[Cite as *State v. Craig*, 2020-Ohio-1102.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TERRANCE DASHAWN CRAIG,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0102

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17-CR-1306

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Edward A. Czopur, DeGenova & Yarwood, Ltd. 42 North Phelps St., Youngstown, Ohio 44503 for Defendant-Appellant.

Dated: March 3, 2020

Robb, J.

{¶1} Defendant-Appellant Terrance Dashawn Craig appeals the judgment of the Mahoning County Common Pleas Court convicting him of two counts of felonious assault, a firearm specification, and tampering with evidence. As to the first count of felonious assault, he contests the court's decision admitting statements a witness made to a detective about a shooting, claiming the statements did not satisfy the excited utterance hearsay exception and violated the confrontation clause. As to the second count of felonious assault, he contests the admissibility of statements made by a patient with a head wound to a medic in the ambulance and to a nurse practitioner in the emergency room. Related to the tampering with evidence count, Appellant raises sufficiency and manifest weight of the evidence. For the following reasons, we overrule Appellant's assignments of error and affirm the trial court's judgment.

STATEMENT OF THE CASE

{¶2} On October 30, 2017 at 7:42 a.m., Sydney Williams called 911 to report that Dawon Brigham was shot while he sat in his vehicle in front of the Austintown Walmart store. She said an unknown male approached the vehicle, shot the victim, and fled in a burgundy Chrysler 200. (St.Ex. 69).

{¶3} Video surveillance footage from the store that morning (which may be a minute behind the time on the 911 system) showed the shooting and surrounding events. On the morning of the shooting: the driver of a newer maroon Chrysler 200 arrived at the parking lot at 7:35 a.m. and backed into a parking space; four minutes later, he pulled forward at an angle, reversed through two spaces, and parked again; more than a minute later, he pulled forward and reversed back to his space; and then, he pulled through a spot, quickly turned into a lane heading toward the store, and began driving past the front of the store.

{¶4} In the meantime, other store cameras showed: Dawon Brigham pulled his white Cadillac into a parking space one spot away from the front doors of the store at 7:38; while Dawon remained in the vehicle, Sydney exited from his passenger door and

entered the store at 7:39; she returned at 7:41 with a bag in her hand; instead of entering the vehicle, she circled it; and at 7:42, the maroon Chrysler swerved down an aisle and parked at an angle blocking the front of the white Cadillac.

{¶5} The driver of the maroon Chrysler exited the vehicle, and approached the driver's side of the white Cadillac from the front. The driver of the Chrysler was a black male wearing a tan jacket, a red shirt, and dark jeans. He pointed a gun at Dawon's closed driver-side window while Dawon drove the Cadillac in reverse; at this point on the video, the driver's window appears to break (showing when the shot was fired). One 9mm shell casing was found in the parking lot near this area. As the Cadillac fled, the shooter crouched behind a car. When he stood and started back toward his maroon Chrysler, Sydney appeared to be looking at him from across the hood of the car he hid behind. The shooter then drove the maroon Chrysler from the scene. Dawon drove his Cadillac in a circle to flee the shooter and then ran into the store for help, while Sydney called 911.

{¶6} A law enforcement officer, who was on his way to the police station and who was also an emergency room technician, arrived immediately. He saw the white Cadillac was in front of the building with the driver's door open and a broken window, and he found the victim inside the store. (Tr. 269, 281). He said the bullet entered Dawon's upper abdomen (left of center) and a large bulge on the right side of the torso indicated the path of the bullet and where it stopped inside his body. (Tr. 270, 542); (St.Ex. 61). Dawon repeatedly declared that he was going to die while holding his side in pain. (Tr. 269, 271).

{¶7} Detective Yacavone was at the nearby Austintown Police Department and arrived at the scene within three to five minutes of the dispatch. (Tr. 325, 334). He too noticed that Dawon appeared to be in excruciating pain. The detective testified that Dawon said he was shot by Sydney's male friend and Sydney added that the shooter was her ex-boyfriend, Dashawn Craig. (Tr. 289-291, 346).

{¶8} Due to chaos at the store, the detective found it necessary to remove Sydney from the scene as the ambulance transported Dawon; the detective asked if Sydney would accompany him to the nearby police station, estimating he left five minutes after arriving. (Tr. 287-289, 292). At the police station, Sydney reiterated that Dashawn Craig was the shooter and the driver of the maroon Chrysler 200. She provided further

details of her arrival at the store and the shooting (confirmed by the store's exterior and interior surveillance footage).

{¶9} Another officer researching a database for "Dashawn Craig" found the name "Terrance Dashawn Craig" (Appellant herein). (Tr. 347). The photograph attached to Appellant's official record was presented to Sydney at the police station, and she confirmed his identity. (Tr. 348). Detective Yacavone thereafter drove Sydney to the hospital to visit Dawon, but he was in surgery at the time. (Tr. 350).

{¶10} Sydney provided consent to search her phone. Detective Solic, who performed the phone search, discovered that an iCloud account for "TerranceCraig" had previously logged-in to iTunes from Sydney's phone. (Tr. 429, 433). A state agent provided Appellant's phone number to the detective so he could extract the texts to Sydney from Appellant. The agent testified that Appellant told him this was his phone number a week before the shooting. (Tr. 405). After the shooting, Appellant spoke to Detective Solic from that phone number. (Tr. 458).

{¶11} The detective extracted the following messages sent to Sydney from Appellant's phone in the half hour before the shooting: "Oh and it's some hitters Omm watch they might come in there to get watch"; "You think shit a game you brushed a bunch of ppl the wrong way"; "I never killed nobody"; and "So it don't matter tell them what you want you lying cause I gave you a disease." Five hours after the shooting, the following messages were sent during a ten-minute span to Sydney from Appellant's phone: "You playing crazy"; "But I'm gone win in the end cause you foul"; "Keep playing you go down with me"; "Bet have it yo way I'm done with you omm it's fuck you now you choose sides"; "Fuck you I mean that dude you playing soooooo foul"; "You was on his side when he got hit wasn't you now you on his side in the hospital smdh now I'm just out here on the run"; "Thought I was cold"; "Bitch you the coldest"; "Fuck that we need money to fight des bitches"; and "It's this side and that side period." (Tr. 448-454); (St.Ex. 68B).

{¶12} Within two hours of the shooting, the Youngstown Fire Department was dispatched to a fully engulfed vehicle fire near an abandoned section of streets. The vehicle was a maroon 2015 Chrysler 200 displaying Ohio license plate number HGE 7815. (Tr. 486-487); (St.Ex. 73, 79). An arson investigator was asked to evaluate the vehicle at 10:00 a.m., after it had been towed by a private towing company to a secure

lot. (Tr. 494). He concluded the fire began in the passenger compartment and was set purposely. (Tr. 497, 499). There was a gas can in the backseat area of the vehicle. (Tr. 507). An Austintown police officer searched the inside of the vehicle for evidence related to the shooting and found burnt pieces of clothing on the driver's seat, including tan canvas that appeared to be from the neck and chest area of a jacket and denim that appeared maroon and black. (Tr. 505-507); (St. Ex. 91-92, 110-11). He also recovered a belt buckle and red t-shirt material in connection with the vehicle fire.

