**[Cite as *State v. Jones*, 2010-Ohio-4054.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1002

Appellee — Trial Court No. CR0200802735

v.

Dounche Jones — **DECISION AND JUDGMENT**

Appellant — Decided: August 27, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

HANDWORK, J.

**{¶ 1}** This is an appeal from a judgment of the Lucas County Court of Common Pleas.

**{¶ 2}** At approximately 5:30 a.m. on July 15, 2008, Roland Gladieux awoke to the sound of voices outside his home on Western Avenue, which is located in Toledo, Lucas County, Ohio. When he looked out the window, he saw a man, later identified as

the victim, David Babcock, who was kneeling on one knee holding a bicycle. A man was standing over Babcock telling him: "I'll fucking shoot you, motherfucker, I'll shoot you." According to Gladieux, Babcock replied, "Fuck you." The man who was standing then shot Babcock in the face. Even though he could not see the shooter's face because he was wearing a black "hoodie" with the hood pulled up over his head, Gladieux identified the shooter as being African American because of the sound of his voice. The shooter ran off in the direction of Langdon Street. Gladieux then called 911 emergency services.

**{¶ 3}** Officer Michael Talton and his partner, Officer Valerie Lewis, responded to the call of shots fired on Western Avenue. When they arrived at the scene the officers discovered the body of David Babcock laying "face up" on the sidewalk with a bicycle on top of him. Babcock had a large amount of blood coming from his head. Some of the blood had seeped into the pattern of a shoe print next to Babcock's body. The police took a number of photographs of the shoe print. The coroner later determined that Babcock died from a gunshot wound to his head caused by a .40 caliber semi-automatic weapon.

**{¶ 4}** Keith Brown, who lives on Langdon Street around the corner from Western Avenue, heard sirens, and saw the police car "flying down the street" going the wrong way on a one way street. He then saw two black males run across the street and enter the residence of Amanda Vargas, whose house is directly opposite Brown's home. The Vargas home is about a "half a block" from the scene of the shooting.

**{¶ 5}** Based upon the information provided by Brown, police officers went to the Vargas home where they discovered appellant, Dounche Jones, in an upstairs bedroom,

ostensibly sleeping. Appellant first gave Officer William Berk a false name and birth date. Berk ran "a check" on that name and birth date and learned that it was false. Jones then provided his real name, birth date, and social security number. Nonetheless, when questioned by Berk, appellant just kept mumbling and acting nervous. After checking to determine whether appellant and the other individuals in Vargas home had any outstanding warrants, the officers left.

**{¶ 6}** The day after the murder, Ronald Cabell contacted Detective Robert Schroeder and told him that he overheard appellant describing, both through words and by gestures, how he attempted to rob David Babcock and when Babcock resisted, he shot him in the mouth. At that point, the police began to focus on appellant as the major suspect in Babcock's murder.

**{¶ 7}** After receiving information from several other sources, the police arrested Jones. On the day of appellant's arrest, Detective Schroeder conducted an interview of Jones. During that interview, Schroeder noticed that the pattern on the bottom of appellant's size 11 Nike tennis shoes resembled the shoe print found next to David Babcock's body. Therefore, the detective seized appellant's shoes. Chadwyck Douglass, a criminalist employed by the Toledo Police Department, examined the soles of appellant's shoes and compared their prints to the photographs of the sole of the shoe print found at the site of the murder. He determined that the sole of appellant's shoe made the print at that site.

**{¶ 8}** Jones was subsequently indicted on one count of murder with a firearm specification in violation of R.C. 2903.02(A) and 2941.145. He was found guilty and sentenced to 15 years to life in prison on the murder charge and an additional mandatory three years in prison on the firearm specification. Appellant appeals this judgment and sets forth the following assignments of error:

**{¶ 9}** "I. Trial counsel's performance was deficient in several significant ways which resulted in Jones' conviction. He did not receive effective assistance of counsel as a result.

