[Cite as *State v. Lee*, 2018-Ohio-3957.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 17AP-908 (C.P.C. No. 17CR-2168)
Darryl J. Lee,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 27, 2018

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Michael P. Walton*, for appellee.

On brief: *Crysta R. Pennington*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Darryl J. Lee, appeals from the judgment entry of the Franklin County Court of Common Pleas finding appellant guilty of murder and tampering with evidence. For the following reasons, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On April 19, 2017, a Franklin County Grand Jury indicted appellant on one count of murder, in violation of R.C. 2903.02(A), one count of murder, in violation of R.C. 2903.02(B), and one count of tampering with evidence, in violation of R.C. 2921.12, arising from the death of Deloris Williams ("Deloris"). Each murder count included an associated repeat violent offender specification pursuant to R.C 2941.149(A). Appellant entered a plea of not guilty. Appellant elected to have the specifications tried to the court and the murder

and tampering with evidence counts tried to a jury. Prior to trial, appellant submitted a request for jury instructions regarding self-defense and voluntary manslaughter.

{¶ 3} A four-day trial commenced December 4, 2017. At the beginning of and at several points throughout the trial, the trial court judge admonished the jury to "not discuss this case among yourselves or with anyone else * * * includ[ing] family" and likewise to "not discuss this case outside the Court. You should explain this rule prohibiting discussion of the case to your family." (Tr. Vol. 1 at 14, 15.) The jurors were further admonished to report violations.

{¶ 4} On the third day of trial, Juror 5 informed the court that, while talking with her son the previous evening, she discovered that her son works for a public relations firm that did campaign advertising for the Franklin County Prosecuting Attorney. Juror 5 provided a letter to the court that states she called her son the prior evening to ask if he could stop by her house to care for her dogs while she was on jury duty. Her son asked her if the trial court knew that, although he did not know the Franklin County Prosecuting Attorney personally, he had a role in his political campaign while working at a media firm. Another son of Juror 5 also worked for the same firm. Juror 5 states that she did not know this information at the time she filled out the jury questionnaire but thought she was obligated to bring the information forward to the court. According to the letter, her boys' past and future jobs do not in any way bias her judgment in rendering a verdict in the case.

{¶ 5} Counsel for both parties discussed Juror 5's letter, her repeated tardiness, and her statement during voir dire that she may have seen something on the news about the case. The trial court initially determined it would excuse Juror 5 primarily based on her tardiness. However, after plaintiff-appellee, State of Ohio, discussed the basis for excusing Juror 5 further, the judge expressed that he did not have a concern about bias and decided to give the juror one more chance regarding tardiness. Appellant lodged an objection regarding Juror 5's ability to be on the jury because of a combination of "some concerns" with the fact her son worked for the media company that worked on the prosecuting attorney's campaign, her tardiness, her voir dire statement that she may have seen something on the news about the case, and the possibility that she may be attempting to get out of jury service. (Tr. Vol. 3 at 214.)

{¶ 6} During trial, the state called Yalona Williams ("Yalona"), Deloris's sister, to testify. Yalona testified that appellant is Deloris's ex-boyfriend; they were together one year or two before breaking up around two or three years prior to the trial. Yalona characterized her own relationship with appellant as one of friendship, although appellant wanted to be more than friends with her, and the two would spend time together frequently.

{¶ 7} On Saturday, April 8, 2017, Yalona went to appellant's home around 8:00 p.m., and the two played video games and drank alcohol until both appellant and Yalona became intoxicated. At some point in the night, Deloris joined them. Yalona and Deloris drank together and smoked marijuana, and appellant and Deloris had a lengthy argument about their relationship. The argument calmed down, and appellant fell asleep in the bedroom. At about 3:30 a.m., Deloris took appellant's car keys, and Yalona and Deloris left appellant's house to run an errand and get cigarettes. They returned to appellant's house, had a few more drinks, and began playing video games again. Appellant awoke and joined them, and another woman named "T" arrived at the house. (Tr. Vol. 2 at 92.) Appellant continued to drink alcohol and smoke marijuana, while Deloris drank alcohol and smoked crack cocaine "a few" times. (Tr. Vol. 2 at 97.) According to Yalona, Deloris became controlling, acted like she knew it all when she drank alcohol, and became loud and paranoid, like she was "on full alert" to her surroundings, when she smoked crack. (Tr. Vol. 2 at 167.)

