[Cite as *State v. Green*, 2025-Ohio-255.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

STEVE WILLIAM GREEN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 24 MA 0014

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2021 CR 00709

BEFORE:
Cheryl L. Waite, Mark A. Hanni, Katelyn Dickey, Judges.

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Edward A. Czopur*, Assistant Prosecutor, for Plaintiff-Appellee

Atty. John B. Juhasz and *Atty. Rhys B. Cartwright-Jones*, for Defendant-Appellant

Dated: January 24, 2025

WAITE, J.

{¶1} Appellant Steve William Green is challenging his jury convictions for aggravated murder, rape, extortion, tampering with evidence, and domestic violence. The charges stem from an encounter between Appellant and his former girlfriend A.L. on October 8, 2021, in which Appellant shot A.L. six times and killed her. Appellant asserts the trial court erred by refusing to instruct the jury on voluntary manslaughter. Appellant also argues that the evidence at trial did not support his rape conviction. Finally, he contends that the court erred by overruling his motion to suppress his confession made to police because the state failed to prove he validly waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

{¶2} None of Appellant's assignments of error have merit. The trial court properly denied a jury instruction on voluntary manslaughter because the facts of the case do not warrant the instruction. Regarding his rape conviction, this record fully supports conviction. Finally, the trial court properly overruled the motion to suppress his confession made during a police interview. Nothing in this record supports his contention that he was intoxicated or impaired, and he voluntarily waived his *Miranda* rights in his response to police and in a signed waiver. As none of Appellant's assignments have merit, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} On October 8, 2021, Appellant shot and killed A.L. outside the Compass West Apartments in Austintown, Ohio. Appellant turned himself in to the police shortly after the crime occurred. On December 2, 2021, Appellant was indicted for: aggravated murder in violation of R.C. 2903.01(A), an unclassified felony, with a three-year firearm

specification; murder in violation of R.C. 2903.02(A), (D), an unclassified felony, with a three-year firearm specification; tampering with evidence in violation of R.C. 2921.01(A)(1) and R.C. 2921.12(B), a third-degree felony; and domestic violence in violation of R.C. 2919.25(A) and (D)(2), a first-degree misdemeanor.

{¶4} On September 27, 2022, Appellant, through counsel, filed a motion to suppress statements he made during his interview with the Austintown Police Department ("APD"). He alleged the APD failed to verify that he was not under the influence of a controlled substance before he agreed to waive his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436. Appellant claims that although the police officer's body camera reveals Detective Lieutenant Jordan Yacovone ("Yacovone") asked him if he had been drinking, Yacovone did not ask him about drug use. Appellant says that he took Xanax the night of the shooting, and that he told forensic psychiatric examiners that after he took the Xanax he blacked out and had no memory of his actions.

{¶5} The court held a suppression hearing on December 5, 2022. Det. Lt. Yacovone testified for the state. The state admitted videos into evidence that detailed contacts Appellant had with APD. After the hearing, both parties submitted supplemental briefs. On December 12, 2022, the trial court issued a judgment entry denying Appellant's motion to suppress.

{¶6} A superseding indictment was filed on February 2, 2023, containing additional counts against Appellant: rape in violation of R.C. 2907.02(A)(2) and (B)(1), a first-degree felony; attempted rape in violation of R.C. 2923.02/2907.02(A)(2) and (B), a second-degree felony; and extortion in violation of R.C. 2905.11(A)(2) and (B), a third-degree felony.

{¶7} Trial began on November 13, 2023, and ended November 15, 2023. The state presented numerous witnesses. Appellant testified on his own behalf.

{¶8} At trial, Appellant admitted both to threatening to kill A.L. and that he shot A.L. in the parking lot of the Compass West Apartments in Austintown, Ohio, on October 8, 2021. (11/13/23 Trial Transcript (hereinafter TT) p. 526.)

{¶9} A.L.'s grandmother, Patricia Lockhart, testified that she raised A.L. and that Appellant and A.L. lived with her for a time. (TT, pp. 189, 192.) She related that when Appellant and A.L. ended their relationship, A.L. and her daughter remained with Lockhart. (TT, pp. 189, 192-193.)

{¶10} James Engles testified for the state. (TT, p. 195.) He lived at Compass West Apartments and testified that on October 8, 2021, he was watching television in his apartment when he heard loud female voices outside of his window. (TT, p. 199.) He looked out and saw two women standing on the sidewalk yelling, and a male in a SUV backing out of a parking space where he had diagonally parked. (TT, pp. 201-202.) Engles testified that the male put the car in reverse and appeared to be exiting the parking lot, but then circled back around to the women and started shooting a gun. (TT, p. 202.) Engles heard four to five gunshots and saw one woman run off towards his apartment building screaming. (TT, pp. 206-207.)

{¶11} Engles testified that when he ran outside, he saw the other woman on the ground. (TT, p. 208.) He heard her moaning, but she was not moving. (TT, pp. 208-209.) He called 911 and gave a statement to the police. (TT, pp. 210-211.)

{¶12} Katelyn Lofaro also testified for the state. (TT, p. 225.) She had been acquainted with A.L. since they were both small children. They had drifted apart over the

years but reconnected after both of their children were born. She met Appellant through A.L., and recalled that Appellant and A.L. began dating in 2013 or 2014, but had been separated for a year prior to the shooting. (TT, p. 228.)

{¶13} Lofaro recalled the relationship between Appellant and A.L. as "pretty normal" in the beginning, but later took "a complete 360." (TT, p. 228.) She explained that if she posted her location with A.L. online, she had to block Appellant from seeing it, because he would arrive at the location searching for A.L. (TT, p. 228.) She related that when she was with A.L., Appellant would find out where they were and he would threaten A.L. in Lofaro's presence. (TT, p. 229.) Lofaro recalled Appellant telling her the week before A.L.'s death that he would be better off when A.L. was dead, and he would not be fulfilled in life until she was dead. (TT, p. 229.) Lofaro testified that sometime before the murder, Appellant pointed a gun with a laser sight at both herself and A.L. (TT, p. 270.)

{¶14} On October 1, 2022, a week before the shooting, Lofaro remembered that A.L. and her daughter were at Lofaro's apartment when Appellant called A.L. (TT, p. 230.) A.L. had a second cell phone with her that night on which she recorded her conversations with Appellant. (TT, p. 231.) The recorded conversations were played to the jury. (TT, pp. 232-233.) Lofaro testified that she received a Facebook message from Appellant that night which stated, "If she goes out tomorrow night, Imma kill her. Just so you know, she pushed me to that limit, and I know [our daughter] is in bed with her or I'd go kill her now." (TT, pp. 236-237.)

