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

STATE OF OHIO,	:	APPEAL NO. C-220125 TRIAL NO. B-1806614-C
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
MICHAEL SANON,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 9, 2023

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, *Sarah E. Nelson,* Assistant Public Defender and *Lora Peters,* Assistant Public Defender, for Defendant-Appellant.

ZAYAS, Judge.

{¶1} Michael Sanon appeals his conviction, after a jury trial, for the attempted murder of Cheyanne Willis. In eight assignments of error, Sanon argues that the trial court erred in overruling his post-trial motion for judgment of acquittal because the jury determined he did not possess or use a firearm even though the attempted murder was based on the shooting of Willis, the court erred in allowing peremptory challenges in a racially discriminatory fashion, the prosecutor's repeated use of leading questions deprived him of his right to a fair trial, the state's failure to provide him exculpatory evidence deprived him of his right to a fair trial, the cumulative errors deprived him of his right to a fair trial, his right to confrontation was violated when a witness was permitted to testify via Zoom, his conviction was contrary to the manifest weight of the evidence, and the imposition of a maximum sentence was contrary to law. For the following reasons, we affirm the trial court's judgment.

Factual Background

{¶2} On July 8, 2017, Cheyanne Willis was hosting a gender-reveal party in her home.[1] Toward the end of the night, the remaining guests were in the living room watching movies when two men burst into the home and started shooting. One person was killed, and eight were wounded.

{¶3} Roshawn Bishop eventually admitted that he had hired James Echols, Vandell Slade, and Michael Sanon to kill Willis. Roshawn had a relationship with Willis and believed he could be the father of her unborn child. Roshawn also owed Willis $10,000 and planned the murder when he grew tired of her relentless phone

[1] Willis later admitted that she was not pregnant at the time of the party.

calls and messages asking that he pay her back. Roshawn[2], Sanon, and Echols were charged with the shootings.

{¶4} Sanon and Echols were charged with aggravated burglary, aggravated murder, two counts of murder, eight counts of felonious assault, and eight counts of attempted murder, all with gun specifications.[3] Both pled not guilty and proceeded to a jury trial.

Voir Dire

{¶5} At the beginning of voir dire, a general conversation about Covid-19 occurred with the jurors. Juror 19 stated that her "sense of civic duty is very strong." She felt that the jurors were exposed to too much risk and believed they could distance more and asked if there could at least be a three-foot separation between the potential jurors. When told no, she responded that she was willing to take the chance. A few minutes later, she requested some "really good masks."

{¶6} When she was seated in the jury box, she was asked about her background. Juror 19 had a Ph.D. in anthropology and was employed as a college professor in North Carolina. When her contract ended, she moved to Cincinnati to care for her ill father. For almost five years, she had been unable to find a worthwhile university position. She believed the difficulty was due to some age discrimination. She became a substitute teacher at Cincinnati Public Schools. Sitting on the jury would be a little tough without pay, but she was willing to make that sacrifice because "it's very important I be here." Juror 19 reiterated, "being here

[2] Roshawn was charged with two counts of murder, two counts of felonious assault, and one count of attempted murder, all with gun specifications. His trial would proceed after the conclusion of Echol's and Sanon's trial.

[3] They were also charged with one count of cruel treatment against a companion animal, but that charge was dismissed by the state.

to me is the most important thing right now."

{¶7} Juror 19 equated jury duty to applying theories and believed she would by a good juror due to her "expertise at applying theories." She also had "a really heightened sense by her interest in politics," and an interest in the functioning of society and civic duty that would help her to be a good juror. She further explained that her work in social science deals with people, so it is not the same as physical science, where there are laws and rules that are rigidly applied, making jury duty very close to what she does.

{¶8} When the state exercised a peremptory strike on Juror 19, the defense objected, noting that of the twelve jurors, only two were black, and it would be unfair to have only one African-American juror when both defendants are African-American and the victims are white. The prosecutor responded that some of the victims are black and some are mixed race. The prosecutor provided the following reasons for the peremptory challenge:

> [A] review of Juror Number 19's juror questionnaire reflects she received her Ph.D. She spoke at length about being a college professor. It is a concern of the State in that she is an anthropologist, which [is] the study of the social science of people and their behaviors, that she would treat her jury service as one of her experiments.
>
> She was very passionate and adamant about serving on this jury, more so than anyone that we have heard from over the past three days we've engaged in this group of people. We feel she would take control of the jury, manipulate the jury in a unfair way, and she will say and do anything, so she can engage in the social experiment. It is

not a factor of race.

{¶9} The trial court did not believe a prima facie case had been made by the defense, but even if it had, the state gave sufficient race-neutral reasons to challenge the juror.

{¶10} While seating alternate jurors, the state excused Juror 26. Defense counsel made a *Batson* challenge, and the prosecutor gave the following explanation:

> I just ask the record reflect there's an alternate who's African American that the State passed for cause on. The race-neutral reason, why we're excluding Juror Number 36, is due to her experience with being involved with domestic violence between her and her children. Also, on her questionnaire she went into detail about being extremely litigious and making claims for discrimination. She also has multiple jobs working at US Bank and as an STNA. We believe those are race-neutral reasons, including also her son who's involved in the criminal justice system with mental health issues.
>
> Based on her disclosures on the jury questionnaire, we find that's a sufficient basis to use a peremptory challenge. We do not want to embarrass her by exploiting all those details of all those statements in front of the jury pool, and we exercise a peremptory.

