

[Cite as *State v. Gay*, 2024-Ohio-1673.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. 22CA3999
 :
 v. :
 :
 CHRISTOPHER GAY, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

Valerie Webb, Portsmouth, Ohio, for appellant¹.

Shane A. Tieman, Scioto County Prosecuting Attorney, and Matthew F. Loesch, Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:4-25-24
ABELE, J.

{¶1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. Christopher Gay, defendant below and appellant herein, assigns two errors for review:

FIRST ASSIGNMENT OF ERROR:

"APPELLANT'S CONVICTION ON THE CHARGE OF FELONIOUS ASSAULT SHOULD BE REVERSED BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT."

¹ Different counsel represented appellant during the trial court proceedings.

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SECOND ASSIGNMENT OF ERROR:

"APPELLANT'S CONVICTION ON THE CHARGE OF FELONIOUS ASSAULT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND SHOULD BE REVERSED."

{12} The state charged appellant and four others after the beating death of James Liles. In September 2021, a Scioto County Grand Jury returned an indictment that charged appellant with (1) one count of murder in violation of R.C. 2903.02(B), an unclassified felony, (2) one count of felonious assault in violation of R.C. 2903.11(A)(1), a second-degree felony, (3) one count of tampering with evidence in violation of R.C. 2921.12(A)(1), a third-degree felony, (4) one count of possession of a fentanyl-related compound in violation of R.C. 2925.11(A), a fifth-degree felony, (5) one count of aggravated possession of drugs in violation of R.C. 2925.11(A), a fifth-degree felony, (6) one count of aggravated possession of drugs in violation of R.C. 2925.11(A), a fifth-degree felony, (7) one count of possessing criminal tools in violation of R.C. 2923.24(A), a fifth-degree felony, and (8) one count of permitting drug abuse in violation of R.C. 2925.13(B), a fifth-degree felony. Appellant entered not guilty pleas.

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{13} In addition to the indictment against appellant, a Scioto County Grand Jury also returned indictments that charged Johnathan Kozee, Antwan Bass, Dakota Fitzpatrick, and Kala Rhea with crimes relating to Liles' death. Prior to appellant's trial, Bass, Fitzpatrick, and Rhea entered into plea agreements with the state to testify against appellant and Kozee.

{14} At trial, Portsmouth Police Officer Tyler Spriggs testified that he arrived at 1663 Robinson Avenue in Portsmouth on August 14, 2021 after first responders summoned law enforcement regarding a possible assault. As paramedics placed Liles in an ambulance, Spriggs found Liles nonresponsive with eyes closed and swelling on his face, ears, and eyes. Kala Rhea told Spriggs that Liles arrived at the home a little after midnight and appeared "to have been beaten up." Rhea stated that "they took him in," and during the night, Liles had "a couple seizures." She asked Liles "multiple times if she could call police or EMS," but Liles did not want her to do so. Rhea stated that Liles told her that "supposedly a group of people in a red truck had beaten him up."

{15} Portsmouth Police Officer Jeremy German testified that he arrived at the residence at about the same time as Officer Spriggs. German observed multiple fire units and noticed a female standing

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outside. The female, Rhea, told German that the victim "had been beaten up at another location and she wasn't really sure where," "and he had come to her house, he didn't want EMS called, he did not want police called and she was taking care of him." When Antwan Bass appeared, German questioned Bass about the victim's injuries, but Bass stated that he "was asleep which Kala corroborated that and said that he was not awake when [the victim] showed up." Bass told German that he woke up at 8:00 a.m., "saw Liles on the couch," and Bass "could tell he was beat up," but Bass "didn't think he was bad." Bass told German that Liles has seizures, and when he has them, "he acts like he's real tough." Officers Spriggs and German acknowledged that they had not seen the appellant or Kozee while at the Robinson Avenue residence. Although neither officer recalled the time, defense counsel noted a "dispatch mark here at 18:44, so that would be 6:44 p.m."

{116} Portsmouth Fire Lieutenant Kyle Moore recalled that dispatch relayed information about a male on the front porch at 1663 Robinson Avenue "who was badly injured." Moore and the fire department arrived a little over a minute after the call but found no one on the porch. Staff knocked and entered the home and found Liles on his back on a couch. Moore recalled a "considerable amount of swelling," and stated they performed an initial

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assessment, had safety concerns, and went outside to wait for police. Moore's initial assessment revealed that Liles "had a significant head injury," "bruising on the face, around the eyes, * * * around the ears." Liles did not respond to attempts to wake him and never gained consciousness. Moore requested helicopter transport to a trauma center when they noticed the victim's unequal pupils, "a sign of a traumatic brain injury." Medics then transported Liles a couple of blocks to the helipad. Moore noted that the residents at the home were "walking around acting like they were busy" and "didn't seem like they were concerned with what was going on," and said "he had gotten in a fight with somebody in Farley Square in a red truck."

