[Cite as *State v. Armstrong*, 2022-Ohio-1119.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LAMAR ARMSTRONG,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0127

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 20-CR-40

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

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Edward A. Czopur,* Assistant Mahoning County Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee, and

Atty. Wesley A. Johnston, 190 North Union St. #102, Akron, Ohio 44304 for Defendant-Appellant.

Dated: March 24, 2022

Robb, J.

{¶1} Defendant-Appellant Lamar Armstrong appeals after being convicted in the Mahoning County Common Pleas Court of felonious assault with a firearm specification and having a weapon while under disability. He raises arguments on the sufficiency of the evidence, the weight of the evidence, the court's decision to call its own witness, and ineffective assistance of counsel. For the following reasons, Appellant's convictions are affirmed.

STATEMENT OF THE CASE

{¶2} Appellant was indicted with the aforementioned offenses due to a shooting which occurred on the night of January 1, 2020. Days prior to trial, the state filed a motion asking the judge to call Appellant's girlfriend (Witness A) as the court's witness. The court granted the motion at the beginning of the November 2020 trial with defense counsel specifying that he did not object. (Tr. 177-178). Due to Appellant's motion for severance and the resulting bench trial on the charge of having a weapon while under disability, the court heard the detective's testimony on Appellant's prior convictions outside of the jury's presence. A jury trial proceeded on the charge of felonious assault with a firearm specification.

{¶3} The shooting victim testified he went to Topsy's Lounge in Youngstown on New Year's Day with Witness A, whom he had recently started dating. Witness A had recently ended her relationship with Appellant, who was at the bar as well. As the victim and Witness A exited the bar, Appellant argued with the victim. Witness A stepped between the men. As confirmed on the bar's surveillance video, a somewhat physical argument then ensued between Appellant and Witness A. They eventually retreated in opposite directions. The victim and Witness A approached Witness A's vehicle which was parked in the side lot, and the victim started to enter the driver's seat. (Tr. 187).

{¶4} Appellant soon appeared in the side lot as confirmed on video surveillance. The victim said Appellant approached Witness A with a gun in his hand and grabbed her; the victim believed Appellant was about to shoot Witness A in the head. (Tr. 190-191).

As depicted in the video, the victim then ran toward the altercation between Appellant and Witness A. The victim testified he grabbed Appellant by the collar at which point Appellant shot the victim in the leg. (Tr. 192). As they rolled on the ground, the victim said he was fighting for his life because Appellant was trying to point the gun at his head. (Tr. 193).

{¶5} According to the victim's testimony, Appellant fired the gun a second time near the victim's head. (Tr. 194). A man intervened and wrestled the gun from Appellant's hand. (Tr. 194). The fighting stopped. The victim walked backward in a staggering manner toward the driver's side of Witness A's vehicle. After continuing to gesture toward the victim, Appellant can be seen on video following after the man who confiscated his gun.

{¶6} The victim drove himself to the hospital in Witness A's vehicle. (Tr. 197). The victim was treated for a gunshot wound that entered the front of his leg from the side and exited the middle of the back of his leg. (Tr. 200). He disclosed: he was unable to work due to nerve damage in his leg; he attended physical therapy twice a week; he experienced temporary hearing loss and then ear infections; he continued to suffer ear drainage; and he had been diagnosed with post-traumatic stress disorder. (Tr. 202).

{¶7} The shooting was reported by the hospital. (Tr. 162). A police officer responded to the hospital to interview the victim. Witness A was with the victim, and she was described as crying, upset, bothered, and scared. She confirmed her former boyfriend, Appellant Lamar Armstrong, shot the victim while they were in the bar's parking lot. (Tr. 234). The officer learned there was a surveillance video, but the bar could not immediately make it available. (Tr. 236).

{¶8} Another officer searched the front parking lot without realizing the shooting occurred in the side lot. (Tr. 249). A detective subsequently found a .40 caliber shell casing in the side lot. (Tr. 154). The bar's surveillance video was played during the testimony of the victim and during the testimony of the detective. The victim asserted the gun was visible on the video as Appellant approached Witness A. The detective believed flashes in the video were suggestive of shots being fired; however, there were numerous flashes, and the victim opined they were caused by a phone's flash ringtone feature. (Tr. 153, 170, 227).

