

**COURT OF APPEALS OF OHIO**  
**EIGHTH APPELLATE DISTRICT**  
**COUNTY OF CUYAHOGA**

IN RE D.W.	:	
	:	No. 107920
A Minor Child	:	

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: AFFIRMED**  
**RELEASED AND JOURNALIZED: August 1, 2019**

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Civil Appeal from the Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. DL-171116581

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*Appearances:*

Mark A. Stanton, Cuyahoga County Public Defender, and  
Britta M. Barthol, Assistant Public Defender, *for*  
*appellant.*

Michael C. O'Malley, Cuyahoga County Prosecuting  
Attorney, and Megan Helton, Assistant Prosecuting  
Attorney, *for appellee.*

FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Defendant-appellant, D.W. (“appellant”), brings the instant appeal challenging his adjudications of assault and aggravated riot. Specifically, appellant argues that the trial court erred when it admitted out-of-court statements in violation of the Confrontation Clause; he was denied the effective assistance of counsel; and his adjudications were based on insufficient evidence and against the

manifest weight of the evidence. After a thorough review of the record and law, this court affirms.

### **I. Factual and Procedural History**

{¶ 2} Appellant brings the instant appeal from a juvenile case in which, after a jury trial, he was found guilty of assault and aggravated riot in Cuyahoga J.C. No. DL-171116581.

{¶ 3} Appellant was charged in juvenile court by complaint with one count of felonious assault, in violation of R.C. 2903.11(A)(1), a second-degree felony, with a serious youthful offender specification, in violation of R.C. 2152.011, and one count of aggravated riot, in violation of R.C. 2917.02(A)(2). The state filed a discretionary bindover motion pursuant to R.C. 2152.10(B) seeking to transfer the case to adult court.

{¶ 4} On April 6, 2018, a probable cause hearing was held on the state's bindover motion. The juvenile court found that probable cause existed to transfer the case to adult court. An amenability hearing was then held on July 3, 2018, to determine if appellant was amenable to the juvenile court system. The juvenile court found appellant amenable and the case was not transferred to adult court.

{¶ 5} Subsequently, on July 18, 2018, the Cuyahoga County Grand Jury returned a two-count indictment that included identical charges as the juvenile complaint.

{¶ 6} The matter remained in juvenile court and a jury trial<sup>1</sup> commenced on August 27, 2018. The following facts are deduced from the testimony presented at trial.

{¶ 7} On October 7, 2017, John Lykes (“Lykes”) was attacked and beaten by eight juveniles at 1:00 a.m. as he sat waiting for a bus at a bus stop on Cleveland’s east side. Lykes had finished a shift at a local store and was awaiting his bus ride back to a homeless shelter where he was staying at this time. Lykes left the store and walked to the bus stop at East 79th Street and Euclid Avenue. A few minutes after Lykes arrived at the bus stop and sat down on a bench, one of the juveniles approached Lykes and knocked Lykes’s hat off his head, presumably in a taunting manner. At that same moment, the juvenile began punching Lykes. The other juveniles then immediately began attacking Lykes, punching and kicking him.

{¶ 8} Lykes sustained injuries from the attack and was transported to St. Vincent Charity Hospital that night. Lykes testified that he sustained a cut on the right side of his face that required stitches and resulted in a scar. Further, Lykes testified that he sustained bruised ribs from the attack.

{¶ 9} The Greater Cleveland Regional Transit Authority Police Department (“RTA”) arrived on the scene and assisted Lykes. Lykes reported to the RTA officers that some of the juveniles arrived on foot and some arrived on bikes. Lykes stated

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<sup>1</sup> Pursuant to R.C. 2152.13(C)(1), which provides in part, “[o]nce a child is indicted, or charged by information or the juvenile court determines that the child is eligible for a serious youthful offender dispositional sentence, the child is entitled to an open and speedy *trial by jury* in juvenile court[.]” (Emphasis added.)

that the juveniles were all boys and appeared to be 14 and 15 years old. RTA conducted an investigation into the attack. Through this investigation, RTA officers obtained a surveillance video from the bus stop where the attack occurred.<sup>2</sup> Detective Alfredo Cuevas was assigned to the case. Detective Cuevas obtained still images from the video in an attempt to assist him in identifying the subjects. Detective Cuevas took these still images to local recreation centers and schools in an attempt to identify the juveniles. Detective Cuevas testified that

If we had a named suspect and we were able to pull up either that child's school identification, then we would show the school that and say, do you have this named student? If we didn't have that named student, then we would show up to the school with the pictures and say, do you have any children here that possibly could be this student?