{17} Portsmouth Fire Lieutenant and Paramedic Ryan Robertson arrived within minutes and noticed a white female on the porch who told him he would find the victim inside. Inside, Robertson found an African-American male and Liles, unconscious with "significant head trauma, bruising, swelling to the head, respirations were fast and shallow." Robertson testified that in over 1,500 emergency runs he had never seen injuries "to that severity." Robertson further stated that the victim "would not have been able to walk, talk or anything within the last 30 minutes." "The amount of bruising, * * * swelling to both eyes, both ears, * * * there was

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battle signs on bruising behind the ears, * * * and * * * his face almost looked just deformed, it didn't look human like in a sense." Robertson explained, "when the scene started to escalate a little bit, people started to get * * * upset, EMS removed themselves from the house and called for PD assistance."

{118} Air Evac Life Team Flight Paramedic Timothy Johnson testified that when the victim arrived, "he had severe bruising around the eyes, the ears uh which would be raccoon eyes and battle signs, * * * indicative of a severe head trauma, skull fracture to be specific." Johnson noticed a "significant difference in [the victim's] pupils, one was 4 mm and the other one was 2 mm * * * that increases the likelihood of a more severe brain trauma." Johnson testified that the victim scored a 3 of 15 on the Glasgow Coma Scale, with 3 the worst score. Johnson explained that, in his career of over 1,100 Air Evac flights, Liles appeared "probably one of the most severe." Dispatch notified Air Evac of the incoming patient at 6:54 p.m., they departed at 7:42 and arrived at 8:03 in Huntington, West Virginia, at St. Mary's, a Level 2 Trauma Center.

{119} Kala Rhea testified that she owns the home at 1663 Robinson Avenue and is a recovering addict. Rhea lived at the home with appellant, her fiancé, when she relapsed in March or April 2021 after three years sober and began to use fentanyl. After her

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unemployment expired, Rhea rented a room to support her drug habit. Rhea also referred to her home as a "flophouse," a place where she sometimes sold drugs to addicts and allowed addicts to bring drugs into her home, use them, shower, and eat. During this time in 2021, Rhea became familiar with co-defendant Johnathan Kozee and his girlfriend, Dakota Fitzpatrick, when they began to hang around the home about two months before the incident. Rhea met Liles "a couple days" before the assault when he visited the home because he knew appellant.

{¶10} On August 13, 2021, appellant, Kozee, Fitzpatrick, Antwan Bass, and Ebony Underwood (a renter) were present at the residence when Kozee "noticed that he had dope come up missing." Kala Rhea explained that the missing drugs constituted half a gram, worth \$50 or less. Rhea stated that when this discovery occurred, she, appellant, Kozee, Fitzpatrick, Bass and the victim were present. Kozee appeared angry and "told everybody nobody was going anywhere until he found his dope and he started going through the things laying around in the dining room and stuff looking. He had a like a bag that he was looking through." Rhea stated, "I noticed I hadn't seen James Liles and I asked [appellant], where is * * * they called him Jimmy, I said where is Jimmy and he said I don't know." Rhea continued, "I said well you need to go find him and he

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went in through the dining room, into the kitchen and to the bathroom and he was in the bathroom." Rhea stated that appellant went toward the bathroom and then he "hollers for [Kozee] and tells [Kozee] that Jimmy had something he needed to tell him." Kozee walked toward the bathroom and "you hear a scuffle begin * * * inside the bathroom" between Liles, Kozee, and appellant. Rhea saw "[Kozee] lean down and lay a punch and then the door was shut." Rhea could not estimate how long the three men remained in the bathroom, but at some point, "[t]he bathroom door opens and then they are dragging James out of the bathroom * * * They are dragging him by the hands and feet out of the bathroom naked." Rhea testified that the victim wore clothing when he entered the bathroom.

{111} Kala Rhea stated that appellant and Kozee left Liles on the kitchen floor near a table, and then she witnessed appellant "hitting and kicking" the victim. When asked if the victim tried to defend himself, Rhea said, "No." Rhea observed Liles "laying there * * * You could hear him moan; he's making noises but he's unable to defend himself." Then Rhea said Dakota Fitzpatrick "was just punching him on - it would have been - he was laying on his stomach so it would have been his right hand side * * * And screaming calling him names."

