[Cite as *State v. Hopkins*, 2021-Ohio-4632.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

STEPHON HOPKINS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0054

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 19 CR 377

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera,* Assistant Chief, Criminal Division, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Louis M. DeFabio, 4822 Market Street, Suite 220, Youngstown, Ohio 44512 for Defendant-Appellant.

Dated: December 15, 2021

Robb, J.

{¶1} Defendant-Appellant Stephon Hopkins appeals his convictions in the Mahoning County Common Pleas Court after a jury found him guilty of murder with a firearm specification and a judge found him guilty of having a weapon while under disability. He raises issues with: the denial of his motion to suppress an identification provided by a witness who was at the gathering before the shooting; the mid-trial removal of a juror for illness; the admissibility of a detective's testimony identifying Appellant from a surveillance video which recorded the shooter as he fired a gun toward the victim's position; the admissibility of testimony by two detectives disclosing they each received a tip providing the names of the suspects; sufficiency of the evidence; and weight of the evidence. For the following reasons, these arguments are overruled, and Appellant's convictions are affirmed.

STATEMENT OF THE CASE

{¶2} Near midnight as June 18 turned to June 19 in 2018, Brandon Wylie was shot multiple times on the grounds of the Plazaview Apartments in Youngstown, Ohio. His body rested face up in the grass under a surveillance camera. Two females told the first-responding officer they were at their car when they saw two males with handguns, heard the shots, and then saw the two males run toward the entrance of the apartment complex at McGuffey Road. (Tr. 492).

{¶3} The police reviewed video from multiple cameras at the apartment complex. The victim arrived at the street entrance to the apartment complex on foot at 11:52 p.m. on the video's time which was approximately ten minutes behind real time. (Tr. 730). The victim walked north on Plazaview Court. At the same time, a small gathering could be seen outside of Building L. At 11:54, the victim turned into the parking lot of Building L. Two males from the gathering approached the victim's location in the parking lot.

{¶4} After viewing video collected from multiple cameras, a detective identified these two males. He said Appellant was the one wearing a white shirt and dark shorts with a large logo covering much of the left leg and Brian Donlow was the one wearing a

dark shirt. (A female remained near a car in front of the building, and a different male in a white shirt can be seen with her.)

{¶5} After Appellant and Donlow approached the victim, the three walked in the direction from which the victim approached; Appellant led the way while Donlow trailed behind. As they turned the corner from the parking lot and walked south onto Plazaview Court, they passed close by the camera facing the office at 11:55 (from the time marks of 18 to 36 seconds).

{¶6} After they reached the playground area, the video from the camera above the victim's body shows the person identified as Appellant enter the scene while shooting at 11:55 (at the 48 second mark). He was facing the location of the camera and walking south up the street while firing multiple times with his left hand toward the east side of the road where the victim's body was found. (Tr. 736). The victim was under the camera viewing area.

{¶7} As Appellant stopped firing, the person identified as Donlow ran into the frame toward Appellant from the north. Donlow had a black object in his hand and approached the area where the victim's body was found. Appellant and Donlow then walked south down the sidewalk together. After an approaching car passed, they ran toward the complex exit, turned east at McGuffey Road at 11:56, and ran along the front of the complex. (Tr. 738).

{¶8} Immediately after the first shot was captured on one camera, a different camera showed the female in front of Building L flee into the apartment while two individuals in white T-shirts in front of her building ran in the opposite direction from the location of the shooting and cut north between two buildings. A different camera with a back view of Building L showed these two individuals continuing to run in the opposite direction of the individuals identified as Appellant and Donlow. (Tr. 739-740).

{¶9} Then, at 11:58, two individuals in white shirts walked south past the office camera toward the playground and the victim’s body. A detective identified them as Lorice Moore and Chasmar Ford. Moore approached the location of the victim’s body under the camera and turned away with both hands on his head as if in distress. They walked up Plazaview Court and were picked up by a vehicle at midnight before they reached McGuffey Road.

{¶10} The police found fourteen shell casings in two distinct areas on the roadway of Plazaview Court. (Tr. 607); (St. Ex. 36). In the northern location, they found eight 9mm shell casings, which testing showed were all fired from the same firearm. (Tr. 676). This location was near where the victim dropped a .32 caliber revolver and cigarettes in the road (north of the victim's final resting place). In the southern location, more parallel to the victim's body, they found six .45 caliber shell casings, which testing showed were fired from the same firearm. (Tr. 677).

{¶11} The victim suffered nine gunshot wounds with the following entry points and paths: (1) right clavicle, upper lung; (2) center chest, through the heart and fatal within seconds; (3) lower right abdomen, from right to left; (4) abdomen, left to right and up, lodging in fat by the colon; (5) skin of abdomen pierced by fragment without penetrating into abdomen; (6) lower left abdomen, lethal wound hitting the largest vessel in the body near the bowel; (7) back of thigh, lodging in the body after an upward path from right to left; (8) right knee at a downward path, passing behind the kneecap; and (9) left inner lower leg, passing straight through with no angle. (Tr. 530-545).

{¶12} The victim's revolver contained three live .32 caliber rounds, which were in position to be fired next, and no empty casings in the other three spots in the chamber, indicating the victim fired no shots (as a revolver does not eject its casings). (Tr. 623, 654, 869). In addition, testing showed none of the recovered casings or slugs were fired by the revolver. (Tr. 679).

{¶13} The victim had a wallet and phone in his pocket and blister packs of Tramadol (an opioid) in his sock. (Tr. 620, 626-627). The victim's phone showed he communicated with Lorice Moore a few times that evening. There were phone calls, and then, at 11:27 p.m., the victim texted, “Tell dude I had to go somewhere.” (Tr. 707, 784, 801).

