IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. DANTE SHELTON, Defendant-Appellant.	: : : : :	APPEAL NO. C-220513 TRIAL NO. 22CRB-16173 *O P I N I O N.*

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 19, 2023

Emily Smart Woerner, City Solicitor, *William T. Horsley,* Chief Prosecuting Attorney, and *Ashton Tucker,* Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, and *Krista Gieske,* Assistant Public Defender, for Defendant-Appellant.

BOCK, Judge.

{¶1} Defendant-appellant Dante Shelton challenges his conviction for public indecency in violation of R.C. 2907.09(A)(1) in four assignments of error. For the following reasons, we affirm his conviction.

I. Facts and Procedure

{¶2} Weeks after an incident in a Target parking lot with J.R., the victim in this case, Shelton was charged with misdemeanor public indecency in violation of R.C. 2907.09(A)(1). The statute prohibits reckless exposure of a "person's private parts" when "the person's conduct is likely to be viewed by and affront others who are in the person's physical proximity and who are not members of the person's household." R.C. 2907.09(A)(1). According to the complaint, Shelton "pulled up next to [J.R.'s] vehicle, rolled down his window to get her attention and was exposing his private parts."

{¶3} At trial, the jury heard testimony from J.R. and Detectives Newman and Zeller of the Cincinnati Police Department. In addition, the state relied on parking lot surveillance footage from the day of the incident, footage from Shelton's interrogation, an investigation flier, and a photo array.

{¶4} J.R. described walking across the parking lot when a red Chevrolet Camaro pulled into the parking spot adjacent to her car, on the driver's side. According to J.R., the Camaro was roughly 12 inches from her car, close enough to prevent her from opening the door and entering the car. She recalled that the driver had "call[ed] to me to like look over, and then that's when his genitals were out and he was masturbating." He asked "if [she] liked what [she] saw." J.R. "asked him to leave multiple times, and he didn't. And that's when I punched him." After the two exchanged punches, the Camaro drove off. Based on the eye contact sustained throughout the incident, J.R. identified Shelton as the driver in the courtroom.

{¶5} J.R. testified that she was unable to report the incident immediately because she left the parking lot. She contacted her fiancé and went to work. That evening, she reported the incident to the police. At the station, she gave a statement and a description of the Camaro and the driver. Over an objection, J.R. testified that she returned to the station weeks later and quickly identified Shelton from a photo array. His photo was remarkable because of "his eyes. I won't forget them."

{¶6} Newman described her investigation of the incident and recalled securing the surveillance footage. To identify the driver, she created a flier that included a physical description of the driver. Newman compiled the photo array and described J.R.'s identification of Shelton.

{¶7} In his testimony, Zeller recounted his interrogation of Shelton at the police station. As described by Zeller and depicted in the interrogation video, Shelton denied exposing himself to J.R. Rather, Shelton explained to Zeller that he was likely urinating in a bottle and a search of his car would reveal "piss bottles in there." Zeller recalled searching the Camaro and finding no bottles of urine.

{¶8} Shelton entered the investigation report into evidence, which included a statement from J.R. that failed to mention any masturbation:

> [J.R.] stated she was walking through the parking lot toward her car when a newer Red 4D Camaro with Ohio Tags followed her and pulled with their driver's door right next to her car, causing [J.R] to be unable to open the driver's side door to enter her vehicle. The suspect then said, "Hey look here." When [J.R.] looked at the car, the suspect had his pants down and was exposing his genitals. [J.R.] feeling trapped, punched the suspect from where she was standing in an effort to get him to move his car so she could enter hers safely.

{¶9} Shelton unsuccessfully moved for a judgment of acquittal under Crim.R. 29(A) and requested a jury instruction for a lesser offense of disorderly conduct. The trial court denied both. The jury found Shelton guilty of public indecency and the trial court imposed a 30-day sentence.

II. Law and Analysis

{¶10} Shelton challenges his conviction in four assignments of error. First, he maintains that prosecutorial misconduct in the state's opening and closing statements prejudiced the jury. Second, he contends that the trial court erroneously allowed the state to enter cumulative identification evidence into the record. Third, he asserts that the trial court abused its discretion when it denied his request to include a lesser-included-offense instruction to the jury. And fourth, he argues that his conviction is supported by insufficient evidence and against the manifest weight of the evidence.

