[Cite as *State v. Heath*, 2025-Ohio-996.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DAVELLE LAMAR HEATH,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 24 MA 0062

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2022 CR 00233

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Lynn Maro, Mahoning County Prosecutor and *Atty. Ralph M. Rivera* and *Atty. Kristie M. Weibling*, Assistant Prosecutors, for Plaintiff-Appellee

Atty. Rhys Brendan Cartwright-Jones, for Defendant-Appellant

Dated: February 28, 2025

WAITE, J.

{¶1} Appellant Davelle Lamar Heath appeals a May 24, 2024 judgment entry of the Mahoning County Common Pleas Court convicting him of attempted murder and felonious assault. Appellant bases his challenge on sufficiency of the evidence and manifest weight of the evidence. He also argues that the trial court improperly denied his Crim.R. 33 motion for a new trial without first holding an evidentiary hearing. Finally, he claims that in the event this Court finds any alleged errors to be harmless, the cumulative effect of such errors requires reversal. For the reasons that follow, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} The victim in this matter, K.T., owns a two-bedroom house in Youngstown. She occupies one upstairs bedroom and rents the bedroom across the hallway to a long-time friend. The friend's boyfriend moved in at some point, as well. At the time of the incident, all three individuals were present at the house.

{¶3} The relationship between K.T. and Appellant is somewhat factually complicated. The record shows Appellant lived in Youngstown as a child, and at one point in time, he and his family temporarily moved into K.T.'s house. Appellant's paternal grandmother lives approximately ten houses away from K.T.'s residence. In fact, while living with K.T., Appellant often walked back and forth between the two houses.

{¶4} Sometime after moving out of K.T.'s house, Appellant and his family (his father, stepmother, and stepsister) moved to Texas, and then later to Kentucky. Since then, Appellant has lived in several United States' cities, completed a year long stay in Africa, and enrolled in a doctoral program at a university located in London, England.

While Appellant was in Europe on a student visa, it appears that he intended to remain there permanently after completing his studies.

{¶5} After the family's move to Kentucky, Appellant's father and his stepmother divorced, but share a son born during their marriage. While Appellant and his stepsister continued their brother-sister relationship even after the divorce, neither of them continued to maintain a close relationship with their former stepmother, who is remarried.

{¶6} In mid-March of 2021, Appellant entered the United States to see his daughter in Atlanta, and then planned to visit Kentucky, where his father and former stepsister reside. Appellant intended to finish his trip by visiting Youngstown along with his stepsister and her girlfriend, D.S. Appellant and his former stepsister's birthdays are close in proximity, and they planned to jointly celebrate their birthdays with their families in Youngstown. Appellant's father lives in Kentucky and did not travel to Youngstown.

{¶7} On March 21, 2022, the birthday party was planned at "Westside Bowl," a local bowling alley. Although Appellant and his former stepmother are now somewhat estranged, because of the child she shares with Appellant's father, the party included her along with several members of both families. The morning began with a family breakfast at a Perkin's Restaurant.

{¶8} Later that evening, the family attended the birthday celebration at Westside Bowl. The party included heavy drinking. While Appellant typically does not drink alcohol, he admitted he was very intoxicated that night. Several witnesses testified that Appellant left the bowling alley and arrived at his former stepmother's house around 9:00-9:30 p.m. The celebrants ate cake at the house before the visitors left. The following individuals remained at the house with plans to stay the night: Appellant's stepmother, her husband,

her child, Appellant, his stepsister, and stepsister's girlfriend D.S. Appellant's stepmother and her husband stayed in their bedroom and the child slept in his own room, Appellant slept on the couch in the living room. His stepsister and D.S. slept on an air mattress that was apparently pushed up against the couch.

{¶9} Each person who stayed at the house that night testified at trial that no one, including Appellant, left the house that night. They testified in remarkable unison to the same specific, minute details of that night, including the order in which everyone fell asleep, that a door chime rang loudly when an entry door opened or closed, and that the dogs would have barked if someone left the house. All of them testified that Appellant fell asleep first and stepmother's husband fell asleep last. They all claimed that in order to leave the couch, Appellant would have been forced to walk across the air mattress and over his stepsister and D.S.

{¶10} Around 10:35 p.m. that night, K.T. walked from her house to her car to retrieve her reading glasses. Her housemates were home that night, her roommate's boyfriend downstairs playing video games and her roommate upstairs in the bedroom. According to K.T., when she approached her vehicle, she noticed a shadow behind her and immediately recognized the voice as Appellant's when he spoke. K.T. testified that she has known Appellant since "he was in diapers."