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{¶12} Kala Rhea then observed that the victim "started losing bodily function, uh his bowels released in the floor and * * * [Kozee] was gathering up stuff to uh take and trade for more dope." Kozee also went through the victim's bag and wallet and then left with his girlfriend, Dakota. During this time, Rhea explained that she sat in the living room "using drugs." After Kozee and Fitzpatrick left, Rhea told appellant he needed to clean up the mess "before the cops came." Rhea observed appellant "cleaning up," and noticed blood around Liles' mouth, jaw, and nose. Rhea stated that appellant helped Liles "get in the shower and * * * they sat at the kitchen table for a little bit." The victim "spoke like he was uh cussing at [appellant] but not much." Rhea recalled waking up the next day on the couch and the victim "was sitting in the chair across from me. Rhea visited the dollar store with her mother around noon, and during that time, Liles "was kind of in and out of it. Um, at this point I knew that he needed medical attention." On cross-examination, Rhea acknowledged that the victim needed medical attention earlier, but "I failed to do that." She also admitted that she abused drugs while Liles suffered and that she had been in the presence of drug dealers after she claimed she stopped using or selling.

{¶13} Kala Rhea further explained that Antwan Bass called 911

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"because we knew that he was getting worse." Rhea said she wanted to call earlier, but the others resisted. Rhea, Antwan, and appellant decided to tell first responders that Liles "came to the house beat like that. And that it could've possibly been gang related." Rhea stated that Antwan and appellant were not present at the house when first responders arrived. Rhea acknowledged that the state charged her with third-degree felony tampering with evidence, and if she cooperated she would receive a community control sentence.

{¶14} Kortni Campbell, Kala Rhea's sister, testified that she stopped at Rhea's house at least every other day to "check on her" because everyone at the house "was on drugs." Campbell stated that Rhea had been sober for ten years before she relapsed three years ago. Campbell typically stopped on Thursdays to take Rhea a "pizza and a vape pen every week that way she had something to eat that day and a cigarette to smoke all week." While Campbell visited Rhea on August 13, 2021, she observed appellant, Kozee, and another man. Campbell returned later that day with food, but only stepped inside the door and saw Rhea, appellant, Kozee, Fitzpatrick, Bass, and Liles. Campbell just met Liles that day and visited "10 minutes maybe at the most." Campbell also acknowledged that she observed a white man in a black hoodie that she did not know.

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{¶15} Dakota Fitzpatrick testified that she and Kozee, her boyfriend for nine years, were together on August 13, 2021, but homeless. Rhea and appellant invited them to move in, but Fitzpatrick and Kozee "were chasing drugs." Fitzpatrick purchased drugs from Ebony Underwood, the renter at Rhea's. She knew Rhea and appellant about two months before the August 13, 2021 assault. Fitzpatrick and Kozee arrived at Rhea's home and observed appellant, Rhea, Underwood, some other friends of Underwood, and Liles, who she knew for about nine years. Fitzpatrick also stated that those at the home appeared to be high when they arrived, but no one appeared injured. Fitzpatrick and Kozee used methamphetamines and heroin while they visited Rhea's home.

{¶16} At some point, Dakota Fitzpatrick sat at the dining room table and "had just did a shot of dope" when "some dope came up missing and [appellant] told [Kozee] that [Liles] took it. [Liles] took your dope." Liles walked out of the bathroom and Kozee said to Liles, "where is my dope." Liles said, "I didn't take it; I didn't take it and then he said I am sorry bro." Kozee and appellant "started hitting James, James hit them back and then they just started going at it." Then, the three went into the bathroom and Bass closed the door. Fitzpatrick heard "a lot of commotion," and when the door opened, "they [appellant, Kozee, and Bass]

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dragged him out and he was stripped completely." Liles "wasn't responsive. He was just lying there." Appellant "started kicking him [i]n his head, in his chest." Kozee attacked Liles, too, but "he was more worried about where his dope went." The kicking and hitting lasted "for a good five minutes." After that, appellant and Rhea gave Fitzpatrick and Kozee "some of Ebony Underwood's stuff to go get rid of for some more dope so we left." Fitzpatrick stated that she and Kozee also took the victim's pants that he had defecated in and discarded them in the woods. Fitzpatrick also acknowledged that they did not call for help for Liles.

{¶17} Dakota Fitzpatrick identified appellant and Kozee as the primary aggressors, but claimed that the fight occurred in the kitchen, not the bathroom. Fitzpatrick noted that law enforcement arrested her and Kozee the following day for tampering with evidence. Fitzpatrick pleaded guilty, had been sentenced to probation and ordered to serve time in a treatment facility. Fitzpatrick further explained that presently, she is serving a sentence for violating her previous community control.

