

[Cite as *State v. Fuller*, 2016-Ohio-4796.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 14 BE 0016
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
DEVIN W. FULLER)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Belmont County,
Ohio
Case No. 12 CR 249

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee:

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JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 27, 2016

[Cite as *State v. Fuller*, 2016-Ohio-4796.]
WAITE, J.

{¶1} Appellant Devin W. Fuller appeals his March 13, 2014 convictions on aggravated murder, aggravated burglary, and burglary in the Belmont County Common Pleas Court. He was sentenced to life in prison without the possibility of parole. Appellant raises five assignments of error. In his first and third assignments of error, he challenges his convictions based on sufficiency of the evidence and manifest weight of the evidence arguments. In his second assignment of error, he argues that the trial court abused its discretion when it admitted several photographs into evidence. In his fourth assignment of error, he claims that his counsel was ineffective for failing to object to testimony regarding prior bad acts. In his final assignment of error, he contends that the trial court improperly used his silence against him and failed to consider mitigating evidence when determining his sentence. For the reasons provided, Appellant’s arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} The victim in this case was a 92-year-old woman who lived alone in a house located in Belmont County, Ohio. On June 29, 2012, the victim’s daughter called to check on her after a storm had passed through the area. The victim told her daughter that she was fine and would be going to bed soon. The next morning, the victim’s daughter became concerned after the victim failed to answer or respond to several phone calls. The daughter and her husband drove to the victim’s house to check on her.

{¶13} When the daughter arrived, she unlocked the front door and entered the house. Almost immediately, she saw that the storm door leading outdoors from the kitchen was wide open and that the kitchen door had been knocked down. She also saw splintered wood from the doorframe lying on the floor next to the door. She immediately ran to her mother's bedroom where she found her deceased, lying on the bed with her pajama pants and underwear around her ankles. The bedroom, along with at least two other rooms, had been ransacked. She noticed that someone had pulled the drawers out of the dressers and left them on the bed and floor. At some point, she determined that a jewelry box engraved with her mother's name, a suitcase with important papers, and a purse containing between \$1,500 and \$2,300 were missing.

{¶14} After the daughter's husband called 911, Lt. John J. Watson arrived at the scene and similarly noted the condition of the kitchen door. He testified that he called Ohio Bureau of Criminal Investigations ("BCI") to investigate the scene. Lt. Watson secured the scene until BCI Special Agent Ed Lulla arrived. After speaking with Lt. Watson, Agent Lulla began searching for evidence. During his investigation, Agent Lulla discovered a hole had been cut into the screen door in a spot corresponding with where the sliding lock had been. He also noted that a slab of wood had been pulled off the cellar door where the handle had been.

{¶15} Shortly thereafter, the coroner arrived and removed the victim's body. Agent Lulla used an evidence vacuum to search a one-foot-by-one-foot area of the bed underneath where the victim's buttocks had been and a one-foot-by-one-foot

area where the victim's feet had been. The vacuum contained a filter which collected any trace evidence from the area. The filter was sent to the crime lab for analysis.

{¶6} The crime lab found approximately thirty hairs in the filter. Of those, it was determined that at least seven were foreign, meaning they did not belong to the victim. One of the foreign hairs had a root intact and was deemed suitable for DNA testing. Approximately thirty other items were sent to the lab for DNA testing. However, a reportable DNA profile could not be obtained from any of the latter items.

{¶7} The police investigation focused on four suspects, including Appellant and his codefendant. At some point, the police narrowed the list to only Appellant and his codefendant. Shortly thereafter, the police obtained a search warrant for Appellant's DNA. A comparison of Appellant's DNA profile and the DNA profile developed from the foreign hair revealed that Appellant could not be excluded as the contributor of the hair. The testing determined that 1 out of 364 quintillion, 600 quadrillion unrelated individuals would be expected to have this DNA profile.