{¶14} On May 16, 2019, Appellant was indicted for aggravated murder (prior calculation and design) and an alternative count of murder (purposely causing the death), both with an accompanying firearm specification. He was also charged with having a weapon while under disability. Co-defendant Brian Donlow was similarly charged. The case was jointly tried to a jury.

{¶15} The victim's father testified the victim helped him move an appliance from a relative's house on June 18, 2018 and they did not get home until nearly 11:00 p.m. The Plazaview apartment complex was a quarter of a mile from their house. The victim's father did not know the defendants. (Tr. 416-422).

{¶16} Witness A testified she was spending time outside of the apartment of her female friend on June 18, 2018. Her other female friend, Witness B, was present as well. Witness A named the four males who arrived later: Lorice Moore, Chasmar Ford, Brian Donlow, and Appellant Stephon Hopkins. (Tr. 452). Witness A said she took orders from each person for drinks and snacks and drove to a convenience store, bringing Witness B with her. (Tr. 454). She identified Appellant and Donlow at trial and said they were at the gathering when she left just minutes before the shooting. (Tr. 457). The victim had not arrived by the time she left for the store. (Tr. 456).

{¶17} Approximately ten minutes later, while driving back from the store, Witness A picked up Moore and Ford on McGuffey Road in front of the apartment complex (as confirmed on video) and dropped them off a few blocks away near the housing development of Victory Estates. (Tr. 455-456, 462-463). She called the police the next day to report who was at the gathering in front of Building L. (Tr. 821-822). Moore and Ford were her friends, and she knew Appellant as Chip. (Tr. 460, 474). She did not know Donlow's name until she heard it on the news. (Tr. 466).

{¶18} Witness B confirmed the location of the gathering outside of the friend's apartment and said four males were present: Moore, Ford, Appellant, and one other male. She claimed she did not see the fourth male's face but said he arrived with the other males who knew him. (Tr. 426-427). She was pregnant with Moore's child at the time of the gathering and had attended school with Ford. (Tr. 439-440, 862). She testified Appellant was wearing a white T-shirt and had “a little afro.” (Tr. 432).

{¶19} Witness B said while she was at the store with Witness A, the female friend they were visiting called and said not to come back to the apartment complex. (Tr. 428). Witness B confirmed they collected Moore and Ford at the corner of McGuffey Road and Plazaview Court and dropped them off at the corner by Victory Estates; they told her someone had been killed. (Tr. 429).

{¶20} Detective Zubal testified he viewed photographs Appellant posted on Facebook. He said Appellant was wearing Nike shorts which matched those worn by the shooter in the video. (Tr. 757).

{¶21} Detective Bobovnyik said the shooter was wearing a white T-shirt and shorts with an unusual look, matching those worn by Appellant in his Facebook post. (Tr. 815, 828). He said Appellant appeared to be left-handed just like the shooter in the white T-shirt. (Tr. 829). He pointed out Appellant and Donlow had similar characteristics with the individuals in the surveillance video from the scene of the shooting, while Moore and Ford did not. (Tr. 827).

{¶22} Detective Lambert was not assigned to the case but watched the surveillance video. He testified he was familiar with the four males reported to be at the gathering before the victim arrived. (Tr. 785-796). He identified Appellant as the person in the white T-shirt seen firing a gun. (Tr. 795-796). He identified Donlow as the individual who followed behind the victim in the video facing the office and who approached the body after Appellant stopped shooting as captured in the video from the camera above the body. (Tr. 797). Detective Lambert said Moore and Ford did not look similar to the two suspects; Moore is muscular, lean, and older, and Ford is shorter, stockier, and darker with sideburns and a beard. (Tr. 796-799). Photographs of the four men were introduced into evidence. (Tr. 805-806, 874-875).

{¶23} Appellant's sister testified as an alibi witness. She claimed Appellant was home with her on the night of the shooting, he did not leave their home, and she was awake until 3:00 a.m. (Tr. 912, 918). She added that Donlow, who was a family member, was present at her house as well. (Tr. 912, 931). Donlow's sister testified Donlow was at her apartment watching television with her on the night of the shooting. She said she went to bed before midnight but noticed he was still asleep on her couch at 12:30 a.m. (Tr. 949-954).

{¶24} The jury found Appellant and Donlow not guilty of aggravated murder but guilty of murder with a firearm specification. The court found each defendant guilty of having a weapon while under disability; they both waived a jury trial on this offense. The court sentenced Appellant to fifteen years to life for murder plus three years for the firearm specification and a consecutive three-year sentence for the offense of having a weapon

while under disability, for a total sentence of twenty-one years to life in prison. Appellant filed a timely notice of appeal from the April 22, 2020 sentencing entry.

ASSIGNMENT OF ERROR ONE: SINGLE PHOTO IDENTIFICATION

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

"The trial court erred in overruling his Motion To Suppress and permitting the identification testimony of [Witness B]."

{¶26} On November 7, 2019, Appellant filed a motion to suppress seeking to exclude the identification of Appellant by Witness B. He argued the identification procedure used by the police on June 21, 2018 was improperly suggestive and the identification was unreliable.[1] A suppression hearing was held on January 22, 2020. Detective Bobovnyik testified he showed Witness B one photograph of Appellant and she confirmed this was the Stephon Hopkins she named as being present before the shooting. The court overruled Appellant's motion. (2/6/20 J.E.).

{¶27} Because the detective showed only Appellant's photograph to Witness B rather than a lineup using the procedure in R.C. 2933.83, Appellant contends the single photograph was unduly suggestive and the resulting identification was unreliable. Although the detective testified Witness B said she knew Appellant prior to the identification, Appellant complains the detective did not provide specifics as to how Witness B knew Appellant. He concludes the in-court identification of Appellant by Witness B was tainted by the detective's pretrial identification procedure.