{¶11} Again, the trial court found the state gave sufficient race-neutral reasons to challenge the juror.

Trial Testimony

{¶12} At the trial, Deborah Bishop, Roshawn's wife, testified that on the night of the shooting, she was at home with her husband, children, sister-in-law, Robert Howard ("Geezy"), and Kevin Barton. They had eaten dinner outside that

evening, and the men stayed outside drinking. After 11:00 p.m., she saw Vandell Slade, Echols, and Sanon outside with the other men. Deborah testified that she saw Echols and Sanon putting their clothes on the grill and burning them. Deborah identified both Echols and Sanon in court. When asked about the shooting during her police interview, Deborah told the police she heard Roshawn and Geezy discuss the shooting. She did not tell the police that Sanon was at her home the night of the shootings or about the burning of the clothes. Deborah described Sanon to the police as darker than Echols–but did not mention that he had a lazy eye. Deborah admitted that she knew what Sanon looked like from seeing him on the news.

{¶13} Kevin Barton testified that he sold methamphetamine for Roshawn and Geezy in 2017. Barton grew up with Geezy, and he met Roshawn when both were in prison. On the day of the shooting, Barton went to Roshawn's house for dinner. When he arrived, Barton saw Roshawn, Geezy, Echols, Slade and a man he did not know. Barton described the unidentified man to the police as a short, Haitian guy with dark skin, who seemed a bit off and was not talking. Barton was unable to identify Sanon from a police lineup. Barton told the police that Sanon was not at Roshawn's house the night of the shooting. Barton did not see anyone burn clothing or smell burning clothes.

{¶14} A week or two after the shooting, Barton was riding around with Roshawn and Geezy when Deborah called and told Roshawn that Echols and Sanon were driving to Roshawn's home. After retrieving a gun from Barton's house, they drove to Roshawn's house, and Roshawn met with Sanon. After they spoke, Sanon left. Later, Roshawn testified that Barton was wrong when he had said that Sanon

came to his house a week after the shootings and testified that it had been Echols who came to his house unannounced.

{¶15} Roshawn confirmed that he had met Willis at the Boost Mobile store where she worked and had intimate relations with her on two occasions. Roshawn had borrowed $10,000 from her after losing money in a drug transaction. When he did not repay Willis, she began calling him and Geezy demanding the money. Instead of repaying Willis, Geezy and Roshawn decided to kill her. Roshawn enlisted his cousin Slade to shoot Willis, and Echols accompanied Slade.

{¶16} Roshawn testified that Slade was the driver, and Echols and Sanon were the shooters. After Slade arrived at Willis's home, he called Roshawn and told him that Willis had guests in her home. Roshawn told Slade not to enter the home. When the three returned to his home, Echols said that he and Sanon had wrapped their shirts around their heads, entered the home, and started shooting. Echols's and Sanon's shirts were burned in the grill. Roshawn and Geezy paid Echols $1,500, and the three left. A week later, Echols came to his home and demanded more money. Roshawn gave him a few hundred dollars, and he left.

{¶17} Roshawn admitted that he did not initially tell the police the truth, and his statements evolved over time. In May 2018, he told Agent Seth Hagaman that Geezy was one of the shooters and did not implicate Slade. He identified Geezy's cousin, Jay Bodie, as the second shooter. Initially, he claimed that Sanon, described as the "Haitian dude," arrived the day before the shooting and cased Willis's house. Then he said that Slade picked Sanon up in Lexington after the shooting. During his first four interviews, Roshawn never mentioned that clothes were burned after the shooting. His description of Sanon also evolved. He described him as a "short dude"

who was much smaller than Echols, but did not describe his lazy eye. Sanon is six feet tall, and Echols is six feet, four inches. At one point, he claimed that Sanon was cross-eyed, which changed to, "It's like he looked like he was cross-eyed, lazy eye, however you say it."

{¶18} Defense counsel questioned Roshawn about a conversation he had with his wife Deborah the night before she testified. Roshawn told her the police had no cell phone evidence placing Sanon at the shooting. Deborah responded, "So that's why they need me to say he was there with you-all." A portion of their conversation was played in court. Roshawn told Deborah:

> Follow me on this babe. There is something called prosecutor misconduct, and I do not want to bring this up because I know they the only ones that helping me. But in they case, they trying to play me. They intentionally withholding that phone from Sanon and them's lawyer. If Sanon and them lawyer knew about the phone, this case goes away. * * * They specifically told me not to bring that phone up, babe. They told me on Friday. Then they was like scared. They're like nervous, for real, I'm going to fuck them.

{¶19} Roshawn testified that he was referring to his iPhone that was confiscated by the Regional Narcotics Unit ("RENU") when he was arrested for drug trafficking after the shooting. Roshawn was using that phone at the time of the shooting and testified that the phone also contained a photo showing where the guns were dropped after the shooting. The phone was never recovered, and the police did not request the cell phone data from that phone number.

{¶20} Roshawn also spoke with Deborah after she testified. Deborah shared her testimony with Roshawn and informed him of the questions she was asked. Roshawn testified that their conversation did not influence his testimony.

{¶21} Colerain Police Detective Corey Boyle, the lead investigator, testified about the lengthy investigation. He had no leads for ten months, in part because several witnesses had lied due to their own drug activity. Boyle requested assistance from Agent Seth Hagaman, who worked for the Ohio Bureau of Criminal Investigation. After Boyle interviewed Roshawn in January 2018, he decided to focus on him because he believed Roshawn was lying. After Roshawn implicated Geezy, Boyle interviewed Geezy and obtained his cell phone records. Geezy implicated Roshawn's cousin Slade, which eventually led to two additional suspects, Echols and Sanon.