(Tr. 281.)

{¶ 10} Detective Cuevas's investigation led him to Thurgood Marshall Recreation Center in Cleveland. Detective Cuevas provided the still image of the video surveillance to staff members. Detective Cuevas learned from one of the rec center staff members that one juvenile depicted in the images, D.H.,<sup>3</sup> regularly frequented the rec center. Detective Cuevas testified that in the course of his investigation, he utilized a Cleveland Metropolitan School District ("C.M.S.D.") database that enabled him to search for D.H.'s name to determine which school D.H. attends.

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<sup>2</sup> RTA officers obtained an additional surveillance video from a separate bus stop attack. This attack occurred in a similar manner as the attack at issue in the instant appeal. However, the separate attack is not the subject of the instant appeal.

<sup>3</sup> D.H. was eventually charged in the matter.

**{¶ 11}** Detective Cuevas’s investigation then led him to the name of another juvenile who was believed to be one of the attackers. Detective Cuevas testified that he spoke with that juvenile and it was discovered that this juvenile was not involved in the attack. As a result of his interview with this juvenile, Detective Cuevas did, however, learn the names of other juveniles who were involved in the attack. Detective Cuevas testified in particular that “now we had more names, and [the juvenile] had named quite a few other suspects, and we started to investigate both social media and looking in local schools to see if we could potentially locate any of the suspects that he had named.” (Tr. 264.)

**{¶ 12}** Through Detective Cuevas’s investigation, he was able to obtain appellant’s name and date of birth. Further, Detective Cuevas was able to utilize the C.M.S.D. database to determine that appellant attended Jamison Elementary School in Cleveland. Detective Cuevas went to appellant’s school and spoke with Principal Sharon Cooper, and provided her with images of who at this point, Detective Cuevas believed to be appellant. After his conversation with Principal Cooper, Detective Cuevas was able to confirm appellant’s identity. At Detective Cuevas’s request, the school turned appellant over to his custody.

**{¶ 13}** Detective Cuevas arrested appellant and transported him to the RTA police department. The school notified appellant’s mother of the matter and thereafter, at the RTA police department, Detective Cuevas spoke with appellant with his mother present. Detective Cuevas testified that during the interview with appellant, appellant admitted that he participated in the attack and identified

himself in the bus stop surveillance video. Detective Cuevas also testified that appellant was 14 years old at the time of the offense.

{¶ 14} One of the other juveniles charged in the matter, C.M., testified against appellant at trial. C.M. was charged with one count of felonious assault and one count of aggravated riot. C.M. struck a plea deal with the state wherein the state would dismiss the felonious assault count in exchange for C.M.'s testimony at appellant's trial.

{¶ 15} At trial, C.M. was initially uncooperative with the prosecution's questions on direct examination. Pertaining to the attack on Lykes, C.M. stated that "we was riding around. Then that's when we seen the old man and we started to beat him up." (Tr. 240.) When asked by the prosecutor who he was riding around with, C.M. stated that he "forgot their names." (Tr. 240.) After a brief recess, and after C.M. conferred with his own counsel, C.M. testified that he and seven other juveniles "jumped on an old man." (Tr. 246.) C.M. further testified that appellant was one of the eight individuals who participated in the attack. C.M. also identified appellant in court as one of the eight individuals.

{¶ 16} At the close of the state's case-in-chief, appellant's counsel moved for a Crim.R. 29 judgment of acquittal. The juvenile court denied appellant's motion. On August 29, 2018, the jury returned its verdict and found appellant not guilty of the felonious assault count, but found appellant guilty of the lesser included offense of assault, a first-degree misdemeanor. The jury also returned a guilty verdict as to

the aggravated riot count. Appellant was adjudicated delinquent and the matter was set for disposition.

{¶ 17} On October 19, 2018, the juvenile court committed appellant to 90 days at the Cuyahoga County Juvenile Detention Center on Count 1; and six months at the Ohio Department of Youth Services on Count 2, which was suspended. Appellant was additionally placed on community control sanctions for one year.

{¶ 18} On November 16, 2018, appellant filed a notice of appeal. Appellant assigns five errors for our review.