{¶15} Lofaro testified that on October 8, 2021, she and A.L. made plans to go to Shotz Bar. (TT, p. 237.) Lofaro did not speak with A.L. from 9:15 p.m. until 10:10 p.m. that night, when A.L. called her sounding distressed. (TT, p. 239.) A.L. told Lofaro that

Appellant was following her in his car with the laser on his gun pointed at her. A.L. said that Appellant forced her to have sex with him that night in exchange for his promise not to murder her. (TT, p. 239.) Lofaro tracked A.L.'s location: she was heading to Lofaro's apartment from Appellant's father's house. (TT, p. 240.)

{¶16} Lofaro related that A.L. arrived at her apartment soon after their phone call, and they went inside. (TT, pp. 240-241.) As they were leaving the apartment, A.L. realized that Appellant was blocking her car with his. (TT, p. 241.) A.L. then handed Lofaro her second cell phone to hide from Appellant. (TT, p. 241.) Lofaro testified that A.L. spoke to Appellant as she entered her car, and when she turned the ignition the car signaled that she had a flat tire. (TT, pp. 241-242.) A.L. blamed Appellant for the flat tire. (TT, p. 243). A.L. first told Lofaro to get soap from her apartment so she could rub it on the tire to find the location of the leak, but changed her mind and instead begged Lofaro to stay at her side. (TT, p. 244.)

{¶17} At this point, since some of Lofaro's neighbors were also blocked in by Appellant's car, Appellant moved his vehicle. (TT, p. 244.) She observed him circle around the parking lot and then return to once again block in A.L.'s car. (TT, p. 244.) She heard A.L. tell him: "You forced me to have sex with you. I did everything you said. You said you'd leave me alone for the night. Why are you here? Like, why are you following me? You promised you'd leave me alone for the night." (TT, pp. 244-245.) Lofaro testified that Appellant exited his vehicle and approached A.L. as A.L. called 911. (TT, p. 246.) Lofaro was afraid, because Appellant always scared her and she knew he always had a gun with him. (TT, p. 246.) She saw Appellant's gun before he exited his vehicle, as he had flashed it at them. (TT, p. 246.)

{¶18} Lofaro testified that she turned her back to run away when Appellant started walking toward A.L. (TT, p. 247.) A.L. exited her vehicle. Lofaro's back was facing both A.L. and Appellant when she heard the first gunshot. (TT, p. 247.) She turned around, and then heard more gunshots. (TT, p. 246.) After the second shot, Lofaro observed that Appellant was standing "right over" A.L. as she lay on the ground. (TT, p. 248.) Lofaro ran and hid. (TT, p. 248.) She heard a total of six shots. (TT, p. 249.) She waited until she saw Appellant drive away before returning to A.L. because she thought she would be his next victim. (TT, p. 248.)

{¶19} Lofaro observed A.L. lying motionless on her stomach on the ground in a parking spot next to her car. (TT, pp. 249-250.) She called 911, and as police arrived on the scene her cell phone rang. Appellant was calling her to ask if A.L. was alive. (TT, p. 252.) When she told him "no," Appellant then texted her and asked, "what they saying?" As she did not respond, he texted again, saying, "hello?," and when she did not respond he again phoned her, but she did not answer. (TT, p. 253.) She received another call from him when she was in the ambulance. She handed her phone to Yacovone, who talked to Appellant. (TT, p. 255.) After Lofaro identified A.L.'s body, she went to the police station to be interviewed by Yacovone. (TT, pp. 255-256.) Lofaro identified Appellant in the courtroom as the person who killed A.L. (TT, pp. 256-257.)

{¶20} On cross-examination, Lofaro acknowledged that A.L. and Appellant both spoke about killing each other. (TT, p. 261.). She explained that neither she nor A.L. reported Appellant's prior threats to the police because they believed the police would do nothing. (TT, p. 262.) Lofaro testified that A.L. tried to record as much as she could on her second cell phone because she knew Appellant was going to kill her and she wanted

to have evidence. (TT, p. 262.) Lofaro explained that they did not call the police about Appellant pointing the laser of his gun at A.L. because police would simply tell her to get a restraining order, and they knew Appellant would not follow it. (TT, p. 267.)

{¶21} On redirect, Lofaro testified that she did call 911 once, after Appellant pointed the laser on his gun at A.L. and the laser also hit Lofaro's face. (TT, p. 270.)

{¶22} Officer Chance Hanshaw of the APD was the first officer on the scene at 10:40 p.m. (TT, p. 277.) He testified that he received a dispatch call about an incident that began as a domestic dispute between a male and female and ended with gunshots. (TT, p. 277.) He arrived at the scene and exited his cruiser with his body camera on and waited for backup, when he heard screams for help. (TT, p. 278.) He thereafter observed A.L. lying on the ground surrounded by blood. (TT, p. 279.) He observed one gunshot wound to her cheek, two to her neck, one underneath her right armpit, and one in her stomach. (TT, p. 282.) He checked her for a pulse, but there were no signs of life. (TT, p. 283.)

{¶23} When the ambulance arrived, paramedics pronounced A.L. dead. (TT, p. 284.) Officer Hanshaw spoke to Lofaro, who told him what she witnessed and gave him A.L.'s second cell phone. (TT, pp. 285-286.) He testified that as they were speaking, Lofaro's cell phone rang, and she told him Appellant was calling. (TT, p. 286.) He advised her not to answer. When Det. Lt. Yacovone arrived, Hanshaw observed Yacovone speaking to Appellant on Lofaro's cell phone. (TT, pp. 286-287.)

{¶24} The police located six spent shell casings at the scene, and the coroner confirmed A.L. suffered six gunshot wounds, located as follows: (1) the left side of her neck; (2) the right side of her chin; (3) the front of her neck; (4) the right side of her chest;

(5) the left side of her back; and (6) the upper left buttock. (TT, pp. 299-300, 337-346.) Some of the shots were fired from a distance of two to three feet. Some of them, alone, would have been fatal. (TT, pp. 352-353.)

