

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	No. 112934
TYERRA POUGE,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 19, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-664492-B

Appearances:

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

Kimberly Kendall Corral, Gabrielle Ploplis and Carly Caldron, *for appellant*.

EILEEN A. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Tyerra Pouge, appeals her conviction for felonious assault with a firearm specification following a jury trial. For the reasons that follow, we affirm.

I. Factual Background and Procedural History

{¶ 2} On November 1, 2021, a Cuyahoga County Grand Jury returned a two-count indictment charging Tyerra Pouge with two counts of felonious assault, each count carrying one- and three-year firearm specifications. The charges stemmed from an investigation into a physical altercation on October 10, 2021.

{¶ 3} The State's theory was that Pouge and codefendant, Tara Moore, had been romantically involved with the same man at various times and when they discovered that the victim, Kristin Hughes, was also involved with the man, they "track[ed] [her] down" and assaulted her. The State alleged that Pouge produced a firearm during the assault and repeatedly struck Hughes with the weapon.

A. Voir Dire

{¶ 4} During voir dire, the State moved to excuse a prospective juror — Juror No. 15 — for cause. The prosecutor argued that the juror would not be a good fit for the case for several reasons: (1) she said she was biased multiple times across two days of voir dire; (2) she indicated that she is fearful and distrustful of law enforcement; (3) she was less than forthcoming when the court inquired about close family and friends who had been the victims of crime; (4) she said she would not be able to hold the State to its beyond-a-reasonable-doubt standard; (5) she related that she was concerned about jury service because she is a very emotional person and (6) she described being uncomfortable with jury service because she was the only African American female in the venire and identified with the defendants.

{¶ 5} Counsel for both defendants opposed the motion.

{¶ 6} The trial court called it a “close call” but ultimately denied the motion. The court agreed that Juror No. 15 had “spent the first two days absolutely indicating she could not be fair, and she was a little withholding with some of my questions about people accused of a crime or victims of a crime.” But the court noted that on the third day of voir dire she reported that she was still “very concerned, but if she had to do it, she would be fair.” The court also said it was “very cognizant” that she was the only prospective juror who identified as an African American female.

{¶ 7} The State thereafter used one of its peremptory challenges to excuse Juror No. 15. Pougé’s counsel raised a *Batson* challenge, noting that the prospective juror was the only member of the venire who identified as being both Black and female. Counsel said that she appeared to be one of only three Black members of the venire.¹ Counsel argued that the “verdict would shift” if Juror No. 15 was excused.

{¶ 8} The State responded that its decision to excuse Juror No. 15 was not based on the fact that she was a Black female. The prosecutor raised the same concerns it had expressed when it moved to strike her for cause. And the prosecutor said that, because the venirepersons had not been individually polled, it was merely “an assumption” that Juror No. 15 was the only member that would identify as a Black woman.

¹ It is not apparent from the record whether any Black members of the venire ultimately served in this case, but neither of the defendants raised another *Batson* challenge in the matter.

{¶ 9} The trial court excused Juror No. 15, over the *Batson* challenge, finding that the State had identified “many non-racial reasons” for striking the juror that were supported by the voir dire.

{¶ 10} The State presented three witnesses and numerous exhibits in its case in chief.

B. The Examination of Kristin Hughes

{¶ 11} Kristin Hughes testified that she has lived in Cleveland her entire life. She has known a man named Tenard Davis for 11 years and they have been friends that entire time.

{¶ 12} Hughes and Moore had attended the same high school for a few months. Hughes did not see Moore between high school and August 2021.

{¶ 13} Hughes had seen Pouge from time to time at social events. Hughes came to learn that Pouge shares a child with Davis. Hughes also learned that Moore and Davis were in a relationship.

{¶ 14} Davis had been incarcerated and was released from prison in August 2021. Davis and Hughes then entered into a sexual relationship and Hughes became pregnant. She was pregnant on October 10, 2021.

{¶ 15} At approximately 2:00 a.m. on October 10, 2021, Hughes was at home. Davis called her and asked her to meet him so they could talk. Hughes drove to West 11th Street arriving at approximately 2:20 a.m. or 2:30 a.m. Davis came to her car and asked her to walk with him toward the river. They walked together and Hughes told Davis that she was feeling sick from the pregnancy and wanted to go home. She

walked back to her car and sat inside. Davis repeatedly told her that he wanted to talk. She repeatedly told him that she did not want to talk.

{¶ 16} There came a point in this back-and-forth that she noticed, through the front windshield, “three people walking up the hill.” She could not tell who they were at first, but she recognized Moore when Moore began running up the hill toward Hughes’ car. Moore ran to the side of Hughes’ car, entered the vehicle on the passenger’s side, and began punching Hughes with a closed fist. Moore was hitting Hughes’ “whole . . . upper body.” Hughes began hitting Moore back to defend herself.

{¶ 17} During the struggle, Hughes felt someone “hitting me on the top of my head,” at which point she “blanked out.” When she “came back to,” she could feel blood rushing down her face. She turned around toward the driver’s-side door and kicked at a person near her. Hughes saw that this person was Pougé as Pougé had fallen as a result of the kick. When Pougé fell, Hughes heard a noise and looked at the ground outside of her car and saw “a nude or tan-looking gun” on the ground. Hughes tried to drive away in the car but Pougé grabbed Hughes by the hair and pulled her out of the car. Pougé “swung me to the ground” and sat on Hughes and Hughes described not being able to breathe as Pougé was on top of her.

{¶ 18} Pougé spit on Hughes. Pougé pulled out a phone “and said she should record me.” Pougé told Moore to go into Hughes’ car and take Hughes’ key fob and “whatever else was in my car.” Pougé told Moore to pick up the gun; Moore did so and handed the gun to Pougé. Pougé then continued striking Hughes with the gun.

{¶ 19} While Hughes was pinned under Pouge, unable to breathe, Hughes said she called for Davis' help. Hughes pleaded with Moore and Pouge, telling them that she had kids. Moore and Pouge "told me they were all one [sic] and that [Davis] wasn't coming to help me, and I shouldn't have been dealing with him." Hughes saw Moore standing over her, with a "smirk on her face like she was smiling." During this ordeal, Hughes "was going in and out."