{¶22} Boyle obtained Sanon's Google account data and Facebook records, which revealed a messenger conversation with Echols about picking Sanon up in Lexington on July 7, 2017, and included Sanon's Lexington address. Sanon's Google search history beginning on July 6, 2017, shows him searching for a transit center in Lexington, a bus stop, and numerous job opportunities.

{¶23} FBI Special Agent Lance Kepple, a member of the Cellular Analysis Survey Team, testified as an expert in cellular telephone record analysis. Kepple was provided with cell phone detail records and Google location information for Roshawn, Slade, Echols, and Sanon. With this data, Kepple created a report showing each person's location from July 6 thru July 9. Sanon's records placed him in Lexington, Kentucky on July 6. On July 8, the records show that Slade and Echols drove to Lexington, remained in Lexington from 3:20 p.m. to 5:00 p.m., and then

returned to Cincinnati. The last data point Kepple had for Sanon before the shooting was at 6:37 a.m. on July 8, showing him in Lexington. The next Gmail account data location for Sanon was on July 9, from 10:15 p.m. to 10:36 p.m. in Columbus at the Easton Square Mall with Slade and Echols. Kepple's report showed that Sanon obtained a new phone number on July 9 at 5:54 p.m., but Kepple did not receive any records related to the new phone number. Kepple did not have any records for two of Roshawn's phone numbers, including the number attached to the missing phone, Geezy, Deborah, or Barton. Kepple acknowledged that the data revealed that one of Roshawn's phones called his other phone on four occasions.

{¶24} The state's final witness was Hagaman. Over objection, Hagaman was permitted to testify via Zoom because he had tested positive for Covid-19 and was exhibiting symptoms of the virus. The trial court found that preventing the spread of Covid-19 was an important public policy, and Hagaman's presence would risk the health of the public. The health and safety of the court employees, trial participants, jurors, and members of the public warranted the alternative to face-to-face confrontation. The court further found that testimony via Zoom would permit the oath to be administered, cross-examination could proceed, and the jury and trial participants would be able to view Hagaman's demeanor during his testimony.

{¶25} During Hagaman's testimony, the trial court confirmed that:

> The Zoom call that we have organized here this morning is working very well. I have a full-face view of Sergeant Hagaman. It's almost life-size almost in the exact same place that the witness stand would be. Sergeant Hagaman was sworn. Both defendants are on the Zoom call. They have Sergeant Hagaman's face clearly in front of them. The jury

> has a large screen view full of Sergeant Hagaman. I find that the audio is very clear. It is obvious to me that Sergeant Hagaman is not feeling well so I appreciate him appearing today, and I am not finding any bad feedback of the audio.

{¶26} Hagaman testified that Sanon's identity was unknown for a considerable amount of time. After obtaining Echol's Facebook records, Hagaman identified Sanon as a possible suspect because he was communicating with Echols via Facebook messenger on the day of the shooting, using the name "Fetti Finesse." After obtaining the Facebook records for "Fetti Finesse," Hagaman received the subscriber information and the associated Gmail account of Mike Sanon. Hagaman showed a photo lineup to Roshawn, and he identified Sanon as the second shooter with 100 percent certainty.

{¶27} When questioned about Roshawn's missing phone, Hagaman testified that Roshawn discussed a rose gold iPhone and stated that the phone contained a photo with a GPS coordinate showing where the guns were dropped after the shooting. He contacted a captain with RENU in an attempt to obtain the phone. Hagaman was told that RENU could not locate the phone.

{¶28} During deliberations, the jury requested "the transcript of Roshawn Bishop's testimony regarding the missing phone, specifically in his conversation with Deborah Bishop including cross-examination? RE: What was on the phone?" The jurors were instructed to rely on their collective memory.

{¶29} Sanon was acquitted of all the charges except the attempted-murder charge related to Cheyanne Willis. Sanon was acquitted of the gun specifications related to that charge. Sanon was sentenced to an 11-year term of incarceration.

Sanon filed a post-verdict motion for judgment of acquittal arguing the evidence was insufficient to establish that he shot Willis where the jury determined he did not have a firearm while committing the attempted murder, and the conviction was contrary to the manifest weight of the evidence. The trial court overruled the motion.

Sufficiency and Manifest Weight

{¶30} In his first and seventh assignments of error, addressed together, Sanon contends that the trial court erred in overruling his post-verdict motion for judgment of acquittal because the jury's determination that he did not possess or use a firearm while committing the offense was inconsistent with him having shot the victim. He further asserts that the state failed to present credible evidence that he was one of the shooters.

{¶31} Under Crim.R. 29(C), a court may set aside a jury's verdict and enter a judgment of acquittal after the jury returns a guilty verdict. The rule allows a defendant "to challenge defects in the sufficiency of the evidence that only become apparent after the jury returns its verdicts." *State v. Harris*, 2017-Ohio-5594, 92 N.E.3d 1283, ¶ 14 (1st Dist.). "On review of a Crim.R. 29(C) post-verdict motion for judgment of acquittal, a court must view the evidence in a light most favorable to the state to determine if reasonable minds could differ as to whether each material element of the crime has been proven beyond a reasonable doubt." *Id.* at ¶ 15.