{¶ 8} Around sunrise, Deloris became concerned that someone may be in appellant's bedroom, and appellant and Deloris began arguing again. Appellant told Deloris to "shut up or get the heck out," Deloris responded she was just looking out for him as a friend, and appellant replied that he did not need her looking out for him. (Tr. Vol. 2 at 100.) At that point, Deloris, who was sitting facing away from appellant, got upset and said "[w]hatever, Nigga." (Tr. Vol. 2 at 101.) According to Yalona, appellant "snapped" and the argument escalated. (Tr. Vol. 2 at 101.) Appellant "grabbed [Deloris] by the hoodie and like yoked her up" and told her "get the F out of here." (Tr. Vol. 2 at 101.) Deloris tried to pull away, then picked up a "little knife" that was on the floor. (Tr. Vol. 2 at 102.) Appellant stood blocking the exit from the room. Yalona turned to put her drink down and did not see whether Deloris came at him with the knife but witnessed both Deloris and appellant fall in her direction. Appellant then straddled Deloris, who was lying face down on the floor

with the knife still in her hand. Appellant grabbed Deloris by the hair and repeatedly slammed her head on the ground. Yalona pleaded with him to stop and said she would take Deloris away. Appellant then started "hitting her and hitting her" and said "[t]he bitch ain't going nowhere now. She wants to act like a man, I'm going to treat her like a man." (Tr. Vol. 2 at 105, 106.) Appellant banged his fist on her hand until she let go of the knife, and Yalona grabbed the knife and threw it.

{¶ 9} Yalona testified that she continued to plead with appellant, saying "don't do this" and "she learned her lesson," but appellant kept slamming Deloris's face to the ground. (Tr. Vol. 2 at 105.) During this time, Deloris would say things to appellant like "[y]ou bitch, you going to jail," which prompted "really * * * hard" physical responses from appellant: he began to hit Deloris with objects and his fist. (Tr. Vol. 2 at 107.) Appellant hit Deloris in the face with his cell phone so hard that it cracked and broke. When Deloris said she was going to call the police on him, appellant hit her a few times with a speaker. Yalona said the force of the hit from the speaker "sounded like bone," and Yalona attempted to get in between them, taking a hit from the speaker herself in the process. (Tr. Vol. 2 at 109.)

{¶ 10} Appellant continued to beat Deloris. According to Yalona, appellant would take breaks while still straddled over top of Deloris like he was "getting a breather" and would wipe his sweat off because it was so hot in his house. (Tr. Vol. 2 at 112.) But when Deloris would say something again, appellant "would just go back to beating her and hitting her and he just wouldn't stop." (Tr. Vol. 2 at 111.) Yalona begged Deloris to be quiet and asked the other girl in the room, T, to help her. According to Yalona, appellant told T, "Go get [Deloris's] nigga, tell that nigga she over here and she ain't leaving so I can beat his ass too," and T left the house. (Tr. Vol. 2 at 111.)

{¶ 11} At some point, Deloris quit saying anything. Another woman arrived, and appellant got up and off of Deloris. Yalona tried to prompt Deloris to leave, but she was not responding. They turned Deloris over onto her back; Yalona could feel a faint pulse, and said they should call 911. Appellant proceeded to try what Yalona characterized as CPR by holding Deloris's nose and blowing into her mouth two or three times. Deloris made a sound like "brrrrr," and Yalona heard her breathing. (Tr. Vol. 2 at 117.) Appellant gave Deloris a pillow, apologized repeatedly to Yalona, and promised he would not hurt Deloris, saying "I got her." (Tr. Vol. 2 at 118.) Satisfied that Deloris was alive, but being unable to

move her and thinking she was passed out drunk, Yalona left Deloris in the house in order to go to work. At that point, Yalona estimated it was about 1:00 p.m. on Sunday.