{¶ 20} There came a time where Pouge allowed Hughes to stand. Hughes then ran to her car and drove away. She called 911 from the car and drove herself to a hospital emergency room. The State played the 911 call for the jury.

{¶ 21} At the hospital, she received 20 staples in her head and Hughes was diagnosed with a concussion and, at the time of trial, still had a scar from the injuries she sustained.

{¶ 22} While at the hospital, Hughes spoke to two police officers about the incident and went to stay with a friend after she was discharged. There came a time that she spoke with a police detective about the incident. The detective asked her to identify each of the people who assaulted her, out of a set of two photograph lineups. She did so.

{¶ 23} Hughes identified photographs taken of her injuries at the hospital and further identified the medical records provided to her upon her discharge from the hospital. The exhibit of medical records contained a document executed by a custodian of medical records at University Hospitals Cleveland Medical Center, in which the custodian certified that the records "are true and authentic copies of the

medical records prepared in the usual course of business” by employees of the medical center on the dates indicated in the records.

{¶ 24} The records include a narrative of the emergency room doctor who wrote that Hughes “does have 2 lacerations on the scalp, 1 on the left side of the scalp that is 1 cm in a U-shape[], an additional laceration that is 0.5 cm on the left parietal scalp. These lacerations were cleaned and closed with staples . . . She also has a full-thickness laceration to the right ear with exposed cartilage.” Plastic surgeons repaired the ear wound. Additional testing — including CT scans — did not reveal anything remarkable. The report indicates that Hughes “denie[d] loss of consciousness” in the emergency department but the records do include a narrative drafted by a professional on the plastic-surgery team, indicating that Hughes reported that she “briefly los[t] consciousness” during the assault.

{¶ 25} Hughes testified that there came a time that someone sent her a photograph posted to Pouge’s account on Instagram. The photograph depicted three firearms under which was a caption that read, “I got my gun license & fell in love with this s . . .,” followed by an emoji of a smiling face with red heart-shaped eyes. Hughes identified one of the firearms as the one she saw during the assault, because the color matched what she saw that night.

{¶ 26} Hughes made an in-court identification of Pouge and Moore.

{¶ 27} On cross-examination, Hughes admitted that it was her understanding that Davis was having casual sexual relations with women, in addition to her, in October 2021. She further admitted that she never saw Davis or

heard his voice again after she saw the three people walking up the hill in front of her car on the night of the assault and believes that he ran away.

{¶ 28} Hughes estimated that Moore hit her approximately six times but does not believe that she sustained any injuries from those strikes. Hughes estimated that their scuffle lasted only seconds.

{¶ 29} Hughes denied that there was any gap of time between the fight with Moore and the fight with Pougé. The punching inside the car stopped when Pougé hit her in the head with a gun.

{¶ 30} Hughes further admitted that it was her understanding that Davis and Pougé had had no romantic relationship for at least eight years preceding the assault.

{¶ 31} Hughes said that Davis denied having a romantic relationship with Moore after his release but suspected that he may have been lying about that. Hughes was not particularly concerned about what Davis did with other people because Hughes and Davis “weren’t together.”

{¶ 32} Hughes further admitted that there had never before been a physical fight between herself and Pougé. Before the assault, there had been no threats made to Hughes nor had she heard rumors that Moore and Pougé wanted to hurt her.

{¶ 33} Hughes said she had no reason to believe that Moore or Pougé knew she was pregnant before the assault.

C. The Examination of Scot Sherwood

{¶ 34} Scot Sherwood testified that he is employed as a detective in the Cleveland Division of Police and works in the Third District. Sherwood was assigned to investigate the alleged assault on Hughes.

{¶ 35} Sherwood related that he interviewed Hughes, during which time she identified Pougé and Moore from “six-pack” lineups of photographs as the women who attacked her.

{¶ 36} Sherwood also spoke with Davis. They discussed “how the two individuals tracked him to the location” and Davis “was wondering how they tracked him as well.”

{¶ 37} There came a time when Hughes directed Sherwood to an Instagram account belonging to Tyerra Pougé. The account’s privacy settings were such that Hughes was able to look up the account on that site and independently review its postings.

{¶ 38} Sherwood identified the screenshot of the photograph posted to the Instagram account, in which three firearms are depicted. Sherwood created this screenshot on October 12, 2021.

{¶ 39} Police then obtained a search warrant for the location at which Pougé was staying. Police executed the search warrant and Pougé identified the location of the firearm they were seeking. Police located the firearm, a “tan or brown” 9 mm handgun. The handgun was collected as evidence and tested for operability. It was operable.

{¶ 40} On cross-examination, Sherwood admitted that Hughes never told him about the things which she testified were said to her by Moore and Pouge during the assault. However, in an interview conducted on the same day as the assault resulted in Det. Sherwood generating a report in which he wrote, “Words were exchanged between females. She was only able to understand what Moore was saying. “This is over a guy. Enough. Get off.””

{¶ 41} Sherwood further admitted that the firearm recovered from Pouge’s apartment was never tested for the presence of DNA, even though Sherwood had wanted to see if Hughes’ DNA could be recovered from the weapon. The crime lab informed Sherwood that he would need to obtain a swab from Pouge in order to do so. However, Sherwood never asked Pouge for consent to collect a swab and he never sought a court order to obtain one.

D. The Examination of Marianna Caraballo

{¶ 42} Marianna Caraballo testified that she is employed as a police officer in Cleveland and works basic patrol. Caraballo and her partner responded to a call for service at University Hospitals on October 10, 2021, at approximately 4:41 a.m., where she met with, and interviewed, Hughes and the interaction was recorded on Caraballo’s body-worn camera.

{¶ 43} Caraballo identified footage recorded by her body-worn camera. The State played the footage, over objection.

{¶ 44} Caraballo also photographed Hughes' injuries at the hospital. She identified the photographs she took and described the injuries she observed on Hughes during the interaction.

E. The Motion for Judgment of Acquittal

{¶ 45} After the admission of the State's exhibits, several admitted over defense objections, the State rested. Pougé moved for acquittal pursuant to Crim.R. 29, and the motion was denied.