**{¶ 10}** "II. The trial court abused its discretion and erred when it allowed a criminalist to be qualified as an expert witness in shoe print analysis.

**{¶ 11}** "III. The trial court erred by permitting Rule 404(B) [sic] evidence. The evidence was from an unrelated crime and was not timely evaluated by the trial court.

**{¶ 12}** "IV. Due to issues involving chain of custody and foundation, Jones' conviction is not supported by legally sufficient evidence.

**{¶ 13}** "V. Jones' conviction is against the manifest weight of the evidence. Jones never admitted to the crime, and no forensics or eyewitnesses place him at the scene.

**{¶ 14}** "VI. The trial court erred by other evidentiary rulings that were highly prejudicial to Jones.

**{¶ 15}** "VII. The prosecutor engaged in misconduct through a pattern of eliciting improper evidence and vouching for witnesses.

**{¶ 16}** We shall first address appellant's Assignment of Error No. II. In this assignment appellant contends that the trial court erred in allowing a "criminalist" to testify as an expert on shoe print analysis.

**{¶ 17}** Evid.R. 702 reads as follows in pertinent part:

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

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

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

**{¶ 21}** "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *."

**{¶ 22}** Qualification as an expert witness does not require any special education, certification, or complete knowledge of the field in question. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 113. It is necessary only that the witness's specialized knowledge, skill, experience, training or education "will aid the trier of fact in performing its fact-finding function." Id. A trial court's decision to allow a witness to testify as an expert will not be reversed absent an abuse of discretion. *State v. Mack* (1995), 73 Ohio St.3d 502, 511.

**{¶ 23}** In the present case, Chadwyck Douglass testified that he has a master's degree in forensic science from Michigan State University and also received training in

footwear analysis while he was an extern with the Michigan State Police. In addition, he stated that he participated in two separate training classes in shoe print analysis-both as to class characteristics and individual characteristics. This witness further averred that he has worked as a criminalist for the Toledo Police Department for six years analyzing "either drug evidence or footwear evidence" and spends 15 to 20 percent of his time on footwear analysis. It was only after this recitation of his qualifications that Douglass explained the specialized process that he used to compare the characteristics of the sole of appellant's shoe to the photographs taken at the murder scene and opined that appellant's shoe probably made that shoe print. Based upon the foregoing, we cannot say that the trial court abused its discretion in qualifying Douglass as an expert in the analysis of shoe prints. Appellant's Assignment of Error No. II is found not well-taken.

**{¶ 24}** Appellant's Assignment of Error No. III asserts that the trial court erred in allowing the state to present evidence of Jones' other crimes. Specifically, appellant argues that the trial court abused its discretion in allowing appellee's ballistics expert, David Cogan, to testify that appellant's DNA was found on the casing of a .40 caliber semi-automatic pistol used in "shooting up" a vehicle on Airport Highway four days before the murder and that the casing and the casing from the bullet that killed David Babcock came from the same weapon.

**{¶ 25}** Pursuant to Evid.R. 404(B), the state cannot offer evidence of other crimes or wrongs to prove a defendant's character as to criminal propensity. Other crimes evidence may be admissible, however, "for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. In the present case, the other acts evidence was offered to establish Jones as the person who shot David Babcock, that is, to prove identity.

**{¶ 26}** "In order '[t]o be admissible to prove identity through a certain modus operandi, other-acts evidence must be related to and share common features with the crime in question.'" *State v. Craig*, 110 Ohio St.3d 306, 2006 -Ohio- 4571, ¶ 43, quoting *State v. Lowe* (1994), 69 Ohio St.3d 527, paragraph one of the syllabus. Additionally, other acts evidence is inadmissible under Evid.R. 403 if its probative value is substantially outweighed by unfair prejudice. *State v. Rawls*, 10th Dist. No. 03AP-41, 2004-Ohio-836, ¶ 19. Here, both acts involved a shooting with the same .40 caliber semiautomatic weapon; therefore they are related to and share common features. Moreover, appellant suffered no prejudice from the introduction of the other shooting because he was never charged with the Airport Highway shooting, the jury was made aware of the fact that no one was hurt in that shooting, and the court gave the following limiting jury instruction:

