[Cite as *State v. Powell*, 2017-Ohio-5629.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. TIFFANY POWELL Appellant	C.A. No. 28170 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2014-04-1179(A)

DECISION AND JOURNAL ENTRY

Dated: June 30, 2017

SCHAFER, Judge.

{¶1} Defendant-Appellant, Tiffany Powell, appeals the judgment of the Summit County Court of Common Pleas convicting her of aggravated murder and obstruction of justice. For the reasons that follow, we affirm.

I.

{¶2} The Summit County Grand Jury indicted Powell on one count of aggravated murder in violation of R.C. 2903.01(A), a special felony, one count of complicity to commit aggravated murder in violation of R.C. 2903.01(A) and R.C. 2923.03, a special felony, and one count of obstructing justice in violation of R.C. 2921.32(A)(5), a third-degree felony. The indictment arose from the murder of James Harris on April 26, 2014, after Powell plotted with her boyfriend, Paul Reed, to lure Mr. Harris to a residence on Minota Avenue in Akron, Ohio, where he was beaten to death. Powell pleaded not guilty to the charges contained within the

indictment and the matter proceeded to a jury trial. Prior to trial, the trial court granted the State's motion to dismiss the complicity to commit aggravated murder charge.

{¶3} At trial, the State presented 13 witnesses to testify on its behalf. At the close of the State's case-in-chief, Powell made a Crim.R. 29 motion for judgment of acquittal, which the trial court summarily denied. Three witnesses, including Powell, testified on behalf of the defense before the defense rested its case. Powell requested that the trial court instruct the jurors on the lesser included offenses of murder, involuntary manslaughter, and reckless homicide. The trial court denied Powell's request to give an involuntary manslaughter instruction, but did instruct the jury on the lesser included offenses of murder and reckless homicide. The jury ultimately found Powell guilty of aggravated murder and obstruction of justice and the trial court subsequently sentenced Powell according to law.

{¶4} Powell filed this timely appeal, which presents seven assignments of error for our review. To facilitate our analysis, we elect to address Powell's assignments of error out of order. As Powell's second and third assignments of error implicate similar issues, we elect to address them together.

II.

Assignment of Error II

Tiffany Powell's conviction is based upon insufficient evidence.

Assignment of Error III

Tiffany Powell's conviction is against the manifest weight of the evidence.

{¶5} In her first and second assignment of error, Powell argues that her conviction for aggravated murder[1] is both unsupported by sufficient evidence and against the manifest weight of the evidence. We disagree.

{¶6} "'We review a denial of a defendant's Crim.R. 29 motion for acquittal by assessing the sufficiency of the State's evidence.'" *State v. Smith*, 9th Dist. Summit No. 27389, 2015-Ohio-2842, ¶ 17, quoting *State v. Frashuer*, 9th Dist. Summit No. 24769, 2010-Ohio-634, ¶ 33. A sufficiency challenge of a criminal conviction presents a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In carrying out this review, our "function * * * is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. After such an examination and taking the evidence in the light most favorable to the prosecution, we must decide whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* Although we conduct de novo review when considering a sufficiency of the evidence challenge, "we neither resolve evidentiary conflicts nor assess the credibility of witnesses, as both are functions reserved for the trier of fact." *State v. Jones*, 1st Dist. Hamilton Nos. C-120570, C-120751, 2013-Ohio-4775, ¶ 33.

{¶7} A sufficiency challenge is legally distinct from a manifest weight challenge. *Thompkins* at 387. Accordingly, when applying the manifest weight standard, we are required to consider the whole record, "weigh the evidence and all reasonable inferences, consider the credibility of the 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

[1] Powell does not challenge her conviction for obstruction of justice in these assignments of error.

that the conviction must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App.3d 339, 340 (9th Dist.1986). Courts are cautioned to only reverse a conviction on manifest weight grounds "in exceptional cases," *State v. Carson*, 9th Dist. Summit No. 26900, 2013–Ohio–5785, ¶ 32, citing *Otten* at 340, where the evidence "weighs heavily against the conviction," *Thompkins* at 387.

{¶8} This matter implicates Powell's conviction for aggravated murder in violation of R.C. 2903.01(A), which provides that "[n]o person shall purposely, and with prior calculation and design, cause the death of another[.]" Accordingly, to prove that Powell committed aggravated murder under R.C. 2903.01(A), the State was required to prove: (1) Powell acted purposely; (2) Powell acted with prior calculation and design; and (3) Powell caused the death of James Harris. *See* R.C. 2903.01(A); *State v. Williams*, 8th Dist. Cuyahoga No. 98528, 2013-Ohio-1181, ¶ 24; *State v. Neeley*, 143 Ohio App.3d 606, 620 (1st Dist.2001).

