[Cite as *State v. Adkins*, 2020-Ohio-1618.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108737
v.	:	
MATHEW W. ADKINS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 23, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-616546-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Gregory M. Paul and Maxwell M. Martin, Assistant Prosecuting Attorneys, *for appellee*.

Robert E. Dintaman, Esq., L.L.C., and Robert E. Dintaman, *for appellant*.

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

{¶ 1} Defendant-appellant Mathew Adkins brings the instant appeal challenging his convictions for murder and felonious assault. Appellant argues that the trial court erred by admitting other acts evidence and inadmissible hearsay, the

trial court erred by declaring a state's witness a court's witness, the cumulative effect of the trial court's evidentiary errors denied appellant a fair trial, and his murder conviction is 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} The instant matter arose from the murder of Ricardo Debrossard on April 15, 2017, at a residence in Euclid, Ohio. Appellant married Tenesha Thomas in 2007, and they have three children together. Appellant and Tenesha resided in the Euclid residence until September 2016, when appellant moved out. Appellant and Tenesha were still married at the time of the murder but they were estranged.

{¶ 3} Tenesha and Ricardo had been romantically involved before Tenesha married appellant. Tenesha and Ricardo reconnected around the time appellant moved out of the Euclid residence. Ricardo moved into the Euclid residence during the early months of 2017, and he was living at the residence in March and April 2017.

{¶ 4} When Ricardo moved into the residence, the relationship between appellant and Tenesha became "bumpy." (Tr. 532.) They had their issues and arguments, and the arguments would occasionally get "out of hand[.]" (Tr. 533.) Appellant frequently expressed a desire to get back together with Tenesha.

{¶ 5} Appellant and Ricardo also frequently argued with one another. Two of these arguments are at issue in this appeal.

{¶ 6} First, on March 7, 2017, appellant came to the residence and asked for Ricardo. Appellant pushed past Tenesha and came face to face with Ricardo.

Appellant was holding a firearm in his hand during this altercation. (Tr. 539.) Appellant left the residence, and Tenesha reported the incident to police.

{¶ 7} Second, on April 15, 2017, appellant returned to the residence. Tenesha exited the residence and spoke with appellant in his vehicle in the driveway. Ricardo came out of the residence, approached the vehicle, and spoke with appellant. Tenesha testified at trial that Ricardo punched appellant in the face, after which appellant drew his gun and shot Ricardo in the head. (Tr. 551.) Tenesha ran inside the house after appellant fired the first shot. She heard multiple gunshots after running inside. She looked out the window and saw Ricardo on the ground and appellant standing near Ricardo's legs. Tenesha called 911 from inside the house. Appellant fled from the scene in his vehicle.

{¶ 8} Tenesha's testimony that Ricardo punched appellant in the face was inconsistent with a recorded statement she made two days after the shooting. Tenesha did not mention Ricardo punching appellant in the driveway in her recorded statement. Rather, she asserted that Ricardo verbally threatened appellant before appellant shot him in the head. The state played the recorded statement at trial.

{¶ 9} On the same day of the shooting, appellant turned himself in to police. On April 24, 2017, the Cuyahoga County Grand Jury returned a four-count indictment charging appellant with (1) aggravated murder, in violation of R.C. 2903.01(A); (2) murder, in violation of R.C. 2903.02(B); (3) felonious assault, in violation of R.C. 2903.11(A)(1); and (4) felonious assault, in violation of R.C.

2903.11(A)(2). All four counts contained one- and three-year firearm specifications. Appellant was arraigned on April 27, 2017. He pled not guilty to the indictment.

{¶ 10} A jury trial commenced on March 25, 2019. During the direct examination of Tenesha, the state requested to treat her as a court's witness. The trial court granted the state's request on March 27, 2019.

{¶ 11} On April 5, 2019, the jury returned its verdict. The jury found appellant not guilty of aggravated murder on Count 1. The jury found appellant guilty of murder on Count 2 and felonious assault on Counts 3 and 4. The trial court ordered a presentence investigation report and set the matter for sentencing.

{¶ 12} The trial court held a sentencing hearing on May 28, 2019. The trial court determined that Counts 2, 3, and 4 merged as allied offenses of similar import for sentencing purposes. The state elected to sentence appellant on Count 2. The trial court sentenced appellant to a prison term of 15 years to life on the murder offense to be served consecutively with the underlying three-year firearm specification, for an aggregate prison term of 18 years to life.