- I. The trial court erred when it improperly admitted out-of-court statements at trial in violation of the rules of evidence and appellant's state and federal right to confrontation.
- II. Plain error occurred with the admission of evidence in violation of the Ohio Rules of Evidence and appellant's right to state and federal confrontation.
- III. Appellant was denied effective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.
- IV. The evidence was insufficient as a matter of law to support a finding beyon[d] a reasonable doubt that appellant was guilty of assault and aggravated riot.
- V. Appellant's convictions were against the manifest weight of the evidence.

## **II. Law and Analysis**

### **A. Out-of-Court Statements**

{¶ 19} In his first assignment of error, appellant argues that the trial court erred when it admitted out-of-court statements at trial. More specifically, appellant

argues that these out-of-court statements were inadmissible hearsay and admitted in violation of the Sixth Amendment's Confrontation Clause.

{¶ 20} Appellant argues that Detective Cuevas was not permitted to testify to other individuals' statements regarding the identification of appellant. Appellant argues that the trial court permitted Detective Cuevas to testify to statements made to him by D.H., Cooper, and other individuals.

### **1. Hearsay**

{¶ 21} Appellant argues that these out-of-court statements were inadmissible hearsay. A trial court has broad discretion regarding the admission of evidence, including whether such evidence does in fact constitute hearsay and whether it is admissible hearsay. *Solon v. Woods*, 8th Dist. Cuyahoga No. 100916, 2014-Ohio-5425, ¶ 10. This court will not disturb a trial court's decision regarding the admissibility of hearsay evidence absent an abuse of discretion. *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984). "Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard." *State v. Shropshire*, 2017-Ohio-8308, 99 N.E.3d 980, ¶ 19 (8th Dist.), citing *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987).

{¶ 22} Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). In this regard, "[i]f either element is missing — (1) a statement or (2) offered for its truth — the testimony is not hearsay." *State v.*



*Wingfield*, 8th Dist. Cuyahoga No. 107196, 2019-Ohio-1644, ¶ 30, citing *State v. Holt*, 9th Dist. Lorain No. 97CA006985, 1999 Ohio App. LEXIS 4149, 8 (Sept. 8, 1996), citing *Maurer* at 262.

{¶ 23} Appellant argues that Detective Cuevas testified to other individuals' statements that implicated appellant in the attack. To this end, appellant argues that these individuals did not testify at trial, and the statements were offered for the truth of the matter asserted, and thus, the testimony was inadmissible hearsay. The testimony with which appellant takes issue is as follows:

[PROSECUTOR]: Okay. So Detective, who was the first person you identified?

[DETECTIVE CUEVAS]: The first suspect we identified was [D.H.], also known as Luke, aka Luke.

[PROSECUTOR]: Okay. And once identifying Luke, who did you identify next?

[DETECTIVE CUEVAS]: We identified a juvenile who was not involved in this. He was named to be a potential suspect. Upon interviewing that juvenile, he then advised us of other names of different juveniles.

[PROSECUTOR]: So after you interviewed that individual, what did you guys do in the course of your investigation?

[DETECTIVE CUEVAS]: Well, all we had [were] names and we had one that was identified. Like I said, the first one we identified was [D.H.] We identified him through the rec center, Thurgood Marshall, which according to staff he regularly attends. We learned the school that he attended.

[APPELLANT'S COUNSEL]: Objection.

THE COURT: Your basis is that [D.H. is] not here, so I'm going to permit it because it doesn't mean that your client was there. So go ahead. You may proceed.

[DETECTIVE CUEVAS]: [D.H.], we went to his school which was at East Tech High School. We were able to speak to staff, showed them pictures of [D.H.], asked them if he attended there. They did say yes. At that point we asked staff to escort him down to the office, introduced ourself[ves] to [D.H.], advised him of what we were investigating, why we were there.

We had staff contact his parents, advised them, introduced myself, what we were investigating, and advised them that he was a potential suspect in a crime and we detained him in handcuffs and transported him back to [RTA] Headquarters to await his guardian to interview. So [D.H.] also named multiple suspects in this —

[APPELLANT'S COUNSEL]: Objection.

THE COURT: Well, so far it's overruled.

[PROSECUTOR]: So you said [D.H.] has named multiple suspects. After interviewing him, what did you do?

[DETECTIVE CUEVAS]: Well, now we had more names, and he had named quite a few other suspects, and we started to investigate both social media and looking in local schools to see if we could potentially locate any of the suspects that he had named.

