[Cite as *State v. Bruce*, 2008-Ohio-5709.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon: Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2006-CA-45
DAVID L. BRUCE	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Fairfield County Court of Common Pleas, Case No. 2005-CR-089
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 31, 2008

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DAVID L. LANDEFELD JULIA B. DILLON Fairfield County Prosecutor 201 S. Broad St., Ste. 400 Lancaster, OH 43130	KENNETH R. SPIERT Assistant State Public Defender 8 E. Long St., 11th Floor Columbus,OH 43215

Gwin, P.J.

{¶1} Defendant-appellant David L. Bruce appeals from his convictions and sentences in the Fairfield County Court of Common Pleas on Aggravated Murder, in violation of R.C. 2903.01(A); Murder, in violation of R.C. 2903.02(B); Kidnapping, in violation of R.C. 2905.01(A)(4); Aggravated Robbery, in violation of R.C.2911.01(A)(1), and Aggravated Robbery, in violation of R.C.2911.01(A)(3). Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} When Troy Boyes arrived for work at 4640 Bridgeport Street, Lot #13, Baltimore, Ohio, on January 27, 2005, he discovered a partially clothed African-American female with multiple stab wounds and remnants of bindings on her body, deceased on the front porch of the home that was under construction. Mr. Boyes noticed blood on the windows in the formal eating room, the floor, the front door, the stairs and the tile kitchen. The blood, the body, and the trash were not on the front porch the evening before when Mr. Boyes left that home which he was helping to build.

{¶3} Troy Boyes tried calling the president of his company, Phil DiYanni. When Mr. DiYanni was reached, he immediately called 9-1-1. Mr. DiYanni drove to the house and saw the bloodstains up and down the stairwell, around the front door and the body on the front porch.

{¶4} The numerous puncture or stab wounds were obvious and the victim was lifeless according to Fairfield County Deputy Betsy Willey's observations when she arrived at the scene. Deputy Gerald Seipel described the victim as a female, partially clothed from the waist up lying on the porch with her feet over the edge, with obvious

stab or puncture marks in several places. Firefighter/Paramedic Ray Friesner of the Basil Joint Fire District verified that the female was deceased. Mr. Friesner observed that the deceased victim on the porch was a partially clothed black female with some sort of bandanna around her neck and wrists. The bandanna appeared to have been tied around her neck, the clothes she had on were bloody, and there were some bindings on both of her wrists and her right ankle.

{¶5} The coroner, Dr. Patrick Fardal testified that the victim, identified as Robin Brown, had at least fifteen (15) sharp instrument wounds. Some of the wounds were connected meaning they went all the way through her body. This made it impossible to know the exact number of times she had been stabbed. On the lateral side of her right thigh, there was a sharp instrument wound about one and a half inches long. There was a sharp instrument wound on the inside of her right thigh that was also one and a half inches long. The doctor concluded that these two wounds were connected and counted them as one because it was most likely that the sharp instrument went in one side and came out the other with a connector of about two and three-quarter inches. There was another sharp instrument wound approximately two and a half inches long on the outside of her body that connected up to a one and one half inch sharp instrument wound on her anterior right thigh, with the connected path of nearly five and one half inches. This sharp instrument went through a considerable portion of her right thigh. Therefore, while there were four injuries on her right thigh the doctor counted two sharp instrument wounds on the right thigh, meaning that she was stabbed in the right thigh at least twice.

{¶6} The victim also had at least five stab wounds on her right hand. On the back of her right hand, there was a one and a half inch sharp instrument wound with secondary tearing toward the front of the body at the top. There was another sharp instrument wound between her thumb and right finger that was approximately three-eighths of one inch long, connected to the wound on the back of the hand. Additionally, a three-eighths of one-inch defect on the knuckle of the thumb that was also connected to the back of the hand was discovered. This wound looked like the sharp instrument came in the backside of her hand, went towards her thumb, and exited in two places – inside the web between her fingers and the back part of her thumb on her knuckle.

{¶7} Separate wounds identified as two, three, four, and five on the back of her right hand were caused by a sharp instrument. These wounds measured three quarters of one inch, three quarters of one inch, one inch, and one quarter of one inch respectfully. The wounds on the back of her knuckles could have been one slice that caused all of the wounds on each of her fingers. Accordingly, the total number of cuts on her right hand ranged from two to five.

{¶8} The victim's right breast also had multiple stab wounds. There was a series of approximately three wounds in the upper outer quadrant of her right breast towards her axilla that measured one and one quarter inch, one and one half inch, and one inch. Due to the close proximity of the separate wounds, the doctor could not determine which of the three was fatal, but could conclude within a reasonable degree of medical certainty that one of the three wounds were fatal. One of the three wounds in the right side of her breast went into her right chest and caused an injury to her right lung and then extended through her pericardial sac and caused an injury to the area of the right

heart. Another separate sharp instrument wound in her right breast measured one and three-quarter inches long and extended upward towards her axilla, or armpit, which was in the opposite direction of the other three. The wound that was responsible for penetrating her heart went through her chest and into the chest wall extending six inches into her body. Another sharp instrument wound in her right breast extended anteriorly in toward her midline and was one and three-quarters inches long and six inches deep injuring the lower lobe of her right lung, the pulmonic veins, and created a defect in the sac around her heart. In addition to the fatal wounds, a superficial abrasion extended from her right nipple that was one and a half inches by one half inch wide. Accordingly, at least seven sharp instrument wounds occurred on the victim's right breast.

{¶9} Between the victim's breasts on her right chest was another sharp instrument wound measuring two and a half inches by one-sixteenth of an inch in width and three and a half inches deep that extended posteriorly, towards her back, but went into the fat of her abdomen. The victim's back had a sharp instrument wound on the left side measuring one and three-quarters inches long that extended three inches into her pleural cavity on the left side and injured her left lung. The wound entered through her back and injured both the upper and lower lobes of the left lung. The victim's neck had two abrasions that could be from the sharp instrument being dragged along the skin, or could have been from another source such as clothing. One measured four and a half inches in length and the other one measured about three-quarters of an inch in length.