{¶ 13} Appellant filed the instant appeal on June 26, 2019. He assigns six errors for review:

> I. Appellant was denied a fair trial by the improper admission of other acts evidence by the State of Ohio pursuant to Evidence Rule 404(B).
>
> II. Appellant was denied a fair trial through the State of Ohio's use of a videotaped prior statement by witness Tenesha Thomas as impeachment under Evidence Rule 801(D)(2).
>
> III. Appellant was denied a fair trial due to the introduction of hearsay testimony pursuant to Evidence Rule 803(3) by witness Tenesha

> Thomas to [Officer Trevor Thomas] as an excited utterance of witness Tenesha Thomas.
>
> IV. The cumulative nature of the prejudicial errors in this case constitute a denial of due process and a fair trial to the Appellant.
>
> V. The lower court erred in declaring State of Ohio witness Tenesha Thomas as a court's witness.
>
> VI. The verdict and judgment below finding the Appellant guilty of murder was against the manifest weight of the evidence.

{¶ 14} For ease of discussion, we will address appellant's assignments of error out of order.

II. Law and Analysis

A. Other Acts Evidence

{¶ 15} In his first assignment of error, appellant argues that the trial court erred by permitting the state to present other acts evidence at trial. Specifically, appellant contends that the trial court should have excluded Tenesha's testimony regarding the March 7, 2017 incident.

{¶ 16} The admission of evidence lies within the broad discretion of a trial court, and this court will not disturb evidentiary rulings absent an abuse of that discretion that materially prejudices the defendant. *State v. Hart*, 2018-Ohio-3272, 118 N.E.3d 454, ¶ 28 (8th Dist.), citing *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 43. Evid.R. 404(B), "other acts," provides that evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." However, such

evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*.

> In determining whether to permit other acts evidence to be admitted, trial courts should conduct the three-step analysis set forth in *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, to (1) determine if the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence under Evid.R. 401, (2) determine if the other acts evidence is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B), and (3) consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *Id*. at ¶ 20.

State v. Primm, 8th Dist. Cuyahoga No. 103548, 2016-Ohio-5237, ¶ 56.

{¶ 17} In the instant matter, appellant filed a pretrial motion in limine seeking to exclude evidence pertaining to the March incident. The trial court granted the motion in part and denied the motion in part.

{¶ 18} The trial court determined that the state could present evidence that appellant went to the residence on March 7, exchanged words with Ricardo, and threatened Ricardo before leaving. The trial court concluded that this evidence arguably fell under Evid.R. 404(B)'s motive or intent exceptions. Furthermore, citing this court's holding in *State v. Hicks*, 8th Dist. Cuyahoga No. 102206, 2015-Ohio-4978, ¶ 41, and the factors identified by the Ohio Supreme Court to consider in determining whether a defendant acted with prior calculation and design,[1] the trial court determined that the evidence was relevant and probative of whether

[1] *See State v. Taylor*, 78 Ohio St.3d 15, 19, 676 N.E.2d 82 (1997).

(1) appellant and Ricardo knew each other and their relationship was strained, and (2) there was thought and preparation in choosing the murder weapon or murder site. The trial court determined that the state could not, however, present evidence that appellant had a gun or threatened Ricardo with a gun during the March 7 incident.

{¶ 19} The following exchange occurred between the prosecutor and Tenesha on direct examination at trial:

> [Prosecutor]: Do you remember March the 7th, 2017?
>
> [Tenesha]: If I said I remember that exact day, no. Do I remember the incident you're talking about? Yes.
>
> [Prosecutor]: Okay. Well, what incident are we talking about?
>
> [Tenesha]: You're talking about the day that [appellant] came over to the house and he — I opened the door. He asked me where Ricardo was at.
>
> I said, why?
>
> He pushed past me, went to my bedroom. They met up face-to-face. [Appellant] had a gun in his hand. Ricardo told him, if you're going to shoot me, shoot me.
>
> I called the police, made a police report. Ricardo didn't want to give a statement.

(Tr. 538-539.)

{¶ 20} Defense counsel objected to Tenesha's testimony, and the trial court called the parties to sidebar. Defense counsel referenced the ruling on the motion in limine that there would be no reference to a firearm being involved in the March incident. The trial court explained that the basis for the pretrial ruling on the motion

in limine was that there was no indication that Tenesha had any information, other than through hearsay, that a gun was involved in the March incident. The trial court concluded that if Tenesha did, in fact, see that appellant was carrying a gun during the March incident, then she would be permitted to testify to that observation.