{¶13} A Youngstown police officer testified that he responded to a call on October 27, 2017 (three days before the shooting). He took a report from Sydney Williams, who was very upset and crying. She reported that Terrance Craig was driving a maroon Chrysler 200 with Ohio license plate number HGE 7815. (Tr. 554-555).

{¶14} On the morning of November 3, 2017 (four days after the shooting), a Youngstown police officer was dispatched to an apartment where he found Sydney Williams bleeding from an injury. (Tr. 514). There was a large amount of blood on her shirt and on the carpet. (Tr. 516). She did not want to speak to the officer. She was transported to the emergency room by ambulance. The medic observed a laceration on Sydney's forehead which appeared recent. (Tr. 526). Over objection, the medic testified that on the way to the hospital, Sydney said her boyfriend struck her in the head with a gun. (Tr. 529-530).

{¶15} A nurse practitioner who treated Sydney in the emergency room testified about a laceration on Sydney's upper forehead and a circular burn on her arm; Sydney declined the offer to suture her head wound. (Tr. 533-536). After an overruled objection, the nurse practitioner testified that Sydney reported sustaining her injuries when her ex-boyfriend hit her with a gun and his fist. (Tr. 534).

{¶16} A jailhouse informant testified that he was friends with Appellant for at least five years and was in jail while Appellant was being held there in this case. He asked Appellant why he would engage in a shooting in broad daylight at Walmart. According to Appellant's friend, Appellant disclosed that he shot the man for "fucking with his girl" and he "caught the dude slipping out there" so he "upped the burner and hit him" while the victim was sitting in his car. (Tr. 228-229, 231, 249, 251, 257). He defined "burner" as street slang for a gun. (Tr. 231). This witness said Appellant indicated "anybody going

to get that with fucking with him like that." (Tr. 249). He also said Appellant admitted that he beat up his girlfriend because "the dude was fucking his girl." (Tr. 229-230, 257).

{¶17} Appellant was convicted by a jury of the counts set forth in the indictment: (1) felonious assault for shooting Dawon Brigham on October 30, 2017, plus a firearm specification; (2) felonious assault for injuring Sydney Williams on November 3, 2017; and (3) tampering with evidence for the vehicle fire on October 30, 2017. He was sentenced to three years for the firearm specification, six years for each felonious assault, consecutive to each other but concurrent to three years for tampering with evidence, for a total of fifteen years. Appellant appealed from the August 28, 2018 sentencing entry.

EXCITED UTTERANCE (COUNT 1)

{¶18} Appellant sets forth five assignments of error, the first of which contends:

"AS TO THE FELONIOUS ASSAULT OF DAWON BRIGHAM, THE STATEMENTS OF MS. WILLIAMS TO DETECTIVE YACAVONE DID NOT QUALIFY AS AN 'EXCITED UTTERANCE,' AND WERE THEREFORE ADMITTED IN ERROR DEPRIVING APPELLANT OF A FAIR TRIAL."

{¶19} Sydney Williams was subpoenaed to testify. When she failed to appear on the first day of trial, a material witness warrant was issued, but she could not be located during trial. When the detective was asked what Sydney told him after they left the store, the defense objected. The court conducted an admissibility hearing on the excited utterance hearsay exception. (Tr. 293). The detective said he arrived three to five minutes after the dispatch, he was at the store for five to ten minutes, and it took three to five minutes to return to the station with Sydney. (Tr. 286, 291, 325, 334).[1] He brought Sydney to the nearby police station because the scene was chaotic.

{¶20} The detective described Sydney's demeanor as "obviously still under a lot of stress ***, very excited, very – I don't' know -- almost like a nervous giddy, very excitable still *** very stressful giddy. It's hard to explain. She was very chattery, very talkative, very excited *** very emotional." (Tr. 290-291). She was shaking (but not uncontrollably), cried on and off, was breathing heavy while keeping up a "constant

[1] The surveillance video shows Dawon ran into the store after the shooting at 7:43 and Sydney left the store with the detective at 7:53, after Dawon was taken away on a stretcher. (St.Ex. 3).

chatter," and "was obviously affected by a stressful situation." (Tr. 293-295). She voiced that she needed to get to the hospital. (Tr. 295). Although she calmed "a little bit" when they arrived at the police station, she was "still very stressed from the situation." (Tr. 296). The detective opined that Sydney's demeanor during the interview at the police station was more excitable than he sees in a typical interview and was not representative of her regular demeanor, as experienced in later encounters with her. (Tr. 295, 313).

{¶21} The detective recorded the interview with Sydney, and the trial court watched this video to make a determination on Sydney's demeanor. (Tr. 328). The trial court concluded the statements made to the detective qualified as excited utterances. The state did not seek to play the recording for the jury but elicited the following testimony from the detective about what Sydney told him: she stayed at a motel with Dawon the prior night; he drove her to the store that morning because she was scheduled to work there at 8:00 a.m.; she entered the store with money he gave her to buy food; she returned to the parking lot and gave Dawon his change; and she circled the car because she was concerned about her ex-boyfriend, Dashawn Craig, who drove up in the maroon Chrysler 200 and shot the victim. (Tr. 335-338). The detective testified that she confirmed the person she referred to as Dashawn Craig was the person in a photograph the police obtained from the records attached to Appellant Terrance Dashawn Craig. (Tr. 346-348)

{¶22} Appellant contends the trial court abused its discretion in admitting Sydney's hearsay statements because they did not qualify under the excited utterance exception. He argues Sydney's identification of the shooter as "Dashawn Craig" instead of "Terrance Dashawn Craig" showed that the nature of her statement was reflective, rather than unreflective, and too much time had passed within which she calmed down prior to the interview at the station.

{¶23} On the issue of time, the trial court cited a case where the Supreme Court upheld the admission of an excited utterance when a detective recorded a victim's statement 30 to 45 minutes after a stabbing incident while the victim was in the hospital in pain. *See State v. Huertas*, 51 Ohio St.3d 22, 31, 553 N.E.2d 1058 (1990). The trial court also pointed out the admission of a statement under the excited utterance exception is not precluded merely because the declarant responded to questions if the questioning: (1) is not coercive nor leading, (2) facilitates the declarant's expression of what is already

the natural focus of her thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant's reflective faculties. *See State v. Wallace*, 37 Ohio St.3d 87, 93, 524 N.E.2d 466 (1988). After watching the interview, the trial court found Sydney spoke about the incident without questioning by the detective, she spoke very rapidly, and she was emotional and nervous, which prevailed over any reflective thoughts on the incident. (Tr. 329-330).