{¶9} Witness A was called as the court's witness. By the time of trial, she and Appellant had reconciled and were dating again. (Tr. 274). She acknowledged: Appellant was at the bar when she was there with the victim on New Year's Day 2020; they had recently broken up; and Appellant was upset. (Tr. 268-269). She then claimed she was very intoxicated and did not remember most of that night. (Tr. 270). When asked about her statements to police, she said she merely repeated what she heard the victim report. (Tr. 272).

{¶10} Witness A then read her written statement aloud, which she made the day after her initial oral report. In the statement, she recited: Appellant followed them out of the bar; Appellant grabbed his gun from his car and approached her with the gun; the victim came to defend her; Appellant shot the victim; and someone grabbed the gun from Appellant after a second shot was fired. (Tr. 273).

{¶11} The jury found Appellant guilty of felonious assault, a second-degree felony, with a firearm specification. The court found Appellant guilty of having a weapon while under disability, a third-degree felony. Appellant filed a timey notice of appeal from the November 10, 2020 sentencing entry.

SUFFICIENCY OF THE EVIDENCE

{¶12} Appellant sets forth four assignments of error. His second assignment of error, which we are addressing first, contends:

"ARMSTRONG'S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE AS A MATTER OF LAW."

{¶13} 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). In considering 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).

{¶14} The pertinent elements of felonious assault are knowingly (1) causing serious physical harm to another or (2) causing or attempting to cause physical harm to

another by means of a deadly weapon or dangerous ordnance. R.C. 2903.11(A). For the firearm specification, the state was required to prove Appellant "had a firearm on or about [his] person or under [his] control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." R.C. 2941.145. As for the charge of having a weapon while under disability, Appellant was not permitted to knowingly acquire, have, carry, or use any firearm or dangerous ordnance due to his prior convictions. R.C. 2923.13(A).

{¶15} Appellant claims the state failed to establish who caused the harm to the victim for the charge of felonious assault with a firearm specification or that Appellant had a gun for the charge of having a weapon while under disability. Appellant emphasizes the victim testified he did not realize he had been shot until he got in the car. He believes the video did not clearly show a gun. He states there was no corroborating testimony given by the victim and suggests the victim may have introduced the gun to the fight.

{¶16} However, the victim specifically testified to seeing Appellant approach Witness A with a gun drawn. In order to protect Witness A from being shot, the victim said he grabbed Appellant at which point Appellant shot him in the leg. Appellant then attempted to point the gun at the victim's head and fired a second shot near his head. The victim testified he never carried a gun and did not have one that night; he also said he did not grab Appellant's gun. Moreover, Witness A provided statements to the police confirming the victim's testimony. A video of the events was played at trial for the jury's consideration.

{¶17} 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). 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).

{¶18} Viewing the evidence and all rational inferences in the light most favorable to the prosecution, a rational juror could find the elements of the offenses and the specification were established beyond a reasonable doubt. Appellant's arguments on the proper weight to assign the evidence and the credibility of testimony are more appropriate under a manifest weight of the evidence argument. Appellant's sufficiency argument within this assignment of error is overruled.

MANIFEST WEIGHT OF THE EVIDENCE

{¶19} This leads to Appellant's first assignment of error:

"ARMSTRONG'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION."

{¶20} 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 to be 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).

{¶21} 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. A bench trial can be reversed on manifest weight grounds with the vote of two appellate judges, but where a charge 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 (the power of the court of appeals to sit as the "thirteenth juror" is limited to preserve the jury's primary function of weighing the evidence), citing Ohio Constitution, Article IV, Section 3(B)(3).

{¶22} Appellant complains the state failed to thoroughly investigate by searching for bystanders. He also argues the victim's testimony was self-serving and lacked credibility. Appellant emphasizes the victim's admission that he did not realize he had been shot until he got in the vehicle after which he was able to drive himself to the hospital. Appellant suggests there was a lack of corroborating evidence, pointing to the testimony from Witness A saying she was too intoxicated to remember the events and the video which he believes does not show he carried a gun or a shot was fired. Appellant suggests the victim may have been shot later that night. He also says it is equally reasonable to believe it was the victim who carried the firearm that night.

{¶23} The trier of fact occupies the best position from which to 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). The jury had the opportunity to watch and hear the victim as he testified and to detect indicators of truthfulness. In reading the transcript, there are no indications the victim's testimony was unbelievable. In fact, the victim's testimony was clear and credible. The victim explained why he was unaware of the shot through the leg by stating he was in shock and his "adrenaline was running a million miles an hour." (Tr. 195, 197). The video shows the victim walking backward after the incident in a stiff and staggering manner. We also note the photograph shows the entrance wound to the front of the victim's leg was lower than the exit wound to the back of the leg, which was consistent with his testimony and Appellant's initial position during the fight as shown in the video.

