live and photo lineups to adopt specific procedures for conducting the lineups. Such procedures must provide, at minimum, the use of a "blind administrator" for the photo array. R.C. 2933.83(B). "'Blind administrator' means the administrator does not know the identity of the suspect. 'Blind administrator' includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system." R.C. 2933.83(A)(2).

{¶53} Furthermore, the administrator conducting the lineup must make a written record of the lineup that includes all results obtained during the lineup, the names of all persons at the lineup, the date and time of the lineup, and the sources of the photographs used in the lineup. R.C. 2933.83(B)(4). The administrator is also required to inform the eyewitness that the suspect may or may not be in the lineup and that the administrator does not know the identity of the suspect. R.C. 2933.83(B)(5).

{¶54} As to the folder system set forth in the statute, it provides for the suspect's photograph, five filler photographs, and four dummy folders. The blind administrator does not know which photo the witness is viewing. R.C. 2933.83(A)(6). Although R.C. 2933.83(A)(6) defines the "folder system" procedure, this court has held that R.C. 2933.83 does not require the use of the "folder system" and that the "folder system" is just one of the systems law enforcement

agencies may use for photo lineup identifications. *State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2013-Ohio-3722, ¶ 77.

{¶55} Finally, the statute provides that evidence of the law enforcement's noncompliance with the statute shall be considered by the trial court in ruling on a defendant's motion to suppress. R.C. 2933.83(C)(1). Moreover, such evidence of noncompliance is admissible at trial. R.C. 2933.83(C)(2). If such evidence of noncompliance is admitted at trial, the court shall instruct the jury that such noncompliance may be considered in determining the credibility of the witness identification. R.C. 2933.83(C)(3).

{¶56} At the suppression hearing, defense counsel specifically argued the state failed to establish that Det. Benz complied with the "documentation and record" requirements of R.C. 2933.83(A)(6)(h). This section requires the administrator to document and record the results of the procedure, including (1) the date, time, and location of the lineup procedure, (2) the name of the administrator, (3) the names of all of the individuals present during the lineup, (4) the number of photographs shown to the eyewitness, (5) copies of each photograph shown to the eyewitness, (6) the order in which the folders were presented to the witness, (7) the source of each photograph, and (8) a statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification.

{¶57} After careful review of the photo array and its accompanying documentation submitted as exhibits both at the suppression hearing and at trial, we find the procedure for the photo array administered in this case substantially complied with the requirements set forth in R.C. 2933.83(A)(6)(h). We recognize that the blind administrator's documentation failed to reflect that Hall's sister, Monya Hall ("Monya"), was present during the administration of the photo array. However, we are not convinced that the failure to list her in the documentation rendered the procedure "unnecessarily suggestive."

{¶58} Accordingly, we find the photo array procedure was in compliance with R.C. 2933.83 and, as such, was not unnecessarily suggestive under the first prong of the analysis. Consequently, we need not engage in the second prong of the analysis.

{¶59} Nevertheless, we observe that, even if the administration of the photo array to the Hall was not in compliance with R.C. 2933.83, any impropriety would not have been prejudicial. In this case, Hall was familiar with appellant from the neighborhood and, as seen from the surveillance footage, was standing face-to-face with appellant at the time of the shooting. Further, the blind administrator testified that Hall immediately circled appellant's photo, indicating his level of certainty. Viewed under the totality of the circumstances, we find the identification to be reliable.

{¶60} Based on the foregoing, we find the trial court did not err in denying appellant's motion to suppress Hall's identification on grounds that the photo array was administered in violation of the procedures set forth in R.C. 2933.83.

ii. Sixth Amendment Challenge

{¶61} As raised in appellant's first assignment of error, defense counsel also argued at the suppression hearing that Hall's identification constituted inadmissible hearsay and was testimonial in nature, thereby depriving him of his right to confront his accusers as guaranteed by the Sixth Amendment of the U.S. Constitution and Article I, Section 10, of the Ohio Constitution. Specifically, defense counsel maintained that Hall's identification was not "made under a sense of impending death," and therefore, was not a dying declaration that is admissible pursuant to *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and Evid.R. 804(A)(2). (Tr. 238-239.)

{¶62} The Sixth Amendment to the U.S. Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the

witnesses against him." The United States Supreme Court in *Crawford*, held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id*. at 53-54.

