[Cite as *State v. Rinehart*, 2008-Ohio-5770.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

State of Ohio,	:	Case No. 07CA2983
Plaintiff-Appellee,	:	
vs.	:	DECISION AND JUDGMENT ENTRY
Paul E. Rinehart,	:	
Defendant-Appellant.	:	**Released 11/6/08**

APPEARANCES:

Eric W. Brehm, Brehm & Associates, Columbus, Ohio, for Appellant.

Michael M. Ater, Ross County Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

Harsha, J.

{¶1} A Ross County jury found Paul E. Rinehart guilty of one count of aggravated murder and one count of tampering with evidence. These charges stemmed from an incident in which Rinehart purportedly shot the victim with a .22 caliber rifle and, upon fleeing, told his passenger in the car to throw the rifle out the window.

{¶2} First, Rinehart argues that the trial court committed plain error and violated his constitutional right to confront the witnesses against him when it allowed the prosecution to play a 911 tape in which the victim identified Rinehart as being present at the time of the shooting. Because the primary purpose of the dispatcher's questioning was to gather information about an ongoing emergency, rather than to establish the facts of past criminal conduct, the victim's statement identifying Rinehart was not

testimonial in nature. Therefore, the statement was not subject to the strictures of the confrontation clauses of the Ohio Constitution or the Constitution of the United States. And, because the statement was an excited utterance, its admission did not violate the substantive rules of evidence. In any case, Rinehart himself admitted being present at the time of the shooting, so any possible error was harmless beyond a reasonable doubt.

{¶3} Second, Rinehart argues that the trial court committed plain error in excluding from evidence the victim's toxicology report, which showed the presence of marijuana and other illegal drugs in the victim's system at the time of death. Rinehart argues that this evidence was relevant to bolster his claim that he had gone to the victim's house to obtain marijuana and to impeach the victim's statement on the 911 tape that Rinehart had been present at the time of the shooting. However, the State did not contest that Rinehart had gone to the victim's house to get marijuana or that Rinehart had smoked marijuana with him in the past. Furthermore, there was no impeachment value to this report concerning the victim's ability to place Rinehart at the scene because Rinehart admitted that he had been present. Thus, we cannot conclude that the trial court abused its discretion in excluding the toxicology report.

{¶4} Third, Rinehart contends that insufficient evidence supports his convictions because the State failed to show that he tampered with evidence. However, Rinehart's passenger testified that Rinehart told him to throw the rifle out the window and that he did so out of fear he or someone else would get shot. Given that Rinehart fled the scene of a shooting, attempted to elude law enforcement, and lied to investigators, the jury could reasonably infer that Rinehart's purpose in forcing the

passenger to throw the rifle out the window was to impair the authorities' ability to investigate the shooting. Rinehart also asserts that the State did not prove the time or date of the victim's death and that it presented only circumstantial evidence that Rinehart shot the victim. However, the State presented the certificate of death showing the time, date, and cause of the victim's death, and the coroner testified that the victim died of a gunshot wound. Furthermore, the State presented eyewitness testimony that Rinehart had the rifle immediately before and immediately after the gunshot, and Rinehart's passenger testified that Rinehart admitted shooting the victim. Thus, sufficient evidence supported Rinehart's convictions.

{¶5} Finally, Rinehart argues that he received ineffective assistance of counsel. He asserts that trial counsel was deficient by failing to object to the victim's statement on the 911 tape that Rinehart was present at the time of the shooting, failing to object to an eyewitness's testimony that only Rinehart could have fired the rifle, and for failing to move for a judgment of acquittal. However, the trial court properly admitted the statement of identification, and the victim's statement was not prejudicial because Rinehart admitted being at the scene. The opinion testimony that only Rinehart could have fired the weapon was proper lay testimony, as the witness testified that he saw Rinehart aim the rifle at the victim "almost immediately" before he heard the gunshot. Finally, because sufficient evidence supported Rinehart's convictions, counsel was not deficient for failing to make a futile motion, and Rinehart could not have been prejudiced by his attorney's failure to move for an acquittal. Accordingly, we affirm the judgment of conviction.

I. Facts

{¶6} During the evening hours, Rinehart and his friend Nathan "Doug" Wright went to Shawn Cottrill's house in Ross County, Ohio, to ask Cottrill to share some marijuana with them. There was a .22 caliber rifle and ammunition in Rinehart's car, which Rinehart drove. Wright testified on behalf of the State after agreeing to a plea bargain conditioned on his truthful testimony. He explained that Rinehart had retrieved the rifle from his house while they were on their way to Cottrill's house. Upon arriving at Cottrill's house, Wright testified that he walked out into the road to urinate. After approaching the house, Wright had begun to enter the front door when he heard a gunshot. Wright saw Rinehart running from the house carrying the rifle, and Wright ran after him. According to Wright, Rinehart asked repeatedly, "What did I do?" When Wright asked what he had done, Rinehart admitted shooting Cottrill. Rinehart drove off at a high rate of speed, with Wright in the passenger seat. Wright heard sirens, and Rinehart turned onto an abandoned railroad right of way. According to Wright, "[Rinehart] told [him] to throw the weapon out of the window." Wright threw the rifle out of the window because "[Rinehart] told me to and - - I was kinda happy to cause I was scared. * * * I didn't want to get shot myself or I didn't want nothing else happening to nobody." While the car was still moving, Wright opened the car door and jumped out. He ran to his parents' house, which was nearby, and hid in a camper throughout the night. During the night, investigators came to Wright's parents' house to find Wright, and when they knocked on the locked camper door, Wright remained hidden. Wright revealed himself to his parents the next morning and turned himself in to police.