{¶8} The police arrested Appellant on October 11, 2012. A Grand Jury indicted him on: four counts of aggravated murder, a first-degree felony in violation of R.C. 2903.01; two capital specifications, in violation of R.C. 2929.04(A)(3) and R.C. 2929.04(A)(7); one count of aggravated burglary, a first-degree felony in violation of R.C. 2911.11(A)(1); and one count of burglary, a second-degree felony in violation of R.C. 2911.12. Prior to trial, the state dismissed two of the four aggravated murder counts. Following trial, a jury found Appellant guilty of one count of aggravated murder, with a capital specification, one count of aggravated burglary,

and one count of burglary. The jury found Appellant not guilty of the remaining count of aggravated murder and capital specification.

{¶9} Because Appellant was convicted of aggravated murder with a capital specification, the case moved to the penalty phase where the jury heard mitigating evidence. However, the jury became deadlocked and sentencing reverted to the trial court. On March 13, 2013, the trial court held a sentencing hearing. At hearing, the trial court sentenced Appellant to life imprisonment without the possibility of parole on the aggravated murder and capital specification count. The remaining counts, aggravated burglary and burglary, merged with the aggravated murder count for sentencing purposes. This timely appeal followed.

FIRST AND THIRD ASSIGNMENT OF ERROR

THE JURY ERRED IN FINDING APPELLANT GUILTY WHERE THAT FINDING IS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S RULE 29 MOTION FOR ACQUITTAL.

{¶10} Although Appellant frames his first assignment of error as a manifest weight argument, the substance of his argument appears to challenge his convictions based on sufficiency of the evidence. In his third assignment of error, Appellant challenges the trial court's denial of his Crim.R. 29 motion for an acquittal based on a sufficiency of the evidence argument. Appellant's arguments within these respective assignments mirror one another and will be addressed together.

{¶11} In relevant part, Crim.R. 29(A) states that “[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.”

{¶12} Pursuant to Article IV, Section 3(B)(3) of the Ohio Constitution, appellate courts are authorized to assess the weight of the evidence. *State v. Draper*, 7th Dist. No. 07 JE 45, 2009-Ohio-1023, ¶ 25. When a manifest weight argument has been presented, “[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Id.* at ¶ 26, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶13} A manifest weight of the evidence review determines whether the evidence presented is persuasive or believable. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). “Weight is not a question of mathematics, but depends on its effect in inducing belief.” (Emphasis deleted.) *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12, citing *Thompkins, supra*, at 387, 678 N.E.2d 541.

{¶14} If a reviewing court disagrees with a jury’s decision and reverses a verdict, the court acts as a thirteenth juror. *Id.* at 387, citing *Tibbs v. Florida*, 457

U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Accordingly, an appellate court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Draper, supra*, at ¶ 29. In order to reverse a jury verdict under manifest weight of the evidence, three appellate judges must concur. *Id.*, citing *Thompkins* at 389.

{¶15} On the other hand, sufficiency of the evidence involves a legal question which addresses adequacy. *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476 ¶ 49 (7th Dist.), citing *Thompkins, supra*, at 386. "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *Draper, supra*, at ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). An appellate court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. No. 09-JE-26, 2011-Ohio-1468, ¶ 34.

{¶16} Appellant argues that the state presented a "mere scintilla of evidence" against him. (Appellant's Brf., p. 10.) In Appellant's arguments he contends the state failed to prove that he was the perpetrator of these crimes. Appellant correctly states that the primary evidence used to link him to these crimes was the foreign hair found underneath the victim's body. Appellant asserts that either his codefendant, who frequently visited Appellant's house, or the crime scene investigators could have had

his hair on their clothing and transported it to the scene. As there are other plausible explanations for the presence of his hair at the crime scene, Appellant urges that the fact that his hair was at the scene, alone, does not prove that he was the perpetrator.

{¶17} In response, the state contends that the physical evidence and witness testimony presented at trial provided more than adequate evidence to support Appellant's convictions. And while Appellant attempts to argue manifest weight in his first assignment, it is clear that he is really arguing the sufficiency of the evidence. As to the burglary charge, the state contends that it provided evidence on all elements. The record shows that Appellant and his codefendant entered the victim's house by knocking down the kitchen door, the house was ransacked, and several of the victim's possessions were removed from the house. As to aggravated burglary, the state asserts that it was required to prove, in addition to the elements of the crime of burglary, that Appellant inflicted physical harm on the victim. The state argues that this element was satisfied through evidence of the severity of the victim's injuries. The state further contends that this evidence was also sufficient to prove the "purposeful" element of aggravated murder.

