

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00289
THOMAS LEWERS	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2009-CR-0001

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 1, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Gwin, P.J.

{¶1} Defendant-Appellant, Thomas Lewers, appeals his convictions on one count of aggravated murder, with a firearm specification, one count of murder, with a firearm specification and one count of aggravated burglary in connection with the death of Jeff Cole.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 20, 2009, appellant was indicted on two counts of Aggravated Murder, both with firearm and death penalty specifications, as well as one count of Aggravated Burglary. The charges stem from an incident that occurred on December 23, 2008. Testimony concerning the events that led up to that incident was presented during appellant's jury trial that took place September 21, 2009 through September 25, 2009 as well as September 28, 2009, and September 29, 2009.

{¶3} Appellant married his wife Shawna in 1994. Appellant and Shawna have two children ages sixteen and thirteen. Beginning in 2006, the marriage became rocky due to appellant's lack of full time employment. In 2007, in an attempt to find something they could both enjoy doing together and perhaps reignite their relationship, the two used Shawna's father's motorcycle and began riding with a group of people who meet for group rides at the Lighthouse Tavern. Eventually they bought their own bike, and rode with the group through summer and fall of 2008. It was through these rides that the couple met the decedent Jeff Cole.

{¶4} The three were friends for a while. Cole permitted appellant to use his hot tub for photo shoots for his struggling photography business and repaired appellant's bike. During summer of 2008, however, the relationship between Cole and Shawna

became closer. The two began calling and texting one another frequently. Apparently suspecting the shift in the relationship, appellant put a recorder in Shawna's car and captured Shawna's end of two phone calls to Cole. Appellant confronted Shawna and she informed Tom she was not going to stop talking to Cole.

{15} By September 2008, the relationship between Cole and Shawna had become intimate. Shawna's job required travel, and that fall, Cole met her once in Florida and once in Mansfield, Ohio. While the two were in a hotel in Mansfield, Shawna heard her car alarm. She looked outside, saw no one, turned the alarm off and re-armed it. Appellant then called her and told her he was outside. Shawna told him to leave.

{16} In November 2008, Shawna again raised the issue of appellant's joblessness, telling him to either find a job, or their relationship was over. Appellant agreed to an "open marriage" if this meant that it would avoid a divorce and a break-up of the family.

{17} The same month, Shawna went with Cole and his family to Mountaineer Park. She also discussed her marriage with Cole, indicating that she was going to try to make it through the holidays for the sake of her children, but then was planning on leaving appellant.

{18} Both appellant and Shawna held conceal carry permits. Appellant always carried his weapon, unless he is in an establishment that prohibits concealed weapons.

{19} On the evening of December 23, 2008, Shawna had dinner with appellant and her children and then went to Aultman Hospital to visit a friend. Before leaving the

house that night, she told appellant she was going to visit Cole after she finished at the hospital.

{¶10} Around 10:30 p.m., Shawna left the hospital and drove to Cole's home. It was cold and rainy, and the rain was beginning to freeze. Once she got to Cole's the two watched a movie. At some point Shawna turned off the ringer of her cell phone. Shawna noticed she had missed some calls from appellant. It was not unusual for appellant to pick Shawna up during bad weather upon her request, however, she sent him a text letting him know she was at Cole's and she was fine. A short time later, she saw appellant pull into the driveway. She put on her shoes and went outside to meet him.

{¶11} The two met at the end of the walkway outside the front door. Shawna asked appellant why he was there and appellant said because the roads were icy. He slid his foot back and forth on the icy walkway and told her the roads were in the same condition. Shawna told him she was fine, and to go home - she would meet him there. Instead of complying with her wishes, appellant declared "this is bullshit," pushed by Shawna and headed toward the front door of the home. Shawna grabbed appellant's arm in an attempt to stop him, but he pulled away hard enough to rip one of Shawna's fingernails off.

{¶12} Shawna's memory becomes a bit "fuzzy" at this point. She remembers hearing voices while she was still outside the house, however, the next thing she remembers is standing in the living room and Mr. Cole was face down on the floor. Shawna testified at trial that she saw Jeff face down on the floor and appellant standing over him, pointing a gun at Cole's body. Appellant fired twice and Shawna ran for her

phone. As she did, appellant pointed the gun to his own head and said, "I'm next." In neither of her statements to the police did Shawna recall hearing any shots being fired. Nor did she remember whether she mentioned this fact to the Grand Jury.

{¶13} Shawna called 911, but because she was calling from a cell phone, she was passed through two call stations before finally being connected to the Perry Township 911 dispatcher. Shawna was hysterical and it was difficult for dispatchers to get information from her. While she was on the phone, appellant continued to threaten to shoot himself. Eventually Shawna convinced him to give her the gun. She unloaded the weapon and put the clip in her pocket. Appellant told her he did not need the gun to die and he was not going to prison. Appellant produced a film canister containing white powder and swallowed it with water. He told Shawna it would not take long, but she still had some time to talk to him.

{¶14} Perry Township police officers Ben Barrett and George Dietrick were first on the scene. As they approached, Shawna came out of the house hysterical and screaming "he's dead, he's dead." She handed Officer Dietrick the magazine for the gun and said her husband shot Cole. The officers placed Shawna in a cruiser before they attempted to make contact with appellant.

{¶15} As the officers approached the home again, appellant came out of the house with one hand up and the other appearing to be holding a gun pointed at his head. The officers ordered appellant to drop the weapon. Appellant stood there a moment, then went back into the house. The officers took cover. Appellant reemerged from the house, again appearing to have a weapon pointed at his head. He was again ordered to drop the weapon. Appellant told the officers it was his phone. Officer Barrett

ordered him to drop the phone and get on his knees. Appellant calmly complied and was taken into custody and placed in a cruiser without incident. Officer Barrett asked if there was anyone else in the house and appellant denied there was anyone else inside the home. Officer Barrett asked, "Well, what about the guy you just shot?" Appellant replied, "Well, yeah, he's in there."