**{¶ 27}** "Evidence was received about the commission of an act other than the offense with which the defendant is charged in this trial. That evidence was received only for a limited purpose. It was not received and you may not consider it to prove the character of the defendant in order to show that he acted in conformity with that character. If you find that the evidence of an act is true, that the defendant committed it, you may consider that evidence only for the purpose of deciding whether it proves the

defendant's motive, identity, opportunity, intent or purpose, preparation, [or] plan to commit the offense charged in this trial."

**{¶ 28}** Based upon the foregoing, Appellant's Assignment of Error No. III is found not well-taken.

**{¶ 29}** In Assignment of Error No. IV, appellant contends that his conviction is not supported by sufficient evidence. The arguments set forth under this assignment of error restrict the alleged insufficiency of evidence to establish the chain of custody as to his Nike shoes and the ballistics evidence from the Airport Highway shooting linking him to David Babcock's murder. We shall, therefore, confine our review to these arguments.

**{¶ 30}** An exhibit may not be admitted into evidence until it is properly authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). Testimony by a witness with knowledge "that a matter is what it is claimed to be" is an acceptable method of authentication. Evid.R. 901(B)(1). As a result, physical evidence may be admissible pursuant to such testimony even if there is no proof of a perfect chain of custody. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶ 57. A break in the chain of custody goes to the weight of the evidence, not its admissibility. Id.

**{¶ 31}** Here, Detective William Goetz of the Toledo Police Department's scientific investigation unit testified that he took the photographs of the shoe print in the sand at the scene of the homicide. The parties stipulated that these photos were fair and accurate representations of what Detective Goetz saw at that scene. Detective Schroeder swore

that, when arrested, Jones was wearing a pair of size 11 Nike shoes that looked as if they had the same pattern on the sole as the shoe print found at the murder scene. Goetz therefore seized the shoes and gave them to Chadwyck Douglass, who testified, after opening the plastic bag in which the shoes were placed, that these shoes were in substantially the same condition as they were when he received them. The shoes were then admitted into evidence without objection. Based upon this testimony, we find that sufficient evidence was offered to establish the shoes and photographs were what they were supposed to be.

**{¶ 32}** Appellant's only argument involving the shell casing from the Airport Highway shooting is that it was identified as both Exhibit 27 and Exhibit 29. The record of this case reveals that this casing was Exhibit 27 and was admitted into evidence without objection. Moreover, Detective Goetz testified that he found the .40 caliber bullet whose casing bore appellant's DNA at the Airport Highway shooting, bagged it, sealed the evidence bag, and tagged that bag. At appellant's trial, Jennifer Akbar, who is a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation, also referred to the re-bagged casing as Exhibit 27 and testified that this casing bore appellant's DNA. Consequently, we find that sufficient evidence was offered at trial to establish that Exhibit 27 was the casing involved in the Airport Highway Shooting. Appellant's Assignment of Error No. IV is found not well-taken.

**{¶ 33}** Appellant's Assignment of Error No. V, maintains that his conviction for murder is against the manifest weight of the evidence.

**{¶ 34}** In determining whether a verdict is against the manifest weight of the evidence, this court sits as a "thirteenth juror." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. In resolving conflicts in the evidence, we must determine whether the finder 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.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Moreover, this court must keep in mind that it is the trier of fact's duty to determine the credibility of a witness; accordingly, our ability to consider credibility is limited. *State v. Reynolds*, 10th Dist. No. 03AP-701, 2004-Ohio-3692, ¶13. (Citation omitted.)