{¶28} R.C. 2933.83 provides procedures for a photographic lineup such as: a blind or blinded administrator; a folder system; filler photographs resembling the description of the suspect; blank photographs; instructions; and documentation. As appellant acknowledges, "a failure to comply with R.C. 2933.83 does not require suppression of the pretrial identification." *State v. McCrary*, 7th Dist. Mahoning No. 12 MA 135, 2014-Ohio-1468, ¶ 50. The statute does not require exclusion for failure to comply but instructs the court to consider the failure to comply in addressing suppression

[1] Appellant previously filed a motion to suppress the identification of a different witness, but that October 22, 2019 motion was conceded to be moot when the state said that witness would not be presented at trial. (Supp.Tr. 50-51).

and to admit the failure into evidence at trial. *Id.* at ¶ 51. We apply the two-prong test for evaluating the constitutionality of a pretrial identification. *Id.* at ¶ 52.

{¶29} "When a witness has been confronted with a suspect before trial, due process requires a court to suppress her identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt *and* the identification was unreliable under all the circumstances." *State v. Murphy*, 91 Ohio St.3d 516, 534, 747 N.E.2d 765 (2001) (adding emphasis), quoting *State v. Waddy*, 63 Ohio St.3d 424, 438, 588 N.E.2d 819 (1992). "Thus, if the presentation was not unduly suggestive, the court need not proceed any further in the test, and likewise, if the court finds the identification reliable, it need not consider suggestiveness." *McCrary*, 7th Dist. No. 12 MA 135 at ¶ 53, citing *State v. Gross*, 97 Ohio St.3d 121, 2002–Ohio–5524, 776 N.E.2d 1061, ¶ 19 and *Murphy*, 91 Ohio St.3d at 534.

{¶30} In a First District case cited by the state, a witness named the shooter to police ten days after a shooting and said she knew him from the apartment complex. She confirmed she was referring to the defendant when detectives showed her a single photograph. The court held: "Although one-photograph identification procedures are generally suggestive, we conclude that there was not a substantial likelihood of irreparable misidentification in this case because [the witness] had known [the defendant] before the shooting and identified him by name before she saw his photograph." *State v. Levingston*, 1st Dist. Hamilton No. C-090235, 2011-Ohio-1665, ¶ 9.

{¶31} In an earlier case, the court held that even if the one-photo procedure used by the detective was suggestive, the identification was reliable because: "The witnesses identified [the defendant] by name as someone they knew before being shown the photograph, so there was an independent basis for their identification separate from the photo. * * * The photo was used to confirm [the defendant's] identity, not to identify an unknown person." *State v. Huff*, 145 Ohio App.3d 555, 564, 763 N.E.2d 695 (1st Dist.2001). *See also State v. Ross*, 7th Dist. Mahoning No. 96 C.A. 247 (Oct. 12, 1999) (reliability is bolstered where the witness knew and named the perpetrator before the officer displayed a single photograph to confirm identity).

{¶32} At the suppression hearing in the case at bar, the detective testified he visited Witness B less than three days after the shooting. She named everyone who was

present at the gathering with her in the minutes before the shooting, including Appellant. She said she knew Appellant personally. (Tr. 7-8). She identified Appellant by first and last name and by nickname. The detective testified Witness B indicated "she's known him for some time, that she's known him from seeing him around." (Tr. 9). Appellant was "good friends with her fiancé" (who was one of the other males she named as being present at the gathering). (Tr. 8, 41). Before being shown the photograph, Witness B indicated she could readily recognize Appellant. (Tr. 9, 41). She also described him as a black male in his early 20's with a fade haircut wearing a white shirt and black shorts. (Tr. 39).

{¶33} After Witness B made these statements, the detective showed her Appellant's photograph, which he retrieved from the state database (OHLEG). (Tr. 9-10). She confirmed this was the person about whom she was speaking. (Tr. 10, 22).

{¶34} Applying some common factors on reliability, we point out she had the opportunity to view the suspect at the small gathering where she was spending time socializing with him. Her degree of attention is not in question as she already knew him before the gathering. He was friends with her fiancé, and she knew him "for some time." She provided his first and last name and his nickname. Her physical description was accurate. Her level of certainty was high as she could readily recognize this person she named and then did so. And, the length of time between the event and the identification was short. *See Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) (identification reliability factors).

{¶35} Under the totality of the circumstances, the identification by Witness B was not unreliable, and her in-court identification was not tainted. This assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: JUROR ILLNESS

{¶36} Appellant's second assignment of error alleges:

"The trial court abused its discretion in discharging a juror during the middle of a trial, based upon the juror's apparent illness, without providing Appellant notice of the discharge and/or an opportunity to inquire or be heard regarding the discharge."

{¶37} Jury selection took place on February 18, 2020; opening statements began the next morning. On February 20, one witness continued testifying. After less than 25

pages in the morning's transcript, the witness finished and the court asked to see counsel. (Tr. 662). After a brief recess, the court announced to the courtroom: "Obviously Juror Number 13 was not feeling well. [The bailiff] gave me the note indicating he was sick. I went back and checked on him. He was not doing well. He said he would try to come back in and make it if he could."

{¶38} The judge then explained he excused the juror for the juror's own sake (he worried about the juror as he was not doing well) and for the sake of the other jurors (he did not want anyone else to get sick on the jury and believed a concern about getting sick would be weighing on the other jurors' minds if the sick juror remained). (Tr. 662). The court replaced the juror with an alternate.

{¶39} After two more witnesses testified, the judge pointed out they had agreed to wait until the next break to put Appellant's objections on the record as to the removal of the juror. (Tr. 715-716). Counsel complained he did not have an opportunity to ask the juror about his ability to remain on the jury. (Tr. 716).