{¶18} Antwan Bass testified that in this case he pleaded guilty to tampering with evidence and had also served time in another case that involved drug possession and retaliation. Before that, Bass had been homeless and occasionally stayed with appellant and Rhea

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and used drugs at their residence, where other addicts would "come and go." Bass recalled the assault and described the fight between appellant, Kozee, and Liles. Bass did not know how the fracas started, but claimed that when he arrived, Liles was on the kitchen floor "it was like a little altercation and swings and punches started being swing and he on the floor getting beat the f*ck up I guess * * * they were stomping him, punching him, kicking him." Bass stated that while he was in the kitchen, appellant and Kozee took Liles into the bathroom and shut the door. Thus, Bass did not know what occurred in the bathroom. Bass testified that Kozee and appellant participated in the assault, but "mainly" appellant. Bass added that he heard Liles fall in the bathroom before the fight and said "from what I was told he had OD'd and that's when I guess he was in there getting high. I don't know, I wasn't in the bathroom. All I know is I heard a big boom noise and he fell then; I know he said something about his collar bone."

{¶19} After the assault, Antwan Bass saw Liles on the kitchen floor and appellant at the kitchen table. Bass said Kozee and Fitzpatrick left between midnight and five in the morning, that no one called 911, and he did not call because he feared what may occur and he did not have a phone. At that point, Bass went upstairs to "get some rest."

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{¶20} Around five the next morning when Antwan Bass awoke, he went downstairs and observed appellant cleaning the kitchen and helping Liles clean up, "gave him like some clothes, get in a shower and clean up with and stuff." When Kala Rhea woke up, "we got some dope and got high." Bass testified that he was not high at the time of the assault, but got high the following morning with Rhea and appellant. After Liles showered, he "laid on the couch" in the living room, "sat there the whole next day * * * he was in and out * * * [h]e was talking for a minute, wasn't, moaning, screaming and getting mad, in pain." Later in the day, "it was getting worse for him," so Bass "went upstairs and * * * called 911" because he "didn't want them to know I was calling 911." Before first responders arrived, Bass decided to lie and tell the responders that Liles "said that he got jumped and beat up before he showed up at the - when he showed up at the house." While Bass sat on the porch and waited for responders, Rhea came out on the porch. Bass, however, was unaware of appellant's location because, after Bass told Rhea and appellant that he called 911, appellant left. Police asked Bass to write a statement, but he told them he did not know how to read or spell.

{¶21} Health Trauma Director Dr. Errington Thompson testified that he is the Director of Surgery at St. Mary's, a level two

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trauma facility in Huntington, West Virginia. Thompson visited Liles in the emergency room about 20 minutes after he arrived and described him as a "priority two trauma." Liles' airway was "relatively fine," but his pupils "were unequal," which "can be a sign of significant brain injury." Liles sustained "some facial trauma, had a laceration over his right eye, and had a deformity of his nose." In addition, a CT scan revealed rib fractures and an intracranial bleed, "a hemorrhage or a bleed in the head * * * next to the brain," and a subdural hemorrhage on the right side of his brain, "a bleed that is between the skull and the brain itself." When assessed, Liles scored lowest on the Glasgow Coma scale and his subdural hemorrhage rated 9 ½ to 10 on a 10 scale. The neurosurgeon thus determined that Liles would not "benefit from surgery." The medical team did not believe Liles had any hope for recovery as they considered his injuries "terminal, lethal." Medical personnel provided comfort care after consultation with Liles' family, and Liles died at St. Mary's Hospital on August 21, 2021.

{¶22} Scioto County Prosecutor's Office Investigator Steven Timberlake testified that on August 17, 2021 he, Portsmouth Police Detective Lee Bower, and other officers arrested appellant at the Robinson Avenue home. Upon entering the house, Timberlake encountered appellant and Rhea. When officers ordered appellant on

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the floor, he dropped a bag of drugs. Officers then secured the scene and sought a search warrant for evidence of the assault against Liles. After Timberlake left the scene around 6:30-7:00 p.m., he came upon Kozee and arrested him. Timberlake noticed that Kozee's knuckles "were very red."

{¶23} Detective Bower testified that on August 14, 2021, he received notice that an assault victim "had showed up at a residence on Robinson Avenue and it was also claimed he had a seizure and they didn't know how he got assaulted, didn't have any suspects, didn't have a crime scene because they didn't know where it happened." The following day, the hospital informed Bower about Liles' "bad condition" and the hospital "needed family members to make decisions." Bower spoke with Rhea, who was nervous, and her story "was changing and * * * it wasn't the same as what she told the patrol officers." Bower drove to the hospital to check on Liles, learned of his "grave condition," took photos, and assisted in locating Liles' family. Bower noticed that Liles had "two black eyes, injury to his nose, to his ear - people refer to it as cauliflower ear, it's kind of puffed out like maybe there had been some injury there, it was swollen."