{¶11} After Appellant called out to her and she immediately recognized his voice, she turned to greet him. Even though K.T. recognized him, Appellant introduced himself as Davelle Heath and explained that he was in town visiting from London. K.T. bent down to open her car door to retrieve her glasses, intending to continue the conversation afterwards. However, as she reached for the door handle, she was struck by something

and fell to the ground. She looked up and saw Appellant standing over her. When she called out for help, Appellant disappeared down the street.

{¶12} K.T.'s roommates heard her calls, but were fearful of going outside, as they were afraid their lives would be at risk. 911 was called. In the meantime, K.T. was able to crawl back to the house and collapsed at the door's threshold. K.T. suffered a significant gunshot wound to her head that exposed part of her skull. When the 911 dispatch asked who might have fired the weapon, K.T's roommate said K.T. kept saying a name that sounded like "Lavelle." Appellant's name is "Davelle."

{¶13} When officers arrived at the house, Patrolman Robert DeMaiolo of the Youngstown Police Department waited for the ambulance with K.T., concerned that she would not survive. Patrolman DeMaiolo testified that K.T. wanted to identify the shooter and asked for a piece of paper. As Patrolman DeMaiolo only had evidence envelopes on his person, he gave her one along with a pen. On the envelope, K.T. wrote "Davelle Heath" and also wrote Appellant's grandmother's address and phone number.

{¶14} K.T. survived the shooting, with some permanent disabilities. While she recovered at the hospital, Detective Chad Zubal spoke with her and she was "very clear that the person that shot [her] was Davelle Heath." (Trial Tr., p. 291.) She asked for paper and when Det. Zubal complied, she again wrote Appellant's name and his grandmother's contact information.

{¶15} The morning after the shooting, Appellant's stepsister and D.S. were to take him back to Kentucky with them, where he was to board a flight to Atlanta. It appears from the record that either the night before the shooting or the morning after, the three changed their plans, deciding to leave Youngstown earlier that morning than expected,

supposedly due to the women's work schedules. Appellant then boarded a plane in Kentucky for Atlanta, with plans to fly to London a few days later.

{¶16} During the investigation into Appellant, officers found a photograph on his Facebook account showing him with what appeared to be a glock firearm sticking out of his pants' pocket. Investigators also discovered a Facebook messenger conversation between Appellant and his stepsister from the day before the shooting, stating in relevant part:

> [Stepsister]: My dude still ain't pulled up with it.
>
> Appellant: It's all good. I'll see about something when I'm there. If not, Then, fuck it. It's a sign.
>
> [Stepsister]: Fuck around. Beat the shit out of a nigga.
>
> Appellant: Shit, I probably should.

(Trial Tr., pp. 421-422.)

{¶17} K.T.'s identification, the Facebook photograph, and these messages led police to focus on Appellant as the sole suspect. However, it took several days for officers to complete their investigation and obtain an arrest warrant. During this time, Appellant was in Atlanta. However, when he attempted to board his final flight back to London, U.S. Marshalls stopped him and placed him under arrest. He was eventually extradited back to Ohio.

{¶18} On September 8, 2022, Appellant was indicted on one count of attempted murder, a felony of the first degree in violation of R.C. 2923.02; 2903.02(A), (D),

2929.02(B) with an attenuated firearms specification in violation of R.C. 2941.145(A), and one count of felonious assault, a felony of the second degree in violation of R.C. 2903.11(A), (D)(1)(a) with an attenuated firearm specification in violation of R.C. 2941.145(A).

{¶19} Appellant was placed on house arrest pending trial. On January 4, 2023, the court issued a bench warrant after learning that Appellant violated the terms of his house arrest. GPS monitoring on Appellant placed him in an empty parking lot from 12:09 a.m. to 1:32 a.m. on December 22, 2022. However, two days later, the court recalled the warrant and allowed Appellant to remain on house arrest.

{¶20} Trial commenced on January 29, 2024 and continued through January 31st, when the jury announced its guilty verdict on all counts as charged within the indictment. On April 15, 2024, Appellant filed an untimely motion for a new trial pursuant to Crim.R. 33 without first filing a motion for leave.