{¶24} Pursuant to Evid.R. 803(2), an excited utterance is not excluded by the hearsay rule even if the declarant is available as a witness. An excited utterance is defined by the rule as: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). A four-part test for an excited utterance has been employed: (1) the event was startling enough to produce nervous excitement in the declarant sufficient to still reflective faculties and make the statement an unreflective, spontaneous, and sincere expression of actual impressions; (2) the statement, even if not strictly contemporaneous with the event, was made before there was time for the nervous excitement to lose its domination over the declarant's reflective faculties so that domination continued to be sufficient to make her statements the unreflective and sincere expression of her actual impressions; (3) the statement related to the startling event or surrounding circumstances; and (4) the declarant had the opportunity to observe personally the matters asserted in his statement. *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 166.

{¶25} Here, Appellant does not contest the third and fourth prongs of this test, conceding the statement related to the startling event and the declarant had a clear opportunity to personally observe the matters asserted (as confirmed by video). Appellant's main focus is the second prong, but he also contests the first prong of the test. However, the shooting of the declarant's friend was an event startling enough to produce a nervous excitement in the declarant sufficient to make her statement an unreflective and sincere expression.

{¶26} The detective's testimony clearly showed Sydney was in an excited state at the scene and on the way to the police station. Minutes before she left the store, she witnessed her ex-boyfriend drive up to her location and shoot her friend while she stood

a few feet away. The scene was chaotic. Her friend was in major pain with a bullet in his abdomen and was repeatedly declaring his belief that he was going to die. She left with the detective and chattered away in an excited, stressed-out manner, voicing that she needed to be at the hospital instead of the police station.

{¶27} Notably, the detective testified that the statement he obtained from Sydney at the police station was "the same statement" that she gave at the scene. (Tr. 316). In discussions with Sydney at the scene and again minutes later at the police station, she identified the shooter as Dashawn Craig, her ex-boyfriend. (Tr. 346). This was the incriminating portion of her statement, and her reiteration of this information at the police station was repetitive. The fact that she identified the shooter (her ex-boyfriend) as "Dashawn Craig" instead of "Terrance Dashawn Craig" at the scene and again the police station does not demonstrate she did not suffer a nervous excitement sufficient to make her statement unreflective.

{¶28} Furthermore, as to the issue of time passed since the shooting, the statement need not be "strictly contemporaneous with its exciting cause * * *." *Jones*, 135 Ohio St.3d 10 at ¶ 166 (finding an excited utterance where "[l]ess than an hour had elapsed" between the defendant's confession to his wife that he killed a woman and his wife's utterance to the person who testified about what the defendant's wife told him). "There is no per se amount of time after which a statement can no longer be considered to be an excited utterance. * * * The passage of time between the statement and the event is relevant but not dispositive * * *." *Id.* at ¶ 168.

{¶29} Sydney's statement at the police station was taken approximately 20 minutes after the shooting, but this was only 5 to 10 minutes after she left the scene. At the scene, the stressful after-math of the event was still occurring as emergency personnel were arriving; Dawon Brigham's condition was being evaluated, and he was yelling in pain that he was dying. We note the declarant did not appear at the location of the police station and present herself to police to make a statement; she was transported from the scene to the station (3 to 5 minutes away) at the detective's request. She wanted to go straight to the hospital to ascertain the victim's condition, and the detective said he would drive her there after taking her statement.

{¶30} Although the detective acknowledged Sydney started to calm down at the station, he testified that she was still under the stress of the situation. The trial court could use its discretion to believe this testimony. Plus, the trial court watched the video of the interview and could use its own observations to assist in judging her demeanor at the pertinent time. Moreover, the trial court could believe and give weight to the detective's testimony that the demeanor exhibited by Sydney during that interview was much different than her regular demeanor as he learned from his later experiences with her, i.e., she exhibited an excitable demeanor for her personally. The fact that he learned about her normal demeanor from later encounters does not diminish from his observation.

{¶31} We conclude the trial court did not abuse its discretion in finding the challenged statement made by Sydney to the detective was an excited utterance. This assignment of error is overruled.

CONFRONTATION CLAUSE (COUNT 1)

{¶32} Appellant's second assignment of error examines the constitutional admissibility of the excited utterances analyzed above, arguing:

"AS TO THE FELONIOUS ASSAULT OF DAWON BRIGHAM, APPELLANT WAS DENIED A FAIR TRIAL BY THE COURT ALLOWING IN NUMEROUS HEARSAY STATEMENTS FROM WILLIAMS WHICH RAN AFOUL HIS RIGHT TO CONFRONT HIS ACCUSERS AS CONTAINED IN THE SIXTH AND FOURTEENTH AMENDMENTS."

{¶33} Appellant contends Sydney's statements to the detective were admitted in violation of the confrontation clause because her statements were testimonial (as opposed to nontestimonial). In arguing the statements at issue were testimonial, he says they were the product of a formal police interrogation, the circumstances did not objectively indicate there was an ongoing emergency merely because the suspect was still at large, and the primary purpose of the interrogation was to establish past events relevant to the future criminal prosecution of the shooter.

{¶34} The federal confrontation clause in the Sixth Amendment to the United States Constitution applies to federal and state prosecutions. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Testimonial statements of a witness who did not appear at trial are not admissible under the confrontation clause (unless the defendant had a prior opportunity for cross-examination and the witness was

later unavailable to testify). *Crawford v. Washington*, 541 U.S. 36, 53-54, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (the primary object of the confrontation clause is to bar testimonial hearsay). In *Crawford*, the defendant's wife was *Mirandized* and questioned by police at the police station *after the defendant was arrested* for stabbing a man; she was later unavailable to testify, and the state sought to introduce her statement suggesting her husband did not act in self-defense. The Supreme Court found her statement was testimonial and barred by the confrontation clause. Appellant adds emphasis to the *Crawford* Court's statement: "testimonial * * * applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and *to police interrogations*." *Id.* at 68.

{¶35} Thereafter, the Court clarified that a statement is testimonial if the circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish past events potentially relevant to later criminal prosecution. *Hammon v. Indiana*, 547 U.S. 813, 822, 26 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The Court excluded as testimonial the statements of a domestic violence victim made to police and memorialized in an affidavit at the scene while police were questioning her *and her husband* at their house. *Id.*

{¶36} In a case decided within the same opinion (*Davis v. Washington*), the Court admitted as nontestimonial a victim's statements to a 911 operator during and shortly after her boyfriend's violent attack. *Id.* The Court declared that a statement can be labeled non-testimonial *even if it was made in the course of a police interrogation* if the circumstances objectively indicate the primary purpose of the interrogation was to enable police to assist in meeting an ongoing emergency. *Id.*

{¶37} If it objectively appears the primary purpose of an interrogation was to respond to an ongoing emergency, then the purpose of the interrogation is not to create a record for trial and does not fall within the scope of the confrontation clause. *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). The rationale "is not unlike that justifying the excited utterance exception in hearsay law." *Id.* at 361. "[W]hen a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony * * *, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.* at 358-359.