A. Shelton did not suffer prejudice from the prosecutor's misconduct.

{¶11} In his first assignment of error, Shelton contends that prosecutorial misconduct during opening and closing statements deprived him of his constitutional rights of due process and a fair trial. Shelton emphasizes several "golden rule" arguments made by the prosecutor, who invited the jury to view the case from the perspective of the victim.

{¶12} To find that prosecutorial misconduct violated Shelton's rights to due process and a fair trial, we must find that the prosecutor's remarks during opening statements and closing arguments were both improper and prejudicial to Shelton's substantial rights. *State v. Hall*, 1st Dist. Hamilton Nos. C-170699 and C-170700, 2019-Ohio-2985, ¶ 29, citing *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶ 44. In doing so, we must "evaluate the allegedly improper statements in the context of the entire trial." *State v. Treesh*, 90 Ohio St.3d 460, 464,

739 N.E.2d 749 (2000). Prosecutorial-misconduct issues turn on " 'the fairness of the trial, not the culpability of the prosecutor.' " *State v. Ladson*, 8th Dist. Cuyahoga No. 105914, 2018-Ohio-1299, ¶ 37, quoting *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

{¶13} Prosecutors "must avoid insinuations and assertions which are calculated to mislead the jury." *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984); *see State v. Grable*, 11th Dist. Ashtabula No. 2019-A-0042, 2019-Ohio-4516, ¶ 16. Shelton focuses on several statements made by the prosecutor during her opening statement:

> So where I want us to all to start off with is, put yourself in somebody's shoes kind of exercise okay.
>
> * * *
>
> You go to your car. You start to get in and put all of your stuff away and that car whips into the parking spot that's open next to your driver side to the point that you can't open your door. You don't know what's going on. You think, world's worst parking job, no big deal, until that person calls to you through the open window. And when you turn around and see the person in the driver's seat, they have their genitals out masturbating in your direction and they are calling for your attention. Those shoes that you just stepped into are the shoes of [J.R.], who is the prosecuting witness in today's case.
>
> * * *
>
> Now if you're putting yourself in those shoes, if you're thinking, what kind of situation – what kind of person, what kind of situation does this

> come up in? What kind of explanation could a person possibly offer for that kind of behavior?

And the prosecutor reminded the jury at the start of her closing arguments that she "asked you to put yourself in someone else's shoes."

{¶14} Golden-rule arguments, like these, that implore the jury to " ' "place themselves in the position of a party to the cause * * * are usually improper, and reversibly erroneous." ' " *State v. Ross*, 2d Dist. Montgomery No. 22958, 2010-Ohio-843, ¶ 126, quoting *State v. Southall*, 5th Dist. Stark No. 2008 CA 00105, 2009-Ohio-768, ¶ 112. As this court has explained, golden-rule arguments are, in essence, "a request by the prosecutor that the jury accord a defendant the same treatment that the defendant accorded his victim." *State v. Hairston*, 1st Dist. Hamilton No. C-830127, 1984 Ohio App. LEXIS 8832 (Jan. 18, 1984). By asking the jury to step into the shoes of the victim, the state is "essentially seek[ing] to have the jury abandon their position of impartiality." *State v. Ford*, 2d Dist. Clark No. 2005-CA-76, 2006-Ohio-2108, ¶ 38. The state concedes that the prosecutor's remarks were improper.

{¶15} Nevertheless, the state argues that Shelton cannot demonstrate any prejudice suffered from these golden-rule arguments. Golden-rule arguments are "not per se prejudicial as requiring a new trial; rather, the test is whether it prejudicially affected substantial rights of the defendant." *Ross* at ¶ 126. "An improper comment does not affect a substantial right of the accused if it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *Treesh,* 90 Ohio St.3d at 464, 739 N.E.2d 749, citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). Indeed, "it is not enough that there be sufficient other evidence to sustain a conviction in order to excuse the prosecution's improper remarks." *Smith* at 14. Courts have considered a host of factors to determine

whether golden-rule arguments were prejudicial, including the frequency of the argument, the evidence in the record, whether the defense raised an objection, and any instructions by the trial court to the jury. *See State v. Hunt*, 5th Dist. Tuscarawas No. 2019 AP 07 0023, 2020-Ohio-1124, ¶ 37 ("isolated comment during closing argument did not prejudicially affect Appellant's substantial rights in light of all the evidence and the trial court's admonition as to the limited purpose of closing argument"); *see also Southall* at ¶ 116 ("jurors were instructed that closing arguments are not evidence").