F. The Defense Case and the Examination of Tyerra Pougé

{¶ 46} Tyerra Pougé testified in her own defense and related that she is 30 years old and lives in Cleveland with her 11-year-old daughter who was fathered by Tenard Davis. Pougé and Davis were in a relationship but she came to learn that Davis was "having an affair" with both Hughes and Moore. Pougé continued on in a relationship with Davis for a time, knowing of these other women's associations with Davis yet Pougé never got into a fight with them.

{¶ 47} Pougé and Davis ended their relationship when Davis was sent to prison for the first time, and the relationship never resumed. They have had no romantic relationship for the past eight years.

{¶ 48} While Davis was in prison, Moore helped Pougé's daughter visit Davis in the institution. Moore and Pougé would coordinate logistics for the visits and Moore would transport the girl to the institution and back. When Davis was released from prison, he went to live with Moore. Moore and Pougé continued coordinating visitation for the daughter.

{¶ 49} Pouge has a valid permit to carry a concealed weapon which was issued in November 2020.

{¶ 50} Pouge saw Hughes and Davis together in public on one occasion. Pouge did not fight Hughes; in fact, they “all hung out together that day.”

{¶ 51} On October 10, 2023, Pouge was with friends at a music concert. There came a time that day that Moore called Pouge. After that call, Pouge felt like she had to leave the concert to go pick up her daughter from Davis; Pouge felt that her daughter “was in harm’s way.” Pouge called Davis to arrange to pick up her daughter and Davis asked Pouge to meet him on West 10th Street.

{¶ 52} Pouge used a ride-sharing service to return to her apartment. She called Davis from her apartment to let him know that she was on her way. While she was attempting to hail a ride-sharing vehicle to take her to West 10th Street, Moore called her. Pouge told her she was on her way to get her daughter and Moore offered to give her a ride.

{¶ 53} Moore picked Pouge up from the apartment and drove her to West 10th Street. Pouge carried the tan firearm she owned. Pouge and Moore walked down a hill as Pouge tried to reach Davis by phone. He did not answer. Pouge and Moore walked around the area for about 15 minutes after which time Pouge recommended that they leave because they could not find Davis. At that point, Moore noticed a vehicle with its lights on parked up a hill. Pouge did not want to climb the hill so she stayed at the bottom while Moore walked up the hill towards the vehicle.

{¶ 54} Pougé saw Moore open the passenger door of the vehicle, and then the vehicle began shaking back and forth “like there was some type of commotion.” Pougé believed that Moore and Davis were fighting because Davis “was abusive to me in the past,” so Pougé went up the hill toward the vehicle. She approached the driver’s side and saw that there were “two females fighting” inside. Pougé did not see Davis that evening. Pougé denied that there was a third woman walking with Moore and her that night.

{¶ 55} Pougé “tried to break up the fight,” at which time Hughes “turned around and power kicked me to the floor, jumped out of the vehicle and started to attack me.” Pougé’s firearm fell out of her clothing to the ground when she was kicked. Hughes jumped on top of Pougé, but Pougé managed to flip her over “by her hair” and “restrain[] her” by taking hold of her shirt and arms. Pougé tried to calm Hughes down, saying “I’m not trying to fight you. . . . [W]hy are you acting like this?” While restraining Hughes, Pougé asked Moore to pick up her firearm so that Hughes was not able to reach it.

{¶ 56} Pougé denied punching Hughes, choking her or spitting on her. She said neither she nor Moore hit Hughes with the firearm. Hughes continued struggling for a time but eventually “g[a]ve up.” At that point, Pougé “let her up” and Hughes got back into her car. Hughes said, “You b. . . is going to jail.”

{¶ 57} Pougé returned to her apartment, with the firearm, and Davis dropped off her daughter several hours after the altercation

{¶ 58} On cross-examination, Pouge admitted that as she ran up to the car she saw Moore leaning into the vehicle from the passenger side, with her feet on the ground. Pouge was “very” surprised to see Hughes in the vehicle. Pouge tried to lean into the vehicle from the driver’s side to break up the fight which is when Hughes kicked her. Pouge denied that Hughes was bleeding or visibly injured at the scene of the fight. Pouge said that she “really truly, honestly do[es] not know where [Hughes’] injuries came from,” but speculated that the laceration may have come “from her hair being ripped out” as Pouge was defending herself. Pouge denied that Hughes was hit with the pistol.

{¶ 59} On redirect, Pouge testified that she is much stronger than Hughes. If Pouge had been punching Hughes, she believes Hughes would have had black eyes and other injuries beyond those seen in the State’s photographs.

G. The Verdict

{¶ 60} The defense renewed its Crim.R. 29 motion at the close of evidence and the motion was denied.

{¶ 61} The jury found Pouge guilty of count one of felonious assault finding that she knowingly caused serious physical harm to Hughes. It further found her guilty of the one-year firearm specification finding that she had a firearm on or about her person or under her control or acted with another who possessed a firearm while committing the offense of felonious assault.

{¶ 62} The court ordered a presentence investigation and set the matter for sentencing.

H. The Sentence and Appeal

{¶ 63} The court indicated that it had reviewed the presentence-investigation report. The defense addressed the court in mitigation. The State and the victim also addressed the court.

{¶ 64} The court sentenced Pougé to a mandatory one-year prison term on the firearm specification, to be served prior, and consecutive, to an indefinite sentence consisting of a minimum of five years and a maximum of 8.5 years² in prison on the underlying felony. Pougé received 38 days of jail-time credit.

{¶ 65} Pougé appealed, raising the following assignments of error for review:

First Assignment of Error

The trial court erred in denying Appellant's *Batson* objection to the exercise of peremptory challenges by the state to eliminate Black female jurors.

Second Assignment of Error

Defense counsel was ineffective in failing to file a motion to sever where the interests of Appellant's codefendant were clearly adversarial.

Third Assignment of Error

The trial court abused its discretion by admitting a recording of Officer Carab[a]llo's body camera footage which had minimal probative value, was cumulative to the victim's testimony, served only to inflame the jury, and impermissibly bolstered the state's witness.