{¶32} In support of his position, Sanon relies on *State v. Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970 (1990). In *Koss*, the defendant-wife was charged for the murder of her husband, with a gun specification. *Id.* at 213-214. The husband died due to a single gunshot wound to his head. *Id.* at 213. Koss sought to introduce expert testimony on the defense of battered wife syndrome to support a claim of self-defense, which the trial court denied. *Id.* at 214. The court instructed the jury on

murder, voluntary manslaughter, and self-defense. *Id.* The jury acquitted Koss of murder, found her guilty of voluntary manslaughter, and not guilty of the gun specification. *Id.* On appeal, Koss argued that the trial court erred in refusing to admit evidence of battered wife syndrome. *Id.* The Ohio Supreme Court agreed and held the testimony was admissible. *Id.* at 218.

{¶33} Koss also argued that she was "entitled to an acquittal because the jury's verdict is inherently inconsistent." *Id.* at 219. In resolving this issue, the court stated, "In view of the evidence which demonstrates that the victim died of a gunshot wound, we must find that the jury's verdict that appellant was guilty of voluntary manslaughter but not guilty of having 'a firearm on or about her person or under her control while committing the offense' is inconsistent." The court resolved the issue by concluding that "[t]he jury not having found appellant guilty of the gun specification, the prosecution will not be permitted to retry her on the specification upon remand." *Id.* The *Koss* court did not conclude that she was entitled to an acquittal based on the inconsistency.

{¶34} Notably, *Koss* does not reference the court's earlier decision in *State v. Perryman*, 49 Ohio St.2d 14, 25-26, 358 N.E.2d 1040 (1976), *vacated in part on other grounds*, 438 U.S. 911, 98 S.Ct. 3136, 57 L. Ed. 2d 1156 (1978). In *Perryman*, the Ohio Supreme Court held that the principal charge and the specification are not interdependent. *Id.* at 25-26. Specifications are considered after and in addition to the finding of guilt on the principal charge. *Id.* at 26. Therefore, any determination as to the specification cannot change the finding of guilty on the principal charge. *Id.* This court has also adopted the *Perryman* rationale in concluding that "[t]he conviction on a principal charge and acquittal on a specification for identical

behavior is not invalid." *State v. Lee*, 1st Dist. Hamilton No. C-160294, 2017-Ohio-7377, ¶ 43, citing *State v. Allen*, 1st Dist. Hamilton No. C-060239, 2006-Ohio-6822, ¶ 32, citing *Perryman* at paragraph three of the syllabus.

{¶35} When jury verdicts appear inconsistent, such inconsistencies may reflect jury confusion, a compromise, or basic leniency. *See State v. Rardon*, 2018-Ohio-1935, 112 N.E.3d 380, ¶ 73 (5th Dist.). Given the evidence present in the instant case, leniency may well have motivated the jury's decision.

{¶36} As to the weight of the evidence, we review whether the jury created a manifest miscarriage of justice in resolving conflicting evidence, even though the evidence of guilt was legally sufficient. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). We consider all the evidence in the record, the reasonable inferences, the credibility of the witnesses, and 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 and a new trial ordered. *State v. Bailey*, 1st Dist. Hamilton No. C-140129, 2015-Ohio-2997, ¶ 59, quoting *Thompkins* at 387. We afford substantial deference to credibility determinations because the factfinder sees and hears the witnesses. *See State v. Glover*, 1st Dist. No. C-180572, 2019-Ohio-5211, ¶30.

{¶37} Roshawn testified that Sanon was hired to commit the shooting, and that he was one of the shooters. Roshawn further testified that, after the shooting, Slade, Echols, and Sanon came to his home where Echols discussed the shooting, prompting the burning of Sanon's shirt. Deborah confirmed that Sanon was at her home and his clothing was burned on the grill. In finding Sanon guilty, the jury found the testimony to be credible. Because credibility is an issue for the trier of fact

to resolve, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice.

{¶38} Accordingly, we overrule the first and seventh assignments of error.

Peremptory Challenges

{¶39} In his second assignment of error, Sanon argues that the trial court erred in allowing peremptory challenges in a racially discriminatory fashion in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. Sanon argues that the trial court failed to properly evaluate the state's reasons for striking Juror 19 and alternate Juror 36, and therefore, the court's conclusion was clearly erroneous.

{¶40} "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, ___ U.S. ___, 139 S.Ct. 2228, 2244, 204 L.Ed.2d 638 (2019). *Batson* established a three-step process for evaluating claims of racial discrimination. *Id.* at 2241. First, the defendant must establish a prima facie case of discrimination, and second, if this burden is satisfied, the state must provide race-neutral reasons for its peremptory strikes. *Id.* Third, the trial court must determine whether the defendant has proven the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination. *Id.*

{¶41} "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.' " *State v. Garrett*, Slip Opinion No. 2022-Ohio-4218, ¶ 69, quoting *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). Because the reasons given for peremptory challenges frequently involve a juror's demeanor, the trial court's observations are of great importance in evaluating credibility. *Id.* at ¶ 70. The "ultimate inquiry" is whether the prosecutor was "motivated in substantial part by discriminatory intent."

Flowers at 2244. We defer to the trial court's finding, and a finding of no discrimination will not be reversed unless it is clearly erroneous. *Garrett* at ¶ 70.