{¶38} In *Bryant*, the Court found statements made to police by a victim about the shooter were not testimonial as the circumstances of the interaction between the victim and the police objectively indicated that the primary purpose of the interrogation was to enable police to assist in meeting an ongoing emergency. *Id.* at 359. The ongoing emergency may extend "beyond an initial victim to a potential threat to the responding police and the public at large." *Id.* Still, this does not mean an emergency is ongoing "for the entire time the perpetrator of a violent crime is on the loose." *Id.* at 365. Moreover, "a conversation which begins as an interrogation to determine the need for emergency assistance" can "evolve into testimonial statements" if: a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute; if a perpetrator is disarmed, surrenders, or is apprehended; or if the perpetrator flees and is unlikely to pose a threat to the public. *Id.* It is for the trial court in the first instance to determine when any transition from nontestimonial to testimonial occurred. *See id.*

{¶39} The existence or non-existence of an ongoing emergency, although among the most important considerations, is one factor in determining the primary purpose of an interrogation, and "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 562 U.S. at 358, 361, 366, 374. Other factors to consider may be whether the interrogation occurred "at or near the scene" and "the informality of the situation and the interrogation." *Id.* at 360, 366, 377 (a formal interrogation at a police station, as in *Crawford*, is more likely to provoke testimonial statements, than less formal questioning). In objectively viewing the totality of the circumstances on whether a statement is testimonial (i.e., whether the primary purpose of the conversation was to create an out-of-court substitute for trial), the Court also considers "standard rules of hearsay, designed to identify some statements as reliable * * *." *Id.* at 358-359. The relevant inquiry is not the actual purpose of the individuals involved in the encounter, but is the purpose a reasonable participant would have possessed. *Id.* at 360.

{¶40} After reiterating its main holdings from *Crawford* to *Bryant*, the United States Supreme Court in *Clark* advised that this did not mean the confrontation clause bars every

statement that satisfies the primary purpose test: "We have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. * * * Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." *Ohio v. Clark*, __ U.S. __, 135 S.Ct. 2173, 2180-2181, 192 L.Ed.2d 306 (2015) (citing examples involving forfeiture by wrongdoing and dying declaration).

{¶41} Rather than address the admissibility of Sydney's statement to the detective, the state responds that even assuming arguendo there was an error in allowing the detective to testify about what Sydney told him at the police station, admission of the statement obtained at the police station was harmless beyond a reasonable doubt. *See State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 192 (even assuming there was confrontation-clause violation, admission of the evidence was harmless beyond a reasonable doubt where there was no reasonable possibility the improperly admitted evidence contributed to the conviction). Appellant's friend already testified that Appellant admitted he committed the shooting at Walmart due to the victim's interaction with Appellant's girlfriend. The surveillance video showed the shooter drove a maroon Chrysler 200, which was confirmed by the 911 call. There was evidence that Appellant drove a maroon Chrysler 200, including evidence showing the license plate number of the maroon Chrysler 200 driven by Appellant three days before the shooting was the same license plate number as the maroon Chrysler 200 found burning (along with clothing matching that worn by the shooter) less than two hours after the shooting.

{¶42} The state additionally emphasizes the texts from Appellant's phone to Sydney after the shooting: complaining she was with the victim at the scene and at the hospital; stating she must choose sides; noting he was on the run without denying he was the shooter; and threatening she would go down with him. Before the shooting, she received a text from Appellant's phone threatening he had "hitters" on his mind and "watch they might come in there to get watch"; a detective testified "hitters" was street lingo for "[p]eople that would come kill you." (Tr. 454). The state also points to Detective Solic's testimony on cross-examination suggesting that it was his opinion that Appellant was the shooter seen on the surveillance footage. (Tr. 459).

{¶43} Furthermore, Detective Yacavone testified that Sydney's statement at the police station identifying her ex-boyfriend, Dashawn Craig, as the shooter was a reiteration of her statement at the scene. (Tr. 346). The detective was only at the scene for five minutes, racing there from the nearby police station. An ongoing emergency was occurring in the minutes after the shooting where the scene at the store was chaotic, the shooting victim was yelling that he was going to die, and his friend (who was steps away from the shooting as it occurred) was speaking to law enforcement who had just arrived on scene. The stability of the state of affairs at the scene was as yet unknown. The shooter had not been apprehended, and his immediate fleeing from the scene in a motor vehicle mere minutes before represented an emergency situation and a danger to the public.

{¶44} The circumstances objectively indicated the primary purpose of the statement at the scene was to enable police to assist in an ongoing emergency, and thus, Sydney's statement naming Dashawn Craig, her ex-boyfriend, as the shooter was non-testimonial. *See Hammon*, 547 U.S. at 822 (defining non-testimonial). The detective's testimony that she repeated this at the police station would not be prejudicial (even assuming the emergency was not still ongoing at the police station). She also provided background information and identified a photograph at the police station. Nevertheless, under the totality of the circumstances in this case, there was still an ongoing emergency at the police station when Sydney spoke to the detective.

{¶45} "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." *Bryant*, __ U.S.__, 131 S.Ct. at 1158 (ongoing emergency where the victim suffered a gunshot wound and the police did not know the identity or location of shooter). "[T]he duration and scope of an emergency may depend in part on the type of weapon employed." *Id.* "An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." *Id.* ("Domestic violence cases like *Davis* and *Hammon* often have a narrower zone of potential victims than cases involving threats to public safety."). "Statements to police officers responding to an emergency situation are generally considered nontestimonial precisely because the declarant is usually acting—under great emotional

duress—to secure protection or medical care." *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028 (non-testimonial statements to officer who arrived 15 minutes after the 911 call).

{¶46} Here, the weapon was a firearm. This was a public shooting occurring at 7:42 a.m. in the part of a store parking lot which was right by the front door while store patrons were walking nearby through the lot. The victim was shot through a closed vehicle window and told police he never met the shooter. The suspect was in the process of fleeing by vehicle, but his location was unknown in the minutes after the shooting and while Sydney was at the police station. This was not comparable to completed domestic dispute with the parties isolated from each other by police. (We also note the ex-girlfriend of the shooter appeared to be under continued threat as confirmed by text messages.)

{¶47} Although the interview after leaving the scene was in a formal setting, which is one factor in assessing the primary purpose of the interrogation, the police station was only three to five minutes from the scene of the shooting. The detective, who arrived at the scene within minutes and stayed only five minutes, transported her there because the scene was chaotic. Other officers remained at the scene. The shooting victim was being rushed to the hospital with a bullet lodged in his abdomen, and Sydney was requesting to be transported to the hospital; instead, the detective first drove her to the nearby police station as part of enabling the Austintown police to respond to the ongoing emergency of a fleeing maroon Chrysler 200, such as knowing what name and photograph to place in the all-points bulletin being broadcast around the area along with the vehicle description.