**{¶ 35}** To obtain a conviction for murder, the state must prove, beyond a reasonable doubt, that appellant purposely caused the death of another. R.C. 2903.02(A); *State v. Rhode*s (1992), 63 Ohio St.3d 613, 627-628. "A person acts purposely when it is his specific intention to cause a certain result." R.C. 2901.22(A). "Intent to kill" can be inferred from all the circumstances surrounding the death, "'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.'" *State v. Stallings*, 89 Ohio St.3d 280, 290, 2000-Ohio-164, quoting *State v. Robinson* (1954), 161 Ohio St. 213, paragraph five of the syllabus. To get a conviction for a firearm specification, the state must prove, beyond a reasonable doubt, that a firearm existed and that it was operable at the time of the offense. R.C. 2941.145(A); *State v. Murphy* (1990), 49 Ohio St.3d 206, 208.

**{¶ 36}** Based upon a review the entire record of this case, weighing the evidence as set forth infra and all reasonable inferences therefrom, and considering the credibility of witnesses, we cannot say that the jury lost its way in determining that Jones intentionally shot David Babcock in the face with a .40 caliber semiautomatic pistol thereby causing his death. Therefore, the verdict in this cause is not against the manifest weight of the evidence, and appellant's Assignment of Error No. V is found not well-taken.

**{¶ 37}** Appellant's Assignment of Error No. VI argues that the trial court abused its discretion in the manner in which it dealt with two other evidentiary questions. First, appellant asserts that the manner in which the trial court allowed the state to handle the elicitation of testimony from Ricardo Pearson transformed that testimony into hearsay. A reading of the relevant portion of the transcript reveals that Pearson initially told Detective Schroeder that Jones told Pearson that he shot Babcock in the face on the morning of July 15, 2008. At trial, however, Pearson insisted that appellant never said anything to him about the murder. Instead, this witness claimed that he simply told the detective what he had heard "around the neighborhood." While the prosecution initially asked the court to declare Pearson a hostile witness, it then sought to use the detective's report to refresh this witness's recollection. Over appellant's objection, the court allowed the prosecution to use the report. Pearson then acknowledged that he did tell Schroeder that appellant admitted he killed Babcock; nevertheless, Pearson maintained that he was lying to the detective in order to "get out of his [Schroeder's] office."

**{¶ 38}** Evid.R. 801(C) defines "hearsay" as "a statement *other than one made by the declarant* while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." The fact that the trial court permitted the prosecution to attempt to refresh Pearson's memory with Detective Schroeder's report did not transform Pearson's testimony into hearsay because Pearson (as the declarant) was testifying as to his own statement that he previously made to the detective. *State v. Guyton*, 8th Dist.No. 88423, 2007-Ohio-2513, ¶14-15.

**{¶ 39}** In any event, if error, the admission of this statement is harmless error beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 24. Not only did Pearson recant his statement to Detective Schroeder, but also other evidence was offered to establish, beyond a reasonable doubt, that appellant was the individual who murdered David Babcock. This included the shoeprints, appellant's DNA on .40 caliber bullet casing, the fact that this casing and the casing from the bullet that killed Babcock were fired from the same semi-automatic pistol, and the testimony of other witnesses.

**{¶ 40}** Appellant also claims that the trial court erred by allowing Detective Goetz "to become a multi-purpose expert witness and testify about blood transference." At trial, the prosecutor noted that in one of the photographs of shoe prints, the blood from the victim's head wound was visible in just the corner of that photograph. He then asked Goetz whether he "thought the blood was there when the shoe print was actually made or" if it entered "that area at a later time." Trial counsel objected, asserting that the

detective was not an expert on the transference of blood. The court overruled the objection.

**{¶ 41}** The prosecutor attempted to rephrase the question a second time-appellant's counsel again objected. The court below overruled this objection, stating: "He can testify as to what he knows." At that point, the prosecutor asked Goetz:

**{¶ 42}** "According to the scene and what you saw at the scene, what is your determination as to where that blood came from." Appellant objected arguing that there was no basis for the question,; "It's still speculative." The court again overruled the objection. When Goetz started to answer the question by starting to discuss the blood flow and gravity, trial counsel again objected. The judge overruled the objection holding that Goetz was merely testifying as to what he observed. At that point, Goetz stated:

**{¶ 43}** "The longer we were there, the more moisture was presented into that sand, so it was gradually going down into that area. You could see the flow of the blood based upon the fact that the victim's head was at the furthest point to the west. The gravity was taking the blood eastward down the sidewalk and flowing into the sandy area."