{¶10} In addition to the injuries caused by the sharp instrument, the victim had injuries on her face. There was a pattern abrasion on her face below the left eye that

was a three-quarter-by-three-quarter inch diameter pattern abrasion. An object striking her head or her head striking an object could have caused the injury. Finally, there were some superficial abrasions on her left wrist.

{¶11} The cause of Robin Brown's death was multiple sharp instrument wounds with injuries to the right heart, right lung, pulmonic veins, and the left lung.

{¶12} The bindings around Robin's wrists and ankles as well as her clothes were sent from the coroner's office to BCI & I through the Sheriff's Office. The denim from the victim's right wrist was stained with blood. The t-shirt was so heavily stained with blood that there were not any isolated stains on the shirt.

{¶13} Detectives from the Fairfield County Sheriff's Office and the specialists from BCI & I collected evidence from the scene, 4640 Bridgeport Street, Lot #13 Baltimore Ohio. Detective Stephanie Russell located a cigarette butt on the floor of the garage between tire tracks and the door. Detective Scott Jones removed drywall from the west side of the wall in the bedroom. This drywall was covered in what was later determined to be blood. The bloody stain also contained a fingerprint. A single edged knife blade, butcher style, stamped stainless steel marked "Made in China" was recovered from the scene. There was dried blood on the blade and no handle for the knife. A piece of black plastic that could have been a portion of the handle was also recovered. A pair of glasses missing the left lens was located in a small bedroom. The t-shirt Robin Brown was wearing was observed by officers at the scene and then removed at the time of the autopsy at the Franklin County Morgue. In addition, photos were taken showing the victim with the bindings and the blood around her at the scene. Detectives never found pants, a skirt, a purse, a wallet or any money.

{¶14} Following a match by BCI & I of appellant's prints found in the victim's blood on the drywall and the scene, the appellant made two taped statements to detectives. Following a waiver of his *Miranda* rights, appellant stated that he worked for Buckholz Wall Systems, a stucco company. His supervisor is Anthony Smith. When confronted with the evidence that his fingerprint was in one of the houses in the victim's blood, appellant explained that he would go in houses all the time, especially in the winter to warm up. While the appellant stated that he did not remember the last time he was working on houses in the Woodside area, he knew it was in January and said he believed he left town the night of January 21, 2005. Appellant also stated that the night that he left town, his car broke down and he was picked up by a courtesy van that should have his information in the driver's records.

{¶15} Appellant further stated that his brother lives near Champion Avenue in Columbus, Ohio. While appellant was not certain, he stated it was possible that he and his brother picked up Robin in appellant's car. However, after seeing her picture he stated that he did not know the victim. Appellant did not have any explanation as to how his fingerprint could have ended up in the victim's blood inside of the house.

{¶16} Testimony was presented at trial that employees who worked outside were not permitted inside of the homes. The crew leader, Steven Smith, testified that in order to enter a house, a crewmember would need to ask his permission and appellant never asked his permission to enter the house. Similarly, Christopher Curtis testified that he was on the same crew as appellant and was never in the house, but was in the garage. The Office Manager for Buckholz Wall Systems testified that appellant was one of their employees from April 21, 2004 through January 21, 2005, and that appellant

would not be allowed in the house as the company only works on the outside of the houses, not the inside.

{¶17} Records from the courtesy van company from West Virginia were inconsistent with the appellant's statement. The records established that appellant did not leave town on January 21, 2005 as he stated to the police. The records show that he left town the night Robin Brown was killed. The courtesy van driver, John L. Aylor, testified that he received a call on January 27, 2005 at 7:23 a.m. regarding a broken Explorer with the license plate DBY 5680. Mr. Aylor took the driver to the Go-Mart in Elkins, West Virginia. Appellant's co-worker Charles Okpara identified appellant's car as the same one photographed by law enforcement.

{¶18} Appellant's car was towed in West Virginia on February 19, 2005, when a private citizen called to report the vehicle on the roadway. The vehicle was a 1997 Ford Explorer with a license plate number of DBY 5680. The back window was already broken out when Jeffrey Fletcher of the West Virginia State Police first saw the vehicle. The State and Defense stipulated that if called to testify, Jimmy Tincher would testify that he is the owner of Tincher's Towing in Elkins, West Virginia and that he has a wooden fence surrounding the lot. He towed a white Ford Explorer license plate DBY 5680 to his lot and noticed that the back window had been broken out. He went through the car in order to locate some papers with a phone number and address in an attempt to reach the owner. On March 7, 2005, he towed the vehicle to the Sheriff's lot and saw law enforcement put crime scene tape around the vehicle. Investigators came some time between February 19, 2005, and March 7, 2005, to look at the vehicle, but they did

not put in, or take out, anything. To the best of his knowledge, no one else entered or tampered with the vehicle.

{¶19} Detective Mark Green of the Columbus Police Department processed the white Ford Explorer, DBY 5680, on March 18, 2005. He found a piece of denim on the driver's side rear floorboard with discoloration that appeared to be blood. The vehicle also contained work gloves, two knives, and tape.

{¶20} On January 26, 2005, Angelo Brown, the victim's husband, drove Robin Brown to Champion where Sherwood Brown lives. Robin was wearing a black coat, jeans and tennis shoes when he dropped her off. Jacqueline Meadows saw Robin Brown at 485 North Champion Avenue the night Robin was murdered. Jacqueline had often seen Robin there visiting her nieces and Robin appeared to be visiting her nieces that night. Jacqueline last saw Robin between 9:00 and 10:30 p.m. that night when Robin was leaving in a white SUV that looked like appellant's vehicle. When Jacqueline last saw Robin, Robin did not appear to be under the influence of drugs or alcohol and was wearing a jacket, a dark-colored shirt, and jeans.