{¶9} "A person acts purposely when it is the person's specific intention to cause a certain result * * *." R.C. 2901.22(A). The Supreme Court of Ohio defines "prior calculation and design" as requiring "evidence of 'more than the few moments of deliberation * * * and * * * a scheme designed to implement the calculated decision to kill.'" *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 38, quoting *State v. Cotton*, 56 Ohio St.2d 8, 11 (1978). "Prior calculation and design" denotes "sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation" coupled with circumstances that demonstrate "a scheme designed to implement the calculated decision to kill[.]" *Cotton* at paragraph three of the syllabus. There is no bright-line test for determining whether a defendant acted with prior calculation and design, so courts consider the totality of the circumstances in each case, including:

> (1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or "an almost instantaneous eruption of events"?

State v. Taylor, 78 Ohio St.3d 15, 19 (1978), quoting *State v. Jenkins*, 48 Ohio App.2d 99, 102 (8th Dist.1976); *State v. Fry*, 125 Ohio St.3d 163, 2010–Ohio–1017, ¶ 154.

{¶10} "[A] defendant charged with an offense may be convicted of that offense upon proof that he was complicit in its commission * * *." *State v. Herring*, 94 Ohio St.3d 246, 251 (2002). "To support a conviction for complicity by aiding and abetting * * * the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus. "The criminal intent of the aider and abettor 'can be inferred from the presence, companionship, and conduct of the defendant before and after the offense is committed.'" *State v. Smith*, 9th Dist. Summit No. 25650, 2012-Ohio-794, ¶ 7, quoting *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, ¶ 13. "As with proof of any element of an offense, complicity may be proved by circumstantial evidence, which has the same probative value as direct evidence." *Smith* at ¶ 7.

{¶11} At trial, Jabari Harris, James Harris' adult son from a previous marriage, testified that he has known Powell for approximately ten years, as she and his father used to date each other. Jabari Harris testified that his father and Powell had five children together, all daughters ranging from four to 13 years of age at the time of trial. Jabari Harris testified that Powell and his father ended their relationship "about a year or two" before his father died in 2014. Mr. Harris also testified that his father was a retired school teacher and had a hobby of buying old cars and fixing them for resale.

{¶12} Beverly Proctor-Donald, an attorney operating a solo family law practice in Canton, Ohio, testified that James Harris retained her services in July or August of 2013 to help him obtain legal custody of the five minor children that he shared with Powell. Ms. Proctor-Donald testified that on August 23, 2013, she filed on Mr. Harris' behalf an emergency ex parte motion for temporary custody, along with a complaint for legal custody of his five children. She further testified that a judge granted the emergency ex parte motion, thereby granting Mr. Harris temporary custody of his five children. According to Ms. Proctor-Donald, the trial court also set a trial date for May 5, 2014, to determine the issue of legal custody. However, that trial did not proceed since Mr. Harris died on April 26, 2014.

{¶13} Ro'ceeda Kelly, a friend of Powell's, testified that Powell offered to pay her $100.00 if she helped in a plot to lure James Harris to a house on Minota Avenue in Akron, Ohio, under false pretenses. Kelly stated that Powell told her the purpose of the plot was to entrap Mr. Harris into violating a civil protection order, which Powell said would help her regain custody of her five children. Kelly testified that she agreed to help in the plot because she wanted Powell to regain custody of her children. Kelly testified that upon agreeing to help Powell with her plot, Powell texted her "yay im getting my babies back * * * I mean with your help of course! Thanks!" Several witnesses subsequently testified that no civil protection order existed.

{¶14} Kelly then testified about how the plot developed on the day in question. Kelly testified that on April 26, 2014, Powell and her boyfriend, Paul Reed, picked her up in a van at approximately 4:20 p.m. Kelly stated that they then all drove over to Mr. Harris' garage so that she could make her initial contact with him. Kelly testified that Reed parked the van down the street from Mr. Harris' garage so that it could not be seen. Kelly then exited the van and

approached the garage while Reed and Powell stayed in the van. Kelly testified that Mr. Harris was not at his garage, but that she spoke with one of his acquaintances. Kelly told the acquaintance about a car she wanted to sell to Mr. Harris and the acquaintance provided her with Mr. Harris' cell phone number. Kelly testified that she then returned to the van and she, Reed, and Powell drove around while she tried calling Mr. Harris on a brand new TracFone that Powell had provided for her. Kelly testified that she eventually got in touch with Mr. Harris and had a one-to-two minute telephone conversation with him. Kelly stated that she told Mr. Harris that she had a car and a washing machine that she wanted to sell him. Kelly stated that while she was speaking with Mr. Harris on the phone, Reed and Powell were both providing her with information to relay to Mr. Harris about the car that was allegedly for sale. Mr. Harris arranged to meet Kelly later that evening at the Minota Avenue residence, which Kelly said was her residence, pursuant to Powell's instructions. Kelly, Reed, and Powell then went to the Minota Avenue residence, parked around the corner so that the van could not be seen near the house and waited in the garage for Mr. Harris to arrive.