{¶ 21} Following the sidebar, Tenesha confirmed that she did see a gun in appellant's hand when he entered the house and had the face-to-face altercation with Ricardo. Tenesha testified that she recognized the gun that was in appellant's hand, and that the gun belonged to appellant.

{¶ 22} In the instant matter, regarding the first *Williams* prong, we find that the evidence of the March incident was relevant to the element of prior calculation and design that the state was required to prove on the aggravated murder offense charged in Count 1.

> There is no "bright-line test" for determining the presence or absence of prior calculation and design; however, the Ohio Supreme Court has identified several factors to be weighed along with the totality of the circumstances surrounding the murder in determining the existence of prior calculation and design, including: whether the defendant and the victim knew each other and, if so, whether the relationship was strained; whether there was thought or preparation in choosing the murder weapon or murder site; and whether the act was "drawn out" or "an almost instantaneous eruption of events." [*Taylor*, 78 Ohio St.3d at 19, 676 N.E.2d 82], citing *State v. Jenkins*, 48 Ohio App.2d 99, 102, 355 N.E.2d 825 (8th Dist.1976); *see also State v. Woods*, 8th Dist. Cuyahoga No. 99630, 2014-Ohio-1722, ¶ 25.

Hicks, 8th Dist. Cuyahoga No. 102206, 2015-Ohio-4978, at ¶ 41. Here, the state presented evidence of the March incident for the legitimate purpose of demonstrating that appellant and Ricardo knew each other and their relationship

was strained. The evidence of the March incident was also relevant to the defense's theory of the case that appellant shot Ricardo in self-defense.

{¶ 23} Second, the evidence was not offered to prove that appellant had bad character and that he acted in conformity therewith. Rather, the evidence was presented for the legitimate purposes of showing appellant's motive and intent.

{¶ 24} Third, we do not find that the probative value of the evidence pertaining to the March incident — Tenesha's testimony that appellant had a gun in his hand during the face-to-face altercation with Ricardo — is substantially outweighed by the danger of unfair prejudice. As noted above, it was undisputed at trial that appellant shot Ricardo.

{¶ 25} For all of the foregoing reasons, we are unable to conclude that the trial court's decision to admit Tenesha's testimony regarding the March incident was unreasonable, arbitrary, or unconscionable. Appellant's first assignment of error is overruled.

B. Tenesha's Testimony

{¶ 26} Appellant's second, third, and fifth assignments of error pertain to the testimony of Tenesha Thomas.

1. Recorded Statement

{¶ 27} In his second assignment of error, appellant argues that the trial court erred and denied him a fair trial by permitting the state to use a videotaped

statement to impeach Tenesha. Defense counsel did not object to the admission of the recorded statement at trial. Therefore, appellant has forfeited all but plain error.

{¶ 28} Tenesha provided the following account of the April 15 incident at trial:

> A conversation took place between [Ricardo and appellant]. The next thing I know, Ricardo punches him. * * * And when he punches [appellant], [appellant's] upper part of his body fell behind the passenger seat where I was sitting. Next thing I know, [appellant's] arm comes back up with his gun. He points it, pow, first shot to the head. I got out of the truck, I took off.

(Tr. 551.)

{¶ 29} The record reflects that two days after the April 15 shooting, Tenesha met with defense counsel and provided a recorded statement about the shooting. The prosecutor inquired about the specific details Tenesha provided in her recorded statement. Tenesha asserted that she was unable to remember the specific details about her recorded statement. Tenesha testified, however, "I don't remember telling nobody I didn't see nobody get hit. I don't remember saying that. I remember [appellant] getting hit." (Tr. 565.) Tenesha continued, "I don't remember saying I didn't see [appellant] punched — that I didn't see [appellant] get punched. I can't remember saying that." (Tr. 566.)

{¶ 30} The prosecutor sought to play a portion of Tenesha's recorded statement to refresh her recollection.[2] Defense counsel did not object to the state's

[2] State's exhibit No. 801.

request. The trial court permitted the state to play the recorded statement to the jury.

{¶ 31} In her recorded statement, Tenesha did not allege that Ricardo punched or struck appellant in the driveway before appellant drew his gun and shot Ricardo.

{¶ 32} After the recorded statement was played in court, the prosecutor inquired about the discrepancy between Tenesha's recorded statement and trial testimony regarding whether Ricardo struck appellant before appellant shot him. Tenesha asserted that she could not remember whether appellant had been hit by Ricardo when she provided her recorded statement two days after the shooting, but she remembered at the time of trial that Ricardo did punch appellant.