² The trial court made an error in the calculation of the maximum prison term. Pursuant to R.C. 2929.144(B), the maximum term should have been 7.5 years, not 8.5 years. The issue was discussed at oral argument in this appeal but, unfortunately, neither party identified the error at sentencing and Pougé has not assigned this as error in her appellate brief. We, therefore, cannot correct the error at this time. *E.g., D.H. v. J.C.*, 2020-Ohio-112, ¶ 25 (8th Dist.) ("An issue raised during oral argument for the first time and not assigned as error in an appellate brief is waived."). If the error is to be corrected, it must be through some other mechanism.

Fourth Assignment of Error

Defense counsel was ineffective in failing to timely object to the admission of medical records without foundation or authentication in violation of the Confrontation Clause.

Fifth Assignment of Error

Defense counsel was ineffective in failing to timely object to the admission of Appellant's social media posts that were irrelevant, overly prejudicial, and impermissibly introduced to show conduct in conformity in violation of the Ohio Rules of Evidence.

Sixth Assignment of Error

The trial court erred in denying Appellant's Rule 29 motion to dismiss when the state failed to prove beyond a reasonable doubt that Appellant was not acting in self-defense.

Seventh Assignment of Error

The state engaged in prosecutorial misconduct when it raised an improper inference during opening statements as it related to Appellant's relationship with her codefendant.

Eighth Assignment of Error

The trial court's application of the Reagan Tokes Law was plain error and violative of Appellant's constitutional rights under both the United States and Ohio Constitutions.

Ninth Assignment of Error

The trial court abused its discretion when it sentenced Appellant over the minimum where she had no prior felony convictions.

Tenth Assignment of Error

Appellant's conviction is against the manifest weight of the evidence.

Eleventh Assignment of Error

The state failed to present sufficient evidence to prove each and every element beyond a reasonable doubt.

Twelfth Assignment of Error

The cumulative effect of multiple errors deprived Appellant of her constitutionally guaranteed right to a fair trial under the federal and state constitutions.

II. Law and Analysis

A. First Assignment of Error — *Batson* Challenge

{¶ 66} Pouge contends that the trial court erred by excusing Juror No. 15 — a Black woman — based on the state’s peremptory challenge. Pouge believes the State excused the juror not for some legitimate reason but because of her race and sex, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Pouge objected to the State’s peremptory challenge to Juror No. 15.

{¶ 67} In *Batson*, the United States Supreme Court recognized that the Equal Protection Clause of the United States Constitution prohibits the use of peremptory challenges in a discriminatory manner to exclude potential jurors solely on account of their race. *Batson* at 89; see also *State v. Hernandez*, 63 Ohio St.3d 577, 581 (1992). The Equal Protection Clause also “forbids intentional discrimination on the basis of gender.” *J.E.B.* at 129.

{¶ 68} A three-step test is applied in adjudicating an alleged *Batson* violation. *State v. Thompson*, 2014-Ohio-4751, ¶ 50. First, a defendant must make a “prima facie case of racial discrimination.” *Id.*, quoting *State v. Bryan*, 2004-

Ohio-971, ¶ 106. The defendant must show that the prosecutor used peremptory challenges to remove from the venire members of a cognizable racial group and that the facts and other relevant circumstance raise an inference that the use of the peremptory challenges was racially motivated. *State v. Johnson*, 2000-Ohio-276, citing *State v. Hill*, 73 Ohio St.3d 433, 444–445 (1995).

{¶ 69} If the defendant satisfies that burden, then the burden shifts to the State to provide a race-neutral explanation for the use of the peremptory challenges. *Thompson* at ¶ 51, citing *Batson* at 97. At step two of the inquiry, the issue is the “facial validity of the . . . explanation” offered for seeking to excuse the jurors. *Thompson* at ¶ 51, quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991). “Although it is not enough to simply deny a discriminatory motive or assert good faith . . . , the ‘explanation need not rise to the level justifying exercise of a challenge for cause.’” *Thompson* at ¶ 51, quoting *Batson* at 97. “Unless a discriminatory interest is inherent in the . . . explanation, the reason offered will be deemed race neutral.” *Purkett v. Elem*, 514 U.S. 765, 768 (1995), quoting *Hernandez* at 360.

{¶ 70} Finally, in step three, the court “must examine the prosecutor’s [peremptory] challenges in context to ensure that the reason is not merely pretextual.” *State v. Pickens*, 2014-Ohio-5445, ¶ 63, quoting *State v. Frazier*, 2007-Ohio-5048, ¶ 65. The trial court must decide “based on all the circumstances,” whether the defendant has proved purposeful racial discrimination. *Thompson* at ¶ 52, citing *Bryan* at ¶ 106, and *Batson* at 98. As the Ohio Supreme Court explained in *Thompson*:

The court must “assess the plausibility of” the prosecutor’s reason for striking the juror “in light of all evidence with a bearing on it.” *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005). Relevant factors may include “the prosecutor’s demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy.” *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). “In addition, race-neutral reasons for peremptory challenges often invoke a juror’s demeanor . . ., making the trial court’s firsthand observations of even greater importance.” *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

Thompson at ¶ 52. The burden of persuasion always stays with the opponent of the strike. *State v. White*, 85 Ohio St.3d 433, 437 (1999), citing *Purkett* at 768. A trial court’s determination that the State did not possess discriminatory intent in the exercise of its peremptory challenges will not be reversed on appeal unless it was clearly erroneous. *State v. Strong*, 2015-Ohio-169, ¶ 14 (8th Dist.), citing *Hernandez*, 63 Ohio St.3d at 583.

{¶ 71} While the appellate record in this case does not include the specific demographic composition of the venire or the petit jury, it is clear that Juror No. 15 was not the only Black person in the venire, nor was she the only female. It seems equally clear that the jury ultimately included female jurors.

{¶ 72} Moreover, even if Pouge could meet her burden to establish a prima facie case for race or gender discrimination, the State offered a race-neutral reason for excusing Juror No. 15. Compare *State v. Hampton*, 2016-Ohio-5321 (8th Dist.) (finding a *Batson* violation where the State failed to articulate any nondiscriminatory reasons for excusing a Black female juror).