{¶21} Robin's husband testified that she was wearing a black coat, jeans, and tennis shoes with a shirt. The jacket, jeans, and tennis shoes were never recovered.

{¶22} The evidence that had been stained with blood was tested by BCI & I to confirm that it was actually blood and to determine the source of the blood. Abby Schwaderer of BCI & I did the presumptive testing and was stipulated as an expert in presumptive testing by the State and Defense. Ms. Schwaderer testified that BCI & I is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board, ASCLD/LAB for forensic DNA and DNA laboratories. The

accreditation includes both training and audits to make sure the lab is upholding all of the requirements and standards to properly determine the source of DNA if present on the items tested. Her report listed all of the items tested with presumptive blood, including but not limited to the knife blade, the door handle, the sock, shirt, and drywall.

{¶23} Amoreena Clarkson, Criminalist II for the Columbus Police Crime Laboratory, routinely reviews evidence submitted to the lab for biological fluids and performs DNA analysis. She testified that she is not an expert in statistics; however, she is able to use the software program provided by the manufacturer to type the samples. The procedures used in the lab are the standard operating procedures accepted in the scientific community. Those procedures include using a database generated by the FBI that is accepted across the community and used in the normal protocol for the lab. Ms. Clarkson was able to match the DNA types from the stains on the blue jean material with the blood standard from the victim Robin Brown.

{¶24} Bobbie Jo Kennedy, forensic scientist for BCI & I, testified that she had been performing DNA analysis for approximately five years. She testified that she had specialized training in DNA at BCI & I and through other workshops. Ms. Kennedy testified to the accreditation standards met at BCI & I regarding how evidence is handled, security of the building, techniques used and documentation all of which are subject to audit. The trial court found that she was an expert witness under Evid.R. 702 and relied upon the Montgomery Court of Appeals case *State v. Powell* (Dec. 15, 2000), 2nd Dist. No. 18095, in overruling the defense objection regarding testifying about statistical conclusions that utilized the FBI database.

{¶25} The first report Ms. Kennedy issued included items she tested from the vaginal swabs, fingernail scrapings, a knife blade, drywall, and standards from the victim and appellant. The victim's blood was on the knife blade and was the only profile on the blade. Appellant was excluded as the source of the DNA from the vaginal swabs, the fingernail scrapings and the knife blade. However, the DNA profile from the drywall was a mixture consistent with contributions from the victim Robin Brown and appellant. Appellant could not be excluded as the minor source of the DNA from the drywall and using the national database from the FBI, the proportion of the population that cannot be excluded as possible contributors to the mixed DNA profile from the drywall was one in 10,990 individuals. Ms. Kennedy also tested the cigarette butt, found in the garage. She testified that there was a mixture of DNA profiles on the cigarette butt, with appellant as consistent for the major contributor and the victim as consistent with the minor contributor.

{¶26} Robin Roggenbeck, a latent print examiner and forensic scientist with BCI & I, analyzed the piece of that drywall that had been covered with blood. Ms. Roggenbeck took a digital image of the surface as it was and then used an enhydrant to further enhance the image and preserve the print. The digital image was stored in the computer. Ms. Roggenbeck was able to identify one sufficient latent palm print area, the interdigital area of the left palm. The latent print was then compared by Ms. Roggenbeck to known prints from appellant and Robin Brown. There were more than ten points that she was able to identify in the print as well as the proper ridge flow and the clarity and quantity of the point resulting in a positive identification. Furthermore, Ms. Roggenbeck was able to determine that appellant's hand was in the victim's blood

to make the print, meaning the print was not on the wall prior to the blood splatter. The defense expert Michael Sinke corroborated Ms. Roggenbeck's conclusion.

{¶27} On March 11, 2005, appellant was indicted by the Grand Jury of Fairfield County, Ohio, for one count of Aggravated Murder, in violation of R.C.2903.01(B) with two Death Penalty Specifications, in violation of R.C.2929.04(A)(3) and R.C. 2929.04(A)(7); one count of Aggravated Murder, in violation of R.C. 2903.01(A), with two Death Penalty Specifications, in violation of R.C. 2929.04(A)(3) and R.C. 2929.04(A)(7); one count of Murder, in violation of R.C. 2903.02(B); two counts of Kidnapping, in violation of R.C. 2905.01(B) and R.C.2905.01(A)(4); two counts of Aggravated Robbery, in violation of R.C. 2911.01(A)(1) and R.C. 2911.01(A)(3); one count of Aggravated Burglary, in violation of R.C. 2911.11(A)(2); and one count of Rape, in violation of R.C.2907.02(A)(2).

{¶28} A verdict of guilty was returned by the jury as to Count One, Aggravated Murder, in violation of R.C. 2903.01(B); Count Two, Aggravated Murder, in violation of R.C. 2903.01(A); Count Three, Murder, in violation of R.C. 2903.02(B); Count Four, Kidnapping, in violation of R.C. 2905.01(A)(4); Count Six, Aggravated Robbery, in violation of R.C. 2911.01(A)(1); and Count Seven, Aggravated Robbery, in violation of R.C. 2911.01(A)(3). Further, the jury found the appellant not guilty as to Counts Five, Kidnapping, and Count Eight, Aggravated Burglary, and the two Specifications to Counts One and Two.

{¶29} On July 5, 2006, the appellant's sentencing hearing was held. The Court found that Count One, Aggravated Murder, Count Two, Aggravated Murder, and Count Three, Murder merged for purposes of sentencing. The State of Ohio elected to have

the appellant sentenced on Count Two, Aggravated Murder, in violation of Ohio Revised Code R.C. 2903.01(A). Pursuant to Ohio Revised Code R.C. 2929.03(C) (1) (a) the Court sentences appellant to life imprisonment with parole eligibility after 20 years. With respect to Count Four Kidnapping, in violation of R. C. 2905.01(B), the Court sentenced appellant to 10 years in the Correctional Reception Center. The trial court merged Counts Six and Seven, Aggravated Robbery, in violation of R.C. 2911.01(A)(3) and R.C. 2911.01(A)(1). The Court sentenced appellant to 10 years in the Correctional Reception Center on the merged counts.

