[Cite as *State v. Widmer*, 2012-Ohio-4342.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-03-027
	:	O P I N I O N
- vs -		9/24/2012
	:	
RYAN K. WIDMER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CR25254

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Michele L. Berry, The Citadel, 114 East Eighth Street, Cincinnati, Ohio 45202, for defendant-appellant

HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Ryan K. Widmer, appeals his conviction in the Warren County Court of Common Pleas for murder in violation of R.C. 2903.02(A). For the reasons discussed below, we affirm Widmer's conviction.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} The record indicates that on Monday, August 11, 2008, at 10:49 p.m., Widmer called 911 for emergency assistance. The phone call lasted less than seven minutes. During

the phone call, Widmer stated that his 24-year-old wife, Sarah Widmer, had fallen asleep in the bathtub at their home in Morrow, Ohio, and he thought she was dead. Widmer told the 911 dispatcher he had been downstairs watching TV, and when he came upstairs, he found Sarah lying face-down in the bathtub. He commented to the dispatcher that Sarah "falls asleep in the tub all the time."

{¶ 3} While on the telephone with the 911 dispatcher, Widmer drained the bathwater, removed Sarah from the bathtub, and proceeded to attempt CPR. Within six minutes of placing the 911 call, Deputy Steve Bishop with the Warren County Sheriff's Office arrived at the scene and found Sarah lying naked on the carpeted floor of the master bedroom. Sarah's body was warm and appeared to be dry, but her hair was wet. Widmer was also in the bedroom, dressed only in his boxer shorts. Bishop did not observe any trauma or injuries to Widmer.

{¶ 4} After determining Sarah did not have a pulse and was not breathing, Bishop began CPR. Bishop noticed that a pinkish-white, frothy discharge was coming out of Sarah's mouth and nose, and additional discharge occurred during chest compressions. Emergency personnel who later arrived at the scene also noticed a frothy discharge coming from Sarah's vaginal area.

{¶ 5} Paramedics and emergency medical technicians (EMTs) from the Hamilton Township Fire and Rescue Department and police officers from the Hamilton Township Police Department arrived shortly after Bishop. EMT Jeff Teague tried to open Sarah's airway and attempted to place a bag valve mask over her nose and mouth to provide concentrated oxygen. Teague struggled to keep the mask on Sarah as her head kept retracting down, making the mask pop off. Teague successfully adhered defibrillation pads to Sarah's body, one on her chest and the other on her back, and attempted to shock her heart back into

rhythm, but she remained asystole.[1]

{¶ 6} Paramedic Jason Stevens made two attempts to intubate Sarah while in the master bedroom, but both attempts were unsuccessful. On his second attempt to intubate, Stevens had Teague perform the Sellick maneuver so that he could see Sarah's vocal cords and place the tube in Sarah's trachea.[2] After the second intubation attempt failed, the decision was made to place Sarah on a backboard and remove her from the home. Sarah's body was covered with a sheet and rolled out of the home into a waiting ambulance.

{¶ 7} While the ambulance was stationary, Stevens attempted to establish an intravenous line (IV) in Sarah. After failing to find a vein in both her right arm and her left arm, Stevens was able to start an IV in the external jugular vein on the left side of Sarah's neck. EMT Derek K. Roat made two unsuccessful attempts to intubate Sarah, utilizing the Sellick maneuver on one of those attempts. While Sarah was being treated in the ambulance, Widmer talked briefly with law enforcement. Widmer admitted he consumed four beers earlier in the evening.

{¶ 8} Approximately ten minutes after Sarah was placed in the ambulance, the decision was made to transport her to the hospital. Widmer, visibly upset, rode along with the ambulance. While en route to the hospital, Roat made a fifth intubation attempt, which proved unsuccessful. When Sarah arrived at Bethesda Arrow Springs Hospital, she was not breathing and did not have a pulse. Dr. David Marcus, the treating emergency room physician, was able to intubate Sarah within 60 to 90 seconds of her arrival. While Sarah underwent treatment, a charting nurse attempted to gain information about Sarah from Widmer. Widmer told the charting nurse that he found Sarah in the bathtub, face-up, and not breathing.

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1. Asystole was defined at trial by medical personnel as the absence of an electrical rhythm in the heart.

2. According to Teague, "[t]he Sellick maneuver is pressure on a cartilage in your throat to allow * * * [for] multiple things. One to close off the actual throat to the stomach to keep from allowing vomit to come out and the other one is visualize the vocal cords."

{¶ 9} At 11:41 p.m., after nearly 20 minutes of treatment in the emergency room, Sarah was pronounced dead. Shortly thereafter, Doyle Burke, the chief investigator for the Warren County Coroner's Office, arrived at the hospital. Upon observing Sarah's body, Burke noticed that Sarah's body appeared dry, but her hair was damp, there did not appear to be any pruning or wrinkling on her body, and she did not have any visible external injuries. When bagging Sarah's hands to preserve evidence, Burke noticed that Sarah's nails were well manicured and were not broken or chipped.

{¶ 10} While at the hospital, Widmer told Burke that he and Sarah were the only people in their home that night. Widmer stated that at about 10:00 p.m., while he was watching a football game on TV downstairs, Sarah said she was going to go upstairs to take a bath. At this point, Widmer interjected that he had been "afraid she may fall asleep in the tub." When Burke asked if Sarah had ever fallen asleep in the tub before, Widmer said no, she'd never fallen asleep in the tub before, but Sarah would fall asleep very easily. After relaying to Burke the events following his discovery of Sarah in the bathtub, Widmer consented to have police search his home.

{¶ 11} Detective Lieutenant Jeff Braley with the Hamilton Township Police Department arrived at the Widmers' home as the ambulance transporting Sarah to the hospital departed from the scene. Upon arriving, Braley was briefed by the officers who had initially responded and was given a tour of the home by officer Quillian Short. During his tour of the home, Braley noticed that the bathroom floor and the items laying on the floor, including magazines, a bathmat, discarded clothing, and a brown towel, appeared dry. Braley also noticed that the tub itself was mostly dry, with the only observable water being droplets located right around the drain. Officer Short noticed water droplets around the drain and on the stopper, but found no evidence of water on the bathroom floor or anywhere else outside of the bathtub. Short also noticed that the majority of the Widmers' bath products were lined up along the edge of the

tub, with the exception of a cup, a loofa, and a bottle of Dial soap, which were inside the bathtub.

{¶ 12} After receiving word of Widmer's consent to have the home searched, a more thorough investigation took place. Officers who secured the scene did not find any indication the house had been broken into. When investigating the downstairs, Short discovered that the TV on which Widmer claimed to have been watching a Cincinnati Bengals football game was actually set to a different program. The TV in the master bedroom, however, was set to the Cincinnati Bengals game.

{¶ 13} Braley examined the master bedroom and found blood stains on the carpet in the location where Sarah's head and vaginal area had been laying. Braley took off his latex gloves and felt the carpet in the area between the blood stains to determine if the carpet contained any moisture. Braley found the carpet dry. He then took samples of the carpet from the area where the stains were. The samples were individually sealed in brown paper bags.

{¶ 14} Evidence was also collected from the bathroom, which included products lined up on the edge of the bathtub and the items inside the bathtub. The items found on the floor of the bathroom, including the magazines, bathmat, discarded clothing, and the brown towel, were recovered as evidence. Also recovered in the bathroom was a used Lysol wipe, which was taken into evidence.

{¶ 15} Additional areas of the Widmers' home were searched for evidence. Officers briefly looked through the laundry room, inside the washer and dryer, in the garage, and inside Sarah and Widmer's vehicles. The officers did not discover wet towels or anything else out of the ordinary during this brief search.

{¶ 16} The following day, Dr. Russell Uptegrove, the Warren County Coroner, performed Sarah's autopsy. Burke and Braley were present during the autopsy. Uptegrove determined that Sarah's death was caused by drowning. Uptegrove observed both external

and internal injuries to Sarah's body. Externally, Sarah had faint bruising on the right-side of her forehead, a petechial hemorrhage on the inner surface of her eyelid, bruising on the left-side of her neck, a contusion on the back of her neck, an abrasion on her left armpit, and bruising and lacerations to her upper lip.[3] Internally, Sarah had significant, deep muscle hemorrhaging in the anterior of her neck and contusions to her scalp. Uptegrove took microscopic samples of Sarah's brain and heart for testing, but did not observe anything out of the ordinary when examining the organs. A toxicology report was ordered, but before the results of the report were received Uptegrove determined that the manner of Sarah's death was a homicide. In Uptegrove's opinion, the injuries Sarah sustained occurred before her death and were not consistent with injuries commonly resulting from CPR. Days later, the toxicology report was completed, and it indicated that Sarah did not have drugs or alcohol in her system at the time of her death.

{¶ 17} On August 15, 2008, two days after the initial autopsy by Uptegrove, a second autopsy was performed by Dr. Werner Spitz. Spitz, an expert in forensic pathology who was retained by the defense, agreed that the cause of Sarah's death was drowning. Spitz observed external injuries to the front of Sarah's neck, to her left and right arms near the crease of her elbow, to her upper lip, and to the nape of her neck. Internally, Spitz observed injuries to Sarah's scalp, a tear in her liver, and hemorrhaging to her neck. Spitz did not find any evidence of petechial hemorrhaging. Spitz was unable to determine whether Sarah's injuries, including the internal hemorrhaging to her neck, were caused by rigorous CPR or by some other means. For this reason, Spitz would not have ruled the manner of Sarah's death a homicide; rather, he would have ruled her death "undetermined."

{¶ 18} Widmer was arrested on a charge of aggravated murder on August 13, 2008.

3. Uptegrove defined a petechial hemorrhage as a very small, red hemorrhage that occurs in the eye once a blood vessel has ruptured due to an increase in pressure.

That same day, a warrant to search the Widmers' home was executed. While executing the warrant, Braley dusted the bathtub for fingerprints and found streak marks that he believed were made by human hands. The marks were located near the middle of the bathtub, on its far wall (or right-side wall). Once the marks were discovered, Braley contacted the Miami Valley Crime Lab (Miami Valley) to have the bathtub examined. Danny Harness, a latent print examiner with Miami Valley, responded to the scene. Using a superglue fuming process and reflected ultraviolet imaging, Harness observed fingermarks and smear marks on the bathtub. He was not, however, able to visualize any latent fingerprints of value on the bathtub. Nonetheless, the decision was made to remove the bathtub from the Widmers' home, and it was sent to Miami Valley for further processing. During his second examination of the bathtub, Harness used fingerprint powder and found fragmented prints on the bathtub. However, the prints lacked identifying characteristics and Harness deemed the prints to be of no comparison value.

{¶ 19} A few months later, William Hillard, a senior criminalist with the city of Cincinnati, was contacted by the Hamilton Township Police Department to examine the bathtub. Hillard found marks along the top of the tub and the side of the tub that indicated it had been wiped down, but he was unable to determine when the tub had been wiped down. Hilliard also found fingertip impressions on the tub. He was unable to make a positive identification as to who specifically left the fingertip markings, but he was able to determine that the markings were in a downward position and were made by a person of small stature, like a child, a female, or a small male. Hillard also found a forearm impression on the bathtub and determined from the presence of hair follicles that the impression was made by an adult male. Hillard determined that this forearm impression overlaid circular marks made on the bathtub by bath product bottles. Hillard could not, however, determine when the forearm impression or fingertip markings were made on the bathtub.