{¶ 12} On her way to work, Yalona kept calling appellant to see how Deloris was, but he did not answer. Appellant eventually texted Yalona that Deloris woke up and left around 1:30 p.m., "hollering and cussing" him out. (Tr. Vol. 2 at 124.) At around 8:00 p.m., Yalona called Deloris's house, spoke to Deloris's daughter, and found out that Deloris had not returned which caused Yalona concern. Yalona called appellant again, and he agreed with Yalona that things did not seem right, but he would not look for Deloris. Yalona spoke with Deloris's fiancé and became even more concerned. After work, Yalona went to appellant's house to speak with him. When Yalona left, appellant texted her: "Did she make it home?" (Tr. Vol. 2 at 136.) Yalona informed appellant that Deloris's daughter was calling the police and filing a missing person report.

{¶ 13} On Monday, April 10, detectives with the Columbus Division of Police spoke with Deloris's daughter and fiancé, then went to appellant's house and spoke with appellant. According to the detective, during the conversation, appellant was very polite, calm, and a "super nice guy." (Tr. Vol. 3 at 229.) Appellant told detectives that Deloris stayed the night, they were drinking and smoking, she "was sleeping it off," and she left and went home. (Tr. Vol. 3 at 231.) Nothing in appellant's demeanor caused the detectives concern, and they believed he was telling the truth. The detective saw and commented on appellant's sport utility vehicle ("SUV"), which had tinted windows, but he had no reason to search the vehicle at that time.

{¶ 14} After speaking to detectives, three of Deloris's daughters and Deloris's fiancé went to appellant's house to look for her. One of Deloris's daughters looked in appellant's SUV and saw what appeared to be "a body wrapped up in carpet like with two laundry bags" on the ends. (Tr. Vol. 2 at 205.) They called the police, who discovered Deloris wrapped in a carpet in the back of appellant's SUV.

{¶ 15} Police located appellant at another former girlfriend's house and apprehended him. Appellant agreed to talk to police. According to the detective, appellant admitted that he wrapped Deloris in a rug, dragged her downstairs, and put her in the rear of his SUV at approximately 1:00 a.m. to 2:00 a.m. at night. Appellant said he had been very intoxicated and was unsure what happened and unsure if he hit her. Appellant did

recall being angry, being on top of her, and having her by the hair at one point. Appellant was unsure why he was angry, did not mention a knife at any point during the interview, and never asserted he had to defend himself against Deloris. Appellant told detectives that Deloris had passed out but was still breathing because they could hear her snoring. Appellant acknowledged lying to Yalona about Deloris leaving his house. The detective agreed there was a possibility that appellant was intoxicated during the interview.

{¶ 16} According to the autopsy report, the manner of death is homicide, with the immediate cause of death identified as "[s]mothering" as a consequence of "[e]xternal obstruction of the nasal and oral airways." How injury occurred states "[s]mothered by another person" and other significant conditions include "[r]ecent use of cocaine and ethanol." (State's Ex. A, Coroner's Report at 2.) A doctor from the Franklin County Coroner's Office testified that while the abrasions and bruises found on Deloris indicated a struggle, those injuries were, in and of themselves, not lethal injuries. Evidence consistent with smothering included injuries to the nose consistent with having their nose forcefully covered, a brain injury consistent with being denied oxygen rather than, for example, an impact injury, and the appearance of her lungs. The doctor ruled out traumatic asphyxia, which involves compression or restriction of the chest, as the cause of death.

{¶ 17} Admitted trial exhibits included a coroner's report, autopsy report, photographs, crime scene and SUV photographs, text messages from appellant to Yalona, and stipulations regarding appellant's prior record provided to the trial court. Both parties rested.