{¶16} When Officer Barrett entered the home, he saw Jeff Cole in the living room lying face down on the floor. Spent shell casings and pieces of spent slugs were scattered around Cole's body. The gun was on the kitchen table. Once the officers were certain no one else was in the home, they let the paramedics in and Cole was pronounced dead at the scene. Dispatch had made the officers aware that appellant allegedly ingested some type of poison. Officer Barrett located the film canister, which contained powder residue. He gave the canister to the paramedics who transported appellant to the hospital.

{¶17} Perry police detective Matthew Barker arrived at the scene shortly after midnight. He summoned Larry Mackey, a criminalist at the Canton-Stark County Crime lab as well as Perry police department's evidence officer, Sergeant Pomesky to process the crime scene. When Mackey arrived, Cole was still in the spot where he had fallen. Nothing around him had been disturbed. Mackey photographed the scene in the living room, took measurements, and then collected five .45 caliber cartridge cases, two deformed bullets and a piece of a bullet jacket. In the kitchen, Mackey collected the handgun, a .45 caliber semi-automatic Taurus. Mackey also collected the magazine for the Taurus that Shawna had given to Officer Bennett. The magazine contained two live rounds. Mackey transported all the items he collected to the crime lab.

{¶18} Officer Barker and another officer followed appellant as he was transported via ambulance to Aultman Hospital to address his ingestion of the white powder. Appellant appeared to be in no physical or emotional distress. Some tests were conducted and he was released to the custody of the officers. Appellant's clothing was collected and his hands were tested for gunshot residue.

{¶19} The next day, Stark County Coroner P.S. Sreenivasa Murthy performed the autopsy on Cole. Cole had a total of ten entrance and exit wounds. Four of the entrance wounds were to the back of his body - one in the back of his right arm above the elbow, one in the back of his forearm, one in the upper right side of his back and one in the left posterior neck. The shot to Cole's upper right back was fatal. This bullet perforated the right lung, the thoracic aorta, the left side of the diaphragm, and traveled through the left lobe of the liver before coming to rest in Cole's lower left chest. Murthy extracted this bullet and sent it to the crime lab. The bullet to the back of Cole's neck entered the left posterior neck entered the facial skeleton, exited through Cole's left cheek. That bullet was later recovered from the floor of Cole's home, underneath the area where his head had come to rest. Additionally, Cole had an entrance wound at the base of his left hand. That bullet exited and then reentered Cole's hand, nearly amputating the left thumb as it exited again. Murthy concluded the cause of death was multiple gunshot wounds and the manner of death as homicide.

{¶20} Michael Short of the Canton-Stark County Crime Lab examined the gun, five spent shell casings, bullets, bullet fragments and pieces of the copper bullet jackets from the scene and Cole's body and Cole's clothing. His examinations concluded that the Taurus is an operable firearm and the casings were all fired from the Taurus. Short

also examined the shirt Cole was wearing when he was shot and performed gunshot residue testing. He identified three defects on the back of the shirt, two near the neckline of the shirt and one in the right sleeve. Short determined that the two defects to the neckline of the shirt were created by one bullet and when appellant was 24 to 36 inches away from Cole. The defect in the sleeve was created from four or more feet away.

{¶21} Two days after the murder, Barker sent Perry police officers Brian Carbenia and Sergeant Rothlisberger back to the scene to look for spent rounds. They had been briefed on the location of the body, and upon arriving at the scene, conducted a visual inspection looking for holes in the carpet or walls. Finding nothing, they rolled the carpet back, looking for anything under the carpet. Under the area of the bloodstain, the officers located a hole in the carpet and a bullet lodged in the padding underneath. There was also damage to the wooden floor under the carpet. The officers photographed the bullet as found and took measurements. Another spent round was located underneath the television stand.

{¶22} On September 1, 2009, the Coroner met with Defense Counsel on the condition that the Prosecutor be present. At this time, Counsel asked the Coroner if he could determine the location of the shooter in relation to Mr. Cole. The Coroner stated that he could not, adding that it would be almost impossible.

{¶23} As with Dr. Murthy, Defense Counsel met with Mr. Short prior to trial and Mr. Short indicated that he could not render an opinion as to the position of the shooter and victim without additional information.

{¶24} Subsequently the prosecutor met with the Coroner alone and provided additional photographs of the scene showing the position of the body, which he had not seen before as well as the results of the gunshot residue tests, performed on Mr. Cole's clothing. Because of this information, Dr. Murthy informed the Prosecutor that he could now give an opinion regarding the position of the shooter and the victim. He informed the prosecutor that the evidence was consistent with the shooter standing over Mr. Cole while Mr. Cole was lying on the floor.

{¶25} Based on the autopsy findings, gunshot residue testing, photographs taken of the scene, and the photographs taken of the bullet lodged in carpet padding, both Short and Dr. Murthy opined at trial that the shooter was standing over the victim at a distance of no more than 36 inches away when the shot to the back of the victim's neck was delivered.

{¶26} Near the end of the State's case, juror number 471 asked to speak to the Judge. The juror indicated that his life experience would keep him from being fair in this case. He repeatedly stated that he was biased. Specifically, he indicated that he, like the victim, had been involved in an extramarital affair. He stated, "I knew it couldn't go on because I knew something like this could happen." He further stated, "I just feel I could be the one dead right now." The Court did not ask the juror if he had shared his concerns with the other jurors nor did he question the other jurors to determine if they had been affected by Juror 471's concerns.

{¶27} At the close of the evidence, appellant requested jury instructions on Voluntary and Involuntary Manslaughter. The Court denied this request but did provide an instruction on the lesser-included offense of murder for counts one and two.

{¶28} As to count one, the jury found appellant guilty of the lesser offense of murder and the firearm specification. He was found guilty as charged, however, of count two, aggravated murder and its specifications and count three, aggravated burglary.

{¶29} The matter moved to the penalty phase. The jury found the aggravating circumstance did not outweigh the mitigating factors and recommended life without the possibility of parole. The court accepted the jury's recommendation and subsequently sentenced appellant to the same.

{¶30} Appellant timely appeals and raises the following five assignments of error:

{¶31} "I. THE TRIAL COURT ERRED IN ALLOWING EXPERT TESTIMONY REGARDING THE POSITION OF THE SHOOTER.