{¶ 20} In addition to the bathtub, other evidence taken from the Widmers' home was sent to Miami Valley for testing. The Lysol wipe recovered from the bathroom tested negative for the presence of blood and semen. Water samples from the bathtub's drain and from the toilet tested negative for the presence of blood. The carpet samples taken from the master bedroom tested positive for blood but negative for semen. The carpet sample taken from the area where Sarah's head had been laying tested positive for human fecal matter. A carpet sample taken east of where Sarah's vaginal area had been laying also tested positive for human fecal matter, but the sample from where her vaginal area had laid did not contain human fecal matter. During testing of the carpet samples, it was discovered that one of the samples had been wet when it was packaged, and the moisture from the sample had soaked the bottom of the bag.

{¶ 21} Miami Valley also did DNA testing of samples taken from under Sarah's fingernails. The majority of the matter taken from underneath Sarah's fingernails contained her own DNA, but there was also an unknown female contributor's DNA present. An effort was made to identify the possible female contributor, but no match was found. Sarah's mother, a female police officer who responded to the Widmers' home on the night of Sarah's death, and nurses who treated Sarah at the hospital were excluded as possible matches.

{¶ 22} Widmer went to trial on the aggravated murder charge in March 2009. He was found guilty of murder, a lesser-included offense, and sentenced to 15 years to life in prison. On July 22, 2009, a new trial was granted after it was discovered that jury members, during their deliberation, had improperly discussed personal and external matters regarding the length of time it took them to dry after bathing. A second trial took place in May 2010. After the jury was unable to reach a verdict, a mistrial was declared. A third trial was scheduled for January 2011.

{¶ 23} Prior to the start of the third trial, Jennifer Crew, a resident of Iowa, contacted the

Warren County Prosecutor's Office with additional information about Sarah's death. In September 2009, Crew watched a Dateline television episode featuring Sarah's death and Widmer's subsequent arrest. After viewing the program, Crew visited a website that supported Widmer's innocence where she obtained information that allowed her to begin communicating with Widmer. The two began exchanging emails, phone calls, and text messages.

{¶ 24} Crew claimed that on October 26, 2009, at 11:06 p.m., she received a phone call from an upset and crying Widmer. Crew claimed Widmer admitted he killed Sarah, saying "I did it. I did it. I killed Sarah. I did it." According to Crew, Widmer told her that he and Sarah fought in their living room on the evening of Sarah's death about his pornography, cheating, drinking, and smoking. The argument continued upstairs in their bathroom, at which point Sarah declared that their marriage was over. Crew stated that Widmer told her things got physical between him and Sarah. Widmer allegedly told Sarah, "Nobody leaves me, nobody ever leaves me and I mean nobody," and then punched her in the chest, causing Sarah to fall backwards and hit her head. Widmer told Crew that he knelt down beside Sarah, "blacked out," and when he came to, Sarah was on the floor, not breathing with her hair wet.

{¶ 25} According to Crew, Widmer said that he "freaked out" because "he had done something that he shouldn't [have] done," and he started wiping up water that was on the bathroom floor with towels while thinking about how he could cover up Sarah's death. Crew stated that Widmer told her he then called 911, and when directed by the 911 dispatcher to give Sarah CPR, Widmer just breathed into the phone to make it sound like he was giving CPR. Widmer allegedly told Crew that he did not give Sarah CPR because he knew she was already dead since she had not been breathing for quite a while. Widmer also allegedly told Crew that when he was answering a nurse's questions at the hospital, he knew he "screwed up" because he told the nurse that he found Sarah face-up in the bathtub when he previously told the 911 dispatcher that Sarah was face-down in the bathtub.

{¶ 26} Crew claimed that she promised Widmer she would never tell anyone about his confession, and in response, Widmer stated, "I hope not because I wouldn't want you to be at where Sarah's at." Crew stated that she feared for her safety after that phone call. Crew claimed that to reassure Widmer that she would not turn him in or disclose the details of the October 26 phone call, she continued to have regular and repeated contact with him until late November 2009. In June 2010, after finding out that Widmer's second trial had ended in a mistrial, Crew contacted officials to report the details she had learned about Sarah's death. Crew testified as to these details at Widmer's third trial. In an effort to discredit Crew's testimony, the defense presented information about Crew's former prescription drug addiction and her numerous convictions for misdemeanor theft.

{¶ 27} Widmer's third trial was held in January 2011. The third trial spanned four weeks and resulted in testimony from more than 40 individuals, including medical personnel who treated Sarah on the night of her death, police officers who investigated her death, and pathologists who conducted Sarah's autopsies. Because Widmer sought to introduce evidence that Sarah may have suffered from an unknown cardiovascular or neurological defect, which caused her to lose consciousness and drown in the bathtub, numerous medical experts were called by the defense to support Widmer's position and by the state to refute Widmer's defense. In support of his defense, Widmer also presented testimony from Sarah's co-workers and friends regarding Sarah's sleeping habits and physical health.

{¶ 28} Before her death, Sarah had been employed as a dental hygienist by a dental practice in Fort Thomas, Kentucky. Sarah's co-workers testified Sarah often slept in her car in the mornings before work, and she would take a nap in her car during her lunch break. Sarah's co-workers also testified that she had allergies, and she would sometimes complain of headaches or stomachaches. Dana Parker-Kist, Sarah's friend and former co-worker, testified that on at least one occasion Sarah's headache was so severe that it blurred her vision and

required her to go into a dark room. Dr. Benjamin Mesmer, a dentist at the practice where Sarah worked, testified Sarah complained of a headache and stomachache on the day of her death.

{¶ 29} Friends of Sarah and Widmer testified that Sarah would fall asleep at "odd" times and places. Friends described instances where Sarah fell asleep while tailgating at Cincinnati Bengals football games, while watching a movie in the early evening, and while sitting in a bar at a table full of talking women. On some of these occasions, Sarah had been drinking alcohol before she fell asleep.

{¶ 30} Sarah's mother, Ruth Ann Stewart, testified at trial on behalf of the state. Stewart testified she and Sarah had a very close relationship, and they had spent nearly every Friday together since Sarah's father's death in March 2007. Stewart testified she had not noticed that Sarah slept a lot or at odd times. Stewart did recall Sarah complaining of headaches, but only when Sarah's sinuses were acting up due to a change in the weather. Stewart testified that she talked to Sarah on the day of her death while Sarah was driving home from work, and Sarah did not tell her that she had a headache, stomachache, or was otherwise feeling ill.

{¶ 31} Stewart also testified that Sarah's family did not have a medical history of seizures, heart disease, or cardiac problems. Stewart testified Sarah had never had a seizure or been diagnosed with epilepsy. Stewart described Sarah as healthy and active. As a baby, however, Sarah had a heart murmur and a cleft palate. Sarah's mother testified the cleft palate was corrected by surgery while Sarah was a child.

{¶ 32} Medical records introduced at trial indicate that Sarah had been diagnosed in November 1984 with a functional heart murmur. Other than the November 1984 report and a dental record dated October 5, 2006, wherein Sarah indicated that as a child she had been told by a physician that she had a heart murmur, none of Sarah's other medical records

mention a heart murmur. Sarah underwent a physical in June 2008, just a few months prior to her death, and the report from the physical did not indicate that Sarah suffered from a heart murmur or any other cardiac ailment. Further, this report did not indicate Sarah suffered from a neurological disease or defect.

{¶ 33} Dr. Charles Jeffrey Lee, an expert in pathology, testified that a functional heart murmur is known as an "innocent heart murmur" that has to do with the "physiology of the body outside of the heart." Lee testified that this type of murmur, which is typically heard in infants, will usually disappear in a few months or a year. In Lee's opinion, Sarah's childhood functional heart murmur did not in any way contribute to her death. After reviewing Sarah's medical records and the autopsy records, Lee testified he did not find any evidence of a heart or brain disease or defect which caused or contributed to Sarah's death. Rather, Lee concurred with Uptegrove's conclusion, opining that Sarah's death was a homicide by drowning. Lee further testified that the injuries Sarah sustained, including the bruising to her neck, scalp, and forehead, where atypical to a drowning event and, in his opinion, were not attributable to medical intervention or the administration of CPR. Dr. William M. Rogers, an expert in emergency medicine, also testified that the bruising to the anterior of Sarah's neck was not consistent with the administration of CPR or intubation attempts.

{¶ 34} Dr. Michael G. Balko, an expert in anatomical pathology, forensic pathology, neuropathology, and cardiovascular pathology, testified that he concurred with Dr. Spitz's findings from the second autopsy.[4] Because he could not exclude rigorous CPR efforts as the cause of Sarah's injuries, Balko, like Spitz, would have declared the manner of Sarah's death "undetermined." Balko testified that in his opinion it was not possible to determine whether a neurological cause rendered Sarah unconscious and subsequently caused her to drown in the

bathtub because Sarah's brain was not adequately sampled and tested during her autopsies. Balko further testified that the injuries Sarah sustained, especially the bruising around her neck, are consistent with injuries sustained from the resuscitative and intubation processes. Dr. Dave Smile, an expert in emergency medicine who characterized the resuscitation efforts on Sarah's behalf as exceptionally long and very difficult, testified that injuries to the neck, especially to the thyroid cartilage, vocal cords, and soft tissues along the trachea, are injuries commonly observed when the Sellick maneuver is utilized during difficult intubations. Smile also testified that the lacerations to Sarah's upper lip are consistent with injuries that commonly occur during difficult intubations.

{¶ 35} Dr. James Layne Moore, an expert in neurology, neurophysiology, and sleep medicine, testified that Sarah's medical records do not indicate Sarah suffered from a sleep disorder or a neurological disease or defect. Moore explained that hypoxia, meaning "low oxygen," causes people who are asleep to wake up when they are deprived of oxygen. Moore testified that even if an individual fell asleep in water, hypoxia would drive the individual to wake up and start breathing. For this reason, Moore testified, he did not believe Sarah fell asleep in the bathtub and then drowned. Moore further testified, given Sarah's medical records, he did not believe Sarah suffered a seizure while in the bathtub.

{¶ 36} Dr. Chandler A. Phillips, an expert in biomedical engineering, human factors engineering, and injury biomechanics, testified on behalf of the defense. Using measurements of Sarah's body, Widmer's body, the bathroom itself, and those fixtures within it, including the bathtub, Phillips reached the opinion that Widmer did not forcibly drown Sarah in the bathtub. Phillips did not testify that there was insufficient space in the bathroom for Widmer to forcibly

4. Dr. Spitz was unavailable to testify at the third trial due to an illness. The trial court permitted his testimony from the second trial to be read into evidence. Neither Widmer nor the state has appealed the trial court's decision to allow Spitz's testimony from the second trial.

drown Sarah, but rather that the injuries Sarah sustained were not consistent with a forcible drowning in the bathroom. Phillips testified that with an anterior strangulation approach, or face-to-face approach, one would expect the victim to have injuries to the small bones in the neck, defense marks to the hands, and injuries to the feet from where the victim kicked the assailant in an effort to break free. With a posterior approach to strangulation, or a strangulation attempt from the rear, Phillips testified that one would expect to see bruising and injuries to the knees, thighs, and pelvis area of the victim. Phillips testified that these injuries were not observed during Sarah's autopsies, and therefore do not support a theory that Sarah was forcibly drowned in the bathroom.