{¶ 73} Specifically, the prosecutor argued that the juror would not be a good fit for the case for several reasons, including (1) she said she was biased multiple times across two days of voir dire; (2) she expressed that she is fearful and distrustful of law enforcement; (3) she was less than forthcoming when the court inquired about close family and friends who had been the victim of crime; (4) she said she would not be able to hold the State to its beyond a reasonable doubt standard; (5) she described that she was concerned about jury service because she is a very emotional person and (6) she described being uncomfortable with jury service because she was the only African American female in the venire and identified with the defendants.

{¶ 74} The State's reasons are supported by the record. Pouge points out that another venireperson, Juror No. 21, expressed some concern that prison was not a "perfect" answer for all people convicted of crime; this concern was shared by several members of the venire, including Juror No. 15. Pouge says that the State's discriminatory motive for excusing Juror No. 15 can be inferred because the State did not excuse Juror No. 21. But viewing the voir dire in its entirety, it is clear that Juror No. 21's isolated acknowledgement of the limitations of the criminal justice system is not equivalent to Juror No. 15's repeated admissions that she was biased against the State and distrustful of law enforcement, and her statement that she could not be fair and impartial in the case.

{¶ 75} After a careful review, we cannot say that the trial court’s ruling on the issue of discriminatory intent was clearly erroneous. *See Flowers v. Mississippi*, 588 U.S. 284, 303 (2019). We, therefore, overrule Pouge’s first assignment of error.

B. Second, Fourth and Fifth Assignments of Error – Ineffective Assistance of Counsel

{¶ 76} In her second, fourth and fifth assignments of error, Pouge contends that she was denied the effective assistance of counsel in various ways, in violation of her rights under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. She contends that her trial counsel failed to request severance from codefendant Moore and failed to object to the admission of medical records and an Instagram post.

{¶ 77} A criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984). As a general matter, to establish ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel’s performance fell below an objective standard of reasonable representation, and (2) that counsel’s errors prejudiced the defendant, i.e., a reasonable probability that but for counsel’s errors, the outcome of the proceeding would have been different. *Id.* at 687-688, 694; *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraphs two and three of the syllabus. “Reasonable probability” is “probability sufficient to undermine confidence in the outcome.” *Strickland* at 694.

{¶ 78} In Ohio, a properly licensed attorney is presumed to be competent. *State v. Black*, 2019-Ohio-4977, ¶ 35 (8th Dist.), citing *State v. Smith*, 17 Ohio St.3d

98, 100 (1985). Because there are “countless ways to provide effective assistance in any given case,” a court must give great deference to counsel’s performance and “indulge a strong presumption” that counsel’s performance “falls within the wide range of reasonable professional assistance.” *Strickland* at 689; *see also State v. Powell*, 2019-Ohio-4345, ¶ 69 (8th Dist.) (“A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”), quoting *State v. Pawlak*, 2014-Ohio-2175, ¶ 69 (8th Dist.).

1. Severance

{¶ 79} Pougé has not shown that defense counsel rendered ineffective assistance by failing to request severance here.

{¶ 80} First, Pougé has not shown that a motion to sever, if filed, would have been successful. Joinder was appropriate under Crim.R. 8 because Pougé and Moore were “alleged to have participated in the same act . . . constituting an offense or offenses.” To obtain severance, Pougé would have had to show that the joinder for trial resulted in prejudice to her. *See* Crim.R. 14. Pougé’s prejudice argument can be summarized like this: Her assertion of self-defense — that she acted to break up the fight between Hughes and Moore and only used the force necessary to stop Hughes from attacking her — was weakened by Moore’s defense, which attempted to paint the incident as two separate fights, a relatively minor scuffle between Moore and Hughes followed by a serious fight between Hughes and Pougé.

{¶ 81} Trial counsel cannot be deemed deficient or ineffective for failing to perform a futile act. *State v. Washington*, 2023-Ohio-1667, ¶ 145 (8th Dist.), citing *State v. May*, 2015-Ohio-4275, ¶ 35 (8th Dist.); *State v. Witherspoon*, 2011-Ohio-704, ¶ 33 (8th Dist.). Moreover, the decision not to move for severance could very well have been part of counsel’s trial strategy. As there was no dispute that the fight broke out between Moore and Hughes before Pouge became involved, counsel may have maintained a hope that Moore’s presence at the trial would divert the blame and result in a lighter sentence. *See State v. Guy*, 1999 Ohio App. LEXIS 5677, *15 (8th Dist. Dec. 2, 1999).

{¶ 82} Based on the record before us, we cannot say that there is a reasonable probability that the outcome of Pouge’s trial would have been different if her trial counsel had requested severance.

2. Medical Records

{¶ 83} Pouge next contends that her trial counsel was ineffective for failing to object to the admission of Hughes’ medical records into evidence. She asserts that the records were not properly authenticated and were hearsay. Pouge does not articulate how the admission of the records prejudiced her.

{¶ 84} After reviewing the record, we cannot say that there is a reasonable probability that the outcome of Pouge’s trial would have been different if her trial counsel had objected to the records. First, it is not clear to us that the objection would have been sustained. A custodian of medical records at University Hospitals averred that the records were “true and authentic copies of the medical records

prepared in the usual course of business” by employees of the medical center. But more importantly, Hughes herself testified about the medical procedures performed to repair the injuries sustained during the assault. We cannot say that there is a reasonable probability that the jury would have returned a different verdict if the records had not been introduced and admitted.

3. Social Media Post

{¶ 85} Finally, Pougé contends that trial counsel was ineffective for failing to object to the introduction of a social media post depicting Pougé’s firearms. She asserts that the photograph was irrelevant and that its introduction violated Evid.R. 404(B) and claims the State introduced the photograph in order to inflame the jury and paint Pougé as a violent person. We disagree.

{¶ 86} First, again, it is not clear that an objection to this exhibit would have been sustained. The photograph was relevant to the State’s case because the firearm depicted in the photograph, which Pougé owned, matched Hughes’ description of the firearm used in the assault.

{¶ 87} Second, in light of the record as a whole, we cannot say that there is a reasonable probability that the verdict would have been different if the photograph had been excluded. Hughes testified that Pougé assaulted her with a firearm and the jury believed Hughes. The exclusion of the photograph would not have meaningfully undercut this testimony. Moreover, there is no reason apparent in the record to conclude that the jury drew improper conclusions about Pougé’s character

or improperly convicted her based on a belief that on this particular occasion she acted in conformity with that character.