{¶18} The crux of this case is whether the presence of Appellant's hair at the crime scene supports the jury's finding that he was the perpetrator of these crimes. Appellant raises no arguments as to whether the state proved that the crimes occurred. Appellant's sole contention is that because identification of the perpetrator rested on a single hair, the state failed to prove identity. We have recently decided a similar case involving a fingerprint that resulted in a murder conviction in *State v.*

Ferrara, 7th Dist. No. 14 MA 4, 2015-Ohio-3822, 42 N.E.3d 224. In *Ferrara*, the appellant's murder conviction rested on three thirty-nine-year old fingerprints found near a garage door that was used to gain entrance into the victim's house. *Id.* at ¶ 5. The appellant denied that he even knew the victims and claimed that he had never been to their home. *Id.* at ¶ 6. The appellant challenged his conviction based on both sufficiency and manifest weight of the evidence arguments. On appeal, we held that the appellant's fingerprints at the crime scene, despite his statements that he did not know the victims and had never been to their home, were sufficient evidence on which the jury could base its conclusion that he was the perpetrator. *Id.* at ¶ 83.

{¶19} Our case similarly rests on a sole piece of identification evidence, Appellant's hair. As in *Ferrara*, the evidence was found inside the victim's house despite Appellant's statement that he had never been to the house. In fact, the hair was found underneath the body of the victim. Based on this evidence, the jury concluded that not only was Appellant present when the victim was murdered, he was the perpetrator of the crime.

{¶20} First and foremost, there is no question that the hair in the instant case belongs to Appellant. Because of the results of the DNA testing, Appellant concedes that the hair belongs to him. The hair was found by Agent Ed Lulla, a BCI crime scene investigator. Agent Lulla testified that after the victim's body was removed, he used an evidence vacuum to collect evidence in a one-foot-by-one-foot area of the bed that had been underneath the victim's buttocks and the same type of area under her feet. (Tr. Vol. II, pp. 261-262.) The hair was collected from one of these two

areas on the bed, and the hair came from underneath the victim's body. Based on the location of Appellant's hair, a logical inference could be drawn that Appellant was in the victim's room and in quite close proximity when she was murdered.

{¶21} Appellant has provided no reasonable explanation as to why his hair was found under the victim at the crime scene in light of his statement that he had never been inside of her house. He attempts to explain the presence of his hair through the "transportation theory." According to Appellant, his codefendant spent considerable time at Appellant's house. While there, Appellant theorizes that the codefendant could have picked up one of Appellant's hairs on his clothing and it could have come off of the codefendant's clothing when he murdered the victim. Hence, his hair was at the crime scene even though he had never been inside the house. Alternatively, Appellant contends that his hair may have been transported to the scene by an investigator who was at the crime scene in some manner.

{¶22} Although Appellant's theory is hypothetically possible, based on this record, it is highly unlikely. His theory was presented to the jury, who clearly rejected it. We must note that only Appellant's hair was found at the scene. Based on this evidence, a jury could reasonably determine that the presence of Appellant's hair and the absence of his codefendant's hair makes the transportation theory unlikely. As to his theory regarding the investigating officers, Appellant has not named any specific investigator who could have come into contact with Appellant at any point prior to the collection of the incriminating hair.

{¶23} Agent Lulla did not find the hair until after the investigators left the room and the coroner moved the body. There is no evidence that any investigator other than Agent Lulla was in the room at the time the area underneath the victim's body was vacuumed. The jury clearly found it unlikely that investigators could have transported the hair underneath the victim before her body was moved. As a reasonable juror could reject Appellant's theory and there is no other explanation for the presence of his hair, it is reasonable to conclude that the presence of his hair leads to the conclusion that Appellant was in the room at the time of the murder and had some kind of contact with the victim.

{¶24} In addition to the hair, Appellant contests the relevancy of testimony from two witnesses, Lt. Watson and his codefendant's former fiancé. Lt. Watson testified that he executed the arrest warrant on Appellant. Appellant asked Lt. Watson why he was being arrested. Lt. Watson informed him that the arrest was for the victim's murder and Appellant asked "[t]he lady in West Bellaire?" (Tr. Vol. II, pp. 109-110.) When Lt. Watson said "yes," he observed tears coming down Appellant's face.