{¶25} Nicole VanHorn, another longtime friend of A.L., also testified about A.L.'s relationship with Appellant. She testified that he would make threats toward A.L. and try to hurt her. (TT, p. 358.) VanHorn witnessed the threats. (TT, p. 359.) She also viewed threatening text messages from Appellant to A.L. (TT, p. 361.) She testified that Appellant said he was going to "F her up," referring to A.L., and that he would harm A.L. "if she didn't satisfy whatever wants." (TT, p. 360.) She testified that in response to the threats A.L. was required to perform sexual favors for Appellant. (TT, p. 360.) A.L. asked VanHorn to keep copies of the text messages, Facebook messages, and Snapchat messages from Appellant to A.L. in case harm ever came to A.L., so that VanHorn could hand the messages over to the police. (TT, p. 361.)

{¶26} Det. Lt. Yacovone also testified for the state. (TT, p. 425.) He was off duty when he received a call about a shooting at the Compass West Apartments. (TT, pp. 427-428.) As he was informed that the victim had died, he drove to the scene. (TT, p. 429.) Once there, he was informed that Lofaro was in the ambulance and was a witness. (TT, pp. 433-434.) He questioned Lofaro in the ambulance. She told him that Appellant had called her several times after the shooting. As they were speaking, Lofaro's cell phone rang again at least four times. (TT, p. 434.) Yacovone testified that he answered one of the calls because he wanted Appellant to meet with him so they could talk. (TT, pp. 434-436.) He testified Appellant sounded "cool, calm, collected, very articulable." (TT, p. 436.) Appellant responded to Yacovone's questions appropriately and did not

appear to have any problem understanding him. (TT, p. 436.) After the call, Yacovone placed Lofaro in his car and drove her to the police station for a formal interview. (TT, p. 438.)

{¶27} Yacovone testified that as he was about to interview another witness, he learned that Appellant had arrived at the police station. This was about an hour after the murder. Appellant was apprehended in the parking lot and brought into the lobby. (TT, p. 439.) Yacovone proceeded to interview Appellant first. (TT, pp. 439-440.)

{¶28} Yacovone testified that he read Appellant his *Miranda* rights and Appellant acknowledged he understood those rights by shaking his head affirmatively. (TT, p. 440.) Yacovone also observed Appellant sign the form waiving his *Miranda* rights. (TT, p. 441.) He recalled that Appellant was calm, provided appropriate responses, answered his questions, and was cooperative. (TT, p. 442.) Yacovone stated that he was well-experienced in observing persons under the influence of drugs or alcohol, and he observed no such signs while speaking with Appellant. (TT, p. 442.)

{¶29} Yacovone testified that during the interview, Appellant admitted he shot A.L. using a Glock model 19 handgun. (TT, p. 445.) Detective Sergeant Greg McGlynn was also in the interview room when Appellant made this confession. (TT, p. 445.) Appellant told them he threw the gun out of his car window while he was driving in Niles, and identified the location of the gun on a Google Map. The gun was eventually recovered. (TT, p. 446.) No laser was found with the gun. (TT, pp. 454-455.) However, Yacovone testified it was not difficult to slide a laser on that type of gun. (TT, p. 455.) Yacovone stated that he obtained oral, video, and written statements from Appellant. (TT, p. 446.) Appellant was arrested after this interview. (TT, p. 447.)

{¶30} Yacovone testified that, in addition to the gun, the police recovered three cell phones: one located near A.L. on the ground; Appellant's cell phone; and A.L.'s second cell phone that she gave Lofaro containing recorded conversations with Appellant. (TT, p. 449.) He stated Nicole VanHorn also provided information, text messages, and screenshots that A.L. sent to her of Appellant threatening A.L.'s life. (TT, pp. 450-451.) Yacovone interviewed Lofaro again the next day, and she provided statements consistent with her prior interview. (TT, p. 452.)

{¶31} The prosecutor asked Yacovone about extractions from A.L.'s second phone, which were provided to him four days after the shooting. (TT, p. 458.) Yacovone testified that after he studied the extraction reports, police began a rape investigation. (TT, p. 458.) He explained that a rape kit was not requested during A.L.'s autopsy on October 12, 2021, because no information about a rape was known at that time. (TT, p. 459.) Yacovone testified that he examined Appellant's cell phone records and found numerous threats sent to A.L. by Appellant. (TT, p. 465.)

{¶32} On cross-examination, Yacovone testified that A.L. and Appellant had a prior history of encounters with the Youngstown Police Department when the couple lived there. (TT, pp. 478-479.) He cited a 911 call after Appellant ran out of the house with a gun in his hand threatening to kill himself. (TT, p. 479.) Yacovone also noted a domestic violence call, where Appellant had pistol-whipped A.L. in the head, requiring her to go to the hospital for stitches. (TT, p. 479.)

{¶33} On redirect, Yacovone read a text between Appellant and A.L. where A.L. texted at one point, "I'm your child's mother. I shouldn't have to buy my fucking life." (TT,

p. 498.) Another text from Appellant to A.L. stated, "You want to be civil, I want sex once a week. That's your only option." (TT, p. 500.)

{¶34} Appellant testified on his own behalf. (TT, p. 515.) He stated he and A.L. lived together in an apartment and at his mother's house during their relationship. (TT, pp. 518-519.) He testified that they ended their romantic relationship when their daughter was five years old, and they had separated the year prior to A.L.'s death. (TT, p. 520.) He reported that he and A.L. still engaged in family activities with their daughter and that he and A.L. still had sex periodically. (TT, p. 521.) Importantly, he admitted making threats to kill A.L. (TT, pp. 525-526.)

{¶35} Appellant also did not dispute that he shot A.L., but he stated that he could not remember what happened after the first shot. (TT, pp. 526-527.) He remembered they argued about their daughter and about Appellant possibly fathering a child with another woman. (TT, pp. 527-528.) Appellant recalled working the night before the shooting and waking up on the day of the shooting to drive his friend to Akron to get a car. (TT, p. 528.) He blocked A.L. from communicating with him on his cell phone because they were arguing. (TT, pp. 529-530.) He stated that he later unblocked her, and they discussed bringing their daughter around the baby that he may have fathered with another woman. (TT, pp. 530-531.) He said they were going to meet at his father's house to discuss the issue. (TT, pp. 531-532.) While his father owned the house, he did not live there. (TT, p. 533.)

{¶36} Appellant testified that he and A.L. met at his father's house and talked about their daughter. (TT, p. 534.) He first said he did not ask A.L. to have sex with him that day, but then admitted he sent a text stating that he wanted to have sex every week.