{¶15} Jabari Harris testified that on April 26, 2014, his father called him at around 8:00 p.m. and asked him to accompany him to Akron in order to check out a car that was for sale. Jabari Harris testified that he agreed and that his father picked him up roughly 20 minutes later in his van. Jabari Harris stated that upon arriving at the Minota Avenue address, a woman was standing in the driveway. He further testified that this woman, who he did not know, indicated that they could not enter the house through the front door because the carpet was recently cleaned. Jabari Harris stated that his father then grabbed a flashlight, exited the van, and walked around the back of the house with the unknown woman while he waited in the van. Jabari Harris testified that he never saw his father alive again. He further testified that after waiting for a

period of time in the van, he walked to the back of the house. Jabari Harris stated that there were no lights on and that it was completely dark behind the house. He testified that he called out for his father, but received no reply. He also called his father on his cell phone, but his father did not answer the call. Jabari Harris testified that he saw no car at the house. Jabari Harris also testified that at this point, his "suspicion was growing" and that he became concerned. Jabari Harris testified that he then walked back to his father's van, at which time police officers began arriving at the scene. The police informed Jabari Harris that they were responding to a reported disturbance. Jabari Harris testified that he eventually saw Powell and Reed exit the house and that he was "shocked" and "astounded" to see Powell there.

{¶16} Ro'ceeda Kelly's testimony buttressed the timeline provided in Jabari Harris' testimony. Kelly testified that while she, Reed, and Powell were all waiting in the garage for Mr. Harris to arrive, James Harris called the TracFone to inform her that he was on his way. Kelly testified that Reed then peered out of a mail slot in the garage to keep an eye out for Mr. Harris. She stated that Mr. Harris subsequently called her again to say that he was on Minota Avenue, but could not locate the house. Kelly stated that she then went outside to meet Mr. Harris while Reed and Powell waited in the garage. Kelly testified that upon meeting Mr. Harris, she informed him that they could not enter the house via the front door because the carpets had just been cleaned. Kelly stated that Powell told her to say this to Mr. Harris in order to have him enter the house via the backdoor that leads directly to the basement. Sergeant John Ross of the Akron Police Department testified that the carpet inside the house was dry during his investigation in the immediate wake of James Harris' death.

{¶17} Kelly stated that she then led James Harris to back of the house to a door that led to the basement. Kelly testified that she led Mr. Harris down the stairs into the basement, at

which time Reed immediately hit Mr. Harris in the head with a pole. Kelly testified that she did not see Mr. Harris carrying a weapon and that Mr. Harris neither said anything to nor made any movements towards Reed prior to Reed hitting him with the pole. Kelly stated that upon seeing Reed hit Mr. Harris with the pole, she immediately ran up the stairs, ran outside, and hid in a neighbor's yard. Kelly stated that she also dropped the TracFone in the neighbor's yard, where it was later recovered by law enforcement. Kelly further testified that the she observed the lights in the basement turn off just before police arrived on the scene.

{¶18} Various police officers with the Akron Police Department testified that they arrived at the Minota Avenue house after receiving a dispatch of a reported fight occurring at the property. Dispatch informed the officers that a firearm was present at the scene. Officers Jason McKeel and Nathaniel Milstead of the Akron Police Department testified that they called for paramedics upon entering the house and seeing James Harris' unconscious body on the basement floor. Officer Milstead testified that he checked Mr. Harris' pulse upon his arrival, but stated that he could not find a pulse. Officer Milstead also testified that he found a firearm located near Mr. Harris' body on the basement floor. Mr. Harris was pronounced dead at the scene.

{¶19} Lisa Kohler, M.D., the Summit County medical examiner, testified that she performed on autopsy on Mr. Harris' body on April 28, 2014. She testified that the cause of Mr. Harris' death was blunt-force trauma to the head and that the manner of death was homicide. Dr. Kohler testified that she counted at least 15 separate points of impact to Mr. Harris' head, but could not definitively state how many blows Mr. Harris endured because the bruises on his head and face "pooled up" and came together. She also testified that she could not determine which particular blow proved to be lethal, but noted that Mr. Harris' head was possibly slammed into the basement's concrete floor. Dr. Kohler also testified that Mr. Harris' brain was swollen and

that bleeding was present around the outside of his brain. She further stated that Mr. Harris had bruising on his thigh, left forearm, lower back, upper back near the shoulder blade, and the base of his neck. She testified that clumps of Mr. Harris' hair were observed on the basement floor and that Mr. Harris bit the back of his tongue. She also stated that Mr. Harris had many contusions and abrasions on his face and forehead. Lastly, Dr. Kohler testified that upon examining his hands, it appears that Mr. Harris had no defensive wounds and that there was no evidence that Mr. Harris fought anybody immediately prior to his death.