**{¶ 44}** This answer reveals that Detective Goetz did not testify as an expert witness, but rather, as a lay witness reciting his observations and recollections. Therefore, appellant's argument on this issue lacks merit. For the foregoing reasons, appellant's Assignment of Error No. VI is found not well-taken.

**{¶ 45}** Appellant's Assignment of Error No. VII urges that plain error occurred in his trial due to prosecutorial misconduct. Plain error may be noticed even if such error

was not brought to the attention of the court. Crim.R. 52(B). "Plain error exists only if 'but for the error, the outcome of the trial clearly would have been otherwise,' and is applied 'under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, ¶ 61, quoting, in part, *State v. Long* (1978), 53 Ohio St.2d 91, 97.

**{¶ 46}** Appellant complains that the prosecutor: (1) called Officer Kevin Dumas as a witness for the sole purpose of portraying Jones as an evil and dangerous man; (2) improperly cross-examined Pearson and, thereby, eliciting hearsay; and (3) used Detective Schroeder to vouch for Pearson and to confirm Pearson's prior statement by using hearsay.

**{¶ 47}** "'The test for prosecutorial misconduct is whether the [conduct was] improper and, if so, whether the [conduct] prejudicially affected the accused's substantial rights.'" *State v. Crisp*, 3d Dist. No. 1-05-45, 2006-Ohio-2509, ¶ 10, quoting *State v. Twyford*, 94 Ohio St.3d 340, 354-355, 2002-Ohio-894. In order to grant a new trial for prosecutorial misconduct, we cannot merely find that the acts of the prosecutor are culpable, but must also find that these acts detrimentally affected the fairness of the proceedings. *Twyford*, 94 Ohio St.3d at 355, citing *Smith v. Phillips* (1982), 455 U.S. 209, 219.

**{¶ 48}** In the present case, we have already determined that testimony elicited by the prosecutor from Pearson was not hearsay and that even if it was deemed hearsay, it was harmless error. With regard to Detective Schroeder, the prosecutor educed testimony

from the detective showing that Pearson's testimony at trial was inconsistent with the statement he made prior to trial. Appellant's trial counsel objected to this line of questioning, the trial court sustained that objection, and instructed the jury to disregard Schroeder's answer. The judge then informed the jury that it was "for them to determine whether or not based upon the examination of Mr. Pearson whether he was consistent or inconsistent with the information he had given this officer." Based upon the foregoing, we cannot say that the prosecutor's line of questioning prejudicially affected any of appellant's substantial rights. Turning now to the questioning of Officer Dumas, we can find nothing in his testimony involving appellant's arrest that would paint Jones as an evil and dangerous man. Moreover, even if we would consider the prosecutor's questions to these witnesses to be misconduct/error, we find that they are not so egregious that they caused a manifest miscarriage of justice in this case. Appellant's Assignment of Error No. VII is found not well-taken.

**{¶ 49}** Assignment of Error No. I asserts that appellant was deprived of his constitutional right to a fair trial due to ineffective assistance of counsel. In *Strickland v. Washington* (1984), 466 U.S. 668, 687, the United States Supreme Court devised a two prong test to determine ineffective assistance of counsel. In order to demonstrate ineffective assistance of counsel, an accused must satisfy both prongs. Id. First, he must show that his trial counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment of the United States Constitution. Id. Second, he must establish that counsel's "deficient performance

prejudiced the defense." Id. The failure to prove any one prong of the *Strickland* two-part test makes it unnecessary for a court to consider the other prong. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Strickland* at 697. In reviewing a claim of ineffective assistance of counsel, it must be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 101, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.3d 299, 301.