{¶ 18} Regarding jury instructions, appellant withdrew his request for a self-defense instruction, and appellee objected to the inclusion of appellant's requested instruction regarding appellant acting under the influence of sudden passion or in a sudden fit of rage brought on by serious provocation by Deloris. The trial court agreed with appellee, finding that even making inferences most favorable to appellant, the testimony in the case is insufficient to meet either the objective or subjective test under applicable case law. Appellant objected.

{¶ 19} The jury found appellant guilty of both counts of murder and tampering with evidence, and the trial court found appellant guilty of the two repeat violent offender specifications. A sentencing hearing was held on December 15, 2017. The trial court

merged the two murder counts, and the state elected for the second count of murder to be sentenced. The trial court imposed a 15-year-to-life sentence for murder, consecutive to 8 years on the associated repeat violent offender specification, consecutive to 30 months for tampering with evidence.

{¶ 20} Appellant filed a timely appeal.

II. ASSIGNMENTS OF ERROR

{¶ 21} Appellant assigns the following as trial court error:

> [1.] APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.
>
> [2.] THE TRIAL COURT COMMITTED REVERSABLE [sic] ERROR WHEN IT FAILED TO DISQUALIFY A JUROR FOR JUROR MISCONDUCT.
>
> [3.] THE TRIAL COURT ERRED IN DENYING THE LESSER INCLUDED JURY INSTRUCTION OF INVOLUNTARY MANSLAUGHTER.

III. LEGAL ANALYSIS

A. Appellant's Second Assignment of Error

{¶ 22} For sake of clarity, we will begin by addressing appellant's second assignment of error. Under his second assignment of error, appellant contends the trial court committed reversible error in failing to disqualify Juror 5 for juror misconduct. Specifically, appellant argues, although it can be inferred that the trial court found misconduct occurred since the judge was initially going to excuse Juror 5, the trial court nevertheless "abused its discretion by failing to voir dire and inquire into Juror 5's conversations with her son and her misconduct" for violating the trial court's admonition to not discuss the case with anyone. (Appellant's Brief at 17.)

{¶ 23} "[W]hen integrity of jury proceedings is in question, court 'should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.' " *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 54, quoting *Remmer v. United States*, 347 U.S. 227, 230 (1954). However, there is no "per se" rule requiring a trial court to inquire into every instance of alleged juror misconduct. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 71-73.

{¶ 24} Trial courts are granted broad discretion in dealing with the outside contact, determining a juror's ability to be impartial, and determining whether to declare a mistrial or replace an affected juror. *State v. Orlandi*, 10th Dist. No. 05AP-917, 2006-Ohio-6039, ¶ 8-9; *State v. Keith*, 79 Ohio St.3d 514 (1997); *State v. Dennis*, 79 Ohio St.3d 421, 427 (1997); *State v. Sanders*, 92 Ohio St.3d 245, 252 (2001) ("The scope of voir dire is generally within the trial court's discretion, including voir dire conducted during trial to investigate jurors' reaction to outside influences."). An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 25} Moreover, "a reviewing court will not reverse a judgment based on juror misconduct unless the complaining party demonstrates prejudice." *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, ¶ 195, citing *Keith* at 526, and cases cited therein. In cases of improper outside juror communication, the defense must establish that the communication biased the juror. *Keith*. A juror's belief in his or her own impartiality may be relied on by the trial court. *Ohio v. Phillips*, 74 Ohio St.3d 72, 89 (1995).