{¶20} Officer Guy Sheffield of the Akron Police Department's computer forensics division testified that he examined the cell phones of Powell, Kelly, and James Harris, as well as the TracFone, as part of the investigation into Mr. Harris' death. Officer Sheffield testified about the phone records of the respective cell phones, including text message, installed applications, and Facebook messages. Officer Sheffield testified that the phone records show that Powell crafted a plan to have Kelly lure Mr. Harris to Minota Avenue under the guise of selling him a car. According to Officer Sheffield, the TracFone made 11 outgoing calls to Mr. Harris' cell phone and had three incoming calls from Mr. Harris' cell phone on the day in question. Moreover, Powell's cell phone made seven outgoing calls to Mr. Harris' cell phone on April 26, 2014, but those calls were made using the "star 67" privacy blocker function. Officer Sheffield further testified that Powell installed nine applications on her cell phone prior to the day in question, including voice changers, phone number hiders, and fake caller IDs. Officer Sheffield testified that although Powell deleted several text messages and calls from her cell phone, this information was not deleted from the TracFone or from Kelly's cell phone. Lastly, Officer Sheffield testified that Powell called 9-1-1 on April 26, 2014, at 10:13 p.m., but that phone call

lasted for only two seconds. However, Powell then again called 9-1-1 approximately two minutes later, at 10:15 p.m., to summon law enforcement to the scene.

{¶21} In viewing this evidence in a light most favorable to the State, we determine that a jury could have found beyond a reasonable doubt that Powell "supported, assisted, * * * cooperated with, [or] advised" Reed in his commission of aggravated murder. The evidence demonstrates that Powell concocted a scheme to lure Mr. Harris, her ex-boyfriend, to a house in Akron under false pretenses so that Reed could beat him to death. Therefore, we conclude that there is sufficient evidence in the record to uphold Powell's conviction for aggravated murder.

{¶22} Turning to her manifest weight argument, Powell argues that her conviction for aggravated murder is against the manifest weight of the evidence because she "was the victim of an overzealous prosecutor, erroneous evidentiary rulings, and a denial of due process[.]" However, Powell's appellate brief fails to: (1) make any specific argument as to why her conviction for aggravated murder should be reversed as being against the manifest weight of the evidence, (2) direct this Court to any conflicting testimony in the record, or (3) point to any evidence in the record weighing heavily against her conviction. *See Thompkins* at 387-388. Pursuant to App.R. 16(A)(7), the brief of an appellant shall include "[a]n argument containing the contentions of the appellant * * * and the reasons in support of the contentions * * *." Where an appellant fails to develop an argument in support of her assignment of error, we will not create one for her. *State v. Harmon*, 9th Dist. Summit No. 26426, 2013-Ohio-2319, ¶ 6, citing App.R. 16(A)(7) and *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998). "If an argument exists that can support [an] assignment of error, it is not this [C]ourt's duty to root it out." *Cardone* at *8.

{¶23} Accordingly, Powell's second and third assignments of error are overruled.

Assignment of Error I

The trial court erred and denied Tiffany Powell due process of law through its evidentiary rulings preventing Tiffany Powell from a fair opportunity to defend against the accusations of the State.

{¶24} Powell advances two arguments in her first assignment of error. First, Powell argues that the trial court erred by denying her motion to use the affirmative defense of battered woman syndrome. Second, Powell argues that the trial court committed plain error by permitting the State to introduce evidence of her misdemeanor convictions for child endangering. We disagree on both points.

{¶25} "Self-defense is an affirmative defense that, if proved, relieves a defendant of criminal liability for the force that the defendant used." *State v. Kozlosky*, 195 Ohio App.3d 343, 2011-Ohio-4814, ¶ 22 (8th Dist.). Powell has the burden of proving by a preponderance of the evidence that she was acting in self-defense when Mr. Harris was beaten to death. *State v. Williford*, 49 Ohio St.3d 247, 249 (1990); R.C. 2901.05(A). In order to demonstrate that she acted in self-defense, Powell must show:

> (1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger.

State v. Goff, 128 Ohio St.3d 169, 2010-Ohio-6317, ¶ 36, quoting *State v. Thomas*, 77 Ohio St.3d 323, 326 (1997). The Supreme Court of Ohio has held that testimony on battered woman syndrome "does not establish a new defense or justification." *State v. Koss*, 49 Ohio St.3d 213, 217 (1990). Rather, such testimony is meant to assist the trier of fact in determining whether the defendant satisfies the second prong of the self-defense standard, showing whether the she "acted out of an honest belief that she was in imminent danger of death or great bodily harm and that the use of such force was her only means of escape." *Id.*, citing *State v. Robbins*, 58 Ohio St.2d

74 (1979), paragraph two of the syllabus. The "elements of self-defense are cumulative. * * * If the defendant fails to prove *any one* of these elements by a preponderance of the evidence [s]he has failed to demonstrate that [s]he acted in self-defense." (Emphasis sic.) *State v. Jackson*, 22 Ohio St.3d 281, 284 (1986); *State v. Cornwell*, 9th Dist. Wayne No. 14AP0017, 2015-Ohio-4617, ¶ 19.