{¶32} "II. THE APPELLANT WAS DENIED HIS RIGHT TO TRIAL BY AN IMPARTIAL JURY.

{¶33} "III. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GIVE INSTRUCTIONS ON LESSER OFFENSE OF VOLUNTARY MANSLAUGHTER.

{¶34} "IV. THE APPELLANT WAS DENIED HIS RIGHT TO FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

{¶35} "V. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I.

{¶36} In his first assignment of error, appellant argues that the trial court abused its discretion in allowing Dr. Murthy to testify as an expert regarding the position of the

victim and shooter, an opinion which appellant contends is beyond the scope of Dr. Murthy's training and experience. Appellant further argues the trial court abused its discretion when it permitted Michael Short a criminalist with the Canton-Stark County Crime Lab to provide an opinion on the same subject without first conducting hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469.

{¶37} In the present, case appellant argues that the Coroner gave an expert opinion regarding the position of the shooter and the victim at the time entrance wound number one, the shot to the back of Cole's neck was inflicted, which was beyond the scope of his training and experience.

{¶38} In Dr. Murthy's case, the state asked for the opinion in response to a hypothetical question. Dr. Murthy's autopsy indicated that the bullet that inflicted this wound traveled through the left side of Cole's neck, into the facial skeleton and exited through his right cheek. The bullet that inflicted the wound was not recovered until two days after the autopsy, when officers returned to the scene and recovered a bullet from under the carpet in the area where Cole's head had come to rest.

{¶39} In the case at bar, the Court held a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786 prior to admitting Dr. Murthy's opinion at trial.

{¶40} "In general, courts should admit expert testimony whenever it is relevant and satisfies Evid.R. 702. *State v. Nemeth* (1998), 82 Ohio St.3d 202, 207, 694 N.E.2d 1332; see, also, *State v. Williams* (1983), 4 Ohio St.3d 53, 58, 4 OBR 144, 446 N.E.2d 444. Thus, the trial judge must perform a 'gatekeeping' role to ensure that expert

testimony is sufficiently (a) relevant and (b) reliable to justify its submission to the trier of fact. See *Kumho Tire*[(1999)], 526 U.S. [137] at 152, 119 S.Ct. 1167; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 589, 113 S.Ct. 2786; *Nemeth*, 82 Ohio St.3d at 211, 694 N.E.2d 1332; *Douglass*, 153 Ohio App.3d 350, 2003-Ohio-4006, 794 N.E.2d 107, at ¶ 32.

{¶41} “In performing its gatekeeping function, the trial court's starting point should be Evid.R. 702, which provides that a witness may testify as an expert if all of the following apply: ‘(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons; (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; (C) The witness' testimony is based on reliable, scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply: (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) The design of the procedure, test, or experiment reliably implements the theory; (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.’” *Abon, Ltd. v. Transcontinental Ins. Co.*, Richland App. No. 2004-CA-0029, 2005-Ohio-3052, citing *Valentine v. Valentine*(2001), 158 Ohio App.3d 615, 628-631 2004-Ohio-4521, 821 N.E.2d 580.(Internal quotation marks omitted).

{¶42} The trial court inquired of Dr. Murthy as follows,

{¶43} “[The Court]: What was there that gave you the change of your opinion from the time you met with [defense counsel] to the time you subsequently changed your opinion when you got additional photos?”

{¶44} “[Dr. Murthy]: The missile was recovered from the carpet under the right side of the body. Right side of the face. And this I would say consistent with the fact that the bullet came from the back of the individual; therefore in my opinion, the assailant fired the missile leaning over about two and a half feet from the surface of the skin.

{¶45} “[The Court]: What gives you the knowledge and experience to say exactly how many feet he was away from the body at the time?”

{¶46} “[Dr. Murthy]: The crime lab, Mike Short told me that according to his test firing project the muzzle to the skin was between 24 inches to 36 inches. And with that information, and the fact that missile entered the left posterior neck and the fact missile exit from the right cheek and the fact the missile was in the blood stain area of the carpet, in view of all this information, I would still say that the assailant fired this missile from the back of the individual when he was lying there on the floor.”

{¶47} (6T. at 95-96).

{¶48} Dr. Murthy’s qualification to render such an opinion was stated as follows,

{¶49} “[Dr. Murthy]: By experience and doing many cases, and also working with senior pathologists and I did attend many courses, seminars in forensic pathology, and I distinctly remember going to many of the advanced courses in forensic pathology at the AFIB and so it all comes in many of the conferences and seminars that I have attended this particular issue as discussed. The target, distance between the muzzle end and the body, yes all of this was discussed.”

{¶150} (6T. at 87).

{¶151} With respect to Dr. Murthy's qualifications to render such an opinion, the trial court found,

{¶152} "The Court has heard relative to the experience level, the training of the coroner, and has heard the arguments of [defense counsel] with regard to the tests that were or were not employed by the witness.

{¶153} "The Court finds that the...witness is qualified to render an opinion in that specific field. That it will be for cross-examination and the weight of the testimony to go to whether or not the assumed facts on which the coroner is rendering any opinion are accurate.

{¶154} "But I see this as going more to the weight to be given to the testimony as opposed to a flawed experiment or test or lack of qualifications on the part of the coroner to render that opinion.

{¶155} (6T. at 112-113).

{¶156} Evid.R. 702(B) provides that a witness may qualify as an expert by reason of his or her "specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Neither special education nor certification is necessary to confer expert status upon a witness. "The individual offered as an expert need not have complete knowledge of the field in question, as long as the knowledge he or she possesses will aid the trier of fact in performing its fact-finding function." *State v. Hartman*, 93 Ohio St.3d at 285, 754 N.E.2d 1150; *State v. Baston*, 85 Ohio St.3d 418, 423, 709 N.E.2d 128. Pursuant to Evid.R. 104(A), the trial court determines whether a witness qualifies as an expert, and that determination will be overturned only for an

abuse of discretion. *State v. Hartman*, 93 Ohio St.3d at 285, 754 N.E.2d 1150; *State v. Williams* (1983), 4 Ohio St.3d 53, 58, 446 N.E.2d 444.