{¶30} The Court ordered that the sentences imposed on Count Four and merged Counts Six and Seven be served concurrently to each other, but consecutively to the sentence imposed on Count Two. The Court further ordered that appellant pay the costs of prosecution. Thus, appellant's aggregate sentence is a life sentence with parole eligibility after 20 years to be served consecutively to a 10-year prison sentence.

{¶31} Appellant has timely appealed raising three assignments of error:

{¶32} "I. *CRAWFORD* BARS TESTIMONIAL STATEMENTS OF A NON-TESTIFYING WITNESS, UNLESS THE WITNESS IS UNAVAILABLE AND THE ACCUSED HAD AN OPPORTUNITY FOR CROSS-EXAMINATION. ALTHOUGH FBI PERSONNEL GENERATED THE STATISTICAL DNA EVIDENCE, NO FBI STATISTICAL EXPERT TESTIFIED; RATHER, THE STATE PRESENTED THE FBI'S EVIDENCE THROUGH THE *BIOLOGICAL* DNA ANALYSTS, WHO DID NOT PERSONALLY KNOW HOW THE FBI GENERATED THE EVIDENCE. OVERRULING MR. BRUCE'S *CRAWFORD* OBJECTION VIOLATED HIS RIGHTS UNDER THE OHIO

AND UNITED STATES CONSTITUTIONS TO CONFRONT THIS POWERFUL EVIDENCE.

{¶33} "II. BY ALLOWING THE STATE TO PRESENT THE FBI'S STATISTICAL DNA EVIDENCE THROUGH ITS BIOLOGICAL EXPERTS, WHERE THE ABSENCE OF A QUALIFIED EXPERT DEPRIVED THE DEFENSE OF THE OPPORTUNITY TO TEST THE RELIABILITY OF THE SCIENTIFIC BASIS FOR THE TESTIMONY THROUGH CROSS-EXAMINATION, THE TRIAL COURT VIOLATED MR. BRUCE'S RIGHTS UNDER EVID.R. 702 AND UNDER THE CONFRONTATION AND DUE PROCESS CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶34} "III. THE TRIAL COURT ERRED BY SENTENCING MR. BRUCE TO MAXIMUM SENTENCES FOR KIDNAPPING AND AGGRAVATED ROBBERY COUNTS AND ORDERING THEM TO BE SERVED CONSECUTIVELY TO THE AGGRAVATED MURDER COUNT, BECAUSE SENTENCING UNDER *STATE V. FOSTER*, 109 OHIO ST.3D 1, 2006-OHIO-856, 845 N.E.2D 470, RETROACTIVELY SUBJECTS A DEFENDANT TO A "STATUTORY MAXIMUM SENTENCE" THAT GREATLY EXCEEDS THE MAXIMUM SENTENCE THE DEFENDANT WAS SUBJECT TO WHEN THE ALLEGED OFFENSES WERE COMMITTED. THIS VIOLATES THE DUE PROCESS CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS."

I.

{¶35} In his first assignment of error, appellant maintains that the statistical DNA evidence the State presented in an effort to identify him as a accomplice in the killing is "testimonial" under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354. We disagree.

{¶36} In *State v. Pierce*[1] (1992), 64 Ohio St.3d 490, 597 N.E.2d 107, the Ohio Supreme Court held that "DNA evidence may be relevant evidence which will assist the trier of fact in determining a fact in issue, and may be admissible." In *Pierce,* the Court recognized that "the theory and procedures used in DNA typing are generally accepted within the scientific community." 64 Ohio St.3d at 497, 597 N.E.2d 107. Further, the Court held that "questions regarding the reliability of DNA evidence in a given case go to the weight of the evidence rather than its admissibility. No pretrial evidentiary hearing is necessary to determine the reliability of the DNA evidence. The trier of fact * * * can determine whether DNA evidence is reliable." *Pierce,* 64 Ohio St.3d at 501, 597 N.E.2d 107. Accord *State v. Nicholas* (1993), 66 Ohio St.3d 431, 437, 613 N.E.2d 225 ("DNA results constitute reliable evidence"). See also, *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29 at ¶80. (DNA evidence meets Evid. R. 702's reliability requirement).

{¶37} An appellate court should apply an abuse of discretion standard in reviewing a court's decision to admit or exclude expert testimony. *Gen. Elec. Co. v. Joiner* (1997), 522 U.S. 136, 144-146, 118 S.Ct. 512, 139 L.Ed. 2d 508; *State v. Williams* (1983), 4 Ohio St.3d 53, 58, 446 N.E.2d 444. "To the extent that doing so is necessary to avoid making an unreasonable, arbitrary, or unconscionable decision, a trial court is obliged to apprise itself of the details of proffered evidence." *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683 at ¶20.

{¶38} In the case at bar, appellant argues that the FBI database used to calculate the statistical conclusion based upon the input gathered from BCI & I is

[1] Superseded by Rule on other grounds as stated *in State v. Nemeth,* 82 Ohio St.3d 202, 1998 Ohio 376, 694 N.E.2d 1332.

testimonial. A brief synopsis of the process to test appellant's DNA and the DNA recovered from the victim and/or crime scene is necessary.