{¶16} Here, the argument was not an isolated remark as the state suggests. Rather, in her opening statement and closing argument, the prosecutor invited the jury to assume the role of the victim. And Shelton did raise the objection during the prosecutor's closing argument. These factors weigh in favor of finding prejudice. But the trial court instructed the jury at the beginning of the trial that "[o]pening statements are not evidence, but they are a preview of [] the claims of each party." And before closing arguments, the trial court instructed the jury that the arguments are not evidence, explaining:

> Your conclusions about the facts will be based on what is called the evidence. You recall, we started with opening statements by counsel in which they told you what they thought the evidence was going to be. Counsel have said various things or incorporated certain things into their questioning and now have concluded their final arguments. All of this is proper part of the trial, but none of it is evidence.

{¶17} The trial court continued and told the jury that "any [s]tatements or answers that were stricken by the Court which you were instructed to disregard are not evidence and must be treated as though they never – you never heard them."

{¶18} Further, the trial court instructed the jury to consider "a number of factors" when assessing witness credibility, including the witness's demeanor, candor, motivations, relationships, consistencies or inconsistencies, and basis for their testimony. In other words, the trial court instructed the jury that the golden-rule argument was not evidence and played no part in its deliberation. And we presume that the jury followed the trial court's instructions. *See State v. Jones*, 91 Ohio St.3d 335, 344, 744 N.E.2d 1163 (2001).

{¶19} The trial court's instructions to the jury weigh against a finding of prejudice. When we view the improper statements in the context of the entire opening and closing arguments, "the statement[s] in no way permeated the state's argument so as to deny [Shelton] a fair trial." *See State v. Hayes*, 2020-Ohio-5322, 162 N.E.3d 947, ¶ 53 (1st Dist.). We overrule the first assignment of error.

B. Identification evidence was not needlessly cumulative.

{¶20} Shelton claims that the trial court erred when it overruled his objection to several pieces of identification evidence as needlessly cumulative. The parties agree that Shelton stipulated that he was driving the Camaro in the Target parking lot. Shelton points to the photo array, testimony, and Detective Newman's flier and testimony and argues that the trial court should have sustained his objection because identification was never in dispute.

{¶21} We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 19. A decision constitutes an abuse of discretion if it can be considered unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Furthermore, " 'courts lack the discretion to make errors of law.' " *State v. Austin*, 1st Dist. Hamilton Nos. C-210140 and C-210141, 2021-

Ohio-3608, ¶ 5, quoting *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 39.

{¶22} Under Evid.R. 403(B), the trial court may exercise its discretion and exclude relevant evidence if the "probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. And the probative value of evidence "is measured partially by the relative scarcity of evidence on the same issue." *State v. Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440, 84 N.E.3d 981, ¶ 22, citing *Old Chief v. United States*, 519 U.S. 172, 185, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

{¶23} At trial, J.R. described returning to the police station and identifying Shelton from a photo array. Newman described the use of the investigation flier and photo array within the context of the investigation into the incident. The photo array was admitted into the evidence and depicts six men of similar age with short-cropped hair and facial hair, all wearing shirts of assorted colors. Underneath each picture are two sets of numbers—a six-digit number and a seven-digit number. Newman testified that officers have access to a program "to find a photo of them, and then we will put in some identifying features; obviously, gender, race, height, weight, age. And then from there it populates several photos of individuals who meet those requirements."

{¶24} We begin with the probative value of the identification evidence. Because the identification of Shelton as the driver was not disputed, Shelton emphasizes the limited probative value of admitting the photo array, flier, and related testimony into the evidence at trial. In response, the state contends that the evidence in question was necessary to demonstrate the course of the investigation to the jury.