(Tr. 262-264.)

[PROSECUTOR]: So you went to these schools. Were you able to obtain any additional names after that?

[DETECTIVE CUEVAS]: Yes, ma'am.

[PROSECUTOR]: Okay. What were those additional names?

[DETECTIVE CUEVAS]: From Jamison Elementary School we were able to retrieve [appellant's name].

[APPELLANT'S COUNSEL]: Your Honor, I'm going to renew my objection. I still don't believe there's a proper foundation of who he talked to at that school.

In addition, on top of foundational issues, there's a hearsay issue because he's now getting into statements made by some individual at that school who's not here to testify that the person was [D.W.].

THE COURT: I believe she has laid the proper foundation, so I'm going to overrule that. So you may proceed.

[PROSECUTOR]: Thank you, your Honor. So you were saying you identified [appellant] from?

[DETECTIVE CUEVAS]: Principal Sharon Cooper.

(Tr. 266-267.)

{¶ 24} We find that the above exchange does contain hearsay. Detective Cuevas testified to out-of-court statements purportedly made by D.H., an unnamed juvenile, and rec center employees. These individuals did not testify at trial. The out-of-court statements, particularly the statement made by D.H., named appellant as a suspect in the attack.

{¶ 25} Although we find Detective Cuevas's testimony contained hearsay statements, appellant cannot establish that he suffered material prejudice. Viewed alongside the state's other evidence against appellant — that appellant himself admitted to Detective Cuevas that he participated in the attack and that appellant identified himself in the video — we do not see a reasonable possibility that the out-of-court statements might have contributed to appellant's adjudication. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 186, citing *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Any error in the admission of hearsay evidence is harmless “so long as there was substantial other evidence to support the guilty verdict.” *State v. Collymore*, 8th Dist. Cuyahoga No. 81594, 2003-Ohio-3328, ¶ 30, quoting *State v. Griffin*, 142 Ohio App.3d 65, 79, 753 N.E.2d 967 (1st Dist.2001).

{¶ 26} Based on the record before us, in view of the other evidence presented at trial, we find no reasonable possibility that the improper hearsay testimony contributed to appellant’s adjudications. Detective Cuevas testified that he interviewed appellant, and appellant admitted to participating in the attack of Lykes. Further, Detective Cuevas played the surveillance video for appellant and appellant identified himself as one of the attackers. The admission of these statements through Detective Cuevas, therefore, was harmless beyond a reasonable doubt because of the substantial other evidence supporting the guilty verdict. As such, we find absolutely no credence to appellant’s assertion that without D.H.’s statements specifically, the state would have been unable to prove that appellant was a participant in the crimes.

## **2. Next Investigative Step**

{¶ 27} Appellant also argues that these individuals’ statements were not admissible for the nonhearsay purpose of explaining an officer’s next investigative step.

{¶ 28} The state argues that this testimony is admissible because it was offered for the nonhearsay purpose of explaining Detective Cuevas’s next investigative step. Indeed, “[l]aw-enforcement officers may testify to out-of-court statements for the nonhearsay purpose of explaining the next investigatory step.” *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 172, citing *McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, at ¶ 186.

Testimony to explain police conduct is admissible as nonhearsay if it satisfies three criteria: (1) the conduct to be explained is relevant, equivocal, and contemporaneous with the statements, (2) the probative value of the statements is not substantially outweighed by the danger of unfair prejudice, and (3) the statements do not connect the accused with the crime charged.

*Id.*, citing *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, ¶ 27.

{¶ 29} After reviewing the testimony in question, we do not necessarily agree with the state that these out-of-court statements were presented for the purpose of explaining Detective Cuevas's next investigative step — Detective Cuevas's subsequent arrest of appellant. In particular, regarding Cooper's statements, although this testimony related to Detective Cuevas's investigation and the information provided to him through his investigation, it is unclear if this testimony simply provided context to the events leading to appellant's identification and arrest. *See Wingfield*, 8th Dist. Cuyahoga No. 107196, 2019-Ohio-1644, at ¶ 38.

{¶ 30} First, D.H.'s statements clearly implicated appellant in the crime charged, and thus do not meet the criteria as nonhearsay offered to explain Detective Cuevas's next investigative step, most notably because D.H.'s statements directly connect appellant to the crime charged.