{¶26} In the present matter, the trial court held a hearing prior to the start of trial on Powell's request to proceed with the affirmative defense of self-defense. During the hearing, the State made an oral motion in limine to prohibit Powell from raising the battered woman syndrome defense at trial. In granting the State's motion in limine, the trial court noted:

> The court having tried this case once already, and I think both sides can agree, that under the facts of this case that there was not any threat -- confrontation between Ms. Powell and the decedent. * * * [T]he incident which led to the decedent's death was a fight between Paul Reed, who was convicted, and the decedent Mr. Harris. Mr. Harris did not have any aggression towards Ms. Powell on that day. And there was no – in other words, there was no force used against Ms. Powell.
>
> So the court is going to grant the State's motion in limine finding that I don't see any interpretation of the evidence that would lead to a conclusion that the defendant had a belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force.

{¶27} Upon review of the record, we determine that Powell was not entitled to claim the affirmative defense of self-defense since the evidence at trial does not demonstrate that she had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force against Mr. Harris. At trial, the State's evidence showed that Powell plotted to lure Mr. Harris to the house on Minota Avenue under false pretenses. Upon Mr. Harris entering the house's basement to inspect items that were allegedly for sale, Reed immediately attacked him with a pole and beat him to death. Thus, pursuant to the State's

theory of the case, although Powell orchestrated the scheme to lure Mr. Harris to the house, she was not physically present in the basement while Reed beat him to death.

{¶28} Indeed, Powell's own trial testimony confirms that she was not in the basement at the time that Mr. Harris suffered the lethal blows to his head. According to Powell's testimony, she developed a plan to lure Mr. Harris to the Minota Avenue house under false pretenses in order to entrap him into violating a civil protection order. Powell testified that her plan went wrong once Mr. Harris entered the basement, at which time he and Reed began fighting while she was upstairs speaking on the phone with the 9-1-1 operator. Powell testified that once she no longer heard any noises emanating from the basement, she went downstairs and saw Mr. Harris on the floor surrounded by broken glass. Thus, it is undisputed that Powell was neither present in the basement when Reed killed Mr. Harris, nor was she in a physical altercation with Mr. Harris on the day in question. For these reasons, Powell has failed to demonstrate that she had a bona fide belief that she was in imminent danger of death or great bodily harm from Mr. Harris and that it was necessary to use force against Mr. Harris in order to escape. We therefore conclude that the trial court did not err by prohibiting Powell from claiming the affirmative defense of self-defense at trial.

{¶29} With respect to Powell's argument that the trial court committed plain error by permitting the State to introduce evidence of her prior misdemeanor convictions for child endangering, we note that Powell has failed to develop a plain error argument in her brief. Thus, because Powell has failed to develop her plain error argument, we do not reach the merits and decline to address this argument. *See* App.R. 16(A)(7); *see also State v. Hairston*, 9th Dist. Lorain No. 05CA008768, 2006-Ohio-4925, ¶ 11 (noting that appellant did not adequately present

a claim of plain error where his brief makes a conclusory statement that plain error occurred, but did not provide the Court with any reasoning to support that position).

{¶30} Powell's first assignment of error is overruled.

Assignment of Error IV

The trial court erred and denied Tiffany Powell due process of law through its grant of an additional peremptory challenge to the State in violation of [Crim.R.] 24(G) and (E) and in violation of the *Batson* Rule.

{¶31} In her fourth assignment of error, Powell contends that the trial court erred by granting the State an additional peremptory challenge during voir dire, which the State exercised on a potential African American juror. We disagree with Powell's arguments.

{¶32} The Equal Protection Clause of the United States Constitution prohibits deliberate discrimination based on race by a prosecutor in the exercise of peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). "A court adjudicates a *Batson* claim in three steps." *State v. Murphy*, 91 Ohio St.3d 516, 528 (2001). "First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge." *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶ 106, citing *Batson* at 96-98. "Finally, the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination." *Id*. "The judge must 'assess the plausibility' of the prosecutor's reason for striking the juror 'in light of all evidence with a bearing on it.'" *State v. Pickens*, 141 Ohio St.3d 462, 2014–Ohio–5445, ¶ 63, quoting *Miller–El v. Dretke*, 545 U.S. 231, 252 (2005). A trial court's findings of no discriminatory intent will not be reversed on appeal unless such findings are clearly erroneous. *State v. Hernandez*, 63 Ohio St.3d 577, 583 (1992), citing *Hernandez v. New York*, 500 U.S. 352 (1991).

{¶33} Here, the State exercised a peremptory challenge to excuse Juror No. 27, an African-American female, and the only potential African American juror left in the venire. The State provided the following as racially-neutral reasons in support of its challenge: (1) Juror No. 27 indicated during voir dire that she has multiple family members who have all been charged with and convicted of crimes in Summit County where the Akron Police Department was involved in the investigations; (2) Juror No. 27 specifically expressed her frustration with one of the criminal cases involving a relative and stated she was "unhappy with how that all played out."; and (3) Upon learning that domestic violence may be mentioned in the present case, Juror No. 27 indicated that she has been a victim of domestic violence and that she also has a relative that was a victim of domestic violence. Defense counsel then raised a *Batson* challenge. The trial court determined that the State's reasons for challenging the prospective juror were race-neutral.