{¶24} Detective Bower continued to search for Liles' clothing and then sought some video because the fire department advised him

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that they had been told that unknown assailants assaulted the victim in Farley Square. After Bower checked multiple cameras and found nothing to substantiate the Farley Square attack theory, Bower and other officers visited the Robinson Avenue address to locate appellant and Rhea. Bower advised appellant of his *Miranda* rights, sought the location of Liles' clothing and wallet, collected a digital scale in the dining room, a pair of shoes in the living room, an empty wallet, and the plastic bag with drugs that appellant tossed to the floor when arrested.

{¶25} Detective Bower testified that when he photographed appellant he noticed redness around his knuckles and swollen fingers. Bower collected saliva DNA swabs from appellant, Rhea, Kozee, Underwood, and Bass, and impounded a knife, a lighter, and a sweatshirt from Kozee during his arrest. Bower also interviewed Bass at the police station, photographed his hands, and noticed that his right hand middle knuckle appeared to be swollen. Bower also found Fitzpatrick's interview consistent with her trial testimony. In addition, Bower interviewed Ebony Underwood and searched her phone, but found nothing of value. Bower also observed nothing of note on Rhea's hands.

{¶26} Ohio Bureau of Criminal Investigation Special Agent Chad Holcomb testified that he arrived at the Robinson Avenue residence

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with a trainee, Sarah Taylor, on August 17, 2021, three days after the assault. Holcomb found that the Portsmouth Police Department secured the scene. Holcomb testified about photographs he took and noted evidence of blood in the kitchen sink, the bathroom sink, the floor, the side of the refrigerator, the back of a chair, and a cabinet. Holcomb also collected shoes with blood. According to Holcomb, the residence was a mess and "you could tell that there was a major blood shedding event inside that kitchen."

{¶27} Bureau of Criminal Investigation DNA Analyst Devonie Herdeman testified that swabs from the bathroom sink tested "presumptive positive for blood * * * and * * * a DNA profile consistent with James Liles." The kitchen cabinet swabs also tested presumptive positive for blood, and "the DNA profile included a mixture with one major contributor and that major contributor was consistent with James Liles." A pair of pink and white shoes tested presumptive positive for blood, and that DNA profile was a mixture of two major contributors, consistent with appellant and Ebony Underwood. A swab from the interior heel of a shoe is consistent with one major contributor, appellant. Finally, swabs from two stains on the white Nike shoes tested presumptive positive for blood, and the DNA profile consistent with appellant.

{¶28} Ohio Bureau of Criminal Investigation Chemist Beth

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Underwood testified that the digital scale contained a trace amount of methamphetamine, tramadol, cocaine, and fentanyl. The baggie appellant held when arrested contained a mix of methamphetamine, fentanyl, and 3-hydroxyphencyclidine (3-hydroxy-PCP). Ohio Bureau of Criminal Investigation Forensic Scientist Ashley Owen testified that a fingerprint on the digital scale belonged to appellant.

{¶29} Montgomery County Coroner's Office Forensic Pathologist Dr. Susan Brown conducted Liles' autopsy and noted bruises on the right side of his body and chest, with an abrasion on the right temple and bruises around the right eye. The left side of his body showed bruises along the left side of his chest, bruises on his legs and right foot, and an abrasion on his right leg. Liles also had bruises on his chest and abdomen and abrasions on his buttocks. Both sides of Liles' head and neck appeared swollen and bruised with multiple abrasions, and he sustained injuries to his nose and mouth. Brown also found bruises on muscles on either side of Liles' skull, scalp, and the bottom of the right side of Liles' brain, along with a subarachnoid hemorrhage. Brown opined that Liles died of "blunt force trauma of the head." Brown said Liles' injuries compared to those of someone injured in a traffic accident and required a "significant amount of force * * * on multiple sides of his head * * * from multiple strikes."

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{¶30} After deliberation, the jury found appellant not guilty of murder, tampering with evidence, possession of drugs (methamphetamine), and possession of drugs (phencyclidine/PCP), but guilty of felonious assault in violation of R.C. 2903.11(A) (1) (Count 2), possession of a fentanyl-related compound in violation of R.C. 2924.11(A) (Count 4), and possession of criminal tools in violation of R.C. 2923.24(A) (Count 7).

{¶31} The trial court sentenced appellant to (1) serve an indefinite 8 to 12-year prison term on Count 2, felonious assault, (2) serve an 11-month prison term on Count 4, possession of a fentanyl-related compound, (3) serve a 6-month prison term on Count 7, possession of criminal tools, (4) serve the prison terms in Count 4 and Count 7 concurrently to Count 2 for a total sentence of 8 to 12 years, (5) serve an 18-month to 3-year postrelease control term, and (5) pay costs. This appeal followed.