{¶21} The court sentenced Appellant and filed a judgment entry reflecting his sentence on May 3, 2024. The court agreed with the parties that the conviction for felonious assault merged with attempted murder for purposes of sentencing. The state elected to proceed with sentencing on the attempted murder conviction. The court imposed the following: an indefinite term of nine to thirteen and one-half years of incarceration for attempted murder, with a three-year term for the attenuated firearm specification to run consecutive to and prior to the sentence for attempted murder.

{¶22} On that same date, May 3, 2024, the court filed a "Judgment Entry of Resentence" after realizing the entry contained an error in calculating the aggregate

sentence pursuant to the Reagan Tokes Act, however, the individual sentence lengths did not change.

{¶23} On May 24, 2024, the court filed a "Nunc Pro Tunc Judgment Entry of Resentence." There appears to be no difference between this and the "resentence" entry earlier filed. Also on May 24, 2024, the court denied Appellant's motion for a new trial "[f]or good cause shown." This timely appeal followed.

{¶24} After the filing of the notice of appeal in this matter, Appellant delayed the matter several times. On September 23, 2024, Appellant filed his first request for an extension of time in which to file his brief. While Appellant sought thirty-five additional days, we granted twenty. On October 15, 2024, Appellant filed a second request for an extension, seeking thirty more days. We granted a fourteen-day extension. On October 28, 2024, Appellant filed a third request for extension, seeking seven more days, which was granted, and Appellant did file his brief within that time. However, on November 21, 2024, he moved for leave to file an amended brief, due to his failure to redact the victim's name in his initial brief and to correct some factual errors. We granted the motion, and Appellant filed an amended brief on November 25, 2024. The state quickly filed its brief, leading Appellant to seek a fourteen-day extension in which to file his reply brief. Appellant claimed he needed additional time to address cases that had been recently released, however, these cases had been released in September, prior to Appellant's original deadline. We denied the request.

ASSIGNMENTS OF ERROR NOS. 1 and 2

The trial court erred in allowing a conviction in light of insufficient evidence. Const. Amend V, VI, XIV.

The trial court erred in entering a conviction against the manifest weight of the evidence. Oh.Const. Art. VI, sec. 3(B)(3).

{¶25} Appellant challenges both the sufficiency and manifest weight of the evidence, here. Appellant discounts K.T.'s identification based on alleged "inconsistencies." This involved a disputed factual question regarding the last time K.T. and Appellant saw one another. He also highlights his family's alibi evidence, believing this testimony cast doubt on K.T.'s identification of him as the shooter.

{¶26} "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, ¶ 4 (7th Dist.), citing *State v. Robinson*, 162 Ohio St. 486 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing 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.), citing *State v. Merritt*, 2011-Ohio-1468, ¶ 34 (7th Dist.).

{¶27} 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 no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id*.

{¶28} 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.) *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). It is not a question of mathematics, but depends on the 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). The 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 the 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*.

{¶29} "[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. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 2010-Ohio-3282, ¶ 42 (7th Dist.), citing *State v. Mastel*, 26 Ohio St.2d 170, 176 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we

will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201 (7th Dist.1999).

{¶30} It is uncontested here that K.T. identified Appellant as the shooter on two occasions prior to trial, and then again at trial. On this testimony, alone, the evidence was sufficient to convict Appellant. K.T. first identified him as the shooter to Patrolman DeMaiolo at the scene of the shooting. She asked the officer for a piece of paper and wrote Appellant's first and last name along with his grandmother's address. While in the hospital, K.T. asked Det. Zubal for a piece of paper and for a second time wrote Appellant's name and grandmother's address on the paper. A 911 call was admitted at trial where K.T.'s female roommate told dispatch that K.T. kept saying a name that sounded like "Lavelle." Again, Appellant's first name is Davelle. K.T. also spoke to Det. Zubal a second time while in the hospital and was "very clear that the person that shot [her] was Davelle Heath." (Trial Tr., p. 291.) K.T. testified at trial and identified Appellant as the shooter.

{¶31} "While identity is an element that must be proven by the state beyond a reasonable doubt, the credibility of witnesses and their degree of certainty in identification are matters affecting the weight of the evidence." *State v. Hill,* 2024-Ohio-2744, ¶ 31 (7th Dist.), citing *State v. Bias*, 2022-Ohio-4643, ¶ 39 (10th Dist.), citing *State v. Reed*, 2008-Ohio-6082, ¶ 48 (10th Dist.). Again, K.T.'s testimony clearly provided sufficient evidence, leaving only an argument as to manifest weight, based on her credibility.