{¶ 26} In this case, appellant did not object to the trial court's lack of further inquiry or questioning of Juror 5, which is his only argument in support of his assignment of error. Where the complaining party fails to object to the trial court's failure to question a juror or decision to not disqualify a juror for misconduct, an appellate court may notice a "plain error" although it was not brought to the attention of the court. *Thompson* at ¶ 73; *Keith* at 528; *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 107; *State v. Clark*, 10th Dist. No. 14AP-142, 2014-Ohio-5101, ¶ 23. For an error to be "plain error" under Crim.R. 52(B), (1) there must be an error, meaning a deviation from a legal rule, (2) the error must be "plain," meaning an "obvious" defect in the trial proceedings, and (3) the error must have affected "substantial rights," meaning the error must have affected the outcome of the trial. *State v. Urbina*, 10th Dist. No. 15AP-978, 2016-Ohio-7009, ¶ 43, citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶ 27} Appellant has not demonstrated error, let alone plain error, in this case. First, "[t]he burden of affirmatively demonstrating error on appeal rests with the [appellant]."

Miller v. Johnson & Angelo, 10th Dist. No. 01AP-1210, 2002-Ohio-3681, ¶ 2; *see also* App.R. 9 and 16(A)(7). Appellant has not provided any argument or legal authority in support of why the trial court's lack of further inquiry or questioning of Juror 5 constituted plain error in this case. At the same time, appellant provided no other argument and associated legal authority to support his assignment of error as stated. As such, appellant has not met his burden in demonstrating error on appeal. *State v. Sims*, 10th Dist. No. 14AP-1025, 2016-Ohio-4763, ¶ 11; *Roby v. Roby*, 4th Dist. No. 15CA21, 2016-Ohio-7851, ¶ 18, and cases cited therein; App.R. 9 and 16(A)(7).

{¶ 28} Second, even had appellant properly preserved and argued this issue, the trial court's decision to not disqualify Juror 5 due to misconduct did not constitute an abuse of discretion on the facts of this case. We note appellant does not argue the trial court erred in relying on the letter provided by Juror 5 or otherwise employed an inadequate hearing or procedure for addressing outside communication to a juror.[1] In her letter, Juror 5 explained the conversation with her son arose from needing help with her dogs during her service on a jury. Her son at that time brought to her attention his prior work at a media firm on the prosecuting attorney's political campaign. Juror 5 clearly states that the information about her son did not in any way bias her judgment in the case. Juror 5 brought this newly learned information to the trial court the next day. Contrary to appellant's position, the trial court judge expressly stated he had no concern about the issues raised by the letter; we cannot, as appellant suggests, infer the trial court initially found Juror 5 committed misconduct based on her conversation with her son. Like the trial court, we find no juror misconduct is apparent on the facts of this case.

{¶ 29} Third, nothing in the record supports the trial court's lack of further inquiry or decision to retain Juror 5 effected the outcome of the trial. *Adams* at ¶ 195; *Thompson* at ¶ 73; Crim.R. 52(B). There is no reason to believe additional questioning of Juror 5 would have revealed different information regarding the conversation with her son from what she already stated in the letter. Such an argument is based purely on speculation. As such, there is no plain error in this regard. *Adams* at ¶ 121 ("there is no plain error when a claim

[1] *See, e.g., State v. Thomas*, 9th Dist. No. 27266, 2015-Ohio-2935, ¶ 51-58 (overruling appellant's assignment of error regarding trial court's failure to hold a "*Remmer*" hearing related to outside communication to a juror where the defendant failed to object to the procedure and did not establish a reasonable probability that the outcome of the case would be different to constitute plain error).

is speculative"); *Frazier* at ¶ 106-08 (finding no plain error demonstrated regarding outside contact of a juror where appellant's claims regarding the outside communication were speculative); *Lang* at ¶ 55 (finding no plain error where nothing in the record supported defendant's claim regarding juror misconduct is speculative and unsupported by the evidence).

{¶ 30} Considering all the above, appellant has not demonstrated that the trial court committed reversible error when it retained Juror 5 on the jury.

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

B. Appellant's First Assignment of Error

{¶ 32} Under his first assignment of error, appellant contends he was prejudiced by the ineffective assistance of his trial counsel. We disagree.