I.

{¶32} In his first assignment of error, appellant asserts that the state failed to present sufficient evidence to prove beyond a reasonable doubt that appellant committed the crime of felonious assault. In particular, although appellant concedes that the victim sustained serious injuries that resulted in his death, he

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argues that the state did not adduce sufficient evidence to prove that appellant caused the injuries because (1) Rhea's testimony is inconsistent with statements given to law enforcement immediately after the beating, (2) Fitzpatrick testified that Bass also punched the victim and helped drag him from the bathroom and that she told Detective Bower that a "hit" was out on Liles and someone paid Koze to attack him, (3) Bass's inconsistent testimony, (4) inconclusive testimony regarding the co-defendant's hands, and (5) inconclusive DNA evidence.

{¶33} In general, a claim of insufficient evidence invokes a due process concern and raises the question of whether the evidence is legally sufficient to support the verdict as a matter of law. *State v. Schroeder*, 2019-Ohio-4136, 147 N.E.3d 1, ¶ 59 (4th Dist.), citing *State v. Blanton*, 2018-Ohio-1278, 110 N.E.3d 1, ¶ 13 (4th Dist.); *State v. Wickersham*, 4th Dist. Meigs No. 13CA10, 2015-Ohio-2756, ¶ 22; *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). When reviewing the evidence's sufficiency, the adequacy of the evidence is the focus; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *Thompkins*, syllabus.

{¶34} The standard of review for an appellate court in an evidence sufficiency inquiry is whether, after viewing the

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probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991); *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 207. Further, an assignment of error based on sufficiency of the evidence challenges the state's prima facie case's legal adequacy, not its rational persuasiveness. *State v. Anderson*, 4th Dist. Highland No. 18CA14, 2019-Ohio-395, ¶ 13. Therefore, when an appellate court reviews a sufficiency of the evidence claim, the court must construe the evidence in a light most favorable to the prosecution. *State v. Dunn*, 4th Dist. Jackson No. 15CA1, 2017-Ohio-518, ¶ 13; *Wickersham*, *supra*, ¶ 23; *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996). Consequently, a reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds cannot reach the conclusion that the trier of fact did. *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001).

{¶35} In the case sub judice, to convict appellant of the crime of felonious assault the state must prove, beyond a reasonable doubt, that appellant knowingly caused serious physical harm to another. R.C. 2903.11(A)(1). "A person acts knowingly, regardless

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of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶36} In his challenge to the sufficiency of the evidence, appellant primarily challenges inconsistent witness statements from Rhea, Fitzpatrick and Bass. Appellant alleges that (1) although Rhea testified at trial that appellant hit and kicked the victim, Rhea initially told Detective Bower that Kozee assaulted Liles and did not mention appellant's involvement, (2) Fitzpatrick stated that both appellant and Kozee participated in the assault, but also told Detective Bower that someone placed a "hit" on Liles and paid Kozee to attack him, and (3) Bass provided untruthful testimony when he testified that both appellant and Kozee assaulted Liles, said Liles fell in the bathroom before the fight started, and claimed he was not involved in the assault.

{¶37} We recognize that Rhea, Fitzpatrick and Bass, the state's three eyewitnesses, did make inconsistent statements at trial that varied from the statements initially given during the investigation. However, at trial all three identified appellant as one of two primary aggressors. Generally, it is within the province of the jury to choose which witnesses to believe, and even

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which portions of each witnesses' testimony to believe. "[O]n review for evidentiary sufficiency we do not second-guess the jury's credibility determinations; rather, we ask whether, 'if believed, [the evidence] 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), quoting *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus (emphasis added). Thus, we will not "disturb a verdict on appeal on sufficiency grounds unless 'reasonable minds could not reach the conclusion reached by the trier-of-fact.'" *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 94, quoting *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997); *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 74.

{¶38} In the case at bar, the state's three eyewitnesses' testimony, if believed, constitute significant circumstantial evidence that allowed the jury to identify appellant, beyond a reasonable doubt, as the victim's primary assailant. Moreover, we note that "the testimony of one witness, if believed by the jury, is enough to support a conviction." *State v. Hood*, 10th Dist. No. 15AP-656, 2015-Ohio-5373, ¶ 11, citing *State v. Strong*, 10th Dist. No. 09AP-874, 2011-Ohio-1024, ¶ 42. Here, trial counsel explored the inconsistent statements and argued that the witnesses'

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credibility is suspect and should have no evidentiary weight.

However, a jury may choose to believe all, part, or none of the testimony of any witness. We should not, absent more, second guess the jury's credibility assessment.