{¶42} With respect to Juror 19, the state excused Juror 19 due to her strong desire to serve on the jury and a concern that she would treat jury duty like an experiment. Unlike any of the other jurors, Juror 19 repeatedly expressed her strong desire to serve on the jury. She also equated jury duty to applying theories and opined that jury duty was like a social science where laws and rules are not rigidly applied.

{¶43} With respect to Juror 36, the state excused the juror due to a domestic-violence conviction involving her children, and her son's involvement with the criminal justice system. Courts have "recognized that the potential bias that may result from a prospective juror's or his or her family's experiences with the criminal justice system may be a legitimate, racially-neutral reason for exercising a peremptory challenge against the prospective juror." *State v. May*, 2015-Ohio-4275, 49 N.E.3d 736, ¶ 51 (8th Dist.); *see also State v. King*, 1st Dist. Hamilton No. C-060335, 2007-Ohio-4879, ¶ 30.

{¶44} The trial court was in the best position to weigh the credibility of the state's explanations in determining whether the state exercised its peremptory challenges with a discriminatory intent. Following a thorough review of the record, we cannot say that the trial court's decision to allow the state to exercise its peremptory challenges was clearly erroneous. We overrule the second assignment of error.

Prosecutorial Misconduct

{¶45} Sanon next contends that the assistant prosecuting attorney engaged in misconduct when he repeatedly asked leading questions of several witnesses, depriving Sanon of his right to a fair trial.

{¶46} Prosecutorial misconduct will not provide a basis for overturning a conviction unless, on the record as a whole, the misconduct can be said to have deprived the defendant of a fair trial. *State v. Lott*, 51 Ohio St.3d 160, 166, 555 N.E.2d 293 (1990). The test for whether prosecutorial misconduct mandates reversal is whether the prosecutor's remarks or actions were improper, and, if so, whether they prejudicially affected the substantial rights of the accused. *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221, ¶ 45. "This analysis turns on whether the trial was fair, not the prosecutor's culpability. Thus, the impact of the alleged misconduct must be considered in the context of the whole trial." *State v. Lee*, 1st Dist. Hamilton No. C-160294, 2017-Ohio-7377, ¶ 17.

{¶47} A leading question suggests the desired answer to the witness. *See State v. Glenn*, 1st Dist. Hamilton No. C-090205, 2011-Ohio-829, ¶ 53. "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." Evid.R. 611(C). Where leading questions are designed to move the testimony along without delay and direct the witness's attention to the topic of inquiry, they are not improper. *Id.* A prosecutor may commit misconduct by persistently asking leading questions after objections have been sustained if the misconduct pervades the trial to such a degree that there was a denial of due process. *See State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 205.

{¶48} Sanon argues that the prosecutor's leading questions to Barton

manipulated him to identify Sanon as present at Roshawn's house after the shooting. However, Barton never testified that Sanon was at the house.

{¶49} Sanon further contends that the prosecutor asked leading questions of Roshawn and Deborah to elicit phone numbers that were not attached to the missing Iphone. The record here is clear that the state did not obtain the cell phone records for the number associated with the missing phone. Thus, these leading questions could not have prejudiced Sanon.

{¶50} We overrule the third assignment of error.

Failure to Disclose Materially Exculpatory Evidence

{¶51} In his fourth assignment of error, Sanon asserts that the trial court erred when it overruled his motion for judgment of acquittal based in part on an argument that a cell phone containing exculpatory evidence was withheld from the defense.

{¶52} "The state's failure to preserve materially exculpatory evidence violates a defendant's due-process rights under the Fourteenth Amendment to the United States Constitution." *State v. Green*, 1st Dist. Hamilton No. C-200068, 2021-Ohio-1645, ¶ 11, citing *State v. Brewster*, 1st Dist. Hamilton Nos. C-030024 and C-003025, 2004-Ohio-2993, ¶ 41. "Evidence is materially exculpatory where the evidence possesses an exculpatory value that is apparent before the evidence is destroyed, and it is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means." *Id.* If the evidence is potentially useful, a defendant cannot establish a due process violation without first demonstrating the state acted in bad faith. *See State v. Benson*, 152 Ohio App.3d 693, 2003-Ohio-1944, 788 N.E.2d 693, ¶ 10 (1st Dist.). The defendant bears the

burden to show the exculpatory nature of the evidence. *Id.* at ¶ 10.

{¶53} After the shootings in 2017, Roshawn was arrested on drug trafficking charges. At that time, RENU confiscated his cell phone. By the end of January 2018, Roshawn was found guilty of the drug charges and incarcerated. RENU never returned the phone to Roshawn. Sanon argues that Roshawn's testimony that the state intentionally withheld the phone and the case would go away if Sanon knew about the phone established that the phone contained exculpatory evidence. However, Roshawn also testified that his statements were based on his own independent research about evidence, and that he wanted the phone to corroborate his statements to the police. He further clarified that the contents of the phone would implicate Sanon and Echols. Based on this record, we cannot conclude that the iPhone contained exculpatory evidence. Moreover, it is unclear from the record whether the phone has been destroyed or whether the cell phone data is unavailable via subpoena.

{¶54} Even assuming the cell phone is potentially useful, Sanon cannot establish the state acted in bad faith. "Bad faith imports a dishonest purpose, moral obliquity, and conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Green* at ¶ 12. Hagaman attempted to retrieve the phone but was informed by RENU that it was missing. At the time the phone was taken by RENU, its potential relevance to this case was unknown. Accordingly, we overrule the fourth assignment of error.