{¶63} Thus, according to *Crawford*, the initial analysis to be made in determining whether a defendant's right to confrontation has been violated by the admission of out-of-court statements that are not subject to cross-examination "is not whether [the statements] are reliable but whether they are testimonial in nature." *Toledo v. Sailes*, 180 Ohio App.3d 56, 2008-Ohio-6400, 904 N.E.2d 543, ¶ 13 (6th Dist.), citing *Crawford* at 61.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

{¶64} Finally, to determine whether a statement is testimonial or nontestimonial, we inquire "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the case." *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, paragraph two of the syllabus.

{¶65} In this case, Hall's identification of his assailant from a photo array is undoubtedly testimonial and, thus, subject to the Confrontation Clause. His identification was taken in the course of police investigation, when there was no emergency, and the primary purpose of the interrogation was to establish or prove past events potentially relevant to later prosecution.

{¶66} While testimonial statements under *Crawford* are not subject to the exceptions to the hearsay rules, they may nevertheless be admissible under one of the two historical exceptions

to the Confrontation Clause recognized by the U.S. Supreme Court — forfeiture by wrongdoing and dying declarations. *See Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678, 171 L.E.2d 488 (2008).

{¶67} At the suppression hearing, the state argued that Hall's identification of appellant was a dying declaration and, thus, did not implicate *Crawford*. We agree.

{¶68} Evid.R. 804(B)(2), defines a dying declaration or a statement under belief of impending death as "a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death."

{¶69} The Supreme Court of Ohio has provided that to admit dying declarations as evidence, "'it should be made to appear to the court, by preliminary evidence, not only that they were made in articulo mortis (at the point of death), but also made under a sense of impending death, which excluded from the mind of the dying person all hope or expectation of recovery.'" *State v. Woods*, 47 Ohio App.2d 144, 147, 352 N.E.2d 598 (9th Dist.1972), quoting *Robbins v. State*, 8 Ohio St. 131 (1857).

{¶70} Thus, in order to qualify as a dying declaration in a criminal matter, the following four-prong test must be met (1) the declarant is aware that death is impending, (2) the declarant has died since the dying declaration was made, (3) the dying declaration is offered in a criminal prosecution that involves a homicide, and (4) the dying declaration involves or relates to the cause of death. *State v. Huertas*, 51 Ohio St.3d 22, 553 N.E.2d 1058 (1990); *State v. Knight*, 20 Ohio App.3d 289, 485 N.E.2d 1064 (8th Dist.1984).

{¶71} After careful review of the record, we find the trial court did not err in denying appellant's motion to suppress Hall's identification pursuant to the dying declaration exception. In this case, Monya testified that at the time Det. Betz presented the photo lineup, Hall's

condition was stable after coming out of a medically induced coma, but remained "critical." According to Monya, Hall did not believe his condition was improving. Specifically, Monya testified that Hall told her just before Det. Benz arrived at the hospital that "he was not going to make it" and similarly stated to her fiancé that he "was not going to make it out of the hospital." (Tr. 152-153.) Further, the record reflects that Hall passed away less than two days after the identification was made. Accordingly, we conclude that the circumstances surrounding Hall's testimonial statement support the states position that (1) Hall was aware of his impending death at the time the identification was made, (2) Hall died shortly after the identification was made, (3) the identification was offered in a criminal prosecution involving a homicide, and (4) the identification related to Hall's cause of death.

{¶72} Accordingly, we conclude that Hall's identification qualifies as a testimonial statement that falls within the dying declaration exception to the Confrontation Clause and, therefore, is admissible. For these reasons, and in response to appellant's first assignment of error, the trial court did not err in denying appellant's motion to suppress or abuse its discretion by permitting the state to introduce evidence of Hall's identification at trial.

{¶73} Appellant's first and fifth assignments of error are overruled.

B. Manifest Weight of the Evidence

{¶74} In his second assignment of error, appellant argues his convictions were against the manifest weight of the evidence.

{¶75} While the test for sufficiency of the evidence requires a determination whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). Also, unlike a challenge to the sufficiency of the evidence, a manifest weight challenge raises a factual issue.

> "The court, reviewing 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 and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

Id. at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶76} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

{¶77} In challenging the weight of the evidence supporting his convictions, appellant argues the state relied on speculative and noncredible evidence, including (1) Hall's delayed identification of appellant as his shooter, (2) the low quality surveillance video, and (3) the testimony of Maclin. Further, appellant contends that eyewitness McGee's description of the shooter varied significantly from Dominique's and Kim's description of what appellant was wearing on the night of the incident.