{¶39} As one court explained the biological analysis, "involves determining the specific genetic variations, or 'alleles,' in the DNA samples at specific sites ('loci') along the DNA thread. The particular variations examined in this case are called short tandem repeats, or 'STRs.' They were examined at thirteen loci which have been adopted as a national standard for use in the Combined DNA Identification System (CODIS) established by Congress in 1994. The PCR-based analysis using the thirteen STR loci has been explained by the Supreme Court of New Hampshire as follows:

{¶40} "'At each locus, an individual's genetic code contains a combination of chemical markers organized into a pattern. These chemical patterns repeat themselves and these repeats can be chemically cut apart from one another. At any particular chromosomal locus, an individual will have a characteristic inherited from each of his or her parents, known as an allele. Further, at any given locus, a person will have DNA with a specific number of repeats of these alleles from each parent. Thus, for example, a person's PCR-based STR DNA profile for a particular DNA locus could contain a ten-repeat allele from his or her mother and a twelve-repeat allele from his or her father. STR testing involves the examination of short repeats and distinguishes between individuals by comparing the number of repeats at certain loci.'" *Roberts v. United States* (D.C. Cir. 2007), 916 A.2d 922, 926-927). (Quoting *State v. Whittey* (2003), 149 N.H. 463, 821 A.2d 1086, 1093.

{¶41} "The relevance of the DNA analysis, in criminal law generally, and in the context of this case, is to establish the identity of the source of a DNA sample

discovered at a crime scene. If the DNA sample from the crime scene matches the DNA of an accused, it is at least evidence that the DNA discovered at the crime scene is that of the accused. If the DNA sample matches the DNA of the accused *and no one else,* then it, of course, conclusively establishes that the accused is the source of the DNA found at the scene of the crime. This distinction is expressed in terms of statistical probability of the match occurring randomly in the population. A DNA expert might testify that a given DNA match will occur only once in a population of 10,000,000. Obviously, such a probability makes it highly likely that the DNA samples came from the same source. If the DNA expert's testimony, however, is that a given match might occur coincidentally once in every one hundred samples, then it is far weaker in establishing the sources of the DNA samples as being one and the same individual.

{¶42} "Thus, in terms of the inferential conclusion to be drawn from DNA evidence in a criminal trial-the accused as source of the DNA sample found at the crime scene- DNA analysis generally can provide only statistical probability; e.g., there is one chance in four hundred or one chance in four million that the DNA sample came from someone else. Conversely, a DNA *mismatch* constitutes conclusive and certain scientific proof that the DNA samples come from different sources. For proving identity, however, as opposed to disproving identity, DNA can never provide absolute, conclusive proof, even though extremely low probabilities of a coincidental match provide a basis for very strong inferences of identity." *Commonwealth v. Crews* (1994), 536 Pa. 508, 519, 640 A. 2d 395, 400.

{¶43} In the case at bar, appellant is not challenging the "matching" portion of the DNA analysis; appellant is only challenging the *statistical* portion of the DNA test evidence.

{¶44} In this case, the experts relied upon a database compiled by the Federal Bureau of Investigation through its "Popstat" computer software program. Appellant claims that he was denied any opportunity to cross-examine the FBI's random match probability estimates because the witnesses presented at appellant's trial did not prepare the database and had no personal knowledge of the methods and procedures the FBI used to compute the statistical estimates or the dataset upon which the calculations were based. [Appellant's Brief at 14].

{¶45} In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, the United States Supreme Court held that testimonial statements of a witness who does not appear at trial may not be admitted or used against a criminal defendant unless the declarant is unavailable to testify, and the defendant has had a prior opportunity for cross-examination. *Crawford* thus involved the admissibility under the Confrontation Clause of recorded testimonial statements of a person who did not testify at the trial. The holding in *Crawford* was that such statements, regardless of their reliability, are not admissible unless the defendant was able to cross-examine their maker.

{¶46} The Ohio Supreme Court recently addressed *Crawford* in examining whether the admission of DNA reports without the testimony of the analyst who prepared the report violated the Confrontation Clause. *State v. Crager,* 116 Ohio St .3d 369, 2007-Ohio-6840. The Court found the key inquiry under *Crawford* was whether a particular statement was testimonial or non-testimonial. Id. at ¶ 41. It then determined

that the reports of DNA analysis prepared by an analyst at BCI were business records that fell under the hearsay exception of Evid.R. 803(6) and therefore, were not testimonial under *Crawford.*

{¶47} In *Crawford* the Supreme Court stated that business records, which are analogous to public records are "by their nature * * *not testimonial" and not subject to the requirements of the Confrontation Clause. Id. at 56; “[t]o its credit, the Court's analysis of ‘testimony’ excludes at least some hearsay exceptions, such as business records and official records. See *ante,* at 1367. To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process.” Id. at 76, 124 S.Ct. at 1378. (Rehnquist, C.J., concurring).

{¶48} DNA samples have been held to be non-testimonial evidence with respect to the Fifth Amendment privilege against self-incrimination. A DNA sample obtained from a state prisoner, pursuant to Ohio statute requiring the collection of DNA specimens from convicted felons, was physical, rather than testimonial evidence, and thus did not implicate the prisoner's Fifth Amendment privilege against self-incrimination. *Wilson v. Collins* (CA 6, 2008), 517 F. 3d 421, 431. The Court reasoned that a DNA sample was analogous to a photograph or fingerprint identifying an individual. Id. (Citing *United States v. Zimmerman,* 514 F.3d 851, 853 (9th Cir. 2007) (citing *Schmerber v. California,* 384 U.S. 757, 765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (holding that “blood test evidence, although an incriminating product of compulsion, [is] neither [ ] testimony nor evidence relating to some communicative act or writing” and is therefore not protected by the Fifth Amendment)).

{¶49} The Court's decision in *Crawford* neither overruled nor called into question its two earlier decisions that addressed and resolved a similar issue: *Delaware v. Fensterer* (1985), 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 and *United States v. Owens*(1988), 484 U.S. 554, 108 S.Ct. 838.

{¶50} *Owens* involved an adult victim of a severe beating, who suffered memory loss stemming from his head injuries and testified at trial. While hospitalized, he had identified Owens as his assailant, which identification was admitted into evidence. During the victim's cross-examination, he was unable to recall details of the attack and the identification. Id. at 556, 108 S.Ct. 838. The Ninth Circuit held that, under the circumstances, the introduction of the victim's testimony violated the Confrontation Clause. The Supreme Court reversed, ruling, "the Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' "Id. at 559, 108 S.Ct. 838 (quoting *Kentucky v. Stincer,* 482 U.S. 730, 739, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) and *Delaware v. Fensterer,* 474 U.S. 15, 19-20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)) (emphasis in original). In *Fensterer,* the Court held that the Confrontation Clause was not violated where an expert witness who testified as to his opinion could not recollect the basis upon which he had formed that opinion. In *Fensterer*, the Court explained that:

{¶51} "The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and

expose these infirmities through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony." 474 U.S. at 21-22, 106 S.Ct. 292.

