[Cite as *State v. Armstrong*, 2004-Ohio-5635.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2001-T-0120 and 2002-T-0071**
SHAWN ARMSTRONG,	:	
Defendant-Appellant.	:	October 22, 2004

Criminal Appeal from the Court of Common Pleas, Case No. 00 CR 274.

Judgment: Reversed and remanded.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos,* Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street., N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Margaret E. Amer Robey, 14402 Granger Road, Cleveland, OH 44137 (For Defendant-Appellant).

JUDITH A. CHRISTLEY, J.

{¶1} Appellant, Shawn Armstrong, appeals from a Trumbull County Court of Common Pleas jury verdict, finding him guilty of one count of aggravated murder, in violation of R.C. 2903.01(A), with a firearm specification, in violation of R.C. 2941.145. For the following reasons, we reverse appellant's conviction and remand this matter for further proceedings.

{¶2} The record discloses the following facts. On the evening of August 9, 1998, the victim, Brad McMillan ("McMillan"), and his sister, Tracy Robinson

("Robinson"), visited the Elk's Lodge in Warren Township, Ohio. Robinson was initially hesitant in allowing McMillan to go out because McMillan had previously served as a confidential informant for the Trumbull County Drug Task Force and was scheduled to give testimony in an upcoming drug trafficking case. Ultimately, McMillan persuaded Robinson to join him for a night out at the Elk's Lodge.

{¶3} The Elk's Lodge was located at 1919 Highland Avenue. Immediately adjacent and to the south of the Elk's Lodge was Cliff's Lounge. These two properties were separated by a small grass median. To the east and behind Cliff's Lounge was a small wooded area. Two blocks south of the Elk's Lodge was the Monument of Faith Church, which was positioned on the corner of Highland Avenue and Miller Street.

{¶4} While Robinson and McMillan were inside the Elk's Lodge, McMillan was informed that an unidentified man wanted to see him in the parking lot. McMillan left Robinson and went outside to the parking lot.

{¶5} Shortly after McMillan had left the club, Robinson went outside to check on him. Robinson found McMillan's body in the driver's seat of his car. He was dead with a bullet wound to the back of the head. Robinson immediately ran back into the Elk's Lodge and called 911 for emergency assistance.

{¶6} Sergeant Edward Anthony ("Sgt. Anthony"), of the Warren Township Police Department, was patrolling the area near the Elk's Lodge on the night of the shooting. As he drove eastbound onto Miller Street, Sgt. Anthony noticed an occupied burgundy Pontiac that was parked with its lights off at the Monument of Faith Church parking lot. He watched the suspicious vehicle turn on its headlights and make a right turn northbound on Highland Avenue. Sgt. Anthony followed the Pontiac by turning

right on Highland Avenue and radioed in the vehicle's license plate number. The Pontiac then turned into the parking lot of Cliff's Lounge. Sgt. Anthony continued northbound on Highland Avenue, still trying to obtain information on the suspicious vehicle. Before he obtained any information, he received a dispatch that a shooting had occurred at the Elk's Lodge.

{¶7} A short time later, Patrolman Michael Merritt ("Ptlm. Merritt") arrived at the crime scene with Skyler, a trained tracking dog. After speaking briefly with Sgt. Anthony, Ptlm. Merritt checked the scene for contamination and then gave the command to search. Once Skyler came to the back of the deceased's vehicle, he detected a fresh track and began to follow it. Skyler first headed east toward the wooded area behind Cliff's Lounge and then proceeded south. Eventually, Skyler ended his track at the Monument of Faith Church parking lot.

{¶8} Warren Township Police Lieutenant, Donald Bishop ("Lt. Bishop"), began the investigation by following up on the suspicious burgundy Pontiac which had been previously spotted in the church parking lot. Lt. Bishop learned that the burgundy Pontiac belonged to Ronald Peterson ("Peterson"), a Youngstown City police officer. Further investigation revealed that appellant had been staying at Peterson's home in Youngstown, Ohio, while Peterson was living with his parents in Warren. On August 10, 1998, appellant agreed to give a voluntary statement to Lt. Bishop.

{¶9} In his statement, appellant explained that he had borrowed Peterson's car on the night of the homicide to visit his own family in Warren. Appellant stated that he went to the Elk's Lodge around midnight, but did not enter the club due to the entrance fee. Instead, appellant parked the car at Cliff's Lounge and began to roll a joint of

marijuana. Appellant was about to smoke the joint when a man passing by informed him that there were undercover police officers nearby.

{¶10} At this time, appellant maintained that he drove Peterson's car to the Monument of Faith Church parking lot and started to smoke marijuana. Appellant acknowledged that he saw a police car heading eastbound down Miller Street towards Highland Avenue. Appellant then stated that he exited the church parking lot and drove northbound on Highland Avenue with the police officer directly behind him. He further explained that he took a right turn into the Elk's Lodge parking lot and the police officer continued northbound on Highland Avenue. Appellant asserted that when he pulled into the Elk's Lodge he heard someone scream, "Brad is dead." Without exiting the car, he claimed he then drove to the back of the club and drove out of the parking lot.

{¶11} Lt. Bishop continued his investigation by questioning Peterson and receiving his consent to search and tow his Pontiac. Peterson also surrendered an empty gun box that contained .45 caliber Speer Lawman ammunition. A casing recovered from the front seat of the victim's car matched this caliber and brand of ammunition. Lt. Bishop further discovered that on August 12, 1998, three days after the homicide, Peterson reported to the Youngstown City Police Department that his .45 caliber automatic pistol had been stolen from his residence.

{¶12} During the pendency of the investigation, Lance Pough ("Pough"), the individual against whom McMillan had been scheduled to testify as a confidential informant, and Pough's friend, Art Bell, were already incarcerated due to federal drug trafficking charges. While incarcerated, both Pough and Art Bell entered into various agreements with the prosecution relating to the McMillan homicide investigation. Pough

and Art Bell provided Detective Melanie Gambill ("Det. Gambill"), of the Warren City Police Department, with information regarding the murder. Specifically, Art Bell provided Det. Gambill with unsworn, out-of-court statements as part of his agreement, in which he confessed to his participation in the planning of the McMillan homicide. His statements also inculpated appellant as part of this murder-for-hire scheme. Ultimately, prior to appellant's trial, Art Bell was convicted in state court for his role in the McMillan homicide.

{¶13} Thereafter, the investigation effectively stalled until March 30, 2000, when an Austintown police patrolman stopped the car of Edrick Davis ("Davis") and observed a round of ammunition and a clip in plain view. The patrolman investigated and found a gun next to the clip. The gun was later identified as Peterson's missing weapon. Further evidence was gathered which ultimately linked appellant to the gun that was found in Davis' car.

{¶14} On May 9, 2000, appellant was indicted for one count of aggravated murder with specifications of aggravated circumstances and a firearm specification, in violation of R.C. 2903.01(A), R.C. 2929.04(A)(8), and R.C. 2941.145. Appellant was also indicted on one count of conspiracy to commit aggravated murder with a firearm specification, in violation of R.C. 2923.01(A)(1) and 2941.145. Before trial, the prosecution nolled the aggravated circumstances, and the trial court dismissed the conspiracy charge. As a result, appellant proceeded to a trial by jury on September 18, 2001, for one count of aggravated murder with a firearm specification.

{¶15} During trial, Pough and Art Bell testified as to their involvement with the homicide. Pough testified that he had agreed to pay Carlo Eggleston ("Eggleston")

$14,000 to have McMillan killed because McMillan was going to testify against Pough in a drug trafficking case. Eggelston was also a police officer with the Youngstown City Police Department and had been Peterson's partner. Pough testified that he had paid Eggleston $6,700 while in Art Bell's garage. Pough further stated he had given Eggleston the $6,700 that day, but knew none of the details surrounding the murder because, as he testified, "it was irrelevant to me really." Pough then testified that after Art Bell informed him of McMillan's death, Pough instructed Art Bell to "give the money to whoever is over there."

{¶16} During his direct and cross-examination, Art Bell developed memory problems concerning his previous unsworn statements to Det. Gambill. As a result of Art Bell's lack of recollection, the prosecutor read aloud a series of statements, previously made to Det. Gambill, by Art Bell. In those unsworn statements, Art Bell confessed to his own role in the murder-for-hire scheme and inculpated appellant. After each incriminating statement was read, Art Bell testified that he did not remember making the statements. At no time did he acknowledge or deny the substance of those statements.