{¶ 33} In this appeal, appellant argues that the state failed to establish the proper foundation under Evid.R. 613(B) to use the recorded statement to impeach Tenesha's trial testimony. Evid.R. 613(B), governing extrinsic evidence of a witness's prior inconsistent statement, provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:
>
> (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;
>
> (2) The subject matter of the statement is one of the following:
>
> (a) A fact that is of consequence to the determination of the action other than the credibility of a witness;

> (b) A fact that may be shown by extrinsic evidence under Evid.R. 608(A), 609, 616(A), or 616(B);
>
> (c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence.

{¶ 34} Ohio courts have regularly applied Evid.R. 613(B) to admit a witness's prior inconsistent statement for impeachment purposes. *See, e.g., State v. Fisher*, 8th Dist. Cuyahoga No. 83098, 2004-Ohio-3123, ¶ 14; *State v. Shaffer*, 114 Ohio App.3d 97, 102, 682 N.E.2d 1040 (3d Dist.1996).

{¶ 35} In the instant matter, appellant has failed to demonstrate plain error. The record reflects that the state initially used the recorded statement to refresh Tenesha's recollection about the details she provided to defense counsel two days after the shooting. After the statement was played in court, Tenesha acknowledged that she made no mention of Ricardo punching appellant in her recorded statement, but explained that she did not remember Ricardo punching appellant at the time.

{¶ 36} The record reflects that the state satisfied the requirements of Evid.R. 613(B). The state laid a proper foundation before playing Tenesha's recorded statement, and the contends of Tenesha's recorded statement went to a fact of consequence in the case — the defense's theory of the case was that appellant shot Ricardo in self-defense, and Tenesha provided conflicting accounts regarding whether Ricardo punched appellant before appellant shot and killed him.

{¶ 37} Finally, as set forth below in the analysis of appellant's fifth assignment of error, the trial court granted the state's request to treat Tenesha as a court's witness. Once Tenesha became a witness of the court, the state was

permitted to impeach her using her prior inconsistent statement. *See State v. Hughley*, 2018-Ohio-1521, 111 N.E.3d 61, ¶ 33 (8th Dist.), citing *State v. Pritchard*, 8th Dist. Cuyahoga No. 78497, 2001 Ohio App. LEXIS 3400, 13-14 (Aug. 2, 2001), and *State v. Dacons*, 5 Ohio App.3d 112, 449 N.E.2d 507 (10th Dist.1982).

{¶ 38} For all of the foregoing reasons, the trial court did not abuse its discretion or commit plain error in permitting the state to present Tenesha's recorded statement at trial. Appellant's second assignment of error is overruled.

2. Excited Utterance

{¶ 39} In his third assignment of error, appellant argues that the trial court erred by permitting Euclid Police Officer Trevor Thomas to testify about Tenesha's statements at the scene of the shooting. Appellant contends that Officer Thomas's testimony was inadmissible hearsay that did fall under the excited utterance exception.

{¶ 40} Officer Thomas was permitted to testify, over the objection of defense counsel, about the following statement that Tenesha provided to him at the scene:

> [Tenesha] advised that [appellant] came to the house, started banging on all the windows. [Ricardo] went outside to confront him. At that point, [appellant] was sitting in his car. She described that [Ricardo] went up to the side door, which was open. She observed [appellant] reach down between his legs, pull out a gun. She said that she heard seven or eight gunshots. [Ricardo] fell down. She then observed [appellant] get out of the car, stand up over top of [Ricardo] and shoot him several more times while standing over top of him.

(Tr. 1734-1735.)

{¶ 41} Officer Thomas confirmed that Tenesha did not bring up anything about punches being thrown or a physical altercation prior to the shooting. Officer Thomas authored a report memorializing the conversation he had with Tenesha on scene.

{¶ 42} Evid.R. 801(C) defines hearsay as "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." Generally, hearsay is not admissible at trial. However, Evid.R. 803 sets forth exceptions to the hearsay rule.

{¶ 43} One such exception is an excited utterance. Evid.R. 803(2) defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

{¶ 44} In *State v. Taylor*, 66 Ohio St.3d 295, 612 N.E.2d 316 (1993), the Ohio Supreme Court identified four factors to consider in determining whether a statement falls under the excited utterance exception to the hearsay rule:

> "(a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his [or her] reflective faculties and thereby make his [or her] statements and declarations the unreflective and sincere expression of his [or her] actual impressions and beliefs, and thus render his [or her] statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his [or her] statements and declarations the unreflective and sincere expression of his [or her] actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of

> such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his [or her] statement or declaration."