{¶ 88} We, therefore, overrule Pougé's second, fourth and fifth assignments of error.

C. Third Assignment of Error — Body Camera Footage

{¶ 89} Pougé contends that the trial court abused its discretion by admitting into evidence a video recording from Officer Caraballo's body-worn camera when the officer interviewed Hughes about the assault at the hospital. Pougé contends that the video was cumulative and unduly prejudicial and had the primary purpose of bolstering Hughes' credibility.

{¶ 90} A trial court has broad discretion in determining whether to admit or exclude evidence. *E.g.*, *State v. Hopper*, 2018-Ohio-4520, ¶ 8 (8th Dist.). The trial court must balance the potential probative value of evidence against the danger of unfair prejudice under Evid.R. 403. *Schaffter v. Ward*, 17 Ohio St.3d 79, 81 (1985); *Licul v. Swagelok Co.*, 2006-Ohio-711, ¶ 21 (8th Dist.); *Knowlton v. Schultz*, 2008-Ohio-5984, ¶ 33–34 (8th Dist.). Evid.R. 403(A) mandates the exclusion of even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Absent an abuse of discretion that materially prejudices a party, a trial court's decision to admit or exclude evidence “will stand.” *Rieger v. Giant Eagle, Inc.*, 2018-Ohio-1837, ¶ 45 (8th Dist.), quoting *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66 (1991).

{¶ 91} A court abuses its discretion “when a legal rule entrusts a decision to a judge’s discretion and the judge’s exercise of that discretion is outside of the legally permissible range of choices.” *State v. Hackett*, 2020-Ohio-6699, ¶ 19; *see also Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35 (describing the “common understanding of what constitutes an abuse of discretion” as “a court exercising its judgment, in an unwarranted way, in regard to a matter over which it has discretionary authority”). A decision is an abuse of discretion when it is unreasonable, arbitrary or unconscionable. *See, e.g., State v. Brusiter*, 2023-Ohio-3794, ¶ 10 (8th Dist.); *State v. McAlpin*, 2023-Ohio-4794, ¶ 30 (8th Dist.); *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). A decision is “unreasonable” “if there is no sound reasoning process that would support that decision.” *State v. Ford*, 2019-Ohio-4539, ¶ 106, quoting *AAAA Ents. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990). An “arbitrary” decision is “made ‘without consideration of or regard for facts [or] circumstances.’” *State v. Beasley*, 2018-Ohio-16, ¶ 12, quoting *Black’s Law Dictionary* (10th Ed. 2014). When applying an abuse of discretion standard, this court may not substitute its judgment for that of the trial court. *State v. McFarland*, 2022-Ohio-4638, ¶ 21 (8th Dist.).

{¶ 92} The State claims that the video at issue was admissible because it documented the extent of Pouge’s injuries in the immediate aftermath of the assault. Pouge contends that the video was unduly prejudicial because it showed “graphic

bloody images of the victim” that “prey[ed] on the juror’s emotions” and “exaggerate[d] her injuries.”

{¶ 93} A careful review of the record reveals that the video is neither as probative as the State claims nor as prejudicial as Pouge contends. For most of the video, which is over 20 minutes long, the camera is pointed either at the police officer’s arms or at a railing on the hospital bed. Hughes’ face is visible, periodically, for only a few seconds. Considering that Hughes testified about her injuries and that medical records and photographs of those injuries were introduced into evidence, it is difficult to see how the video was independently prejudicial as to her injuries.

{¶ 94} Even if we were to find that it was error for the trial court to have admitted this video into evidence, we would find that error harmless. The video was cumulative to other admissible evidence. *See Ford v. Sunbridge Care Ents.*, 2016-Ohio-1122, ¶ 19 (8th Dist.). Hughes testified about the assault, subject to cross-examination, as did Officer Caraballo. Photographs of the injuries were also introduced into evidence. Under these circumstances, we can say that there is no reasonable possibility that the video contributed to the conviction and thus any error in its introduction was harmless.

{¶ 95} We, therefore, overrule Pouge’s third assignment of error.

D. Seventh Assignment of Error — Prosecutorial Misconduct

{¶ 96} Pouge contends that the State committed prosecutorial misconduct in its opening statement. She points to the following portion of the State’s statement:

It boils down to this. Three’s a crowd. Three’s too many. The defendant — Defendant Pouge and Defendant Moore were in a

relationship. Defendant Pouge had a child with a man named Tenard. Defendant Moore was dating this same gentleman.

{¶ 97} Pouge argues that this statement implied that Pouge, Moore and Davis were “in a polyamorous relationship,” a suggestion that Pouge characterizes as “highly inflammatory and prejudicial” because “[s]exual orientation and preference are points of contention for many individuals.”

{¶ 98} The test for prosecutorial misconduct is whether the prosecutor’s remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Bey*, 85 Ohio St.3d 487, 494 (1999); *State v. Lott*, 51 Ohio St.3d 160, 165 (1990), *cert. denied*, 498 U.S. 1017. A prosecutor’s conduct during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch*, 33 Ohio St.3d 19, 24 (1987). The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *Bey* at 487.

{¶ 99} We review this assignment of error for plain error because Pouge did not object to this statement during the trial.

{¶ 100} Crim.R. 52(B) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” An appellate court notices plain error “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Barnes*, 94 Ohio St. 3d 21, 27 (2002), quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. Plain error “must be an ‘obvious’ defect

in the trial proceedings” and we will not find plain error unless, but for the error, the outcome would have been different. *Barnes; Long* at paragraph two of the syllabus; *State v. Gardner*, 2008-Ohio-2787, ¶ 78. “The burden of demonstrating plain error is on the party asserting it.” *State v. Payne*, 2007-Ohio-4642, ¶ 17.

{¶ 101} Pouge has not demonstrated plain error here. As an initial matter, the quoted portion of the State’s opening is taken out of context. The statement in its relevant context reads as follows:

It boils down to this. Three’s a crowd. Three’s too many. The defendant — Defendant Pouge and Defendant Moore were in a relationship. Defendant Pouge had a child with a man named Tenard. Defendant Moore was dating this same gentleman. And then they find out — their perception, it comes to their knowledge that the victim, Kristin Hughes, is also with Tenard. They find out Kristin Hughes is meeting with Tenard late in the evening, and they can’t stand it. So the defendants together track down Kristin Hughes, find her in her car. . . .