{¶17} Kendra Bell, Art Bell's sister, testified that appellant visited the Bell family home on the day after the murder. Although she did not see any exchange of money, Kendra Bell testified that, at that time, Art Bell was there with an undisclosed amount of money.

{¶18} In relationship to the gun, the following convoluted trail of evidence was laid. Vincent Thomas ("Thomas"), a resident of the Westlake Housing Project in Youngstown, testified that, after the murder, Josh Miller ("Miller") had approached him at

his apartment in an attempt to purchase a gun. Thomas told Miller that he was not going to sell him a gun. At this time, a man outside of Thomas' apartment door approached Miller from behind and informed Miller that he had a gun for sale. Thomas then shut the door of his apartment. Lt. Bishop contacted Thomas and asked him to identify the man who approached Miller from an eight-man photo array. Thomas selected appellant's picture as the man who approached Miller regarding a gun for sale.

{¶19} Additional testimony at trial established that, subsequent to McMillan's death, Miller had come into possession of the .45 caliber revolver used in the murder. He ultimately sold the gun to Darrin Lane ("Lane"). Lane then sold it to Darryl Cooper ("Cooper"). Cooper sold the weapon to Davis, who was ultimately pulled over by the Austintown patrolman. Firearms expert, Michael Roberts ("Mr. Roberts"), testified that a bullet fragment recovered from McMillan's skull matched a bullet that was discharged from the .45 caliber revolver recovered from Davis' vehicle.

{¶20} Following the close of the case, the jury found appellant guilty of one count of aggravated murder, in violation of R.C. 2903.01(A), with a firearm specification, in violation of R.C. 2941.145. Appellant was sentenced to a prison term of twenty-three years to life.

{¶21} On October 10, 2001, appellant filed a motion for a new trial and a renewed motion for acquittal. A hearing on the motion for a new trial began on January 18, 2002, but was continued after Thomas unexpectedly invoked his Fifth Amendment privilege. The court gave appellant leave to amend the motion for a new trial, explaining that once the new motion was filed, a second hearing date would be set.

{¶22} Appellant filed a supplemental brief with affidavits on March 14, 2002, and the prosecution filed its response on April 10, 2002. On May 13, 2002, without a hearing, the trial court denied both appellant's motion for a new trial and his renewed motion for acquittal.

{¶23} Appellant filed a timely notice of appeal and now sets forth the following eleven assignments of error for our review:

{¶24} "[1] The trial court erred in admitting the identification testimony of Vincent Thomas in violation of defendant's state and federal right to due process.

{¶25} "[2] The trial court erred and abused its discretion by admitting substantial amounts of inadmissible hearsay at trial, thus depriving the defendant of his rights to due process of law and to confront witnesses.

{¶26} "[3] The trial court erred by preventing the defense from inquiring into Lt. Bishop's alleged threats and intimidation of Witnesses during the investigation of this case, thereby violating the defendant's rights to due process and to confront the witnesses against him.

{¶27} "[4] The trial court erred and abused its discretion by denying the defendant's motion in limine to exclude dog tracking evidence, thus denying the defendant's right to due process of law and to confront witnesses.

{¶28} "[5] The trial court erred by allowing a witness to testify as an expert on firearms identification without being qualified as an expert, and without the testimony passing the *Daubert* test, in violation of the defendant's right to due process and a fair trial.

{¶29} "[6] The trial court erred and abused its discretion in denying the defendant's motion for new trial and failing to complete the hearing on the motion, thus depriving the defendant of his right to due process of law.

{¶30} "[7] The defendant was denied his constitutional right to a fair trial and due process of law because of prosecutorial misconduct that unfairly prejudiced the defendant.

{¶31} "[8] The defendant was denied his constitutional right to effective assistance of counsel when his attorney failed to protect his rights at trial.

{¶32} "[9] The trial court erred in denying the defendant's rule 29 motion when the state failed to offer evidence sufficient to sustain a conviction.

{¶33} "[10] The jury's decision was not supported by sufficient probative evidence.

{¶34} "[11] The jury's verdict was against the manifest weight of the evidence."

{¶35} For the sake of clarity, we will discuss appellant's assignments of error out of order. Under his first assignment of error, appellant contends that the trial court erred by denying his motion to suppress the identification testimony of Thomas. Appellant maintains that the eight-man photo array used by the prosecution to obtain Thomas' identification of appellant was unduly suggestive and created a substantial likelihood of misidentification.

{¶36} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. On review, an appellate court must accept the trial

court's findings of fact if those findings are supported by competent, credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. After accepting such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met. Id.

{¶37} First, we note that even if the identification procedure contains notable flaws, this alone does not necessarily preclude the admissibility of the subsequent in-court identification. *State v. Moody* (1978), 55 Ohio St.2d 64, 67, citing *State v. Barker* (1978), 53 Ohio St.2d 135, 142-143. In order to suppress identification testimony, there must be "'a very substantial likelihood of irreparable misidentification.'" *State v. Jells* (1990), 53 Ohio St.3d 22, 27, quoting *Simmons v. United States* (1968), 390 U.S. 377, 384.

{¶38} Here, appellant claims that the procedure used by the police was unduly suggestive for the following reasons: (1) he was the only light skinned black man among the men depicted in the photos; (2) one of the photos depicted a man in a police uniform; and (3) one of the photos showed a man with a bald head. Further, appellant argues undue prejudice existed, as the photos included only suspects in the instant case.

{¶39} After careful examination, we find that the photo array used by the police was not unduly suggestive. Our review of the photo array shows that at least one of the other men actually had a similar, if not the same, skin tone as appellant. Even if appellant had the lightest complexion of the six men, the procedure still was not unduly suggestive because "'there was not such a significant difference in skin tones to make the distinction prejudicial.'" *State v. McDade* (Sept. 25, 1998), 11th Dist. No. 97-L-059,

1998 WL 682360, at 6, quoting *State v. Cox* (May 23, 1997), 11th Dist. No. 95-T-5279, 1997 Ohio App. LEXIS 2244, at 25. See, also, *State v. Johnson* (Sept. 24, 1999), 11th Dist. No. 97-T-0227, 1999 WL 778383, at 4. The eight photographs in the array all depict eight similar black males, who were roughly the same age, with short hair, unremarkable complexions, and facial hair.

{¶40} Appellant's contention that the photo array was unduly suggestive because only suspects were used is misguided. As stated previously, the linchpin of our review is whether the identification procedure employed was so impermissibly suggestive it gave rise to a substantial likelihood that the identification was unreliable. See, e.g., *Neil v. Biggers* (1972), 409 U.S. 188. The fact that only suspects were used as part of the photo array is irrelevant to the suggestiveness of the photos. It cannot be said that the use of suspects caused Thomas' identification to become unreliable. See, e.g., *Neil*; *McDade*. To the contrary, the physical characteristics of the eight men depicted in the photo array fail to demonstrate that Thomas based his identification upon the use of unduly suggestive photographs. *State v. Green* (1996), 117 Ohio App.3d 644, 652-653. See, also, *McDade*.

{¶41} Having carefully considered the record, we conclude that the photo array employed by the Warren Township Police Department was not unduly suggestive, and that the trial court did not err in overruling appellant's motion to suppress. Accordingly, because appellant has not demonstrated that the photo array was unduly suggestive, there is no need for this court to analyze the totality of the circumstances to determine the reliability of the identification testimony. Appellant's first assignment of error is without merit.

{¶42} Appellant's fourth assignment of error contends that the trial court erred by denying his motion in limine to exclude dog tracking evidence. Initially, appellant argues that the dog tracking evidence is inadmissible under Evid.R. 702, and relevant common law. Appellant maintains that in *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 147, the United States Supreme Court extended the parameters of expert witness testimony to include the testimony of a dog-handler. Accordingly, appellant submits that a dog-handler's testimony is only admissible if it satisfies the reliability requirements set forth in Evid.R. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579. Because these prerequisites were not established during the motion in limine hearing, appellant asserts that the trial court erred in admitting Ptlm. Merritt's dog tracking testimony

{¶43} At the outset, we note that appellant has effectively waived any error on appeal with respect to the trial court's denial of his motion in limine due to his failure to renew his objection at trial. It is well-settled under Ohio law that the granting of a motion in limine is not a final appealable order because such an order does not determine the ultimate admissibility of the evidence. See, e.g., *Stevens v. Provitt*, 11th Dist. No. 2002-T-0076, 2003-Ohio-7226, at ¶39. As a result, appellant was required to renew his objection to Ptlm. Merritt's testimony at trial to preserve such objection for appellate review. See, e.g., *State v. Grubb* (1986), 28 Ohio St.3d 199, paragraph two of the syllabus.