{¶7} John Chaney, Cottrill's roommate, was present when Rinehart and Wright came to the house. Chaney testified he heard a car approach and that Rinehart came to the door. Cottrill told Rinehart to come in, and then "[Chaney saw Rinehart] coming in the house and [Wright] behind him and [Rinehart] had a gun - - twenty-two rifle. Tried to put it in my face[,] and I heard a click." Chaney identified the rifle and Rinehart at trial. According to Chaney, Rinehart was arm's-length away from him pointing the gun at him. Chaney heard a click that "[s]ounded like it was from the gun misfire[ ]" and Rinehart exclaim "shit." According to Chaney, Wright was immediately behind Rinehart in the room. Chaney testified that he saw Rinehart turn the gun toward Cottrill and heard a gunshot "almost immediately." However, because Chaney had turned to jump into his bedroom, he did not see the shot fired. Nonetheless, Chaney testified that no person other than Rinehart could have shot Cottrill and that he was "positive" Rinehart fired the shot at Cottrill. After he heard a door slam, Chaney came into the living room and found that Cottrill had been shot. Chaney called 911.

{¶8} During Chaney's testimony, the State introduced a recording of Chaney's 911 call. The dispatcher asked Chaney who shot Cottrill, and Chaney stated "[a] guy named Doug Wright and a guy named - - Paul - -." When the dispatcher asked Chaney who was with Wright, Chaney's voice on the tape replies "Paul Rinehart." Another voice, identified at trial by Chaney as belonging to Cottrill, also replies "Paul Rinehart." The dispatcher then asked Chaney "who shot him. Who had the gun." Chaney's voice on the tape says "I think Paul. I ain't sure. They both had something. * * * I don't know which one pulled the trigger."

{¶9} Deputy William Matthew Kelley responded to the call and spotted a car matching the description of the car given by Chaney. Deputy Kelley pursued the car, which was taking turns at a high rate of speed and fishtailing, and followed it onto an abandoned railroad right of way. He testified that he did not see anything thrown from the car, but he saw the passenger side door open and suspected that one of the occupants would bail out. After it came to a stop, Deputy Kelley found Rinehart alone in the car. After reading Rinehart his rights, Deputy Kelley testified that Rinehart stated that he did not know who his passenger was, that he was fleeing because he had an open beer in the car, and that he had not been on Minnehen Bend Road or have any idea what had happened there.

{¶10} Tad Manasian, a forensic scientist employed by the Ohio Bureau of Criminal Identifications and Investigations, testified that, based on samples taken by police, Rinehart, Cottrill, and Chaney had gunshot residue on their hands, indicating that they had been in the room when the rifle was fired. Manasian did not find any gunshot residue on Wright, but he admitted that it would be unlikely to find gun shot residue on a person where police took the sample twelve hours later, as was the case with Wright. Heather Williams, also a forensic scientist with the Ohio Bureau of Criminal Identifications and Investigations, testified that the rifle identified by Wright and Chaney was operable, that the bullet that killed Cottrill had been fired from such a rifle, and that the shell casings found on the scene had been ejected from the particular rifle she had tested. The coroner that performed the autopsy on Cottrill testified that Cottrill died of a gunshot wound to the chest.

{¶11} Tim Rinehart, the defendant's brother, testified for the defense. He explained that he loaned Wright $20 so that Wright could buy the rifle from the defendant.

{¶12} Rinehart testified on his own behalf. He had spent most of the day with Wright, cutting wood, playing cards, and drinking beer. Rinehart testified that Wright wanted to buy his rifle for $75, but, because Wright had no money, Wright borrowed $20 from Rinehart's brother to put down on the rifle. Rinehart stated that, from that point on, the rifle belonged to Wright. Rinehart sold the rifle because he "got short on money and Christmas was coming up." However, Rinehart testified that he and Wright then went to the store and bought beer, cigarettes, and gas with the $20. He admitted drinking 20 beers that afternoon and evening. After visiting another neighbor, Wright suggested that he and Rinehart go to Cottrill's house to get some marijuana, saying that he would pawn the rifle for it.

{¶13} According to Rinehart, he and Wright then went to Cottrill's house. Rinehart testified that he told Wright that Wright was not welcome at Cottrill's house; however, Wright explained that he and Cottrill had patched things up. Rinehart entered the house, followed by Wright. Rinehart testified that Wright had the rifle. According to Rinehart, "[Cottrill] started hollering at us - - hollering at me for bringing [Wright] back there and he started coming at us * * * and I heard the shot and I looked over and I seen [Wright] messing with the bolt. * * * I spun and took off out the door." Rinehart testified that he had started his car and had put it in reverse when Wright jumped in and told him to drive. According to Rinehart, Wright brought the rifle into the car. Rinehart explained that he did not know that anyone had been shot and that he drove fast because Wright

told him to do so. Rinehart did not stop the car until he pulled over for the deputy. At that point, Wright jumped out of the car with rifle and ran.