Taylor at 301, quoting *Potter v. Baker*, 162 Ohio St. 488, 501, 124 N.E.2d 140 (1955).

{¶ 45} In the instant matter, the first and fourth factors are satisfied. Tenesha was sitting in a vehicle with appellant, her estranged husband, when he shot her new boyfriend, Ricardo, in the head. Although she ran inside the house after appellant fired the first shot, Tenesha either saw or heard appellant fire several more shots at Ricardo. The third factor is also satisfied. Tenesha's statement to Officer Thomas related to the shooting that occurred in the driveway.

{¶ 46} Appellant challenges the second factor, arguing that enough time passed between the shooting and her statement to Officer Thomas such that her statement was not an excited utterance. Appellant's argument is misplaced and unsupported by the record.

{¶ 47} Even if a statement is not made contemporaneously with the startling event, it may fall under the excited utterance exception to the hearsay rule. *State v. Shutes*, 8th Dist. Cuyahoga No. 105694, 2018-Ohio-2188, ¶ 37, citing *State v. Duncan*, 53 Ohio St.2d 215, 219, 373 N.E.2d 1234 (1978). "There is no per se length of time after which a statement may no longer be considered to be an excited utterance." *Id.*, citing *Taylor* 66 Ohio St.3d at 303, 612 N.E.2d 316. The essential components of an excited utterance are (1) a statement made while the declarant is under the stress of the startling event, and (2) a statement that is not a result of reflective thought. *Id.*, citing *Taylor* at *id.*

{¶ 48} After reviewing the record, we find that Tenesha's statement was made while she was still under the stress of the shooting and her statement was not the product of reflective thought. Officer Thomas was the first officer to arrive on the scene. He arrived on scene approximately one minute after the call came in. (Tr. 1096.) When he arrived on scene, Officer Thomas spent "minutes" performing chest compressions on Ricardo. (Tr. 1096.) Other officers and EMS arrived on the scene "seconds, minutes" after he arrived. (Tr. 1088.) As soon as EMS arrived, they took over the efforts to revive Ricardo.

{¶ 49} At this point, Officer Thomas immediately approached the house, knocked on the door, and spoke with Tenesha. He asked Tenesha what transpired, and she provided the statement that appellant challenges in his third assignment of error. Officer Thomas described Tenesha's demeanor as "mildly hysterical." (Tr. 1090.) He explained that although Tenesha was crying, she appeared to be in a state of panic. He interacted with Tenesha at this point for several minutes. (Tr. 1091.)

{¶ 50} Officer Thomas left Tenesha and assisted the other officers with processing the scene. Several minutes after his initial conversation with Tenesha, during which she made the challenged statement, Officer Thomas was called back into the residence. He went into a bedroom and explained, "[Tenesha] was laying down and appeared to be having maybe a panic attack. She was breathing kind of — she was unresponsive but responsive, if that makes any sense." (Tr. 1093.) Officer Thomas alerted EMS, and Tenesha was transported to the hospital. Officer Thomas

asserted that between his first and second interactions with Tenesha, "[s]he just became zoned out and unresponsive." (Tr. 1095.)

{¶ 51} Officer Thomas's testimony was supported by the testimony of Detective Kroczak. Detective Kroczak testified that as she was processing the scene, "we were alerted that [Tenesha] may need some medical attention. And I observed [Tenesha] to be — she — she couldn't stand on her own. She may have fallen down." (Tr. 1165.)

{¶ 52} Finally, Tenesha's own testimony at trial indicates that her statement to Officer Thomas constitutes an excited utterance. Tenesha testified at trial that she was "[n]ot so good" when she spoke with police on the scene. (Tr. 559.) She described her emotional state as a "wreck," and explained, "I had a bad anxiety attack and passed out several times, according to what I was told." (Tr. 559.) She went to the hospital because she "passed out a couple times" and had a "bad anxiety attack." (Tr. 560.) Finally, Tenesha confirmed that she was still feeling the effects of the shooting when police arrived on scene.

{¶ 53} Accordingly, we find that the second excited utterance factor is satisfied. Tenesha's statement was made during the first encounter between her and Officer Thomas that occurred "minutes" after he arrived on scene. The evidence demonstrates that Tenesha's statement was made while she was still under the stress of the shooting, and not a result of reflective thought.