{¶ 31} In regard to the rec center employees' statements, it is insinuated from Detective Cuevas's testimony that these individuals made statements to him as a result of observing either still images of the surveillance video and/or various photos Detective Cuevas obtained from social media. These statements either identified appellant or appellant's codefendants. If Detective Cuevas provided these rec center

employees with a still image of the surveillance video, then the employees' accompanying statements would undoubtedly connect appellant with the crime charged. If however, Detective Cuevas provided these employees with a photo of appellant that Detective Cuevas obtained through social media, then that photo could not connect appellant to the crime charged, and thus, would seemingly meet the criteria as nonhearsay statements offered to explain Detective Cuevas next investigative step.

{¶ 32} Furthermore, with regard to Cooper's statement, we do not necessarily agree with the state that the out-of-court statement identifying appellant in the photo was presented for the purpose of explaining Detective Cuevas's next investigative step — Detective Cuevas's subsequent arrest of appellant. Although this testimony related to his investigation and the information provided to him through his investigation, it is unclear if this testimony simply provided context to the events leading to appellant's identification and arrest because, as stated directly above, it is unclear which photo Detective Cuevas presented to Cooper. *See Wingfield*, 8th Dist. Cuyahoga No. 107196, 2019-Ohio-1644, at ¶ 38 (where this court recently noted that a detective's testimony identifying a defendant in a surveillance video was not inadmissible hearsay because the detective did not testify to any out-of-court statement, and the testimony related to the detective's investigation into the subject shooting that provided context to the events leading to the suspects' arrest).

{¶ 33} On this subject, in *State v. Jackson*, 8th Dist. Cuyahoga No. 103957, 2018-Ohio-3492, this court noted that an officer's testimony was not hearsay because the officer's testimony was describing his interaction with the victim as he arrived at the scene. Thus, the officer's testimony was provided solely as context for his subsequent investigatory steps while at the scene. The victim's statement to the officer, "I was raped," did not implicate defendant. Furthermore, the victim testified at trial that she was raped. As such, this court found that "[w]hen a hearsay declarant is examined at trial 'on the same matters as contained in impermissible hearsay statements and where admission is essentially cumulative, such admission is harmless.'" *Id.* at ¶ 17, quoting *State v. Tucker*, 8th Dist. Cuyahoga No. 83419, 2004-Ohio-5380, ¶ 78, citing *State v. Tomlinson*, 33 Ohio App.3d 278, 281, 515 N.E.2d 963 (12th Dist.1986).

{¶ 34} In the instant case, in a similar vein as *Jackson*, the admission of Cooper's and the rec center employees' statements, which presumably identified appellant or his codefendants, is essentially cumulative, because appellant identified himself in the surveillance video. Therefore, the admission of these individuals' statements identifying appellant or his codefendants are also harmless. *Id.* In reaching this conclusion, we again note that the record is unclear as to which photo was provided specifically to Cooper. Detective Cuevas testified that he did not recall which photo he showed Cooper. Moreover, neither photo was presented at trial by the state. Assuming without deciding, we believe Detective Cuevas's testimony of Cooper's statements would likely go beyond what is permissible in describing the

steps in an investigation without appellant identifying himself in the surveillance video and admitting to participating in the attack. Given the other evidence presented, there was no need for the state to offer this particular and specific testimony by Detective Cuevas to explain his investigation. *See State v. Robertson*, 8th Dist. Cuyahoga No. 106279, 2018-Ohio-2934, ¶ 24.

### **3. Confrontation Clause**

{¶ 35} Appellant also argues that Detective Cuevas’s testimony violated his constitutional right to confrontation.

{¶ 36} The Confrontation Clause of the Sixth Amendment to the United States Constitution preserves the right of a criminal defendant “to be confronted with the witnesses against him” or her. *State v. Johnson*, 2018-Ohio-1389, 110 N.E.3d 800, ¶ 33 (8th Dist.). “The Confrontation Clause bars the admission of ‘testimonial hearsay’ unless the declarant is unavailable and the accused had a prior opportunity to cross-examine the declarant.” *Id.*, citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

{¶ 37} With regard to Detective Cuevas’s testimony about the statements made by D.H. implicating appellant in the crime, this is a clear violation of the Confrontation Clause. As previously noted, D.H. did not testify at trial, and thus, was not subject to cross-examination. Further, Detective Cuevas’s testimony regarding the rec center employees and the unnamed juvenile was also a clear violation of the Confrontation Clause because these individuals did not testify at trial.