{¶57} In the case at bar, the trial court providently exercised its discretion in permitting the coroner to testify as an expert regarding the trajectory of the bullet and the likely position of the victim when he was shot, since his testimony rested on facts in evidence and personally known to and described by the doctor himself, as well as his extensive experience in forensic medicine.

{¶58} “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.

{¶59} “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 as 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.

{¶60} In any event, assuming, *arguendo*, that the admission of the coroner's opinion would be error, we find that it was harmless error beyond a reasonable doubt.

{¶61} In *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, the Ohio Supreme Court recognized that "[i]n *Arizona v. Fulminante* (1991), 499 U.S. 279, 306-312, 111 S.Ct. 1246, 113 L.Ed.2d 302, the United States Supreme Court denominated the two types of constitutional errors that may occur in the course of a criminal proceeding--'trial errors,' which are reviewable for harmless error, and structural errors, which are per se cause for reversal. * * * Trial error is error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. * * * Structural errors, on the other hand, defy analysis by 'harmless error' standards because they affect the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself. [*Fulminante*] at 309 and 310, 111 S.Ct. 1246, 113 L.Ed.2d 302. Consequently, a structural error mandates a finding of per se prejudice." *Fisher* at ¶ 9. (Internal quotation marks omitted). See, also, *State v. Wamsley*, 117 Ohio St.3d 388, 884 N.E.2d 45, 2008-Ohio-1195 at ¶ 15. In *Wamsley*, the Ohio Supreme Court noted,

{¶62} "We have previously held that if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional[] errors that may have occurred are subject to harmless-error analysis. *State v. Hill* (2001), 92 Ohio St.3d 191, 197, 749 N.E.2d 274), quoting *Rose v. Clark* (1986), 478

U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460. Moreover, as we stated in *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, [c]onsistent with the presumption that errors are not structural, the United States Supreme Court ha[s] found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases. *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel)); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction).” *Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 18, quoting *Neder v. United States* (1999), 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35.” *State v. Wamsley*, supra 117 Ohio St.3d at 391-392, 884 N.E.2d at 48-49, 2008-Ohio-1195 at ¶ 16. [Internal quotation marks omitted].

{¶63} In *Wamsley*, supra, the Ohio Supreme Court further noted, “this court has rejected the concept that structural error exists in every situation in which even serious error occurred. See *State v. Hill*, 92 Ohio St.3d at 199, 749 N.E.2d 274, quoting *Johnson v. United States*, 520 U.S. at 466, 117 S.Ct. 1544, 137 L.Ed.2d 718.

{¶64} In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings. Crim.R. 52(A), which governs the

criminal appeal of a non-forfeited error, provides that “[a]ny error * * * which does not affect substantial rights shall be disregarded.” (Emphasis added.) Thus, Crim.R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an “error”—i.e., a “[d]eviation from a legal rule.” *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770, 123 L.Ed.2d 508. Second, the reviewing court must engage in a specific analysis of the trial court record—a so-called “harmless error” inquiry—to determine whether the error “affect[ed] substantial rights” of the criminal defendant. In *United States v. Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333, the Court defined the prejudice prong of the plain error analysis. “It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake’s effect on the proceeding. See *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991) (giving examples). Otherwise, relief for error is tied in some way to prejudicial effect, and the standard phrased as ‘error that affects substantial rights,’ used in Rule 52, has previously been taken to mean error with a prejudicial effect on the outcome of a judicial proceeding. See *Kotteakos v. United States*, 328 U.S. 750 (1946). To affect “substantial rights,” ..., an error must have “substantial and injurious effect or influence in determining the ... verdict.” *Kotteakos*, supra, at 776.” *United States v. Dominguez Benitez*, supra 542 U.S. 74, 81, 124 S.Ct. at 2339. See, also, *State v. Barnes* (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240; *State v. Fisher*, 99 Ohio St.3d 127, 129, 2003-Ohio-2761 at ¶ 7, 789 N.E.2d 222, 224-225. Thus, a so-called “[t]rial error” is “error which occurred “[d]uring the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other

evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” *Fulminante*, 499 U.S. at 307-308, 111 S.Ct. 1246, 113 L.Ed.2d 302. *State v. Naugle* (2009), 182 Ohio App.3d 593, 913 N.E.2d 1052, 2009-Ohio-3268 at ¶ 16. (Citing *State v. Ahmed*, Stark App. No. 2007-CA-00049, 2008-Ohio-389).

{¶65} The application of the harmless error rule is simple if, in the absence of all erroneously admitted evidence, there remains "overwhelming" evidence of guilt. *State v. Morris*, Medina App. No. 09CA0022-M, 2010-Ohio-4282 at ¶36. Where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless “beyond a reasonable doubt” if the remaining evidence alone comprises “overwhelming” proof of defendant's guilt. *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983) (quoting *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969)).

{¶66} Shawna Lewers saw appellant shoot twice while standing over Cole. From this testimony, the trier of fact could have found that appellant fired the shots from behind while Mr. Cole was on the floor even if the coroner had not directly said so. Additionally, appellant does not deny that he fired the fatal shots. Appellant’s argument at trial was whether or not he was standing directly over Mr. Cole when wound one was inflicted was critical to the culpable mental state purposefully. However, “[i]ntent need not be proven by direct testimony. *State v. Lott* (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293, 302. Instead, intent to kill ‘may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound.’ *State v. Robinson* (1954), 161 Ohio St. 213, 53 O.O. 96, 118 N.E.2d 517, at paragraph five of

the syllabus; *State v. Eley* (1996), 77 Ohio St.3d 174, 180, 672 N.E.2d 640, 648". *State v. Stallings* (2000), 89 Ohio St.3d 280, 290, 2000-Ohio-159, 731 N.E.2d 159,171. The specific intent to kill may be reasonably inferred from the fact that a firearm is an inherently dangerous instrument, the use of which is likely to produce death. *State v. Mackey* (1999), Cuyahoga App. No. 75300, dismissed, appeal not allowed (2000), 88 Ohio St.3d 1496, 727 N.E.2d 920, citing *State v. Widner* (1982), 69 Ohio St.2d 267, 431 N.E.2d 1025 (finding purpose to kill in passenger's firing gun at individual from moving vehicle); *State v. Dunlap* (1995), 73 Ohio St.3d 308, 316, 652 N.E.2d 988, certiorari denied (1996), 516 U.S. 1096, 116 S.Ct. 1096, 133 L.Ed.2d 765. *State v. Banks*, 10th Dist. No. 01 AP-1179, 2002-Ohio-3341 at ¶24.