{¶48} The objective circumstances placed on the record indicate a reasonable person would believe there was still a need to ascertain if there was a public threat involved in the perpetrator's flight when the interview commenced 20 minutes after the shooting. Regardless, as mentioned above, her statement that her ex-boyfriend Dashawn Craig was the shooter was already admissible as it was previously given in the midst of a clear emergency situation with a primary purpose of assisting the evaluation of the emergency rather than provide an out-of-court substitute for trial. Additional background information on the victim was not prejudicial.

{¶49} As to Sydney's identification of a photograph of Appellant as her ex-boyfriend (whom she previously identified as the shooter and called "Dashawn Craig"),

we do not have the video of the interview to ascertain the timing (or evolution of the situation from emergency to testimonial) as it was not played to the jury. It was viewed by the trial court in making the admissibility determination. In any event, there was other overwhelming evidence connecting Appellant "Terrance Dashawn Craig" to the "Dashawn Craig" Sydney said was her ex-boyfriend and the shooter, including: the report to police three days before the shooting attributing a license plate number to Appellant; that license plate number matched the license plate of the car burned less than two hours after the shooting; the burned car was the same make, model, color, and newness as the car used by the shooter in the video; the car contained burned clothing matching that worn by the shooter; Terrance Craig's iCloud account had been used on Sydney's phone; Appellant provided his phone number to a state agent a week before the shooting; his number texted Sydney in a threatening and incriminating manner a half hour before the shooting and hours after the shooting; and the testimony of Appellant's friend that while Appellant was incarcerated on the current offenses, he admitted to the daytime Walmart shooting and disclosed his motive was the victim's relationship with his girlfriend.

{¶50} In sum, we conclude there was an ongoing emergency while the detective was at Walmart listening to Sydney to ascertain the parameters of the emergency and how to respond rather than for the primary purpose of establishing facts for the prosecution. The portion of Sydney's statement made at the scene did not become prejudicial testimony when it was reiterated at the nearby police station mere minutes later, and the emergency had not yet ended when they arrived at the police station. Even if the emergency situation devolved at some point, the additions to her earlier statement were not prejudicial and there was not a reasonable possibility that her identification of a photograph attached to Appellant's official records contributed to his conviction where other overwhelming evidence showed Appellant Terrance Dashawn Craig was the person Sydney called Dashawn Craig, her ex-boyfriend and the shooter of Dawon. This assignment of error is overruled.

CONFRONTATION CLAUSE (COUNT 2)

{¶51} Appellant's third and fourth assignments of error both discuss statements by a medic and a nurse practitioner relevant to the November 3, 2017 felonious assault on Sydney. First, we address Appellant's fourth assignment of error, which contends:

"AS TO THE FELONIOUS ASSAULT OF SYDNEY WILLIAMS, APPELLANT WAS DENIED A FAIR TRIAL BY THE COURT ALLOWING IN NUMEROUS HEARSAY STATEMENTS FROM WILLIAMS WHICH RAN AFOUL HIS RIGHT TO CONFRONT HIS ACCUSERS AS CONTAINED IN THE SIXTH AND FOURTEENTH AMENDMENTS."

{¶52} Appellant asserts a violation of the confrontation clause (and the hearsay rules) as to the following evidence: (1) the medic testified that, while evaluating and treating Sydney in the ambulance on the way to the hospital, Sydney explained her head wound by saying she was struck in the head with a gun by her boyfriend; and (2) the nurse practitioner testified that, while evaluating and treating Sydney's injuries in the emergency room, Sydney explained that her ex-boyfriend hit her with a gun and his fists. Appellant argues these medical providers should not have been permitted to testify as to whom the patient said assaulted her. He refers back to the law in the second assignment of error on testimonial statements being barred under the confrontation clause. He then applies the objective witness test employed in the Ohio Supreme Court's *Stahl* case and concludes an objective witness would reasonably believe the declarations during medical treatment would be available for use at a later trial.

{¶53} Because the line of cases from *Crawford* to *Bryant* involved statements to law enforcement officers, the United States Supreme Court declined to decide whether the same confrontation clause analysis applied to statements made to individuals other than law enforcement officers until directly faced with the issue in *Ohio v. Clark*, __ U.S. __, 135 S.Ct. 2173, 2180, 192 L.Ed.2d 306 (2015). Prior thereto, the Ohio Supreme Court adopted the objective-witness test for evaluating statements made to someone other than law enforcement personnel, holding they are testimonial when an objective witness would reasonably believe the questioning served primarily a prosecutorial purpose. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, ¶ 36 (citing a definition listed in *Crawford* as an example of what an amicus brief proposed for the definition of testimonial statements).

{¶54} In *Stahl*, the Ohio Supreme Court concluded that a rape victim's response to questions by a medical professional in a special sexual assault unit, including the perpetrator's identity, were made primarily for a medical purpose and were nontestimonial. *Id.* at ¶ 46 (even though the nurse's unit had a purpose to assist law

enforcement and collect evidence for prosecution, the victim filed a report at the police station before appearing at the hospital, and a police officer remained in the room while the medical professional interviewed the victim). The Court pointed out the victim could have reasonably assumed that identifying the person who attacked her to a medical professional would serve a medical purpose, such as to structure a plan for her safe release. *Id.*

{¶55} In *Arnold*, the Ohio Supreme Court held: "Statements made for medical diagnosis and treatment are nontestimonial." *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 41. The Court then found the victim's statements that Arnold performed various sexual acts on her were nontestimonial as they were for medical diagnosis and treatment, while the victim's extraneous statements (her description of his boxer shorts and his locking a door) were not for medical treatment. *Id.* (finding the nurse's forensic interview had a dual function of medical treatment and investigator for law enforcement, essentially separating the answers according to the primary purpose of medical or evidentiary).

{¶56} Subsequently in the *Clark* case, a trial court admitted a three-year-old's statement, wherein he named the person who injured him, to his preschool teachers who questioned him after noticing his injuries. The Ohio Supreme Court found a confrontation violation, but the United States Supreme Court reversed, finding no violation. *Clark*, __ U.S. __, 135 S.Ct. 2173. We note here that the confrontation clause in Section 10, Article I of the Ohio Constitution provides no greater confrontation right than the Sixth Amendment; the state and federal confrontation clauses are therefore co-extensive. *Arnold*, 126 Ohio St.3d 290 at ¶ 12.

{¶57} After observing that it had not yet specified the test applicable when a statement is made to someone other than law enforcement, the United States Supreme Court then applied the primary purpose test to a statement to persons other than law enforcement, while observing that these statements "are much less likely to be testimonial than statements to law enforcement officers." *Clark*, __ U.S. __, 135 S.Ct. at 2180-2181 (rejecting the request to hold the confrontation clause did not apply to statements to non-law enforcement because "at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns"). Courts were

instructed to "evaluate challenged statements in context, and part of that context is the questioner's identity. * * * Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.* at 2182 ("the relationship between a student and his teacher is very different from that between a citizen and the police").