{¶25} First, the state was free to satisfy its burdens of persuasion and proof to the jury. A request "to stipulate to identity does not mean the State had to accept the stipulation, nor does it mean that the trial court was required to exclude [] otherwise probative evidence." *State v. Hansen*, 3d Dist. Seneca No. 13-12-42, 2013-Ohio-1735, ¶ 28, citing *State v. Collins*, 4th Dist. Athens No. 1021, 1980 Ohio App. LEXIS 12963, 7 (Apr. 21, 1980), and *State v. Wilson*, 9th Dist. Lorain No. 92CA005396, 1994 Ohio App. LEXIS 4825, 75 (Oct. 12, 1994). Indeed, "the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." *Old Chief,* 519 U.S. at 189, 117 S.Ct. 644, 136 L.Ed.2d 574 (holding that this principle has "virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him.").

{¶26} Second, the photo array, investigation flier, and Newman's testimony were presented to the jury in the context of the investigation into the incident. Significantly, the state's narrative turned on J.R.'s credibility as a witness and Shelton's statements in the interrogation video. In fact, Shelton tried to impeach J.R. with her prior inconsistent statement in the police report. So J.R.'s credibility as a witness, as demonstrated through the consistency of her behavior, was an issue at trial.

{¶27} On the other side of the Evid.R. 403 test, Shelton argues that the identification evidence was not only needlessly cumulative, but extremely prejudicial. Specifically, Shelton asserts that the photographs in the array were mugshots, and likens the photo array to the introduction of a prior conviction similar to the evidence in *Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440, 84 N.E.3d 981. In *Creech*, the Ohio Supreme Court adopted the reasoning of the United States Supreme Court's opinion in *Old Chief* to hold that "a trial court abuses its discretion when it refuses a

defendant's offer to stipulate to the fact of the prior conviction or indictment and instead admits into evidence the full record of the prior judgment or indictment when the sole purpose of the evidence is to prove the element of the defendant's prior conviction or indictment." *Id.* at ¶ 40. According to the Ohio Supreme Court, admitting the full record of Creech's convictions risked evoking the emotions of the jury and leading the jury to reason that the nature of those offenses was indicative of Creech's bad character. *Id.* at ¶ 36.

{¶28} Both *Old Chief* and *Creech* involved criminal offenses that required the state to prove, as an element of the offense, that the defendant had been convicted for an offense identified by the statute. *See id.* at ¶ 35. In other words, the defendant's status as a convicted felon was an element of the offense "entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense." *Id.* at ¶ 38. Because the status element was completely unrelated to Creech's alleged criminal conduct, a stipulation to his status would not have hamstrung the state's "ability to present its story of the case." *Id.* Thus, the probative value of Creech's prior convictions and indictment were diminished. *Id.* And so, "[t]he discounted probative value of the state's evidence was substantially outweighed by the danger of unfair prejudice." *Id.* at ¶ 39.

{¶29} But in this case, the identification evidence is not entirely outside the natural sequence of Shelton's acts that constitute his alleged public indecency. And we are not convinced the photo array in this case can be compared to the "full record of prior judgment or indictment" in *Creech*. Consider the specificity of the defendant's criminal history provided to the jury in *Creech*:

> that he had been convicted of possessing crack cocaine and had been charged with two counts of trafficking in cocaine (including one count

> of trafficking near a school)—also was potentially prejudicial, in that it put before the jury the name and nature of the drug offenses rather than the generalized description of the disability as set forth in the statute. Especially damaging is the indictment submitted to the jury, which alleges that Creech trafficked cocaine and that he had engaged in that felonious activity in the recent past—on one occasion near a school.

Creech, 150 Ohio St.3d 540, 2016-Ohio-8440, 84 N.E.3d 981, at ¶ 37.

{¶30} But here, the photo array presented to the jury consisted of six photographs of men in plain clothes, standing in front of gray backgrounds, with two sets of numbers underneath each photograph. While Shelton contends the photo array is probative of Shelton's past criminal activity because the jury may have discerned that the photo array consisted of mugshots, that contention is speculative.

{¶31} Consider cases addressing the admissibility of photo arrays under R.C. 2945.55, where courts have asked whether the photographs provide a reasonable inference that the defendant has had prior criminal involvement. *See State v. Breedlove*, 26 Ohio St.2d 178, 271 N.E.2d 238 (1971). Under this test, we have held that "photographs containing horizontal 'height lines' do not alone provide a basis for a reasonable inference that the defendant had had prior criminal involvement." *State v. Norman*, 1st Dist. Hamilton No. C-920202, 1993 Ohio App. LEXIS 133, 7 (Jan. 20, 1993), citing *State v. Tolbert*, 70 Ohio App.3d 372, 591 N.E.2d 325 (1st Dist.1990). In this case, the two sets of numbers in the photo array are distinguishable from height lines in the background of the photographs in *Norman,* which are more closely associated with mugshots.