{¶ 102} In context, it is clear that the prosecutor, in explaining the State’s theory of the case, was telling the jury that it would come to find out that Pouge had had a sexual relationship with Davis and that Moore was in a current relationship with him. The State’s theory was that, when Pouge and Moore came to learn that Davis was having something like an affair with Hughes, Pouge and Moore acted together to track Hughes down and assault her.

{¶ 103} We do not see how this statement, considering the evidence presented during the trial, prejudiced Pouge. The evidence established that Pouge was not in a sexual relationship with Davis at the time of the assault, and there was certainly no suggestion of polyamory between Pouge, Davis and Moore.

{¶ 104} Taking the statement in context and considering the rest of the trial, we conclude that there was no plain error in the trial court allowing the prosecutor to explain its theory of the case in the way it did during opening statement.

{¶ 105} We, therefore, overrule Pougé's seventh assignment of error.

E. Eighth Assignment of Error — The Application of the Reagan Tokes Law

{¶ 106} Pougé argues that the trial court committed plain error in its application of the Reagan Tokes Law and that the indefinite sentence imposed upon her violates the constitutional separation of powers and denies her due process of law.

{¶ 107} Under the Reagan Tokes Law, S.B. 201, qualifying first- and second-degree felonies committed on or after March 22, 2019, are subject to the imposition of indefinite sentences. Trial courts imposing prison terms on qualifying offenses are required to impose a stated minimum prison term, as provided in R.C. 2929.14(A)(2)(a), and an accompanying maximum prison term, as provided in R.C. 2929.144(B). *State v. McCalpine*, 2022-Ohio-842, ¶ 5 (8th Dist.).

{¶ 108} Pougé was convicted of felonious assault in violation of R.C. 2911.12(A)(1), a second-degree felony that was committed after March 22, 2019, and subject to the Reagan Tokes Law.

{¶ 109} In *State v. Hacker*, 2023-Ohio-2535, the Ohio Supreme Court addressed the constitutionality of the Reagan Tokes Law. The court rejected the appellants' claims that the provisions of Reagan Tokes Law that allow the Ohio Department of Rehabilitation and Correction to maintain an offender's

incarceration beyond the minimum prison term imposed by a trial court violated the separation-of-powers doctrine, the right to a jury trial or procedural due process. *Id.* at ¶ 1, 12-41.

{¶ 110} This issue has been repeatedly addressed and Pouge’s constitutional arguments in this case do not present novel issues or any new theory challenging the constitutional validity of any aspect of the Reagan Tokes Law left unaddressed by the Ohio Supreme Court’s decision in *Hacker*; see also *State v. Delvallie*, 2022-Ohio-470 (8th Dist.) (en banc). Accordingly, we reject Pouge’s constitutional challenges and overrule her eighth assignment of error.

F. Ninth Assignment of Error — Abuse of Discretion in Sentencing

{¶ 111} Pouge contends that the trial court erred by sentencing her on the underlying felony to a minimum of five years in prison, when the relevant statute allowed the trial court to sentence her to as little as two years in prison. Pouge frames this as an “abuse of discretion,” without citing any law to support that argument or justify a modification to her sentence. Her argument focuses on the mitigation evidence presented at sentencing — “her lack of prior felonies, her show of remorse, her assertion of self-defense, and her steadfast commitment to her daughter and full-time employment” — and asserts that a sentence of two years in prison was a “more appropriate alternative.”

{¶ 112} We review felony sentences under the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 2016-Ohio-1002, ¶ 21. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce or otherwise modify a

sentence or vacate a sentence and remand for resentencing if it “clearly and convincingly” finds that (1) the record does not support the sentencing court’s findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4) or 2929.20(I) or (2) the sentence is “otherwise contrary to law.”

{¶ 113} “A sentence is contrary to law if it falls outside the statutory range for the offense or if the sentencing court fails to consider the purposes and principles of sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12.” *State v. Scott*, 2022-Ohio-3549, ¶ 8 (8th Dist.), quoting *State v. Angel*, 2022-Ohio-72, ¶ 8 (8th Dist.).

{¶ 114} Pougé did not object to her sentence before the trial court. On appeal, she makes no argument that the sentence is contrary to law, nor does she argue that the record does not support any of the enumerated statutory findings. She makes no constitutional argument about her sentence, either. At best, this assignment of error boils down to a disagreement with the trial court’s balancing of the statutory sentencing factors in R.C. 2929.11 and 2929.12. But this court is not permitted to independently weigh the factors and substitute its judgment for the trial court — *State v. Evans*, 2021-Ohio-3679, ¶ 9 (8th Dist.).

{¶ 115} The record reflects that the trial court adequately considered the R.C. 2929.11 and 2929.12 factors prior to imposing its sentence and the five-year minimum prison term falls within the appropriate statutory range.

{¶ 116} Therefore, we overrule Pougé’s ninth assignment of error.

G. Sixth, Tenth and Eleventh Assignments of Error — Sufficiency and Manifest Weight of the Evidence

{¶ 117} We address Pouge’s sixth, tenth and eleventh assignments of error together. Pouge argues that her conviction for felonious assault was not supported by sufficient evidence and was against the manifest weight of the evidence. She further contends that she presented evidence that tends to support that she acted in self-defense and the State failed to prove beyond a reasonable doubt that she was not acting in self-defense.

{¶ 118} A challenge to the sufficiency of the evidence supporting a conviction requires a determination of whether the state has met its burden of production at trial. *State v. Hunter*, 2006-Ohio-20, ¶ 41 (8th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 390 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law. *Thompkins* at 386.

{¶ 119} An appellate court’s function when reviewing the sufficiency of evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince a reasonable juror of the defendant’s guilt beyond a reasonable doubt. *Id.*; see also *State v. Bankston*, 2009-Ohio-754, ¶ 4 (10th Dist.) (noting that “in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state’s witnesses testified truthfully and determines if that testimony satisfies each element of the crime.”). We must determine “whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

crime proven beyond a reasonable doubt.” *State v. Leonard*, 2004-Ohio-6235, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 120} A manifest weight challenge, on the other hand, attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion at trial. See *State v. Whitsett*, 2014-Ohio-4933, ¶ 26 (8th Dist.), citing *Thompkins* at 387; *State v. Bowden*, 2009-Ohio-3598, ¶ 13 (8th Dist.).