(TT, p. 535.) He contradicted himself again on cross-examination, and testified that he told her he wanted oral sex that evening. (TT, p. 551.) He testified that after A.L. left his father's house, he realized he forgot to give her his car payment money, as she made the payments for him. (TT, p. 536.) He stated that he followed A.L. to Lofaro's apartment to give her the money, and waited in his vehicle for them to come out of the apartment. (TT, pp. 536-537.)

{¶37} Appellant saw them come out of the apartment, and saw A.L. get into and start her car. She then started screaming at him because her tire was flat and she blamed him for it. (TT, p. 537.)

{¶38} He told her he did not flatten her tire. (TT, p. 537.) He testified that when he saw A.L. using her phone, he got out of his car and walked up to her. (TT, p. 538.) He did not recall moving his vehicle, circling around the parking lot, and returning to the spot near A.L.'s car. (TT, p. 538.) He remembered A.L. and Lofaro yelling at him, and that A.L. was in her car and Lofaro was on the sidewalk. (TT, p. 539.)

{¶39} Appellant testified that when he walked up to A.L.'s car, he tried to take her phone to see who she was talking to. His gun was in his pocket. (TT, p. 539.) He testified that A.L. reached for his gun, but he got it first. When she grabbed his wrist, he yanked the gun away from her and the gun discharged. (TT, pp. 540). He claimed he then blacked out and could not recall what happened after the first shot. (TT, p. 540.) As he remembered only one gunshot, he could not explain firing six shots. He also did not recall seeing A.L. lying on the ground, bleeding. (TT, p. 541.) The next thing he recalled was driving to Niles and talking with Yacovone on his phone. (TT, pp. 541-542.) He did not recall throwing the gun out of the car window, but he remembered surrendering himself

to APD after agreeing with Yacovone he would come to the police station. (TT, pp. 543-544.)

{¶40} On cross-examination, Appellant testified that he did not stalk A.L., but did appear at places where he knew she would be. (TT, p. 549.) He admitted he threatened to kill A.L. many times and told her he was going to shoot her. (TT, p. 550.) He denied telling her she had to have sex with him weekly or he would kill her, but remembered telling her on the day that he shot her that he wanted oral sex that night. (TT, p. 551.)

{¶41} Appellant also testified that he took a Xanax his friend had given him after driving him to Akron earlier that day. (TT, pp. 554-555.)

{¶42} Appellant testified that he did not tell anyone before the day of trial that A.L. attempted to reach for his gun. (TT, p. 569.) He said he did not remember telling Det. Lt. Yacovone that he shot A.L. at least four times. (TT, p. 567.) He did not remember getting rid of the gun, but remembered talking to Yacovone on the phone and making arrangements to come to the police station to surrender. (TT, p. 561.) Appellant also said he did not tell anyone prior to the day of trial that he could not remember shooting A.L. (TT, p. 568.)

{¶43} The jury deliberated for two hours and returned a verdict finding Appellant guilty on all charges. (11/21/23 J.E.) After a sentencing hearing, the court issued a judgment entry on January 3, 2024, sentencing Appellant as follows: life in prison without the possibility of parole for aggravated murder, with a three-year consecutive firearm specification; a one-year consecutive prison term for tampering with evidence; 180 days for domestic violence, sentence suspended; five to seven and one half years in prison for rape, to be served consecutively; and two years, consecutive, for extortion. Appellant

was also designated a Tier III sex offender. The aggregate sentence was life in prison without the possibility for parole, plus eleven to thirteen-and-a-half years.

{¶44} On January 26, 2024, Appellant filed a notice of appeal raising three assignments of error.

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT, BY REFUSING AN INSTRUCTION ON A LESSER INCLUDED HOMICIDE OFFENSE, DENIED APPELLANT HIS RIGHT TO TRIAL BY JURY AND DUE PROCESS OF LAW, IN VIOLATION OF U.S. CONST., AMEND VI AND XIV AND OHIO CONST., ART. I, §§ 5, 10, AND 16. (T.P. 580-581).

{¶45} Appellant contends that the court violated his due process and jury trial rights by refusing to include a jury instruction for the lesser-included offense of voluntary manslaughter. He cites *Apprendi v. New Jersey*, 530 U.S. 466 (2000) for support that one's liberty cannot be deprived without due process of law. He acknowledges that *Apprendi* was a sentencing enhancement case, but asserts that the same deprivations are at stake, here.

{¶46} Appellant contends that the court emasculated the defense by refusing a jury instruction on voluntary manslaughter and took away the jury's right to decide the facts. He also contends that the indictment was structured to give the state two or three bites at the apple, by charging both aggravated murder and murder for the same conduct, as well as domestic violence. He argues that the judge usurped the jury's function as factfinder and determined the issue of credibility of his testimony when the judge stated

he did not believe Appellant's testimony. He submits that this denied the jury the ability to consider evidence that A.L. reached for his gun and that he blacked out when the gun discharged. Appellant quotes the court's discussion of the voluntary manslaughter charge and the court's assertion that it did not find Appellant's testimony credible. (TT, pp. 580-581.)

{¶47} Appellant further maintains that rather than objectively focusing on whether the instruction for voluntary manslaughter was met, the court focused on the persuasiveness of the evidence. He submits that an instruction on a lesser-included offense must be given if, viewing the facts in a light most favorable to the defendant, the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the higher level offense.

{¶48} Based on this record, Appellant's first assignment of error lacks merit. The defense requested that the court add a jury instruction on voluntary manslaughter as a lesser-included offense to aggravated murder and murder. (TT, p. 575.) Defense counsel reasoned that the testimony established A.L. brought on a fit of sudden passion in Appellant when she tried to take his gun from him, which resulted in Appellant shooting her. (TT, p. 575.) The prosecution responded that a voluntary manslaughter instruction was not warranted because the defense failed to present sufficient evidence which would acquit Appellant of the higher-level offense of aggravated murder. (TT, p. 576.) The prosecution also argued that Appellant could not assert that he had a sudden fit of passion or rage because he testified that he did not recall the circumstances surrounding the shooting. (TT, p. 577.)

{¶49} The court found that the evidence did not support a voluntary manslaughter instruction to the jury. (TT, p. 580.) After reading the definition of voluntary manslaughter, the court stated:

> I do not find that the evidence supports a charge to the jury. Quite frankly, I found the defendants' testimony not credible, in that I don't believe that there was enough -- even if it was credible, that it was sufficient to meet under a sudden passion or fit of rage, and then brought on by serious provocation by the victim.
>
> I know the argument was about her allegedly reaching for his gun. I don't even know if that would have done it if I found that to be credible, but I did not. So I'm not going to give that instruction.