{¶78} After careful review of the record in its entirety, we are unable to conclude that this is the exceptional case in which the evidence weighs heavily against the conviction. At trial, the jury, as the trier of fact, was presented with the testimony of Officer Gregory Hardy, who testified that when he responded to the scene of the shooting Hall was conscious and able to speak but did not identify his shooter despite stating that he had been robbed. However, the jury

also heard testimony from Monya that Hall was reluctant, initially, to reveal the identity of his shooter to the police because he did not want to be labeled a "snitch." Furthermore, the jury viewed the relevant portions of the surveillance video and was free to consider the video's quality, or lack thereof, in rendering its verdict in this matter. Similarly, appellant had the opportunity to cross-examine Maclin at length about the alleged inconsistencies in her testimony, including her statement that she drove past appellant and McCaulley as they pulled out of the apartment complex driveway with their headlights off around the time of the shooting, despite her inability to explain why her vehicle is not seen in the surveillance footage.

{¶79} As stated, the trier of fact was in the best position to weigh the evidence and the witnesses' credibility. In our view, the trier of fact was presented with all relevant evidence and was free, after due consideration and resolution of perceived inconsistencies, to find the state's witnesses to be credible despite the arguments raised by defense counsel on cross-examination. "'[A] conviction is not against the manifest weight of the evidence simply because the jury rejected the defendant's version of the facts and believed the testimony presented by the state.'" *State v. Jallah*, 8th Dist. Cuyahoga No. 101773, 2015-Ohio-1950, ¶ 71, quoting *State v. Hall*, 4th Dist. Ross No. 13CA3391, 2014-Ohio-2959, ¶ 28.

{¶80} Finally, we find the inconsistences between the descriptions provided by McGee, Kim, and Dominique to be insignificant. We recognize that McGee testified that the shooter was wearing camouflage pants, while Kim and Dominique testified that appellant was wearing jeans earlier that evening. However, with that exception, we find the remaining portions of their descriptions to be remarkably similar. For example, each witness's description contained references to a black sweater or coat, winter boots, and a dark colored winter hat with ears that flipped up.

{¶81} Based on the foregoing, we find that appellant's convictions are not against the manifest weight of the evidence. Appellant's second assignment of error is overruled.

C. Sufficiency of the Evidence

{¶82} In his third assignment of error, appellant argues his convictions were supported by insufficient evidence.

{¶83} When assessing a challenge of sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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 reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins*, 78 Ohio St.3d at 390, 678 N.E.2d 541.

{¶84} In arguing his convictions are not supported by sufficient evidence, appellant does not challenge a specific element of his crimes. Instead, appellant incorporates the arguments raised in his second assignment of error and generally contends that the state failed to present sufficient evidence placing him at the scene of the shooting. We disagree.

{¶85} Significantly, the state introduced evidence showing that just before his death, Hall identified appellant as his shooter. Further, ample evidence was presented to show that appellant's conduct was maliciously calculated following an argument he had with Hall earlier that evening. Specifically, the state introduced surveillance evidence showing that at approximately 10:49 p.m., an individual identified as appellant was escorted out of the apartment building by Kim. The video follows as Kim walks appellant to his dark colored SUV. Once

outside, Kim testified that appellant was upset and, while holding a gun, made a threatening comment suggesting that $40 may have saved her son's life. Approximately 12 minutes later, Kim called appellant on his cell phone to see if he had calmed down. During this conversation, appellant reportedly stated that Hall had crossed the line and abruptly hung up the phone. Subsequently, surveillance footage shows a dark colored SUV pull into the apartment complex at 11:37 p.m. The video depicts an individual, with similar characteristics of the man seen leaving the apartment building with Kim earlier that night, step out of the passenger side of the SUV, approach Hall as he walked through the parking lot, and after a momentary conversation, pull out a gun from his waistband and fire a single shot.

{¶86} Viewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could find the essential elements of appellant's crimes to be proven beyond a reasonable doubt.

{¶87} Appellant's third assignment of error is overruled.

D. Ineffective Assistance of Counsel

{¶88} In his fourth assignment of error, appellant argues he received ineffective assistance of counsel based on defense counsel's failure to call an alibi witness at trial.