{¶25} Appellant additionally contests testimony from his codefendant's former fiancé. According to her testimony, she was with both Appellant and the codefendant shortly after learning of the victim's murder and overheard Appellant say "what's done is done. He wish [sic] he could take it back." (Tr. Vol. II, p. 64.) Appellant argues that this testimony is irrelevant as she admittedly had no context for this statement.

{¶26} While neither witnesses' testimony is conclusive evidence of Appellant's guilt, it is up to the jury to determine whether a witness is credible and how much weight to place on their testimony. There is nothing within this record to suggest that the jury's weighing of the evidence created a manifest injustice. Even without the witnesses' testimony, in accordance with *Ferrara*, the presence of Appellant's hair underneath the victim's body is sufficient to support the jury's verdict as to identification of Appellant as the perpetrator .

{¶27} Accordingly, Appellant's first and third assignments of error are without merit and are overruled.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IS [SIC] OVERRULING APPELLANT'S OBJECTIONS TO THE ADMISSION OF CERTAIN PHOTOGRAPHS WHERE THOSE PHOTOGRAPHS WERE PREJUDICIAL AND LACKED PROBATIVE VALUE.

{¶28} Appellant argues that several photographs, specifically exhibit numbers 20, 21, 22, 67, 68, and 71, were cumulative, unnecessarily gruesome, and served only to inflame the jury. A trial court's decision to admit photographs is reviewed for an abuse of discretion. *State v. Morales*, 32 Ohio St.3d 252, 258, 513 N.E.2d 267 (1987). A reviewing court "will not interfere with the trial court's balancing of probativeness and prejudice 'unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby.'" *State v. Slagle*, 65 Ohio St.3d

597, 602, 605 N.E.2d 916 (1992), quoting *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

{¶29} The Ohio Supreme Court has held that a trial court does not abuse its discretion by admitting an arguably gruesome photograph which demonstrates a victim's wounds, establishes intent, and shows the manner and circumstances of the death. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 92, citing *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 85.

{¶30} Exhibits 20 through 22 are crime scene photographs. These photographs were taken by Ohio BCI Special Agent Ed Lulla and were admitted during his testimony. Exhibit 20 showed there were bruises around the victim's eye, significant blood on her face, she had a broken nose, swelling to the left side of her face, a cut on her face, and bruises on her hands, arms, and neck. The victim's dentures are shown lying next to her body. The photograph also reveals that the victim's shirt had been pulled up over her breasts.

{¶31} While the photograph may be called gruesome, it is relevant, as it tends to demonstrate the perpetrator's intent to kill and the manner and circumstances of the victim's death. Importantly, the victim died as a result of manual strangulation. Thus, the wound patterns are highly relevant. The extent and nature of the injuries is also relevant to the "purposeful" element of aggravated murder and the "infliction of physical harm" element of aggravated burglary. The photograph also showed the victim in a state of undress, which was relevant to the rape aspect attached to one of the aggravated murder counts. Accordingly, exhibit 20 is relevant and probative.

{¶32} In regard to exhibit 21, while it does show the victim's head at the bottom of the photograph, it was admitted to show the ransacked state of the room and the proximity of the victim. The photograph shows pillows thrown about on the bed and a box that had been rummaged through. The Ohio Supreme Court has held that photographs that illustrate how close a victim's body is to evidence of a crime is relevant and admissible. See *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 135. Accordingly, exhibit 21 is relevant and probative.

{¶33} The final crime scene photograph, exhibit 22, demonstrates injuries to the victim's hands and arms which are not depicted in exhibits 20 and 21. The photograph also shows that the victim's shirt had been lifted above her breasts and that her pants had been removed, which again provided evidentiary support for the involvement of the rape crime with the aggravated murder count. As the photograph provides evidentiary support for elements of a charged crime and further demonstrates the nature and extent of the victim's injuries, it is relevant and probative.