{¶44} That being said, we further recognize that the foundational prerequisites which are required before a dog-handler's testimony will be admitted, act as a sufficient gate-keeper to exclude unreliable dog tracking evidence. Ohio is one of a number of

states which allows the admission of evidence of trailing by a tracking dog. *State v. Weber* (1997), 124 Ohio App.3d 451. "[B]efore evidence of dog trailing may be admitted, the training and reliability of the dog, the qualifications of the person handling the dog, and the circumstances surrounding the trailing by the dog must be shown." *State v. Bridge* (1989), 60 Ohio App.3d 76, 78. If the foregoing foundational requirements are demonstrated by the dog-handler, the dog-tracking evidence may be properly admitted.

{¶45} As mentioned previously, Ptlm. Merritt gave a substantial amount of testimony regarding his qualifications as a dog-handler, and the training and reliability of Skyler. Moreover, Ptlm. Merritt more than adequately described the circumstances surrounding Skyler's track. Ptlm. Merritt testified that he checked for contamination of the crime scene and initiated Skyler's search near the back passenger seat and rear of the vehicle. Ptlm. Merritt began the search in this area because crime scene evidence demonstrated that the shooter was in the back of McMillan's car. At the rear of the vehicle, Skyler signaled that he had found a track and followed the track to the Monument of Faith Church parking lot.

{¶46} It is clear that the necessary foundational requirements to admit dog-tracking evidence were satisfied. Thus, for this additional reason, the trial court did not err in admitting Ptlm. Merritt's testimony.

{¶47} Appellant also argues that Ptlm. Merritt's testimony is inadmissible because it precludes appellant from effective cross-examination. In support of this contention, appellant states that Ptlm. Merritt's testimony was necessarily based on the opinion and behavior of Skyler and, therefore, was not subject to cross-examination.

{¶48} As stated previously, Ohio has an extended history of accepting a dog-handler's testimony. See, e.g., *State v. Dickerson* (1907), 77 Ohio St. 34. Furthermore, it is obvious from the record that appellant was able to vigorously cross-examine Ptlm. Merritt regarding the possibility of error during Skyler's track. Thus, this portion of appellant's fourth assignment of error is not well-taken.

{¶49} Based upon the foregoing analysis, appellant waived his objection to the admissibility of Ptlm. Merritt's testimony and has failed to demonstrate that the trial court erred in admitting such testimony. Appellant's fourth assignment of error is without merit.

{¶50} Appellant's fifth assignment of error contends that the trial court erred by failing to exclude Mr. Roberts' expert witness testimony, matching the bullet recovered from Peterson's gun to a bullet fragment retrieved from McMillan's body. Appellant contends that Mr. Roberts' testimony did not satisfy the *Daubert* reliability factors.

{¶51} As an initial matter, we note that appellant failed to object to Mr. Roberts' testimony during trial. Under Evid.R. 103(A), error may not be predicated upon a ruling which admits evidence unless "a timely objection or motion to strike appears of record stating the specific ground of objection[.]" "An enduring principle of appellate review is that a party waives an error that it fails to preserve through an objection at trial." *State v. Aldridge* (1997), 120 Ohio App.3d 122, 154. Thus, appellant has waived this error on appeal.

{¶52} Assuming arguendo that appellant had stated a proper objection and preserved this issue for appeal, it is clear that Mr. Roberts' testimony was reliable and properly admitted. A trial court's ruling as to the admission or exclusion of expert

testimony is within its broad discretion and will not be disturbed absent an abuse of that discretion. *State v. Tomlin* (1992), 63 Ohio St.3d 724, 728. An abuse of discretion is more than an error of law or judgment; rather, it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *State v. Bresson* (1990), 51 Ohio St.3d 123, 129.

{¶53} As stated previously, Evid.R. 702 governs the admissibility of expert witness testimony, to wit:

{¶54} "A witness may testify as an expert if all of the following apply:

{¶55} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶56} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶57} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

{¶58} "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

{¶59} "(2) The design of the procedure, test, or experiment reliably implements the theory;

{¶60} "(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

{¶61} Mr. Roberts' testimony clearly established his qualifications as an expert in the science of general ballistics and tool-mark analysis. Furthermore, his testimony dealt with a complex area of expertise which a lay person would commonly have no knowledge. Accordingly, the requirements of Evid.R. 702(A) and (B) have been satisfied, and our review is focused solely upon the reliability of Mr. Roberts' testimony pursuant to Evid.R. 702(C).

{¶62} In *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 611, the Supreme Court of Ohio adopted the following four reliability factors first articulated in *Daubert*: (1) whether the theory or technique has been tested; (2) whether it has been subjected to peer review; (3) whether there is a known or potential rate of error; and (4) whether the methodology has gained general acceptance. See, also, *Daubert* at 593-594.

{¶63} Although the following factors were determined to be useful in testing a theory or a procedure's reliability, the reliability requirement of Evid.R. 702(C) is a "threshold determination," focusing on the scientific evidence and its underlying principles, not on the accuracy of the ultimate conclusions. *Daubert* at 595; *Miller* at 611-612. "[T]he reliability requirement of *Daubert* should not be used to exclude all evidence of questionable reliability, nor should a court exclude such evidence simply because the evidence is confusing." *Miller* at 614. Instead, the "'ultimate touchstone is helpfulness to the trier of fact, and with regard to reliability, helpfulness turns on whether the expert's "technique or principle [is] sufficiently reliable so that it will aid the jury in reaching accurate results."'" Id., quoting *DeLuca v. Merrell Dow Pharmaceuticals, Inc.* (C.A.3, 1990), 911 F.2d 941, 956, quoting 3 Weinstein's Evidence (1988) 702-35, Section 702[3].

{¶64} At trial, Mr. Roberts' testimony centered upon tool-mark analysis. He explained that tool-mark analysis consisted of a comparison of small ridges engraved in a bullet, after it had been fired, to the markings within the gun barrel. Mr. Roberts stated that each gun barrel has a unique set of grooved ridges within the barrel. Due to these barrel grooves, a bullet is engraved with distinct markings which allow it to be matched to a specific gun.

{¶65} Mr. Roberts' testimony at trial established that the procedures he employed during his tool-mark analysis did not negate its reliability. Specifically, he stated that the suspect weapon was test fired on numerous occasions and he compared the test fired bullets with the bullet recovered from McMillan. The overall reliability of the tool-mark analysis was further bolstered based upon Mr. Roberts' testimony describing the use of a water tank to reduce damage or abrading to the comparison bullets.

{¶66} The testimony given by Mr. Roberts confirms that the tool-mark analysis technique is sufficiently reliable to aid the jury in reaching accurate results. We need not determine whether the results of the tool-mark analysis were accurate to Mr. Roberts' ultimate conclusion that the bullet fragment recovered from McMillan was fired from Peterson's gun. The accuracy of Mr. Roberts' ultimate conclusion is a matter best left for the jury to determine after weighing the evidence presented. As to the threshold determination of admissibility, however, the trial court properly admitted Mr. Roberts' expert witness testimony. Appellant's fifth assignment of error is without merit.

{¶67} Under his second assignment of error, appellant contends that the trial court erred by allowing the prosecution to use the prior unsworn statements of Art Bell,

not only for impeachment purposes, but also as substantive evidence. Thus, appellant asserts that his rights to due process of law and confrontation were violated.

{¶68} As previously indicated, the prosecutor called Art Bell as a witness on direct-examination. Throughout his direct-examination, Art Bell consistently expressed uncertainty and a lack of recollection as to his prior, unsworn statements concerning the factual events of the murder for hire scheme. Consequently, the prosecutor requested that Art Bell be declared a hostile witness so he could be impeached with these earlier statements to Det. Gambill. The trial court took a short recess to discuss the matter with counsel in chambers. When trial resumed, the jury was informed that Art Bell's testimony would be continued at a later time.

{¶69} Subsequently, Art Bell took the stand for direct-examination by the prosecution. There is no indication that Art Bell was ever declared a hostile witness. During direct-examination, the prosecutor proceeded to read individual portions of Art Bell's earlier statements to Det. Gambill. Following the reading of each statement, the prosecutor asked Art Bell whether he remembered giving the specific statement. Art Bell continuously answered that he did not remember giving the statements.