{¶39} In addition, appellant argues that photos and testimony about the co-defendant's hands are inconclusive. Appellant notes that Detective Timberlake testified that he took photographs of Kozee's hands after his arrest, and, although his arrest occurred a few days after the assault, Kozee's hands still appeared red and swollen, especially his right hand knuckles. Appellant points out that law enforcement arrested him three days after the assault and Timberlake testified that appellant had some redness around his knuckles and a "puffed up a little bit" right index finger. Moreover, appellant notes that the photos of Bass's hands showed a swollen right hand middle knuckle and Bass told Timberlake that it was "broke." We point out, however, that Detective Bower testified that after he questioned the witnesses, he believed that appellant and Kozee engaged in the assault. Arguments concerning the physical evidence are matters for the trier of fact to resolve. In light of all of the evidence adduced at trial, a reasonable jury could believe that the evidence proved that appellant assaulted Liles.

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{¶40} Finally, appellant points to inconclusive DNA evidence because no Liles DNA existed on any item tested for appellant's DNA. However, even though BCI Analyst Herdeman testified that none of the tested items contained both appellant and Liles' DNA, other evidence does support the conviction, including eyewitness testimony from multiple witnesses. The Supreme Court of Ohio has held that "[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, 154-55, 529 N.E.2d 1236 (1988). In fact, circumstantial evidence may " ` "be more certain, satisfying and persuasive than direct evidence." ' " *State v. Ballew*, 76 Ohio St.3d 244, 249, 667 N.E.2d 369 (1996), quoting *State v. Lott*, 51 Ohio St.3d 160, 167, 555 N.E.2d 293 (1990), quoting *Michallic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330, 81 S.Ct. 6, 11, 5 L.Ed.2d 20 (1960). Thus, the lack of conclusive DNA evidence to link appellant to Liles on various items does not undermine the jury's verdict.

{¶41} In the case sub judice, after we view the evidence in a light most favorable to the state, we conclude that appellee adduced sufficient evidence to establish that appellant knowingly caused physical harm to the victim. Multiple eyewitnesses testified that appellant and Kozee savagely beat and kicked the

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victim's head and body, and thus caused him serious physical harm. All testified that appellant and Kozee were the primary aggressors. Bass testified that both appellant and Kozee participated in the assault, but "mainly" appellant. Consequently, after our review of the record, we believe that a reasonable jury could have found all the essential elements of the offense proven beyond a reasonable doubt.

{¶42} Therefore, because the record contains sufficient evidence to support appellant's felonious assault conviction, we overrule appellant's first assignment of error.

II.

{¶43} In his second assignment of error, appellant asserts that his felonious assault conviction is against the manifest weight of the evidence. Appellant reiterates that the three witnesses present at the residence at the time of the assault gave different accounts of the events and admitted they gave inconsistent statements to law enforcement at different times.

{¶44} After a court of appeals determines that sufficient evidence supports a trial court's judgment, that court may nevertheless conclude that a judgment is against the weight of the evidence. *Dunn, supra*, 2017-Ohio-518, at ¶ 15; *Wickersham, supra*,

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2015-Ohio-2756, at ¶ 24; *Thompkins, supra*, 78 Ohio St.3d at 387. “Weight of the evidence concerns “the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It clearly indicates to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.” ’ ” *Wickersham* at ¶ 24, quoting *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12, quoting *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting Black's Law Dictionary 1594 (6th Ed.1990).

{¶45} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider witness credibility. However, the reviewing court must also remember that credibility generally is an issue for the trier of fact to resolve. *Schroeder, supra*, 2019-Ohio-4136, at ¶ 61; *Dunn* at ¶ 16; *Wickersham* at ¶ 25. Because the trier of fact sees and hears the witnesses, an appellate court will afford substantial deference to a trier of fact's credibility

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determinations. *Schroeder* at ¶ 62. The jury has the benefit of seeing witnesses testify, observing facial expressions and body language, hearing voice inflections, and discerning qualities such as hesitancy, equivocation, and candor. *State v. Fell*, 6th Dist. Lucas No. L-10-1162, 2012-Ohio-616, ¶ 14.

{¶46} To decide whether the case sub judice is an exceptional case in which the evidence weighs heavily against conviction, this court must review the record, weigh the evidence and all reasonable inferences, and consider witness credibility. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). An appellate court may reverse a conviction if the trier of fact clearly lost its way in resolving conflicts in the evidence and created a manifest miscarriage of justice. *State v. Benge*, 4th Dist. Adams No. 20CA1112, 2021-Ohio-152, ¶ 28.