{¶40} The judge disclosed: a break was called after the juror indicated to the bailiff during trial that he was sick and needed to use the restroom; the other jurors remained in the courtroom while the judge and the bailiff went to the juror room and found the juror "in the restroom and he was ill"; when the juror exited the restroom, the judge asked how he was feeling; the juror indicated he "still felt queasy"; the juror was not sure if he could make it through trial; and the juror predicted he "would know better around lunchtime." (Tr. 716-717).

{¶41} The judge again justified his decision to dismiss the juror without hearing from counsel by explaining: "the juror was ill and keeping him on the jury would impose a hardship on him"; "I did not know if he would make it through much more of the trial or if he would become even more sick"; "for the safety of the jurors. I did not want them worrying about whether they would become ill, and I didn't want them to become ill from his presence"; and the alternate was questioned and deemed appropriate in voir dire. (Tr. 717-718).

{¶42} The prosecutor pointed out the juror "left the courtroom in an expedited fashion and did not appear to be well" and "it seemed as though he was extremely ill and needed to get out of here quickly." (Tr. 718). The judge observed: "Without going into

too much graphic detail, when I went back into the jury room he was ill. He was evidencing actions of illness." (Tr. 719).

{¶43} On appeal, Appellant contends the court abused its discretion in removing the juror without providing counsel notice and opportunity to question the juror before the removal. He complains the court discharged the juror for "an undisclosed illness." He notes the removal occurred on February 20, 2020 and claims this was prior to the Covid-19 concerns.

{¶44} "Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors." Crim.R. 24(G). "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." *Id.*

{¶45} A statute specifically covers the situation where a juror becomes sick. "If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged." R.C. 2945.29.

{¶46} These provisions do not require pre-removal notice and opportunity to question a sick juror. *State v. Setty*, 4th Dist. Adams No. 20CA1106, 2020-Ohio-4318, ¶ 30; *State v. Shields*, 15 Ohio App.3d 112, 119, 472 N.E.2d 1110 (8th Dist.1984). *See also State v. McCrary*, 4th Dist. Ross No. 16CA3568, 2017-Ohio-8701, ¶ 27 (removal during deliberations). The trial court's decision to substitute an alternate juror for a reportedly ill juror is within the court's discretion and does not require a showing of manifest necessity. *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996).

{¶47} Contrary to Appellant's complaint, the court disclosed the illness to the parties to the extent possible in a respectful and non-graphic manner. *See id.* (where the court merely disclosed the juror was in the emergency room). Having to run out of the courtroom to the restroom would be considered an emergency. The judge could reasonably conclude it would be irresponsible to allow the juror to be placed in the same

position of fleeing to the restroom again and to allow the other jurors and courtroom participants to be further exposed to an obviously ill juror and to cause worry about the risk of contagion. Furthermore, contrary to Appellant's notation, there were worldwide Covid-19 concerns at the time of the juror's removal.[2]

{¶48} Furthermore, Appellant's argument does not indicate prejudice from the juror's removal for illness. *See Owens*, 112 Ohio App.3d at 337 ("the fact that the substitution occurred on the second day of trial and prior to deliberations reinforces our view that appellant suffered no prejudice as a result of the trial court's decision"). *See also State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 25 ("an erroneous excusal for cause, on grounds other than the venireman's views on capital punishment, is not cognizable error, since a party has no right to have any particular person sit on the jury"). This assignment of error is overruled.

ASSIGNMENT OF ERROR THREE: IDENTIFICATION FROM VIDEO

{¶49} Appellant's third assignment of error provides:

"The trial court abused its discretion in permitting a State's witness to identify the Appellant from a surveillance video."

{¶50} Detective Lambert's testimony identified Appellant as the person leading the victim past the office in one video and then firing a gun at the victim in the subsequent video. The detective identified Donlow as the person following the victim in the first video and then entering the scene immediately after the shots were fired in the next video. Appellant contends the state failed to elicit a sufficient foundation to allow the detective to present his identification opinion from a "blurry" video. Appellant claims the detective did not indicate his opinion was rationally based on his past perceptions and familiarity with Appellant as he failed to specify unique characteristics of Appellant's walk or look and failed to estimate how much time he spent with Appellant in order to substantiate his familiarity with Appellant.

{¶51} "Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier

[2] *See, e.g.,* Head, *The Shape of the Coronavirus News Story* (Sep. 15, 2020) (reviewing the news coverage in the first 100 days), projectinfolit.org/pubs (accessed Sep. 30, 2021); Nakazawa, *Chronology of COVID-19 Cases on the Diamond Princess Cruise Ship* (Mar. 24, 2020) (passengers quarantined in port beginning February 3, 2020), www.ncbi.nlm.nih.gov (accessed Sep. 30, 2021).

of fact." Evid.R. 704. Yet, Appellant points to the rule stating a lay witness's testimony "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Evid.R. 701. As we observed in *Donlow*, Evid.R. 701 was enacted because "the practical possibility of distinguishing between fact and opinion proved to be elusive, if not impossible to draw * * *." *State v. McKee*, 91 Ohio St.3d 292, 296, 744 N.E.2d 737 (2001) (noting a witness could previously only testify to facts, not opinions). The rule has been applied to testimony about the "identity of a person" and "a person's health, age, or appearance." *Id.* (and also allows a non-expert to present a lay opinion about a collection of facts even if it is grounded in experience or specialized knowledge).