{¶32} Appellant contends that the state introduced evidence only as to K.T.'s identification at trial, and nothing more to support his conviction. Appellant is mistaken in this assertion. This record is replete with strong circumstantial evidence which Appellant

ignores. Under Ohio law, "[c]ircumstantial evidence and direct evidence inherently possess the same probative value." *State v. Bellum*, 2024-Ohio-2742, ¶ 57 (7th Dist.), citing *State v. Prieto*, 2016-Ohio-8480, ¶ 34 (7th Dist.), citing *In re Washington*, 81 Ohio St.3d 337, 340 (1998); *State v. Jenks*, 61 Ohio St.3d 259, 272-273 (1991), paragraph one of the syllabus. In fact, "[e]vidence supporting the verdict may be found solely through circumstantial evidence." *Bellum* at ¶ 57, citing *State v. Smith*, 2008-Ohio-1670, ¶ 49 (7th Dist.).

{¶33} First, there is the "coincidence" of K.T. implicating Appellant on the one day he happened to be visiting Youngstown and when there is no evidence she should or would expect him to be in Youngstown. K.T. contends that she last saw Appellant a few years prior while visiting at his mother's house. Appellant concedes that he was in town and visited his mother's house around the time identified by K.T., but he testified that he did not remember seeing her. He regards this as an "inconsistency."

{¶34} Regardless, the parties agree that it had been some time since they last saw one another. K.T. knew Appellant no longer lived in Ohio. She would have had no reason to expect him to be in the area on the night of the shooting. K.T.'s lack of knowledge that Appellant would be in the area appears to corroborate her version of the events that night: that Appellant came up to her, re-introduced himself, and told her he was visiting from London. As Appellant concedes he had not spoken to K.T. recently, there would be no way for her to have known he was in London prior to his visit. It appears the jury believed K.T.'s testimony, and this testimony is fully supported by the record, here.

{¶35} It was Appellant who provided contradictory evidence, when testifying as to whether he visited his grandmother during the fateful trip. In his grand jury testimony (which was admitted at trial for impeachment purposes), Appellant claimed that he did not visit his grandmother. During his trial testimony, Appellant conceded that he did visit his grandmother, who lives approximately ten houses away from K.T., the morning of the shooting. Thus, not only did the jury hear Appellant had lied, but they were also aware he admitted he was near K.T.'s house the morning of the shooting.

{¶36} Also, a Facebook photograph Appellant had posted on his page on the date of the shooting shows him with a firearm sticking out of the front right pocket of his pants. During his grand jury testimony, Appellant conceded the photo showed him carrying a gun. At trial, he repeatedly referred to it as the "alleged firearm." Suspecting coaching from his trial counsel, the prosecutor asked Appellant why he used that phrase. In response, Appellant, for the first time, claimed the weapon was a BB gun. When confronted with his grand jury testimony, Appellant said he only recently learned it was not an actual gun, knowledge he did not have when he testified for the grand jury. When asked why he posed for the photograph, he stated that guns are rare in England and that he wanted to look "cool" for his friends abroad. When asked how he obtained the weapon, he claimed that it belonged to his brother, who had it on his person that day. As his brother was attempting to fix the speakers in his vehicle, he asked Appellant to hold it for him. He said he posed for the photograph around that time. Again, officers testified the gun appeared to be a "glock."

{¶37} The state also introduced a Facebook messenger conversation between Appellant and his stepsister that occurred the day before the shooting. During the conversation, they exchanged the following messages:

> [Stepsister]: My dude still ain't pulled up with it.
>
> Appellant: It's all good. I'll see about something when I'm there. If not, then, fuck it. It's a sign.
>
> [Stepsister]: Fuck around. Beat the shit out of a nigga.
>
> Appellant: Shit, I probably should.

(Trial Tr., pp. 421-422.) This conversation appears to show that Appellant sought his stepsister's assistance in obtaining a gun when he got to Youngstown, but if he could not obtain this weapon he intended to "beat" someone. Although defense counsel conceded that this exchange "sounds bad," Appellant's stepsister claimed to have no memory of it and suggested that the two of them were likely joking.