Cumulative Error

{¶55} Sanon claims that that he was prejudiced and denied his right to a fair

trial by the cumulative effect of the following errors: (1) the overruling of his request to strike testimony when a witness violated the court's order separating witnesses, (2) the error in allowing leading questions, and (3) allowing the state to publish Sanon's nondisclosed phone number.

{¶56} "The doctrine of cumulative error allows a conviction to be reversed if the cumulative effect of errors, deemed separately harmless, deprived the defendant of his right to a fair trial." *State v. Johnson*, 1st Dist. Hamilton No. C-170354, 2019-Ohio-3877, ¶ 57.

1. The request to strike testimony

{¶57} Prior to trial, the court ordered a separation of witnesses and requested that counsel "be diligent in making sure that happens." The court reminded counsel of the separation of witnesses prior to the calling of the first witness. After Deborah testified, she was instructed not to discuss her testimony with any other witness. In direct violation of that instruction, Deborah shared her testimony with Roshawn. The prosecutor acknowledged that Roshawn was not informed of the separation order.

{¶58} Upon learning of the infraction, Sanon requested that Deborah's testimony be stricken, and that Roshawn be prohibited from testifying. The trial court denied the request but allowed the defense "wide latitude" to question Roshawn about the infraction. Ultimately, Roshawn testified that his testimony would not be influenced by the conversation with his wife.

{¶59} Evid.R. 615 requires a trial court, on motion of any party to "order witnesses excluded so that they cannot hear the testimony of other witnesses." "On discovering a violation of a separation order, a trial court has four options: (1)

striking the testimony; (2) excluding additional witnesses; (3) instructing the jury to consider separation violations; or (4) granting a motion for a mistrial." *State v. Lanier*, 2d Dist. Clark C.A. Case No. 98-CA-103, 1999 Ohio App. LEXIS 4005, at *8 (Aug. 27, 1999). The remedy for a violation is within the discretion of the court. *Id.* A witness will not be excluded unless the party calling the witness "consented to, connived in, procured or had knowledge of the witness' disobedience." *State v. Pulley*, 1st Dist. Hamilton No. C-120444, 2013-Ohio-1624, ¶ 9, quoting *State v. Smith*, 49 Ohio St.3d 137, 142, 551 N.E.2d 190 (1990).

{¶60} Here, the prosecutor did not participate in the violation, so the trial court did not err in allowing the witness to testify. *See id.* Additionally, the trial court instructed the jury that it could consider Deborah's violation of the separation order.

2. The error in allowing leading questions

{¶61} Sanon contends that multiple instances of asking leading questions to Deborah, Roshawn, and Barton deprived him of his right to a fair trial. We previously addressed the questioning of Roshawn and Barton and found no error.

{¶62} Deborah was asked if there was anything unusual about Sanon's eye that she remembered. There was no objection to the question, and Deborah responded that one eye was lower, but she did not believe it was a lazy eye. Notably, this testimony was elicited after Deborah identified Sanon in court.

{¶63} Sanon further argues that the prosecutor asked Deborah leading questions about the burnt clothing, the date she met Sanon, and the date of the offense. However, the question regarding the clothing was asked after Deborah had already testified that the clothing was placed on the grill and burned. The questions

regarding the dates were inconsequential because Deborah had previously testified that she met Sanon the day after she met Echols and acknowledged the shooting occurred on July 8, and she met Echols on July 7.

3. Publishing of an Undisclosed Phone Number

{¶64} Sanon argues that the trial court erred in allowing the state to publish the phone number (614) 735-2542 because the number was not provided to Sanon in discovery. Specifically, Sanon contends the number was not disclosed in the cell phone records. While the phone number was not included in the cell phone records, the number was disclosed in the Facebook messenger communications. On July 11, 12, and 19, 2017, Sanon provided the number of (614) 735-2542 in response to messenger requests for his phone number. Moreover, Sanon acknowledged that the state had laid the proper foundation to admit the phone numbers provided to him in the messenger communications.

{¶65} Sanon has failed to establish any instance of error, so we cannot find cumulative error. Consequently, we overrule the fifth assignment of error.

Confrontation Rights

{¶66} In his sixth assignment of error, Sanon asserts that his confrontation rights were violated when Hagaman was permitted to testify via Zoom.

{¶67} Both the federal and Ohio constitutions give a defendant the right to confront witnesses against him. Sixth Amendment to the United States Constitution; Section 10, Article I of the Ohio Constitution. "While admission of testimony is generally reviewed for an abuse of discretion, the question of whether a criminal defendant's rights under the Confrontation Clause have been violated is reviewed de novo." *State v. Banks*, 1st Dist. Hamilton Nos. C-200395, C-200396, 2021-Ohio-

4330, ¶ 14. (Citations omitted.) " '[T]he Confrontation Clause reflects a *preference* for face-to-face confrontation at trial' * * * that 'must occasionally give way to considerations of public policy and the necessities of the case[.]' " (Emphasis in original.) *Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), quoting *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) and *Mattox v. United States*, 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895). Therefore, when the "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured," the right to confrontation is not violated. *Id.* at 850.