{¶52} "We must review the trial court's decision whether to admit evidence under Evid.R. 701 according to an abuse-of-discretion standard, which has been defined as connoting 'more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court'." *City of Urbana ex rel. Newlin v. Downing*, 43 Ohio St.3d 109, 113, 539 N.E.2d 140 (1989). In reviewing for an abuse of discretion, a trial court's "decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo" would have handled the issue differently. *AAAA Enterprises, Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶53} The trial court cited a case where: a video showed the suspect arriving at and leaving the scene of a robbery; the details of the suspect's face were blurry; and the detective was permitted to provide a lay opinion identifying the defendant as the suspect after stating he had opportunities to personally observe the defendant's appearance, gait, and posture over a period of two years. The Second District found no error under Evid.R. 701 and concluded "the jury could have reasonably determined for itself whether [the detective's] identification of Coots as the perpetrator was reasonable under the circumstances." *State v. Coots*, 2015-Ohio-126, 27 N.E.3d 47, ¶ 14, 17-19 (2d Dist.).

{¶54} Appellant distinguishes the Tenth District's *Bond* case which upheld the trial court's decision to admit the identification from a "less than good quality" video by the

defendant's probation officer and by the detective assigned to the case. The probation officer knew the defendant for years and considered the facial features and build of the suspect in the video; the detective said he recognized the defendant in the video due to his walk, gestures, build, and hairline (but only met the defendant during an interview after the probation officer identified him). *See State v. Bond*, 10th Dist. Franklin No. 11AP-403, 2011-Ohio-6828, ¶ 6, 8-9, 13, 17-18.

{¶55} Here, the detective stated through the course of his years on the police force, he has come into contact with various local individuals, including at public functions and during hours of interviews. (Tr. 785). He said he was familiar with Appellant and Donlow and identified them from the stand. (Tr. 790). He said he previously spoke with and watched each of them and answered in the affirmative when asked if he was "familiar with the way these men carry themselves, the way they walk, things of that nature?" (Tr. 790-791).

{¶56} As the video was played, the detective identified Appellant as the person who can be seen shooting in the video and said he recognized him from his hairstyle, the way he walked, and his clothing (the shorts were elsewhere said to have an unusual logo matching the ones Appellant wore in his Facebook post). (Tr. 793, 795). He described Appellant's hairstyle which "kind of looked like a nail head, you know, taller." (Tr. 794). The detective then identified Donlow as the individual with the shooter in the video. (Tr. 794, 796). He answered affirmatively when asked if his identifications were consistent with "the way they carry themselves" and "the way they walk." (Tr. 794-795).

{¶57} The detective also pointed out the males he was identifying "all" had different body builds. (Tr. 798). He was familiar with Lorice Moore and Chasmar Ford and identified photographs of these men. (Tr. 786-788, 805-806). When asked if there was "any way" either of the suspects in the video could be Moore or Ford, the detective said: "No. That's Stephon Hopkins firing the gun, and that's Brian Donlow coming up after entering the path." (Tr. 796-797). He identified Moore from a separate camera's video, noting he has spent "a lot of time" with Moore and could tell it was him by his build, movements, and face shape. (Tr. 797). He noted Moore was lean, muscular, and older while Ford was darker, shorter, and stockier than the other three males (and had "a lot" of facial hair and sideburns at the time). (Tr. 798-799).

{¶58} As emphasized in *Donlow*, before Detective Lambert testified, there was an off-the-record discussion about the detective's identification from the video. *State v. Donlow*, 7th Dist. Mahoning No. 20 MA 0049, 2021-Ohio-3019, ¶ 65. After returning to the record, the court noted the detective had prior interaction with the defendants due to alleged criminal violations. To avoid issues with the defense claiming prejudice from an officer revealing how he knew the defendants, the court cautioned the state not to elicit statements from the detective on his knowledge of the defendants due to their prior criminal activities. (Tr. 749-750, 752). The court noted the defense should also exercise caution in questioning the detective's familiarity with the defendants to avoid opening a door for the state to question him further on specifics. (Tr. 750).

{¶59} Defense counsel said he was objecting because Evid.R. 701 required the detective to establish a foundation for his knowledge by testifying on his familiarity with the defendants but the detective could not delve into the basis for the knowledge without prejudicing the defense. (Tr. 751). The court opined Evid.R. 701 only required enough of a foundation to show the witness can adequately identify someone because of prior contact. The court stated the remaining concern went to the weight of the evidence and the jury would view the video to ascertain "how well he can then identify them" from the video. (Tr. 752-753).

{¶60} As observed in *Donlow*, the defense objection appeared to be an attempted strategy to prohibit the state from eliciting the detective's knowledge of Appellant due to the implications of Appellant's prior involvement with the detective and to then claim the defense's success on this ruling meant the state could not satisfy the foundation under Evid.R. 701 thereby precluding all testimony from the detective identifying Appellant. *Donlow*, 7th Dist. No. 20 MA 0049 at ¶ 67. We noted the discussion occurred at a break during a different detective's testimony and an objection was not made later during the relevant detective's testimony. Regardless, we rejected the argument about the detective's identification from the video:

> The record demonstrates the detective could have gone into greater detail for the jury about his various opportunities to study Appellant over a period of time; however, the court prohibited the detective from doing so at the urging of the defense in order to avoid telling the jury about the prior criminal

> investigations the detective conducted as to Appellant. The court's handling of the situation was not arbitrary or unconscionable, and there was a sound reasoning process behind the decision. The detective said he was familiar with Appellant, Donlow, and other individuals from prior interactions where he spoke to them and observed them. He said he recognized them from their body build, walk, and the way they carried themselves. He spoke of hairstyles and face shapes as to some of the males. And, he explained how Moore and Ford could be distinguished from Appellant and Donlow.

Donlow, 7th Dist. No. 20 MA 0049 at ¶ 69. We concluded it was not unreasonable to find the detective's identification testimony was rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. *Id.*, citing Evid.R. 701. This left the credibility of the detective for the jury, as discussed in the final assignment of error.