{¶ 37} Melissa Waller, a resident of Washington who befriended Widmer after watching the September 2009 Dateline episode, also testified at the third trial. The two communicated regularly by email, text messaging, and phone. Waller testified that on October 26, 2009, the same night Crew claimed Widmer called her to confess to killing Sarah, Waller had talked to Widmer on the phone for nearly two hours, until about 11:00 p.m. In direct contrast to Crew's testimony, Waller testified that Widmer was not intoxicated, emotionally distraught, or upset during their phone conversation.

{¶ 38} After closing arguments, the trial court provided jury instructions for the offense of murder and the lesser-included offense of involuntary manslaughter predicated on the commission of a misdemeanor assault. The jury returned a guilty verdict on the murder charge, and Widmer was sentenced to serve 15 years to life in prison. Widmer timely appealed his conviction, alleging six assignments of error. For ease of discussion, we will address Widmer's fourth assignment of error last.

II. SUPPRESSION OF THE BATHTUB

{¶ 39} Assignment of Error No. 1:

{¶ 40} TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN VIOLATION OF

THE SIXTH AND FOURTEENTH AMENDMENTS BY FAILING TO TIMELY PROSECUTE WHAT WOULD HAVE BEEN A MERITORIOUS MOTION TO SUPPRESS THE BATHTUB AND ALL EVIDENCE RELATED TO SAID TUB DISCOVERED FOLLOWING ITS UNLAWFUL SEIZURE. THE STATE UNCONSTITUTIONALLY SEIZED THE BATHTUB PURSUANT TO A SEARCH WARRANT WHICH NEITHER LISTED THE BATHTUB AS AN ITEM TO BE SEIZED NOR COULD BE CONSTRUED TO VALIDLY INCLUDE THE BATHTUB UNDER THE OVERLY BROAD "LATENT FINGERPRINT" LANGUAGE.

{¶ 41} In his first assignment of error, Widmer argues his trial counsel provided ineffective assistance by failing to timely file and prosecute a motion to suppress the seizure of the bathtub. Widmer argues the seizure of the bathtub fell outside the scope of the search warrant as the bathtub was not particularly described within the warrant and did not fall within the scope of the search warrant's "latent fingerprints" provision. Widmer contends that had his trial counsel timely prosecuted a motion to suppress the bathtub, the bathtub and all evidence relating to it would have been excluded from trial. The state contends, however, that the bathtub was properly seized pursuant to the terms of the search warrant. Further, the state argues that defense counsel's failure to timely file or prosecute a motion to suppress the bathtub was part of the defense's trial strategy.

{¶ 42} To understand both Widmer's and the state's arguments, it is necessary to briefly discuss the history of the bathtub within the context of Widmer's three trials. The bathtub was seized as evidence pursuant to a search warrant executed on August 13, 2008, two days after the police were initially called to the scene. Widmer did not seek to suppress the bathtub prior to his first trial. On April 22, 2010, just days before Widmer's second trial was set to commence, Widmer filed a motion to suppress the bathtub. The trial court denied the motion on April 30, 2010, on the basis that it had not been prosecuted in a timely fashion. In its decision, the trial court stated "an eleventh hour motion to suppress in regard to a matter well

known to counsel for more than six months was not anticipated by the court." Widmer did not file a written motion to suppress the bathtub prior to the third trial. Rather, on February 1, 2011, during the fifth day of live testimony at the third trial, defense counsel objected to the admission of the bathtub as evidence. Defense counsel indicated the objection was in response to the trial court's April 30, 2010 ruling on the motion to suppress filed just prior to appellant's second trial.

> [DEFENSE COUNSEL]: I know it was ruled on at the time but I'm just preserving our object[ion] on the motion to suppress the tub.
>
> THE COURT: From the last trial?
>
> [DEFENSE COUNSEL]: Yes, just for the record.

The trial court overruled the objection and permitted the bathtub to be introduced into evidence.

{¶ 43} To prevail on his ineffective assistance of counsel claim, Widmer must show (1) that his trial counsel's performance in failing to file a motion to suppress the bathtub fell below an objective standard of reasonableness and (2) that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052 (1984). Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id*. at 694. "A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other." *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000).

{¶ 44} As an initial matter, we note that trial counsel's failure to file a motion to suppress evidence does not per se constitute ineffective assistance of counsel. *Id.*; *State v. Layne*, 12th Dist. No. CA2009-07-043, 2010-Ohio-2308, ¶ 46. The party asserting a claim of ineffective assistance of counsel for failure to file a motion to suppress must prove that there was a basis to suppress the evidence in question. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶

65.

{¶ 45} We begin our analysis by determining whether seizure of the bathtub was in violation of the Fourth Amendment. The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures and provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The manifest purpose of the Fourth Amendment's particularity requirement is to prevent general searches. *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 103 (1987). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Id*. Where the items seized are evidence or instrumentalities of a crime, a court must determine whether the warrant could reasonably have described the items more precisely than it did. *State v. Benner*, 40 Ohio St.3d 301, 307 (1988). A search warrant will be held sufficiently particular when it enables a searcher to reasonably ascertain and identify the things which are authorized to be seized. *State v. McCroy*, 6th Dist. Nos. WD-09-074 and WD-09-090, 2011-Ohio-546, ¶ 37; *United States v. Blakeney*, 942 F.2d 1001, 1026 (6th Cir.1991).

{¶ 46} The search warrant executed on August 13, 2008, authorized police to search the Widmers' residence for the following:

> [G]oods, chattels, or articles, and to retrieve any evidence of criminal activity which may be found, to wit: the wallet of Sarah A. Widmer (Deceased); calendars; computers; computer perherials [sic], including external hard drive(s), modums [sic], mediums for the electronic storage of data; caller ID(s); safe(s) and/or lock box(es); notes; medical records; pregnancy test; insurance

> papers; video and/or audio recording device(s); financial records, including credit card statements, certificate of deposit(s), checking account record(s), saving account record(s); birth control devices including pills and condoms; and latent fingerprints.

Officer Short's affidavit, which was attached and incorporated into the search warrant, stated that he had been dispatched to the Widmers' home on a report of a drowning. The affidavit also stated that upon arrival at the home, Short was told by Widmer that Sarah had been in the bathtub 15 to 30 minutes before Widmer found her "under the water" and removed her from the bathtub. Short further averred that an autopsy had been completed, and, although the preliminary cause of Sarah's death was drowning, there were "other injuries found on the body that were inconsistant [sic] with the account reported to police by Ryan K. Widmer." Short then stated that "through his personal knowledge and training, and based upon the preliminary results of the autopsy, [he] believes there exists other evidence at the [Widmers'] residence. The recovery of this evidence is key to the investigation into the death of Sarah A. Widmer."

{¶ 47} On appeal, Widmer argues the "latent fingerprints" provision of the search warrant is overly broad in nature and does not authorize the seizure of the bathtub. Widmer contends the bathtub was an item officers knew existed prior to requesting the warrant to search the home, and, as such, should have been specifically listed in the warrant as an item to be searched and seized. He further argues the "latent fingerprints" provision of the warrant could not have authorized the seizure of the bathtub as the provision offered unbridled discretion to the officers executing the warrant and would have allowed officers to seize "literally every item in the house." Widmer also argues that even if the latent fingerprint provision is not overly broad, seizure of the bathtub pursuant to this provision was improper as an on-site inspection of the bathtub revealed that the bathtub did not contain latent prints of value. We find Widmer's arguments to be without merit.

A. Scope of the Warrant

{¶ 48} In the present case, the warrant specifically authorized officers to search for latent fingerprints and retrieve any evidence of criminal activity. Although the warrant did not specifically list the bathtub, this does not invalidate its seizure. The warrant still enabled the officers to reasonably ascertain and identify the things that were authorized to be seized by way of the attached affidavit. The information contained within the affidavit, which made reference to the bathtub numerous times, sufficiently constrained the officers' search, and any later seizure, to evidence related to a death by drowning. At the time the warrant was sought, the cause of Sarah's death was known. Statements made by Widmer indicated Sarah had drowned in the couple's bathtub. The latent fingerprints provision did not allow officers to seize "literally every item in the house." Rather, it permitted only the seizure of goods, articles, or chattels that contained latent fingerprints *and* provided evidence of a crime, namely death by drowning. Common sense dictates that in an alleged bathtub drowning, valuable evidence, including latent fingerprints, can be obtained from a search of the bathroom and bathtub. Once the officers observed the fingermarks and smear marks on the bathtub, they were entitled to remove the tub from the home pursuant to the express terms of the search warrant. Seizure of the bathtub was therefore within the scope of the "latent fingerprints" provision.

{¶ 49} Widmer, however, seeks to invalidate the search by arguing that at the time the bathtub was removed officers knew that the tub did not contain latent fingerprints because the latent print examiner conducted an on-site inspection and concluded there were no latent prints of value. Yet, as discussed in more detail below, the marks still had evidentiary value as it was possible that further analysis would allow for identification of the source of the marks or would explain how the events unfolded on the night of Sarah's death. Accordingly, seizure of the bathtub to allow further investigation of the marks in a laboratory was warranted.

{¶ 50} We therefore find that the warrant provision allowing the search and seizure of

those items containing "latent fingerprints" was not overly broad. We also find that seizure of the bathtub, as it originated out of a search for latent fingerprints, was authorized by the warrant.

B. Instrumentality of the Crime

{¶ 51} In addition to finding seizure of the bathtub constitutional under the warrant's "latent fingerprints" provision, we also find that seizure of the bathtub was constitutional as the bathtub was an instrumentality of the crime.

{¶ 52} "Evidence not specifically described in a search warrant may be validly seized if, based on evidence known to the officers, the seized items were closely related to the crime being investigated or were instrumentalities of the crime." *State v. Kobi*, 122 Ohio App.3d 160, 171 (6th Dist.1997), citing *State v. McGettrick*, 40 Ohio App.3d 25, 29 (8th Dist.1988). *See also United States v. Wright*, 343 F.3d 849, 863 (6th Cir.2003) (holding "evidence not described in a search warrant may be seized if it is reasonably related to the offense which formed the basis for the search"); *United States v. Korman*, 614 F.2d 541, 547 (6th Cir.1980) (stating that evidence or instrumentalities of a crime may be seized even though not specifically listed in the search warrant).