{¶34} The next set of contested photographs were taken at the autopsy. The first photograph, exhibit 67, depicts a close-up view of bruises on the victim's neck. Exhibit 68 is also a close-up photograph that shows the injuries on the victim's neck, face, chest, and shoulder. Exhibit 71 shows a close-up view of a cut and bruise on the victim's shoulder; a ruler was placed next to the injury. Each of these photographs were offered to support the coroner's testimony and to depict the victim's injuries. (Tr. Vol. II, p. 432.)

{¶35} While each of these photographs illustrate various injuries suffered by the victim, none are particularly gruesome. Even so, the photographs were used to illustrate the testimony of Dr. Charles Lee, the coroner who performed the victim's autopsy. Again, it is important to note that the victim died as a result of manual strangulation. These photographs depict the injuries that led Dr. Lee to this conclusion. Each of the injuries displayed in these photographs were discussed at length by Dr. Lee and led to further testimony regarding the seriousness of each injury.

{¶36} For instance, the bruises shown on the victim's chin and neck in exhibit 67 led to testimony from Dr. Lee that the autopsy revealed deep bruises to the neck muscles underneath the skin and to the collarbone. (Tr. Vol. II, p. 457.) Similarly, the injuries to the victim's jaw, neck, and chest depicted in exhibit 68 led to testimony that the autopsy revealed two jaw fractures, various abrasions, and deep bruises to the chest muscles. Dr. Lee's testimony also revealed that underneath the chest injuries shown in exhibit 71, three fractured ribs were discovered.

{¶37} The Ohio Supreme Court has held that photographs that illustrate a coroner's testimony and provide a general perspective of a victim's injuries are relevant and admissible. *State v. Todd*, 7th Dist. No. 12 CO 28, 2015-Ohio-2682, ¶ 30, citing *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 103. This is because "such photographs provide the jury with a 'total appreciation of the nature and circumstances of the crimes.'" *Todd* at ¶ 30, citing *Diar* at ¶ 109; *State v. Evans*, 63 Ohio St.3d 231, 251, 586 N.E.2d 1042 (1992). As the autopsy

photographs illustrated the coroner's testimony and provided the jury with a prospective of the injuries inflicted on the victim, the autopsy photographs are relevant and probative.

{¶38} "Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact * * * as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number." *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768, (1984), paragraph seven of the syllabus.

{¶39} Appellant contends that material prejudice is reflected in this record due to the reaction to the photographs by one of the jurors. Appellant explains that the parties and the court noticed that one of the jurors, juror number seven, appeared to be falling asleep during the proceedings. According to Appellant, the juror informed the court when questioned that she was not sleeping but was closing her eyes to avoid looking at the photos. This argument is misleading. The prosecutor informed the court that juror number seven appeared to be sleeping during the proceedings. The bailiff told the parties that the juror had approached him and told him that she had not been sleeping but had closed her eyes because she did not like looking at the photographs. However, the state indicated that it had observed her eyes closed at times when photos were not being shown, questioning the truth of her statement. The court, along with counsel from both sides, met with the juror on the record.

{¶40} During this discussion, the juror acknowledged closing her eyes but clarified:

Well, when the pictures and the evidence was being shown up on the screen, I was watching that. When the coroner was talking about some things that he saw when he was describing the injuries and showing where they were, that's what I was having a hard time with, just because the thought of being injured or something that I think is gross, I just - - I kind of cringe when I hear it. (Emphasis added.)

(Tr. Vol. II, p. 507.)

{¶41} It appears from this statement that the juror was troubled more by the coroner's description of the injuries than the actual photographs. We note that in a murder trial, jurors are often exposed to gruesome testimony and photographs. Even so, the juror was adamant that she could continue despite the possibly gruesome nature of the photographs and testimony. Thus, Appellant's argument as to prejudice is unsupported by the record.

{¶42} The contested photographs are probative, illustrated the witnesses' testimony, and provided the jury with a perspective of the injuries inflicted on the victim. As Appellant has not demonstrated material prejudice, the trial court did not abuse its discretion by admitting the photographs. Accordingly, Appellant's second assignment of error is without merit and is overruled.