{¶14} On cross-examination, Rinehart explained that he had only entered three feet into the house and that Wright was behind him at all times. Also, Rinehart admitted lying to police, but he explained he did so only to keep Wright from getting into trouble. In its rebuttal, the State presented the testimony of Detective David Bower, who opined that it would have been impossible for Wright to have fired the shots into the room from just inside the front door of the house, where Rinehart's testimony had placed Wright, because the front door swung inward and blocked the area of the room where Cottrill was sitting on the couch.

{¶15} The jury found Rinehart guilty of aggravated murder with a firearm specification and tampering with evidence. After the trial court imposed its sentence, Rinehart filed this appeal.

II. Assignments of Error

{¶16} Rinehart presents four assignments of error:

> 1. "The trial court did err by allowing hearsay statements made by the victim into evidence. (Trans. at 257)."
>
> 2. "The trial court did err by not admitting the toxicology report into evidence. (Trans. at 389)."
>
> 3. "The convictions are supported by insufficient evidence. (Trans., p. 146-420)."
>
> 4. "Defendant was denied effective assistance of counsel. (Trans., p. 146-474)."

III. The Admission of the Victim's Hearsay Statements

{¶17} In his first assignment of error, Rinehart argues that the trial court committed plain error and deprived him of his constitutional right to confront the witnesses against him when it allowed the State to play the 911 tape in which Cottrell identified Rinehart as being present at the time of the shooting. Rinehart also argues that this statement is hearsay. The State argues that this statement falls under the excited utterances exception and that, in any case, Rinehart suffered no prejudice because Rinehart himself admitted to being at the scene at the time of the shooting. Rinehart did not object to the playing of the tape at trial, and his attorney stated that he would "offer it as a defense exhibit" if the State did not.

{¶18} Because Rinehart raised no objection at trial, we are limited to plain error review. We may notice plain errors or defects affecting substantial rights despite the appellant's failure to bring them to the attention of the trial court. Crim. R. 52(B). For there to be plain error, there must be a plain or obvious error that "affect[s] 'substantial rights,' which the court has interpreted to mean 'but for the error, the outcome of the trial clearly would have been otherwise.'" *State v. Litreal,* 170 Ohio App.3d 670, 2006-Ohio-5416, 868 N.E.2d 1018, at ¶ 11, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. The defendant must demonstrate error on the record before we will find plain error. *In re Nibert*, Gallia App. No. 03CA19, 2004-Ohio-429, at ¶ 11. Moreover, we take notice of plain error with the utmost of caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶ 78; *State v. Patterson,* Washington App. No. 05CA16, 2006-Ohio-1902, at ¶ 13. A reviewing court should

consider noticing plain error only if the error ""seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."" *Barnes*, 94 Ohio St.3d at 27, quoting *United States v. Olano* (1993), 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L.Ed.2d 508, quoting in turn *United States v. Atkinson* (1936), 297 U.S. 157, 160, 56 S. Ct. 391, 80 L.Ed. 555.

A. Confrontation Clauses

{¶19} Rinehart first argues that playing the segment of the 911 tape that contained Cottrill's statement identifying Rinehart deprived him of his right to confront the witnesses against him under the Ohio Constitution and the Constitution of the United States.

{¶20} The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." The Sixth Amendment is made applicable to the states through the Fourteenth Amendment of the Constitution of the United States. *Pointer v.Texas* (1965), 380 U.S. 400, 403-06, 85 S. Ct. 1065, 13 L.Ed.2d 923. We apply a de novo standard of review to a claim that a criminal defendant's rights have been violated under the Confrontation Clause. *State v. Arnold*, Franklin App. No. 07AP-789, 2008-Ohio-3471, at ¶ 9; *State v. Simuel*, Cuyahoga App. No. 89022, 2008-Ohio-913, at ¶ 35; *State v. Pasqualone,* Ashtabula App. No.2007-A0005, 2007-Ohio-6725, at ¶ 42; *State v. Keith*, Allen App. Nos. 1-06-46 & 1-06-53, 2007-Ohio-4632, at ¶ 49; *State v. Barton*, Warren App. No. CA2005-03-036, 2007-Ohio-1099, at ¶ 52; *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903, at ¶ 45; see, also, *United States v. Robinson* (C.A. 6, 2004), 389 F.3d 582, 592 ("The applicable standard of review for an

evidentiary ruling of the district court where the evidentiary issues relate to a claimed violation of the Sixth Amendment is the *de novo* standard.").

{¶21} In *Crawford v. Washington* (2004), 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L.Ed.2d 177, the Supreme Court of the United States held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." For our purposes, the critical portion of this holding is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. *Crawford*, 541 U.S. at 51. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington* (2006), 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L.Ed.2d 224.