{¶ 121} When considering an appellant’s claim that a conviction is against the manifest weight of the evidence, the court of appeals sits as a “thirteenth juror” and may disagree with “the factfinder’s resolution of the conflicting testimony.” *Thompkins*, 78 Ohio St.3d at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the witness’ credibility and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). Reversal on manifest weight grounds is reserved for the “exceptional case in which the evidence weighs heavily against the conviction.” *Thompkins* at 387, quoting *Martin, supra*.

{¶ 122} On the affirmative defense of self-defense, the defendant bears the burden of production and the State bears the burden of persuasion. *State v. Messenger*, 2022-Ohio-4562, ¶ 19; *State v. Giglio*, 2023-Ohio-2178, ¶ 16 (8th Dist.). “To satisfy this burden . . . the state must disprove at least one of the elements of

self-defense.” *State v. Ratliff*, 2023-Ohio-1970, ¶ 27. In other words, the State must demonstrate that (1) the defendant was at fault in creating the situation giving rise to the affray; (2) the defendant lacked a bona fide belief that she was in imminent danger of death or great bodily harm or that another means of escape from such danger existed negating the need for the use of force; or (3) that the defendant violated a duty to retreat or avoid the danger. *See State v. Scales*, 2024-Ohio-2171, ¶ 30 (8th Dist.).

{¶ 123} This court has recognized that “[s]elf-defense claims are generally an issue of credibility” for the trier of fact to decide. *State v. Walker*, 2021-Ohio-207, ¶ 13 (8th Dist.). We review challenges to the State’s burden of persuasion on self-defense under a manifest-weight standard. *State v. Azali*, 2023-Ohio-4643, ¶ 22 (8th Dist.).

{¶ 124} The elements of an offense may be proven by direct evidence, circumstantial evidence, or both. *See, e.g., State v. Wells*, 2021-Ohio-2585, ¶ 25 (8th Dist.), citing *State v. Durr*, 58 Ohio St.3d 86 (1991). Circumstantial evidence and direct evidence have “equal evidentiary value.” *Wells* at ¶ 26, citing *State v. Santiago*, 2011-Ohio-1691, ¶ 12 (8th Dist.).

{¶ 125} A person commits felonious assault by knowingly causing serious physical harm to another. R.C. 2903.11(A)(1). Under most circumstances, a person is subject to a mandatory one-year term of imprisonment if they had a firearm on or about their person or under their control while committing an offense. R.C. 2929.14(B)(1)(a)(iii), 2941.141(A).

{¶ 126} There was more than sufficient evidence that Pouge knowingly caused serious physical harm to Hughes and possessed a firearm during the offense. Hughes testified at length about the assault, describing how Pouge hit her, pulled her from a car and continued beating her — including hitting her with a firearm. The State presented evidence that Hughes sustained a concussion during the assault and lacerations to her head and ear that required numerous staples.

{¶ 127} After a careful review of the record, we conclude that the verdict was not against the manifest weight of the evidence even considering the State’s burden on self-defense.

{¶ 128} The case comes down to credibility. The jury heard from both Pouge and Hughes, and their stories contradicted each other in several meaningful ways. Pouge points to no physical or other evidence that significantly undercuts Hughes’ version of events. This alone is sufficient for us to conclude that this is not the “exceptional case” in which the evidence weighs heavily against a conviction. But we nevertheless also note that Pouge admitted that Moore tracked Davis’ car using OnStar, allowing the women to find Hughes sitting in the vehicle, which tends to support the State’s theory that this was a coordinated ambush. Pouge also denied that Hughes was bleeding or even visibly injured at the scene of the fight, which testimony is hard to believe considering the injuries documented at the hospital.

{¶ 129} Hughes’ testimony readily establishes that Pouge committed felonious assault and possessed a firearm while doing so. It further establishes that Pouge was not acting in self-defense but rather contributed to the situation leading

to the affray and then escalated the fight by using a firearm to hit Hughes and then dragging Hughes out of the vehicle to continue the assault.

{¶ 130} We, therefore, overrule Pougé's sixth, tenth and eleventh assignments of error.

H. Twelfth Assignment of Error – Cumulative Error

{¶ 131} Pougé argues that the alleged errors described in her first eleven assignments of error cumulatively deprived her of her constitutional right to a fair trial.

{¶ 132} Pursuant to the doctrine of cumulative error, a conviction will be reversed where the cumulative effect of errors in a trial deprive a defendant of the constitutional right to a fair trial even though each of numerous instances of trial-court error does not individually constitute cause for reversal. *State v. Baker*, 2011-Ohio-2784, ¶ 59 (8th Dist.), citing *State v. Garner*, 74 Ohio St.3d 49 (1995).

{¶ 133} In order to find cumulative error present, we first must find that multiple errors were committed at trial. We then must find a reasonable probability that the outcome of the trial would have been different but for the combination of the separately harmless errors. *State v. Djuric*, 2007-Ohio-413, ¶ 52 (8th Dist.). To affirm in spite of multiple errors, we would have to determine that the cumulative effect of the errors is harmless beyond a reasonable doubt. *State v. Williams*, 2011-Ohio-591, ¶ 25 (8th Dist.), citing *State v. DeMarco*, 31 Ohio St.3d 191, 195 (1987) (stating that the errors can be considered harmless if there is overwhelming evidence of guilt or other indicia that the errors did not contribute to the conviction).

{¶ 134} Here, Pouge merely references the arguments addressed in her first eleven assignments of error. We did not find multiple errors in the trial and, therefore, there is no reason to reverse based on the doctrine of cumulative error.

{¶ 135} We overrule Pouge's twelfth assignment of error.

III. Conclusion

{¶ 136} Having overruled Pouge's assignments of error for the reasons stated above, we affirm the judgment.

The court finds there were reasonable grounds for this appeal.

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

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

EILEEN A. GALLAGHER, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR