[Cite as *State v. Teets*, 2017-Ohio-7372.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

State of Ohio, : Case No. 16CA3

Plaintiff-Appellee, :

v. : DECISION AND JUDGMENT ENTRY

Trevor A. Teets, :

Defendant-Appellant. : **RELEASED: 08/08/2017**

APPEARANCES:

Kort Gatterdam and Erik P. Henry, Carpenter Lipps & Leland LLP, Columbus, Ohio, for appellant.

Judy C. Wolford, Pickaway County Prosecuting Attorney, Circleville, Ohio, for appellee.

Sadler, J.

{¶1} Defendant-appellant, Trevor A. Teets, appeals from the judgment entry of the Pickaway County Court of Common Pleas finding appellant guilty of murder with specification, involuntary manslaughter with specification, and domestic violence arising from the death of his ex-girlfriend. For the following reasons, we affirm the decision of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶2} On February 6, 2015, a Pickaway County Grand Jury indicted appellant on one count of murder, in violation of R.C. 2903.02(A), with a firearm specification, one count of voluntary manslaughter, in violation of R.C. 2903.03(A), with a firearm specification, one count of involuntary manslaughter, in violation of R.C. 2903.04(B), with

a firearm specification, and one count of domestic violence, in violation of R.C. 2919.25(A). Appellant entered pleas of not guilty.

{¶3} Prior to trial, appellant filed a motion to determine whether he was competent to stand trial and a motion for leave to plead not guilty by way of insanity. The trial court ordered an evaluation of competency and sanity through Netcare Forensic Center ("Netcare"), and a hearing was held on the matter. At the hearing, defense counsel indicated that appellant did not agree with the results of the Netcare evaluation and would not stipulate to the report, and requested another opinion. The trial court asked defense counsel to "specifically, in writing, indicate to [the court] what it is that you have issues with with respect to the [Netcare] report" and stated that the trial court would take it under advisement. (Tr. at 13.) Appellant filed a motion for a second examination, asserting that appellant is entitled to a hearing, pursuant to R.C. 2925.371, and that an examination and testimony by an "independent expert" is necessary for that hearing. (Mot. for Examination by Independent Expert at 1.) The trial court held a second hearing on competency during which the Netcare expert testified regarding his report. By decision and entry dated August 28, 2015, the trial court found appellant competent to stand trial and denied appellant's request for a second evaluation of competency. In doing so, the trial court noted that, under Ohio case law, a defendant's dissatisfaction with the result of an examination of competency does not automatically give him the right to an independent evaluation by the examiner of his choice and that appellant is not indigent and could have presented testimony from another examiner but elected not to do so.

{¶4} On November 16, 2015, plaintiff-appellee, State of Ohio, believing the evidence did not support a sufficient reason to instruct the jury on voluntary

manslaughter, moved to dismiss that count of the indictment. The trial court granted the motion, and the remainder of the case proceeded to a jury trial that same day.

{¶5} Appellee commenced its case-in-chief by calling Ariana Smith as an eye-witness. Smith testified that she knew appellant through work and that appellant had indicated in some text messages to her that he had issues with his ex-girlfriend, Alicia Salyers, who had moved out of their apartment but remained on the lease. Smith had met Salyers once while at work. Smith was in the apartment with appellant at about 1:45 p.m. on Sunday, February 1, 2015, when Salyers arrived to drop off some rent money and give a key back to appellant. Salyers and appellant had a conversation about rent, in which Smith heard appellant say he wanted money and Salyers reply she did not have all of it, and appellant ask for the key. After about two to three minutes, Smith exited the apartment to address problems with her car, which was about four or five vehicles away from the entrance to the apartment. Smith opened her hood to check her car's oil and otherwise tended to her car for approximately ten minutes. At that point, according to Smith, she saw appellant walk out of the apartment, head to Salyers' car, and proceed to hit the driver's side window of Salyers' car with a shotgun. Salyers came out of the apartment and walked around appellant. Within a few seconds of appellant banging the shotgun against Salyers' car window, Smith walked toward appellant but did not make it past her own driver's side door before she heard the shotgun go off and saw Salyers fall to the ground. Smith testified that from where she was standing she saw more of Salyers, who was taller than appellant, and she did not see appellant lift the shotgun to shoot. After the shot, appellant backed up a little bit, dropped the gun, and went into the apartment. Smith walked over to Salyers and called 911. The 911 call recording was

played for the jury. In the call, Smith states that a girl has just been shot, and, in response to the question "[w]ho shot who," Smith names appellant as the shooter and states "[t]hey were fighting and he shot her." (Tr. at 122.)

{¶6} On cross-examination, Smith testified that she was aware appellant had guns in the apartment upstairs, and to the best of her knowledge, he had not moved the guns downstairs prior to Salyers coming over. Smith added that appellant's brother was also in the living room when Salyers arrived at the apartment. She described the conversation between Salyers and appellant as starting out calmly but that Salyers indicated she was not going to give the key to the apartment back to appellant, and, at some point, Smith felt uncomfortable enough with the conversation to leave the apartment. Smith said she was checking her car and text messaging when she saw appellant come out of the apartment with the shotgun in his hands and Salyers follow "[r]ight after" him. (Tr. at 135.) Smith testified that she did not hear any yelling or fighting at that point in time but agreed with the defense attorney's characterization that "they were pretty damn mad at each other" when appellant was hitting Salyers' car window with the butt of the shotgun. (Tr. at 136.) Smith clarified that Salyers walked past appellant between the two cars and turned back toward appellant, facing the apartment. Smith believed Salyers was approximately a couple feet away from appellant when they were standing between the two cars. Smith confirmed that appellant had the shotgun but that she did not see his hands, did not see him transfer the weapon's position, and did not see Salyers reach for the gun.

{¶7} On redirect, when asked whether she tried to walk over and stop appellant, Smith testified that she did not get very far and instead only took a few steps toward

appellant. Smith testified that on the same day as the shooting, she provided a written statement to police about what had happened, and she did recall that in the written statement she said she walked over to try to stop appellant. Smith read the written statement to police out loud in front of the jury.

{¶8} Appellee then called Sara Hempstead, a police officer for the Village of Ashville Police Department. Hempstead testified that she was dispatched to appellant's apartment at approximately 2:00 p.m. on February 1, 2015, on a report of shots fired and was the first officer to arrive at the scene. When she got out of her cruiser, appellant was standing at the front door of the apartment. According to Hempstead, appellant walked directly and calmly toward Hempstead and "[b]efore [she] could say anything to him he held his hands straight out in front of him, put his wrists together and stated, 'take me to prison, I killed her.' " (Tr. at 151-52.) Hempstead put appellant in handcuffs, passed him to another officer who had arrived at the scene, and proceeded to where Salyers' body was located between the cars. She observed a shotgun lying on the ground a couple feet from Salyers. Hempstead checked Salyers for signs of life and then secured the crime scene. About 20 minutes after her arrival, it started to drizzle rain, which turned to steady rain throughout the remainder of her time there. On cross-examination, Hempstead testified that about 3:30 p.m., Detective Phil Roar, an investigator for the city of Circleville Police Department, arrived at the scene and stated that he was instructed to place tarps over the firearm and the body.

{¶9} Dr. John Ellis, Pickaway County Coroner, testified to being called to the scene and finding a deceased female, Salyers, lying in the parking lot with what appeared to be a gunshot wound to her head. At some point, Dr. Ellis rolled Salyers to get a better

look at her injuries. Dr. Ellis was concerned about the weather but testified that he did not think evidence had been compromised. He requested an autopsy at a nearby county coroner's office with expertise to conduct a complete autopsy and received a copy of that report. Based on his observations at the scene and the autopsy report, Dr. Ellis completed a coroner's report, which determined, based on a reasonable degree of certainty, the cause of death in Salyers' case was a gunshot wound to the head.

{¶10} Todd Fortner, a special agent with the Ohio Attorney General's Office, Bureau of Investigation ("BCI"), testified to assisting the city police department with investigating a suspected homicide. According to Fortner, he advised Roar on the phone that it was best to cover some of the evidence to protect them from the elements. Fortner arrived at the scene around 4:15 p.m. Once there, he conducted an initial assessment, including completing a schematic of the area, and began processing and photographing the scene. Fortner identified the weapon involved as a Mossberg, Model 935 semi-automatic 12-gauge shotgun, which holds three shells. Fortner collected two shells from the shotgun and located one fired-shot shell casing on the ground in the parking lot to the right of the shotgun. Fortner observed a key fob and keys lying next to Salyers and testified that detectives were able to ascertain the keys belonged to Salyers. Fortner additionally executed a search warrant for appellant's apartment.

{¶11} On cross-examination, Fortner testified that he could not tell the direction of blood splatter from the shotgun wound impact and did not observe any obvious defensive injuries such as wounds to the hands or arms. Fortner agreed that the shotgun was wet, which possibly could wash away any fingerprints or DNA evidence that might be on the weapon and preclude testing. Defense counsel asked what testing was done as a part of

the investigation, focusing in particular on gunshot residue and blood splatter, including whether blood tests were conducted on appellant's clothing. Fortner testified that tests were done on the weapon but was not sure whether he swabbed the weapon for potential touch DNA and testified that appellant's clothing tested positive for Salyers' blood.

{¶12} On redirect, Fortner testified that although he was not able to determine directionality based on blood splatter, he formed an opinion of the direction of the shot based on the location of Salyers, the gun, the fired-shot shell casing, and pellets. Appellee then asked Fortner to identify for the record a report from the DNA section of the BCI laboratory ("BCI report") regarding several items of appellant's clothing and the shotgun. Fortner read the conclusion of the BCI report and noted that Salyers' blood was present on appellant's shirt and that no DNA profile was found on the trigger or inside the barrel of the shotgun, which he stated is not unusual. On cross-examination, defense counsel asked Fortner more about the BCI report. Fortner testified that he is not a forensic scientist and did not do any of the testing but stated, based on the report, he could say with certainty that presumption, as well as conclusionary, testing was conducted.

{¶13} Detective Phil Roar of the Circleville Police Department testified to receiving a call that a shooting occurred and responding to the scene. Roar called in BCI and the coroner, spoke to Hempstead, and helped to further secure the area. When asked whether he had ever made any contact with appellant, Roar responded that in the Pickaway County Sheriff's Office he sat down with appellant and read him his rights. Appellant indicated that he wanted an attorney, and, therefore, the interview stopped. Roar confirmed that no statement was gained from appellant. On cross-examination,

Roar testified that he did not believe they ever covered the gun. Roar noted that Salyers had some black powder marks and possible bruising in the neck and on her fingers on her left hand.

{¶14} Dispatcher Travis Adkins, a corporal with the Pickaway County Communications Center, testified that on February 1, 2015 at about 2:00 p.m., he answered a phone call from appellant on the regular, non-emergency line. A recording of that call was played for the jury. In it, appellant states: "Hi! I live at * * * and I just killed somebody." (Tr. at 212.) When asked what he meant by that statement, appellant responded, "I shot 'em," then identifies the victim as Salyers and states "she's my ex-girlfriend and we got in a fight, you know. So I have mental issues and she pushed me to the edge and I snapped. * * * There's a lot of people here. I'm going crazy. I killed her. I'm getting close to my breaking point, nobody would help me." (Tr. at 213-14.) Appellant explains on the call that Salyers lived with him until they got in a fight and she moved out, and again repeats "[s]he's dead. I shot her in the head." (Tr. at 215.)

{¶15} Thereafter, appellee introduced exhibits, including the recording of Smith's 911 call, the recording of appellant's call to police, the coroner's report, the lab report from BCI, a photograph of the shotgun with Salyers' covered body visible between the cars, a photograph of Salyers' entire body between the cars, a close up of Salyers between the cars, a front view of Salyers, and several photographs of the shotgun and shells. Appellee agreed that it would not seek to admit Smith's written statement to police. Appellee then rested its case. Appellant moved for a Crim.R. 29 judgment of acquittal, which the trial court denied. Appellant then called Dr. Ellis back to the stand.

{¶16} Dr. Ellis confirmed that Salyers was 5'7" and 220 pounds. Dr. Ellis testified that the stippling on Salyers' face was consistent with a gunshot from a very close proximity but not touching the skin. He explained that the shot entrance was located on the right side of Salyers' face. Specifically, "the shotgun charge pellets went from the front of her face out the back, and then [from her] left to right" in an upward, instead of straight, direction. (Tr. at 230.) Dr. Ellis agreed that his findings would be consistent with a shot from "somewhere below." (Tr. at 230.) Dr. Ellis further confirmed that Salyers had an injury to her left hand consistent with shotgun pellet damage. She also had suet on her hand.

{¶17} Thereafter, the defense rested. Appellant requested a voluntary manslaughter instruction. The trial court denied appellant's request, finding that no evidence showed Salyers did anything to cause sufficient serious provocation to justify the use of deadly force. Neither party lodged objections to the jury instructions.

{¶18} The jury found appellant guilty of all charges. The trial court merged the involuntary manslaughter and domestic violence counts with the murder count and sentenced appellant to prison for 15 years to life on the murder count with a mandatory 3 additional consecutive years on the gun specification, for a total of 18 years to life. Appellant filed a timely appeal to this court.

II. ASSIGNMENTS OF ERROR

{¶19} Appellant presents five assignments of error:

> [1.] APPELLANT'S RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966) WERE VIOLATED WHEN EVIDENCE OF

APPELLANT'S POST-*MIRANDA* SILENCE WAS ADMITTED INTO EVIDENCE DURING THE STATE'S CASE-IN-CHIEF.

[2.] THE ERRONEOUS ADMISSION OF EVIDENCE DEPRIVED APPELLANT OF DUE PROCESS AND OF A FAIR TRIAL CONTRARY TO THE UNITED STATES AND OHIO CONSTITUTIONS.

[3.] THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS AND OF A FAIR TRIAL CONTRARY TO THE U.S. AND OHIO CONSTITUTIONS BY FAILING TO CHARGE THE JURY ON VOLUNTARY MANSLAUGHTER.

[4.] TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

[5.] THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF CONVICTION BASED ON INSUFFICIENT EVIDENCE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.

III. DISCUSSION

{¶20} For clarity of discussion, we will consider appellant's assignments of error out of order. We begin by reviewing appellant's second assignment of error.

A. Admission of Evidence and Confrontation Clause Issue (Second Assignment of Error)

{¶21} Under the second assignment of error, appellant contends the trial court erred in admitting: (1) cumulative, repetitious, and prejudicial photographs of the deceased; (2) permitting Smith to read her written statement without any proper

foundation; and (3) in admitting and permitting testimony regarding a DNA lab report offered through a non-expert witness who did not conduct the testing and did not author the report.

{¶22} Generally, an appellate court reviews a trial court's admission or exclusion of evidence for an abuse of discretion. *State v. Boyd*, 4th Dist. No. 09CA14, 2010-Ohio-1605, ¶ 27. However, because at trial appellant did not object to the admission of evidence challenged here, he has waived all but plain error review on appeal. *State v. Hall*, 4th Dist. No. 13CA3391, 2014-Ohio-2959, ¶ 32. *See also State v. Smith*, 4th Dist. No. 15CA3686, 2016-Ohio-5062, ¶ 74 (applying plain error analysis to confrontation clause issue that defendant did not object to at trial). "An alleged error is plain error only if the error is 'obvious,' and 'but for the error, the outcome of the trial clearly would have been otherwise.' " *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 108, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002), and *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph two of the syllabus. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

1. Admitting Photographs of the Deceased

{¶23} "When considering the admissibility of photographic evidence under Evid.R. 403, the question is whether the probative value of the photographic evidence is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. Morales*, 32 Ohio St.3d 252, 257 (1987); *State v. White*, 4th Dist. No. 03CA2926, 2004-Ohio-6005, ¶ 51. Thus, "a trial court may reject an otherwise admissible photograph which, because of its inflammatory nature, creates a danger of prejudicial impact that

substantially outweighs the probative value of the photograph as evidence. Absent such danger, the photograph is admissible." *Morales* at 257.

{¶24} A trial court does not commit plain error in admitting a gruesome crime scene photograph if, for example, the photograph is probative of intent or helps to illustrate the manner and circumstances of the victim's death, including providing a perspective of the victim's wounds. *Lang* at ¶ 140, 142. *See*, *e.g.*, *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶ 52 (finding trial court did not commit plain error in admitting nine photographs depicting a deceased victim, including showing the same wounds from different angles or distances, because the photographs helped the jury appreciate the nature of the crimes, illustrated testimony, and by portraying the wounds helped to prove the defendant's intent and the lack of accident or mistake); *White* at ¶ 52 (finding trial court did not err in admitting photographs of the victim at the crime scene that showed pieces of human tissue and other matter where the photographs displayed how her body was positioned and helped the jury to understand how the victim's head must have been oriented at the time the gun fired). Furthermore, a trial court does not err by allowing the prosecutor to publish certain images multiple times, where the prosecution is "reasonably employing the images to illustrate its argument and facilitate witness testimony." *State v. Johnson*, 144 Ohio St.3d 518, 2015-Ohio-4903, ¶ 60.

{¶25} Here, during its case-in-chief, appellee presented a total of ten photographs from the scene of the crime. Appellant takes issues with four of those photographs: Exhibits 1, 2, 5, and 6. Exhibit 1 is a photograph depicting a shotgun lying partially on a sidewalk in front of two parked cars and a white sheet presumably covering a body located between the cars. Aside from a corner of what appears to be jeans, a body is not

discernable underneath the sheet. The ground and cars appear wet. Appellee presented Exhibit 1 to Smith, Hempstead, Fortner, and Roar. Exhibit 2 is a photograph depicting the top half of Salyers' body without a sheet, lying on her right side in a pool of blood next to a dark car with keys on the ground next to her hands. Her left arm is wrapped across her body toward the ground, and her ring finger on her left hand appears partially grey. Appellee presented Exhibit 2 to Smith. Exhibit 5 is a photograph depicting the full view of Salyers' body without a sheet lying in a pool of blood between the two cars. The grey marking on her hand is visible in the photograph, as well as a police evidence marker located beyond her legs at what appears to be the base of the curb. Appellee presented Exhibit 5 to Hempstead, Dr. Ellis, and Fortner. Exhibit 6 is a photograph depicting a view of the top half of Salyers' body, apparently still at the crime scene, but positioned flat on her back so that her head wound is partially visible. The far right side of Salyers' face, from her temple to her chin, appears to be severely injured with much blood and what appears to be brain tissue visible beneath her on that side and below her body. Both appellee and appellant presented Exhibit 6 to Dr. Ellis.

{¶26} Exhibit 1, in which Salyers' body is not visible underneath the white cover and depicts the body in relation to the shotgun and cars, is not gruesome and was properly admitted. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, ¶ 21. As to Exhibits 2, 5, and 6, photographs which depict Salyers' uncovered body, each photograph shows something the other does not. Each photograph is a different perspective of Salyers' body, the position of her within the crime scene, and the head wound. As such, Exhibits 2, 5, and 6 were not cumulative or repetitive to each other. *State v. Campbell*, 90 Ohio St.3d 320, 345 (2000). Furthermore, the photographs at issue help to illustrate the

manner and circumstances of Salyers' death and are probative of whether appellant acted purposely. In fact, defense counsel utilized the most disturbing photograph, Exhibit 6, in eliciting testimony from Dr. Ellis regarding the directional path of the gunshot in an attempt to undermine the element of specific intent. Finally, although appellee submitted several of the photographs to multiple witnesses, our review of the transcript confirms that the photographs facilitated and illustrated the testimony of those witnesses. *Johnson*. Considering all the above, we find that the probative value of the photographs at issue is not substantially outweighed by the danger of prejudice to appellant. As a result, the trial court did not err, let alone commit plain error, in admitting Exhibits 1, 2, 5, and 6.

2. Permitting Smith to Read Her Prior Written Statement to the Jury

{¶27} Appellant argues that under Evid.R. 607(A), appellee did not make a showing of surprise and affirmative damages before attacking Smith, appellee's own witness, with what appellant characterizes as a prior inconsistent statement and did not fit the exceptions under that rule. Evid.R. 607(A) reads:

> Who may impeach. 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. This exception does not apply to statements admitted pursuant to Evid.R. 801(D)(1)(a), 801(D)(2), or 803.

Evid.R. 801(D)(1)(a) states that a prior statement by a witness is not hearsay if "[t]he declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is

offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Evid.R. 801(D)(2) concerns admissions by a party opponent. Evid.R. 803 presents a list of hearsay exceptions where the availability of the declarant is immaterial. Appellant points specifically to Evid.R. 803(3) as inapplicable as related to a will, and Evid.R. 803(5), which provides that a "recorded recollection" is not excluded by the hearsay rule where it concerns something of which the witness "once had knowledge but now has insufficient recollection to enable him to testify fully and accurately," and where that witness testifies the recorded recollection was "made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly." If evidence is admitted under Evid.R. 803(5), "the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

{¶28} The record does not clarify what rule appellee proceeded under in order for Smith to read her prior statement to police out loud in front of the jury. In the questioning preceding Smith reading her statement, appellee concentrated on what action Smith took after she saw appellant and Salyers exit the apartment with the shotgun and why. Appellee seemed to take issue with Smith testifying on cross-examination that appellant and Salyers were not yelling or fighting when they first exited the apartment and her testimony on redirect that she nonetheless started toward them "[t]o try to find out what was going on." (Tr. at 143.) Appellee asked Smith whether she recognized a statement that she wrote to police after the incident and whether she recalled a particular line in the statement where she stated that she walked over to try to stop appellant. Smith replied yes to each inquiry, and appellee asked "[w]hat were you trying to stop?" (Tr. at 145.) When Smith replied that she saw appellant with the shotgun, appellee asked Smith to

read her entire prior statement to police, which Smith did. Appellant did not object and instead, on recross, appellant confirmed that Smith saw appellant with the shotgun but did not see him pull the trigger or change the position of the gun.

{¶29} We agree with appellant that permitting Smith to read her prior statement to police was in error in this case. We find no inconsistent statement by Smith or any showing of surprise and affirmative damage to support appellee's impeachment of its own witness to support Evid.R. 607(A). We likewise agree that the record does not support Evid.R. 801(D)(1)(a) as the prior statement was not under oath, does not support 801(D)(2) as a party opponent is not involved, and does not support the hearsay exceptions in Evid.R. 803(5) as Smith gave no indication that she had insufficient recollection of the events. We further find nothing in the record to support admission under Evid.R. 801(D)(1)(b) as a prior consistent statement, a rule that requires a showing of an express or implied charge against the declarant of recent fabrication or improper influence or motive.

{¶30} Nevertheless, appellant has not demonstrated plain error in this instance. Appellant points to Smith's written statement to police that she tried to stop appellant, presumably in an attempt to show that no argument occurred at that point, and Smith's written statement that appellant shot Salyers as prejudicial to appellant. However, the jury heard the 911 call Smith made in which she stated "[t]hey were fighting and he shot her," and appellant himself made the same statement in his call to police. (Tr. at 122.) Appellant does not challenge admission of those calls in this appeal. As such, appellant has not demonstrated that but for the error, the outcome of the trial clearly would have

been otherwise. Therefore, appellant's argument regarding plain error on this issue lacks merit.

3. Testimony Regarding and Admission of the DNA Report

{¶31} Appellant argues that permitting Fortner to testify regarding the BCI report violated appellant's confrontation rights guaranteed by the Sixth Amendment. "The Sixth Amendment to the United States Constitution provides that '[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.' " *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, ¶ 11. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Under the Confrontation Clause, "[a] witness's testimony against a defendant is * * * inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz* at 309. Article I, Section 10 of the Ohio Constitution provides the same protection. *State v. Keck*, 4th Dist. No. 09CA50, 2011-Ohio-1643, ¶ 16, *aff'd,* 137 Ohio St.3d 550, 2013-Ohio-5160.

{¶32} The Confrontation Clause applies only to testimonial statements. Generally, testimonial statements are those made for " 'a primary purpose of creating an out-of-court substitute for trial testimony.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohi0-1019, ¶ 40, quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). Generally, a state forensic analyst's laboratory report prepared for use in a criminal prosecution is testimonial evidence subject to the demands of the Confrontation Clause. *State v. Jackson*, 5th Dist. No. 2012-CA-20, 2012-Ohio-5548, ¶ 53. "[W]here an expert witness's testimony constitutes his/her own original observations and opinions, there is no violation

of the Confrontation Clause, because the expert is available for cross-examination regarding them." *Smith* at ¶ 81, citing *Maxwell* at ¶ 53.

{¶33} "A criminal defendant may waive his right to confront a witness" in certain circumstances. *State v. Woods*, 4th Dist. No. 09CA3090, 2009-Ohio-6169, ¶ 23, citing *Melendez-Diaz* at 313, fn. 3, and *Pasqualone* at ¶ 14 (holding that a defense attorney may waive a client's Sixth Amendment right to confrontation and admitting a laboratory report without its author's testimony, pursuant to R.C. 2925.51, did not violate a defendant's confrontation right); *State v. Martemus*, 8th Dist. No. 96420, 2011-Ohio-5844, ¶ 22-23. Furthermore, defense counsel cannot seek improper testimony in cross-examining a witness and then benefit from the alleged resultant error. *State v. Syx*, 190 Ohio App.3d 845, 2010-Ohio-5880, ¶ 18 (2d Dist.); *State v. Collins*, 7th Dist. No. 10 CO 10, 2011-Ohio-6365, ¶ 93-94; *State v. Bey*, 85 Ohio St.3d 487, 493 (1999), quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 28 Ohio St.3d 20 (1986), paragraph one of the syllabus ("Under the invited-error doctrine, '[a] party will not be permitted to take advantage of an error which he himself invited or induced.' "); *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶ 75-76, *appeal not allowed*, 125 Ohio St.3d 1416, 2010-Ohio-1893 (finding no reversible error occurred due to trial court's failure to exclude testimony allegedly in violation of defendant's confrontation rights under *Bruton v. United States*, 391 U.S. 123 (1968), where defense counsel invited the error).

{¶34} Here, it is undisputed that Fortner, a BCI investigator who assisted in collecting evidence, did not conduct the analysis contained in the BCI report himself and was not otherwise an expert on that issue. Nevertheless, defense counsel questioned

Fortner about tests he ordered on evidence, asked Fortner when he reviewed the report, and asked specific questions about the result of the blood tests on the clothing, the meaning of presumptive versus conclusionary blood tests, and tests performed on the shotgun. On redirect, appellee asked Fortner to identify for the record the BCI report at issue, read the conclusions of the report, and state his impressions regarding the conclusions contained in the report.

{¶35} To the extent that Fortner's testimony constitutes his own observations and opinion, there is no Confrontation Clause violation. *Smith* at ¶ 81. Furthermore, appellant fails to address or provide legal support for an error occurring despite defense counsel initiating the questioning alleged to violate appellant's right to confront witnesses against him. As such, appellant has not met his burden to affirmatively demonstrate error on appeal. *Watkins v. Holderman*, 10th Dist. No. 11AP-491, 2012-Ohio-1707, ¶ 11; *see also* App.R. 16(A). Finally, appellant does not indicate how the admission of Fortner's testimony or the BCI report may have affected the outcome of the trial. The critical determination in this case centered on whether appellee could prove appellant purposely caused Salyers' death. The BCI report here provided little indication of intent, and appellee submitted evidence of Smith's 911 call, appellant's call to police, and Hempstead's initial encounter with appellant, as well as Smith's testimony regarding a conflict preceding the fatal shot. Considering all the above, we cannot say that had the court not considered Fortner's testimony or the BCI report, the outcome of the trial clearly would have been different. Therefore, we do not find that the trial court committed plain error. *Smith* at ¶ 81.

{¶36} Accordingly, appellant's second assignment of error is overruled.

B. *Doyle*[1] Violation (First Assignment of Error)

{¶37} Under the first assignment of error, appellant contends that a "*Doyle* violation" implicating his constitutional right to a fair trial and due process occurred when evidence of appellant's post-*Miranda*[2] silence was admitted into evidence during appellee's case-in-chief. (Appellant's Brief at 13.) For the following reasons, we disagree.

{¶38} An appellate court generally reviews a constitutional challenge de novo. *State v. Neal*, 4th Dist. No. 15CA1, 2016-Ohio-64, ¶ 36, *appeal not allowed*, 145 Ohio St.3d 1471, 2016-Ohio-3028; *State v. Angus*, 4th Dist. No. 15CA3507, 2017-Ohio-1100, ¶ 8. Because at trial appellant did not object to the alleged offending testimony, he has waived all but plain error review on appeal. *Neal.* As stated previously in this opinion, "[a]n alleged error is plain error only if the error is 'obvious,' and 'but for the error, the outcome of the trial clearly would have been otherwise.' " *Lang* at ¶ 108, quoting *Barnes* at 27, and *Long* at paragraph two of the syllabus. "The defendant bears the burden of proof on the issue." *Neal* at ¶ 36. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at paragraph three of the syllabus.

{¶39} The Fourth District Court of Appeals recently explained the applicable law regarding *Doyle* violations as follows:

> The Fifth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth

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[1] *Doyle v. Ohio*, 426 U.S. 610 (1976).
[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

> Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, ¶ 11. "The Fifth Amendment guarantees a criminal defendant's right against self-incrimination, which includes the right to silence during police interrogation. * * * Additionally, a defendant can invoke his rights 'at any time prior to or during questioning[.]' " *State v. Harper*, 4th Dist. Vinton No. 11CA684, 2012-Ohio-4527, ¶ 14, quoting *Miranda v. Arizona*, 384 U.S. 436, 474, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "[W]hen a person is subject to custodial interrogation, he or she must be informed of certain rights, including his or her rights to remain silent and to an attorney." *State v. Bennett*, 9th Dist. Lorain No. 12CA010286, 2014-Ohio-160, ¶ 62, citing *Miranda*. " 'A suspect's right to an attorney during questioning * * * is derivative of his [or her] right to remain silent.' " *Leach* at ¶ 13, quoting *Wainwright v. Greenfield*, 474 U.S. 284, 298-299, 106 S.Ct. 634, 88 L.Ed.2d 623 (Rehnquist, J., concurring).
>
> "Once a person invokes his or her Fifth Amendment right to remain silent, the State cannot use the person's silence [either in pre-arrest or post-arrest circumstances] as substantive evidence of guilt in its case-in-chief." *Bennett* at ¶ 63, citing *Wainwright*, 474 U.S. at 295 (post-arrest, post-Miranda silence is inadmissible as substantive evidence of guilt in the state's case-in-chief), and *Leach* at syllabus ("Use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination"); *see also State v. Perkins*, 3d Dist. Hancock No. 5-13-01, 2014-Ohio-752, ¶ 49, citing *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and *Leach* at ¶ 18 ("Evidence submitted by the State regarding a defendant's exercise of his right to remain silent during an interrogation violates the Due Process Clause of both the state and federal constitutions"). To allow the "[u]se of * * * silence in the state's case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand to explain their prior silence." *Leach* at ¶ 31.

Neal at ¶ 32-33.

{¶40} In order to determine whether testimony is being used as substantive evidence in violation of *Doyle*, an appellate court evaluates "whether the prosecutor's

comment was 'extensive and whether the prosecutor stressed to the jury an inference of guilt from the accused's silence as a basis of conviction.' " *Angus* at ¶ 16, quoting *State v. Froe*, 4th Dist. No. 02CA2860, 2003-Ohio-7334, ¶ 61. *State v. Combs*, 1st Dist. No. C-120756, 2013-Ohio-3159, ¶ 21 (finding no *Doyle* violation where an officer's reference to the defendant's post-arrest silence on direct examination was "not so extensive as to stress to the jury an inference of guilt from the silence" and the prosecutor directed the officer away from, rather than emphasized, the defendant's silence). *But see State v. Rogers*, 32 Ohio St.3d 70, 74 (1987) ("References to appellant's right to silence, his right to an attorney, or the exercise thereof, should not be made."); *Neal* at ¶ 41 ("[W]e do not endorse the state's reference in its case-in-chief to [defendant's] invocation of his right to remain silent.").

{¶41} In cases where no objection was lodged against the alleged offending testimony or comment, a *Doyle* violation is not plain error "per se" demanding automatic reversal. *State v. Hill*, 92 Ohio St.3d 191, 203 (2001). Rather, as outlined in the plain error standard stated above, a reviewing court must examine the error in light of all the evidence properly admitted at trial and determine whether the jury would have convicted the defendant even if the *Doyle* violation had not occurred. *Id.*

{¶42} Here, during appellee's case-in-chief, the following exchange occurred between the state prosecutor and Roar:

> Q. Did you ever make any contact with the defendant?
>
> A. I did make contact with him in the Pickaway County Sheriff's Office. I don't recall the exact time I sat down with him, but Detective Strawser from the Pickaway County Sheriff's Office and I sat down with him, read him his rights.

> He indicated he wanted an attorney and therefore the interview stopped.
>
> Q. So no statement was gained from the defendant by you, correct?
>
> A. That is correct.

(Tr. at 204.) The prosecutor made no other reference of appellant's post-*Miranda* assertion of silence.

{¶43} This exchange appears to fall short of the test for whether a *Doyle* violation has occurred as set forth in *Angus* and *Froe*. The exchange between the prosecutor and the detective is limited to one question in which the prosecutor confirms appellant did not provide a statement to detectives, and the prosecutor did not comment or stress to the jury an inference of guilt from appellant's silence as a basis of conviction. On the whole, this exchange seems more "isolated" rather than "extensive." *Froe* at ¶ 62; *Angus* at ¶ 16. As a result, we cannot say that appellant has demonstrated that an obvious error occurred.

{¶44} Regardless, appellant has not demonstrated that but for the alleged *Doyle* violation, the outcome of the trial clearly would have been otherwise. To this point, appellant argues that Ohio courts have found plain error in cases involving *Doyle* violations, particularly where the evidence does not overwhelmingly support the conviction. Furthermore, appellant believes the testimony here is particularly egregious because he did not testify and the testimony "left the impression that [appellant's] attorneys came up with his defense, or otherwise [appellant] would have told law enforcement what happened." (Appellant's Brief at 12.)

{¶45} While we agree with appellant's assessment that a *Doyle* violation may result in plain error, we disagree that appellant has met his burden to prove plain error in this case. First, as stated above, the comment is of an isolated nature and was not emphasized by the prosecution. Second, even without the detective's reference to appellant's invocation of his right to counsel, the jury still heard other evidence, specifically appellant's call to police and testimony of first responders regarding his behavior, that showed appellant failed to assert he did not fire the shotgun on purpose. Furthermore, based on this evidence, plus Smith's testimony and call to 911, overwhelming evidence exists in this case to establish appellant's guilt. *Neal* at ¶ 39. Considering the above, we cannot say but for the error, the outcome of the trial would clearly have been different. *Id.* Therefore, appellant has not demonstrated plain error.

{¶46} Accordingly, appellant's first assignment of error is overruled.

C. Sufficiency and Manifest Weight (Fifth Assignment of Error)

{¶47} Under the fifth assignment of error, appellant challenges the guilty verdicts as supported by insufficient evidence and as against the manifest weight of evidence. We disagree.

{¶48} Sufficiency of the evidence is a legal standard that tests whether the evidence is legally adequate to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law, not fact. *Id.* In determining whether the evidence is legally sufficient to support a conviction, " '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. A verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶49} In a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed but whether, if believed, the evidence supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime"). Further, "the testimony of one witness, if believed by the jury, is enough to support a conviction." *State v. Strong*, 10th Dist. No. 09AP-874, 2011-Ohio-1024, ¶ 42.

{¶50} "Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence." *State v. McCombs*, 10th Dist. No. 15AP-245, 2015-Ohio-3848, ¶ 3, citing *Thompkins* at 387. "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 38.

{¶51} When presented with a manifest-weight challenge, an appellate court may not merely substitute its view for that of the trier of fact but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175.

{¶52} Appellant was found guilty of murder, in violation of R.C. 2903.02(A), with a firearm specification, involuntary manslaughter, in violation of R.C. 2903.04(B), with a firearm specification, and domestic violence, in violation of R.C. 2919.25(A). For the murder charge, appellee had the burden to prove that appellant purposely caused Salyers' death. For the involuntary manslaughter charge, appellee had the burden to prove that appellant caused Salyers' death as a proximate result of appellant committing or attempting to commit a misdemeanor, which in this case references the domestic violence charge. For the domestic violence charge, appellee had the burden to prove that appellant knowingly caused or attempted to cause physical harm to a family or household member.

{¶53} Appellant first challenges evidence that he intended to kill Salyers. Appellant specifically asserts that no direct evidence exists to prove he actually pulled the trigger or had his hands on the trigger and that the surrounding circumstances of the

case, such as Salyers following and facing appellant when he had a shotgun and physical evidence consistent with a shot coming from somewhere below Salyers' face, lead to the conclusion that appellant did not consciously intend to kill Salyers According to appellant, what is more probable is that Salyers reached for the gun and the gun accidentally discharged.

{¶54} An act is committed "purposely" when it is a person's specific intention to cause a certain result. R.C. 2901.22(A). Intent may be inferred from the circumstances surrounding the crime. *State v. Louis*, 4th Dist. No. 15CA3693, 2016-Ohio-7596, ¶ 54. "An intent to kill may be presumed where the natural and probable consequence of a wrongful act is to produce death, and such intent may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound. A firearm is an inherently dangerous instrumentality, the use of which is likely to produce death." *State v. Krueger*, 8th Dist. No. 93742, 2010-Ohio-3725, ¶ 21 (finding testimony that defendant walked toward the victim, said "[W]hat did you do, bitch?" and then shot her in the face from close range, provide sufficient facts and circumstances to prove intent to kill).

{¶55} Here, appellee offered appellant's call to police in which he stated that he got into a fight with his ex-girlfriend, snapped, and shot and killed her, Hempstead's testimony that appellant immediately approached her with his hands straight out and wrists together and stated "take me to prison, I killed her," Smith's call to 911 in which she told police that appellant and Salyers were fighting and appellant shot Salyers, Smith's testimony at trial that she saw appellant hit Salyers' car with the shotgun, witnessed

appellant and Salyers fighting in close proximity to one another, and then heard the gunshot and saw Salyers fall to the ground and appellant drop the gun and return to the apartment. (Tr. at 152.) After viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

{¶56} In addition, we disagree with appellant's contention that the record shows that the more likely scenario indicates the shotgun fired accidentally. While Salyers followed appellant while he was holding a shotgun, evidence shows that the fight seemed to escalate at the car, and appellant's own words and actions following Salyers' death greatly undermine appellant's argument that he did not purposely kill Salyers. Likewise, evidence of the shotgun's length, Salyers' and appellant's close proximity to each other, and the upward shot trajectory is nonetheless consistent with appellant's purposely killing Salyers, considering Salyers' height and the aforementioned call and behavior of appellant after shooting Salyers. Overall, after reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of witnesses, we cannot say the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶57} Appellant next asserts that no evidence shows that Salyers was "living as a spouse" to meet the statutory relationship element for domestic violence. (Appellant's Brief at 32.) Pursuant to R.C. 2919.25(F)(1), a "[f]amily or household member" includes a "person living as a spouse" who is or has resided with the offender. A "person living as a spouse" is further defined as "a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who

otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question." R.C. 2919.25(F)(2). In this case, evidence establishes that Salyers was appellant's ex-girlfriend, appellant and Salyers had lived together, and the time that Salyers and appellant lived together prior to the shooting was recent: Salyers remained on the lease of the apartment, retained a key to the apartment, had personal items in the apartment, and attempted to pay a portion of rent. Considering the above, we disagree with appellant's argument and instead find that appellee presented sufficient evidence to support the jury's guilty finding on appellant's domestic violence and connected involuntary manslaughter charges and do not find the guilty verdicts to be against the manifest weight of the evidence.

{¶58} Accordingly, appellant's fifth assignment of error is overruled.

D. Voluntary Manslaughter Instruction (Third Assignment of Error)

{¶59} Under the third assignment of error, appellant contends that the trial court erred in failing to provide the jury with an instruction on voluntary manslaughter. Appellant originally had been indicted on a voluntary manslaughter charge, which was later dismissed by the trial court at appellee's request. After the parties rested their cases at trial, appellant requested an instruction on voluntary manslaughter, which the trial court denied. Appellant did not object to the instructions ultimately submitted to the jury.

{¶60} Generally, an appellate court reviews a trial court's refusal to give a requested jury instruction for an abuse of discretion under the facts and circumstances of the case. *Jennings* at ¶ 59; *State v. Clay*, 4th Dist. No. 11CA23, 2013-Ohio-4649, ¶ 43, *appeal not allowed*, 138 Ohio St.3d 1417, 2014-Ohio-566 ("A trial court has broad

discretion to decide how to fashion jury instructions."). However, under Crim.R. 30(A), "a party may not assign as error the giving or failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." *Id.* at ¶ 41. When a party fails to properly object, then the party waives all but plain error. *Id.*, citing *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 51; *State v. Underwood*, 3 Ohio St.3d 12 (1983), syllabus.

{¶61} The trial court must "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus. Additionally, a trial court may not omit a requested instruction, if it is " ' "a correct, pertinent statement of the law and [is] appropriate to the facts." ' " *Clay* at ¶ 43, quoting *State v. Lessin*, 67 Ohio St.3d 487, 493 (1993), quoting *State v. Nelson*, 36 Ohio St.2d 79 (1973), paragraph one of the syllabus.

{¶62} Ohio law codifies the crime of voluntary manslaughter in R.C. 2903.03(A), which states, in pertinent part, "[n]o person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another." Thus, in deciding whether a defendant is entitled to an instruction on voluntary manslaughter, the trial court must determine whether, under any reasonable view of the evidence and construing all the evidence in a light most favorable to the defendant, a reasonable jury could find that the defendant had established sufficient provocation. *State v. Rawlins*, 4th Dist. No. 97CA2539 (Dec. 24, 1998); *State v. Shane*, 63 Ohio St.3d 630 (1992), paragraph one of the syllabus

(determining merely "some evidence" to support voluntary manslaughter is not enough to require an instruction).

{¶63} For provocation to be reasonably sufficient, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control. *Id.* at 635. Generally, "[w]ords alone will not constitute reasonably sufficient provocation to incite the use of deadly force." *Id.* at paragraph two of the syllabus.

{¶64} In this case, the trial court determined that no evidence indicated Salyers did anything to cause sufficient serious provocation to justify the deadly use of force. We agree. Evidence adduced at trial showed that in the apartment, Salyers and appellant had a tense conversation about payment of rent and keys to the apartment, that approximately ten minutes later, Salyers and appellant exited the apartment, and appellant hit Salyers' car with a shotgun while Salyers followed and faced him with keys in hand. At that point, Smith agreed with the characterization that they were "pretty damn mad at each other." (Tr. at 136.) However, nothing in the record suggests that Salyers seriously provoked appellant in a manner which would justify the use of deadly force. Furthermore, appellant does not provide, nor do we find, any authority for using a grand jury's indictment on a charge as a basis for a jury instruction, rather than the evidence actually admitted at trial. Under any reasonable view of the evidence and construing all the evidence in a light most favorable to appellant, a reasonable jury could not find that appellant had established sufficient provocation. As a result, no jury instruction on voluntary manslaughter should have been given, and the trial court did not err, let alone commit plain error, in failing to do so. *Id.* at 638.

{¶65} Accordingly, appellant's third assignment of error is overruled.

E. Ineffective Assistance of Counsel (Fourth Assignment of Error)

{¶66} Under the fourth assignment of error, appellant contends that trial counsel rendered ineffective assistance of counsel. For the following reasons, we disagree.

{¶67} "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "To establish a claim of ineffective assistance of counsel, a defendant must show that the performance of trial counsel was deficient and that the deficient performance prejudiced him." *State v. Frye*, 10th Dist. No. 14AP-988, 2015-Ohio-3012, ¶ 11, citing *Strickland* at 687.

{¶68} To demonstrate that counsel's performance was deficient, the defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *State v. Canada*, 10th Dist. No. 14AP-523, 2015-Ohio-2167, ¶ 89; *State v. Murphy*, 91 Ohio St.3d 516, 524 (2001) ("To prevail on such a claim, a defendant must show that counsel's actions were professionally unreasonable."). In doing so, the defendant must overcome the strong presumption that counsel's performance was adequate or that counsel's actions might be considered sound trial strategy. *Canada* at ¶ 90; *Maxwell* at ¶ 180, quoting *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 116 (" 'Debatable trial tactics generally do not constitute ineffective assistance of counsel.' ").

{¶69} To demonstrate that the deficient performance prejudiced him, the defendant must prove that there exists a reasonable probability that but for counsel's errors, the result of the trial would have been different. *Strickland* at 694. Conjectural evidence—predictions about what evidence could possibly be without a basis in the record—does not support a showing of prejudice to establish a claim of ineffective assistance of counsel. *Columbus v. Oppong*, 10th Dist. No. 15AP-1059, 2016-Ohio-5590, ¶ 35.

{¶70} The failure to make either the deficiency or prejudice showing defeats a claim of ineffective assistance of counsel. *Frye* at ¶ 11, citing *Strickland* at 697. Thus, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. * * * If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland* at 697.

{¶71} First, appellant contends that his trial counsel was ineffective for failing to object to testimony of appellant exercising his *Miranda* rights and failing to object to the evidentiary errors argued in his second assignment of error. A trial counsel's failure to object is generally viewed as trial strategy and does not establish ineffective assistance. *State v. Roby*, 3d Dist. No. 12-09-09, 2010-Ohio-1498, ¶ 44; *State v. Eason*, 7th Dist. No. 02 BE 41, 2003-Ohio-6279, ¶ 133 (finding trial counsel's failure to object to a potential *Doyle* violation fell within the gambit of trial strategy).

{¶72} Regarding appellant's failure to object to testimony of appellant exercising his *Miranda* rights, in appellant's first assignment of error we previously determined that

the exchange that occurred in this case appears to not rise to the level of a *Doyle* violation under the test set forth in *Angus* and *Froe*. An attorney is not ineffective for failing to raise an objection which would have been denied. *State v. Turnbow*, 5th Dist. No. 2006CA00159, 2007-Ohio-2817, ¶ 32. Trial counsel's lack of objection also could be a reasonable trial strategy to de-emphasize appellant's silence to the jury, for example. As such, appellant fails to demonstrate that trial counsel was deficient for not objecting to testimony. *Combs* at ¶ 25. Furthermore, appellant has not established that the alleged error prejudiced him, as the jury heard other evidence, including appellant's call to police and his interaction with Hempstead, whereby appellant did not assert that he did not intend to shoot Salyers. Appellant has not proven that there exists a reasonable probability that but for counsel's errors, the result of the trial would have been different.

{¶73} Regarding trial counsel failing to object to the evidentiary errors argued in his second assignment of error, we have already determined that admission of the photographs of Salyers was not in error, and, therefore, trial counsel's performance was not deficient for not objecting to this evidence. *Turnbow*. We also previously determined appellant failed to demonstrate that testimony about and admission of the BCI report was in error. Our review of the transcript shows that defense counsel initiated the questioning about the BCI report, apparently in pursuit of casting doubt on specific intent by way of physical findings and the possible compromise of favorable evidence by the rain. In other words, trial counsel's failure to object to the BCI report appears to have been a trial strategy and, as such, does not render that decision ineffective. *Roby.* Finally, although we agreed with appellant that permitting Smith to read her prior statement to police for the jury was in error, trial counsel's decision to not object may have also fallen within trial

strategy, and we do not find this decision professionally unreasonable so as to constitute a deficient performance. In addition, the prior statement read by Smith was essentially duplicative of her testimony at trial, and appellant has failed to demonstrate prejudice in this respect. *Combs* at ¶ 35.

{¶74} Second, appellant argues that trial counsel was ineffective for failing to effectively request a second evaluation of competency. We initially disagree with appellant's argument as against the record. Appellant contends the trial court denied appellant's request for a second evaluation of competency "[a]s a result" of defense counsel's failure to abide by the trial court's instruction to specifically articulate the deficiencies with the first report regarding competency and the reasons why a second evaluation was necessary. (Appellant's Brief at 24.) Our review of the trial court decision on competency shows that its decision does not reference trial counsel's failure to comply with its request for specific reasons but, rather, considers the testimony of Dr. Kevin Edwards, the clinical psychologist at Netcare, states that the right to another evaluation is not automatic, and notes that appellant is not indigent and could have presented his own examiner. As a result, appellant has not proven that trial counsel was deficient in this matter. Furthermore, appellant has not shown a reasonable probability that but for trial counsel's alleged error in addressing the second hearing regarding competency, the trial would have been different. Based on the trial court's reasoning, we have no reason to believe that had counsel requested the second evaluation of competency in the manner prescribed by the trial court, the trial court would have granted the request. In addition, results of the second evaluation of competency are conjectural and, as such, do not

support a showing of prejudice to establish a claim of ineffective assistance of counsel. *Oppong* at ¶ 35.

{¶75} Third, appellant contends his trial counsel was ineffective for failing to comply with Crim.R. 16(K) in providing notice of a gun expert and by failing to call a gun expert. According to appellant, "[t]he defense theory at trial was that there was a heated argument between Salyers and [appellant] and Salyers, who was bigger than [appellant], reached for the gun thereby causing it to fire." (Appellant's Brief at 26.) Appellant contends the jury only heard defense counsel state that Salyers was trying to grab the gun away from appellant, based on the direction of the gunshot wound and injury to her left hand, and that trial counsel was ineffective for failing to provide expert testimony to support this theory. Appellant believes that had trial counsel called such an expert, "the jury could believe that the gun accidentally discharged without [appellant] actually pulling the trigger." (Appellant's Brief at 27.) Appellant notes that trial counsel listed a gun expert as a potential witness, that appellee filed a motion in limine due to appellant's alleged failure to comply with Crim.R. 16(K), and that no entry appears in the record granting or denying appellee's motion.

{¶76} "Generally, the decision whether to call a witness 'falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.' " *In re B.C.S.*, 4th Dist. No. 07CA60, 2008-Ohio-5771, ¶ 18, *appeal not allowed*, 121 Ohio St.3d 1427, 2009-Ohio-1296, quoting *Treesh* at 490. As further stated in *B.C.S.*:

> In many criminal cases, trial counsel's decision not to seek expert testimony 'is unquestionably tactical because such an expert might uncover evidence that further inculpates the defendant.' " *State v. Krzywkowski*, Cuyahoga App. Nos.

> 83599, 83842, and 84056, 2004-Ohio-5966, ¶ 22, quoting *State v. Glover*, Clermont App. No. CA2001-12-102, 2002-Ohio-6392, ¶ 95; see, also, *State v. Samatar*, Franklin App. No. 03AP-1057, 2004-Ohio-2641, ¶ 12. "Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time." *In re: J.B.*, Butler App. No. CA2005-06-176, CA2005-07-193, CA2005-08-377, 2006-Ohio-2715, ¶ 18, citing *State v. Gapen*, Montgomery App. No. 20454, 2005-Ohio-441, ¶ 30.

Id. at ¶ 18.

{¶77} In this case, appellant speculates that the Crim.R. 16(K) issue, rather than trial counsel's tactical decision, precluded a gun expert as a witness and speculates that the gun expert's testimony at trial would have supported appellant's theory of the case. However, a gun expert may have testified in a manner contrary to appellant's theory. As a result, appellant has neither demonstrated that trial counsel's performance was deficient in failing to call a gun expert or that but for this alleged error, there is reasonable probability that the result of the trial would have been different.

{¶78} Fourth, appellant contends his trial counsel was ineffective for failing to request an accident instruction. Generally, the failure to request jury instructions is purely a matter of trial tactics and will not be disturbed on review. *State v. Herrington*, 9th Dist. No. 25150, 2010-Ohio-6426, ¶ 11. Furthermore, accident is an argument that supports a conclusion that the state has failed to prove the intent element of the crime beyond a reasonable doubt. *Clay* at ¶ 19. Thus, where the trial court properly instructs the jury on the requisite mental state, which by definition eliminates the defendant's conduct as a mere accident, and the jury necessarily concludes the mental state is met in order to convict the defendant, the defendant cannot show that trial counsel's alleged deficiency in

failing to request a jury instruction on accident affected the outcome of the trial. *Id.* at ¶ 44-47, 53.

{¶79} Here, we note that although appellant frames the argument as an accident on appeal, at trial defense counsel repeatedly described its theory of the case as appellee's failure to provide evidence of purposeful killing; defense counsel avoids explicitly characterizing the incident as an accident. As such, trial counsel's decision to not request an instruction on "accident" may have been a part of trial strategy. Moreover, the trial court instructed the jury that the definition of "purposely" includes "to do an act purposely is to do it intentionally and not accidentally." (Tr. at 260; Jury Instructions at 3.) Following these instructions, in finding appellant purposely caused the death of Salyers, the jury apparently rejected the idea of an accident. On these facts, appellant has not demonstrated any alleged error in not requesting a jury instruction on accident prejudiced him.

{¶80} Finally, appellant argues that the cumulative effect of trial counsel's errors in this case resulted in appellant being denied a fair trial. However, as provided above, appellant did not demonstrate that trial counsel's conduct was professionally unreasonable—that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment—so as to rise to the level of deficient performance. Neither did appellant demonstrate that he was prejudiced by any of the alleged errors. Therefore, appellant's argument regarding cumulative error lacks merit.

{¶81} Accordingly, appellant's fourth assignment of error is overruled.

IV. CONCLUSION

{¶82} Having overruled appellant's five assignments of error, we affirm the judgment of the Pickaway County Court of Common Pleas.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

* Tyack, J. & Brown, J.: Concur in Judgment and Opinion.

For the Court

BY: ________________________
* Lisa L. Sadler, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

* Lisa L. Sadler, George G. Tyack, and Susan D. Brown, Judges of the Tenth Appellate District, sitting by assignment of the Supreme Court of Ohio in the Fourth Appellate District.