¶67 "[T]he act of pointing a firearm and firing it in the direction of another human being is an act with death as a natural and probable consequence." *State v. Turner* (1997), Franklin App. No. 97APA05-709, dismissed, appeal not allowed (1998), 81 Ohio St.3d 1496, 691 N.E.2d 1058 (finding sufficient evidence of intent to kill in firing a gun from an automobile at a group of individuals), quoting *State v. Brown* (1996), Cuyahoga App. No. 68761, dismissed, appeal not allowed, 77 Ohio St.3d 1468, 673 N.E.2d 135; see, also, *State v. Smith* (1993), 89 Ohio App.3d 497, 501, 624 N.E.2d 1114 (finding that pointing gun at a group of people less than twenty feet away and shooting at least one shot could be used by the trier of fact as proof of intention to kill). *Banks*, supra, at ¶26.

¶68 Thus, even if the trial court erred in allowing Dr. Murthy to testify as to the position of the shooter, the remaining evidence, standing alone constitutes overwhelming evidence of appellant's guilt and the error was harmless.

{¶69} Appellant next argues that the court erred when it denied his request to voir dire Michael Short as to his qualifications to render an opinion as to the position of the shooter, arguing the court lacked the necessary evidence to find Mr. Short's expert opinion admissible.

{¶70} Mr. Short has been a criminalist specializing in firearms, fingerprint evidence and major crime scene processing for nineteen years. He has received training as to how bullets react within the human body and in that vein, has been involved in ammunition studies for the Canton Police Department to determine what ammunition officers would carry in their service weapons. At the time of trial, Mr. Short was in his second semester of forensic medicine study, which includes the identification of wounds inflicted on the human body by firearms and determination as to how such wounds are inflicted. Mr. Short had testified in the past as an expert in the field of firearms and ballistics examinations. Appellant did not object to Short's designation as an expert.

{¶71} Appellant did not request to voir dire Mr. Short as to his qualifications until the second day of his testimony. The court overruled the request, finding the state had already laid the foundation as to Mr. Short's qualifications, noting that Mr. Short was "...more than qualified..." and advised that Lewers was free to attack those qualifications on cross exam." (7T. at 97).

{¶72} In *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 119 S.Ct. 1167, the United State's Supreme Court recognized that "[t]he trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate

reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable." *Kumho Tire* at 152. In turn, "[the abuse of discretion] standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion." *Id.*, citing *General Elec. Co. v. Joiner* (1997), 522 U.S. 136, 138-139, 118 S.Ct. 512. Therefore, a trial court is not required to hold a pre-trial *Daubert* hearing. See *State v. Fulton*, Clermont App. No. CA2002-10-085, 2003-Ohio-5432, paragraphs 13-19 (finding no error in trial court's decision to deny pretrial *Daubert* hearing on the admissibility of evidence); See also, *State v. Goins*, Mahoning App. No. 02CA68, 2005-Ohio-1439; *State v. Mills*, Tuscarawas App. No. 2007 AP 07 0039, 2009-Ohio-1849 at ¶ 121.

{¶73} In the case at bar, appellant arguments concern inconsistencies in Mr. Short's testimony, purported conflicts between his testimony and that of other evidence in the case and further, the witnesses' lack of knowledge. Appellant's concerns about Mr. Short's testimony go more to the weight of the evidence rather than to its admissibility. "Questions about the certainty of the scientific results are matters of weight for the jury. For example, in discussing the fact that a hair sampling technique only showed similarities between the hairs and could not show a match with certainty, '[t]he lack of certainty went to the weight to be assigned to the testimony of the expert, not its admissibility, and defense counsel did a creditable job of arguing to the jury that it should be assigned little weight.' *United States v. Brady*, 595 F.2d 359, 363 (6th Cir.1979). And, in general, criticisms touching on whether the lab made mistakes in arriving at its results are for the jury." *United States v. Bonds* (6th Cir 1993), 12 F.3d 540, 563. See also, *State v. Pierce* (1992), 64 Ohio St.3d 490, 597 N.E.2d 107.

{¶74} Assuming the admission of this evidence was error, it was harmless beyond a reasonable doubt. Crim.R. 52(A); *State v. Zimmerman* (1985), 18 Ohio St.3d 43, 45, 479 N.E.2d 862, 863. There was no prejudicial error in allowing Michael Short to testify in this case.

{¶75} Accordingly, appellant's substantial rights were not violated by the admission of Dr. Murthy or Michael Short's testimony.

{¶76} Appellant's first assignment of error is overruled.

II.

{¶77} In his second assignment of error, appellant contends that the trial court erred by not holding a hearing in the presence of all interested parties to determine whether the jury panel was unfair and biased according to *Remmer v. United States* (1954), 347 U.S. 227, 74 S.Ct. 450, after dismissing Juror Number 471 for cause after the trial had commenced. We disagree.

{¶78} Appellant did not object to the trial court's failure to conduct a *Remmer* hearing. Accordingly, Appellant has waived all but plain error. *State v. Wooten*, Stark App. No. 2008 CA 00103, 2009-Ohio-1863 at ¶38. (Citing *State v. McKnight*, 1007 Ohio St.3d 101, 2005-Ohio-6046 at ¶ 185).

{¶79} In criminal cases where an objection is not raised at the trial court level, "plain error" is governed by Crim. R. 52(B), which states, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." An alleged error "does not constitute a plain error ... unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

{¶80} As the United States Supreme Court recently observed in *Puckett v. United States* (2009), 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266, “If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; ‘anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.’” (Citation omitted).