{¶52} It is true that in *Owens* the witness at least recalled having identified the defendant. 484 U.S. at 556, 108 S.Ct. at 840. However, the Court did not restrict its reasoning to such situations. Instead, the Court "agree[d] with the answer suggested" in "Justice Harlan's scholarly concurrence" in *California v. Green* (1970), 399 U.S. 149, 188, 90 S.Ct. 1930, 1950, 26 L.Ed.2d 489 that "a witness' inability to 'recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence.'" 484 U.S. at 558, 108 S.Ct. at 841. The accused has been "confronted with the witnesses against him," as the Sixth Amendment demands, so long as the prosecution produces the witnesses and the witnesses answer defense questions. "[S]uccessful cross-examination is not the constitutional guarantee." 484 U.S. at 560, 108 S. Ct. at 843. When a witness has forgotten the basis for and the giving of testimony under oath in an earlier proceeding and that testimony is then introduced into evidence, defense questioning, though impaired, is not futile for the reasons given in *Owens.* It is still possible to bring out on cross-examination the "witness' bias, his lack of care and attentiveness ... and even (what is often a prime objective of cross-examination) the very fact that he has a bad memory." Id. at 559, 108 S.Ct. at 842 (citation omitted). *United States v. Milton* (DC Cir., 1993), 8 F. 3d 39, 47.

{¶53} The experts in the case at bar did not perform the statistical calculation; rather the computer perform this task. Appellant can, and did, attack the witnesses' lack

of knowledge not unlike the situation presented in *Fensterer,* supra*.* Appellant did not proffer or present anything of evidentiary quality to challenge the reliability of the FBI database or the method of arriving at the statistical conclusion. See, e.g*. State v. Isley* (1997), 262 Kan. 281, 936 P.2d 275; *Watts v. State* (Miss. 1999), 733 So.2d 214 at ¶28-31.

{¶54} In *State v. Adams*, the Ohio Supreme Court observed:

{¶55} "To support his claims, Adams cites a variety of studies suggesting limitations on DNA evidence. For example, Adams argues that the court should have excluded DNA evidence because of controversy over (1) 'the statistical estimates being offered for Polymerase Chain Reaction (PCR) tests'; (2) 'the reliability of the methods used * * * for collecting, handling, processing, and testing crime scene samples'; and (3) 'coincidental match probabilities and false error rates.'

{¶56} "However, the issues that Adams now raises 'go to the weight of the evidence rather than its admissibility.' *Pierce,* 64 Ohio St.3d 490, 597 N.E.2d 107, paragraph two of the syllabus…" 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29 at ¶81-82.

{¶57} Our review of the record reveals that Ms. Kennedy was sufficiently familiar with the underlying formula used by the computer program to generate statistical conclusions. (24T. at 5048-5049; 5096-5097). Appellant's attorney was acutely aware of the mathematics used by the computer program. (24T. at 5161-5162; 5163). The experts testified that they used the FBI database as part of their standard operating procedure. BCI & I is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board, ASCLD/LAB for forensic DNA and DNA

laboratories. (20T. at 4321). The accreditation includes both training and audits to make sure the lab is upholding all of the requirements and standards to properly determine whose DNA is present on the items tested. (Id.). Ms. Clarkson testified that she has a master's degree in forensic DNA and serology. She further has attended numerous workshops, training courses and a DNA statistic workshop. (21T. at 4494-4495). She further has passed the FBI required two proficiency tests per year. (21T. at 4496). Ms. Clarkson has testified more than twenty (20) times. In addition, she has been qualified as an expert on DNA analysis on previous occasions. (Id. at 4497).

{¶58} Ms. Kennedy testified that she began doing DNA analysis in graduate school. (24T. at 5034). She has received specialized training and attended specialized training programs in statistics. (24T. at 5035). She has been qualified as an expert and has testified on five previous occasions. (Id. at 5038).

{¶59} We find Ms. Clarkson and Ms. Kennedy to be properly qualified. See, *Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840, 879 N.E.2d 745 at ¶12.

{¶60} We further note that there was no question in the *Crager* case that the DNA expert was able to testify to the statistical conclusions generated in his report. *Crager* at ¶23. The DNA expert in the *Crager* case testified that the frequency of occurrence of appellant's DNA profile was 1 in 1.028 quintillion people. Id. There was no question from the DNA expert concerning the database that was used to generate that number. Id.

{¶61} Appellant argues that the Ohio Supreme Court incorrectly decided *Crager.* However, this Court cannot declare a decision by a superior court to be unconstitutional. Article IV of the Ohio Constitution designates a system of "superior" and "inferior"

courts, each possessing a distinct function. The Constitution does not grant to a court of appeals jurisdiction to reverse or vacate a decision made by a superior court. See, *State, ex rel. Potain v. Mathews* (1979), 59 Ohio St.3d 29, 32, 391 N.E.2d 343, 345; OH. Const. art. IV, sec. 5; R.C. 2501.02. An inferior court has no jurisdictional basis to review the actions and decisions of superior courts.

{¶62} We find the statistical DNA evidence the State presented in an effort to identify appellant as a accomplice in the killing is not "testimonial" under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354.

{¶63} Accordingly, appellant's first assignment of error is denied.

II.

{¶64} In his second assignment of error appellant argues that the reliability of the FBI's statistical DNA evidence was not established and further, that the State's witnesses were not properly qualified to testify as probability and statistics experts. We disagree with each contention.