(TT, p. 580.)

{¶50} Defense counsel stated:

> Judge, I'm going to tell you that I do object to your excluding that charge, and I think that your recitation is that you have indicated that as fact finder, your finding that the facts don't bear that out. I think that's improper. So I just want the record to reflect that I am, in fact, objecting to the charge as it's going to be given.

(TT, p. 581.)

{¶51} The court responded: "Okay. And if I misstated or if I wasn't clear, I didn't find sufficient evidence to give to a jury to make that finding because I don't believe that the evidence as presented supports them considering that." (TT, p. 582.)

{¶52} Abuse of discretion is the appropriate standard of review of a trial court's refusal to give a requested jury instruction. *State v. Everson*, 2016-Ohio-87, ¶ 58 (7th Dist.). "Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon*, 2013-Ohio-2951, ¶ 21 (7th Dist.). Thus, because a court possesses discretion in determining if sufficient evidentiary support was presented during trial to warrant a jury instruction on a lesser-included offense, we will not reverse that decision absent an abuse of discretion. *State v. Thompson,* 2023-Ohio-2942, ¶ 50 (7th Dist.), citing *State v. Rucker*, 2018-Ohio-1832, ¶ 67 (8th Dist.).

{¶53} Voluntary manslaughter is not a lesser-included offense of murder, but rather, it is an inferior degree of murder. *Thompson*, 2023-Ohio-2942, ¶ 51, citing *State v*. *Shane*, 63 Ohio St.3d 630, 632 (1992). The elements of voluntary manslaughter and murder are the same except for additional mitigating elements. *Id*. Although voluntary manslaughter is not a lesser-included offense of murder, the test that a court applies in determining whether to instruct the jury on voluntary manslaughter is the same as the test applied when an instruction on a lesser-included offense is sought when a defendant is charged with murder. *Id*. Therefore, a defendant charged with murder is entitled to a voluntary manslaughter instruction when the evidence presented at trial reasonably supports both an acquittal on the charge of murder, and a conviction for voluntary manslaughter. *Id*. The same applies to aggravated murder.

{¶54} As to voluntary manslaughter, R.C. 2903.03(A) provides in relevant part: "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another[.]" In considering whether provocation is reasonably sufficient to bring on sudden passion or a sudden fit of rage, both an objective standard and a subjective standard must be applied. *Shane*, 63 Ohio St.3d at 634. The court must refuse to give a voluntary manslaughter instruction under the objective standard if insufficient evidence of provocation is presented so that no reasonable jury would decide that an actor was reasonably provoked by the victim. *Id*. If the objective portion of the test is not met, no inquiry into the subjective portion is warranted. *Id.* If sufficient evidence of provocation is presented, then "the inquiry shifts to the subjective component of whether this actor, in this particular case, actually was under the influence of sudden passion or in a sudden fit of rage." *Id*.

{¶55} In the instant case, the trial court did initially err by stating that it refused to instruct the jury on voluntary manslaughter because it did not find Appellant's testimony credible. (TT, p. 580.) The persuasiveness of the evidence as to a lesser-included offense is irrelevant. *State v. Wilkins*, 64 Ohio St.2d 382 (1980). Further, when determining whether to instruct on a lesser-included offense, the court is to consider the evidence in a light most favorable to the defendant and should generally accept evidence presented by the defense as believable. *Id*. The court must also instruct the jury on the lesser-included offense if, under any reasonable view of the evidence, it is possible for

the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense. *Id*.

{¶56} While the court's initial statement was in error, it immediately corrected itself and elaborated that even if the defendant's testimony was credible, there was insufficient evidence to establish a sudden fit of passion or rage or that there existed serious provocation by the victim. (TT, p. 580.) After defense counsel objected, the court further explained that if it was not clear or the judge had misstated its prior finding, sufficient evidence was lacking to instruct the jury on voluntary manslaughter because the evidence did not support such a consideration. (TT, p. 582.)

{¶57} As argued by Appellee, there is no reading of the evidence in this case in which Appellant could be acquitted on the charge of aggravated murder. R.C. 2903.02(A) provides in relevant part that, "[n]o person shall purposely, and with prior calculation and design, cause the death of another." Appellant threatened to kill and shoot A.L. a number of times before the incident. Lofaro testified that she heard Appellant say to A.L. that he would be better off when she was dead. (TT, p. 229.) She stated that A.L. kept a second cell phone to record threatening conversations that she had with Appellant where he said he would kill her. (TT, p. 231.) She also testified that less than a week prior, Appellant Facebook messaged her that if A.L. went out the next night, he would kill her. (TT, p. 237.) He stated that he would have killed her that night, but he knew that their daughter was in bed with A.L. (TT, p. 237.)

{¶58} Further, Appellant admitted on the stand that he made hundreds of threats to A.L. that he was going to kill her. (TT, p. 550.) He told her that he was going to shoot her. (TT, p. 550.) He also told his friend on the day of the shooting, "I think demon mode's

gonna come out today, bro." (TT, p. 405.) He texted A.L., "I love you to the point that I refuse to let anyone else have you." (TT, p. 402.) He also texted her, "[k]illing you is worth the jail time 'cause you're just trash for no fuckin' reason." (TT, p. 403.) He further texted, "keep putting everyone in my business and I'm going to fuck you up." (TT, p. 404.) A text from A.L. to Appellant that same day stated, "…this is manipulation. I want to live; so I gotta fuck you once a week. Like, what?" (TT, p. 406.) Text messages and testimony from Lofaro and Nicole VanHorn further established the death threats. (TT, pp. 229-230, 236-237, 239, 246, 248, 358-359, 361-365.)

{¶59} Appellant brought a gun to Lofaro's apartment and waited for Lofaro and A.L. in the parking lot. He blocked in A.L.'s car and then moved his car and circled back around to A.L. before shooting her. While he testified that he could not remember shooting her and did not know that he shot A.L., Lofaro testified that she saw Appellant standing "right up on" A.L. after the first shot, while she was lying on the ground. (TT, p. 248.)

{¶60} The evidence presented showed that Appellant had previously threatened to kill A.L. numerous times, followed her to Lofaro's apartment, pointed a laser from the gun on A.L. as she drove to Lofaro's house, blocked in her car with his vehicle, circled around the parking lot, blocked in her car again, waited for her to get into her car, and walked up to her car and shot her. This evidence is clearly sufficient to convict Appellant of aggravated murder.