{¶34} The United States Supreme Court has explained that the racially neutral explanation that the prosecution is required to provide at the second step of the analysis is "an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez* at 360. A prosecutor's explanation for using a peremptory challenge on a juror does not have "to rise to the level justifying exercise of a challenge for cause." *State v. Frazier*, 115 Ohio St.3d 139, 2007–Ohio–5048, ¶ 97, quoting *Batson* at 97. In fact, "a peremptory challenge may be exercised for *any* racially-neutral reason." (Emphasis sic.) *State v. Moss*, 9th Dist. Summit No. 24511, 2009–Ohio–3866, ¶ 12.

{¶35} We conclude that there is no clear error in the trial court's determination. The State provided multiple racially neutral reasons why it sought to exercise a peremptory challenge on Juror No. 27, namely that she and a relative have both been victims of domestic violence and that she was "unhappy" about a relative's criminal case that previously occurred in Summit County and where the Akron Police Department was involved in the investigation. Accordingly, we conclude that the State satisfied its obligation to provide a racially natural explanation for the challenge under the second step of the *Batson* analysis. Accordingly, the trial court did not clearly err when it determined that the State had credible neutral reasons for excluding the African-American juror.

{¶36} Lastly, Powell argues that the trial court erred by granting the State an additional peremptory challenge with respect to the potential alternate jurors in the venire. Crim.R. 24(G), which governs alternate jurors, states that "[e]ach party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled * * *." Specifically, Powell contends that the trial court should not have permitted the State to use its peremptory challenge on Juror No. 27 after purportedly waiving his peremptory challenge of the alternate jurors.

{¶37} A careful review of the record indicates that the State never passed on or waived its sole peremptory challenge of the alternate jurors within the venire prior to exercising its peremptory challenge on Juror No. 27. Rather, the record reflects that upon seating the 12-member jury, Jurors No. 26, 27, and 31 remained as potential alternate jurors. The trial court then explicitly asked if the State was satisfied with Juror No. 26 or if it would like to exercise a peremptory challenge, to which the State notified the trial court that it was "satisfied" with Juror No. 26. Defense counsel subsequently exercised its sole peremptory challenge on Juror No. 26.

The State thereafter elected to exercise its sole peremptory challenge on Juror No. 27, which the trial court permitted. As such, the record indicates that the State, contrary to Powell's contention, did not waive its sole peremptory challenge prior to it excusing Juror No. 27. Accordingly, Powell's argument on this point is without merit.

{¶38} Powell's fourth assignment of error is overruled.

Assignment of Error V

The trial court erred and denied Tiffany Powell due process of law by not excusing [Juror No. 1 and Juror No. 2] given their expressed answers during voir dire that they cannot be fair and impartial jurors.

{¶39} In her fifth assignment of error, Powell contends that the trial court erred by failing to excuse Juror No. 1 and Juror No. 2 given their respective answers during voir dire purportedly indicating that they could not be fair and impartial jurors. We disagree.

{¶40} A juror's disclosure during voir dire that he cannot be a fair and impartial juror or will not follow the law as given to him by the court is good cause for challenging a juror. Crim.R. 24(C)(9). It is the role of the trial court to determine the individual juror's ability to follow the law and be impartial. *State v. Williams*, 79 Ohio St.3d 1, 8 (1997). "A trial court's ruling on a challenge for cause will not be overturned on appeal 'unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion.'" *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 38, quoting *Williams* at 8.

{¶41} When determining whether a denial of a challenge to a juror for cause is prejudicial error, the relevant inquiry is whether the jury panel as a whole was affected by the trial court's error. *Gray v. Mississippi*, 481 U.S. 648, 664 (1987). "[I]n order to state a constitutional violation in this situation, the defendant must use all of his peremptory challenges and demonstrate that one of the jurors seated was not impartial." *State v. Broom*, 40 Ohio St.3d

277, 288 (1988). When a defendant exhausts his or her peremptory challenges before the full jury is seated, the erroneous denial of a challenge for cause may be prejudicial to the defendant. *Williams* at 8. "The reason for this rule is that an error by the trial judge in overruling a challenge for cause forces the defendant to use a peremptory on a prospective juror who should have been excused for cause, giving the defendant fewer peremptories than the law provides." *Id*.

{¶42} In the present case, defense counsel informed the trial court during voir dire that he was "disappointed" in Juror No. 1 and Juror No. 2 because both of their responses "indicated that they were leaning toward" finding Powell guilty. In response, the trial court noted that neither juror had indicated that he could not follow the law. However, the trial court proceeded to instruct both jurors on a criminal defendant's presumption of innocence. The record reflects that both jurors stated that they understood the trial court's instruction and both jurors stated that they could follow said instruction. The trial court then asked defense counsel if he wished to follow up on the instruction, to which defense counsel responded, "[n]o, sir."