{¶ 53} At the time the fingermarks and smear marks were observed on the bathtub, the police were executing a valid search warrant. Once the marks were observed, officers had probable cause to associate the bathtub with Sarah's death. Although an on-site inspection of the bathtub did not reveal latent prints of comparison value, the bathtub still retained evidentiary value as it was the likely instrument of the drowning and held evidence closely related to Sarah's death.[5] As Harness testified, latent prints are of comparison value only

5. In his reply brief, Widmer asks this court to find that the bathtub, as a fixture attached to the home, cannot be classified as an instrumentality of the crime. Widmer contends that items that may be seized as "instrumentalities of the crime" refer to the "papers and effects" clause of the Fourth Amendment and therefore include only personal property. Because a bathtub is a fixture, Widmer contends that the "house" clause of the Fourth Amendment governs, and the bathtub could not have been taken as an "instrumentality or the crime." Widmer's argument,

when the print has a "sufficient amount of class characteristics as well as individual characteristics that would enable [one] to ultimately identify that [print] to one person or another." While the on-site inspection of the bathtub did not reveal a sufficient amount of class or individual characteristics to identify who specifically left the markings, the fingermarks and smear marks did not become valueless. The markings retained evidentiary value because it was possible that further analysis of the marks would allow identification of the source of the marks or that additional evidence could be recovered once the bathtub was inspected in a crime laboratory.[6] Furthermore, removal of the bathtub was warranted as it was possible that further inspection of the item could explain how events unfolded on the night of Sarah's death and provide insight as to how the smear marks were made on the tub.

{¶ 54} We find that the police had probable cause to associate the bathtub, and the markings found therein, as the instrument used to drown Sarah. Because the bathtub was believed to have been used to cause Sarah's death, the bathtub, by its very nature, became an instrument of the crime and subject to seizure. Accordingly, we find that the seizure of the bathtub was not in violation of the Fourth Amendment.

C. The Exclusionary Rule

{¶ 55} Even if we had found the seizure of the bathtub outside the scope of the warrant or found that it was not an instrumentality of the crime, exclusion of the bathtub from evidence is not warranted under the facts of this case. The exclusionary rule is a "prudential doctrine" that was created by the United States Supreme Court to "compel respect for the constitutional guaranty" expressed in the Fourth Amendment. *Davis v. United States*, __ U.S. __, 131 S.Ct.

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however, ignores the unique circumstances of the present case. The cause of Sarah's death was drowning, and the instrument believed to have been used to cause her death was the bathtub. As such, by its very nature, the bathtub became an instrument of the crime and subject to seizure.

6. In fact, Harness testified that during his second examination of the bathtub, which took place in the crime lab after the bathtub had been removed from the home, he discovered additional fragmented prints on the bathtub that he had not observed during the on-site examination.

2419, 2426 (2011), citing *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437 (1960). The purpose of the exclusionary rule is to deter future Fourth Amendment violations. *Davis* at 2426. "Where suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly * * * unwarranted.'" *Id.* at 2426-2427, quoting *United States v. Janis*, 428 U.S. 433, 454, 96 S.Ct. 3021 (1976). Because of the substantial social costs generated by the exclusionary rule, the deterrence benefits of suppression must outweigh its heavy costs. *Davis* at 2427.

> When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. * * * But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful * * * or when their conduct involves only simply "isolated" negligence * * * the "deterrence rationale loses much of its force" and exclusion cannot "pay its way."

Id. at 2427-2428, quoting *United States v. Leon*, 468 U.S. 897, 908-909, 104 S.Ct. 3405 (1984) and *Herring v. United States*, 555 U.S. 135, 143-144, 129 S.Ct. 695 (2009).

{¶ 56} The exclusionary rule therefore applies, and evidence should be suppressed where:

> (1) the issuing judge was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth (2) the issuing judge wholly abandoned his judicial role, (3) an officer purports to rely upon a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) depending upon the circumstances of the particular case, a warrant is so facially deficient, i.e., in falling to particularize the place or things to be searched or seized, that those executing the warrant cannot reasonably presume it to be valid.

State v. Donihue, 161 Ohio App.3d 731, 2005-Ohio-3223, ¶ 9 (12th Dist.), citing *State v. George*, 45 Ohio St.3d 325, 331 (1989).

{¶ 57} In the present case there is no evidence demonstrating that the police deliberately set out to seize the bathtub without setting it forth in the search warrant.

Furthermore, there is no evidence demonstrating that the police acted with deliberate, reckless, or grossly negligent disregard for Widmer's Fourth Amendment rights when seizing the bathtub. Rather, the evidence produced at trial demonstrated that officers seized the bathtub in good faith reliance on the search warrant, removing the bathtub only after a search for latent fingerprints revealed the fingermarks and smear marks. Furthermore, as discussed above, the warrant was not facially deficient in describing the items to be seized. Therefore, exclusion of the bathtub from evidence would not yield any appreciable deterrence.

D. Effective Assistance of Trial Counsel

{¶ 58} As the bathtub was properly seized, we find that Widmer was not prejudiced by his trial counsel's decision not to file or timely prosecute a motion to suppress the bathtub from evidence. Accordingly, we find Widmer was not denied effective assistance of trial counsel.

{¶ 59} Widmer's first assignment of error is therefore overruled.

III. HILLARD'S TESTIMONY

{¶ 60} Assignment of Error No. 2:

{¶ 61} WIDMER WAS DENIED A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF HIS DUE PROCESS RIGHTS THROUGH THE ADMISSION OF IMPERMISSIBLE EXPERT OPINION TESTIMONY THAT: (1) REACHED BEYOND THE EXPERT'S PURPORTED EXPERTISE; (2) LACKED SCIENTIFIC FOUNDATION; AND (3) WAS BASED ON A METHODOLOGY THAT HAS BEEN PROVEN UNRELIABLE. ACCORDINGLY, WIDMER WAS ALSO DENIED THE RIGHT TO ADEQUATELY CONFRONT THIS EVIDENCE IN VIOLATION OF THIS SIXTH AMENDMENT RIGHTS.

{¶ 62} In his second assignment of error, Widmer argues that the trial court erred by allowing Hillard to testify about "body part impressions" found on the bathtub. Widmer challenges the admission of Hillard's testimony regarding: (1) the adult male forearm on the front interior wall of the bathtub; (2) the forearm impression "overlaying" circular marks made

on the bathtub by bath product bottles; and (3) the fingertip marks that were in a "downward position" and were made by a person of small stature, like a child, a female, or small male. Widmer contends that the admission of such testimony was in violation of Evid.R. 702 and his Sixth Amendment rights. Specifically, Widmer argues that "Hillard's testimony runs afoul of due process and the Confrontation Clause" as Hillard was permitted to testify beyond his area of expertise and into a realm of body part impressions for which he has "no training or consistent, methodologically based, non-anecdotal experience" and his testimony was "not based on [a] scientifically valid methodology."

{¶ 63} Prior to the commencement of the third trial, Widmer had filed a motion in limine seeking to limit Hillard's testimony by prohibiting him from testifying about the size and sex of the individuals who made the fingertip marks or the forearm impression. The motion in limine was not ruled on prior to trial and is therefore presumed to have been denied. *Choate v. Tranet, Inc.*, 12th Dist. No. CA2003-11-112, 2004-Ohio-3537, ¶ 60. At trial, Hillard was offered as an expert in the areas of crime scene analysis, fingerprint analysis, and crime scene photography. Widmer did not seek to voir dire Hillard as to his qualifications as an expert in these fields. Rather, Hillard was admitted as an expert in the aforementioned areas without objection. Widmer did object, however, to Hillard's testimony that an adult male forearm impression was found on the bathtub, that this impression overlaid circular marks made on the bathtub by bath product bottles, and that the fingertip marks found in the bathtub were in a "downward position" and were made by a person of small stature, like a child, a female, or small male. Widmer's objections were overruled, and such testimony was deemed admissible by the trial court.

{¶ 64} We begin our analysis by determining whether Hillard's testimony was properly admitted pursuant to Evid.R. 702.

A. Evidence Rule 702

{¶ 65} "The determination of the admissibility of expert testimony is within the discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion." *State v. Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289, ¶ 107 (12th Dist.). An abuse of discretion implies more than an error of law or judgment; it suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *State v. Barnes*, 12th Dist. No. CA2010-06-009, 2011-Ohio-5226, ¶ 23. A trial court's admission of expert testimony is not an abuse of discretion where the testimony is relevant and the criteria of Evid.R. 702 are met. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 23.

{¶ 66} Evid.R. 702 provides that a witness may testify as an expert if all of the following apply:

> (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;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *

{¶ 67} With respect to Evid.R. 702, the trial court, as part of its gatekeeping function, must assess both the relevance of the expert's testimony and the reliability of the testimony prior to admitting such testimony into evidence. *Caputo* at ¶ 24. This gatekeeping obligation applies "not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 141, 119 S.Ct. 1167 (1999). To determine the reliability of testimony, the trial court may consider one or more of the specific factors mentioned in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, 113 S.Ct. 2786 (1993). *Kumho Tire Co.*, 526 U.S. at 141. The specific factors mentioned in *Daubert* include: (1) whether the theory or

scientific technique has been tested; (2) whether the theory or technique has been subject to peer review or publication; (3) whether the method has a known potential rate or error; and (4) whether the theory has gained general acceptance in the scientific community. *Caputo*, 2007-Ohio-5023 at ¶ 25, citing *Daubert* at 593-594. While consideration of the *Daubert* factors is permitted, such consideration is not required to determine the reliability of the testimony. *Kumho Tire Co.*, at 141. Rather, the test of reliability is "flexible" and *Daubert*'s list of specific factors neither necessarily nor exclusively apply to all experts or in every case. *Id.* The trial court is given "broad latitude" in determining reliability. *Id.*

{¶ 68} Hillard testified that he had been employed by the city of Cincinnati as a senior criminalist for five years. Prior to holding that position, he served as a police officer for 28 years. Hillard testified that he had been examining crime scenes and processing evidence for over 30 years. Some of the specific activities that he does as a criminalist include securing the scene, collecting evidence, and processing the evidence for fingerprints or any other forensic evidence. Hillard explained that most of his criminalist education and training has been through on-the-job training and from the FBI Academy in Florida. He has been trained specifically in crime scene photography, evidence collection, interpreting patterns of evidence, and the processing and analyzing of fingerprints. Hillard testified that he has responded to "thousands" of crime scenes over the years, many of which were homicide scenes. He further explained that for 10 to 15 percent of these crime scenes, he has analyzed impressions of body parts other than "fingers, hands and feet." Based on the foregoing, it is clear that Hillard's testimony related to matters beyond the knowledge of a lay person and that he was qualified as an expert in the areas of crime scene analysis, fingerprint analysis, and crime scene photography by his knowledge, education, and experience. *See* Evid.R. 702(A) and (B).

{¶ 69} The issue in this case, however, is whether Hillard went beyond his expertise

when testifying about the fingertip marks and forearm impression found on the bathtub. Essentially Widmer attacks the reliability of Hillard's testimony. He contends that Hillard's testimony lacked a scientific foundation as it was based on the Bertillon system of using body measurements to identify individuals, which Hillard himself admitted is unreliable. The state contends that Hillard's testimony was permissible as it was not based on the Bertillon system but rather on the methodology underlying latent fingerprint analysis. The state further argues that Hillard was qualified to testify about the forearm impression and fingertip marks based on Hillard's "many years of experience" analyzing "other" body part impressions as he had done so in 10 to 15 percent of the thousands of crime scenes he had investigated.