{¶81} “[A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant’s substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *United States v. Marcus* (May 24, 2010), 560 U.S. ___, 2010 WL 2025203 at 4. (Internal quotation marks and citations omitted).

{¶82} The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus; *Perry*, supra, at 118, 802 N.E.2d at 646.

{¶83} Near the end of the State's case, Juror Number 471 informed the Court that he could not be fair and impartial. He repeatedly stated that he was biased. (7T. at 11-17). Specifically, he indicated that he, like the victim, had been involved in an extramarital affair. (Id. at 18). He stated, "I knew it couldn't go on because I knew something like this could happen." (Id. at 20). He further stated, "I just feel I could be the one dead right now." (Id. at 17). Appellant's trial counsel moved to excuse Juror Number 471 for cause and the state agreed. (7T. at 25).

{¶84} A trial judge is empowered to exercise "sound discretion to remove a juror and replace him with an alternate juror whenever facts are presented which convince the trial judge that the juror's ability to perform his duty is impaired." *State v. Hopkins* (1985), 27 Ohio App.3d 196, 198, 500 N.E.2d 323, citing *United States v. Spiegle* (C.A.5, 1979), 604 F.2d 961, 967; *State v. Sikola*, Richland App. No. 06CA72, 2008-Ohio-843 at ¶ 39. Put differently, the court has authority to replace jurors with alternates when the jurors "become or are found to be unable or disqualified to perform their duties." Crim.R. 24(F); see, also, R .C. 2945.29. The trial court has discretion to determine when the appropriate alternate should replace a reportedly disabled juror before deliberations begin. *State v. Sallee* (1966), 8 Ohio App.2d 9, 220 N.E.2d 370. Absent a record showing that the court abused that discretion which resulted in prejudice to the defense, the regularity of the proceedings is presumed. *Beach v. Sweeney* (1958), 167 Ohio St. 477, 150 N.E.2d 42. See also, *State v. Shields* (1984), 15 Ohio App.3d 112, 472 N.E.2d 1110.

{¶85} In *Remmer*, the Supreme Court held that when the parties discover improper contacts with a jury after the verdict, the trial court must conduct a hearing to

determine the effect of those contacts. However, cases that are more recent have determined that the complaining party must show actual prejudice. See *Smith v. Phillips* (1982), 455 U.S. 209, 215, 102 S.Ct. 940, 945, 71 L.Ed.2d 78, 85; *United States v. Olano* (1993), 507 U.S. 725, 738, 113 S.Ct. 1770, 1780, 123 L.Ed.2d 508, 522; *United States v. Sylvester* (C.A.5, 1998), 143 F.3d 923, 934. The case at bar is not a case of extraneous contact or extraneous juror influence. An “extraneous influence” is “one derived from specific knowledge about or a relationship with either the parties or their witnesses.” *United States v. Herndon* (6th Cir 1998), 156 F.3d 629, 636.

{¶186} In support of his position the trial court was required to conduct a *Remmer* hearing, Appellant cites *United States v. Davis*, 177 F.3d 552, 1999 Fed.App. 0184P, in which the United States Court of Appeals for the Sixth Circuit addressed the issue of whether a trial court should conduct a *Remmer* hearing in a case of alleged juror misconduct. In *Davis*, a juror requested he be removed from service out of fear of retaliation. The *Davis* juror did not discreetly bring his concerns to the attention of the trial court, but instead stood up in open court and "requested to be excused from deciding the fate of the defendants." *Id.* at 556. The trial court subsequently questioned the juror who acknowledged he had shared his concerns with the other member of the jury. *Id.* We find *Davis* to be distinguishable from the case sub judice. In the instant action, there is no evidence of similar juror conduct. Furthermore, in order to have a valid claim in a *Remmer* situation, a defendant must show actual prejudice. *State v. Hessler*, 90 Ohio St.3d 108, 121, 734 N.E.2d 1237, 2000-Ohio-30 (Citations omitted). Appellant does not affirmatively demonstrate how he has been prejudiced by the trial court's failure to conduct a *Remmer* hearing. The record does not evidence Juror 28

shared his concerns with any other juror. Unlike *Davis*, Juror 471's disclosure was not made in open court in the presence of the other jurors. *Wooten*, supra at ¶37; See also, *State v. Henness* (1997), 79 Ohio St.3d 53, 65, 679 N.E.2d 686, 697, 1997-Ohio-405. [“Appellant faults the court for failing to question each juror individually. However, he did not ask the court to do so. Moreover, the scope of voir dire is within the trial court's discretion, *State v. Webb*, 70 Ohio St.3d at 338, 638 N.E.2d at 1035, and we find no abuse of this discretion.”].

{¶87} Appellant does not present any record evidence that establishes the alleged error changed the outcome of his trial.

{¶88} Appellant's second assignment of error is overruled.

III.

{¶89} In his third assignment of error, Lewers argues that the trial court erred when it denied his request to instruct the jury on voluntary and involuntary manslaughter. We disagree.

{¶90} “[A]fter arguments are completed, a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.” *State v. Comen* (1990), 50 Ohio St. 3d 206, paragraph two of the syllabus. If a requested instruction contain a correct, pertinent statement of the law and is appropriate to the facts, the instruction must be included, at least in substance. *State v. Nelson* (1973), 36 Ohio St. 2d 79, paragraph one of the syllabus.

{¶91} However, the corollary of this maxim is also true. It is well established that the trial court will not instruct the jury where there is no evidence to support an issue.

Riley v. Cincinnati (1976), 46 Ohio St.2d 287, 75 O.O.2d 331, 348 N.E.2d 135; *Murphy v. Carrollton Manufacturing Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828, 832.

"In reviewing a record to ascertain the presence of sufficient evidence to support the giving of an * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 275 N.E.2d 340, at syllabus; *Murphy v. Carrollton Manufacturing Co.*, supra; *State v. Coleman*, 6th Dist. No. S-02-41, 2005-Ohio-318 at ¶12.