{¶89} To establish a claim for ineffective assistance of counsel, appellant must show that his counsel's performance was deficient and that the deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Under *Strickland*, our scrutiny of an attorney's work must be highly deferential, and we must indulge "a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id*. at 688.

{¶90} In support of his ineffective assistance of counsel argument, appellant proffers information outside the record to suggest he was with his child's mother, Nicole Taylor

("Taylor"), from 10:30 p.m. the night of the incident to 6:30 a.m. the next morning when he left for work. Appellant argues that the decision not to call Taylor as a witness deprived him of the opportunity to prove his innocence.

{¶91} Generally, an attorney's decision whether to call a witness comes within trial strategy and will not be second-guessed by a reviewing court. *See State v. Vargas*, 8th Dist. Cuyahoga No. 97376, 2012-Ohio-2767, ¶ 14, citing *State v. Gooden*, 8th Dist. Cuyahoga No. 88174, 2007-Ohio-2371, ¶ 38 ("Trial tactics and strategies do not constitute a denial of effective assistance of counsel."). Moreover, appellant's argument relies on facts that are outside the record on appeal and, thus, cannot form the basis for review. *See State v. Wittine*, 8th Dist. Cuyahoga No. 90747, 2008-Ohio-5745, ¶ 4. Consequently, we cannot find ineffective assistance of counsel on this record.

{¶92} Appellant's fourth assignment of error is overruled.

E. Motion for Mistrial

{¶93} In his sixth assignment of error, appellant argues the trial court erred by denying his motion for mistrial.

{¶94} The decision whether to grant or deny a motion for mistrial lies within the sound discretion of the trial court and will not be reversed absent a showing of an abuse of discretion. *State v. Willis*, 8th Dist. Cuyahoga No. 99735, 2014-Ohio-114, ¶ 36, citing *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). An "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶95} A mistrial should not be ordered in a criminal case "merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected." *State v. Reynolds*, 49 Ohio App.3d 27, 33, 550 N.E.2d 490 (2d Dist.1988).

Rather, the granting of a mistrial is necessary only when "a fair trial is no longer possible." *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

{¶96} In this case, defense counsel moved for a mistrial following the testimony of Maclin, arguing that she improperly made unsolicited statements that appellant (1) was under house arrest at the time of Hall's shooting, (2) had recently been released from jail, and (3) had engaged in a fraudulent check scheme with Kim in the past. Defense counsel maintained that these statements were inflammatory and unquestionably prejudiced appellant's ability to receive a fair trial.

{¶97} This court has held "that where a witness makes a reference to a defendant's criminal history and there was no showing that the defendant suffered material prejudice, a mistrial is not warranted." *State v. Connor,* 8th Dist. Cuyahoga No. 99557, 2014-Ohio-601, ¶ 92, citing *State v. McCree*, 8th Dist. Cuyahoga No. 87951, 2007-Ohio-268. As discussed, the jury was presented with substantial testimony indicating that appellant's involvement in this case derived from his trafficking of crack cocaine. Thus, while Maclin's unsolicited responses concerning appellant's criminal history were improper, we are unable to conclude that they affected the outcome of appellant's trial given the jury's awareness of appellant's ongoing criminal activity.

{¶98} Under these circumstances, and in light of the overwhelming evidence presented in support of appellant's convictions, we cannot find that Maclin's comments referencing appellant's criminal history materially prejudiced appellant or interfered with his right to a fair trial. Accordingly, we find the trial court did not abuse its discretion by denying appellant's motion for mistrial.

{¶99} Appellant's sixth assignment of error is overruled.

F. Cumulative Error

{¶100} In his seventh assignment of error, appellant argues the trial court erred when it entered the guilty verdicts despite the cumulative error in trial.

{¶101} In *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus, the Ohio Supreme Court recognized the doctrine of cumulative error. Under this doctrine, a conviction will be reversed where the cumulative errors deprive a defendant of his constitutional right to a fair trial, even if the individual errors may not be cause for reversal. *Id*. Pursuant to our analyses under assignments one through six above, we find that the doctrine of cumulative error is not applicable to this case because we do not find multiple instances of harmless error.

{¶102} Accordingly, appellant's seventh assignment of error is overruled.

{¶103} 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 convictions having been affirmed, any bail pending appeal is terminated.

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

EILEEN T. GALLAGHER, JUDGE

TIM McCORMACK, P.J., and
SEAN C. GALLAGHER, J., CONCUR