{¶38} The state attacked, apparently successfully, the credibility of Appellant's family members who provided testimony in support of his alibi defense. His stepsister admitted that she would do anything for Appellant, as they were very close, although she denied that she would commit perjury for him. She claimed that she and D.S. drove Appellant back to Kentucky earlier than planned on the morning after the shooting because they had to work the next day.

{¶39} His stepsister and D.S. both testified that they slept on an air mattress which was pressed up against the couch where Appellant slept. Both women testified that in

order to leave the house, Appellant would have to step over them, which would have caused them to awaken. However, neither woman woke up when Appellant received two calls during the middle the night. Although Appellant claimed in his grand jury testimony that only his grandmother called him that night, at trial he admitted both his grandmother and father called in the middle of the night to talk to him about the shooting. Neither his stepsister nor D.S. apparently heard Appellant receive and answer these two phone calls, despite testifying that because of their close proximity any movements on his part would have awakened them.

{¶40} As to the substance of the phone calls, at trial Appellant testified that his father told him police had appeared at his grandmother's house. The officers informed her that Appellant's name had come up in regard to a shooting down the street from her. When Appellant spoke with his grandmother, he reassured her that the police inquiry into him must have been a mistake.

{¶41} Appellant conceded at trial that despite learning he was a person of interest in a shooting investigation, and that officers had dispatched to his grandmother's house in the middle of the night because of his potential involvement, he made no attempt to contact law enforcement to clear up any "mistake" on the part of the police. Instead, he boarded a plane to Atlanta the next day with plans to board a second flight out of the country a few days later.

{¶42} The family members' alibi testimony as a whole, as noted by the state, appeared to be highly rehearsed, as even the witnesses' insignificant details matched verbatim. Each of the four who provided testimony (his stepsister, D.S., his stepmother, and her husband) gave the exact same story with the same specific, minute details. The

only family member who appeared to be familiar with K.T. was Appellant's stepmother, who testified that she did not like K.T.

{¶43} While K.T.'s identification unequivocally provided sufficient evidence as to the element of identity, K.T.'s identification of Appellant is supported by an abundance of circumstantial evidence on the record, and Appellant's witnesses appeared far less credible than K.T., who not only had no known reason to lie but also no reason to believe Appellant would be in Youngstown on the day of the shooting. The record reveals the conviction is also not against the manifest weight of the evidence. As such, Appellant's first and second assignments of the error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 3

> The trial court erred in denying Heath's Rule 33 juror misconduct motion without an investigation and a hearing. Const. VI, XIV.

{¶44} Appellant contends that the trial court improperly denied his motion for a new trial filed pursuant to Crim.R. 33 on the basis of alleged juror misconduct. In his motion, filed seventy-five days after the verdict, Appellant claimed that a juror graduated from high school with his father more than thirty years before trial and was a member of a high school class reunion Facebook group with his father, and failed to disclose this connection.

{¶45} Crim.R. 33 applies to a request for a new trial. In relevant part, that statute provides:

> (A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is contrary to law;

(5) Error of law occurring at the trial;

(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. . .

{¶46} Appellant's motion seeking a new trial contained no statutory cites or caselaw. It specifically stated that Appellant was "grounding the petition in the stark revelation of *juror misconduct arising from either confusion, inattention, or intentional deceit.*" (4/15/24 Motion for new trial, p. 1.) This unquestionably raises Crim.R. 33(A)(2) grounds. In Appellant's brief, he cites for the first time the applicable law, and specifically cites to and addresses this subsection pertaining to juror misconduct. At no time, either to the trial court or in his brief, does Appellant mention the subsection pertaining to newly discovered evidence, subsection (6).

{¶47} It was not until oral argument and after the state raised the issue that Appellant's Crim.R. 33 request was filed beyond time and without prior approval that Appellant first raised Crim.R. 33(A)(6) regarding newly discovered evidence, which would have given him a longer timeframe within which to have filed his motion. As this was not properly raised to the trial court or even addressed in Appellant's brief, his argument that the evidence on which he relies for his new trial request was "newly discovered" has been waived. Hence, before reaching the merits of Appellant's substantive arguments, we must consider whether his motion was timely. Pursuant to Crim.R. 33(B), "[a]pplication for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered…" "Leave must be granted before the merits are reached." *State v. Lordi*, 2002-Ohio-5517, ¶ 25 (7th Dist.). After leave has been granted, under Ohio law, a "trial court holds the discretion to decide whether a Crim.R. 33 hearing should be held." *State v. Baer*, 2017-Ohio-7759, ¶ 12 (7th Dist.).