{¶61} We also noted the detective testified to his extensive experience in visually identifying people from his encounters with them and then watching surveillance videos; he was often sought out by other officers in this endeavor. (Tr. 777-779). "Testimony offered by a police officer is often considered lay testimony even though based on experience or specialized knowledge where the officer is using a reasoning process familiar in everyday life (as opposed to a reasoning process mastered by a specialist in the field to provide an expert opinion)." *Donlow*, 7th Dist. No. 20 MA 0049 at ¶ 70, citing *State v. Baker*, 2020-Ohio-7023, 166 N.E.3d 601, ¶ 34-35 (7th Dist.) (detective testifying on cell phone location data based on a map he generated), citing *State v. Johnson*, 7th Dist. Jefferson No. 13 JE 5, 2014-Ohio-1226, ¶ 56 (allowing a police officer to testify as a lay witness or as an expert on gang tattoos) and *McKee*, 91 Ohio St.3d at 297 (drug user can offer lay opinion identifying drugs based on experience or specialized knowledge even though not an expert).

{¶62} Based on the foregoing analysis and our holding in *Donlow*, this assignment of error is overruled.

ASSIGNMENT OF ERROR FOUR: ADMISSIBILITY OF TIPS

{¶63} Appellant's fourth assignment of error provides:

"The admission of hearsay testimony relating to the Appellant being a 'suspect' in the police investigation violated Appellant's constitutional right to confront witnesses and right to a fair trial as guaranteed by the United States and Ohio Constitution."

{¶64} Detective Zubal testified about the surveillance video he was involved in downloading and was then asked what else he did to assist Detective Bobovnyik in the investigation. Over objection, he disclosed his receipt of an anonymous voicemail from a female caller identifying Appellant and Donlow as suspects. (Tr. 740-741). He then explained his Facebook search and discovery of photographs of Appellant. (Tr. 756-766).

{¶65} Detective Bobovnyik testified over objection to obtaining the names of Appellant and Donlow as suspects from the victim's family the day after the shooting. (Tr. 823-824). This disclosure prompted him to enter the names in the state's database (OHLEG) and print photographs for his file. (Tr. 824-825). Witness B was shown Appellant's photograph to confirm this was the Stephon Hopkins she was with at the gathering the night of the shooting.

{¶66} Appellant points out the court had already sustained an objection prohibiting the victim's father from testifying to the names of suspects he received and provided to the police. (Tr. 421). Appellant suggests it was inconsistent to allow the detective to present the names after ruling the victim's father could not. Yet, the trial court explained the rulings were not inconsistent as the court agreed with the state's argument that the testimony by the detectives was offered to show their *next step in the investigation* and not to prove the truth of the matter asserted. (Tr. 746, 856-857).

{¶67} Appellant acknowledges the general law allowing a police officer to present, as nonhearsay, information which caused the officer to engage in various investigation steps. However, Appellant emphasizes the caveat that the information can become hearsay if it connects the defendant to the crime on trial and concludes the testimony on the tips was hearsay (or double hearsay). He concludes the evidence was highly prejudicial because identification was the key issue.

{¶68} The state points out the detectives did not specify what was said by the person who left the anonymous voicemail or what was said by the family member of the victim. The state suggests the use of the word "suspect" in the detectives' testimony was

not incriminating as it did not mean either speaker informed the police Appellant was the shooter.

{¶69} Hearsay is "a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). If the statement was not offered to prove the truth of the matter asserted, then it is not hearsay. The Confrontation Clause applies to testimonial hearsay and "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, ¶ 18, citing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), fn.9. "If testimony qualifies as nonhearsay, it does not implicate the Confrontation Clause." *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 186.

{¶70} "It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed." *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980) (finding the officers' testimony on their receipt of a tip about a gambling operation in the town was not hearsay as it was offered to explain the subsequent investigative activities of the witnesses and was not offered to prove the truth of the matter asserted). Therefore, "[a] law-enforcement officer may testify about a declarant's out-of-court statement for the nonhearsay purpose of explaining the next investigative step." *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 136. *See also State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 117 (the detective's testimony stating the defendant became a suspect in the murder after the police received a tip was nonhearsay).

{¶71} In *Ricks*, the Court ruled: "in order for testimony offered to explain police conduct to be admissible as nonhearsay, the conduct to be explained should be relevant, equivocal, and contemporaneous with the statements; the probative value of statements must not be substantially outweighed by the danger of unfair prejudice; and the statements cannot connect the accused with the crime charged." *Ricks*, 136 Ohio St.3d 356 at ¶ 27 (without criticizing the officer's explanation as to why the officer obtained a

photograph of the defendant or the officer's receipt of information implicating the co-defendant).

{¶72} The *Clinton* Court found the trial court should not have permitted an officer to testify he considered the defendant his suspect based on his interview with *the child rape victim* merely because it showed his next investigative step. *Clinton*, 153 Ohio St.3d 422 at ¶ 135-137. The Court said the officer could have explained how he pursued his investigation without linking the defendant to the rape. *Id.* at ¶ 137, citing *Ricks*, 136 Ohio St.3d 356 at ¶ 51 (French, J., concurring in judgment only, with two other justices agreeing: "It is usually possible to explain the course of an investigation without relating historical aspects of the case, and in most cases, testimony that the officer acted 'upon information received,' or words to that effect, will suffice"), citing 2 McCormick, Evidence, Section 249, 193-195 (7th Ed.2013). Still, the Court found the admission of the officer's testimony about whom the rape victim named as the perpetrator was harmless beyond a reasonable doubt. *Clinton*, 153 Ohio St.3d 422 at ¶ 138.