{¶61} Also, there is no evidence to establish that Appellant was in a sudden fit of rage or passion brought on by any serious provocation from A.L. that could reasonably be sufficient to incite him into using deadly force. Appellant testified that he did not recall

what happened after the first shot and did not even realize that he shot A.L. None of the state's witnesses gave any indication that A.L. engaged in any behavior that could be interpreted as provocative. Appellant's testimony about A.L. allegedly reaching for his gun and the gun going off might be relevant to a defense regarding an accidental shooting, but does nothing to support an argument regarding heat of passion brought on by provocation. Appellant's testimony is peppered with statements indicating his lack of passion about breaking up with A.L. According to Appellant, he and A.L. continued to do things as a family, continued to have sex, always talked to each other, and that the only conflict they ever had was about scheduling child visitation. (TT, pp. 521-524.) He testified that he was not jealous of her. (TT, p. 524.) He explained all of the death threats as "just how we talked" rather than threats made in anger or passion. (TT, pp. 524, 526.) He spoke about himself as "calm, cool" and that he does not get emotional. (TT, p. 527.) He spoke about October 8, 2021 as "just a normal day." (TT, p. 527.) He did not describe any animosity between A.L. and himself in the hours leading up to the murder, other than A.L. being angry at Appellant for letting the air out of one of her tires. (TT, pp. 534-539.) Appellant did not express any particular emotion regarding this accusation, and he simply denied that he did it. (TT, p. 539.) Following his testimony in this regard, there are six pages of his testimony in the transcript devoted to his inability to remember anything after the first shot. (TT, pp. 539-545.)

{¶62} Appellant's alleged lack of memory about the shooting, his description of himself as calm and cool, and the many other facts in this record negates his claim of sudden fit of passion or rage and defeats his argument. Additionally, the entire record is replete with facts negating that Appellant's act of shooting A.L. was sudden. His hundreds

of prior threats to kill A.L., leaving the parking lot and circling back, flashing his gun, walking over to A.L. to shoot her and then standing over her body to shoot her five more times, show that whatever emotion Appellant may have been feeling, it could not have been sudden. For the four reasons mentioned above (inability to acquit on aggravated murder; lack of provocation by A.L.; lack of any evidence of rage or passion; no indication that the murder was sudden), Appellant's argument that the court should have given an instruction on voluntary manslaughter is unpersuasive.

{¶63} The trial court did not abuse its discretion in denying Appellant's request for a jury instruction on voluntary manslaughter. Appellant's first assignment of error lacks merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE STATE FAILED TO PROVE THE CRIME OF RAPE AND IT WAS A DENIAL OF FREEDOMS PROTECTED BY U.S. CONST. AMEND. XIV AND OHIO CONST., ART. I, § 16 TO SUBMIT THE CAUSE TO THE JURY.

{¶64} Appellant challenges his rape conviction on the basis of both the sufficiency of the evidence and the manifest weight of the evidence. These are distinct but related legal concepts. "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 2010-Ohio-617, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 2009-Ohio-1023, ¶ 14 (7th Dist.), citing *State v. Robinson*, 162 Ohio St. 486 (1955). When

reviewing a conviction for sufficiency of the evidence, an appellate court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 2015-Ohio-1882, ¶ 14 (7th Dist.).

{¶65} Further, in reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id.*

{¶66} 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." (Emphasis deleted.) *Thompkins* at 387. It is not a question of mathematics, but depends on the overall effect of the evidence in inducing belief. *Id.* Weight of the evidence involves the state's burden of persuasion. *Id.* at 390. (Cook, J. concurring). An appellate court reviews the entire record, 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. *State v. Lang*, 2011-Ohio-4215, ¶ 220, citing *Thompkins* at 387. This discretionary power of an appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

{¶67} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 2011-Ohio-6524, ¶ 118, quoting

State v. DeHass, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. "The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor." *State v. Vaughn*, 2022-Ohio-3615, ¶ 16 (7th Dist.), citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

{¶68} The prosecutor's theory of the case was that Appellant raped A.L. by threat of force and then killed her. Rape under R.C. 2907.02(A)(2) is defined as follows: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." "Sexual conduct" means:

> [V]aginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

R.C. 2907.01(A).

{¶69} It was not alleged that Appellant caused physical injury to A.L. that would evince the rape. The fact that A.L.'s body was not tested for vaginal rape is neither dispositive nor particularly relevant in this case, since such information was not needed by the state to prove its case. It was made clear by Yacovone that he was not investigating a rape charge at the time of A.L.'s autopsy, thereby explaining why no tests for rape were done at that time. Furthermore, "sexual conduct" can be something other than vaginal intercourse, according the statutory definition. The evidence at trial showed

that not only did Appellant repeatedly threaten to kill A.L., he threatened to harm or kill her if she did not have sex with him. On October 8, 2021, Appellant ordered A.L. to have sex with him in order for him to leave her alone. The evidence showed that she did have sex with him in order not to be murdered. (TT, pp. 229, 239-240, 244-245.) Even though she acquiesced to his threats, a few minutes later he shot and killed her.

{¶70} The parties agree that Appellant and A.L. had a child together, were in a relationship and lived together for about five years, and broke off their relationship a year before the murder. They also agree that Appellant threatened to kill A.L. many times. Appellant did not try to hide or deny these threats, but tried to pass it off as just the way he talked. (TT, p. 526.) He admitted to making hundreds of these threats to shoot and kill A.L. (TT, p. 550.) He admitted to meeting A.L. at his father's house at 9:30 p.m. on October 8, 2021. (TT, p. 555.) He admitted that he was planning on engaging in oral sex with A.L. that evening. (TT, p. 551.) He admitted to shooting her both in his own testimony and in his confession to Yacovone.

{¶71} As earlier discussed, the evidence that the threat of murder was credible was overwhelming. Recordings were admitted in which Appellant threatened to kill her. Multiple witnesses heard the death threats. Examples were given of Appellant pointing his gun with the laser sight at A.L. and her friend Lofaro. There were text messages with the same threats. He admitted threatening to kill her. (TT, pp. 524, 526.) Appellant admitted to killing A.L. (TT, p. 526.) There was also evidence that Appellant had pistol-whipped A.L. in the head and she needed to go to the hospital to get stitches. (TT, p. 479.) The credible threat of violence and death is unquestionably supported by the record.