{¶ 70} The Bertillon system is defined as "a system for the identification of persons by a physical description based on anthropometric measurements, standardized photographs, notation and classification of markings, color, bodily anomalies, thumb line impressions, and other data that has been largely superseded by fingerprinting." *Webster's Third New International Dictionary* 207 (1993).[7] At trial, Hillard testified that he was familiar with the Bertillon system of identification that was based on body measurements and that such method had been proven unreliable. Contrary to Widmer's argument, however, Hillard never testified that he relied on the Bertillon system in finding or identifying the forearm impression or fingertip marks on the bathtub. Rather, Hillard testified that a body part impression is made the same way a latent print is made, by touching an object and leaving a residue behind, and the impression can be discovered using a chemical or dusting powder. Specifically, Hillard testified as to this process as follows:

> [HILLARD]: Usually when we go process a crime scene, exactly what's documented, taking pictures and analyzing what we're going to do at the crime scene, when we dust an object we use

7. Anthropometry is defined as "the science of measuring the human body and its parts and functional capacities [especially] as an aid to the study of human evolution and variation." *Webster's Third New International Dictionary* 93 (1993).

dusting powder to try to bring out a fingerprint or any other material that might be on that surface that we're processing.

With fingerprint powder it helps you see a latent print which normally can't be seen with the naked eye, latent means invisible and you use a chemical or dusting powder to bring out that fingerprint.

[STATE]: And Mr. Hillard you used the term latent print. Can you explain what latent print is in your line of work?

[HILLARD]: Latent print is usually a print that is invisible, is usually a print that is not visible to the naked eye, with the naked eye. You have to use some type of enhancing procedure.

[STATE]: And how is such a fingerprint formed, how is it made?

[HILLARD]: Yes. If you look at your fingers you have the friction skin ridges, and on these ridges you have pores and they sweat and whenever you touch something you leave a residue, a water residue and you touch something that leaves a latent print there.

[STATE]: Now for example you were talking about the fingerprints?

[HILLARD]: Yes.

[STATE]: Is that true of other parts of the body as well?

[HILLARD]: Yes. You have the same process with your feet also. You have the friction of your skin ridges on your feet.

[STATE]: And beyond the feet and the fingertips does the body in general produce those kinds of oils or things that would form impressions?

[HILLARD]: Yes. If you took the back of your hand and did the same thing you'd still have that impression. You'd dust it or anything you would have that impression as you dust it with a powder. And nonporous items gets treated with a chemical and you can develop that impression also.

[STATE]: And Mr. Hillard in your experience and you[r] years as a Criminalist, based on your training and experience, do you have any experience in interpreting impressions that are left, that are formed that way other than fingerprints and the feet?

[HILLARD]: Yes.

> [STATE]: Have you responded to crime scenes where you had to interpret impressions that were formed by other parts of the body besides the feet and hands?
>
> [HILLARD]: Yes sir.
>
> * * *
>
> [STATE]: Have you received any specific training in how to interpret impressions other than fingerprints?
>
> [HILLARD]: Again, this comes along with experience.

{¶ 71} Hillard did not claim that there was a recognized scientific process establishing forearm comparison as a science. Rather than trying to identify Widmer or any other individual as the source of the forearm impression through comparison, Hillard limited his testimony to the identification of the impression as one made by an adult male. Hillard did not speculate as to who specifically left the forearm impression or when the impression had been left on the bathtub. Instead, Hillard testified only as to how such an impression was made, the identification of the impression by body part, and the general characteristics of the person who left the impression (an adult male). Given his experience in analyzing crime scenes and body part impressions, for which an understanding of the science behind the transfer and discovery of latent prints or impressions is required, Hillard was more than qualified to testify as to the existence of the forearm impression. Therefore, the trial court did not abuse its discretion in admitting such testimony into evidence.

{¶ 72} Furthermore, we do not find that the court abused its discretion in allowing into evidence Hillard's testimony that the forearm impression overlaid circular marks left on the bathtub by bath products. Hillard testified he has more than 30 years of experience observing crime scenes and interpreting patterns of evidence. Hillard was more than qualified to testify as to his observation that the forearm impression came second in time to the circular marks. If Widmer wanted to cast doubt on the accuracy of Hillard's observations, he had the opportunity

to do so during cross-examination.

{¶ 73} Finally, we do not find the trial court abused its discretion in admitting Hillard's testimony about the fingertip marks found on the bathtub. Hillard testified that latent prints were discovered after dusting powder was used on the bathtub, but the prints lacked minutiae details and therefore could not be used to identify the source of the prints. Although the print lacked identifying characteristics or minutiae details, Hillard was able to determine that the print was left after someone pulled his or her fingers downward using just the fingertips.

> [HILLARD]: These impressions here are the ones I was looking at. It tells you they were fingerprints but I couldn't make a positive identification as to who they belonged to. I could just tell they were in the downward position.
>
> * * *
>
> These are the tips of the fingerprints right here and on the tips usually when you're pulling down on something you very seldom leave minutiae points there and those impressions [sic].

From his testimony, it is clear that Hillard did not rely on the Bertillon system to identify the source of the fingertip marks. Rather, Hillard utilized his training and experience in analyzing fingertip markings to determine that the markings were made by a "person of small stature, like a child, [a] female, or a small male." Although Hillard's training and experience allowed him to draw such an observation from the size and the shape of the markings, Hillard was explicit in stating that he could not identify the specific individual who made the markings, that person's gender, or when the markings had been left on the bathtub. Hillard's testimony was therefore limited to those findings and observations he was qualified to make given his 30 years of experience in analyzing crime scenes, fingerprints, and body part impressions.

{¶ 74} For the aforementioned reasons, we do not find that the trial court abused its discretion in admitting Hillard's testimony about the forearm impression and fingertip markings. Hillard's testimony was relevant, reliable, and permissible pursuant to Evid.R. 702. Any

questions or doubts Widmer had regarding the accuracy of Hillard's observations and testimony about the forearm impression and fingertip markings were capable of being addressed during cross-examination. Furthermore, we find that such questions about the accuracy or reliability of Hillard's testimony in this case go to the weight of the evidence rather than its admissibility.

B. Due Process and the Confrontation Clause

{¶ 75} We further find that the admission of Hillard's testimony did not violate Widmer's due process rights or his constitutional rights under the Sixth Amendment.

{¶ 76} "The Sixth Amendment to the United States Constitution made applicable to the States via the Fourteenth Amendment['s] [due process clause] * * * provides that '[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.'" *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2531 (2009). The Amendment guarantees a defendant the right to confront those who "bear testimony" against him. *Id.*, citing *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354 (2004). "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.*, citing *Crawford* at 54.

{¶ 77} In the present case, Hillard was called as an expert witness at trial. His testimony about the forearm impression and fingertip markings he found on the bathtub were subject to cross-examination by Widmer. Widmer was given the express opportunity to challenge and cast doubt on Hillard's conclusions about the forearm impression and the fingertip marks. Accordingly, we do not find that Hillard's testimony was in violation of Widmer's Sixth Amendment right to confront those who bear witness against him.

{¶ 78} Widmer's second assignment of error is hereby overruled.

IV. JURY INSTRUCTIONS

{¶ 79} Assignment of Error No. 3:

{¶ 80} THE TRIAL COURT ERRED IN VIOLATION OF WIDMER'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS BY FAILING TO PROPERLY INSTRUCT THE JURY ON ALL LESSER-INCLUDED OFFENSES OF MURDER REASONABLY ADDUCED BY THE EVIDENCE. ALTERNATIVELY, DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS BY FAILING TO ENSURE THAT THE JURY INSTRUCTION PROPERLY CONVEYED THE APPLICABLE LAW.

{¶ 81} In his third assignment of error, Widmer argues the trial court committed plain error by failing to instruct the jury on the lesser-included offenses of reckless homicide and involuntary manslaughter predicated on the commission of a felonious assault or an aggravated assault. Widmer also argues that his trial counsel provided ineffective assistance of counsel by failing to ensure that the trial court provided jury instructions for the above mentioned lesser-included offenses. Widmer contends that the evidence presented at trial required an instruction that allowed the jury to determine his mental state on the night of Sarah's death. Widmer further contends that he was prejudiced by the trial court's failure to instruct on the lesser-included offenses as it is likely that the jury "resorted to a murder conviction for lack of an option that properly reflected the state's evidence."

A. Plain Error

{¶ 82} Crim.R. 30(A) provides that a party may not assign as error the trial court's failure to give any jury instructions "unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." The failure to object to a jury instruction in accordance with Crim.R. 30(A) before the jury retires constitutes a waiver, absent plain error. *State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722, ¶ 12.

{¶ 83} In the present case, the state requested jury instructions on involuntary manslaughter predicated on the commission of a felonious assault and misdemeanor assault. Defense counsel objected, stating that "[b]ased on the facts and evidence, we do not think it warrants [a] lesser included offense." The trial court overruled Widmer's objection and provided an instruction for the lesser-included offense of involuntary manslaughter predicated on the commission of a misdemeanor assault. Widmer did not provide any further objection to the jury instructions prior to the jury retiring to consider its verdict. Accordingly, Widmer's failure to object to the jury instructions in compliance with Crim.R. 30(A) constitutes a waiver, and his arguments regarding the need for instructions on the lesser-included offenses of reckless homicide and involuntary manslaughter predicated on the commission of a felonious assault or aggravated assault will be reviewed for plain error only.

{¶ 84} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights by influencing the outcome of the proceedings. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Biros*, 78 Ohio St.3d 426, 436 (1997). Courts should notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice." *Lynn*, 2011-Ohio-2722 at ¶ 14.

{¶ 85} However, where the failure to request a jury instruction was the result of a deliberate, tactical decision of trial counsel, it does not constitute plain error. *State v. Clayton*, 62 Ohio St.2d 45, 47-48 (1980). *See also State v. Pigg*, 9th Dist. No. 24360, 2009-Ohio-2107, ¶ 5; *State v. White*, 6th Dist. No. L-06-1363, 2008-Ohio-2990, ¶ 56; State *v. Murphy*, 4th Dist. No. 07CA2953, 2008-Ohio-1744, ¶ 36-37; *State v. Riley*, 10th Dist. No. 06AP-P1091, 2007-Ohio-4409, ¶ 5; *State v. Marrow*, 2d Dist. No. 2002-CA-37, 2002-Ohio-6527, ¶ 8. "In Ohio,

there is a presumption that the failure to request an instruction on a lesser-included offense constitutes a matter of trial strategy and does not by itself establish plain error or the ineffective assistance of counsel." *Riley* at ¶ 5, citing *State v. Griffie*, 74 Ohio St.3d 332, 333 (1996). Therefore, "[a] defendant may not rely on the plain error rule to evade the consequences of his own trial strategy." *Murphy* at ¶ 37, citing *State v. Claytor*, 61 Ohio St.3d 234, 240 (1991).