{¶24} As for bystanders, the detective testified they were unable to identify other people in the video; he specifically asked the manager to view the person in the video who intervened to stop the fight but this was not helpful. (Tr. 165-166). The victim explained he did not tell the police the name of the man who took the gun from Appellant's hand because he did not clearly see the person who performed this action until he viewed the video later, after which he was able to disclose only that the man was called "Hope." (Tr. 217). We also point out the police did not merely possess the statement of the victim but also possessed a video showing Appellant's aggressive re-engagement and three confirmatory statements from Witness A (an oral statement at the hospital, an oral statement at the police station, and a written statement). She unexpectedly changed her

story after reconciling with Appellant. In earlier statements, she confirmed Appellant shot the victim. Her new claim of lacking memory appeared to lack credibility.

{¶25} "[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. When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). The jury verdict finding Appellant guilty of felonious assault with a firearm specification and the trial court's judgment finding him guilty of having a weapon while under disability were not contrary to the manifest weight of the evidence. Accordingly, this assignment of error is overruled.

COURT'S WITNESS

{¶26} Appellant's third assignment of error alleges:

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING THE STATE OF OHIO['S] MOTION FOR THE COURT TO CALL WITNESS [A], AS ITS OWN WITNESS, PURSUANT TO EVID. RULE 614(A)."

{¶27} Days before trial, the state moved for the court to call Witness A as its own witness under Evid.R. 614(A). The motion disclosed Witness A made numerous visits to the jail to see Appellant and indicated to the prosecution that she had no recollection of the incident despite her prior statements to police incriminating Appellant. The state pointed out: Witness A was a material eyewitness to the shooting; she was likely to be a hostile witness who would testify inconsistently with her prior statements; and the state could be deprived of the ability to cross-examine her if she was called as the state's witness. The motion reviewed case law in support. At trial, the court noted the motion was discussed prior to trial, and defense counsel specified he had no objection to the state's request. (Tr. 178).

{¶28} Appellant now contests the court's decision to call Witness A as the court's own witness. He cites dicta in a non-binding and distinguishable case where a defendant complained about a court calling three witness as its own. *State v. Watson*, 9th Dist. Summit No. 25229, 2011-Ohio-2882, ¶ 14. In dicta, the Ninth District suggested a better

practice: the movant should submit an affidavit specifying the circumstances for invoking the rule and the trial court should examine the prospective court's witness if the opposing party objects. Yet, the court refused to answer the question of whether the trial court abused its discretion as it found any error would have been harmless. *Id.* at ¶ 15.

{¶29} Evid.R. 614(A) provides: "Calling by Court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." Another division of the rule states, "Objections to the calling of witnesses by the court * * * may be made at the time or at the next available opportunity when the jury is not present." Evid.R. 614(C).

{¶30} As the state points out, Appellant failed to object when the motion was discussed outside of the jury's presence or when the witness took the stand. Appellant is therefore required to show plain error. The plain error doctrine requires a defendant to demonstrate an error which was obvious and which affected the outcome of trial. *State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700 at ¶ 93, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Plain error is a discretionary doctrine to be used with the utmost care by the appellate court in exceptional circumstances to avoid a manifest miscarriage of justice. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 62, applying Crim.R. 52(B). Regardless, there was no error, plain or otherwise.

{¶31} The decision to call an individual as a witness of the court is within the trial judge's sound discretion. *State v. Apanovitch*, 33 Ohio St.3d 19, 22, 514 N.E.2d 394, 398 (1987) ("The state need not demonstrate surprise in order to cross-examine such a witness."). An abuse of discretion exists where the court's decision is unreasonable, arbitrary, or unconscionable. *Id.* "Court witnesses under Evid.R. 614(A) can be utilized where, as here, the State can no longer vouch for a witness's credibility. * * * This enables both parties to cross-examine the witness and the jury can determine her credibility. *State v. Woods*, 7th Dist. Mahoning No. 13 MA 81, 2015-Ohio-3950, ¶ 19. "It is well-established that a trial court does not abuse its discretion in calling a witness as a court's witness when the witness's testimony would be beneficial to ascertaining the truth of the matter and there is some indication that the witness's trial testimony will contradict a prior

statement made to police." *Id.* at ¶ 18, quoting *State v. Schultz*, 11th Dist. Lake No. 2003-L-156, 2005-Ohio-345, ¶ 29.