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

{¶ 34} To demonstrate that counsel's performance was deficient, the defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *State v. Canada*, 10th Dist. No. 14AP-523, 2015-Ohio-2167, ¶ 89; *State v. Murphy*, 91 Ohio St.3d 516, 524 (2001) ("To prevail on such a claim, a defendant must show that counsel's actions were professionally unreasonable."). In doing so, the defendant must overcome the strong presumption that counsel's performance was adequate or that counsel's actions might be considered sound trial strategy. *Canada* at ¶ 90. *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, ¶ 180, quoting *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 116 (" 'Debatable trial tactics generally do not constitute ineffective assistance of counsel.' "). Counsel is not required to raise meritless or even all meritorious issues. *State v. Jones*, 91 Ohio St.3d 335, 354 (2001).

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

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

{¶ 37} In this case, appellant argues his counsel was ineffective in failing to voir dire and challenge Juror 5 for cause based on her violating the admonition of the court that jurors are not to discuss the case with anyone. Appellant states that both parties' counsel and the trial court focused on Juror 5's repeated tardiness and her letter stating she could be unbiased, rather than conducting "additional voir dire with Juror 5 on the specifics of her conversations [with her son] and the fact that she violated the admonition of discussing the case, essentially committing juror misconduct." (Appellant's Brief at 14-15.) According to appellant, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is presumptively prejudicial, and the state did not establish that such contact with Juror 5 was harmless to appellant.

{¶ 38} Neither prong of *Strickland* is met in this case. As provided above, trial counsel is not required to raise meritless or even all meritorious issues. *Jones*. As further discussed in the second assignment of error, above, the arguments posed by appellant regarding juror misconduct based on outside communication in this case lack merit. As such, an objection or a for-cause challenge on the grounds alleged by appellant would not likely have been successful. *See Frazier* at ¶ 109 (finding trial counsel was not deficient because nothing was said in juror's outside conversation that would support a defense challenge). Considering the above, we find appellant's trial counsel performance was not deficient.

{¶ 39} Furthermore, regarding prejudice, the Supreme Court of Ohio has rejected the proposition that improper juror conduct, including outside juror communication, is presumptively prejudicial. *Keith* at 526 ("On numerous occasions, * * * we have reaffirmed a long-standing rule that a court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown. * * * In cases of improper outside juror communication, the defense must establish that the communication biased the juror."); *Adams* at ¶ 195; *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 16; *Lang* at ¶ 54.

{¶ 40} Here, record evidence shows Juror 5 was not biased by the information she learned about her son, and there is no other indication in the record that appellant was prejudiced by trial counsel's failure to voir dire and challenge Juror 5 for cause. Appellant has not challenged the trial court's ability to rely on this letter or otherwise specified an error in the trial court's hearing procedure. On these facts, there is not a reasonable probability that, but for trial counsel's failure to voir dire and challenge Juror 5 for cause, the result of the trial would have been different. Having not demonstrated the performance of trial counsel was deficient and the deficient performance prejudiced him, appellant's contentions lack merit. *Frye* at ¶ 11; *Strickland* at 687.

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

C. Appellant's Third Assignment of Error

{¶ 42} Under his third assignment of error, appellant contends the trial court erred in denying the lesser-included jury instruction of involuntary manslaughter. For the following reasons, we disagree.

{¶ 43} In Ohio, "[a] defendant may be found guilty of a lesser included offense even if the lesser offense is not included in the indictment." *State v. Koger*, 6th Dist. No. L-05-1265, 2007-Ohio-2398, ¶ 29. A court is required to give an instruction on a lesser-included offense only when " 'sufficient evidence is presented which would allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included * * * offense.' " (Emphasis sic.) *State v. Hubbard*, 10th Dist. No. 11AP-945, 2013-Ohio-2735, ¶ 37, quoting *State v. Shane*, 63 Ohio St.3d 630, 632 (1992). "In determining whether lesser-included-offense instructions are appropriate, 'the trial court must view the evidence in the light most favorable to the defendant.' " *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, ¶ 21, quoting *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 37.