{¶43} Moreover, the record reflects that of its four peremptory challenges, defense counsel used its first two challenges to excuse Juror No. 1 and Juror No. 2. Thus, these purportedly unfair and partial jurors did not serve on the jury. While defense counsel did exhaust all four peremptory challenges before the entire jury was seated, defense counsel did not object on the basis that using two peremptory challenges to excuse Jurors No. 1 and 2 left Powell with fewer peremptory challenges than the law provides. Additionally, Powell does not argue that any of the jurors who actually sat on the jury were not impartial.

{¶44} For these aforementioned reasons, we determine that the trial court did not abuse its discretion by failing to excuse Juror No. 1 and Juror No. 2.

{¶45} Powell's fifth assignment of error is overruled.

Assignment of Error VI

The trial court erred and denied Tiffany Powell due process of law by not allowing the requested instruction for involuntary manslaughter.

{¶46} In her sixth assignment of error, Powell argues that the trial court denied her due process of law by not giving a jury instruction on the lesser included offense of involuntary manslaughter. We disagree.

{¶47} "A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Williford*, 49 Ohio St.3d 247, 251 (1990). "This Court reviews a trial court's decision to give or not give jury instructions for an abuse of discretion under the particular facts and circumstances of the case." *State v. Calise*, 9th Dist. Summit No. 26027, 2012-Ohio-4797, ¶ 68, citing *State v. Sanders*, 9th Dist. Summit No. 24654, 2009-Ohio-5537, ¶ 45. An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, a reviewing court may not simply substitute its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶48} Determining whether a lesser included offense instruction is warranted involves a two-part test. *State v. Deanda*, 136 Ohio St.3d 18, 2013–Ohio–1722, ¶ 6. First, a trial court must determine the purely legal question of whether the requested charge is generally a lesser included offense of the charged crime. *Id.*; *State v. Kidder*, 32 Ohio St.3d 279, 281 (1987). Second, the trial court must consider the particular evidence and determine if "a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense." *Shaker Hts. v. Mosely*, 113 Ohio St.3d 329, 2007–Ohio–2072, ¶

11; *accord Deanda* at ¶ 6; *State v. Evans*, 122 Ohio St.3d 381, 2009–Ohio–2974, ¶ 13. Only in the second tier of the analysis do the facts of a particular case become relevant. *Deanda* at ¶ 6. However, a lesser included offense instruction requires more than "some evidence" that a defendant may have acted in such a way as to satisfy the elements of the lesser offense. *State v. Shane*, 63 Ohio St.3d 630, 633 (1992). "In deciding whether to instruct the jury on a lesser-included or inferior-degree offense, the trial court must view the evidence in a light most favorable to the defendant." *State v. Meadows*, 9th Dist. Summit No. 26549, 2013-Ohio-4271, ¶ 8, citing *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, ¶ 192, quoting *State v. Thomas*, 40 Ohio St.3d 213 (1988), paragraph two of the syllabus.

{¶49} The Supreme Court of Ohio has explicitly held that involuntary manslaughter, R.C. 2903.04, is a lesser included offense of aggravated murder, R.C. 2903.01(A). *See Thomas* at 216 (applying the test found in *State v. Deem*, 40 Ohio St.3d 205 (1988)). Accordingly, we proceed to the second step of the *Deanda* analysis and examine the facts of this case in light of the statutory elements.

{¶50} Here, the State charged Powell with aggravated murder in violation of R.C. 2903.01(A), which provides that "[n]o person shall purposely, and with prior calculation and design, cause the death of another * * *." R.C. 2903.04(A) sets forth the offense of involuntary manslaughter and states that "[n]o person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony." "As the only distinguishing factor between Section 2903.01(A) of the Ohio Revised Code and involuntary manslaughter is the mental state involved, an instruction on involuntary manslaughter must be given when the jury could reasonably find against the state on the elements of purpose and prior calculation and design, but still find for the state on the defendant's act of killing another." *State*

v. Cole, 9th Dist. Summit No. 17064, 1995 WL 752682, *2 (Dec. 20, 1995), citing *Thomas* at 216. That is, "[a]n involuntary manslaughter instruction is not justified * * * unless the defendant convinces the jury that the defendant 'lacked the purpose to kill required by the aggravated murder statute.'" *State v. Linkous*, 4th Dist. Scioto No. 12CA3517, 2013-Ohio-5853, ¶ 66, quoting *State v. Scott*, 61 Ohio St.2d 155, 167 (1980) (applying the same logic to sustaining a conviction for aiding and abetting an aggravated murder).