{¶73} In another case, the Supreme Court found the trial court should not have permitted an officer to testify she heard a missing person was present during a homicide, which prompted the officer to engage in certain activities to locate the missing person. The Court said this went beyond the nonhearsay purpose of explaining why the officer was trying to locate the missing person and supported the state's theory that the defendant killed the missing person because he witnessed the prior murder: "Viewed for its truth, [the officer's] statement connected the two deaths." *McKelton*, 148 Ohio St.3d 261 at ¶ 188-189. However, the Court found the error was harmless beyond a reasonable doubt. *Id.* at ¶ 190.

{¶74} Here, the investigative conduct was relevant, equivocal, and contemporaneous with the tips, and the probative value of the statements was not substantially outweighed by the danger of unfair prejudice. Notably, "evidence against a defendant is meant to be prejudicial; it is only unfair prejudice that concerns the court and only unfair prejudice that can substantially outweigh the probative value." *State v. Smith*, 7th Dist. Belmont No. 15 BE 0064, 2017-Ohio-2708, ¶ 30, quoting *State v. Agee*, 7th Dist. Mahoning No. 12 MA 100, 2013-Ohio-5382, ¶ 40.

{¶75} The statements explained the reason for the next step in the investigation. *See State v. Thompson*, 6th Dist. Lucas No. L-19-1289, 2021-Ohio-1344, ¶ 37 (the officer's statement that the victim said the defendant took her to a second house was offered to explain the progression of the investigation). As for the connection of the defendant to the crime, the part of the statements regarding Donlow did not connect Appellant with the crime.

{¶76} The portion of the statements pointing the police toward investigating Appellant vaguely connected Appellant with the crime charged by disclosing that two people reported to the police he was a "suspect." The detectives' statements were not much more detailed or connective than a statement such as: "upon information received, [I retrieved photographs of the defendant]" (which was language suggested by three justices in *Ricks* and seemingly cited as acceptable by the *Clinton* court). *Donlow*, 7th Dist. No. 20 MA 0049 at ¶ 82. *See also State v. Watts*, 1st Dist. Hamilton No. C-180545, 2019-Ohio-4856, ¶ 11 (where the officer testified to relying on a witness statement about an altercation in deciding to charge the defendant with assault rather than the other injured party).

{¶77} Even if the trial court should have excluded the testimony on the names of suspects from tips under *Ricks* utilizing a theory that they tended to connect Appellant to the crime charged, the errors would be individually and cumulatively harmless. *Donlow*, 7th Dist. No. 20 MA 0049 at ¶ 83-88. A defendant does not have a constitutional right to an error-free or perfect trial. *State v. Hill*, 75 Ohio St.3d 195, 212, 661 N.E.2d 1068 (1996), citing *United States v. Hasting*, 461 U.S. 499, 508–509, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

{¶78} "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). *See also* Evid.R. 103(A). "[E]vidence errors that are prejudicial because they improperly affect the verdict will be excised from the record with the remaining evidence weighed to see if there is evidence beyond a reasonable doubt of the appellant's guilt * * *." *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 33 (same harmless error test for constitutional and non-constitutional error). Excising the contested evidence to perform an alternative analysis, we rejected a similar argument in *Donlow*.

{¶79} We refer to our Statement of the Case and offer a brief review here. The testimony of Witness B identified the four males present at the gathering minutes before the shooting, including Appellant. Witness A identified Appellant as one of the four males present at the gathering as well. A video showed two of the males leave the gathering and walk up to the victim as he arrived. Text messages to Moore indicated the victim's arrival was expected but delayed. The view of the person identified as Appellant was fairly clear on the video in some of the multiple camera angles. The detective identified Appellant based on his familiarity with him. The detective said Appellant was the person captured on one video leading the victim toward the playground and on another video shooting multiple rounds in victim's direction while facing the camera (corresponding to the position in the street where the six .45 caliber casings were collected). The detective also identified the other two males who were seen leaving the apartment complex separate from and after Appellant and Donlow fled; he confirmed they were not the two males who fled the scene together immediately after the shooting.

{¶80} We conclude the detective's disclosure that he received an anonymous tip leading him to use Appellant's name to search for his photograph online would have been harmless beyond a reasonable doubt under the totality of the circumstances (if the disclosure had been labeled an error abov*e)*. Likewise, we conclude the other detective's disclosure that a member of the victim's family provided Appellant's name as a suspect and led the detective to investigate Appellant would have been harmless beyond a reasonable doubt even (if the disclosure had been labeled an error above). This assignment of error is overruled.

ASSIGNMENT OF ERROR FIVE: SUFFICIENCY & WEIGHT

{¶81} Appellant's final assignment of error alleges:

"The jury's verdict of Guilty as to the Murder charge, and the trial court's verdict of guilt as to the Weapon charge, were not supported by sufficient evidence and were against the manifest weight of the evidence."

{¶82} First, Appellant concludes the trial court should have granted his motion for acquittal as the state failed to set forth sufficient evidence showing he was the person seen shooting a gun on the video to support the murder conviction and to find he possessed a weapon while under disability a conviction. Appellant points out the two

female witnesses from the gathering did not testify to seeing him possess a gun and they left the apartment complex before the shooting. He notes these witnesses were not asked to identify him from the video. Appellant says the detective's identification of him was dubious as the video was blurry. He points out there was no forensic evidence connecting him to the scene.

{¶83} Murder has the elements of purposely causing the victim's death. R.C. 2903.02(A). "A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A). The specific intent to cause death "may be presumed where the natural and probable consequence of the wrongful act done is to produce death." *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 53. "The intent of an accused person dwells in his mind. Not being ascertainable by the exercise of any or all of the senses, it can never be proved by the direct testimony of a third person, and it need not be." *In re Washington*, 81 Ohio St.3d 337, 340, 691 N.E.2d 285 (1998).