{¶65} In *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29 the Ohio Supreme Court held that DNA evidence meets Evid. R. 702's reliability requirement. Id. at ¶86. The Court in *Adams* cited with approval *State v. Martin* (Aug. 14, 2000), Brown App. No. CA99-09-026, wherein the Court held "Questions regarding the reliability of DNA evidence * * *, including alleged defects or limitations of DNA population frequency statistics, go to weight of the evidence rather than its admissibility". *Adams, supra* at ¶ 86. The Court further acknowledged the Court's previous decision in *State v. Faust.* (Id.).

{¶66} In *State v. Faust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, the Ohio Supreme Court held:

{¶67} "DNA evidence expressed in terms of population frequency is admissible if it is relevant. Questions regarding the reliability of DNA evidence in a given case, including DNA statistics on population frequency, go to the weight of the evidence rather than its admissibility. See *State v. Pierce,* 64 Ohio St.3d 490, 597 N.E.2d 107, paragraph two of the syllabus. Moreover, expert witnesses are allowed to testify to statistical conclusions about DNA evidence without being experts in statistical analysis. See *State v. Rowe* (Dec. 26, 2001), Hamilton App. No. C-000727, 2001 WL 1887770; *State v. Martin* (Aug. 14, 2000), Brown App. No. CA99-09-026, 2000 WL 1145465. "Id. at ¶85.

{¶68} Many Ohio jurisdictions have allowed expert opinion testimony under Evid.R. 703 even though the expert's opinion was based in part on statistics published by other sources. *State v. Flowers* (May 4, 2000), Franklin App. No. 99AP-530; *State v. Powell* (Dec. 15, 2000), Montgomery App. No. 18095**;** *State v. Stokes* (Dec. 11, 1997), Cuyahoga App. No. 71654; *State v. Breeze* (Nov. 24, 1992), Franklin App. No. 92AP-258; *State v. Martin* (Aug. 14, 2000), Brown App. No. CA99-09-026.

{¶69} Accordingly, appellant's argument that the trial court abused its discretion by allowing expert witnesses to testify to statistical conclusions about DNA evidence without being experts in statistical analysis is without merit.

{¶70} Questions concerning the reliability of DNA evidence introduced under Evid. R.702 go to the weight of the evidence to be determined by the trier of fact, and

not its admissibility. *State v. Pierce,* 64 Ohio St. 3d 490, 1992-Ohio-53, 597 N.E.2d 107; *Adams* at ¶80; *Foust* at ¶85.

{¶71} Therefore, appellant's argument that contends that the trial court abused its discretion by admitting "unreliable" evidence is likewise without merit. The Supreme Court of Ohio has clearly stated that questions regarding the reliability of DNA go to the weight of the evidence rather than its admissibility. Id. In *Adams*, the Supreme Court of Ohio explained that a preliminary hearing under Evid.R. 104 is not required for DNA evidence, so the threshold requirement is already established as a matter of law. *Adams* at ¶80.

{¶72} "A court resolving a reliability question should consider the 'principles and methods' the expert used 'in reaching his or her conclusions, rather than trying to determine whether the conclusions themselves are correct or credible.' *Nemeth,* 82 Ohio St.3d at 210, 694 N.E.2d 1332; see, also, *Miller,* 80 Ohio St.3d 607, 687 N.E.2d 735, paragraph one of the syllabus. As the *Daubert* court stated, in assessing reliability, '[t]he focus * * * must [generally] be * * * on principles and methodology, not on the conclusions that they generate.' *Daubert,* 509 U.S. at 595, 113 S.Ct. 2786, 125 L.Ed.2d 469.

{¶73} "A trial court may not, therefore, exclude expert testimony simply because it disagrees with the expert's conclusions. Instead, if the expert followed methods and principles deemed valid by the discipline to reach his opinion, the court should allow the testimony. See *Paoli,* 35 F.3d at 742 ('an expert's testimony is admissible so long as the process or technique the expert used in formulating the opinion is reliable'). The traditional adversary process is then capable of weeding out those shaky opinions. See

Daubert, 509 U.S. at 596, 113 S.Ct. 2786, 125 L.Ed.2d 469" *Valentine v. Valentine* (2001), 158 Ohio App.3d 615, 628-631; 2004-Ohio-4521 at ¶23-31, 821 N.E.2d 580, 628-631.

{¶74} The United States Court of Appeals for the Sixth Circuit explained Daubert's requirements in the context of DNA test results as follows:

{¶75} "Because the DNA results were based on scientifically valid principles and derived from scientifically valid procedures, it is not dispositive that there are scientists who vigorously argue that the probability estimates are not accurate or reliable because of the possibility of ethnic substructure. The potential of ethnic substructure does not mean that the theory and procedures used by the FBI are not generally accepted; it means only that there is a dispute over whether the results are as accurate as they might be and what, if any, weight the jury should give those results.

{¶76} " * * *

{¶77} "When reviewed in light of the four *Daubert* factors (testing, peer review, rate of error, and general acceptance), we find that the underlying principles and methodology used by the FBI to declare matches and make statistical probabilities are scientifically valid. The methodology was valid in that it "result[ed] from sound and cogent reasoning," Bert Black, *A Unified Theory of Scientific Evidence,* 56 Ford.L.Rev. 595, 599 (1988), and was "'well grounded or justifiable [and] applicable to the matter at hand,' " *id.* at 599 n. 9 (quoting *Webster's Unabridged* 2529-30). Thus, the methodology clearly had "a grounding in the methods and procedures of science" and was based on "more than subjective belief or unsupported speculation." *Daubert,* 509 U.S. at ----, 113 S.Ct. at 2795." *United State v. Bonds* (6th Cir. 1993), 12 F.3d 540, 564-565.

{¶78} Rule 703 permits experts to testify without personal knowledge of the underlying facts or data. The Rule further permits experts to testify based on hearsay or unadmitted evidence, as long as the evidence is of a kind "reasonably relied upon by experts in the particular field."