{¶51} In the trial court, Powell's counsel did not indicate why he thought Powell was entitled to an instruction on the lesser included offense of involuntary manslaughter with respect to aggravated murder. Instead, counsel asked for the instruction on the lesser included offense and merely objected to the trial court's refusal to give said instruction. While Powell now makes specific arguments on appeal, she did not do so below prior to the jury beginning its deliberations. Additionally, on appeal, Powell has failed to cite to any authority that would support these specific arguments. *See* App.R. 16(A)(7). Thus, we will broadly consider whether the trial court abused its discretion in failing to give an involuntary manslaughter instruction as a lesser included offense of aggravated murder.

{¶52} After reviewing the evidence in a light most favorable to Powell, we cannot say that the trial court abused its discretion in failing to give an instruction on involuntary manslaughter. At trial, Ro'ceeda Kelly testified at great length about the plot developed by Powell to lure Mr. Harris to the house on Minota Avenue under false pretenses. Kelly's testimony of this plot was consistent with the timeline provided in Jabari Harris' testimony and with the subpoenaed phone records from the cell phones of Mr. Harris, Powell, and Kelly, as well as the TracFone.

{¶53} Additionally, Dr. Kohler, the Summit County medical examiner who performed Mr. Harris' autopsy, described the nature and extent of his injuries to the jury. Dr. Kohler testified that Mr. Harris' cause of death was blunt-force trauma to the head and counted *at least* 15 separate impact sites, but stated that more impact sites possibly existed that she could not count due to the bruises on the body "pool[ing] up." Dr. Kohler testified that Mr. Harris had many contusions and abrasions to his face and head, observed bleeding around the outside of his brain, and observed bruising on the base of his neck, his lower back, his upper back near the shoulder blade, his thigh, and his left forearm. Moreover, Dr. Kohler stated that Mr. Harris bit the back of his tongue and survived the multiple blows to his head and face long enough for his brain to swell. She also stated that she observed clumps of Mr. Harris' hair on the basement floor near where his body was discovered. Dr. Kohler testified that her examination of Mr. Harris' body, specifically his hands, revealed that Mr. Harris had no defensive wounds and that no evidence existed showing that he fought anybody immediately prior to his death. Lastly, Dr. Kohler testified that while she could not definitively state what object was used to kill Mr. Harris, she stated that Mr. Harris' head was possibly slammed into the concrete basement floor and/or hit with a pole.

{¶54} Taking this evidence into consideration, we conclude that no trier of fact could reasonably reject the greater offense of aggravated murder and find Powell guilty of the lesser included offense of involuntary manslaughter. Rather, the jury concluded that Powell aided and abetted the aggravated murder of Mr. Harris. Thus, given the limited argument made on the record to the trial court, and the evidence presented at trial, we cannot conclude that the trial court abused its discretion in failing to give an instruction on involuntary manslaughter with respect to the aggravated murder count.

{¶55} Powell's sixth assignment of error is overruled.

Assignment of Error VII

The trial court erred and denied Tiffany Powell due process of law by allowing the State's DNA expert witness to testify on matters of scientific conjecture and erred when the trial court allowed the coroner to use cumulative gruesome photographs; both in violation of Evid.R. 403(B).

{¶56} In her seventh assignment of error, Powell argues that the trial court erred by permitting Emily Feldenkris, a forensic scientist with the Ohio Bureau of Criminal Investigation, to "testify on matters of scientific conjecture" with respect to the DNA test results from the firearm that was discovered next to Mr. Harris' deceased body. Powell also argues that the trial court erred by permitting Dr. Kohler, the medical examiner, to present cumulative photographs from Mr. Harris' autopsy to the jury. We disagree with both arguments.

{¶57} A careful review of the record reflects that Powell failed to object to Ms. Feldenkris' testimony concerning the DNA test results from the firearm that was discovered near Mr. Harris' deceased body. Additionally, the record reflects that Powell failed to object to Dr. Kohler's testimony during her presentation of Mr. Harris' autopsy photographs. Accordingly, Powell has forfeited all but plain error on appeal. *State v. Tucker*, 9th Dist. Lorain No. 14CA010704, 2016-Ohio-1354, ¶ 23, citing *State v. Bowerman*, 9th Dist. Medina No. 13CA0059-M, 2014-Ohio-4264, ¶ 16, citing *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, ¶ 242. Although Powell has preserved plain error review on these points and generally asserts in her appellate brief that Ms. Feldenkris and Dr. Kohler's respective testimony amounted to plain error, Powell has failed to develop a plain error argument. Thus, because Powell has failed to develop her plain error argument, we do not reach the merits and decline to address this argument. *See* App.R. 16(A)(7); *see also Hairston*, 2006-Ohio-4925 at ¶ 11 (noting that appellant did not adequately present a claim of plain error where his brief makes a conclusory

statement that plain error occurred, but did not provide the Court with any reasoning to support that position).

{¶58} Powell's seventh assignment of error is overruled.

III.

{¶59} With all seven of Powell's assignments of error having been overruled, the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JULIE A. SCHAFER
FOR THE COURT

HENSAL, P. J.
CARR, J.
CONCUR.

APPEARANCES:

RUSSELL A. BUZZELLI, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.