**{¶ 50}** Appellant insists that trial counsel was ineffective for a number of reasons. First, appellant argues that his counsel's request for a competency hearing necessitated the vacation of the October 20, 2008 trial date. Therefore, his trial did not commence until December 1, 2008. According to appellant, because the state did not file its notice to use the DNA evidence obtained as the result of the shooting on Airport Highway until November 14, 2008, they could not have presented it at trial if it had commenced on time. This allegation is mere speculation. There is nothing in the record of this cause to show that the prosecution could not have presented such evidence during a trial that commenced on October 20, 2008.

**{¶ 51}** Next, appellant asserts that trial counsel was ineffective because he did not file a memorandum in opposition to appellee's Notice of Intent to Use Other Evidence, that is, the DNA evidence. Crim.R. 12(E) provides that, in his or her discretion, a prosecutor "may" give notice of an intent to use other evidence. The rule does not require a criminal defendant to respond in writing. Trial counsel did object to the introduction of the evidence at that time, and the court overruled his objection.

**{¶ 52}** Appellant further argues that counsel was ineffective because of the delays in processing Pearson's .40 caliber "handgun" and/or obtaining his own weapons expert. Immediately prior to the commencement of appellant's trial, the prosecutor notified the judge of the fact that a .40 caliber handgun belonging to Ricardo Pearson had been tested by the police and preliminarily determined not to be the weapon used in the murder of David Babcock. The state said that the handgun would be more fully tested and the results of that testing reported at a later time. Defense counsel indicated that he had consulted with Jones who elected to proceed with the trial. The cross-examination of Pearson was then delayed until the results of further testing were reported. These results substantiated the earlier finding that this handgun was not the murder weapon Appellant fails to offer any evidence that he was either prejudiced by this procedure or that an expert would have had any effect on its outcome.

**{¶ 53}** Jones also contends that his trial counsel was ineffective because he almost conceded that his client was guilty in his opening statement. Appellant, however, fails to point out what portion of the opening statement he relies on for this argument. Accordingly, with regard to this aspect of Assignment of Error No. I, we will not address it. See App.R. 16(A)(7) and App.R. 12(A)(2).

**{¶ 54}** Next appellant maintains that "many witnesses" testified that Babcock and Jones engaged in a "heated argument" in which Babcock called appellant a "nigger;" therefore, counsel was ineffective because he failed to ask for a jury instruction on voluntary or involuntary manslaughter.

**{¶ 55}** We initially note that there is a dearth of evidence in the record of this case establishing that Babcock and Jones engaged in a heated argument. The only eyewitness to the shooting was Roland Gladieux. He testified that he woke up to the sound of arguing. When he looked out his front window, he saw Babcock on one knee holding his bicycle with a man standing over him. The man told the victim. "I'll fucking shoot you.", and the victim replied. "Fuck you." At that point, the man holding the gun "pulled up and shot him [Babcock] right in the face." In addition, Joey Moore testified that he overheard a telephone conversation between Jones and his mother in which appellant said that David Babcock kept calling him a "nigger" so he shot Babcock "in the mouth."

**{¶ 56}** Under R.C. 2903.03, voluntary manslaughter occurs when a "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 * * *." Assuming that the testimony of Gladieux and Moore shows that Jones acted in a sudden fit of rage, "reasonably sufficient" under R.C. 2903.03 means that the provocation was "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *State v. Shane* (1992), 63 Ohio St.3d 630, 633. Some examples of serious provocation are assault and battery, mutual combat, illegal arrest, and discovering a spouse in the act of adultery. Id. at 635. Mere words, however, do not justify the use of deadly force, and "vile or abusive language or verbal threats, no matter how provocative,

do not justify * * * the use of a deadly weapon." *State v. Napier* (1995), 105 Ohio App.3d 713, 723.

**{¶ 57}** As applicable here, even if the testimony of Joey Moore is believed, the use of the epithet "nigger" by Babcock is not sufficiently provocative to justify shooting him. Consequently, appellant's trial counsel did not violate any duty to his client by failing to request a jury instruction on voluntary manslaughter.