{¶68} To determine whether an alternative to physical face-to-face confrontation is warranted, Ohio courts have employed a two-prong test. *Banks* at ¶ 22. When deciding whether an exception to the Confrontation Clause is warranted, a trial court must first consider whether the procedure is "justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case." *Id.* at ¶ 22, quoting *State v. Howard*, 2020-Ohio-3819, 156 N.E.3d 433, ¶ 53 (2d Dist.). The court must find that the specific circumstances surrounding a specific witness warrant denying the right to face-to-face confrontation. *Craig* at 850, 855. Second, the court must ensure the testimony is reliable by utilizing a procedure that satisfies the other three elements of confrontation: oath, cross-examination, and observation of the witness's demeanor. *Id.*

{¶69} In this case, Hagaman was permitted to testify via Zoom because he had tested positive for Covid-19 and was exhibiting symptoms of the virus. The trial court found that preventing the spread of Covid-19 was an important public policy, Hagaman's presence would risk the health of the public, and the health and safety of

the court employees, trial participants, jurors, and members of the public warranted the alternative to face-to-face confrontation. We conclude that under these specific circumstances, the remote testimony was necessary to further the important public policy of preventing the spread of Covid-19.

{¶70} Turning to the reliability prong, the court found that testimony via Zoom would permit the oath to be administered, cross-examination to proceed, and allow the jury and trial participants to view Hagaman's demeanor during his testimony. And during Hagaman's testimony, the court confirmed that Hagaman was sworn, both defendants were on the Zoom call, the jury and trial participants had a clear almost life-sized view of Hagaman, and the audio was clear. Sanon's counsel had ample opportunity to cross-examine him, and the transcript shows that counsel conducted an effective cross-examination. These procedures preserved the other three elements of confrontation.

{¶71} Based on the important public policy of preventing the spread of Covid-19 and the procedures employed to guarantee the reliability of Hagaman's testimony, the court did not violate Sanon's right of confrontation when it allowed Hagaman to testify via Zoom. Accordingly, we overrule the sixth assignment of error.

Maximum Sentence

{¶72} In his eighth assignment of error, Sanon argues that the trial court erred when it imposed a maximum sentence because the record does not support the sentence. Sanon challenges the trial court's weighing of the sentencing factors.

{¶73} Sentences are reviewed under the standard set forth in R.C. 2953.08(G)(2). Under this standard, an appellate court may increase, reduce, or

otherwise modify a sentence, or may vacate the sentence and remand the matter to the sentencing court for resentencing, if the court clearly and convincingly finds that (1) the record does not support the sentencing court's findings under R.C. 2929.13(B) or other relevant statutes, or (2) if the sentence is contrary to law. R.C. 2953.08(G)(2)(a). However, 2953.08(G)(2)(b) "does not provide a basis for an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 or 2929.12." *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649, ¶ 39.

{¶74} Sanon acknowledges that the sentence is within the permissible range for the conviction, yet urges this court to review the sentence pursuant to *State v. Bryant*, 168 Ohio St.3d 250, 2022-Ohio-1878, 198 N.E.3d 68, an Ohio Supreme Court decision rendered after *Jones*. In *Bryant*, the court reiterated that appellate courts may review a sentence "when the claim is that the sentence was imposed based on impermissible considerations—i.e., considerations that fall outside those that are contained in R.C. 2929.11 and 2929.12." *Id.* at ¶ 22. Claims that challenge a sentence that was imposed "based on factors or considerations that are extraneous to those that are permitted by R.C. 2929.11 and 2929.12," may be reviewed. *Id.*

{¶75} Sanon does not allege that his sentence was based on impermissible factors. Therefore, *Jones* prohibits this court from independently weighing the evidence in the record and substituting its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and R.C. 2929.12. *Jones* at ¶ 39.

{¶76} We overrule the eighth assignment of error.

Conclusion

{¶77} Having overruled Sanon's eight assignments of error, we affirm the trial court's judgment.

Judgment affirmed.

CROUSE, P.J., concurs.
KINSLEY, J., concurs separately.

KINSLEY, J., concurring separately.

{¶78} I concur with the majority's resolution of Sanon's assignments of error. I write separately, however, to highlight the significance of the Confrontation Clause in today's digital environment, a question presently pending before the Ohio Supreme Court in *State v. Carter*, No. 2023-0156.[4]

{¶79} The onset of the coronavirus pandemic and the development of remote work technologies have changed the shape of American courtrooms, at times for the better. *See* Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond*, 115 N.W. L. Rev. 1875, 1880 (2021). Thanks to innovations like Zoom, people can attend court from their homes, cars, or jobs without incurring travel or childcare expenses. *See* Jenia I. Turner, *Remote Criminal Justice*, 53 Tex. Tech L. Rev. 197, 213 (2021). Attorneys

[4] Interestingly, the question of whether remote testimony by videoconference raises Confrontation Clause concerns is not a new or novel one. As far back as 2002, the Judicial Conference of the United States, the rulemaking authority for the federal courts, proposed an amendment to Fed.Crim.R. 26(b) that would have allowed a witness to testify remotely by videoconference under limited circumstances. *See* Richard D. Friedman, *Remote Testimony*, 35 U. Mich. J.L. Reform 695, 696 (2002). The Supreme Court declined to transmit the proposed rule to Congress for adoption. *Id.* At the time, a number of Justices explained the basis of that decision was the view that proposed rule would violate the Confrontation Clause. *See, e.g.*, Amendments to Fed.Crim.R. 26(b) (Apr. 29, 2002), at 1 (statement of Scalia, J.) ("I share the majority's view that [the proposal] is of dubious validity under the Confrontation Clause * * * ."); *Id.* at 4 (statement of Breyer, J.) ("The Court has decided not to transmit the proposed Rule because, in its view, the proposal raises serious concerns under the Confrontation Clause.").

can make multiple court appearances in a single day, thereby minimizing the costs to their clients. Courts can manage their dockets more efficiently, which benefits the taxpayers and community at large. *See id.* at 199, 215. And the public can have greater access to the work of the courts through remote access to any courtroom, anywhere, any time. *Id.* at 265-266.