{¶ 44} "As is the case when reviewing a trial court's jury instructions generally, the proper standard of review for an appellate court in reviewing whether to give an instruction as to a lesser-included offense is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Noor*, 10th Dist. No. 13AP-165, 2014-Ohio-3397, ¶ 81. Abuse of discretion connotes more than an error of law or judgment; rather, it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore* at 219.

{¶ 45} As a preliminary issue, a mismatch exists between the assignment of error and the argument. After identifying involuntary manslaughter[2] in the assignment of error and discussing case law establishing involuntary manslaughter as a lesser-included offense of murder, the remainder of appellant's brief appears to argue in support of an instruction on voluntary manslaughter. Appellee addressed the third assignment of error as if it pertained to voluntary manslaughter, which appellee notes aligns with appellant's arguments at both the trial court and appellate levels. Appellant did not submit a reply to appellee's brief or otherwise seek to clarify its position.

{¶ 46} This court rules on assignments of errors and generally does not address arguments unrelated to sustaining the assignments of error. *Huntington Natl. Bank v. Burda*, 10th Dist. No. 08AP-658, 2009-Ohio-1752, ¶ 21, citing App.R. 12(A)(1)(b) (stating that "a court of appeals shall * * * [d]etermine the appeal on its merits on the assignments of error set forth in the briefs"), and *Williams v. Barrick*, 10th Dist. No. 08AP-133, 2008-Ohio-4592, ¶ 28 (holding that appellate courts "rule[] on assignments of error only, and will not address mere arguments"). Here, because appellant has not supported his assignment of error as stated with pertinent argument or legal authority, he has not demonstrated error on appeal. *Miller* at ¶ 2; *see also* App.R. 9 and 16(A)(7).

{¶ 47} Moreover, even if appellant intended voluntary manslaughter to be identified in the assignment of error, this contention lacks merit. Voluntary manslaughter is an inferior degree of murder. *Shane* at 632. In line with the general rules, "a defendant charged with murder is entitled to an instruction on voluntary manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged

[2] Pursuant to R.C. 2903.03, involuntary manslaughter generally provides that no person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony, misdemeanor of any degree, certain minor misdemeanors, or a regulatory offense. R.C. 2903.03(A) and (B).

crime of murder and a conviction for voluntary manslaughter." *Id.* A jury instruction is not required every time "some evidence" is presented supporting voluntary manslaughter. *Id*. at 632-33.

{¶ 48} Voluntary manslaughter generally provides that no 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. R.C. 2903.04.

{¶ 49} Whether the provocation was reasonably sufficient to prompt sudden passion or a sudden fit of rage involves both an objective and a subjective analysis. *Id.* at 634. For the objective standard, the alleged provocation by the victim must be reasonably sufficient to incite deadly force, meaning "it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Id.* at 635. For the subjective standard, the defendant in the particular case must have actually acted under the influence of sudden passion or in a sudden fit of rage. *Id.* at 634-35. When, as a matter of law, no reasonable jury could find that the provocation was adequate, the judge may refuse to give a voluntary manslaughter instruction. *Id.* at 634, fn. 2.

{¶ 50} "Words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations." *Id.* at paragraph two of the syllabus. Likewise, evidence showing a defendant acted out of fear in a situation does not constitute serious provocation necessary for a jury instruction on voluntary manslaughter. *State v. Lindsey*, 10th Dist. No. 14AP-751, 2015-Ohio-2169, ¶ 58 (finding defendant's statement to police that he was "afraid or that he feared for his life" did not constitute evidence that the defendant acted under a sudden passion or fit of rage to support a jury instruction on voluntary manslaughter); *State v. Collier*, 10th Dist. No. 09AP-182, 2010-Ohio-1819, ¶ 17. Furthermore, "[a] lapse of time, i.e., a cooling off period, between the circumstances causing the defendant to be enraged and the commission of the crime renders the 'sudden passion' element of voluntary manslaughter insufficient as a matter of law." *State v. Shakoor*, 7th Dist. No. 01 CA 121, 2003-Ohio-5140, ¶ 103. *State v. Cruz-Altunar*, 10th Dist. No. 11AP-1114, 2012-Ohio-4833, ¶ 9; *Collier* at ¶ 15; *State v. Huertas*, 51 Ohio St.3d 22, 25 (1990).