{¶ 86} The record demonstrates that defense counsel's failure to request jury instructions for the lesser-included offenses of reckless homicide and involuntary manslaughter predicated on the commission of a felonious assault or an aggravated assault was a deliberate, tactical decision aimed at limiting the instructions in an effort to obtain Widmer's complete acquittal rather than inviting conviction on a lesser offense. Defense counsel specifically objected to the trial court providing jury instructions on the lesser-included offense of involuntary manslaughter predicated on the commission of a felony or misdemeanor. Furthermore, the record reveals that defense counsel's trial strategy was to persuade the jury that Widmer was not guilty of killing Sarah because her death occurred when she suffered a seizure or some other medical event caused by a previously unknown neurological or cardiovascular disease or defect. Defense counsel's actions in seeking to limit the jury instructions to murder alone demonstrate a tactical choice not to request instructions on lesser-included offenses in an effort to secure a total acquittal based upon the argument that Widmer did not purposely cause Sarah's death. Therefore, Widmer cannot claim that the trial court's failure to give the jury instructions on the lesser-included offenses constituted plain error as the record clearly demonstrates that the failure to request the instructions was the result of trial strategy.

B. Trial Strategy: Effective Assistance of Trial Counsel

{¶ 87} Furthermore, we do not find that trial counsel provided ineffective assistance by

failing to request jury instructions for the lesser-included offenses of reckless homicide and involuntary manslaughter predicated on the commission of a felonious assault or an aggravated assault. To prevail on his ineffective assistance of counsel claim, Widmer must show (1) that his trial counsel's performance fell below an objective standard of reasonable representation and (2) that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052 (1984).

{¶ 88} In the present case, Widmer has not demonstrated that his trial counsel's performance was deficient or that he was prejudiced as a result of this alleged deficiency. The Ohio Supreme Court has held that the "[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel." *State v. Griffie*, 74 Ohio St.3d at 333, citing *State v. Clayton*, 62 Ohio St.2d 45. Although Widmer's trial counsel's strategy in seeking an acquittal was unsuccessful, this does not mean that his counsel's performance was constitutionally deficient. *See Clayton* at 49 ("Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client"). "A strong presumption exists that licensed attorneys are competent and that the challenged action is the product of a sound trial strategy and falls within the wide range of professional assistance." *State v. Martin*, 12th Dist. Nos. CA2003-06-065 and CA2003-06-066, 2004-Ohio-702, ¶ 12.

{¶ 89} After a careful review of the record, we cannot say that Widmer's counsel's performance was deficient and fell below an objective standard of reasonableness. Choosing to limit jury instructions in an effort to obtain a complete acquittal falls within the wide range of acceptable professional assistance. Furthermore, we cannot say that the failure to request jury instructions for the lesser-included offenses of reckless homicide and involuntary manslaughter predicated on the commission of a felonious assault or an aggravated assault caused prejudice. Because the jury found Widmer guilty of murder beyond a reasonable

doubt, it seems improbable that giving the jury additional lesser options would have resulted in a different verdict. *See State v. Johnson*, 6th Dist. No. L-04-1221, 2006-Ohio-1406, ¶ 22 (finding that because jury found defendant guilty of murder, it was improbable that giving a jury instruction for lesser-included offense of voluntary manslaughter would have resulted in a different verdict). Accordingly, Widmer did not receive ineffective assistance of counsel.

{¶ 90} Based on the foregoing, Widmer's third assignment of error is overruled.

V. INSUFFICIENCY AND MANIFEST WEIGHT

{¶ 91} Assignment of Error No. 5:

{¶ 92} WIDMER'S CONVICTION IS BASED ON INSUFFICIENT EVIDENCE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL. AT MOST, THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF INVOLUNTARY MANSLAUGHTER OR RECKLESS HOMICIDE.

{¶ 93} Assignment of Error No. 6:

{¶ 94} WIDMER'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF EVIDENCE.

{¶ 95} In his fifth and sixth assignments of error, Widmer argues that his murder conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. Widmer contends the state failed to prove the necessary elements to sustain a murder conviction, and he argues that "[a]t most, the state proved a lesser-included offense of murder." Widmer specifically contends that Crew's testimony was the only evidence presented to establish his *mens rea* on the night of the crime, and her testimony did not demonstrate that he intended to kill Sarah. Rather, Widmer argues that, at best, Crew's testimony proves that he acted recklessly or knowingly in causing Sarah's death because "[i]f Crew's testimony is believed, [Widmer] submerged Sarah's head under water while blacked out."

{¶ 96} When reviewing the sufficiency of the evidence underlying a criminal conviction,

an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298, ¶ 33. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 97} A manifest weight of the evidence challenge examines the "inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other." *State v. Barnett*, 12th Dist. No. CA2011-09-177, 2012-Ohio-2372, ¶ 14. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Graham*, 12th Dist. No. CA2008-07-095, 2009-Ohio-2814, ¶ 66. In reviewing the evidence, an appellate court must be mindful that the jury, as the original trier of fact, was in the best position to judge the credibility of witnesses and determine the weight to be given to the evidence. *State v. Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289, ¶ 114 (12th Dist.). "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). Furthermore, "[a] unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required to reverse a judgment on the weight of the evidence in a jury trial." *Id.*, citing *Thompkins* at 389.

{¶ 98} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of

sufficiency." *State v. Hart*, 12th Dist. No. CA2011-03-008, 2012-Ohio-1896, ¶ 43, citing *Graham* at ¶ 67. Accordingly, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency. *Id.*

{¶ 99} Widmer was convicted of murder in violation of R.C. 2903.02(A), which provides that "[n]o person shall purposely cause the death of another." A person acts purposely "when it is his specific intention to cause a certain result." R.C. 2901.22(A). "A jury may infer an intent to kill where (1) the natural and probable consequence of a defendant's act is to produce death, and (2) all of the surrounding circumstances allow the conclusion that a defendant had an intent to kill." *State v. McGraw*, 12th Dist. No. CA2009-10-020, 2010-Ohio-3949, ¶ 12, citing *State v. Locklear*, 10th Dist. No. 06AP-259, 2006-Ohio-5949, ¶ 15. Further, "[p]urpose or intent * * * may be established by circumstantial evidence." *McGraw* at ¶ 12. "[A] conviction based on purely circumstantial evidence is no less sound than one based on direct evidence." *State v. Curtis*, 12th Dist. No. CA2009-10-037, 2010-Ohio-4945, ¶ 22, citing *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330, 81 S.Ct. 6 (1960). "Circumstantial evidence and direct evidence have the same probative value, and in some instances, certain facts can only be established by circumstantial evidence." *Curtis* at ¶ 22, citing *State v. Mobus*, 12th Dist. No. CA2005-01-004, 2005-Ohio-6164, ¶ 51.

{¶ 100} After review of the record, we cannot say the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. The state presented testimony and evidence from which the jury could have found the essential elements of murder proven beyond a reasonable doubt.

{¶ 101} The state presented evidence that Sarah and Widmer were the only two individuals present in the Widmers' home on the night of Sarah's death. The state also presented evidence that Sarah died from a forcible drowning. Dr. Uptegrove testified that during Sarah's autopsy he observed contusions on Sarah's scalp and on the back of her neck,

external bruising to her forehead and the left side of her neck, and significant internal bruising to the anterior of her neck. Uptegrove testified that Sarah's injuries were not consistent with or caused by medical intervention or the administration of CPR. Rather, Uptegrove believed the bruises to Sarah's neck were caused prior to her death and resulted from significant compressional force or a blunt force being applied to her neck. Dr. Lee, an expert in pathology, also testified that the injuries Sarah sustained to her neck, scalp, and forehead were atypical to a natural drowning event and were not attributable to medical intervention. Lee testified that the bruising around Sarah's neck was caused by blunt force injury or compressive force. From this testimony, the jury could have drawn a reasonable inference that the bruising around Sarah's neck occurred when Widmer used compressive force to hold Sarah's head underwater, thereby causing her death.

{¶ 102} To support his argument that he did not forcibly drown Sarah, Widmer presented evidence and testimony that the injuries Sarah sustained occurred during the resuscitative and intubation processes. Dr. Smile, an expert in emergency medicine, testified that injuries to the neck are commonly observed when the Sellick maneuver is utilized during difficult intubations. Dr. Balko and Dr. Sptiz, expert pathologists, testified that they would have ruled Sarah's death "undetermined" rather than a "homicide" because they could not rule out prolonged and rigorous CPR as the cause of Sarah's injuries.

{¶ 103} In further support of his contention that Sarah did not die by a forcible drowning, Widmer argued Sarah either drowned after suffering a medical event caused by a previously unknown neurological or cardiovascular disease or defect or drowned after falling asleep in the bathtub. Widmer presented evidence that Sarah had a childhood heart murmur that had never been corrected by surgery. He also presented evidence that Sarah sometimes suffered severe stomachaches and headaches, and, on the day of her death, Sarah had complained to a co-worker that she had a headache and stomachache. Additionally, Widmer presented

evidence that Sarah had been known to fall asleep at "odd" times and places, including at football tailgating events and in a bar at a table full of talking women.

{¶ 104} The state, however, presented evidence that cast doubt on Widmer's version of the events that led to Sarah's death. The state presented evidence that Widmer attempted to establish Sarah's death as an accidental drowning that occurred when she fell asleep in the bathtub. In his 911 phone call, Widmer told the dispatcher that Sarah "falls asleep in the tub all the time." In a statement made to Doyle Burke, the chief investigator for the Warren County Coroner's Office, Widmer said that when Sarah went upstairs to take a bath on the evening of her death, he had been "afraid she may fall asleep in the tub." Widmer then admitted to Burke that Sarah had never fallen asleep in the tub before. The jury was entitled to weigh this evidence in determining whether Sarah commonly fell asleep in the bathtub or whether Widmer made such statements in an effort to conceal his actions in forcibly drowning Sarah.

{¶ 105} The state also presented evidence which permitted the jury to determine whether it believed Widmer staged Sarah's death to look like an accidental drowning. In doing so, the jury was entitled to consider Widmer's inconsistent statements about how he discovered Sarah – face-down, as he told the 911 dispatcher, or face-up, as he told the emergency room charting nurse. The jury was also entitled to consider the testimony of emergency personnel who responded to the Widmers' home. Although Widmer's 911 phone call indicated Sarah had been found in a bathtub full of water, emergency personnel who responded to the scene within minutes of the phone call testified that they found Sarah's body dry. These first responders also testified that the carpet in the master bedroom where Sarah had been lying was dry, except for the areas where the foamy, bloody discharge was observed. Officers who secured and investigated the scene testified that the bathroom floor and items lying on the bathroom floor were also dry. A used Lysol wipe had been discovered in the bathroom, and there was testimony from Hillard that the bathtub appeared to have been

wiped down. There was also testimony from Crew that Widmer had admitted he had tried to "cover up" Sarah's death, and had wiped up the water on the bathroom floor with towels before placing the 911 call. From this evidence, the jury could have determined that Widmer staged Sarah's death to look like an accident rather than a forcible drowning.