{¶80} But there can also be downsides to conducting court through the computer. Not everyone has reliable WiFi access or internet-connected devices, and not everyone who has them is adept at using them. *See, e.g.,* Bannon & Keith, at 1876. Even those who are can experience technology failures. *See* Turner, at 219. Remote court proceedings can disadvantage the attorney-client relationship, because clients have limited ability to interact with their attorneys in real time. *See* Bannon & Keith, at 1893. And studies are mixed as to whether remote proceedings produce the real advantages we theoretically think they do. *See, e.g.,* Turner, at 252 (citing survey indicating that a majority of defense attorneys, prosecutors, and judges believe an online setting makes it difficult for the parties to present their cases always, often, or sometimes).

{¶81} With respect to criminal cases, and jury trials in particular, the more troubling aspects of remote court proceedings are magnified, just when accuracy of the record and the ability to discern human behavior are of heightened importance. *See* Turner, at 201. For example, factors like lighting, screen angles, and audio range can distort how a person comes across on screen, and studies show these production qualities can make a witness appear less credible or favorable than they may appear in person. *See, e.g.,* Robin Davis et al., *Research on Videoconferencing at Post-Arraignment Release Hearings: Phase I Final Report*, (May 29, 2015), at 5-6,

https://www.ncjrs.gov/pdffiles1/nij/grants/248902.pdf (accessed Aug. 1, 2023). Witnesses testifying from behind a computer may be coached by others off-camera or may be distracted by events occurring in their environment that are outside the view of the jury. *See* Turner, at 219; Friedman, at 713-714. Jurors may struggle to pay attention for long periods of time to witnesses testifying on screen, given the higher cognitive load it takes to pay attention to a video, and details of a remote witness's testimony may therefore be comparatively minimized vis-à-vis live witnesses. *See* Turner, at 219.

{¶82} For these reasons, experts and the Supreme Court alike have cautioned against a blanket rule allowing remote testimony by witnesses in criminal cases. *See supra* note 4; Turner, at 201. They have instead recommended sharp limitations on the circumstances in which witnesses testify by computer and, in those small number of cases, strong prophylactic measures to limit potential negative outcomes. *See* Turner, at 267. These include adopting camera angle, lighting, and image size standards to reduce the biasing impacts of appearing by video rather than in person. *Id*. at 269. Other recommendations include ensuring that a remote witness is subject to full-cross examination; is sufficiently able to be observed by the judge, jury, and defendant as they testify; and is not distracted by their environment or being coached off-camera during their testimony. *See id*. at 269. To accomplish the latter, the National Center for State Courts has noted that some judges are already requiring witnesses to assert under oath that no one else is in the room with them or to pan their camera around the room prior to testifying. *See* Nat. Ctr. for State Courts Joint Tech. Comm., *Managing Evidence for Virtual Hearings* (2020), at 4, *https://perma.cc/MC69-CSSK* (accessed Aug. 1, 2023).

{¶83} Not all of this happened here. On the positive side, the trial judge in Sanon's case created a specific record about what the courtroom half of the digital divide looked like. He described in detail where the screen depicting Seargeant Hagaman was positioned, its size, and the quality of the audio of Hagaman's voice. He ensured the parties and the jury could adequately see and hear Seargeant Hagaman on the screen.

{¶84} What was missing, however, was a description of Seargeant Hagaman's side of the computer. We do not know who, if anyone, was present in the room with Seargeant Hagaman during his testimony or if he had any notes or visual aids in his space that were outside the view of the Zoom camera. We also do not know whether the jury could see Hagaman's hands or otherwise fully assess his body language, which can be an important factor for determining whether a person is believable.

{¶85} Considering the overall circumstances, though, I have no doubt that the jury could adequately determine Hagaman's credibility and weigh the information he provided without those details. After all, Sanon's defense did not rise or fall based on Hagaman's testimony, and the jury ultimately acquitted him of the vast majority of the charges against him anyway. In fact, Hagaman should be commended for testifying at all when he was, according to the trial court, clearly not feeling well.

{¶86} But in other cases involving other witnesses, these missing details could be of critical importance. So critical, in fact, that two Supreme Court Justices from polar ends of the ideological spectrum found it hard to believe that remote video testimony by witnesses could meet the demands of the Confrontation Clause.

See supra note 4; *see also* Amendments to Fed.Crim.R. 26(b) (Apr. 29, 2002), at 2 (statement of Scalia, J.) ("Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.").

{¶87} They expressed this opinion with regard to the Supreme Court's rulemaking authority, not their adjudicatory authority, and, as a result, their statements do not bind us here. In fact, no authority explicitly compels the conclusion that the Confrontation Clause prohibits remote testimony in a jury trial, and thus I join the majority in overruling Sanon's assignment of error based on the Confrontation Clause. But, for the reasons I have stated, the question is both an important and a close one. In my opinion, the courts' resolution of this significant issue should be guided by the growing body of social science, some of which I have collected and cited here, that informs us of the status of our ongoing experiment in digitization.

Please note:

The court has recorded its own entry this date.