{¶ 38} Nevertheless, “[w]here [a] constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of [the] defendant’s guilt.” *State v. Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, 984 N.E.2d 1057, ¶ 43, quoting *State v. Williams*, 6 Ohio St.3d 281, 452 N.E.2d 1323 (1983), paragraph six of the syllabus.

{¶ 39} Detective Cuevas testified that he interviewed appellant, and appellant admitted to participating in the attack of Lykes. Further, Detective Cuevas played the surveillance video for appellant, and appellant identified himself as one of the attackers. We thus conclude that the admission of these statements did not contribute to appellant’s adjudication and that their admission was harmless beyond a reasonable doubt. *Id.* at ¶ 50. As such, the trial court did not abuse its discretion in permitting Detective Cuevas to testify to these individuals’ statements.

{¶ 40} For these reasons, appellant’s first assignment of error is overruled.

### **B. Personal Knowledge and Opinion Testimony**

{¶ 41} In appellant’s second assignment of error, he argues that the trial court erred when it allowed Detective Cuevas to testify that appellant was depicted in the surveillance video. In this regard, appellant argues that the trial court improperly allowed Detective Cuevas to testify that the individual depicted in the surveillance video was appellant, and based on this identification, Detective Cuevas was also implicitly testifying that in his opinion he believed appellant to be guilty.

{¶ 42} Appellant argues that Detective Cuevas's statements were inadmissible pursuant to Evid.R. 602 because he lacked personal knowledge of the attack. Appellant also argues that Detective Cuevas's testimony in this regard is improper opinion testimony pursuant to Evid.R. 701.

{¶ 43} We note, as does appellant in his brief, that appellant's trial counsel did not object to this testimony. Appellant's failure to object to any of the testimony waives all but plain error review. Crim.R. 52(B). Crim.R. 52(B) provides that, "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Further, "[i]n order to prevail on a claim of plain error, [an] appellant must be able to demonstrate that the outcome of the trial would have been clearly different." *State v. Bourn*, 8th Dist. Cuyahoga No. 92834, 2010-Ohio-1203, ¶ 18, citing *State v. Moulder*, 8th Dist. Cuyahoga No. 80266, 2002-Ohio-5327. An appellate court will not reverse a adjudication based on the plain error rule unless the outcome of the trial would clearly have been different if the error is excluded. *Id.*

{¶ 44} Evid.R. 602, dealing with personal knowledge, provides that

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

Furthermore, with regard to opinion testimony, Evid.R. 701 provides that

If the witness is not testifying as an expert, the witness' 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.

{¶ 45} To the extent that appellant argues that Detective Cuevas testified to facts of which he did not have personal knowledge and were not based on his own perceptions, we do not agree. Again, we note that appellant himself admitted to Detective Cuevas that he participated in the attack. Furthermore, in his interview with Detective Cuevas, appellant identified himself in the surveillance video. Therefore, Detective Cuevas was not testifying with regards to what he believed or what his opinion was. Indeed, Detective Cuevas was relaying statements and information that appellant provided to him. Further, Detective Cuevas was not offering his opinion as to which individual appellant was in the surveillance video. Therefore, contrary to appellant's argument, this is not a case in which appellant was denied his constitutional right to a fair trial because the prosecutor elicited opinion testimony from Detective Cuevas. *See State v. Dzelajlija*, 8th Dist. Cuyahoga No. 88805, 2007-Ohio-4050, ¶ 33, 34 (where, for example, this court noted that a witnesses' opinion as to whether another witness is being truthful is inadmissible).

{¶ 46} As such, Evid.R. 602 and 701 have no relevance to the testimony of Detective Cuevas with which appellant takes issue. We find no error in this testimony, plain or otherwise.

{¶ 47} In addition, appellant argues that the entirety of Detective Cuevas's interview with appellant should not have been played for the jury because it included inadmissible hearsay statements. To this end, appellant argues that the trial court

should have redacted Detective Cuevas's statements from the interview. Specifically, appellant takes issue with a statement made by Detective Cuevas where he stated "you think I got your name on accident. You think that the people who pointed you and 'T' as the leaders in this thing, that said you guys set this up. These are your boys that are telling us this."