{¶22} In *Davis*, the victim called 911 following a domestic disturbance with her former boyfriend. Because the line disconnected before anyone spoke, the 911 operator reversed the call and the victim answered. After ascertaining that the petitioner was "jumpin' on [her] again," the operator began questioning the victim, asking her whether the assailant had any weapons, whether he had been drinking, and his name. At that point, the victim told the operator that the boyfriend had run from the apartment, but the operator cut her off and told her to "[s]top talking and answer my questions." The operator gathered more information, including the boyfriend's birthday and the facts of the assault. As police arrived, the operator told the victim that they would search the area for the boyfriend before coming in to talk to her. Because the

victim did not appear at his trial for felony violation of a domestic no-contact order, the prosecution played the 911 tape.

{¶23} Without attempting to set out an exhaustive definition "testimonial statements" in the context of a police interrogation, the court nonetheless explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Applying this primary-purpose test, the court inquired whether, "objectively considered," the primary purpose of the police interrogation was "to enable police assistance to meet an ongoing emergency" or, conversely, to "establish[ ] the facts of a past crime." *Davis*, 547 U.S. at 826-27. Because the challenged portion of the 911 tape "describe[d] current circumstances requiring police assistance" rather than past events, the call "was plainly a call for help against bona fide physical threat[,]" and "the nature of what was asked and answered * * * was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn * * * what had happened in the past." *Davis*, 547 U.S. at 827. For these reasons, the court held that the statements were not testimonial and therefore did not violate the confrontation rights of the accused.

{¶24} Importantly, the Supreme Court of the United States recognized that a 911 call that begins as an interrogation to determine the need for emergency assistance and that initially elicits non-testimonial statements can evolve into gathering testimonial statements "once [the initial] purpose has been achieved." *Davis*, 547 U.S. at 828.

> In [*Davis*], for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told [the victim] to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, [the victim's] statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford.* This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York v. Quarles,* 467 U.S. 649, 658-59, 104 S. Ct. 2626, 81 L.Ed.2d 550 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial.

Davis, 547 U.S. at 828 (internal citation omitted). However, because the petitioner only challenged "the early statements identifying [him] as her assailant," the court did not need to address whether any statements coming after those were testimonial. Cf. *United States v. Arnold* (C.A. 6, 2007), 486 F.3d 177, 190 ("It is one thing for the *assailant* to start 'runnin[g]' after his victim calls 911, to leave in a car and to give the victim an opportunity to lock the door, all of which happened in *Davis* and all of which suggested that the responses to the 911 operator may have evolved into testimonial hearsay. It is another thing for the *victim* to flee the house and for the assailant still to be 'fixing to shoot' her." (citation omitted)).

{¶25} The companion case to *Davis*, *Hammond v. Indiana*, makes clear that once there is no longer an ongoing emergency, an interrogation that has a primary purpose of investigating past criminal behavior produces testimonial statements subject to the Confrontation Clause. In *Hammond*, police officers responded to a domestic disturbance report. However, when they arrived on the scene, the victim stated that she had had an argument with her husband but that everything was "fine." The police, properly suspecting criminal activity, removed the victim from the presence of her

husband, interrogated her regarding the attack, and had her fill out a spousal battery report. Because she was no longer in immediate danger and was protected by the police, her story about past events was "inherently testimonial." *Hammond*, 547 U.S. at 830-31.

{¶26} We do not believe that the statement identifying Rinehart was testimonial, i.e., that the primary purpose of that interrogation was to establish the facts of a past crime. We recognize that Wright and Rinehart had, as it turned out, fled the scene and no longer actually posed an immediate danger to Cottrill or to Chaney. However, the transcript of the 911 call shows that the primary purpose of the interrogation was to provide police assistance for an on-going emergency. Cottrill lay dying on the floor, and Chaney stayed on the line to help ensure that Cottrill received that attention. Furthermore, neither Cottrill, Chaney, nor the 911 dispatcher knew that Rinehart no longer posed an immediate danger. Chaney stated in the 911 tape that he did not know for certain whether Rinehart had left. He had not seen Rinehart leave the house, and he and Cottrill heard a car drive away without seeing who was in it. The primary purposes of the interrogation, then, was to allow the dispatcher to summon the appropriate assistance Chaney and Cottrill needed, medical attention and police protection, and to ensure the safety of those responding. Thus, the statement identifying Rinehart, although relating facts pertaining to a past crime, nonetheless described the current circumstances awaiting emergency responders by providing information that Rinehart and Wright – one or both of whom may have been the shooter – had been present and, as far as Chaney or Cottrill knew, may still be present. Because no one knew that the scene was secure, and because the primary purpose of

the interrogation was to gather information about the situation emergency responders would encounter on arriving, Cottrill's identification was not a testimonial statement subject to the strictures of the Confrontation Clause of the Sixth Amendment.