{¶70} We first note that appellant failed to object either to the court's failure to declare Art Bell a hostile witness, to the prosecutor's reading of Art Bell's prior statements, or to the absence of any limiting instruction relating to Art Bell's prior statements. Therefore, our examination of appellant's contentions will be made pursuant to a plain error analysis. Crim.R. 52(B).[1]

1. Crim.R. 52(B) expressly states, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

{¶71} That being said, the majority of the statements read by the prosecutor were merely cumulative of prior testimony given by Pough. However, of significance on appeal is the reading of those portions of Art Bell's prior statements to Det. Gambill that directly connected appellant to the murder-for-hire scheme. The following passages demonstrate these relevant portions of testimony:

{¶72} "Q: Do you remember stating in response to a question I had asked you, 'Do you know who, who if anyone had anything to do with [McMillan] being killed?'

{¶73} "And do you remember stating, 'Oh, Lance Pough, uh Carlo Eggleston and [appellant]'?

{¶74} "A: No. I don't remember.

{¶75} "Q: You don't remember making that statement?

{¶76} "A: No.

{¶77} "Q: And do you remember in reply to this question, 'Okay those are the three individuals that you have knowledge participated in some form in the death of Brad McMillan'?

{¶78} "And your answer being, 'Yes'?

{¶79} "***

{¶80} "Q: You don't remember saying that?

{¶81} "A: No.

{¶82} "***

{¶83} "Q: My question to you. 'Well let me ask you this, when, when you give the money to [appellant], why do you think you're giving it to [appellant]?'

{¶84} "***

{¶85} "'I guess he owed, he just, [inaudible], owe some money so I guess [appellant] got something to do with it, that's why I given him the money. More likely he got;' do your remember telling me that?

{¶86} "A: No.

{¶87} "***

{¶88} "Q: 'And you also believe that [appellant] must have had something to do with [McMillan's murder] because he picked up the money after the fact'?

{¶89} "'Right[.]'

{¶90} "Q: Do you remember saying that?

{¶91} "A: No."

{¶92} At no time during direct or cross-examination did Art Bell provide additional substantive testimony which directly linked appellant to the murder of McMillan. On cross-examination, Art Bell again testified that he had no recollection of making any of the specific statements to Det. Gambill.[2]

{¶93} With a proper foundation and a proper limiting instruction, the prosecution could have used Art Bell's prior unsworn statements for impeachment purposes under Evid.R. 613(B). Unfortunately, no such foundation was laid, and no such instruction was given. Evid.R. 613(B) states:

{¶94} "Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:

2. The testimony of events which Art Bell did remember was cumulative of the testimony of Kendra Bell and Pough. Art Bell's actual testimony merely placed appellant at the Bell's house the day after the murder and established that he gave appellant a substantial amount of money. Art Bell, however, failed to provide direct testimony as to the reason for this payment.

{¶95} "(1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;

{¶96} "(2) The subject matter of the statement is one of the following:

{¶97} "(a) A fact that is of consequence to the determination of the action other than the credibility of a witness;

{¶98} "(b) A fact that may be shown by extrinsic evidence under Evid.R. 608(A), 609, 616(A), 616(B) or 706;

{¶99} "(c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence."

{¶100} Despite the mandates of Evid.R. 613(B), Evid.R. 607(A) states, "[t]he credibility of a witness may be attacked by any party *except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage*." (Emphasis added.)

{¶101} Here, Art Bell was called as the prosecution's witness. As stated previously, Art Bell was never declared a hostile witness. Nevertheless, it was the prosecution that used Art Bell's unsworn statements in an apparent attempt to impeach him. Therefore, as required by Evid.R. 607, the prosecution was required to demonstrate surprise and affirmative damage.

{¶102} In the case sub judice, the prosecutor informed the trial court that it had not spoken with Art Bell since he had given his statements. The prosecutor further

stated that it had no reason to believe that Art Bell would be unable to testify in accordance with his prior statements. Moreover, there is no evidence showing that the prosecution was aware that Art Bell would testify that he could not recollect the substance of his prior statements. As a result, the prosecution established that the testimony provided by Art Bell was a surprise. See, e.g., *State v. Davie* (Dec. 27, 1995), 11th Dist. No. 92-T-4693, 1995 Ohio App. LEXIS 6064, at 83-84

{¶103} Notwithstanding the establishment of surprise, the prosecution must also demonstrate that Art Bell's testimony affirmatively damaged its case. "Affirmative damage can be shown if the party's own witness' testimony contradicts, denies, or is harmful to that party's trial position." *Davie* at 84. A non-harmful neutral answer, such as "I don't know" or "I can't remember[,]" does not show affirmative damage, as such answers fail to contradict or deny a prior statement. See, e.g., *State v. Keenan* (1993), 66 Ohio St.3d 402, 412. See, also, Staff Note to Evid.R. 607, ("Requiring a showing of affirmative damage is intended to eliminate an 'I don't remember' answer or a neutral answer by the witness as a basis for impeachment by a prior inconsistent statement.")

{¶104} As established by the aforementioned portions of Art Bell's testimony, at no time did he contradict or deny his inculpatory statements. Instead, he merely testified that he could not remember making the statements. This type of neutral answer fails to establish the affirmative damage necessary for the prosecution to impeach its own witness under Evid.R. 607.

{¶105} The dissent relies upon *State v. Wilbon*, 8th Dist. No. 82934, 2004-Ohio-1784, at ¶26; *State v. Baker* (2000), 137 Ohio App.3d 628, 651; *State v. Hartman* (Apr. 5, 1999), 12th Dist. No. CA98-06-040, 1999 Ohio App. LEXIS 1476, at 16-17; and *State*

v. Marsh (Sept. 30, 1985), 12th Dist. No. CA84-11-080, 1985 Ohio App. LEXIS 7189, at 13, in an attempt to demonstrate that the requisite foundation for affirmative damage was established by Art Bell's lack of recollection regarding his prior inculpatory statements. Such reliance is misplaced.

{¶106} Neither *Wilbon*, *Baker*, *Hartman*, nor *Marsh* required a showing of affirmative damage. In each case, the prosecution *was not* attempting to impeach its own witness.[3] Instead, these various holdings only indicate that lack of memory is a proper foundation to impeach a witness with extrinsic evidence per Evid.R. 613(B). Evid.R. 607 was not applied in these cases; thus, the respective holdings of each case are irrelevant to the establishment of affirmative damage.

{¶107} Here, the failure to declare Art Bell a hostile witness and the failure to establish affirmative damage rendered Evid.R. 607 inapplicable. As a result, Art Bell's prior statements could not be admitted for impeachment purposes. Under no theory or rule were these out-of-court statements admissible as substantive evidence.

{¶108} Moreover, we are not persuaded that any error with respect to the improper admission of Art Bell's statements under Evid.R. 613(B) can be considered harmless. Art Bell's prior statements were the only submissions which directly linked appellant as the hit-man in the murder-for-hire scheme. See, e.g., *State v. Lewis* (1991), 75 Ohio App.3d 689, 697. Although there was some broad-brush, circumstantial evidence which connected appellant to the murder, without Art Bell's prior statements, there was no other direct link between him and the murder-for-hire scheme.

3. In *Wilbon* and *Marsh*, the witnesses of issue were called as the court's witnesses pursuant to Evid.R. 614. *Wilbon* at ¶24; *Marsh* at 9. In *Hartman* and *Baker*, the witnesses of issue were called by the defendants and impeached with prior inconsistent statements by the prosecutors on cross-examination. *Hartman* at 15; *Baker* at 651.

{¶109} Even if the error in admitting Art Bell's prior statements was somehow construed as harmless error, the court's failure to issue a limiting instruction on the use of impeachment evidence was fatal and plain error. Statements admitted under Evid.R. 613(B) require a limiting instruction to inform the jury that the prior statements were only to be considered for impeachment purposes. See, e.g., Evid.R. 105. The absence of such an instruction created further prejudice as it allowed the jury to consider Art Bell's prior statements as substantive evidence when determining appellant's guilt.

{¶110} As a result, the prosecutor's reading of Art Bell's statements violated appellant's constitutional right to confront a witness under the Sixth Amendment of the United States Constitution. The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him."[4] "[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him." *Pointer* at 406-407.

{¶111} The instant case is analogous to *Douglas v. Alabama* (1965), 380 U.S. 415. In *Douglas*, two individuals, Loyd and Douglas, were accused of assault with intent to murder and were tried separately. Loyd was tried first and found guilty. Subsequently, at Douglas' trial, Loyd was called as a witness against Douglas. Because an appeal was pending from his earlier conviction, Loyd invoked his right against self-incrimination and refused to answer any questions. As a result, the prosecution was permitted to treat Loyd as a hostile witness. Under the guise of

4. The United States Supreme Court has held that a defendant's right to confront witnesses is extended against the states under the Fourteenth Amendment of the United States Constitution. *Pointer v. Texas* (1965), 380 U.S. 400, 404.

refreshing Loyd's recollection, the prosecutor proceeded to read Loyd's purported confession in the presence of the jury. Specifically, the prosecutor would read a small portion of Loyd's confession and would ask, "[d]id you make that statement?" Each time, Loyd asserted his right against self-incrimination and refused to answer. Various statements contained within Loyd's confession were relevant to Douglas' trial as they named Douglas as the person who fired a shotgun blast which wounded the victim. *Douglas* at 416-417.

{¶112} Ultimately, in *Douglas*, the United States Supreme Court held that Douglas' inability to cross-examine Loyd denied him the right of cross-examination secured by the Confrontation Clause. Id. at 419. The Court expressly stated:

{¶113} "Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. *** Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him." (Internal citations omitted.) Id.

{¶114} Based upon the foregoing, the Court reasoned that "effective confrontation of Loyd was possible *only if Loyd affirmed the statement as his*." (Emphasis added.) Id. at 420. Because Loyd refused to acknowledge the statements as his, Douglas was precluded from any useful cross-examination. Id. The Court reversed Douglas'

conviction, concluding that "[t]his case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.'" Id., quoting *Namet v. United States* (1963), 373 U.S. 179, 187.

{¶115} In the instant case, Art Bell was convicted for his role in the McMillan homicide prior to appellant's trial. During appellant's trial, the prosecutor read various portions of Art Bell's prior statement which inculpated appellant. Although Art Bell did not assert his right against self-incrimination, he did continuously fail to affirm or confirm the inculpatory statements as his. Due to Art Bell's failure to acknowledge the statements as his, appellant was denied the ability to effectively cross-examine Art Bell on these inculpatory statements. Thus, the prosecutor's reading of the statements in this manner violated the Confrontation Clause under the Sixth Amendment of the United States Constitution.

{¶116} The dissent incorrectly maintains that appellant's right to confront the witness was not violated. We acknowledge that Art Bell's cross-examination testimony admitted that he, at some point in time, spoke with Det. Gambill and that during this discussion appellant was mentioned. However, at no time did Art Bell assert ownership or "disavow" making these inculpatory statements.

{¶117} The holding of *Douglas* was not based upon Loyd's invocation of the Fifth Amendment. To the contrary, the holding was grounded solely upon Loyd's refusal to

assert ownership of those statements which directly inculpated Douglas. Id. at 419-420. Without Loyd's assertion of ownership, it was impossible for Douglas to cross-examine Loyd on the inculpatory statements. Id. The holding of *Douglas* in no way limits its application to the invocation the Fifth Amendment.

{¶118} As a result, regardless of Art Bell's presence and testimony at trial, appellant's right to confrontation required Art Bell to be subjected to "*full and effective* cross-examination." (Emphasis added.) *California v. Green* (1970), 399 U.S. 149, 158. Art Bell's failure to claim the inculpatory prior statements as his own prohibited a full and effective cross-examination on these statements.

{¶119} "[T]he [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Crawford v. Washington* (2004), 124 S.Ct. 1354, 1370.

{¶120} The procedural guarantees of the Confrontation Clause were clearly violated in the instant case. To hold otherwise, would allow the prosecution to circumvent the ultimate purpose of the Confrontation Clause by reading inculpatory prior statements into evidence for substantive purposes. Further, it would allow the jury to consider evidence, which could only be offered for impeachment purposes, for substantive purposes.

{¶121} This error is of such magnitude that it requires the reversal of appellant's conviction and a new trial. As mentioned previously, Art Bell's prior statements comprised the only direct link between appellant and the murder-for-hire scheme. The record before us demonstrates that the remaining evidence, standing alone, was inconclusive or suspect circumstantial evidence. Therefore, Art Bell's statements clearly formed the core part of the prosecution's case against appellant.

{¶122} The improper introduction of these inculpating statements, standing alone, prevented appellant's confrontation of the witness against him. We cannot ignore this error. Therefore, although appellant failed to bring this error to the attention of the trial court, the improper admission of Art Bell's statements results in plain error. See, e.g., Crim.R. 52(B).

{¶123} More importantly, even assuming that Evid.R. 613(B) applied, and appellant's right to confront the witness had not been violated, Art Bell's statements could only be used for impeachment purposes. As mentioned previously, the court's failure to issue a limiting instruction allowed the jury to consider the inculpatory statements read by the prosecution as substantive evidence of appellant's guilt. The absence of a limiting instruction, standing alone, requires a reversal, as Art Bell's inculpatory statements were the only direct evidence linking appellant to the murder-for-hire scheme.

{¶124} Appellant's second assignment of error is with merit. Accordingly, we are required to reverse appellant's conviction and remand this matter for a new trial.

{¶125} Based upon the foregoing analysis, appellant's first, fourth, and fifth assignments of error are without merit. However, appellant's second assignment of

error is with merit, thereby rendering his remaining assignments of error moot. Accordingly, we reverse appellant's conviction and remand this matter for further proceedings consistent with our opinion.

DONALD R. FORD, P.J., concurs,

DIANE V. GRENDELL, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

{¶126} I concur in the majority's determination that appellant's first, fourth, and fifth assignments of error lack merit. However, I respectfully dissent from the majority's application of a plain error analysis to appellant's second assignment of error and decision to reverse appellant's conviction based on that assignment. For the reasons discussed below, appellant's second and sixth through eleventh assignments of error are without merit, and appellant's conviction for aggravated murder should be affirmed.

{¶127} As the majority correctly notes, appellant's counsel failed to make a timely objection to the reading of Art Bell's proferred statements. The analysis of appellant's second assignment of error could and should stop there. The majority, however, pursues a Sixth Amendment "confrontation" analysis to find plain error. Both the majority's analysis and conclusion are misplaced and incorrect.

{¶128} The majority erroneously relies on what it calls an analogous case, *Douglas v. Alabama* (1965), 380 U.S. 415, to find a violation of appellant's right to

confront and cross-examine Art Bell in this case. In *Douglas*, Loyd, the other perpetrator (the Art Bell figure in that prosecution), invoked his Fifth Amendment right when called to testify against Douglas. Id. at 416. The prosecution was then allowed to read Loyd's purported prior confession and ask Loyd "did you make that statement?" Loyd asserted his right against self-incrimination and refused to answer. Id. The confession implicated Douglas. Because Loyd invoked his fifth amendment right not to answer, Douglas could not cross-examine Loyd. For that reason, The U.S. Supreme Court reversed Douglas' conviction. Id. at 419-420.

{¶129} The primary focus behind the U.S. Supreme Court's ruling in *Douglas* is not "ownership," as the majority opines. Rather, the U.S. Supreme Court, quoting its prior ruling in *Mattox v. United States* (1895), 156 U.S. 237, 242-243, framed the "primary object" of the Sixth Amendment's Confrontation Clause providing an accused "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Douglas*, 380 U.S. at 419.

{¶130} The facts and circumstances in *Douglas* are not analogous to the instant case. In the present case, Art Bell disavowed making the statements read by the prosecution. This did not prevent appellant's counsel from cross-examining Art Bell. In fact, appellant's counsel cross-examined Art Bell and elicited contradictory statements from him and testimony that was beneficial to appellant. Appellant clearly had the opportunity to confront and cross-examine Art Bell. Thus, appellant's trial counsel was able to test Art Bell's recollection and hold him up to the jury so that the jury could

decide whether he was worthy of belief. In *Douglas*, the accused's counsel did not have this opportunity because the co-perpetrator invoked his Fifth Amendment right against self-incrimination. A plain error analysis based on *Douglas* is, therefore, *not* warranted.

{¶131} In support of his second assignment of error, appellant contends that the trial court erred in allowing the prosecution to impeach its own witness, Art Bell, with his prior statement.

{¶132} "The credibility of a witness may be attacked by *any* party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage." Evid.R. 607(A) (emphasis added). "Surprise can be shown if the testimony is materially inconsistent with the prior written or oral statements and counsel did not have reason to believe the witness would recant when called to testify." *State v. Davie* (Dec. 27, 1995), 11th Dist. No. 92-T-4693, 1995 Ohio App. LEXIS 6064, at *83-*84, quoting *State v. Stearns* (1982), 7 Ohio App.3d 11, 15. The question of surprise is one within the broad discretion of the trial Court. *Davie*, 1995 Ohio App. LEXIS 6064, at *84-*85.

{¶133} In this case, the prosecution informed the trial court that it had not spoken with Art Bell since he gave his pre-trial statement. The prosecution further stated that it had no reason to believe that Art Bell would not testify in accordance with his prior statement. Moreover, the record is void of any evidence showing that the prosecution was aware that Art Bell would testify in this manner. Thus, the prosecution established that the testimony provided by Art Bell satisfied the surprise element of Evid.R. 607(A). See *State v. Stearns* (1982), 7 Ohio App.3d 11, 15, (citations omitted) ("Surprise can be shown if the testimony is materially inconsistent with the prior written or oral statements

and counsel did not have reason to believe the witness would recant when called to testify.").

{¶134} Notwithstanding the establishment of surprise, the prosecution must also demonstrate that Art Bell's testimony affirmatively damaged its case. "Affirmative damage can be shown if the party's own witness' testimony contradicts, denies, or is harmful to that party's trial position." *Davie*, 1995 Ohio App. LEXIS 6064, at *84 (citation omitted). A neutral answer, such as "I don't know," however, does not demonstrate the requisite affirmative damage. See, e.g., *State v. Keenan* (1993), 66 Ohio St.3d 402, 412. Accordingly, if a witness merely responds to a direct-examination question with a neutral answer, affirmative damage has not been established and the witness may not be impeached with a prior statement pursuant to Evid.R. 607(A).

{¶135} Art Bell's direct-examination testimony consisted of answers such as "I can't remember that" and "I don't remember that." Thus, Art Bell repeatedly claimed a lack of memory about the events covered in his prior statement. In fact, the majority correctly stated, "Art Bell consistently expressed uncertainty and a lack of recollection as to his prior, unsworn statements concerning the factual events of the murder for hire scheme."

{¶136} "[W]hen a witness claims a lack of memory regarding the events described in a prior statement, the prior statement is considered inconsistent." *State v. Wilbon*, 8th Dist. No. 82934, 2004-Ohio-1784, at ¶26 (citation omitted); see, also, *State v. Baker* (2000), 137 Ohio App.3d 628, 651 (citation omitted); *State v. Hartman* (Apr. 5, 1999), 12th Dist. No. CA98-06-040, 1999 Ohio App. LEXIS 1476, at *16 (citation omitted). Considering that the prosecution already established the requisite surprise element of

Evid.R. 607(A), as discussed above, the proper foundation for the admissibility of Art Bell's prior statement was laid when Art Bell, on direct examination, repeatedly claimed a lack of knowledge regarding the events as contained in his prior statement. See Evid.R. 607(A), *Davie*, 1995 Ohio App. LEXIS 6064, at *84, *Wilbon*, 2004-Ohio-1784, at ¶33; *Hartman*, 1999 Ohio App. LEXIS 1476, at *16-*17; *State v. Marsh* (Sept. 30, 1985), 12th Dist. No. CA84-11-080, 1985 Ohio App. LEXIS 7189, at *12-*13 (citation omitted). Thus, his prior statement was admissible. Evid.R. 607(A).[5]

{¶137} Moreover, even if a witness' testimony during direct-examination fails to establish the requisite affirmative damage, if a witness's testimony during cross-examination demonstrates affirmative damage, "[a]ny error in permitting the prosecutor to impeach testimony by his own witness[, who initially on direct-examination gave neutral answers,] was cured by the later testimony affirmatively denying [his prior statement]." *Stearns*, 7 Ohio App.3d at 16. In other words, "[t]he order in which the testimony [is] adduced is not significant, so any original error became harmless beyond a reasonable doubt." Id.

{¶138} In this case, even if Art Bell did not provide contradictory testimony during his direct-examination, it is clear from the record that he *did* give contradictory testimony on cross-examination. During cross-examination, Art Bell testified that although he had

5. *State v. Wilbon*, 8th Dist. No. 82934, 2004-Ohio-1784; *State v. Baker* (2000), 137 Ohio App.3d 628; *State v. Hartman* (Apr. 5, 1999), 12th Dist. No. CA98-06-040, 1999 Ohio App. LEXIS 1476, *State v. Marsh* (Sept. 30, 1985), 12th Dist. No. CA84-11-080, 1985 Ohio App. LEXIS 7189; stand for the proposition that when a witness claims a lack of knowledge regarding events described in his or her prior statement, the prior statement is considered inconsistent. *Wilbon*, 2004-Ohio-1784, at ¶33; *Baker*, 137 Ohio App.3d at 651; *Hartman*, 1999 Ohio App. LEXIS 1476, at *16-*17; *Marsh*, 1985 Ohio App. LEXIS 7189, at *12-*13 (citation omitted). As such, the statement would satisfy the affirmative damage requirement of Evid.R. 607(A). *State v. Davie* (Dec. 27, 1995), 11th Dist. No. 92-T-4693, 1995 Ohio App. LEXIS 6064, at *84 ("Affirmative damage can be shown if the party's own witness' testimony *contradicts*, denies, or is harmful to that party's trial position.") (emphasis added). Thus, contrary to the majority's contention, these cases are relevant to the issue of whether Art Bell's prior statement was admissible pursuant to Evid.R. 607(A).

given money to appellant on behalf of Pough, he had no idea of the purpose for which the payment was made. This testimony clearly contradicts his pre-trial statement in which he asserted that he thought the payment to appellant had something to do with the murder-for-hire scheme which resulted in McMillan's death. Thus, even if Art Bell's direct examination did not provide the requisite affirmative damage, the introduction of Art Bell's prior statement during direct-examination would constitute harmless error since Art Bell made contradictory statements during cross-examination. Id.

{¶139} Appellant further argues in support of his second assignment of error that certain portions of Art Bell's pre-trial statement included inadmissible hearsay statements made by Pough and Eggleston. Therefore, appellant maintains that the trial court erred by allowing these statements to be read by the prosecution during trial. Appellant's argument is without merit.

{¶140} "A statement is not hearsay if *** [t]he statement is offered against a party and is *** a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." Evid. R. 801(D)(2)(e). "[T]he statement of a co-conspirator is not admissible pursuant to Evid. R. 801(D)(2)(e) until the proponent of the statement has made a prima facie showing of the existence of the conspiracy by independent proof." *State v. Carter*, 72 Ohio St.3d 545, 550, 1995-Ohio-104. To establish independent proof of a conspiracy, the prosecution must prove: (1) the existence of a conspiracy; (2) the defendant's participation in the conspiracy; (3) the declarant's participation in the conspiracy; (4) that the statement was made during the course of the conspiracy; and (5) that the statement was made in furtherance of the conspiracy. *Baker*, 137 Ohio App.3d at 653 (citation omitted).

{¶141} The existence of a conspiracy was affirmatively established by Pough's testimony. Pough testified that he paid Eggleston to kill McMillan. Appellant's participation in the conspiracy was demonstrated by evidence of his receipt of the money from Art Bell, on behalf of Pough, for his involvement with McMillan's murder. Art Bell also testified that he informed Pough of McMillan's death. Further evidence at trial demonstrated that Art Bell was involved with a payment of money to appellant believed to be for the murder of McMillan. Thus, the evidence clearly established Art Bell's involvement in the conspiracy. The alleged hearsay statements that appellant refers to were made by Pough and Eggleston during the course of the conspiracy. Moreover, these statements displayed the amount and manner of payment that would be used for the murder-for-hire scheme. Thus, these statements were in furtherance of the conspiracy.

{¶142} The foregoing confirms that Pough and Eggleston's statements, which were included in Art Bell's pre-trial statement, meet the prerequisites of Evid. R. 801(D)(2)(e). As a result, these statements are not hearsay.

{¶143} Appellant's second assignment of error is without merit.

{¶144} Under his sixth assignment of error, appellant contends that the trial court erred in denying his motion for a new trial before holding a hearing. Appellant maintains that this arbitrary and capricious action caused appellant prejudice and denied him the right of due process.

{¶145} Appellant filed a proper and timely motion for a new trial. On January 18, 2002, a hearing was held and appellant presented testimony from Giles and Thomas. When Thomas unexpectedly asserted his Fifth Amendment right, appellant requested a

continuance of the hearing so he could amend and supplement his motion for a new trial. The trial court granted appellant a continuance and explained that once appellant amended his motion, a new hearing date would be scheduled.