{¶ 51} Depending on the circumstances, a cooling off period may be a " 'very short time span.' " *State v. Caulton*, 7th Dist. No. 09 MA 140, 2011-Ohio-6636, ¶ 70, *discretionary appeal not allowed*, 131 Ohio St.3d 1500, 2012-Ohio-1501, quoting *State v. Kanner*, 7th Dist. No. 04 MO 10, 2006-Ohio-3485, *discretionary appeal not allowed*, 111 Ohio St.3d 1493, 2006-Ohio-6171. *State v. Crago*, 93 Ohio App.3d 621, 644 (10th Dist.1994). For example, in *Caulton*, the Seventh District Court of Appeals determined the fact that the defendant shot the victim, walked away, then returned and shot the victim several more times demonstrated deliberation rather than sudden passion. Thus, the court held the trial court did not abuse its discretion in declining to instruct the jury on voluntary manslaughter.

{¶ 52} Here, the evidence in this case, viewed in the light most favorable to appellant, showed appellant "snapped" immediately following Deloris referring to appellant as a "Nigga." (Tr. Vol. 2 at 101.) At that point, the argument escalated into a physical confrontation. Appellant grabbed Deloris by her hoodie, a struggle ensued, and Deloris picked up a small knife. Appellant ended up on top of Deloris, pinning her face down, and struck her head and hand with repeated blows. Yalona testified to being unable to convince appellant to let Deloris leave. Significantly, after the knife was removed, appellant continued beating Deloris by slamming her head into the ground repeatedly. While still straddling her, appellant would take repeated breaks from beating Deloris to wipe his sweat and rest. During this time, Deloris would talk back to appellant, saying things like he was going to go to jail, which prompted appellant to re-engage and hit her even harder with his fist, cell phone, and a speaker. There is no indication in the record that after the knife was removed from Deloris's hand that she posed any threat to appellant or engaged him physically. Although Deloris was apparently breathing when Yalona left appellant's apartment, according to the coroner's report, Deloris died as a result of smothering. Appellant admits to rolling Deloris in a carpet, putting her in the back of his SUV, and lying to police and Yalona regarding Deloris regaining consciousness and leaving his house. Appellant told police he was "angry" during the confrontation but was not sure what he was angry about, and he did not mention Deloris having a knife. (Tr. Vol. 3 at 344.)

{¶ 53} Appellant essentially argues that Deloris's words and the possibility that she came at him with a knife is reasonably sufficient to incite appellant or anyone else to use

deadly force in return. However, evidence showing a defendant used deadly force out of fear or in response to words alone does not usually constitute serious provocation necessary for a jury instruction on voluntary manslaughter. *Shane* at paragraph two of the syllabus; *Lindsey* at ¶ 58. Moreover, in this case, after the knife was removed from Deloris's hand, appellant continued to forcefully beat Deloris and even took repeated rest breaks. Appellant had more than sufficient time to cool down after the knife was removed from Deloris's hand. *Shakoor* at ¶ 103; *Caulton*; *Crago.*

{¶ 54} We find that the evidence presented at trial, even viewed in the light most favorable to appellant, would not reasonably support both an acquittal on murder and a conviction for voluntary manslaughter. *Shane* at 632-33. Considering all the above, under the facts and circumstances of the case, the trial court did not abuse its discretion in declining to instruct the jury on voluntary manslaughter. *Noor.*

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

IV. CONCLUSION

{¶ 56} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and DORRIAN, J., concur.

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