FOURTH ASSIGNMENT OF ERROR

INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶43} Appellant argues that his counsel was ineffective for eliciting testimony concerning his prior bad acts from Lt. Watson and failing to object or move to strike the testimony. In response, the state contends that Lt. Watson’s testimony was the result of questions asked by the trial court judge, not Appellant’s counsel. Even so, the state argues that counsel’s decision not to draw further attention to the testimony was trial strategy and did not amount to ineffective assistance of counsel.

{¶44} In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that his counsel’s performance was deficient and that he was prejudiced by the deficiency. *State v. White*, 7th Dist. No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. In order to demonstrate prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Lyons*, 7th Dist. No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694.

{¶45} Pursuant to Evid.R. 404(B), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”

{¶46} During Lt. Watson’s testimony, defense counsel asked him whether Appellant cooperated during the execution of the DNA warrant. Lt. Watson testified that he had cooperated. The following colloquy followed:

Q. And then you arrested [Appellant]?

A. Are we talking about the first instance on the 17th, or on October 3rd?

THE COURT: Now, wait a minute. Wait a minute. The 17th of what?

THE WITNESS: September - - I'm sorry. September 17th.

THE COURT: And you arrested him for what purpose?

A. At that point in time, we had the DNA search warrants.

Q. Okay.

A. When our investigation showed that [Appellant] also had active warrants out of Belmont County - -

Q. Okay.

A. - - that's when we, in turn with the Belmont County Sheriff's Office, went out to Mount Olivet Road, where [Appellant] was staying. Of course, it was outside of Bellaire. * * * We accompanied the Belmont County Sheriff's Office out there to his residence to execute the arrest warrants, on the warrants that he had that had absolutely nothing to do with the case that we have right now.

Since there was arrest warrants for him and we also had a DNA warrant for his arrest, that's why the Bellaire Police Department went out with the sheriff's office and arrested him in a residence.

(Tr. Vol. II, pp. 169-170.)

{¶47} Importantly, the contested testimony was in response to the trial court judge's question, not defense counsel. Thus, the issue is limited to whether defense counsel was ineffective for failing to object or move to strike the testimony.

{¶48} The Ohio Supreme Court has held that "experienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment." *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 140, citing *Lundgren v. Mitchell*, 440 F.3d 754, 774 (C.A.6, 2006). As such, defense counsel's decision not to move to strike an answer can be a trial tactic to prevent emphasizing the information inadvertently elicited. *State v. Schlagcheck*, 6th Dist. No. L-00-1121, 2001 WL 85158, *6 (Feb. 2, 2001). Such trial tactic is presumed to be used by defense counsel as part of trial strategy. *Id.*

{¶49} In this case, the contested testimony was buried within Lt. Watson's lengthy answer to the court's question. It is reasonable to assume that trial counsel determined objecting to and bringing further attention to the testimony could cause more harm than good to Appellant, and was reasonable trial strategy.

{¶50} Furthermore, the Ohio Supreme Court has held that "any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial * * * that failure to object essentially defaults the case to the state."

Johnson at ¶ 140, citing *Lundgren*. Here, Appellant has not argued nor demonstrated prejudice. The record is devoid of any evidence to suggest that this testimony contributed to Appellant's conviction.

{¶51} As counsel's failure to object or move to strike comments buried within Lt. Watson's lengthy response could be considered reasonable trial strategy and Appellant has not argued or demonstrated resulting prejudice, he cannot meet either *Strickland* prong. Accordingly, Appellant's fourth assignment of error is without merit and is overruled.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO LIFE
WITHOUT THE POSSIBILITY OF PAROLE.

{¶52} Citing *State v. Donald*, 7th Dist. No. 08 MA 154, 2009-Ohio-4638, Appellant argues that the trial court improperly used his silence against him when determining his sentence. Additionally, Appellant contends that the trial court failed to consider mitigating evidence when determining his sentence.

{¶53} In response, the state distinguishes *Donald* from the case at bar. Unlike the instant case, Appellant notes that the trial court judge in *Donald* stated that, because defendant was silent, the judge assumed defendant did not dispute any of the testimony presented in the matter. The state points out that the trial court in this case made no such statement. The state argues that this case is more akin to *State v. Davis*, 7th Dist. No. 08 MA 236, 2011-Ohio-292. Pursuant to *Davis*, a trial court's statement that a defendant has failed to demonstrate remorse is relevant to

the seriousness and recidivism factors a court is required to consider when sentencing. Additionally, the sentencing transcripts demonstrate that the trial court considered mitigating evidence when determining Appellant's sentence.