{¶ 106} Although Widmer presented an alternative theory as to the manner of Sarah's death and provided contradicting medical testimony about the cause of Sarah's injuries, the jury was entitled to find the state's experts' testimony more credible. Not only did the state present expert testimony that Sarah's bruising was caused by compressive force, but the state also presented testimony that Sarah was a healthy 24-year-old woman who had never had a seizure or been diagnosed with epilepsy. The state further presented expert testimony that Sarah's childhood heart murmur was an "innocent heart murmur" that typically disappears on its own within a few months or a year of life. Experts testifying for the state also testified that there was no evidence of a cardiovascular or neurological disease or defect which caused or contributed to Sarah's death. Uptegrove testified he had not discovered anything out of the ordinary when examining Sarah's heart and brain. Further, Dr. Moore, an expert in neurology, neurophysiology, and sleep medicine, testified that individuals do not typically fall asleep and drown in bathtubs as hypoxia causes one to wake up and start breathing once the individual has been deprived of oxygen. Moore also testified that a person who experiences a seizure while seated in a bathtub would not "flip over" or fall face-down into the bathwater as the stiffening and shaking that occurs during a seizure prevents an individual from falling in that direction. Based on this testimony, the jury was entitled to find that Sarah's death was caused by a forcible drowning that occurred when Widmer used compressive force to hold Sarah's head underwater and not by some unknown and undiscovered medical event or the act of falling asleep in the bathtub.

{¶ 107} Furthermore, contrary to Widmer's argument, the state also presented sufficient

evidence to establish Widmer acted with purpose in killing Sarah. On behalf of the state, Crew testified that Widmer admitted to punching Sarah in the chest before blacking out, regaining consciousness, and finding Sarah on the floor, not breathing, with her hair wet. Crew further testified that prior to Sarah's death, Widmer had threatened Sarah that "[n]obody leaves me, nobody ever leaves me and I mean nobody." In determining what weight, if any, to give to Crew's testimony, the jury was permitted to reject those portions of her testimony that it did not find credible. *See In re S.C.T.*, 12th Dist. No. CA2004-04-095, 2005-Ohio-2498, ¶ 24 (finding jurors, as the trier of fact, are "free to believe all, part, or none of the testimony of each witness"). Given the evidence presented, the jury was entitled to reject Crew's testimony that Widmer "blacked out" and caused Sarah's death. Rather, the jury was entitled to believe that Widmer purposefully and forcibly held Sarah's head underwater as a means of killing her and preventing her from leaving him.

{¶ 108} As "[t]he law has long recognized * * * intent, lying as it does within the privacy of a person's own thoughts, is not susceptible of objective proof. The law recognizes that intent can be determined from the surrounding facts and circumstances, and persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts." *State v. Garner*, 74 Ohio St.3d 49, 60 (1995). Given the aforementioned facts and circumstances surrounding Sarah's death, the jury could have determined that Widmer purposefully drowned Sarah with the intent of causing her death.

{¶ 109} Based on the foregoing we find that there was credible evidence that Widmer purposely caused Sarah's death. The jury weighed the evidence and came to the conclusion, beyond a reasonable doubt, that Widmer was responsible for the murder of his wife. The jury chose to credit the witnesses presented by the state and believe the prosecution's version of events. The jury was in the best position to hear the witnesses speak and view their demeanor, and we find no indication that the jury lost its way or created a manifest miscarriage

of justice in finding Widmer guilty of murder. Thus, Widmer's conviction is not against the manifest weight of the evidence. Having found Widmer's conviction was not against the manifest weight of the evidence, it follows that the evidence was sufficient to support the conviction.

{¶ 110} Widmer's fifth and sixth assignments of error are hereby overruled.

VI. BRALEY'S BACKGROUND

{¶ 111} Assignment of Error No. 4:

{¶ 112} DUE PROCESS AND SIXTH AMENDMENT VIOLATIONS OCCURRED WHEN THE TRIAL COURT: (1) QUASHED THE DEFENSE SUBPOENAS SEEKING TO FURTHER INVESTIGATE LT. BRALEY'S BACKGROUND FOLLOWING THE MAY 5, 2010 HEARING; AND (2) DENIED THE JANUARY 2011 DEFENSE MOTION REQUESTING PERMISSION TO CONFRONT LT. BRALEY DURING TRIAL ABOUT HIS BACKGROUND.

{¶ 113} In his fourth assignment of error, Widmer contends that the trial court erred when it quashed the defense's subpoenas seeking to obtain further information about Lieutenant Braley's education and employment background and denied the defense motion to confront Braley during trial about his background. Widmer asserts that the trial court's actions in quashing the subpoenas and precluding cross-examination about Braley's background effectively denied him his right to present a "*Kyles* defense." Widmer further contends that the trial court's actions denied him his Sixth Amendment right to meaningfully confront witnesses who testify against him.

{¶ 114} In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995), the United States Supreme Court reversed a murder conviction upon discovering that the state had withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963). The evidence withheld by the state included, among other things, inconsistent eyewitness statements and inconsistent statements made by an "associate" of the defendant who

allegedly had knowledge of the crime and access to the location where items taken from the victim were found. The Supreme Court held that disclosure of the withheld evidence undermined confidence in the outcome of the trial court and therefore made a different result reasonably probable. *Kyles* at 441. In reaching this determination, the Supreme Court noted that the withheld evidence would have "raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation." *Id.* at 445. Furthermore, the Supreme Court stated that the evidence withheld denied the defense the ability to "undermine the ostensible integrity of the [police] investigation" and "[lay] the foundation for a vigorous argument that the police had been guilty of negligence." *Id.* at 447-448.

{¶ 115} Relying on the Supreme Court's decision in *Kyles*, Widmer argues that the trial court should not have quashed the subpoenas or denied him the right to question Braley about his background at trial because information may have come to light that would have allowed Widmer to attack the thoroughness and good faith of the police investigation into Sarah's death. Specifically, Widmer contends the information that Braley lied on an application for employment with Hamilton Township could have been used not only to attack Braley's credibility, but also as a means of "insert[ing] Braley's dishonesty into the case to challenge the integrity of: (1) the processing and collecting of evidence * * * including the * * * tub; (2) the Coroner's conclusion, given Braley's attendance and participation in the autopsy; and (3) the decision to charge Widmer, in which Braley participated."

{¶ 116} We begin our analysis by determining whether the trial court properly granted the motions to quash the subpoenas duces tecum.

A. Motions to Quash the Subpoenas Duces Tecum

{¶ 117} Sometime prior to March 2010, the defense obtained a copy of a Hamilton Township Division of Fire and Emergency Services application form that had purportedly been

completed by Braley and placed in his personnel file. The application form was dated June 25, 1996. This application form allegedly contained information about Braley's education and former employment experiences. With respect to the education portion of the form, the application indicated that Braley had received a master's degree after completing two years of schooling at Wright State University and two years of schooling at a college in Florida. With respect to the employment experience portion of the form, the application indicated that Braley had been previously employed by General Electric, the United States Postal Service, the Loveland Heights Church of Christ, and Tufts Schildmeyer Funeral Home. The form stated that Braley had performed engineering work for General Electric from 1985 to 1993, had worked with the U.S. Postal Service as a postal inspector from 1993 to October 1995, had served as a minster for the Loveland Heights Church of Christ since October 1990, and had served as the Director of Aftercare Programs at Tufts since January 1996.

{¶ 118} Believing that some of the information contained on the application form had been fabricated by Braley, Widmer served subpoenas duces tecum on General Electric, the U.S. Postal Service, and Hamilton Township to obtain information about Braley's employment experiences. Both the state and Braley filed motions to quash the subpoenas. The trial court held a hearing on the motions to quash on April 28, 2010, and May 5, 2010. Among those who testified at the hearing were Melissa Brock, the Human Resources Manager for Hamilton Township, Chief Frank Richardson and Detective Paul Bailey of the Hamilton Township Police Department, Richard Shipp, a forensic document examiner, and Braley.

{¶ 119} Brock testified that she is the current custodian of personnel files for Hamilton Township. She further explained that the police department's personnel records were previously maintained by the chief of police. Brock stated that Braley's personnel file contained an original application for employment dated June 25, 1996. However, Brock admitted that there was no record of Braley being associated with Hamilton Township in 1996.

Rather, records indicated that Braley was "brought into the township" in May 1997 as a volunteer chaplain for the fire department. Brock could not tell who authored the June 25, 1996 application.

{¶ 120} Brock also testified that over the past few years she had received numerous requests for copies of Braley's personnel file. Among those individuals who had requested and received a copy of Braley's file was former police chief Gene Duvelius, who left the department in 2005.

{¶ 121} Chief Richardson testified that he took over as chief of police in 2005. He stated that animosity existed between Duvelius and Braley because Braley had investigated allegations of wrongdoing involving Duvelius. Richardson testified that he was aware that Duvelius asked Detective Bailey to investigate Braley's background, specifically whether Braley had been honorably discharged from his service with the United States Air Force.

{¶ 122} Bailey admitted that Duvelius asked him to do "some background investigation" into Braley's past. Specifically, Duvelius asked Bailey to look into Braley's pre-employment application because he did not believe Braley's military, education, and previous employment experiences were accurately detailed. Bailey testified that his investigation led to information that Braley had been honorably discharged from the Air Force.

{¶ 123} Braley testified that he first learned of "the existence of Hamilton Township" in 1997, a year after the June 25, 1996 application had been completed, when he took an unpaid, volunteer position as a chaplain for the fire department. He testified that he did not fill out an application for this position. The first time he became aware of the disputed June 25, 1996 application was in October 2008. Braley testified that although the signature on the application looks similar to his own signature, he did not recall signing the form. Further, he did not recall "at all" filling out the application. Braley stated that the form contains some accurate and inaccurate information. Braley testified that he did not have a master's degree

and never attended a college in Florida. Further, while he had worked for the U.S. Postal Service, he was only employed by them for a few weeks and only as a clerk, not as an inspector. Braley also testified that he had not worked as an engineer with General Electric, but rather "ran C & C Machinery for an engineering group."

{¶ 124} Braley testified that he was aware that former police chief Duvelius felt animosity towards him due to his role in getting Duvelius terminated from the police force. Braley stated that he was asked to investigate Duvelius, and this investigation ultimately led to a federal lawsuit against Duvelius. Braley further testified that the reason he did not seek to clear up the existence of the June 25, 1996 application after having learned of its existence in 2008 was because doing so would have required him to go before the Hamilton Township Board of Trustees. By this time, Duvelius had been elected as a trustee. Braley testified that he did not think he could go before the trustees and request that the application be removed from his record because Duvelius had made public statements about having him fired.

{¶ 125} Finally, Braley testified that he had undergone background checks that he knew he had passed. Braley testified that he passed an 11-month background check to receive national security clearance to be hired by the FBI's Cincinnati Field Office's task force.

{¶ 126} Shipp, a forensic document examiner who was retained to do a handwriting comparison and analysis, testified that he had compared the June 25, 1996 application to "known documents" containing Braley's handwriting. These known documents included: a sheet of paper from 2010 that Braley had written and printed his name on numerous times; a 2005 Loveland income tax return signed by Braley; a sofa express invoice signed by Braley; Braley's W-4's from 2000 and 2004; performance reviews from 2005 and 2007 signed by Braley; and an April 2002 employment verification request signed by Braley. Shipp testified that although he was able to do a comparison with the June 25, 1996 application, he was not satisfied with the quantity and quality of the "known documents" that he had for comparison

with the application because the "known documents" did not have like words and letter combinations. Nonetheless, Shipp was able to reach the "probable opinion that [Braley] signed [the application]." However, Shipp's opinion was inconclusive as to whether Braley printed the information contained within the application. He stated, "I wasn't satisfied with enough agreement or differences to identify or eliminate [Braley] as the printer of that document and that's why I say I'm inconclusive."