{¶72} The proof that Appellant forced A.L. to have sexual conduct with A.L. on October 8, 2021, also came from many parts of the record. Lofaro gave two examples of A.L. stating that Appellant forced A.L. to have sex with him on October 8, 2021. The first was when she was relating the phone call A.L. made to her just before the murder. Appellant was in his car following A.L. and pointing his gun at her. (TT, p. 239.) A.L. told Lofaro on the phone that Appellant forced A.L. to have sex with him that evening, just moments before the phone call. (TT, pp. 239-240.)

{¶73} The other example was just after A.L. arrived at Lofaro's house on Compass West Drive. A.L. and Lofaro spent a few minutes together, then went outside. Appellant was there in his car blocking A.L.'s car. A.L. started her car and saw that the tire pressure was low in one tire. She yelled from her car that "[y]ou forced me to have sex with you. I did everything you said. You said you'd leave me alone for the night. Why are you here? Like, why are you following me? You promised you'd leave me alone for the night." (TT, pp. 244-245.) A.L. called 911, and then Appellant exited his car. Appellant flashed his gun at A.L. and Lofaro, then walked up to A.L. and shot her six times.

{¶74} Another friend of A.L., Nicole VanHorn, testified about the many threats Appellant made against A.L., including threats that A.L. had to perform sexual favors in order to live. According to VanHorn, Appellant told A.L. that he would "F her up" if she did not do sexual favors for him. (TT, p. 360.)

{¶75} Appellant stated in a text message: “[Y]ou want to be civil, I want sex once a week. That’s your only option.” (TT, p. 405.) There was a text message from A.L. saying "I gotta fuck you just to live." (TT, p. 406.)

{¶76} Appellant himself testified that after he broke up with A.L. he continued to have sexual relations with A.L. periodically. (TT, p. 521.) He also testified that he was going to have oral sex with A.L. at his father's house on October 8, 2021, and that he was with A.L. at his father's house on October 8, 2021. Oral sex by threat of force constitutes rape under R.C. 2907.02(A)(2) and under the definition of sexual conduct in R.C. 2907.01(A).

{¶77} There is nothing in the record, other than Appellant's contradictory partial denials, that shows that the sexual relationship between the two of them, after they had broken up their relationship, was consensual on her part. Appellant's own testimony, text, and voice recordings provide all the evidence needed to support the rape charge, and the additional evidence from Lofaro and VanHorn provides a very strong case beyond a reasonable doubt from the state. Appellant's arguments in this assignment of error are not supported by the record and are overruled.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED ON OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT AND IN ADMITTING THE STATEMENT AT TRIAL. (T.D. 32, 51).

{¶78} Appellant contends that while Yacovone read him his *Miranda* rights and asked if he understood them, Appellant did not say that he understood them, and he now asserts that he did not read the waiver of *Miranda* rights form. He asserts that a valid waiver exists only if the totality of the circumstances shows both that a defendant understands the rights and waiver and the defendant makes an uncoerced choice to

waive the rights. Appellant argues that the court in his case should have presumed that he did not waive his rights and should have followed the standard set forth by the United States Supreme Court in *Tague v. Louisiana*, 444 U.S. 469 (1980). Appellant contends that this standard required the trial court to presume that Appellant did not waive his *Miranda* rights and to place a great burden on the state to prove that he voluntarily, knowingly, and intelligently waived those rights. Appellant asserts that he took Xanax before the shooting and he blacked out after shooting A.L., thereby negating his waiver of *Miranda* rights and his confession.

{¶79} The trial court denied Appellant's motion to suppress the statements he made to Yacovone at the police station. The court held a hearing on the motion and Yacovone testified at the hearing. The state also played the video of Appellant's interview with Yacovone at the police station. The court noted Appellant's assertions that the police failed to verify that he was not under the influence of drugs during the interview, and Appellant's argument that their failure to do so invalidates his *Miranda* waiver and any statements he made to police.

{¶80} The trial court issued a judgment entry after the hearing, after review of the testimony and evidence, the parties' briefs and supplemental briefs, the videos, and the caselaw. (12/12/22 J.E.) The court found Appellant had sufficient awareness of his surroundings when he was interrogated, and he understood his *Miranda* rights and his waiver. The court held that Appellant voluntarily, knowingly, and intelligently waived his rights and executed a written form journalizing his waiver.

{¶81} The court noted that during his continued interactions with the police, Appellant was "lucid, coherent, and at no times presented an indication that he did not

understand the gravity of the situation." (12/12/22 J.E.) The court also held that Appellant did not exhibit any "signs of intoxication, impaired understanding or lack of coherency that would cause this Court any concern that his actions were anything other than intentional, voluntary and lucid." (12/12/22 J.E.)

{¶82} Appellate review of a trial court's denial of a motion to suppress involves a mixed question of law and fact. *State v. Burnside*, 2003-Ohio-5372, ¶ 8. In a hearing on a motion to suppress, the trial court sits as the trier of fact and is responsible for determining witness credibility and weighing the importance of the evidence. *State v. Fanning*, 1 Ohio St.3d 19, 20 (1982). A reviewing court should accept the trial court's findings of fact if they are supported by competent and credible evidence. *Id.* at 20. However, a court of appeals applies a de novo standard to the trial court's conclusions of law and must determine whether the facts satisfy the applicable legal standards. *Burnside*, at ¶ 8.

{¶83} *Miranda* requires the police to warn a suspect before a custodial interrogation that: he has the right to remain silent; anything he says can and will be used against him; he has a right to the presence of an attorney; he has a right to an appointed attorney. *Miranda,* 384 U.S. at 444. A defendant may waive these rights if the waiver is made voluntarily, knowingly and intelligently. *State v. Eichler*, 2024-Ohio-4819, ¶ 29 (7th Dist.).

{¶84} Where a defendant challenges his *Miranda* waiver in a suppression motion, the state has the burden to show by a preponderance of the evidence that the defendant knowingly, intelligently, and voluntarily waived his privilege against self-incrimination and his right to retained or appointed counsel before speaking to the police. *State v. Kalna*,

2020-Ohio-5016, ¶ 23 (7th Dist.), citing *State v. Barker*, 2016-Ohio-2708, ¶ 23 (citing *Miranda,* 384 U.S. at 475.)

{¶85} We look at the totality of the circumstances in order to determine if a defendant voluntarily waived his *Miranda* rights*. Kalna* at ¶ 24, citing *Barker*, 2016-Ohio-2708, ¶ 39. Those circumstances include: background and criminal experience; age, education, and intelligence; capacity and ability to understand the rights and the consequences of waiving those rights; the details of the interview (including length, frequency); and the existence of deprivation, mistreatment, threat, or inducement. *Kalna* at ¶ 24, citing *State v. Lather*, 2006-Ohio-4477, ¶ 9.