{¶ 48} We note that appellant does not develop this argument in a separate assignment of error as required by App.R. 16(A)(7). Nevertheless, we conclude that these statements were not hearsay because they were not offered for the truth of the matter asserted. Considering the entirety of the trial proceedings, it appears that the purpose of including Detective Cuevas's statements was to provide context for appellant's statements and admissions. *See State v. Neil*, 10th Dist. Franklin Nos. 14AP-981 and 15AP-594, 2016-Ohio-4762, ¶ 76, citing *State v. Woods*, 10th Dist. Franklin No. 05AP-704, 2006 Ohio App. LEXIS 4175 (Aug. 17, 2006); *see also State v. Jenkins*, 9th Dist. Summit No. 28736, 2018-Ohio-4814, ¶ 23. Therefore, we find no merit to appellant's assertion that the trial court should have redacted Detective Cuevas's statements from the interview in this particular instance.

{¶ 49} Accordingly, appellant's second assignment of error is overruled.

### **C. Ineffective Assistance of Counsel**

{¶ 50} In appellant's third assignment of error, he argues that he was denied the effective assistance of counsel when his trial counsel failed to object to Detective Cuevas's testimony as outlined in his second assignment of error.

{¶ 51} To establish that one's counsel was ineffective, a defendant must demonstrate: (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) counsel's errors prejudiced the defendant, i.e., a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

{¶ 52} Appellant argues that his trial counsel's failure to object to Detective Cuevas's testimony constituted deficient performance. More specifically, appellant takes issue with his trial counsel's failure to "object to the detective's testimony that appellant was the individual depicted in the surveillance video stepping on the victim." Appellant's brief at 22. In this regard, appellant reiterates his arguments within his first and second assignments of error.

{¶ 53} After review, we find no merit to this argument that appellant was denied the effective assistance of counsel. Based on our resolution of appellant's second assignment of error, appellant cannot establish that his trial counsel's performance was deficient for failing to object to the testimony at issue.

{¶ 54} Furthermore, appellant's trial counsel did not contest appellant's identity in the surveillance video at trial. Appellant's trial counsel likewise did not confront witnesses through cross-examination who had identified appellant as an attacker or who identified appellant at trial. In our review of the trial transcript, it appears appellant's trial counsel's strategy was attacking whether or not Lykes's injuries amounted to serious physical harm. Clearly, appellant's trial counsel was successful in this regard as appellant was not found guilty of the felonious assault count or the serious youthful offender specification.

{¶ 55} Based on these facts, we cannot find that appellant's trial counsel was deficient, and thus, appellant was not denied the effective assistance of counsel.

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

#### **D. Insufficient Evidence**

{¶ 57} In appellant's fourth assignment of error, he argues that his adjudications were based on insufficient evidence. Appellant similarly argues that the trial court erred when it denied his Crim.R. 29 motion for judgment of acquittal.

A Crim.R. 29 motion challenges the sufficiency of the evidence. The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Walker*, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124,

¶ 12, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

*State v. Keller*, 8th Dist. Cuyahoga No. 106196, 2018-Ohio-4107, ¶ 19.

{¶ 58} Appellant does not argue that the state failed to provide sufficient evidence with regard to the elements of assault or aggravated riot. Rather, appellant simply challenges whether the state provided sufficient evidence as to the identification of appellant — that appellant was the individual who committed these crimes. To this end, appellant argues that the evidence presented at trial identifying him as a participant in the attack was insufficient to support his adjudications for assault and aggravated riot.

{¶ 59} In order to merit an adjudication, “the evidence must establish beyond a reasonable doubt the identity of the accused as the person who committed the crime.” *State v. Mallory*, 8th Dist. Cuyahoga No. 106052, 2018-Ohio-1846, ¶ 7, quoting *State v. Scott*, 3 Ohio App.2d 239, 244, 210 N.E.2d 289 (11th Dist.1965). In support of his argument in this regard, appellant states that Lykes and C.M. were not able to identify appellant as one of the eight juveniles who attacked him. Appellant argues that even though C.M. testified at trial, C.M. identified himself in the video as being a participant in the attack but he did not identify appellant as one of the assailants in the video.