{¶192} "Ohio law permits a trier of fact to consider three types of lesser offenses when determining a defendant's guilt: '(1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; or (3) lesser included offenses.' *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph one of the syllabus, construing R.C. 2945.74 and Ohio Crim.R. 31(C)". *Shaker Heights v. Mosely*, 113 Ohio St.3d 329, 332, 2007-Ohio-2072 at ¶ 10, 865 N.E.2d 859, 862-863.

{¶193} In determining whether an offense is a lesser included offense of another, a court shall consider whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense, and whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed. (*State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, clarified.) *State v. Evans*, 122 Ohio St.3d 381, 381, 911 N.E.2d 889, 890, 2009-Ohio-2974 at paragraph 2 of the syllabus.

{¶94} The evidence in a particular case is relevant in determining whether a trial judge should instruct the jury on the lesser-included offense. If the evidence is such that a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser-included offense, then the judge should instruct the jury on the lesser offense. *State v. Shane* (1992), 63 Ohio St.3d 630, 632-633, 590 N.E.2d 272.

{¶95} "Even though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus. In making this determination, the court must view the evidence in a light most favorable to defendant. *State v. Smith* (2000), 89 Ohio St.3d 323, 331, 731 N.E.2d 645; *State v. Wilkins* (1980), 64 Ohio St.2d 382, 388, 18 O.O.3d 528, 415 N.E.2d 303.

{¶96} Nevertheless, an instruction is not warranted every time any evidence is presented on a lesser-included offense. There must be "sufficient evidence" to "allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included (or inferior-degree) offense." (Emphasis sic.) *State v. Shane*, 63 Ohio St.3d at 632-633, 590 N.E.2d 272; *State v. Conway*, 108 Ohio St.3d at 240,842 N.E.2d at 1027, 2006-Ohio-791 at ¶134. (Emphasis in original).

{¶97} Voluntary manslaughter is defined in R.C. 2903.03(A):

{¶98} "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim

that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another[.]"

{¶199} Voluntary manslaughter is not a lesser-included offense of murder, but rather is an inferior degree of murder. *State v. Tyler* (1990), 50 Ohio St.3d 24, 36, 553 N.E.2d 576, superseded by constitutional amendment in part on other grounds *State v. Smith* (1997), 80 Ohio St.3d 89, 103 at n. 4, 684 N.E.2d 668, 684. (Citations omitted).

{¶100} Nonetheless, when determining whether an instruction on voluntary manslaughter should have been given, we apply the same test utilized when determining whether an instruction on a lesser-included offense should have been given. *State v. Shane* (1992), 63 Ohio St.3d 630, 632, 590 N.E.2d 272. An instruction on voluntary manslaughter is appropriate when "the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter." *Id.* See also, *State v. Horton*, Stark App. No. 2007-CA-00085, 2007-Ohio-6469 at ¶ 86.

{¶101} "Before giving a jury instruction on voluntary manslaughter in a murder case, the trial judge must determine whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction." *Shane*, at paragraph one of the syllabus. "The trial judge is required to decide this issue as a matter of law, in view of the specific facts of the individual case. The trial judge should evaluate the evidence in the light most favorable to the defendant, without weighing the persuasiveness of the evidence." *Id.* at 637, citing *State v. Wilkins* (1980), 64 Ohio St.2d 382, 388. "An inquiry into the mitigating circumstances

of provocation must be broken down into both objective and subjective components." *Shane*, at 634.

{¶102} When determining whether provocation was reasonably sufficient to induce sudden passion or sudden fit of rage, an objective standard must be applied. *Id.* "For provocation to be reasonably sufficient, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Id.* at 635. Thus, the court must furnish "the standard of what constitutes adequate provocation, i.e., that provocation which would cause a reasonable person to act out of passion rather than reason." (Citations omitted.) *Id.* at 634, fn. 2. "If insufficient evidence of provocation is presented, so that no reasonable jury would decide that an actor was reasonably provoked by the victim, the trial judge must, as a matter of law, refuse to give a voluntary manslaughter instruction." *Shane*, at 364. The subjective component of the analysis requires an assessment of "whether this actor, in this particular case, actually was under the influence of sudden passion or in a sudden fit of rage." *Id.* "Fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." *State v. Mack* (1998), 82 Ohio St.3d 198, 201.

{¶103} The trial court should have given an instruction on voluntary manslaughter if the evidence presented at trial demonstrated that appellant had killed Mr. Cole while under the influence of a sudden passion or fit of rage caused by provocation from Mr. Cole that was serious enough to incite him into using deadly force. In this case, appellant suggests the there was an argument between these two individuals that was so loud that Shawna Lewers could hear their voices coupled with

the fact that appellant had seen evidence of his wife's infidelity and had never reacted in any way in the past supported the conclusion that Mr. Cole provoked appellant.

{¶104} However, any provocation by the victim must be sufficient to arouse the passions of an ordinary person beyond his or her control. *Shane*, 63 Ohio St.3d at 634-35, 590 N.E.2d 272. The provocation must be reasonably sufficient to incite the defendant to use deadly force. *Id.* at 635, 590 N.E.2d 272. Mere words do not constitute sufficient provocation in most situations. *Id.* at 637, 590 N.E.2d 272.

{¶105} Appellant concedes that he had never reacted with anger or violence to Shawna's infidelity. Thus by his own argument, appellant was not enraged nor incited to a sudden fit of passion by the fact of Shawna's infidelity. Further, there was no evidence presented at trial that Mr. Cole provoked appellant in any regard.

{¶106} Based on the foregoing, we conclude that the trial court did not err in not instructing the jury on the issue of voluntary manslaughter.

{¶107} Involuntary manslaughter is a lesser-included offense of aggravated murder. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph one of the syllabus. The difference between the two offenses is the mental state of the accused. Aggravated murder under R.C. 2903.01(A) requires a purpose to kill, with prior calculation and design, while involuntary manslaughter requires only that the killing occur as a proximate result of committing or attempting to commit a misdemeanor or a felony. R.C. 2903.04(A); *Thomas* at 216-217, 533 N.E.2d 286; *State v. Conway*, 108 Ohio St.3d 214, 842 N.E.2d 996, 2006-Ohio-791, at ¶ 130.