{¶86} The interview video shows that Yacovone immediately stopped Appellant as he began to speak and warned him of his *Miranda* rights. He then asked Appellant if he understood his rights, and Appellant nodded affirmatively. After Yacovone placed the written waiver form in front of him and another officer was removing his handcuffs, Appellant again nodded affirmatively when Yacovone asked him if he understood his rights and waiver. Yacovone confirmed that Appellant nodded his head twice after he informed Appellant of his rights and waiver. (12/5/22 Tr., p. 40.) Appellant signed the form.

{¶87} While Appellant now contends that he did not read the waiver form before signing it, "an express statement of waiver is not necessary." *Kalna* at ¶ 30, citing *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived his *Miranda* rights." *Id.* Further, the court can infer a defendant's waiver from his actions and words. *Id*. The interview video shows that Yacovone informed Appellant of his *Miranda* rights and

Appellant nodded twice when asked if he understood his rights and the waiver. The record shows that the police explained Appellant's *Miranda* rights to him. Appellant's signature is on the waiver form. Appellant did not testify at the suppression hearing, so his argument on appeal that he did not understand his *Miranda* rights is simply based on an inference he hopes to raise. We decline to make such an inference. The totality of the circumstances in this case clearly demonstrates that Appellant understood and voluntarily waived his *Miranda* rights.

{¶88} Appellant also asserts that his waiver was not valid because he took Xanax before the shooting and blacked out after the shooting. He noted at the hearing that he misspelled A.L.'s name on the written statement. However, the video of the interview reveals no obvious signs that Appellant was impaired, as he answered questions coherently and appropriately, did not appear intoxicated or impaired in any way, and looked alert and aware. Yacovone testified at the hearing that his 42 years of police experience helped him evaluate whether a person was impaired by drugs, stress, mental condition, or anxiety, and Appellant exhibited no such signs of impairment, except that he said he could not remember how many times he shot at A.L. (12/5/22 Tr., pp. 51-52.) Yacovone also testified that had Appellant displayed any signs of impairment, he would have terminated the interview. (12/5/22 Tr., p. 19.) Yacovone also said that Appellant's testimony was consistent with Lofaro's statements, and Appellant told them exactly where he had thrown the gun. (12/5/22 Tr., p. 20.) Yacovone asked Appellant if he had been drinking alcohol and Appellant responded that he had not. (12/5/22 Tr., p. 20.) Appellant was also able to write out a statement indicating that he and A.L. had an argument, it escalated, and he shot at her.

{¶89} Regardless, even if Appellant could show the court erred by not suppressing Appellant's statement that he shot A.L., this error would be harmless.

{¶90} Where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless "beyond a reasonable doubt" if the remaining evidence alone comprises "overwhelming" proof of defendant's guilt. *State v. Williams,* 6 Ohio St.3d 281, 290 (1983), citing *Harrington v. California*, 395 U.S. 250, 254 (1969).

{¶91} First, Appellant admitted at trial that he shot A.L. (TT, p. 526.) Further, Lofaro witnessed Appellant and A.L. arguing immediately before the shooting, she saw Appellant flash a gun, walk up to A.L., and she heard the first shot. She testified that she began running away and heard additional gunshots, and observed Appellant standing "right up on" A.L. as she lay on the ground. She also testified as to numerous occasions where Appellant threatened to kill A.L. and gave the police A.L.'s second cell phone in which A.L. recorded some of Appellant's threatening messages. VanHorn testified to the numerous threats as well. Importantly, Appellant admitted at trial that he had threatened to kill A.L. on numerous occasions. He further admitted that he told police where he disposed of the gun.

{¶92} Assuming arguendo the court had erred in admitting Appellant's confession, it was harmless based on Appellant's own testimony at trial and the other overwhelming evidence of guilt. Accordingly, Appellant's third assignment of error lacks merit and is overruled.

Conclusion

{¶93} Appellant attempts to overturn his convictions on three grounds. Appellant first argues that the trial court erred by refusing to instruct the jury on voluntary manslaughter. However, the facts of the case did not warrant this instruction. He also argues that the evidence at trial did not support his rape conviction. After thoroughly reviewing the record, there was sufficient evidence to convict Appellant of rape, and the manifest weight of the evidence supports his conviction. Finally, he argues that his waiver of *Miranda* rights was insufficient and the trial court erred by overruling his motion to suppress. This record reflects that Appellant was not intoxicated or impaired when he waived his *Miranda* rights, and he voluntarily waived those rights prior to being interrogated and in a signed waiver form. Accordingly, all of Appellant's assignments of error are overruled, and the judgment of the trial court is affirmed.

Hanni, J. dissents; see dissenting opinion.

Dickey, J. concurs.

Hanni, J., dissenting.

{¶94} With regard and respect to my colleagues, I must dissent from the majority opinion. I would find that sufficient evidence was not presented to support the rape conviction.

{¶95} The majority cites the overwhelming evidence demonstrating that Appellant threatened to kill A.L. I agree that this evidence conclusively showed that Appellant threatened to kill A.L. on numerous occasions. Appellant admitted threatening to kill A.L. and he even admitted to killing her.

{¶96} However, this evidence does not sufficiently establish a rape conviction. The evidence showed that A.L. had told others that Appellant previously forced her to have sex and threatened to harm her and kill her if she did not have sex with him. Appellant himself admitted that he was planning on engaging in oral sex with A.L. on the night of the shooting. Katelyn testified that A.L. told her on the phone that evening that Appellant forced her to have sex with him.

{¶97} Yet despite possessing this information, the police did not immediately investigate the crime of rape and did not request that A.L.'s autopsy include a rape kit. Further, Appellant testified that he and A.L. continued to have sexual relations after they ended their relationship. And while Katelyn testified that she overheard A.L. yelling at Appellant that night that he had forced her to have sex with him, she overheard A.L. state that it was so that Appellant would leave her alone while she and Katelyn went to the bar.

{¶98} Again, while Appellant no doubt threatened A.L. if she did not have sex with him, I would find that insufficient evidence was presented that Appellant forced or threatened A.L. with force that night to compel her to have sex with him.

{¶99} Accordingly, I would sustain this part of Appellant's second assignment of error and vacate the rape conviction on the basis of insufficient evidence.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.