{¶ 60} C.M. did, in fact, identify appellant in the courtroom at trial as being a participant in the attack. Therefore, the fact that C.M. did not identify appellant in the video is of no consequence. Furthermore, the jury was provided with the

surveillance video and with the video of Detective Cuevas’s interview of appellant. In the interview, Detective Cuevas played the surveillance video for appellant and appellant identified himself as one of the attackers. Further, Detective Cuevas testified that appellant admitted to him that he was a participant in the attack on Lykes. Thus, contrary to appellant’s argument, we are not faced with the issue of having no in-court testimony that established that appellant committed the crimes charged. *See State v. Blair*, 8th Dist. Cuyahoga No. 85880, 2005-Ohio-6630, ¶ 25, 27 (where, for example, this court found that there was clearly insufficient evidence of identification because “[t]here was simply no in-court testimony that established Blair committed the charged crimes, and the prosecutor agreed that no out-of-court identification would be introduced.”).

{¶ 61} Based on this testimony, we find that appellant’s adjudications were supported by sufficient evidence, and the trial court did not err in denying appellant’s Crim.R. 29 motion for acquittal.

{¶ 62} Accordingly, appellant’s fourth assignment of error is overruled.

### **E. Manifest Weight**

{¶ 63} In appellant’s fifth assignment of error, he argues that his adjudications were against the manifest weight of the evidence. Appellant specifically challenges the credibility and reliability of the witnesses that identified him as one of the attackers.

{¶ 64} A manifest weight challenge questions whether the state met its burden of persuasion. *Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, at



¶ 12. A reviewing court “weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). “A conviction should be reversed as against the manifest weight of the evidence only in the most ‘exceptional case in which the evidence weighs heavily against the conviction.” *State v. Burks*, 8th Dist. Cuyahoga No. 106639, 2018-Ohio-4777, ¶ 47, quoting *Thompkins* at 387.

{¶ 65} In support of his manifest weight argument, appellant essentially challenges Lykes’s, C.M.’s and Detective Cuevas’s reliability and credibility. Although this court reviews credibility when considering the manifest weight of the evidence,

we are cognizant that determinations regarding the credibility of witnesses and the weight of the testimony are primarily for the trier of fact. *State v. Bradley*, 8th Dist. Cuyahoga No. 97333, 2012-Ohio-2765, ¶ 14, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact is best able “to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24.

*Burks* at ¶ 48. The jury is then able to observe any inconsistencies and resolve them accordingly, in turn, accepting or rejecting each witness’ testimony as they see fit. *Id.*, citing *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

**{¶ 66}** In the instant case, the jury heard testimony from Detective Cuevas and C.M., and appellant's statements to Detective Cuevas all identifying appellant as one of the juveniles that participated in the attack. In addition, the jury was provided with the surveillance video and with the video of Detective Cuevas's interview of appellant. In the interview, Detective Cuevas played the surveillance video for appellant and appellant identifies himself as one of the attackers.

**{¶ 67}** As noted above, C.M. identified appellant, in court, as one of the attackers. However, C.M. did not identify appellant in the surveillance video. Appellant argues that C.M.'s testimony was not reliable and not credible because C.M. received a plea deal from the state in exchange for his testimony at trial. We note that the trial court gave a detailed instruction to the jury as follows:

Co-defendant testimony does not become inadmissible because of the complicity, moral turpitude or self-interest, but where a witness is claimed to be complicit with the Defendant, that fact may affect the credibility of that witness and make his testimony subject to grave suspicion and require that to be weighed with great caution.

It is for you, the jurors, in light of all the testimony presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.

(Tr. 376.) We presume that the jury members followed this instruction. *State v. Harris*, 2017-Ohio-2751, 90 N.E.3d 342, ¶ 87 (8th Dist.). Further, the record does not establish how much, if any, weight the jury afforded C.M.'s testimony.

**{¶ 68}** After a review of the evidence, we find that the evidence does not weigh heavily against appellant's adjudications. Accordingly, we overrule appellant's fifth assignment of error.

### **III. Conclusion**

**{¶ 69}** Although the trial court erred in admitting out-of-court statements that were inadmissible hearsay and were admitted in violation of the Confrontation Clause, such error is harmless beyond a reasonable doubt because there existed overwhelming independent evidence of appellant's guilt. Detective Cuevas was testifying as to information that appellant had provided to him in his interview with appellant; thus, the testimony was not improper pursuant to Evid.R. 602 and 701. Appellant was not denied the effective assistance of counsel. Appellant's adjudications were supported by sufficient evidence and were not against the manifest weight of the evidence.

**{¶ 70}** Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution. The finding of adjudication having been affirmed, any bail or stay of execution pending appeal is terminated. Case remanded to the trial court for execution of commitment.

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

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FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and

**RAYMOND C. HEADEN, J., CONCUR**