{¶48} If a motion for new trial is not timely, a motion seeking leave to file the late motion must be filed, first. In this case, Appellant filed a motion for a new trial grounded in the subsection addressing juror misconduct, subsection (2), seventy-five days after the verdict and without first seeking leave of the trial court to do so. For this reason, alone, the trial court was well within its right to dismiss the motion without reaching the merits.

{¶49} While the untimeliness of the motion, alone, resolves the issue, we also note there appears to be no credible, substantive grounds for relief even if it were properly framed as one involving newly discovered evidence and timely filed. Appellant complains that one of the jurors, S.J., graduated from high school with his father in 1993. Apparently

S.J. and Appellant's father are both members of a Facebook group titled "East High School Class of 1993 Reunion." The sole evidence of their connection is a screenshot of the Facebook group member list. There is no affidavit from Appellant's father corroborating this allegation, or even verifying that this juror is the same person with whom he graduated and not merely someone else having the same name as his former classmate.

{¶50} Even so, as asserted by the state, there is no evidence that S.J. and Appellant's father ever communicated with one another during their time at school or after graduating from high school more than thirty years prior, even if the juror was a classmate. Assuming he remembered Appellant's father or made the connection, it appears his failure to mention this tenuous connection would not rise to the level of juror misconduct in any way.

{¶51} In reviewing the voir dire transcripts, the following excerpt from the trial court's initial statement to potential jurors is relevant: "[d]o you know or are you related to anyone or the parties in this cause of action or the lawyers who represent them?" (Trial Tr., p. 25.) None of the potential jurors answered in the affirmative.

{¶52} This matter is similar to *State v. Wilson,* 2022-Ohio-2769 (8th Dist.). In *Wilson,* one of the jurors was the assistant principal of a high school the appellant had attended ten years before his criminal trial. *Id.* at ¶ 34. The juror had been responsible for disciplining the appellant and caused him to be expelled from school. When the potential jurors were asked if anyone knew any of the parties in the case, none of them, including the former assistant principal, responded in the affirmative. The Eighth District determined that "[a]s an assistant principal, Juror No. 8 must have interacted with

thousands of students over the years and it is not unreasonable to conclude that he did not remember Wilson, with whom he had not interacted for nearly a decade." *Id.* at ¶ 35.

{¶53} Arguably the facts in *Wilson* are more egregious than in the instant matter. In *Wilson,* the juror had disciplined the appellant and had caused him to be expelled from school. In the matter before us, Appellant provided no evidence that Appellant's father ever interacted with juror S.J. personally. In *Wilson,* the connection occurred ten years before the trial. In the instant case, graduation occurred more than thirty years prior.

{¶54} Based on the record and the caselaw, Appellant's third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

> When one combines the above assignments of error, one's trust in the verdict is undermined such that the cumulativity (sic) of error demands reversal.

{¶55} Appellant contends that the cumulative effect of all his perceived errors requires reversal of this matter. As we can find no error in this matter, harmless or otherwise, Appellant's arguments in this regard are not well-taken.

{¶56} In Ohio, it is generally recognized that "given the myriad [of] safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." *State v. Howard-Ross*, 2015-Ohio-4810, ¶ 11 (7th Dist.), citing *State v. Rupp*, 2007-Ohio-1561, ¶ 83 (7th Dist.); *State v. Jones*, 90 Ohio St.3d 403, 422 (2000).

{¶57} With this in mind, cumulative error exists only where errors actually "deprive a defendant of the constitutional right to a fair trial." *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus. In order to reverse a matter based on cumulative error, there must be multiple instances of harmless error. *State v. Garner*, 74 Ohio St.3d 49, 64 (1995).

{¶58} As we have found no error in any assignment of error, there can be no question of cumulative error. It is axiomatic there can be no cumulative error without any instances of individual error. As such, Appellant's fourth assignment of error is without merit and is overruled.

Conclusion

{¶59} Appellant contends that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. However, the victim's identification of Appellant provides sufficient evidence supporting the element of identity and the record contains an overwhelming amount of evidence supporting that identification and its credibility. Appellant also argues that the trial court improperly denied his Crim.R. 33 motion for a new trial. That motion was untimely filed without first requesting, and being granted, leave to file. Finally, Appellant claims that the cumulative effect of his arguments requires reversal. As we have found no error, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, P.J. concurs.

Hanni, J. concurs.

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.