{¶ 54} For all of the foregoing reasons, we find no basis upon which to conclude that the trial court abused its discretion in admitting the statement

Tenesha made to Officer Thomas. Tenesha's statement was admissible under the excited utterance exception to the hearsay rule. Appellant's third assignment of error is overruled.

3. Court's Witness

{¶ 55} In his fifth assignment of error, appellant argues that the trial court erred in declaring Tenesha a court's witness.

{¶ 56} As an initial matter, we note that the trial court did not declare Tenesha a hostile witness pursuant to Evid.R. 611. "Evid.R. 611 allows a party to call a hostile witness, an adverse party, or a witness identified with an adverse party and examine the witness with the use of leading questions on direct examination." *In re K.S.*, 8th Dist. Cuyahoga No. 97343, 2012-Ohio-2388, ¶ 16. Rather, the trial court, as the state's suggestion, called Tenesha as a court's witness, as permitted under Evid.R. 614.

{¶ 57} The record reflects that before trial commenced, the state requested that Tenesha be considered a court's witness based, in part, on the fact that Tenesha willingly met with appellant's defense team but refused to meet with police or prosecutors before trial, and the state's concern that Tenesha's interests were "clearly aligned with [appellant] in this case for a lot of reasons[.]" (Tr. 578.) The trial court denied the state's pretrial request.

{¶ 58} During the state's direct examination of Tenesha, the state renewed its request to treat Tenesha as a court's witness. In support of the renewed request, the state argued that it was necessary to further explore Tenesha's testimony

through cross-examination and that further exploration would be beneficial to ascertaining the truth based on the indication that her trial testimony contradicted the prior statement she made to police.

{¶ 59} The trial court granted the state's renewed request, explaining

> I do find [Tenesha's] testimony was somewhat of a surprise, I believe, to the State with respect to the incident involving [Ricardo] and [appellant] that led to the gunshot, at least the initial gunshot.
>
> [Tenesha] did testify about a punch, and I don't even think the Defense team was expecting that testimony, as that was inconsistent with her prior statements to police. It was, in fact, a punch, not just a threat of a punch at that time. So it was a surprise.

(Tr. 580.)

{¶ 60} Evid.R. 614(A) provides, in relevant part, "[t]he 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." Pursuant to Evid.R. 611 and 614, a trial court has discretion to control the flow of the trial, including questioning of witnesses, "in a search for the truth." *State v. Redon*, 8th Dist. Cuyahoga No. 92611, 2009-Ohio-5966, ¶ 8. "Evid.R. 614(A) exists to bring about the proper determination of a case. A witness whose appearance is important to the proper determination of the case, but who appears to be favorable to the other party, is a principal candidate for application of Evid.R. 614(A)." *State v. Curry*, 8th Dist. Cuyahoga No. 89075, 2007-Ohio-5721, ¶ 18.

{¶ 61} The trial court's decision to treat Tenesha as a court's witness, rather than a witness of the state's, is entirely within the trial court's discretion, and this court will not reverse the trial court's decision absent an abuse of that discretion.

Parma Hts. v. Owca, 2017-Ohio-179, 77 N.E.3d 505, ¶ 35 (8th Dist.), citing *State v. Stadmire*, 8th Dist. Cuyahoga No. 81188, 2003-Ohio-873, ¶ 26; *State v. Davis*, 79 Ohio App.3d 450, 454, 607 N.E.2d 543 (4th Dist.1992).

{¶ 62} In the instant matter, the record reflects that Tenesha was a principal candidate for the application of Evid.R. 614(A). Tenesha was the only eyewitness to the circumstances that led to the shooting in the driveway. Her testimony was undoubtedly important to the determination of whether appellant shot Ricardo in self-defense. The state presented substantial evidence of the inconsistency between Tenesha's recorded statement and her trial testimony regarding whether Ricardo punched appellant before appellant drew his weapon and opened fire.

{¶ 63} The state also presented evidence from which a reasonable inference could be drawn that the inconsistency between Tenesha's statements was possibly motivated by her ongoing relationship with appellant. Tenesha testified on direct examination that she will always love appellant, and that he is an "excellent father and provider[.]" (Tr. 615.) Tenesha asserted that she spoke on the phone with appellant hundreds of times since he was arrested, and her children reside at appellant's mother's house. Her testimony indicated that she willingly met with defense counsel before trial, but refused to meet with the prosecution for two years, and spoke with Detective Kroczak one time on the phone about the shooting.