{¶32} The probative nature of the identification evidence was not substantially outweighed by any prejudice suffered by Shelton. The trial court's decision to admit the identification evidence was not an abuse of discretion. We overrule the second assignment of error.

C. The evidence did not support a lesser-included-offense jury instruction.

{¶33} Turning to his third assignment of error, Shelton argues that the trial court abused its discretion in failing to instruct the jury on the lesser-included offense of disorderly conduct. Shelton requested a jury instruction on disorderly conduct based on *Cleveland v. Pugh,* 110 Ohio App.3d 472, 474-475, 674 N.E.2d 759 (8th Dist.1996), but that request was denied without an explanation.

{¶34} We review the trial court's decision to deny a jury instruction for a lesser-included offense under a two-prong test. The first prong requires a comparison of statutory elements and penalties of the two offenses. *See State v. Evans,* 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 9. Specifically, "[a]n offense may be a lesser-included offense of another if (1) the offense carries a lesser penalty than the other; (2) the greater offense, cannot, as statutorily defined, be committed without the lesser offense also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Peel*, 1st Dist. Hamilton Nos. C-200431, C-200432 and C-200433, 2022-Ohio-362, ¶ 9. If the first prong is satisfied, we review the trial court's decision for an abuse of discretion. *See State v. Wine,* 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶ 21; *see also State v. Miree,* 2022-Ohio-3664, 199 N.E.3d 72, ¶ 48 (8th Dist.) ("Trial courts have broad discretion to determine whether the record contains sufficient evidentiary support to warrant a jury instruction on a lesser included offense.").

{¶35} Shelton argues that disorderly conduct in violation of R.C. 2917.11(A)(5) is a lesser-included offense of public indecency in violation of R.C. 2907.09(A)(1). Public indecency is a fourth-degree misdemeanor and consists of reckless exposure of private parts "under circumstances in which the person's conduct is likely to be viewed by and affront others who are in the person's physical proximity and who are not members of the person's household." R.C. 2907.09(A)(1). And relevant here, disorderly conduct is a minor misdemeanor when a person "recklessly cause[s] inconvenience, annoyance, or alarm to another by * * * [a]creating a condition that is physically offensive to persons." R.C. 2917.11(A)(5). Shelton directs our attention to the legislative Committee Comment to R.C. 2907.09, which provides that "[a]nswering an urgent call of nature alfresco would not be an offense if the actor takes reasonable precautions against discovery, although if he or she is imprudent in choosing a site the act might constitute disorderly conduct under new section 2917.11(A)(5)." The state does not dispute Shelton's argument that disorderly conduct is a lesser-included offense of public indecency.

{¶36} Moving to the second prong, the trial court is only required to instruct the jury on the lesser-included offense if "a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense." *State v. Hunt*, 8th Dist. Cuyahoga No. 111892, 2023-Ohio-1977, ¶ 32, quoting *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 13, quoting *Shaker Hts. v. Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, ¶ 11. Our review turns on the quality of the evidence presented at trial. *Wine* at ¶ 26. But we must view the evidence "in a light most favorable to the defendant." *Miree* at ¶ 48, citing *State v. Campbell*, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994).

{¶37} The state maintains that the evidence presented at trial did not support a jury instruction on disorderly conduct as a lesser-included offense. Shelton disagrees, arguing that his remarks to Zeller during his interrogation demonstrated that Shelton was attempting to urinate in the parking lot, which would reasonably support an acquittal of the greater offense of public indecency and a conviction of the lesser-included offense of disorderly conduct. Zeller testified that Shelton explained if he had his private parts exposed, he would have been urinating. But nothing in the evidence substantiates Shelton's self-serving remarks. Zeller also testified that he searched Shelton's car and found no evidence to support Shelton's explanation. Furthermore, the surveillance footage from the parking lot shows Shelton pulling into a parking spot next to J.R.'s car *after* J.R. had already arrived at her car. And it is undisputed that his windows were down. So, it is difficult to see how exposing his private parts was the result of having chosen an imprudent location to urinate when he relocated his car next to J.R. with his windows down.