{¶79} In the case at bar, the only evidence presented to the trial court was that the database and method of calculating the statistical conclusions are accepted across the community. (21T. at 4533; 4534; 4541-4542; 4555; 4557; 24T. at 5154). In overruling appellant's objection the trial court noted, "the Court has heard the testimony that the procedure that was followed in this case is one that has been used widely throughout at least the law enforcement forensic scientific community; that the results have been audited and the procedure has been audited by outside agencies. I've not heard any testimony that as a result of those audits, that it appeared the [sic.] that procedure was not reliable. I'm going to allow the admission of this testimony and find that the objections go to the weight of the evidence…" (21T. at 4561).

{¶80} An appellate court should apply an abuse of discretion standard in reviewing a court's decision to admit or exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). *Gen. Elec. Co. v. Joiner* (1997), 522 U.S. 136, 144-146, 118 S.Ct. 512, 139 L.Ed.2d 508. We apply this standard and conclude that the trial court in this case did not abuse its discretion when it permitted the State's expert's to testify concerning the statistical DNA evidence. We further find the trial court did not abuse its discretion when it found the statistical DNA evidence to be reliable under *Daubert.*

{¶81} Accordingly, appellant's second assignment of error is denied.

III.

{¶82} In his third assignment of error appellant argues that the retroactivity principles of the Fifth Amendment's Due Process Clause preclude the retroactive application of the remedial holding of *State v. Foster,* 109 Ohio St.3d. 1, 2006-Ohio-856, 845 N.E.2d 470 [hereinafter cited as "*Foster* "] which excised portions of R.C. 2929.14. We disagree.

{¶83} Article I of the U.S. Constitution provides that neither Congress nor the states shall pass an "ex post facto Law." *See* U.S. Const. art. I, § 9, cl. 3; art. I, § 10, cl. 1. The Ohio Constitution contains a similar provision. See, Ohio Const. Art. 2, § 28. Although the Ex Post Facto Clause limits the legislature instead of the judiciary, "limitations on *ex post facto* judicial decision-making are inherent in the notion of due process." *Rogers v. Tennessee* (2001), 532 U.S. 451, 456, 121 S .Ct. 1693, 149 L.Ed.2d 697. In the context of judicial decision-making, a defendant has "a right to fair warning of that conduct which will give rise to criminal penalties." *Marks v. United States* (1977), 430 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed. 2d 260. Appellant claims that the United States Supreme Court in *Booker* and the Ohio Supreme Court in *Foster* altered sentencing law in a manner detrimental to him and thereby violated his due process right to fair warning. *United States v. Farris,* supra 448 F.3d at 967.

{¶84} In *State v. Paytner*, Muskingum App. No. CT2006-0034, 2006-Ohio-5542, we rejected appellant's argument stating, "We conclude that retroactive application of the remedy in this case does not run afoul of the state or federal prohibitions against *ex post facto* laws. Id*.* Additionally, we would note that under the federal sentencing guidelines as applied in light of the *Booker* decision "defendant's due process [and ex

post facto] argument has been justifiably rejected by the Courts of Appeals that have considered it. *See, e.g., United States v. Lata,* 415 F.3d 107 (1st Cir. 2005); *United States v. Vaughn,* 430 F.3d 518 (2d Cir. 2005), *cert. denied* --- U.S. ----, 126 S.Ct. 1665, 164 L.Ed.2d 405 (2006); *United States v. Scroggins,* 411 F.3d 572 (5th Cir. 2005); *United States v. Jamison,* 416 F.3d 538 (7th Cir. 2005); *United States v. Dupas,* 417 F.3d 1064 (9th Cir. 2005), *amended by* 419 F.3d 916 (9th Cir. 2005), *cert. denied* --- U.S. ----, 126 S.Ct. 1484, 164 L.Ed.2d 261 (2006); *United States v. Rines,* 419 F.3d 1104, 1106 (10th Cir. 2005), *cert. denied* --- U.S. ----, 126 S.Ct. 1089, 163 L.Ed.2d 905 (2006); and *United States v. Duncan,* 400 F.3d 1297 (11th Cir. 2005), *cert. denied* --- U.S. ----, 126 S.Ct. 432, 163 L.Ed.2d 329 (2005)". *United State v. Shepherd* (6th Cir 2006), 453 F.3d 702, 705-706." Id. at ¶ 42.

{¶85} Furthermore, every Ohio appellate court that has addressed this issue has concluded that the *Foster* remedy does not pose an *ex post facto* problem. *See, e.g., State v. Gibson,* 10th Dist. No. 06AP-509, 2006-Ohio-6899; *State v. Grimes,* 4th Dist. No. 06CA17, 2006-Ohio-6360; *State v. Durbin,* 2d Dist. No.2005-CA-134, 2006-Ohio-5125; *State v. McGhee,* 3d Dist. No. 17-06-05, 2006-Ohio-5162; *State v. Paynter,* 5th Dist. No. CT2006-0034, 2006-Ohio -5542; *State v. Ross,* 9th Dist. No. 23375, 2007-Ohio-1265.

{¶86} Based upon this Court's holding in *Paynter,* we find the sentence imposed in this case did not violate the due process or the ex post facto clauses of the United States or Ohio Constitutions.

{¶87} Appellant's third assignment of error is denied.

{¶88} For the foregoing reasons, the judgment of the Fairfield County Court of Common Pleas, Ohio, is affirmed.

By Gwin, P.J.,

Farmer, J., and

Edwards, J., concur

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HON. W. SCOTT GWIN

_____

HON. SHEILA G. FARMER

_____

HON. JULIE A. EDWARDS

WSG:clw 1008

[Cite as *State v. Bruce*, 2008-Ohio-5709.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DAVID L. BRUCE	:	
Defendant-Appellant	:	CASE NO. 2006-CA-45

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Fairfield County Court of Common Pleas, Ohio, is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. SHEILA G. FARMER

_____
HON. JULIE A. EDWARDS