{¶58} In evaluating the totality of the circumstances, the *Clark* Court found: the questioning occurred in an informal setting immediately after the injuries were noticed; the situation qualified as an ongoing emergency as teachers would want to protect the child and possibly other children; the questions and answers were primarily aimed at identifying and ending the threat; a young child could rarely intend a statement to be used as a substitute for trial testimony; there was strong evidence these types of statements were admissible at common law; and Ohio's mandatory reporting requirements do not mean the teacher's mission was primarily to gather evidence for a prosecution (just as police responding to an ongoing emergency may not have this primary purpose). *Id.* at 2181-2183.

{¶59} The *Clark* Court concluded the victim's statements were not testimonial and thus not admitted in violation of the confrontation clause as there was "no indication that the primary purpose of the conversation was to gather evidence for [the defendant's] prosecution" and as the statements "clearly were not made with the primary purpose of creating evidence for Clark's prosecution." *Id.* at 2181, 2183. "Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial." *Id.* at 2177.

{¶60} Here, there appeared to be an emergency where the victim of a second felonious assault was found. The responding police officer described the victim as being covered in blood. The medic arrived in an ambulance and treated the victim while transporting her to the emergency room where she was presented to a nurse practitioner who offered to suture the head wound. From the perspective of the speaker and the listener, Sydney's description of how she obtained her injuries and the mechanism causing the injury was relevant to medical diagnosis. As for the object causing the

injuries, a person who was hit in the head with a gun may have a risk of concussion and fractures, whereas a person suffering a wound that was caused by a knife may not have these same risks; likewise, tetanus may be a concern depending on the weapon.[2]

{¶61} As for the portion of the statement identifying the perpetrator, identity can be relevant to medical personnel providing medical treatment. The medical provider may decide to refer the patient and formulate different treatment plans based on the assailant's identity. For instance, the medical provider may refer a patients suffering abuse to a hospital social worker for a particular form of assistance. Or, the medical provider may refer or release certain patients directly to an abused women's shelter for transportation from the hospital and housing. *See Stahl*, 111 Ohio St.3d 186 at ¶ 46. The victim's psychological state can also be of medical concern, and a referral or recommendation may depend on many facts including the identity of the perpetrator. *See State v. Triplett*, 7th Dist. Mahoning No. 17 MA 0128, 2018-Ohio-5405, ¶ 95-97.

{¶62} If we applied the objective witness test requested by Appellant, we would conclude an objective witness being treated as a patient in the ambulance on the way to the hospital and then in the emergency room would not reasonably anticipate that her statement identifying her assailant as her ex-boyfriend would be used at a later trial under the circumstances herein. In *Stahl*, the adult victim's statement was not testimonial even though the nurse worked in a special unit tasked with gathering evidence and a police officer was present for the examination. Here, there was no indication the emergency room nurse practitioner had any involvement in a special forensic unit or that she was performing a medical examination with forensic components; nor was the medic treating a patient in an ambulance charged with uncovering crimes or gathering evidence. They were charged with responding to the emergency medical case placed before them. "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Clark*, 135 S.Ct. at 2182.

{¶63} Appellant recognizes that statements about assaults to family and friends are typically nontestimonial. *See, e.g., State v. Peeples,* 7th Dist. Mahoning No. 07 MA

[2] Being hit in the head with a gun by an angry boyfriend during a beating may suggest a higher concussion risk than being hit by a friend who was non-aggressively waving an object around.

212, 2009-Ohio-1198, ¶ 29-30. However, he says statements to friends and family are made in confidence and thus distinguishable from the statements here. Yet, statements to medical personnel are typically thought to be made in confidence as well. The relationship between the victim of a beating and the medical professional rendering medical treatment (especially in the private setting of an ambulance rushing to the hospital or an examination room in the emergency department after arriving by ambulance) is different from the relationship between a citizen and a police officer. *See Clark*, 135 S.Ct. at 2182.

{¶64} After stating, "only testimonial statements are excluded by the Confrontation Clause," the United States Supreme Court observed: "Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules." *Giles v. California*, 554 U.S. 353, 376, 128 S.Ct. 2678, 2692–93, 171 L.Ed.2d 488 (2008). *See also Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 312, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) ("medical reports created for treatment purposes, which would not be testimonial under our decision today"). The intent of an objective declarant is considered under the primary purpose applied by the United States Supreme Court in *Clark*, along with the questioner's intent and other considerations.

{¶65} Under the totality of the circumstances, there is no indication the medical personnel here had a primary purpose of investigating a crime or gathering evidence for future prosecution, and there is no indication the assault victim made the statement with a primary purpose of creating evidence for Appellant's prosecution. *See Clark*, 135 S.Ct. at 2181, 2183. The confrontation clause argument related to the second count of felonious assault is overruled.

HEARSAY EXCEPTION (COUNT 2)

{¶66} Appellant argues that even if we do not find a confrontation clause violation in the prior assignment of error, the testimony of the medic and the nurse practitioner (on the patient's disclosure of who caused her injury) was inadmissible as hearsay. His third of assignment of error provides:

"AS TO THE FELONIOUS ASSAULT OF SYDNEY WILLIAMS, APPELLANT WAS DENIED A FAIR TRIAL BY THE COURT ALLOWING A NUMBER OF HEARSAY STATEMENTS, WITHOUT AN EXCEPTION, TO BE TOLD TO THE JURY."

{¶67} Where a non-testimonial statement is admitted, the confrontation clause does not apply and the matter is left to the application of state rules of evidence such as hearsay rules. *Michigan v. Bryant*, 562 U.S. 344, 358-359, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). Appellant argues the state hearsay rules precluded the ambulance medic and the emergency room nurse practitioner from testifying as to whom Sydney said assaulted her. He contends the statements were not excited utterances under Evid.R. 803(2) as a substantial time elapsed. He then contends the identity of who caused the injury was not admissible under the hearsay exception in Evid.R. 803(4) as it was not relevant to medical diagnosis or treatment.

{¶68} The trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception. *State v. Dever*, 64 Ohio St.3d 401, 410, 596 N.E.2d 436 (1992). The victim's statement to the medic could reasonably be considered an excited utterance. We discussed the excited utterance exception under the first assignment of error, where we set forth the four-part test. *See State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 166. Clearly, there was an event startling enough to produce a nervous excitement in the declarant; her statement related to the event; and she personally experienced the event.

{¶69} As to whether the statement was made while under the stress of excitement, the event causing the injury was recent as the blood on the carpet was wet and the victim's injury appeared fresh. Before the medical witnesses testified, a police officer testified that he observed a large amount of blood on the victim's shirt and on the ground which appeared wet; the victim was disheveled and covered in blood. (Tr. 516, 519-520). She appeared scared and intimidated and would not speak to the police while she awaited the ambulance holding a towel to her bleeding head. (Tr. 516). The ambulance arrived ten minutes after the officer was dispatched to the apartment. The victim was visibly upset, excited, crying, and yelling. (Tr. 527). Although the victim "calmed down a little bit" once she left the scene in the ambulance, she was still upset. (Tr. 528). A victim need not still be crying to be under nervous excitement from a stressful event.