{¶154} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, Slip Opinion No. 2016-Ohio-1002, ¶ 23. In addition, an appellate court may vacate or modify a sentence that is not clearly and convincingly contrary to law only if the record does not contain clear and convincing evidence to support the sentence. *Id.*

{¶155} Appellant does not argue that his sentence, which is within the statutory guidelines, is contrary to law. Accordingly, in order to sustain his argument, we must find that the record does not provide clear and convincing evidence in support of the sentence. Appellant argues that the trial court improperly considered his silence as evidence and failed to consider mitigating evidence in sentencing. However, the record does not support his claims.

{¶156} As to his silence, the state correctly points out that *Donald* is not applicable. In *Donald*, the trial court stated that it interpreted the defendant's silence to mean that he agreed with the testimony as presented. In the matter before us, the trial court never commented on Appellant's silence. Rather, as in *Davis*, the trial court commented on Appellant's lack of remorse. In *Davis*, we held that a trial court's discussion of lack of remorse does not constitute error.

{¶157} We further explained the difference between a trial court's comment on a defendant's silence at trial versus a statement regarding lack of remorse at

sentencing in *State v. Clunen*, 7th Dist. No. 12 CO 30, 2013-Ohio-5525. In *Clunen*, we held that a trial court's determination of a defendant's lack of remorse and refusal to take responsibility are indicative that the court considered the statutory sentencing factors and are not related to a defendant's silence. *Id.* at ¶ 21, citing *State v. Moore*, 11th Dist. No. 2011-G-027, 2012-Ohio-3885, ¶ 47

{¶58} At the sentencing hearing, the trial court stated that it considered Appellant's age, his family, his education, and whether he was a candidate to return to society at some point. Regarding this last point, the court stated:

[T]his Court cannot and will not ignore the fact that since you were arrested, approximately 16 months ago, and up to today's date, even though you have been convicted of your crimes beyond a reasonable doubt, not once have you expressed an ounce of remorse for [the victim] and the harm that you have caused to her family. Not once have you assumed any responsibility or accountability for your action.

(3/13/14 Sentencing Hrg. Tr., pp. 20-21.)

{¶59} The court continued, “[y]et to this moment, not one word or expressed concern for what you did or for the aged, innocent person you did it to.” (3/13/14 Sentencing Hrg. Tr., p. 21.) Additionally, the court noted that it had an obligation to be fair to both Appellant and to society. The court determined that Appellant's lack of remorse in addition to the fear that he instilled within the community demonstrated that he was not a candidate to return to society.

{¶60} It is apparent from this record that the trial court's statements were related to its consideration of the statutory sentencing factors and not an inappropriate comment on Appellant's silence at trial. In accordance with *Davis* and *Clunen*, the trial court's statements were proper.

{¶61} As to Appellant's claim that the trial court failed to consider mitigating evidence, this claim is also unsupported by the record. At the sentencing hearing, the judge stated that he:

[R]eviewed the record of proceedings for Phase II, including evidence pertaining to the aggravating circumstance, *mitigation testimony*, including the expert opinion of a forensic psychologist, defendant's record that was submitted, victim impact letters, statements of defendant's family members, and all oral statements presented at the sentencing hearing prior to imposing sentence upon defendant.

(Emphasis added.)

(3/13/14 Sentencing Hrg. Tr., p. 15.)

{¶62} The judge specifically stated that he had considered mitigating evidence. The record is devoid of any evidence to suggest that the court did not, in fact, consider such evidence. Accordingly, Appellant's sentence is supported by clear and convincing evidence. Appellant's arguments are without merit and are overruled.

Conclusion

{¶63} Appellant challenges his convictions based on sufficiency of the evidence and manifest weight of the evidence arguments. He additionally argues that the trial court abused its discretion by admitting several gruesome photographs. He also argues that his trial counsel was ineffective for eliciting testimony regarding prior bad acts and for failing to object or strike the testimony. Finally, he argues that the trial court abused its discretion in determining his sentence. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.