{¶47} Although appellant attacks the credibility of the witnesses because of their plea agreements, the trial court instructed the jury, pursuant to R.C. 2923.03(D), to cautiously weigh their testimony. In addition, trial counsel for both appellant and Kozee questioned the motives of the three witnesses who received plea agreements in exchange for their testimony. A witness may be questioned about their own charges when the testimony is given in exchange for promises in a witness's own

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case. See *State v. Brooks*, 75 Ohio St.3d 148, 152, 661 N.E.2d 1030 (1996) (a witness' pending charges or plea agreement are admissible to demonstrate bias of the witness). Here, trial counsel examined each witness regarding their agreement and motivation to testify and informed the jury about the agreements for each of the witnesses. Consequently, the jury could assess these facts when it made their credibility assessment.

{¶48} Further, “ “[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.” ’ ” *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶ 17 (4th Dist.), quoting *State v. Mason*, 9th Dist. Summit No. 21397, 2003-Ohio-5785, ¶ 17, quoting *State v. Gilliam*, 9th Dist. Lorain No. 97CA006757, 1998 WL 487085, *4 (Aug. 12, 1998). Moreover, a conviction is not against the manifest weight of the evidence, even if the “evidence is subject to different interpretations.” *State v. Adams*, 2d Dist. Greene Nos. 2013CA61, 2013CA62, 2014-Ohio-3432, ¶ 24; *State v. Simms*, 2023-Ohio-1179, 212 N.E.3d 458, ¶ 119 (4th Dist.). Here, the jury could determine whether to credit all, part, or none of their testimony, and we defer to the jury's credibility assessment. See *State v. Rodriguez-Baron*, 7th Dist. No. 07-MA-86, 2008-Ohio-4816, ¶ 34

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(declining to second-guess jury's determination that co-defendant's testimony was credible; jury heard co-defendant explain he testified as part of plea deal and some charges against him were dropped because of cooperation with state); *State v. Royal*, 8th Dist. No. 93903, 2010-Ohio-5235, ¶ 22 (deferring to jury's credibility determination when jury advised co-defendant participated in crime and received a favorable plea agreement for cooperation).

{¶49} Appellant further contends that “[b]esides the testimony of the three witnesses who were there that night, the only other evidence presented against appellant was the photograph of his hand taken after the incident,” and appellant’s DNA did not exist on any of the personal items collected. However, the fact that the testimony of the three witnesses constituted the primary evidence against appellant does not render his convictions against the manifest weight of the evidence. See *State v. Berry*, 10th Dist. No. 10AP-1187, 2011-Ohio-6452, ¶ 17-18 (rejecting defendant's manifest weight challenge based on assertion that accomplice is not reliable witness and because state failed to present physical evidence to link defendant to crime scene; jury aware of accomplice's involvement in murders, his willingness to testify

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against defendant, and his attempt to minimize his role); *State v. Peeples*, 10th Dist. No. 13AP-1026, 2014-Ohio-4064, ¶ 21 (“a lack of physical evidence, standing alone, does not render appellant's conviction against the manifest weight of the evidence”).

{¶50} Appellant also points to places in the record that support his version of the facts, and the state does the same. Once again, the jury heard both versions of the facts and chose to believe the state's version, not appellant's version. See *State v. Anderson*, 4th Dist. Washington No. 03CA3, 2004-Ohio-1033, ¶ 33. The trier of fact determines the weight afforded to evidence and the credibility of testimony. *State v. Smith*, 2016-Ohio-5062, 70 N.E.3d 150 (4th Dist.), ¶ 103, citing *State v. Frazier*, 73 Ohio St.3d 323, 339, 652 N.E.2d 1000 (1995). A defendant is not entitled to a reversal on manifest weight grounds simply because inconsistent evidence existed at trial. *State v. Gunn*, 6th Dist. Lucas No. L-20-1034, 2021-Ohio-2253, ¶ 41, citing *State v. Lowery*, 6th Dist. Lucas No. L-18-1170, 2020-Ohio-5549, ¶ 80, appeal not allowed, 162 Ohio St.3d 1421, 2021-Ohio-1201, 166 N.E.3d 13. (Additional citation omitted.)

{¶51} In the case sub judice, we also recognize that the jury evaluated the credibility of the testimony and evidence presented at trial and found appellant not guilty of 4 of the 7 offenses.

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Once again, the jury is in the best position to hear testimony and assess witness credibility. Here, the jury chose to believe the state's witnesses when it resolved conflicts in the evidence. This is the function of the trier of fact. In resolving conflicts in the evidence, we cannot conclude that in the case sub judice the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.

{¶52} Accordingly, for the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JU

DGMENT

AFFIRME

D.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellee shall recover of appellant the 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 Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

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

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.