{¶27} Other Ohio appellate courts have concluded that statements in 911 calls are not testimonial when the primary purpose of the 911 dispatcher's interrogation of the caller was to allow law enforcement officers to secure their own safety and the safety of the public. See *Kirtland Hills* at ¶¶ 24-26 ("Hall attempts to distinguish *Davis* from the present case by stating that Mr. Throw was reporting past, non-emergency criminal activity of a swerving driver and, therefore, his statements should be considered testimonial in nature. We disagree. Mr. Throw was not acting as a testifying witness; he was attempting to seek assistance against an impaired driver with whom he was sharing the road. His purpose in relaying this information to dispatch was not for the purpose of a later prosecution, but to enable the police to respond to an ongoing emergency."); *State v. Riley*, Wood App. No. WD-03-076, 2007-Ohio-879, at ¶ 21 ("When police, upon their arrival at a crime scene, are notified that suspects have just fled and are given a description to aid in their apprehension, the emergency is 'ongoing,' especially when, as here, the statements were made minutes after officers responded to the 911 call."); *State v. Reardon*, 168 Ohio App.3d 386, 2006-Ohio-3984, 860 N.E.2d 141, at ¶ 15 ("Questions designed to promote safety in an ongoing emergency are nontestimonial as a matter of public policy because officers need to know the character of the individuals they are pursuing."); cf. *State v. Bailey*, Hamilton App. Nos. C-060089 & C-060091, 2007-Ohio-2014, at ¶ 50 ("The record demonstrates that [the declarant who had flagged down officers] made these statements to get aid from the police and to

help the police in an emergency situation - locating a man in the dark of night who was armed and who had already fired a weapon. Therefore, her statements were nontestimonial * * *.").

{¶28} Rinehart next argues that his confrontation rights under the Ohio Constitution have been violated. He relies solely on language in the constitution guaranteeing the accused the right to meet the witnesses against him "face to face." Ohio Const. Art. I, § 10. However, Ohio courts, in cases before and after the *Crawford* decision, have interpreted the confrontation rights afforded by the Ohio Constitution to parallel those of the Sixth Amendment. See *State v. Self* (1990), 56 Ohio St.3d 73, 78, 564 N.E.2d 446 ("Our interpretation of Section 10, Article I has paralleled the United States Supreme Court's interpretation of the Sixth Amendment: the primary purpose of our Confrontation Clause is to provide the accused an opportunity for cross-examination." (internal quotation omitted)); *State v. McKenzie*, Cuyahoga App. No. 87610, 2006-Ohio-5725, at ¶ 2 ("Although the 'face to face' language of the Ohio Constitution would arguably appear to grant even greater rights to confrontation, the Ohio Supreme Court has construed Section 10, Article I, to parallel that of the federal constitution, rejecting the argument that the section requires an interpretation at its literal extreme."); *State v. McCormick* (July 11, 1996), Jackson App. No. 95CA765, 1996 WL 384585, at *7 ("The right to confrontation guaranteed by the Ohio Constitution has generally been construed to be similar to that guaranteed by the United States Constitution."). In *Self*, the Supreme Court of Ohio refused to interpret the phrase "face to face" at its "literal extreme" and "conclude[d] that Section 10, Article I provides no greater right of confrontation than the Sixth Amendment * * *."

{¶29} Rinehart puts forward no other argument or authority for the proposition that the Ohio Constitution would bar Cottrill's statement in the 911 tape where the Sixth Amendment would not. We therefore decline to address this argument any further. App. R. 16(A)(7); App. R. 12(A)(2); see, also, *State v. D.H.*, Franklin App. No. 07AP-73, 2007-Ohio-5970, at ¶ 57 ("We note, too, that appellant provides no supporting argument or case law regarding whether the admission of non-testimonial, out-of-court statements from a witness deemed unable to testify at trial implicates Ohio's constitutional confrontation clause. Therefore, pursuant to App. R. 12(A)(2), we decline to address the argument any further."). Having found no constitutional error in the admission of the tape, we conclude that the plain error analysis does not apply here. *Niebert* at ¶ 11.

B. Rules of Evidence

{¶30} Next, we must determine whether Cottrill's statements were admissible under the substantive rules of evidence. The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, at ¶ 50; *State v. Robb* (2000), 88 Ohio St.3d 59, 68, 723 N.E.2d 1019. Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence. *State v. Martin* (1985), 19 Ohio St.3d 122, 129, 19 OBR 330, 483 N.E.2d 1157. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443; *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶31} Evid. R. 803(2) defines an "excited utterance" as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement

caused by the event or condition." In *State v. Taylor* (1993), 66 Ohio St.3d 295, 300-01, 612 N.E.2d 316, the Supreme Court of Ohio outlined the requirements for admission of evidence as an excited utterance:

> Such testimony as to a statement or declaration *may be* admissible under an exception to the hearsay rule for spontaneous exclamations where the trial judge reasonably finds (a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination *continued* to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.

We agree that Cottrill's statement qualified as an excited utterance. Here, Cottrill lay in pain and dying on the floor minutes after being shot, the statement identifying Rinehart as being present at the scene related to the startling event – the gunshot –, and Cottrill had the opportunity to observe Rinehart in his house. Accordingly, the hearsay rule did not bar the admission of Cottrill's statement on the 911 tape. Likewise, Chaney's statements also satisfy Evid.R. 803(2). Thus, there can be no plain error. *Niebert* at ¶11.