{¶ 64} Finally, the trial court entertained arguments from the parties and announced its decision to treat Tenesha's as a court's witness outside the presence of the jury. The trial court did not make a formal declaration to this effect to the

jury, rather, the trial court concluded that it would "simply allow counsel the opportunity to engage in more of a cross-examination-type inquiry than would be the case if [Tenesha] was simply the State's witness." (Tr. 581.) Therefore, the trial court exercised caution to ensure that its ruling would not prejudicially influence the jury.

{¶ 65} For all of the foregoing reasons, we find no basis upon which to conclude that the trial court's decision to treat Tenesha as a court's witness was unreasonable, arbitrary, or unconscionable. Appellant's fifth assignment of error is overruled.

C. Cumulative Error

{¶ 66} In his fourth assignment of error, appellant argues that the cumulative effect of the errors in the trial court's evidentiary rulings — permitting the state to present evidence of the March incident, Tenesha's recorded statement, Tenesha's statement to Officer Thomas on the scene, and permitting the state to treat Tenesha as a court's witness — violated appellant's due process rights and denied him a fair trial.

> Under the doctrine of cumulative error, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the errors does not individually constitute cause for reversal. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 132; *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). However, the doctrine of cumulative error is inapplicable when the alleged errors are found to be harmless or nonexistent. *Id.*; *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 48.

State v. Shine, 2018-Ohio-1972, 113 N.E.3d 160, ¶ 141 (8th Dist.).

{¶ 67} In the instant matter, based on our resolutions of appellant's first, second, third, and fifth assignments of error, the cumulative error doctrine is inapplicable. Accordingly, appellant's fourth assignment of error is overruled.

D. Manifest Weight

{¶ 68} In his sixth assignment of error, appellant argues that his murder conviction is against the manifest weight of the evidence.

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

{¶ 70} In support of his manifest weight challenge, appellant argues that (1) he shot Ricardo in self-defense, (2) the only direct evidence implicating him was the testimony of Tenesha, and her testimony was not credible, and (3) investigators failed to properly test evidence at the scene, specifically the vehicle in the driveway and items of clothing, that would have substantiated his self-defense claim.

{¶ 71} Appellant's argument regarding the lack of direct evidence implicating him is misplaced. It is undisputed that the state's case against appellant was largely circumstantial. However, "[a] conviction can be sustained based on circumstantial evidence alone." *State v. Franklin*, 62 Ohio St.3d 118, 124, 580 N.E.2d 1 (1991), citing *State v. Nicely*, 39 Ohio St.3d 147, 529 N.E.2d 1236 (1988).

{¶ 72} Appellant's argument regarding the investigators' failure to test evidence from the crime scene is vague and entirely speculative. He does not specify what type of testing should have been conducted on the evidence (i.e., testing for fingerprints, DNA, gunshot residue, etc.). Appellant assumes that if testing was conducted, it would have substantiated his self-defense claim. Specifically, appellant appears to contend that if the testing results demonstrated that Ricardo was near appellant at the time the first shot was fired, this would conclusively establish that Ricardo struck appellant and appellant shot Ricardo in self-defense. Appellant's argument is misplaced.

{¶ 73} As noted above, the defense's theory of the case was that appellant shot Ricardo in self-defense. The defense maintained that appellant suffered a traumatic brain injury during an industrial accident, and was told that he could die if he sustained another head injury.

> In Ohio, self-defense is an affirmative defense that a defendant must prove by a preponderance of the evidence. R.C. 2901.05(A); *State v. Williford*, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990). To succeed on a claim of self-defense, a defendant must establish the following three elements: (1) no fault in creating the situation giving rise to the affray; (2) a bona fide belief that he or she was in imminent danger of death or great bodily harm and that the only means of escape from such

> danger was in the use of force; and (3) no violation of any duty to retreat or avoid the danger. *State v. Barnes*, 94 Ohio St.3d 21, 24, 759 N.E.2d 1240 (2002). Specifically, as to the third element, "[b]efore using deadly force in self-defense, a person must first use any reasonable means of retreat when attacked outside the confines of his or her own home." *State v. Reynolds*, 10th Dist. Franklin No. 18AP-560, 2019-Ohio-2343, ¶ 39, citing *State v. Johnson*, 10th Dist. Franklin No. 06AP-878, 2007-Ohio-2792, citing *State v. Thomas*, 77 Ohio St.3d 323, 673 N.E.2d 1339 (1997).