{¶32} As the trial court and the state pointed out: Witness A's most recent statement claimed she could not recall the shooting incident; the state was concerned it would be precluded from claiming surprise and cross-examining her as to prior inconsistent statements; and the use of Evid.R. 614(A) would allow both sides to cross-examine her as the court's witness. (Tr. 177-178). Witness A was not only present at the scene of the shooting but was physically involved in the event as the shooting occurred. Her proximity and vantage point are confirmed by video. She gave three statements incriminating Appellant and consistent with the victim's statements but later claimed she could not recall the incident. She admitted she was dating Appellant again and visited him in jail. Under these circumstances, the trial court did not abuse its discretion in calling Witness A as the court's own witness. This assignment of error is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶33} Appellant's final assignment of error contends:

"ARMSTRONG RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶34} Ineffective assistance of counsel arguments require a showing of both deficient performance and resulting prejudice. *State v. Carter*, 72 Ohio St.3d 545, 557, 651 N.E.2d 965 (1995), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the performance was not deficient, then there is no need to review for prejudice and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). In evaluating the deficiency prong of the test, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142-143, 538 N.E.2d 373 (1989). There are "countless ways to provide effective assistance in any given case." *Id.* at 142, quoting *Strickland*, 466 U.S. at 689.

{¶35} On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Id.* Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142, fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective

representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶36} First, Appellant reiterates his sufficiency argument addressed supra and argues counsel was ineffective by failing to move for an acquittal. He notes counsel declined to so move even though the court specifically asked him if he wished to do so. However, "criminal defense attorneys regularly move for acquittal as a matter of custom, but the failure to so move does not necessarily render trial counsel's performance deficient." *State v. Heckathorn*, 7th Dist. Columbiana No. 17 CO 0011, 2019-Ohio-1086, ¶ 34. "Failure to move for an acquittal under Crim.R. 29 is not ineffective assistance of counsel, where the evidence in the State's case demonstrates that reasonable minds can reach different conclusions as to whether the elements of the charged offense have been proved beyond a reasonable doubt, and that such a motion would have been fruitless." *Id.*, quoting *State v. Stokes*, 2d Dist. No. 2016-CA-4, 2016-Ohio-7520, ¶ 17.

{¶37} We have also explained the subject of sufficiency need not be considered under the framework of ineffective assistance of counsel because, regardless of whether the defense files a motion, Crim.R. 29(A) requires the trial court to grant an acquittal on its own motion if the evidence is insufficient to support an offense. *Heckathorn*, 7th Dist. No. 17 CO 0011 at ¶ 34-35. A defendant does not waive a sufficiency argument by failing to raise the argument below as the state must prove each and every element of the offense beyond a reasonable doubt and a not guilty plea preserves sufficiency arguments for purposes of appeal. *Id.* at ¶ 35, citing *State v. Jones*, 91 Ohio St.3d 335, 346, 744 N.E.2d 1163 (2001) and *State v. Carter*, 64 Ohio St.3d 218, 223, 594 N.E.2d 595 (1992). In accordance, a defendant is not required to move for acquittal in order to raise sufficiency of the evidence on appeal. *Heckathorn*, 7th Dist. No. 17 CO 0011 at ¶ 35, citing *In re J.M.*, 7th Dist. Jefferson No. 12 JE 3, 2012-Ohio-5283, ¶ 34.

{¶38} Notably, 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). As we found the state presented sufficient evidence, defense counsel's failure to move for acquittal was not deficient performance or prejudicial.

{¶39} Appellant's second argument under this assignment of error is that counsel rendered ineffective assistance of counsel by failing to object to the state's request for the court to call Witness A as the court's own witness. We found no error under Appellant's third assignment of error where Appellant argued the court erred in calling Witness A as the court's witness under Evid.R. 614(A). In doing so, we evaluated for plain error but alternatively concluded the court would not have abused its discretion even if an objection had been voiced. Accordingly, Appellant was not prejudiced by the failure to object to the court's calling of Witness A. Moreover, counsel was not deficient by failing to object because the state's rationale underlying the Evid.R. 614(A) motion was strong as set forth above. This assignment of error is overruled.

{¶40} For the foregoing reasons, Appellant's convictions are affirmed.

Donofrio, P 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.