{¶32} In any case, even were we to conclude that the trial court erred in admitting this evidence, any prejudice in playing the jury Cottrill's statement identifying Rinehart as being present at the scene would be harmless beyond a reasonable doubt. See *State v. Hill*, 160 Ohio App.3d 324, 2005-Ohio-1501, 827 N.E.2d 351, at ¶ 31 ("'A

violation of an accused's right to confrontation and cross-examination is not prejudicial where there is sufficient independent evidence of an accused's guilt to render improperly admitted statements harmless beyond a reasonable doubt.'" (quoting *State v. Moritz* (1980), 63 Ohio St.2d 150, 17 O.O.3d 92, 407 N.E.2d 1268, at paragraph two of the syllabus)); *State v. Burney*, Franklin App. No. 06AP-990, 2007-Ohio-7137, at ¶ 61 ("[A] violation of Ohio's Confrontation Clause is subject to harmless error review."). Rinehart admitted that he was in the house at the time of the shooting, and two witnesses, Wright and Chaney, both testified at trial that Rinehart was there. Accordingly, we cannot conclude that the admission of Cottrill's identification of Rinehart on the 911 tape constituted reversible error, and we overrule Rinehart's first assignment of error.

IV. The Exclusion of the Toxicology Report

{¶33} In his second assignment of error, Rinehart argues that the trial court erred in excluding Cottrill's toxicology report from evidence. The report showed the presence of cocaine, valium, and marijuana in Cottrill's system at the time of his death. Although Rinehart's trial counsel proffered the report after the trial court excluded it, the record does not disclose his reasons for wanting the report admitted into evidence. On appeal, Rinehart argues that the trial court should have allowed the report into evidence because it was relevant to prove that Rinehart and Wright went to Cottrill's house to obtain marijuana, as well as to impeach Cottrill's ability to observe, remember, and relate the fact expressed in the 911 tape that Rinehart was present at the shooting. He also argues that the State "opened the door" to such evidence by eliciting testimony from Wright that he and Rinehart went to Cottrill's house for marijuana.

{¶34} As already noted, we review the trial court's exclusion of evidence absence under an abuse of discretion standard. *Haines* at ¶ 50. The trial court concluded that the toxicology report was not relevant under Evid. R. 401 and that, even if relevant, it was unduly prejudicial under Evid. R. 403(A) as likely to mislead and confuse the jury. We find no error here.

{¶35} Evid.R. 402 provides that all relevant evidence is admissible unless otherwise excluded by law. Evid.R. 401 defines relevant evidence as evidence tending to make the existence of any "fact that is of consequence to the determination of the action" more or less probable than it would be without the admission of the evidence. The question of whether Wright and Rinehart went to Cottrill's house to obtain marijuana is not a fact of consequence. There has been no argument, either below or in this Court, showing why the fact that Rinehart and Wright wanted marijuana from Cottrill mattered. Rinehart testified that when he and Wright entered the house, Cottrill started shouting at him for bringing Wright there. According to Rinehart, Cottrill started to come toward them, and Wright shot him. However, nothing in the record suggests that the drugs in Cottrill's system played any role in his death or in the events leading up to his killing. The alleged dispute between Wright and Cottrill centered on Wright's failure to repay a loan, but nothing in the record suggests that the loan or the dispute had any relationship to illegal drugs. Moreover, the State did not contest that Wright and Rinehart went to obtain marijuana. For these reasons, the fact that Wright and Rinehart wanted marijuana from Cottrill is not a fact of consequence.

{¶36} Nor do we believe that the report was admissible for purposes of impeaching Cottrill's "ability to observe the shooter." First, Cottrill's statement on the

911 tape identified Rinehart as being present at the time of the shooting. Cottrill did not say that Rinehart was the shooter. And Rinehart admitted to being inside Cottrill's house at the time of the shooting, so Cottrill clearly was correct in his statement that Rinehart was there. Accordingly, the report in itself had no impeachment value.

{¶37} Rinehart argues that the State "opened the door" to the admission of the report when it elicited testimony from Wright that he and Rinehart talked about getting marijuana from Cottrill. However, the information in the report that Cottrill had at some time in the recent past consumed illegal drugs is only tangentially related to Wright's testimony that he and Rinehart wanted to obtain marijuana from Cottrill. The trial court did not limit Rinehart's cross-examination of Wright regarding his statement that they went to obtain marijuana, and the State did not attempt to introduce part, but not all, of the findings found in the toxicology report. In any case, Rinehart fails to cite any authority showing how Wright's testimony required, in fairness, that the jury also consider the toxicology report. We therefore decline to address this argument further. App. R. 16(A)(7); App. R. 12(A)(2); *State v. McGee*, Washington App. No. 05CA60, 2007-Ohio-426, at ¶ 21 ("It is not an appellate court's duty to discover and rationalize the basis for appellant's claim * * *."); *Knapp v. Knapp*, Lawrence App. No. 05CA2, 2005-Ohio-7105, at ¶ 45 ("We are not obligated to search for authority to support an appellant's argument as to an alleged error."); see, also, *State v. Collins*, Cuyahoga App. No. 89668, 2008-Ohio-2363, at ¶ 88 ("We note that the appellant carries the burden of establishing his claims on appeal through the use of legal authority and facts contained in the record.").

{¶38} Accordingly, we overrule Rinehart's second assignment of error.

V. Sufficiency of the Evidence

{¶39} In his third assignment of error, Rinehart argues that the State failed to produce sufficient evidence proving all of the elements of tampering with evidence and aggravated murder. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. 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. Id., citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560; *State v. McGhee*, Lawrence App. No. 04CA15, 2005-Ohio-1585, at ¶ 57. The Court's evaluation of the sufficiency of the evidence raises a question of law and does not permit the Court to weigh the evidence. *State v. Simms*, 165 Ohio App.3d 83, 2005-Ohio-5681, 844 N.E.2d 1212, at ¶ 9, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

A. Tampering with Evidence

{¶40} R.C. 2921.12(A)(1) provides that "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation * * *." We believe that the State put forward sufficient evidence of each of these elements that, if

believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.

{¶41} Wright's testimony showed that Rinehart ran from the house after shooting Cottrill and fled the scene in his car at a high rate of speed. Before Rinehart and Wright reached the abandoned railroad tracks, Wright could hear sirens following them. Rinehart made a quick turn behind an old store to reach the abandoned railroad right of way, and he directed Wright to throw the gun out of the window at a time that he and Wright were no longer in the pursuing deputy's line of sight. Wright testified that he threw it out the window because Rinehart told him to do so and because he was scared of getting shot. The deputy testified that he did not see the rifle thrown from the car, and investigators found the rifle in the weeds beside the railroad right of way. Upon being apprehended by police, Rinehart lied about knowing anything about a shooting or being near Cottrill's house.

{¶42} Given that the evidence showed Rinehart had shot someone, attempted to elude law enforcement, directed Wright to discard the rifle on an abandoned railroad right of way, and lied to investigators, the jury could reasonably infer that he was aware that an investigation had begun or was likely to begin and that Rinehart had forced Wright to throw the rifle out the window with a purpose to impair authorities' ability to investigate the shooting. See *State v. Wheeler*, Ross App. No. 05CA2873, 2006-Ohio-2026, at ¶ 12 ("After stealing the DVD player from the store, Appellant entered the van of an acquaintance and concealed the player underneath a cloth. This act shows that he was attempting to hide the item to render it unavailable for the police investigation."); *State v. Wagner* (Aug. 4, 1995), Highland App. No. 94CA843,1995 WL 470190 (holding

that jury could infer that the appellant was complicit in tampering with evidence where he knew that the victim would be discovered missing, triggering an investigation, and where he alerted an accomplice to dispose of guns); see, also, *State v. Russ*, Trumbull App. No. 2007-T-0045, 2008-Ohio-1897, at ¶ 77 ("[T]he evidence reflected appellant, after striking the victim with the SUV, *removed* the vehicle from the scene and ultimately succeeded in attempting to *conceal* it by functionally endorsing Wright's decision to store the vehicle in her cousin's garage. Under the circumstances, therefore, we hold the state put forth sufficient, credible evidence to support a conviction on the tampering charge beyond a reasonable doubt."); *State v. Powell*, Montgomery App. No. 22049, 2008-Ohio-1316, at ¶ 43 (holding evidence sufficient to support conviction for tampering with evidence where defendant admitted that she "threw the gun away"); *State v. Stubbs*, Greene App. No. 2005-CA-88, 2006-Ohio-3858, at ¶ 28 ("[I]t is clear that Stubbs was aware that he was being stopped by the police. The testimony also permits a trier of fact to conclude that Stubbs was deliberately concealing the gun in his right hand until he could get to an area where he could dispose of it. The evidence demonstrates that Stubbs was twenty to thirty feet away from Hicks when he threw the gun into a grassy area. We conclude that a jury could reasonably conclude that these actions demonstrate the intent to conceal the gun from the officer.").

{¶43} Accordingly, we believe that sufficient evidence supports Rinehart's conviction for tampering with evidence.

B. Aggravated Murder

{¶44} Next, Rinehart argues that the State failed to produce sufficient evidence to convict him of aggravated murder. In particular, Rinehart asserts that the State did

not prove the time and date of Cottrill's death. In spite of the fact that direct and circumstantial evidence have the same probative value, see *Jenks*, supra, at paragraph one of the syllabus, he also contends that the State produced only circumstantial evidence that Rinehart shot Cottrill.

{¶45} The State produced sufficient direct and circumstantial evidence that, if believed, proved the time, date, and manner of Cottrill's death. The coroner who performed the autopsy on Cottrill testified that Cottrill died of a gunshot to the chest. The coroner also authenticated Cottrill's death certificate, which the State offered into evidence. The death certificate gave the time, place, and cause of Cottrill's death.

{¶46} The State also produced sufficient evidence that, if believed, would convince the average mind beyond a reasonable doubt that it was Rinehart that pulled the trigger and killed Cottrill. Chaney testified that Rinehart entered the house, pointed the rifle at him, and pulled the trigger. However, the rifle misfired. Chaney stated that before he dove into his bedroom he saw Rinehart turn and point the rifle at Cottrill. Although he did not see Rinehart pull the trigger, Chaney testified that the shot fired almost immediately after Rinehart aimed the rifle at Cottrill. Wright testified that Rinehart came out of the house carrying the rifle and admitted shooting Cottrill. According to Wright, Rinehart fled from the scene, attempted to elude police, and directed Wright to dispose of the rifle. Finally, Rinehart admitted lying to law enforcement about the identity of his passenger and the fact that he had been near Cottrill's house. If believed, this evidence, albeit circumstantial, would convince the average mind of the defendant's guilt beyond a reasonable doubt.

{¶47} Accordingly, we overrule Rinehart's third assignment of error.

VI. Ineffective Assistance of Counsel

{¶48} In his final assignment of error, Rinehart argues that he received ineffective assistance of counsel at trial. Particularly, he asserts that trial counsel was deficient in failing to object to the admission of Cottrill's statements on the 911 tape and to Chaney's "speculation" that Rinehart could not have handed the rifle to Wright. He also argues that trial counsel improperly failed to move for a judgment of acquittal pursuant to Crim. R. 29.

{¶49} To obtain the reversal of a conviction on grounds of ineffective assistance of counsel, an appellant must show (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense so as to deprive him of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674; *State v. Issa* (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904. To demonstrate prejudice, an appellant must show a reasonable probability exists that, but for the alleged errors, the result of the proceeding would have been different. *State v. White* (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus. "[I]n Ohio, a properly licensed attorney is presumed competent." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, at ¶ 62.

{¶50} The record reflects that Rinehart's trial counsel did not object to playing the 911 tape as a matter of trial strategy. Before the prosecution played the tape, Wright had already testified that he had not entered the house and had not seen the shooting. On the tape, however, Chaney initially states that it was Wright and Rinehart who shot Cottrill. The tape discredited Wright's testimony that he was not present or

any way involved, and trial counsel used these facts to argue that the jury should credit Rinehart's testimony that Wright was the guilty party. "[Appellate courts] will ordinarily refrain from second-guessing strategic decisions counsel make at trial, even where counsel's trial strategy was questionable." *State v. Myers,* 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, at ¶ 152; see, also, *State v. Conway,* 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶ 95 ("[D]ebatable trial tactics do not constitute ineffective assistance of trial counsel."). Given Rinehart's testimony at trial attempting to shift the blame onto Wright, we cannot say that trial counsel's strategy rendered his representation of Rinehart constitutionally deficient. In any case, Rinehart has not demonstrated any prejudice caused by the jury hearing Cottrill's statement that Rinehart had been present at the scene of the shooting. Rinehart admitted being there, and both Chaney and Wright testified that Rinehart was in the house at the time Cottrill was shot.

{¶51} Likewise, we conclude that trial counsel was not ineffective for failing to object to Chaney's testimony that Rinehart could not have given the rifle to Wright before the shot that killed Cottrill was fired. Although he calls this testimony "speculation," Evid. R. 701 permits lay witnesses to express an opinion when it is rationally based on the perception of the witness and it is helpful to a clear understanding of the witness's testimony or the determination of the fact in issue. Here, Chaney testified that he saw Rinehart point the rifle at Cottrill and that "almost immediately" after he turned away he heard the gunshot. Chaney's testimony clarified the amount of time that had elapsed between seeing Rinehart aim the rifle and hearing the gunshot based on his perceptions of those actions. Thus, we do not believe that trial counsel was deficient in failing to object. In any case, Rinehart did not testify that

he handed the rifle to Wright. Instead, he testified that Wright already had the rifle and that Wright had fired it while standing behind him.

{¶52} Finally, trial counsel was not ineffective for failing to move for a judgment of acquittal at the end of the State's case. "Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. We have already held that sufficient evidence supports his convictions. Accordingly, a Crim. R. 29(A) motion would have been futile, and trial counsel was therefore not ineffective in failing to move for a judgment of acquittal. See *State v. Coe*, 153 Ohio App.3d 44, 2003-Ohio-2732, 790 N.E.2d 1222, at ¶ 65 ("[T]he record contains sufficient evidence concerning the elements of escape. Trial counsel's failure to move for a judgment of acquittal would not have affected the outcome of the proceedings below and, therefore, appellant has not suffered prejudice."); see, also, *State v. Washington*, Stark App. No. 2005CA00050, 2006-Ohio-825, at ¶ 21 ("An attorney is not ineffective for failing to raise an objection which would have been denied. Upon review of the record and consistent with our disposition of appellant's first assignment of error, we do not find appellant's counsel's performance deficient for failing to move the trial court for acquittal because the evidence noted supra, when considered in a light most favorable to the appellee would most likely have resulted in the motion being overruled." (citation omitted)); *State v. Fowler*, Franklin App. No. 03AP-647, 2004-Ohio-349, at ¶ 14 ("[T]here was sufficient evidence as to each element

of the offense and a motion for acquittal at the close of the state's case would have served no purpose. Counsel is not ineffective for failing to make a meritless motion.").

{¶53} Thus, we overrule Rinehart's fourth assignment of error and affirm the judgment of conviction.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.