State v. Bouie, 8th Dist. Cuyahoga No. 108095, 2019-Ohio-4579, ¶ 37.

{¶ 74} Here, the jury heard conflicting testimony regarding whether appellant was at fault in creating the situation. As noted above, Tenesha testified at trial that Ricardo punched appellant in the driveway. Assuming that Ricardo did, in fact, punch or attempt to punch appellant in the driveway, the jury was free to believe whether or not Ricardo's conduct gave rise to a bona fide belief that appellant was in imminent danger of great bodily harm or death.

{¶ 75} In her recorded statement, Tenesha made no mention of Ricardo punching or attempting to punch appellant. She was directly asked whether appellant was punched, and she repeated two times, "I'm not sure if [appellant] got punched or not[.]" (Tr. 571.) Although Tenesha asserted at trial that she was "positive" Ricardo punched appellant, she could not recall what hand Ricardo struck appellant with, or where appellant was struck (i.e., nose, cheek, mouth, etc.). Tenesha generally testified that appellant was punched "in the face region." (Tr. 533.)

{¶ 76} The jury was also free to reject appellant's self-defense claim based on the number of shots fired by appellant. Tenesha testified that appellant's first shot

struck Ricardo in the head. The jury could have determined that Ricardo would have been incapacitated by the first shot, such that he no longer presented an imminent danger of death or great bodily harm to appellant, or that appellant could have escaped any danger presented by Ricardo through other means. Appellant fired at least nine additional shots, and, at some point, repositioned himself. Tenesha testified that appellant fired the first shot inside the car. When she ran inside the house and looked into the driveway, she saw appellant standing over Ricardo's body. Ricardo sustained 12 gunshot wounds to his head, neck, trunk, and extremities.

{¶ 77} Tenesha testified that appellant fled from the scene in his vehicle. A reasonable inference could be drawn that appellant would not have fled had he shot Ricardo in self-defense.

{¶ 78} Finally, the jury heard the conflicting statements provided by Tenesha regarding whether Ricardo punched or attempted to punch appellant in the driveway. Two days after the shooting, Tenesha did not mention Ricardo punching appellant. Almost two years after the shooting, Tenesha testified at trial that Ricardo punched appellant and as a result, appellant drew his gun and shot Ricardo in the face. She asserted that she did not mention Ricardo punching appellant in her recorded statement because she did not remember it at the time, two days after the shooting. The jury, as the trier of fact, was free to give more weight to Tenesha's recorded statement in April 2017, and free to reject Tenesha's trial testimony that Ricardo punched appellant in the face.

{¶ 79} After reviewing the record, and drawing the reasonable inferences based on the evidence presented at trial, we find no basis upon which to conclude that the jury lost its way and created such a manifest miscarriage of justice that a new trial should be ordered. This is not an exceptional case in which the jury clearly lost its way in finding appellant guilty or that the evidence weighs heavily against appellant's convictions. The state's theory was that appellant intentionally shot Ricardo out of jealously and rage. The defense's theory was that appellant shot Ricardo in self-defense.

{¶ 80} Appellant's convictions are not against the manifest weight of the evidence merely because the jury found the state's version of the events to be more believable than appellant's theory of the case. "'[A] conviction is not against the manifest weight of the evidence simply because the jury rejected the defendant's version of the facts and believed the testimony presented by the state.'" *State v. Jallah*, 8th Dist. Cuyahoga No. 101773, 2015-Ohio-1950, ¶ 71, quoting *State v. Hall*, 4th Dist. Ross No. 13CA3391, 2014-Ohio-2959, ¶ 28. The jury did not lose its way in resolving the conflicting theories based on the evidence presented at trial.

{¶ 81} For all of the foregoing reasons, appellant's sixth assignment of error is overruled. Appellant's convictions are not against the manifest weight of the evidence.

III. Conclusion

{¶ 82} After thoroughly reviewing the record, we affirm the trial court's judgment. The trial court did not abuse its discretion in permitting the state to

present evidence related to the March 2017 incident. The trial court did not commit plain error in allowing the prosecutor to present Tenesha's recorded statement at trial. The trial court did not abuse its discretion in permitting Officer Thomas to testify about Tenesha's statement at the scene. The trial court did not abuse its discretion in granting the state's request to treat Tenesha as a court's witness. Appellant's convictions are not against the manifest weight of the evidence.

{¶ 83} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
EILEEN A. GALLAGHER, J., CONCUR