{¶146} On March 14, 2002, appellant filed a supplemental motion for a new trial which included the affidavits of Kendra Bell, Giles, and Tisdale. Each affidavit detailed various instances of purported police misconduct and threats, allegedly resulting in Thomas' invalid identification of appellant. After reviewing the supplemental motion and affidavits, the trial court, without a hearing, denied appellant's motion for a new trial.

{¶147} A trial court does not abuse its discretion when it overrules a motion for a new trial that is not properly supported by affidavits as required by Crim. R. 33(C). *State v. Hargrove*, 11th Dist. No. 2000-A-0068, 2002-Ohio-2944, at ¶52 (citation omitted). The decision of whether or not to hold an evidentiary hearing on a defendant's motion for a new trial is within the sound discretion of the trial court. *State v. Tomlinson* (1997), 125 Ohio App.3d 13, 20 (citation omitted); *State v. Stewart*, 4th Dist. No. 02CA29, 2003-Ohio-4850, at ¶10 ("A trial court has broad discretion to determine whether a motion for a new trial merits an evidentiary hearing."). See, also, *State v. Smith* (1986), 30 Ohio App.3d 138, 139 ("[a] ruling on a motion for new trial on the ground of newly discovered evidence is within the discretion of the trial court").

{¶148} To prevail on a motion for a new trial based upon newly discovered evidence pursuant to Crim. R. 33(A)(6), the defendant must establish that the new evidence: "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) *** could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not

merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350 (citation omitted).

{¶149} With respect to Kendra Bell's affidavit, the trial court's denial of appellant's opportunity to cross-examine Kendra Bell regarding allegations of police misconduct was in error. Nevertheless, such error was harmless beyond a reasonable doubt because her testimony was superfluous and added no additional substantive evidence. Furthermore, Kendra Bell's affidavit specifically stated that Lt. Bishop attempted to coerce testimony to the effect that she "saw" Art Bell give appellant money. At trial, however, Kendra Bell merely testified that she saw appellant at the Bell house on the day after the murder and that she saw Art Bell with money. Clearly, Kendra Bell's affidavit is not evidence creating a strong probability that a different result would have been reached had a second trial been granted. Thus, the trial court did not abuse its discretion by denying appellant's motion for a new trial, without a hearing, based on Kendra Bell's affidavit.

{¶150} In its judgment entry denying appellant's motion for a new trial, the trial court determined that Giles's affidavit lacked credibility. Giles's affidavit maintained she was present when Lt. Bishop allegedly threatened Thomas with criminal charges if he did not identify appellant as the man he had seen attempting to sell Miller a gun. The trial court found the affidavit of Giles highly suspect. The trial court cited to the fact that, while Giles claimed that she witnessed Lt. Bishop pressure Thomas into selecting appellant's photograph while they were at the Helleck Street residence, three officers offered contradicting affidavits stating that Thomas was shown the photograph only at

the Task Force Offices without the presence of Giles. Therefore, the trial court correctly found that "the affidavit lacks credibility and does not support any claim asserted by [appellant] in his motion."

{¶151} To support a motion for new trial, the newly discovered evidence must create a strong probability that a different outcome would result at another trial. *Dayton v. Martin* (1987), 43 Ohio App.3d 87, 90; see, also, *Hawkins*, 66 Ohio St.3d at 350. Evidence that, if believed, would establish a defendant's innocence, may not be discredited on its face. *State v. Wright* (1990), 67 Ohio App.3d 827, 831. Faced with such evidence, a trial court "must afford the movant an opportunity to present evidence at a hearing in support of the motion and affidavit before electing whether to grant or to deny the motion." Id. at 831-832. However, "[e]vidence which merely impeaches or contradicts evidence in the former trial is *insufficient* to support a motion for a new trial." Id. at 831 (emphasis added), citing *State v. Petro* (1940), 148 Ohio St. 505, 507-508; see, also, *Hawkins*, 66 Ohio St.3d at 350.

{¶152} In this case, Giles's affidavit would not establish appellant's innocence. Rather, Giles's affidavit, without more, merely impeaches Thomas' identification testimony. Thomas never recanted his previous trial testimony and identification of appellant as the man who approached Miller to sell him a gun. It is evident that Giles's affidavit is being offered in an attempt to impeach Thomas' trial testimony linking appellant to the murder weapon. This evidence does not establish appellant's innocence, nor does it create a strong probability that appellant would be found not guilty if a new trial were granted. Since this evidence merely impeaches Thomas' trial

testimony, the trial court did not abuse its discretion in denying appellant's motion for a new trial without a hearing based on Giles's affidavit.

{¶153} The trial court found Tisdale's affidavit to be "pure hearsay and her testimony *** wholly inadmissible in a court of law." A careful review of Tisdale's affidavit supports the trial court's determination that the contents of the affidavit are inadmissible hearsay. Because her statements would be inadmissible during both a hearing on a motion for a new trial and a second trial, such evidence *cannot* create a strong probability that appellant would be found not guilty if a new trial were to be granted. Consequently, the trial court did not abuse its discretion in denying appellant's motion for a new trial without a hearing based on Tisdale's affidavit.

{¶154} Appellant further argues that his motion for a new trial was improperly denied based upon cumulative errors made by the trial court during the trial. Appellant restates the following alleged errors in support of this contention: 1) forbidding Kendra Bell to testify as to Lt. Bishop's alleged police misconduct; 2) hearsay statements admitted during Art Bell's testimony; and 3) supplemental affidavits supplied with his motion for a new trial. As discussed above, the trial court did not err in its disposition of each of the purported errors. Thus, even if viewed cumulatively, the trial court did not abuse its discretion by denying appellant's motion for a new trial without a hearing.

{¶155} Appellant's sixth assignment of error is without merit.

{¶156} Appellant's seventh assignment of error contends that he was denied his constitutional right to a fair trial and due process of law due to prosecutorial misconduct that unfairly prejudiced him. Appellant alleges that the prosecution engaged in misconduct for its failure to disclose evidence that Thomas had failed three polygraph

tests regarding his identification testimony. Additionally, appellant contends that the prosecution knowingly elicited false identification testimony from Thomas during trial because of its knowledge of the polygraph results.

{¶157} "The standard of review regarding a claim of prosecutorial misconduct based upon failure to disclose evidence is whether the nondisclosure was material to the finding of guilt based upon the totality of the record, and whether there is a reasonable likelihood that the undisclosed material would have affected the guilty verdict." *State v. Frederick*, (Nov. 8, 1999), 12th Dist. Nos. CA98-10-094 and CA98-11-101, 1999 Ohio App. LEXIS 5244, at *13-*14 (citation omitted); see, also *State v. Johnston* (1988), 39 Ohio St.3d 48. It is axiomatic that the prosecution must have knowledge of the evidence it purportedly failed to disclose to substantiate a claim of prosecutorial misconduct based upon a failure to disclose evidence. Furthermore, pursuant to Crim. R. 33(C), a motion for a new trial based upon claims of prosecutorial misconduct "must be sustained by affidavits showing their truth."

{¶158} In this case, evidence of the results of Thomas' alleged polygraph test originates from Giles's affidavit submitted with appellant's motion for new trial. Appellant has failed to set forth sufficient evidence demonstrating prosecutorial misconduct. The statements in Giles's affidavit pertaining to the alleged polygraph tests are inadmissible hearsay. Giles does not claim to have witnessed the administration of the alleged polygraph tests or to have seen the results. Instead, her testimony reiterates statements purportedly made by Thomas regarding the polygraph tests results. Moreover, Giles's affidavit fails to establish that the prosecution was aware that Thomas had actually taken these alleged polygraph tests or was aware of the results of

the alleged polygraph tests. Thus, appellant's claim of prosecutorial misconduct is not sustained by Giles' affidavit since it fails to prove the allegations of a polygraph test. Because appellant failed to show sufficient evidence regarding Thomas' three separate polygraph tests, his subsequent claim that the prosecution engaged in misconduct by knowingly eliciting false identification testimony is also without support.

{¶159} Appellant's seventh assignment of error is without merit.

{¶160} Under his eighth assignment of error, appellant contends that throughout the trial his defense counsel failed to protect his various rights, thereby denying him effective assistance of counsel. This argument lacks merit.

{¶161} To establish ineffective assistance of counsel, appellant must demonstrate "(1) deficient performance by counsel, i.e., that, in light of all the circumstances, counsel fell below an objective standard of reasonable representation, and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's unprofessional errors, the proceeding's result would have been different." *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247 at ¶132 (citation omitted).