{¶70} While the medic was evaluating the victim's recent forehead injury and her medical condition *on the way to the hospital in the ambulance*, the victim said her boyfriend hit her in the head with a gun. (Tr. 526, 529-531). Contrary to Appellant's contention, there is no indication a substantial amount of time passed between the event and the ambulance ride. It was not unreasonable for the trial court to conclude that when the victim told the medic how she sustained her injury, she was still under the stress of excitement from suffering an injury by being hit in the forehead with a gun.

{¶71} As to the nurse practitioner, she evaluated the victim in the emergency room approximately 30 minutes after the police officer arrived at the scene. (Tr. 513, 529); (St.Ex. 103). She confirmed the forehead laceration was fresh. The victim informed the nurse practitioner that she sustained her injuries when her ex-boyfriend hit her with a gun and a fist. (Tr. 534). She told the victim sutures were warranted, but the victim declined the procedure. (Tr. 533, 535). The nurse practitioner was not asked about whether the victim was stressed or excited at that time. The state may have been relying on the hearsay exception in Evid.R. 803(4).

{¶72} Pursuant to Evid.R. 803(4): "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The Ohio Supreme Court has allowed the admission of statements to a medical provider about sexual acts and identifying the perpetrator of the sexual abuse as pertinent to both diagnosis and treatment of a child. *See State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944; *Dever*, 64 Ohio St.3d 401. Although involving young children, the Court suggested an adult may have more motivation to be truthful at a medical examination than a child (and thus set forth additional considerations for evaluating a child's statement to a medical provider including leading questions, age, and motive). *See Muttart*, 116 Ohio St.3d 5 at ¶ 48-49 (noting the trial court has discretion to admit testimony on statements during a medical examination after considering the circumstances surrounding a child-victim's statement); *Dever*, 64 Ohio St.3d at 414 ("a child's statement identifying his or her abuser should be treated the same as any other statement which is made for the purposes set forth in Evid.R. 803(4)").

{¶73} Later, the Ohio Supreme Court found the identity of the assailant of an adult victim was provided for the purpose of medical diagnosis and treatment. The medical functions relevant to this type of identity information can include structuring a safe release plan, assessing risks, or checking for diseases. *See Stahl*, 111 Ohio St.3d 186 at ¶ 46 (referring to the release plan). We note that *Stahl* was a rape case with an adult victim where a release plan may not have been implemented once it was disclosed that the identity of the assailant was the former boss of the victim's boyfriend. This may suggest that the test of whether it was reasonably pertinent to diagnosis or treatment does not mean reasonably pertinent in hindsight.

{¶74} As discussed in the prior confrontation clause assignment, a release plan may include the medical provider's decision to arrange transportation by and lodging at a battered women's shelter (or to refer the victim to the hospital social worker or other personnel).[3] Identity can also be relevant to screenings for suicide risk or readmission risk which can affect the formulation of proper medical treatment, including the giving of medical advice to the patient. Similarly, the relevancy of identity to the medical functions of diagnosis and treatment can also include psychological referrals. *See State v. Triplett*, 7th Dist. Mahoning No. 17 MA 0128, 2018-Ohio-5405, ¶ 95-97. *See also United States v. Joe*, 8 F.3d 1488, 1494-1495 (10th Cir.1993) (diagnosing and formulating recommendations for emotional and psychological injuries can depend on the identity of the abuser; the physician generally must know who the abuser was to render proper treatment which may differ if the abuser is a member of the victim's household).

{¶75} Although the Supreme Court in *Stahl* analyzed the question (of identification for medical diagnosis and treatment) under confrontation clause principles, the Court has applied *Stahl* to a case reviewing a hearsay exception argument under Evid.R. 803(4). After citing *Stahl* and Evid.R. 803(4), the Supreme Court recently held: "information [the victim] provided [to the nurse] about '*the identity of the perpetrator*, the age of the perpetrator, the type of abuse alleged, and the time frame of the abuse' *were all for*

[3] The medical records made by the nurse practitioner show the "Plan" she formulated included "Discharge to women's shelter" (and states the patient did not feel safe going where her significant other may locate her). This portion of the records is in the file but was redacted from the medical record provided to the jury as an exhibit. (Tr. 633); (St.Ex. 103). The evidence a trial court relies on in ruling on a hearsay exception need not be presented in testimony to the jury.

medical diagnosis." (Emphasis added.) *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 3, 139, 142-143 (where a seventeen-year-old victim was raped after going to a bar with a man she recently met and gave information to a nurse who was trained to evaluate sexual assault victims), quoting *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 32 (a confrontation clause case concerned with a forensic interview with a dual purpose).

{¶76} We also note the Supreme Court in *Stahl* affirmed a Ninth District case which not only found no confrontation clause violation but also overruled the defendant's argument on the medical treatment hearsay exception. The Ninth District said it "has consistently held that a description of the encounter and even identification of the perpetrator are within the exception, as statements made for purposes of diagnosis or treatment." *State v. Stahl*, 9th Dist. Summit No. 22261, 2005-Ohio-1137, ¶ 15 (adult victim). More recently, other courts also made this holding in adult victim cases. *See State v. Magwood*, 8th Dist. Cuyahoga No. 105885, 2018-Ohio-1634, ¶ 40 ("courts have consistently found that a description of the encounter and identification of the perpetrator are within [the] scope of statements for medical treatment and diagnosis"); *State v. Ridley*, 6th Dist. Lucas No. L-10-1314, 2013-Ohio-1268, ¶ 52 (and as emphasized by the state in the case at bar, the victim merely told the nurse her "boyfriend" caused the injuries).

{¶77} We conclude the trial court could reasonably find the victim's statement to the nurse practitioner during the emergency room visit (explaining that her head wound occurred when her boyfriend hit her in the head with a gun) was made for the purpose of medical diagnosis or treatment and was reasonably pertinent to diagnosis or treatment. The victim's motive in making the brief statement to medical attendants appeared consistent with that of a patient seeking treatment, and it was reasonable for medical personnel to rely on the information in diagnosis or treatment.

{¶78} Finally, we note the victim's statement that her boyfriend caused the injury was already admitted when the medic was permitted to testify to the statement as an excited utterance, and, Appellant's friend testified that Appellant admitted his girlfriend's relationship with the shooting victim was the reason he shot the victim and beat up his girlfriend.

TAMPERING WITH EVIDENCE (COUNT 3)

{¶79} Appellant's fifth assignment of error provides:

"THE CONVICTION FOR TAMPERING WITH EVIDENCE WAS BASED ON INSUFFICIENT EVIDENCE AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS THE STATE FAILED TO PROVE THAT APPELLANT STARTED THE FIRE, OR THAT ANYTHING OF VALUE TO THE INVESTIGATION WAS DESTROYED THEREIN."