{¶84} The standard for reviewing the sufficiency of the evidence to support a criminal conviction on appeal is the same as the standard used to review the denial of a motion for acquittal. *See State v. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996); Crim.R. 29(A) (motion for judgment of acquittal based on insufficient evidence). 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). If a court finds a conviction was not supported by sufficient evidence, then a retrial is barred. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 16-20. Yet, erroneously admitted evidence can be considered in the sufficiency evaluation because the remedy for the erroneous admission of prejudicial evidence is a new trial. *See id.*

{¶85} In reviewing the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution to ascertain whether any 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). The 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).

{¶86} Sufficiency involves the state's burden of production rather than its burden of persuasion. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). An evaluation of witness credibility is not involved in a sufficiency review as the question is whether the evidence is sufficient if it is 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).

{¶87} To recap from our Statement of the Case above, the four males at the gathering before the victim arrived were identified by the two female witnesses who were at the gathering but who left to get snacks shortly before the shooting. From the communications between one of the males (Moore) and the victim, it could be gleaned the victim's arrival was expected. From the content of a text message, it appeared one of the other males was becoming impatient with the victim. The video showed the victim arriving and then leaving the vicinity of the gathering with individuals identified as Appellant and Donlow (who were related to each other).

{¶88} The detective identified Appellant and Donlow from the video. The detective separately identified the other two males from the gathering (as Moore and Ford) and noted how they looked different than Appellant and Donlow. Photographs of the males at the gathering were presented, including a photograph of Appellant wearing similar shorts as the shooter.

{¶89} As Appellant led the victim around a corner, Donlow followed behind the victim. Within seconds, the person identified as Appellant can be seen on another video firing a gun multiple time towards the victim's position. Appellant was facing the camera with his arm extended and walking as he fired. The person identified as Donlow approached Appellant as he finished shooting as if they were part of a trusting team and then approaching the area of the victim's body beneath the camera (at which point the video does not show what he was doing). Appellant and Donlow then fled the scene on foot together.

{¶90} The evidence indicated the victim fired no shots: his double action .32 caliber revolver had three live rounds in the firing position, contained no fired shell casings

in the chambers, and did not eject fired casings (unlike a semi-automatic firearm which does eject the casings). Also, the casings at the scene were of a different caliber than the victim's revolver. The fired shell casings were found in two distinct areas, and each collection of casings was associated with a different caliber of bullet. The location of Hopkins on the shooting video was consistent with where the six .45 caliber casings were found (while the location of the 9mm casings was consistent with Donlow's last position). The victim suffered nine gunshot wounds from upper chest to ankle with diverse trajectories.

{¶91} Appellant makes no argument as to whether the person seen shooting in the video intended to kill the victim, did kill the victim, or participated in the criminal intent of the other shooter (whereas Donlow emphasized he was not caught on camera firing a gun). Still, we note a person is complicit if, acting with the kind of culpability required for the commission of an offense, he aids or abets another in committing the offense. R.C. 2923.03(A)(2). Aiding and abetting exists where the evidence shows "that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal" and participation in criminal intent may be inferred from all the circumstances, including presence, companionship and conduct before and after the offense. *State v. Johnson*, 93 Ohio St.3d 240, 245, 754 N.E.2d 796 (2001).

{¶92} The detective testified the shooter was Appellant based on his experience with Appellant in the past. His believability is not a sufficiency question. For a sufficiency review, the question is merely whether "any" rational juror could have found the contested element satisfied beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998), quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Viewing the evidence and all rational inferences in the light most favorable to the prosecution, a rational juror could find the elements proven beyond a reasonable doubt. This argument is overruled.

{¶93} Within this assignment of error, Appellant also contends the jury verdict was contrary to the manifest weight of the evidence. 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." *Thompkins*, 78 Ohio St.3d at 387. Although the

effect of the evidence in inducing belief is evaluated, weight of the evidence is not a question of mathematics. *Id.* 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).

{¶94} When a defendant claims the 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. Although only two of the three appellate judges on the panel must vote to reverse a conviction on the grounds of sufficiency of the evidence, the situation is different when a defendant asks for reversal of a jury verdict on weight of the evidence grounds. Where a case was tried by a jury, only a unanimous appellate court can reverse on manifest weight of the evidence grounds. *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 primary function of weighing the evidence. *Id.*

{¶95} Witnesses placed Appellant at the gathering in the minutes before the shooting. The detective identified the shooter seen on the video as Appellant. The detective had the opportunity to view multiple camera angles from various locations. He said he recognized Appellant by the hairstyle, build, and the way he walked and carried himself. He described the hairstyle. *See* Assignment 3, supra. The shorts Appellant wore in a Facebook post matched those he wore during the shooting. And, Appellant appeared easier to recognize in the video than Donlow.

{¶96} We upheld the jury verdict in the jointly-tried *Donlow* case when reviewing the weight of the evidence regarding the detective's identification of Appellant's co-defendant from the video. *Donlow*, 7th Dist. No. 20 MA 0049 at ¶ 51, 44. "Whether Detective Lambert was as familiar with Appellant as he claimed was a matter related to his credibility." *Id.* at ¶ 51, citing *State v. Reading*, 5th Dist. Licking No. 07-CA-83, 2008-Ohio-2748, ¶ 26 (where the witness identified the defendant as the suspect on the video,

the court pointed out the jury had the opportunity to view the surveillance video as well as assess the credibility of the witness). We viewed the videos which were played for the jury. The jury could use the video and its portrayal of the person identified as Appellant in ascertaining the weight to assign the detective's opinions. *Id.*

{¶97} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. *See also Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984) (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). The detective's identification testimony was believable. The jury verdict was not contrary to the manifest weight of the evidence. This assignment of error is overruled.

{¶98} For the foregoing reasons, the trial court's judgment is affirmed.

Donofrio, P J., concurs.

Waite, 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.