{¶38} Therefore, it was reasonable for the trial court to not include a lesser-included-offense instruction. Finding no abuse of discretion, we overrule Shelton's third assignment of error.

D. The conviction is supported by the evidence.

{¶39} In his fourth assignment of error, Shelton contends that his conviction is not supported by sufficient evidence and against the manifest weight of the evidence.

{¶40} A sufficiency challenge focuses upon whether the state met its burden of production for each element of an offense to a degree sufficient to sustain the verdict as a matter of law. *State v. Lowery,* 160 Ohio App.3d 138, 2005-Ohio-1181, 826 N.E.2d 340 ¶ 19 (1st Dist.). We view the evidence in a light most favorable to the prosecution to see if a rational trier of fact could have found that the state proved the essential

elements of the offense beyond a reasonable doubt. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77.

{¶41} Under R.C. 2907.09(A)(1), public indecency consists of recklessly exposing one's private parts "under circumstances in which the person's conduct is likely to be viewed by and affront others who are in the person's physical proximity and who are not members of the person's household." Shelton concedes that his private parts were exposed but argues that he was answering the urgent call of nature alfresco, which he maintains is a statutory exception to public indecency for a person who exposes their private parts when urinating. *See City of Cleveland v. Pugh,* 110 Ohio App.3d 472, 475, 674 N.E.2d 759 (8th Dist.1996).

{¶42} But the surveillance footage established that Shelton moved his car next to J.R.'s parking spot as she arrived at her car. J.R. testified that Shelton "calls to me to like look over, and that's when his genitals were out and he was masturbating." His windows were down and J.R. was within reach of Shelton. Likewise, the investigation notes, written on the day of the incident, are consistent with J.R.'s testimony. At a minimum, it also establishes that Shelton exposed his genitals and called J.R.'s attention to his private parts. When viewed in a light most favorable to the state, this evidence satisfies every element of public indecency under R.C. 2907.09(A)(1).

{¶43} Turning to Shelton's manifest-weight argument, we must consider the record, independently weigh the evidence, and assess the credibility of the witnesses to determine if the jury clearly lost its way and created a manifest miscarriage of justice. *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 140. In other words, a manifest-weight argument tests the believability of the evidence. *State v. Strietelmeier*, 1st Dist. Hamilton No. C-210409, 2022-Ohio-2370, ¶ 7. But "[o]nly in exceptional cases will we reverse a jury verdict as being against the manifest

weight of the evidence, 'because "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." ' " *Id.,* quoting *State v. Hudson,* 1st Dist. Hamilton No. C-170681, 2019-Ohio-3497, ¶ 16, quoting *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). Indeed, "the jury 'is free to believe or disbelieve all or any of the testimony.' " *Id.*, quoting *Hudson* at ¶ 16.

{¶44} Shelton argues that inconsistencies in J.R.'s testimony favor reversal. Shelton asserts that J.R. had nothing to document any injuries or bruising from being allegedly punched by Shelton, that she followed Shelton out of the parking lot despite shaking in fear after the incident, and that the investigative notes omitted any mention of Shelton masturbating. Instead, Shelton relies on his explanation to Zeller during the interrogation that he initially thought that J.R. was "Cassie" and speculated that J.R. had unfortunately observed him urinating in his car.

{¶45} But the inconsistencies upon which Shelton relies are minor. It is clear that, on the day of the incident, J.R. had informed the police that Shelton called her attention to his exposed private parts. And it is clear that the jury found J.R. credible. Her testimony was likewise supported by the parking lot footage. While Shelton relies on his statements to Detective Zeller, his statements were equally inconsistent. And while this court is instructed to assess the credibility of the evidence in a manifest-weight challenge, "the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence presented." *State v. Carson*, 1st Dist. Hamilton No. C-180336, 2019-Ohio-4550, ¶ 16.

{¶46} Therefore, the weight of the evidence supports Shelton's conviction. We overrule his fourth assignment of error.

III. Conclusion

{¶47} We overrule the four assignments of error and affirm the conviction.

Judgment affirmed.

ZAYAS, P.J., and **WINKLER, J.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.