{¶80} Whether the evidence is legally sufficient to sustain a conviction is a question of law dealing with adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). An evaluation of witness credibility is not involved in a sufficiency review as the question is whether the evidence is sufficient if believed. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79, 82; *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001). In other words, sufficiency involves the state's burden of production rather than its burden of persuasion. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶81} A conviction cannot be reversed on the grounds of insufficient evidence unless the reviewing court determines, after viewing the evidence in favor of the prosecution, that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). Rational inferences to be drawn from the evidence are also evaluated in the light most favorable to the state. *See State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999). Even erroneously admitted evidence can be considered to determine whether the sufficient evidence supports the guilty verdict. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 16-20; *Lockhart v. Nelson*, 488 U.S. 33, 35, 38, 40-42, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988). This is because a defendant cannot be retried if the evidence was insufficient, but the remedy for erroneously admitting prejudicial evidence is a new trial with exclusion of the evidence. *See id.*

{¶82} Appellant was convicted of tampering with evidence under R.C. 2921.12(A)(1), which provides the following elements: "No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following: (1) Alter, destroy, conceal, or remove any record, document,

or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation * * *."

{¶83} Appellant argues that the only evidence on the tampering with evidence charge was that someone purposely caused his vehicle to be destroyed by a fire. He states there was no evidence presented to show: he was the person who set the fire; he acted with the purpose of impairing the value or availability of evidence; or what evidence was destroyed, altered, or concealed.

{¶84} As Appellant concedes, there was evidence that his car was purposely set on fire. An arson investigator testified to his conclusion that the fire was purposely set and the fire started in the passenger compartment. (Tr. 497, 499). The car was in a desolate area near abandoned streets. A gas can was found in the backseat area of the vehicle. (Tr. 507). The state showed the official investigation was in progress in Austintown before and during the time the car was burned in Youngstown. The vehicle fire was still in engulfed in flames when the fire department arrived, which occurred within two hours of the shooting. (Tr. 483-484, 494). The jury could view for themselves that the shooter was the driver of a maroon Chrysler 200 of a newer year, such as the 2015 Chrysler 200 burned soon after the shooting.

{¶85} Contrary to Appellant's suggestion, it is part of the investigation of the shooting for the state to find the car that a shooter used to: arrive at the scene of a shooting, block a victim's vehicle, alight from in order to shoot the victim, and flee with after the shooting. In addition, other evidence valuable to the investigation was discovered in the vehicle after the fire. Burnt clothing pieces were found while investigating the vehicle fire, and this evidence matched the clothing the shooter was wearing as seen in the video surveillance footage. An officer combing through the interior of the burnt vehicle after the fire found burnt pieces of clothing on the driver's seat, including tan canvas that appeared to be from the neck and chest area of a jacket and denim that appeared dark maroon and black (and a belt buckle). (Tr. 505-507). Red t-shirt material was also recovered. The jury viewed the recovered burnt clothing remnants which were admitted as exhibits (along with photographs of the clothing when it was recovered). (St. Ex. 109-112). The jury also watched the video surveillance footage of

the shooting which was admitted into evidence and which allowed them to view the clothing worn by the shooter.

{¶86} This was all evidence of value to the investigation, which was altered by the fire. The state need not prove the evidence no longer had value after the burning but had to show he altered, destroyed, concealed, or removed the evidence "with purpose to impair its value or availability as evidence in such proceeding or investigation." R.C. 2921.12(A)(1). (Also, a reasonable person would conclude the value of the evidence was in fact impaired by the burning as the shooter's complete, unburned outfit would have been valuable to the investigation and to the prosecution but was lost as a result of the burning {as was the ability to test for gunshot residue}.)

{¶87} The burned car was the same make and model and had the same license plate number as the car Appellant was driving three days before the shooting. (Tr. 487, 554-555); (St.Ex. 73). Evidence was presented that Appellant was the Walmart shooter. To prove identity of the person who started the vehicle fire, the state need not present video footage of or an eye witness to the commencement of the fire in order to prove that the person using it before and during a shooting he committed was the person who burned the vehicle. Circumstantial evidence inherently possesses the same probative value as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001). "A conviction can be sustained based on circumstantial evidence alone." *State v. Franklin*, 62 Ohio St.3d 118, 124, 580 N.E.2d 1 (1991).

{¶88} Appellant's association with the vehicle, the evidence connecting the vehicle with the shooting, the location of the shooting in a parking lot of a major store with video cameras, and the evidence inside the vehicle all point toward motive and identity in the vehicle fire. The circumstantial evidence suggests the shooter removed his clothing and burnt them with the vehicle. Because a defendant's intent dwells in his mind, the surrounding facts, circumstances, and resulting inferences are all used to demonstrate intent. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001). Viewing all of the evidence and rational inferences in the light most favorable to the prosecution, a rational juror could find that Appellant, "knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted," did "[a]lter, destroy, conceal, or

remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation" as prohibited by R.C. 2921.12(A)(1).

{¶89} Moreover, the jury's decision to convict Appellant of tampering with evidence was not contrary to the manifest weight of the evidence as he argues under the same assignment of error as his sufficiency argument. 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"; it deals with the persuasive effect of the evidence in inducing belief and is not a question of mathematics. *Thompkins*, 78 Ohio St.3d at 387. A weight of the evidence review considers whether the state met its burden of persuasion, as opposed to the burden of production involved in a sufficiency review. *See id.* at 390 (Cook, J., concurring).

{¶90} When a defendant claims a conviction is contrary to the manifest weight of the evidence, the appellate court is to 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. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, 78 Ohio St.3d at 387. The appellate court's discretionary power to grant a new trial on these grounds can be exercised only in the exceptional case where the evidence weighs heavily against the conviction. *Id.*

{¶91} The weight to be given the evidence is primarily for the trier of the facts. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact occupies the best position from which to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Additionally, in a case tried by a jury, only a unanimous appellate court can reverse on the ground that the verdict was against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 389, citing Ohio Constitution, Article IV, Section 3(B)(3). The power of the court of appeals to sit as the "thirteenth juror" is limited in order to

preserve the jury's role with respect to issues surrounding the credibility of witnesses and the weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387, 389.

{¶92} It was not incredible to believe Appellant set the vehicle on fire after the shooting with a purpose to conceal objects related to or used in the shooting whose discovery by police would have assisted their investigation. When more than one competing interpretation of the evidence is available and the one chosen by the jury is not unbelievable, we do not choose which theory we believe is more credible and impose our view over that of the jury. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Reviewing the entire record, weighing the evidence and all reasonable inferences, considering the credibility of witnesses, and determining whether, in resolving conflicts in the evidence, we do not find the jury clearly lost its way in convicting Appellant of tampering with evidence. There is no indication the jury created a manifest miscarriage of justice or lost its way in weighing the evidence and concluding that Appellant set fire to the vehicle, knowing an investigation was starting (on a shooting), with purpose to alter or destroy something (the clothes and car used by the shooter during the shooting) so as to impair its value or availability as evidence in the investigation. This assignment of error is overruled.

{¶93} The trial court's judgment is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

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

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

NOTICE TO COUNSEL

This document constitutes a final judgment entry.