**{¶ 58}** The same is true as to appellant's allegation that trial counsel was ineffective by failing to request a jury instruction on involuntary manslaughter. The offense of murder requires proof that the accused acted purposely, or with specific intent to cause the death of another. See R.C. 2903.02. A voluntary manslaughter instruction is warranted only if the accused did not act purposefully. See *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶ 80-81. Here, David Babcock was purposefully shot in the face while kneeling on the ground with appellant standing in front of him.

**{¶ 59}** Appellant next argues that his trial counsel violated a duty to his client by failing to hire an expert on shoe print analysis and/or to be better prepared to conduct a cross-examination of the state's experts. "[D]ebatable trial tactics do not establish ineffective assistance of counsel." *State v. Hoffner* (2004), 102 Ohio St.3d 358, 365, 2004-Ohio-3430, ¶ 45. Because trial counsel's failure to request an expert is a debatable trial tactic, "it does not constitute ineffective assistance of counsel." *State v. Mills*, 5th Dist.No. 2008AP0051, 2009-Ohio-654, ¶ 79 (Citation omitted.). Moreover, defense

counsel did conduct an extensive cross-examination of the state's witness in an effort to show that his opinions were reached without using scientific instruments.

**{¶ 60}** Appellant's allegation that counsel was ineffective for failing to raise the fact that no measurements of the shoe print were made is without merit because a ruler was placed next to the shoe print and appears in the photographs taken of that item. Furthermore, the state's expert testified as to the process that is used in determining whether a shoe print resulted from a particular shoe through not only the use of class characteristics, but also the individual characteristics that occur when that shoe is used by a particular individual.

**{¶ 61}** Defendant's argument with regard to counsel's failure to hire a ballistics expert is pure speculation. He fails to set forth any examples of defense counsel's purported lack of awareness of exhibit numbers and chains of custody. As to the proposition that counsel could not even authenticate cell telephone records, appellant suffered no prejudice because these records were later admitted into evidence.

**{¶ 62}** Jones next challenges trial counsel's cross-examination of witnesses, contending that he asked too many questions when that witness has already provided a "helpful answer." Nonetheless, appellant fails to point out any specific instances in the record where this occurred. Thus, we need not address this issue. See App.R. 12(A)(2). Appellant, also challenges his trial attorney's failure to object to the testimony of Kevin Dumas characterizing Jones as a "street thug." A review of that testimony discloses no such characterization. He also claims that trial counsel was ineffective because he

allowed Goetz to testify as a "blood transference expert." We previously discussed this issue and found that counsel did not allow the same to occur. Appellant's third example of trial counsel's ineffectiveness in cross-examining witnesses "was asking Pearson about Jones undertaking an armed home invasion of his residence 3 years previously which could not have been admitted by the prosecutors." In this instance, counsel was using a permissible trial tactic. *State v. Murphy*, 12th Dist.No. CA2009-05-128, 2009-Ohio-6745, ¶ 36.

**{¶ 63}** Finally, appellant urges that his trial counsel violated an essential duty to his client by failing to challenge Gladieux's testimony identifying the murderer as a black man by the sound of his voice. In *Clifford v. Chandler* (C.A. 6, 2003), 333 F.3d 724, 731, overruled, in part, on other grounds by *Wiggins v. Smith* (2003), 539 U.S. 510, the Sixth Circuit Court of Appeals observed that racial voice identification was extremely reliable. The court therefore determined that the admission of such evidence for the purpose of identification was not "unconstitutionally prejudicial." Id. at 732. Accordingly, appellant's final argument is without merit.

**{¶ 64}** For all of these reasons, appellant's Assignment of Error No. I is found not well-taken.

**{¶ 65}** The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____

_____
JUDGE

Mark L. Pietrykowski, J. _____

_____
JUDGE

Keila D. Cosme, J. _____
CONCUR.

_____
JUDGE