{¶162} Appellant first argues that counsel failed to render effective assistance regarding the admission of dog tracking evidence in the following manner: (1) by failing to mention Evid. R. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579,[6] in his motion in limine; (2) by failing to hire an expert witness to testify about dog tracking at a *Daubert* hearing and, if necessary, at trial; and (3) by failing to request a jury instruction that caution should be used when considering dog tracking evidence.

6. In *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 1998-Ohio-178, the Supreme Court of Ohio adopted the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, regarding "the question of when expert scientific testimony is relevant and reliable." *Miller*, 80 Ohio St.3d at 611.

{¶163} Patrolman Merritt's dog-tracking testimony was not expert witness testimony under Evid. R. 702 and *Daubert*. Therefore, appellant's counsel did not render ineffective assistance of counsel by failing to cite to Evid. R. 702 or *Daubert*, which both apply to expert testimony, in his motion in limine.

{¶164} Counsel's decisions not to hire an expert witness to testify about dog tracking evidence and not to request a jury instruction cautioning the jury about dog tracking evidence are both viewed as trial strategy. See *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, at ¶90 (citations omitted); *State v. Griffie*, 74 Ohio St.3d 332, 333, 1996-Ohio-71 (citations omitted). It is well-established under Ohio law that even a questionable trial strategy does not compel a finding of ineffective assistance of counsel. *State v. Smith*, 87 Ohio St.3d 424, 441, 2000-Ohio-450; *State v. Clayton* (1980), 62 Ohio St. 2d 45, 49. "[R]eviewing courts must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners." *Samatar*, 152 Ohio App.3d at ¶88.

{¶165} In the case at bar, counsel may have felt that his vigorous cross-examination of Patrolman Merritt was more than sufficient to display the possible weaknesses of the dog-tracking evidence. Accordingly, sound trial strategy dictates that counsel avoid opening the door to further testimony regarding dog tracking, which could have further damaged appellant's case. Moreover, the trial court instructed the jury that they were to determine the credibility of each witness and weigh their testimony accordingly. Again, counsel may have felt that the foregoing instruction was not only sufficient, but also simplistic so as not to confuse the jury. As a result, counsel's assistance was not ineffective in this respect.

{¶166} Appellant also maintains he was provided ineffective assistance of counsel due to his counsel's failure to object to Mr. Robert's tool-mark analysis testimony on the grounds that it did not satisfy Evid. R. 702 and *Daubert* and to his counsel's failure to hire a firearms identification expert.

{¶167} Since Mr. Robert's testimony was properly admitted pursuant to Evid. R. 702 and *Daubert*, appellant's counsel did not provide ineffective assistance of counsel for failing to object to this properly admitted testimony. In addition, counsel's decision not to hire a firearm identification expert is a matter of trial strategy and will not support a claim of ineffective assistance of counsel. *Samatar*, 2003-Ohio-90, at ¶90 (citations omitted). Appellent's counsel, therefore, did not render ineffective assistance of counsel by either failing to object to Mr. Robert's testimony or by failing to hire a firearm identification expert.

{¶168} Appellant's eighth assignment of error is without merit.

{¶169} Appellant's ninth assignment of error asserts that the trial court erred by denying his motion for acquittal under Crim. R. 29. Specifically, appellant maintains that the prosecution failed to present sufficient evidence to show that appellant fired the bullet that killed McMillan or to demonstrate that appellant acted in complicity with another party that fired the bullet that killed McMillan.

{¶170} Pursuant to Crim.R. 29, a motion for judgment of acquittal should be granted "if the evidence is insufficient to sustain a conviction." In other words, a trial court "shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978),

55 Ohio St.2d 261, syllabus. The same standard of review that is applied to a challenge to the sufficiency of evidence is also applied to a denial of a motion for acquittal. *State v. Ready* (11th Dist. 2001), 143 Ohio App.3d 748, 759. Thus, a trial court's denial of a motion for acquittal must be sustained if, "after reviewing 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." Id., citing *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶171} Appellant was indicted and convicted of aggravated murder under R.C. 2903.01(A). Thus, the prosecution was required to present sufficient evidence demonstrating that appellant purposely, and with prior calculation and design, caused the death of another. Id. Prior calculation and design is not defined in the Revised Code, but is considered to be more than just an instantaneous decision to kill; it encompasses planning "a scheme designed to carry out the calculated decision to cause the death." *State v. Jones*, 91 Ohio St.3d 335, 348, 2001-Ohio-57 (citation omitted).

{¶172} During trial, the evidence established that McMillan was shot at point blank range in the back of the head. His murder occurred while he was sitting in the driver's seat of his car in the Elk's Lodge parking lot. Eyewitness testimony described a man fleeing from the back seat of McMillan's car immediately following the murder. The foregoing evidence, when viewed in a light favorable to the prosecution, is sufficient to establish that McMillan's death was caused purposefully.

{¶173} Furthermore, the evidence presented at trial placed appellant at the crime scene and at the Monument of Faith Church parking lot. Further evidence

demonstrated that appellant was staying at Peterson's home at the time of the homicide. Mr. Robert's testimony confirmed that Peterson's gun was the weapon used in McMillan's death. Clearly, this established that appellant had access to Peterson's gun. Thomas identified appellant as the person who had approached Miller to buy a gun. Additional evidence confirmed that, at one time, Miller had come into possession of Peterson's gun. Art Bell testified that Eggleston and Pough had hatched a murder-for-hire scheme to have McMillan killed. The testimony further established that, after Art Bell informed Pough that McMillan had been killed, Pough instructed him to pay appellant a large sum of money.

{¶174} Viewing the foregoing evidence in a light most favorable to the prosecution, it is evident that the prosecution presented a sufficient amount of evidence so that a rational trier of fact could infer that the appellant committed the offense beyond a reasonable doubt. Thus, the trial court did not err in denying appellant's motion to acquit pursuant to Crim. R. 29(A).

{¶175} Appellant's ninth assignment of error is without merit.

{¶176} Appellant's tenth assignment of error argues that his conviction was not supported by sufficient evidence tending to show that either appellant or someone with whom he acted in complicity with shot McMillan. Specifically, appellant argues that, because there was no direct evidence implicating appellant, his conviction was not supported by sufficient probative evidence.

{¶177} Although there is no direct evidence that confirms appellant participated in the murder-for-hire scheme, there was a substantial amount of circumstantial evidence, as discussed above, demonstrating appellant's involvement in McMillan's murder.

"[T]he rule in Ohio is that circumstantial evidence carries the same weight as direct evidence." *State v. Collymore,* 8th Dist. No. 81594, 2003-Ohio-3328, 2003 Ohio App. LEXIS 3049, at ¶34 (citation omitted). The strength of the circumstantial evidence against appellant is more than compelling. Therefore, there was sufficient probative evidence presented to allow the jury to find appellant guilty beyond a reasonable doubt. Appellant's tenth assignment of error lacks merit.

{¶178} Under his eleventh and final assignment of error, appellant contends that the jury's verdict was against the manifest weight of the evidence. Again, appellant argues that the jury convicted appellant of aggravated murder despite a lack of evidence establishing that he either fired the fatal shot or that he acted in complicity with the individual who did so. Appellant concludes that the jury's verdict, when compared to the evidence presented, demonstrates that the jury lost its way and, thus, a new trial is necessary.

{¶179} In reviewing a manifest weight argument, we must conduct an "examination of the entire record and a determination of whether the evidence produced attains the high degree of probative force and certainty required of a criminal conviction." *State v. Getsy*, 84 Ohio St.3d 180, 193, 1998-Ohio-533. "The question is whether there is *substantial* evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonably doubt." Id. at 193-194, citing *State v. Eley* (1978), 56 Ohio St.2d 169, at syllabus. In other words, we must "determine whether 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. Tibbetts*, 92 Ohio St.3d 146, 163, 2001-Ohio-132 (citations omitted).

{¶180} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, at ¶86 (citation omitted). An appellate court is to engage in a limited weighing of the evidence introduced at trial in order to resolve whether the state appropriately carried its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52 (Cook, J., concurring). Accordingly, a reviewing court must defer to the factual findings of the trier of fact as to the weight to be given the evidence and the credibility of the witnesses. *State v. DeHaas* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶181} A voluminous amount of testimony and evidence was set forth showing that appellant was involved in the murder-for-hire scheme. Again, as discussed above, while there was no direct evidence of appellant's involvement, the circumstantial evidence presented at trial supports the jury's determination of appellant's guilt beyond a reasonable doubt.

{¶182} Appellant's eleventh assignment of error is without merit.

{¶183} Appellant's eleven assignments of error are without merit. Therefore, appellant's conviction should be affirmed.