{¶ 127} After hearing the foregoing testimony, the trial court granted Braley's and the state's motions to quash Widmer's subpoenas duces tecum. In reaching its decision, the court stated the following:

> Okay. I'm going to issue my ruling without argument and that is I'm going to sustain the motion[s] to quash. I feel that the application we're talking about is, first of all, it's 14 years removed, at best. If this was a criminal felony we couldn't get into it being more than ten years.
>
> It seems unlikely looking at the application for employment * * * that somebody would enhance his application on a non paid position over what it would be in seeking employment for a paid position and just there are significant questions as to the veracity outside of the fact that we get into a battle as we have for a full day that would be misleading to the jury, and the court would make a determination that any probative value would be outweighed by undue prejudice.
>
> What was the oft to be explored and we would require the prohibited induction of astringent evidence under 608, so I would grant the motion[s] to quash the various subpoenas that have been issued in the case * * *.

{¶ 128} Crim.R. 17(C) confers upon the trial court the discretion to quash or modify a subpoena, on motion of a party, if compliance would be "unreasonable or oppressive." *State v. Baker*, 12th Dist. No. CA2009-06-079, 2010-Ohio-1289, ¶ 15. A trial court's decision on a motion to quash is reviewed for an abuse of discretion. *Id.* As previously stated, an abuse of discretion implies more than an error of law or judgment; it suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *State v. Barnes*, 2011-Ohio-5226 at ¶

23.

{¶ 129} Pursuant to Crim.R. 17(C), when deciding a motion to quash a subpoena duces tecum prior to trial, a trial court must hold an evidentiary hearing. *Baker* at ¶ 21, citing *In re Subpoena Duces Tecum Served Upon Atty. Potts*, 100 Ohio St.3d 97, 2003-Ohio-5234, ¶ 16. At the hearing, the burden is on the proponent of the subpoena to demonstrate that the subpoena is not unreasonable or oppressive. *In re Potts*, 2003-Ohio-5234 at ¶ 16. The proponent accomplishes this by showing:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id., quoting *United States v. Nixon*, 418 U.S. 683, 699-700, 94 S.Ct. 3090 (1974).

{¶ 130} After a careful review of the record, we find that the trial court did not abuse its discretion when it granted the motions to quash Widmer's subpoenas. Widmer failed to demonstrate that the subpoenas were not unreasonable or oppressive as he did not show that the information sought was relevant and evidentiary. Braley's testimony that he had been unaware of Hamilton Township's existence until 1997 when he took an unpaid, volunteer position as chaplain without having filled out an employment application, Brock's testimony that there was no record of Braley being associated with the township in 1996, and Shipp's testimony that he could not determine whether Braley printed the information contained within the June 25, 1996 application support the trial court's decision to quash Widmer's subpoenas. The trial court's determination that the disputed application (1) contained information that was more than 14 years removed, (2) was of unknown and questionable origin, and (3) was unlikely to lead to admissible evidence given the trial court's discretion under Evid.R. 608 to

limit character evidence that would mislead the jury or cause confusion of the issues, was supported by the evidence and testimony presented at the evidentiary hearing. We therefore affirm the trial court's decision to grant the motions to quash Widmer's subpoenas duces tecum.

B. Motion to Allow Confrontation of Braley

{¶ 131} On January 11, 2011, Widmer filed a "Motion to Allow Confrontation of Lead Investigator" seeking the right to confront and cross-examine Braley at trial with the June 25, 1996 application form found in his Hamilton Township personnel file. In his motion, Widmer stated that the Ohio Bureau of Identification and Investigation (BCI) had analyzed and compared the writing and signature on the June 25, 1996 application (item #1) with known writing samples from Braley (item #2) and concluded that Braley was the author of the application. BCI's report specifically stated as follows:

> Comparison of the questioned writing in item #1 with the samples in item #2 revealed that the writer of item #2 filled in the application and signed the letter in item #1.
>
> Instrumental analysis of the documents in item #1 did not reveal evidence of an alteration or the presence of more than one ink pen to fill in the application. A lack of evidence does not prove that only one ink pen was used or that no alterations could have occurred, only that there is no evidence of an alteration.[8]

Relying on BCI's report, Widmer claimed that the June 25, 1996 application was authenticated as having been filled out by Braley and was therefore admissible as a specific instance of conduct demonstrating Braley's character for untruthfulness, pursuant to Evid.R. 608(B).[9]

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8. BCI's report was not provided to the trial court by Widmer or the state. However, both parties quoted identical language to the trial court regarding BCI's analysis of the June 25, 1996 application. The language quoted in the body of our decision is the same language quoted by Widmer in his Motion to Allow Confrontation of Lead Investigator, by the state in its Memorandum in Opposition to Defendant's Motion to Allow Confrontation of Lead Investigator, and by the trial court in its January 21, 2011 Order denying Widmer's Motion to Allow Confrontation of Lead Investigator.

9. In his Motion to Allow Confrontation of the Lead Investigator, Widmer also argued that the June 25, 1996 application was admissible as a party-opponent admission under Evid.R. 801(D)(2)(b). Widmer did not advance this argument in the present appeal. Even if he had, we find *State v. Stacy*, 12th Dist. No. CA2006-02-021, 2007-

{¶ 132} The state filed a memorandum opposing Widmer's request to allow cross-examination of Braley with the June 25, 1996 application form on the basis that the disputed document was of questionable authenticity and was not clearly probative for truthfulness under Evid.R. 608(B). The trial court issued a decision on January 21, 2011, denying Widmer's Motion to Allow Confrontation of Lead Investigator. In reaching its decision, the trial court determined the authenticity of the document remained in dispute and the document could not be introduced into evidence because Evid.R. 608(B) prevents a party from introducing extrinsic evidence to impeach a witness on a collateral matter not material to any issue in the trial. The trial court also determined that permitting cross-examination about the application would "evolve into a trial within a trial – a parade of witnesses, exhibits and thirteen years of events to attack or bolster the witness and/or the veracity of the document." The trial court ultimately concluded that any probative value derived from questioning Braley about the June 25, 1996 application was substantially outweighed by the danger of misleading the jury or causing confusion of the issues.

{¶ 133} Whether a defendant is permitted to question a witness about prior instances of conduct pursuant to Evid.R. 608(B) is a decision that rests in the sound discretion of the trial court, and it will not be reversed absent an abuse of discretion. *State v. Moshos*, 12th Dist. No. CA2009-06-008, 2010-Ohio-735, ¶ 18. *See also State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, ¶ 45 ("The admission or exclusion of relevant evidence rests within the sound discretion of the trial court").

{¶ 134} Evid.R. 608(B) provides in relevant part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness * * * may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of

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Ohio-6744, to be controlling. An admission or statement by a law enforcement officer is not admissible against the prosecution as an admission of a party-opponent. *Id.* at ¶ 14.

> truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness * * *.

Under this rule, particular instances of conduct, though not the subject of a criminal conviction, may be inquired into on cross-examination of a principal witness. *State v. Miller*, 12th Dist. No. CA97-10-050, 1998 WL 468802, *3 (Aug. 10, 1998), citing *State v. Williams*, 1 Ohio App.3d 156, 157 (10th Dist.1981). However, "because the potential for abuse is high, through unfair prejudice, confusion of the issues, and misleading of the jury, safeguards are erected in the form of requiring that the instances inquired into must be *clearly* probative of truthfulness or untruthfulness." (Emphasis sic.) *Williams* at 157.[10] "Evid.R. 608(B) * * * protects a legitimate state interest in preventing criminal trials from bogging down in matters collateral to the crime with which the defendant was charged." *Moshos*, 2010-Ohio-735 at ¶ 18.

{¶ 135} In this case, under the totality of the circumstances, we are unable to say that the trial court abused its discretion in precluding the defense from questioning Braley about the June 25, 1996 application. The testimony sought to be elicited concerned a disputed application completed more than 14 years before trial. In attempting to ascertain the veracity of the application, the trial court held a two-day evidentiary hearing where more than ten witnesses testified about their knowledge of the application or their knowledge of Braley's employment background. At the conclusion of this hearing, the authentic nature of the application and the author of the application were questions that remained at issue. The BCI report, which indicated "[a] lack of evidence does not prove that only one ink pen was used or that no alterations could have occurred, only that there is no evidence of an alteration," did not resolve these issues. Whether Braley authored the 14-year-old fabricated application was an

10. We note that Evid.R. 608(B) is nearly identical to Fed.R.Evid. 608(b). However, unlike the federal rule, Ohio Evid.R. 608(B) contains the word "clearly." Therefore, Ohio Evid.R. 608(B) "requires a high degree of probative value of instances of prior conduct as to truthfulness or untruthfulness of the witness before the court, in the exercise of its discretion, will allow cross-examination as to such prior conduct for purposes of attacking the credibility of the witness." Evid.R. 608, Staff Notes.

issue collateral to Widmer's murder trial, and exploration of this issue was likely to "bog down" the criminal trial and lead to confusion of the jury and misleading of the jury. See Evid.R. 403(A).[11] We therefore find that the trial court did not abuse its discretion in denying Widmer's Motion to Allow Confrontation of Lead Investigator.

{¶ 136} We also find Widmer's argument that the trial court's decision not to allow cross-examination of Braley about the June 25, 1996 application violated his Confrontation Clause rights under the Sixth Amendment to be without merit. Contrary to Widmer's claim, a trial court's decision to exclude evidence with minimal probative value under Evid.R. 608(B), such as the case here, does not violate a defendant's Sixth Amendment rights. *See State v. Boggs*, 63 Ohio St.3d 418, 422 (1995); *State v. Moshos*, 2010-Ohio-735, ¶ 20; *State v. Rainey*, 2nd Dist. No. 23070, 2009-Ohio-5873, ¶ 22.

{¶ 137} Finally, we find that the trial court's decisions to quash Widmer's subpoenas duces tecum and deny Widmer's Motion to Allow Confrontation of Lead Investigator did not prohibit Widmer from presenting a "*Kyles* defense." Widmer had the opportunity to challenge the integrity of the police officers' investigation of Sarah's death by cross-examining Braley and other testifying officers about the processing and collecting of evidence from the crime scene as well as their role, if any, in the decision to charge Widmer with the crime. Further, Widmer had the opportunity to question all three individuals who were present at the time of Sarah's autopsy, Braley, Burke, and Uptegrove, about the coroner's conclusion that Sarah's death was a homicide. The trial court's decision precluding the defense from questioning Braley about his employment background did not prevent the defense from questioning witnesses about Braley's role or "participation in the autopsy."

{¶ 138} Widmer's fourth assignment of error is therefore overruled.

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11. Evid.R. 403(A) mandates exclusion of relevant evidence where "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

VII. CONCLUSION

{¶ 139} Having found Widmer's assignments of error to be without merit, we hereby affirm Widmer's conviction for murder.

{¶ 140} Judgment affirmed.

RINGLAND and BRESSLER, JJ., concur.

Bressler, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.