{¶108} The predicate offense for aggravated murder as charged in the case at bar was aggravated burglary pursuant to R.C. 2911.11(A) (1) and (A)(2). Appellant

argues, however, that the evidence reasonably could support the conclusion Mr. Cole's death occurred during the commission of misdemeanor criminal trespass rather than aggravated burglary.

{¶109} Specifically, appellant argues,

{¶110} “When considered in the light most favorable to the Appellant, a jury could reasonably conclude that, based upon the fact the Appellant did not have his gun drawn when he entered the house, that some rounds fired at a close range struck Mr. Cole's hand and arm, and the State's expert admission that Mr. Cole could have been falling when he was struck in the back of the neck, the Appellant did not purposely cause the death of Mr. Cole, but rather recklessly did so during a struggle over the weapon.” (Appellant's Brief at 31).

{¶111} Appellant has not cited to any other evidence that the shooting was unintentional.

{¶112} There was no evidence presented at trial, however, that the men struggled for control of the gun. Appellant entered Mr. Cole's home with a deadly weapon in his possession. That appellant shot Mr. Cole five times and that the final shots were fired at defenseless victim and at close range belie his denial of a purpose to kill. See, e.g., *State v. Raglin* (1998), 83 Ohio St.3d 253, 257-258, 699 N.E.2d 482; *State v. Sheppard* (1998), 84 Ohio St.3d 230, 236-237, 703 N.E.2d 286; *State v. Palmer*, 80 Ohio St.3d at 562-563, 687 N.E.2d 685; *State v. Conway*, 108 Ohio St.3d 214, 842 N.E.2d 996, 2006-Ohio-791, at ¶ 130.

{¶113} Based on the foregoing, we conclude that the trial court did not err in not instructing the jury on the issue of involuntary manslaughter.

{¶1114} Appellant's third assignment of error is overruled.

IV.

{¶1115} In his fourth assignment of error, appellant argues that the prosecutor engaged in misconduct by failing to disclose damaging expert opinion. Specifically, he complains that the prosecutor, before trial, did not disclose that Michael Short had arrived at a new conclusion regarding appellant's position when he shot Mr. Cole in the back of the neck. Appellant notes that the expert informed the prosecutor of his specific findings but allegedly left only a vague phone message for defense counsel.

{¶1116} Crim. R. 16(B)(1)(d) requires the state to disclose the results or reports of scientific tests made in connection with the case that are known or by due diligence may become known to the prosecutor.

{¶1117} While Crim.R. 16(B)(1)(d) undoubtedly requires the State to disclose existing "reports of * * * scientific tests or experiments," the rule does not compel the State to generate reports that are not already in existence for the benefit of a defendant. See, e.g., *State v. Daws* (1994), 104 Ohio App.3d 448, 472, 662 N.E.2d 805 (holding that the State is not required to prepare a report detailing mental examinations conducted by psychologists retained by the prosecuting attorney). Consequently, the State's responsibility for disclosure is fulfilled when all existing documents connected with a scientific evaluation are provided to the defense. See *id.* at 473, 662 N.E.2d 805. The burden of disclosure does not extend to material upon which a report is based. *State v. Robertson* (May 26, 1994), Knox App. No. 92-CA-21, unreported, 1994 Ohio App. LEXIS 2422, at *6-7. Expert testimony that is not contained in any existing report does not fall within the scope of Crim.R. 16(B)(1)(d). See *State v. Blankenship* (Dec. 9,

1998), Summit App. No. 18871, unreported, at 15. See, also, *State v. Crowe* (July 22, 1992), Lorain App. No. 91CA005239, unreported, at 5 (concluding that a trial court did not abuse its discretion by declining to impose Crim.R. 16 sanctions in the absence of written test results).

{¶118} Similarly, Crim.R. 16(B)(1)(e) requires the disclosure of potential witness names, not the substance of their testimony. *State v. Volgares* (May 17, 1999), Lawrence App. No. 98CA6, unreported, 1999 Ohio App. LEXIS 2356 at *55. The mere fact that Defendant was unaware of Dr. Challenger's opinion with respect to the significance of Exhibit 77 would not, in and of itself, provide grounds for excluding his testimony. See *State v. Goble* (1982), 5 Ohio App.3d 197, 198, 450 N.E.2d 722.” *State v. Iacona*(March 15, 2000), Medina App. No. CA 2891-M. (Internal quotation marks omitted).

{¶119} In the case at bar, the trial court noted that the prosecutor was not present when defense counsel met with Mr. Short. The court therefore ruled that the state had not violated any rule of discovery and the expert's opinion could vary depending on the information he was provided so long as it was not the result of a test or experiment. There does, however, appear to have been an element of gamesmanship involved by the State. The prosecutor apparently learned of the change in Mr. Short's opinion when he later met with Mr. Short. In fact, recent amendments to the Rules of Criminal Procedure are aimed at precisely this situation. Rule 16 (K) has been amended, effective July 1, 2001 to provide:

{¶120} “(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis,

conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial." Thus, neither party can elicit expert opinions not contained within the expert's written report that has been disclosed to the opposing party.

{¶121} However, this does not end our inquiry. We find the admission of this evidence under the facts of the case at bar did not affect appellant's substantial rights.

{¶122} In *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, the Ohio Supreme Court recognized that "[i]n *Arizona v. Fulminante* (1991), 499 U.S. 279, 306-312, 111 S.Ct. 1246, 113 L.Ed.2d 302, the United States Supreme Court denominated the two types of constitutional errors that may occur in the course of a criminal proceeding--'trial errors,' which are reviewable for harmless error, and structural errors, which are per se cause for reversal. * * * Trial error is error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. * * * Structural errors, on the other hand, defy analysis by 'harmless error' standards because they affect the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself. [*Fulminante*] at 309 and 310, 111 S.Ct. 1246, 113 L.Ed.2d 302. Consequently, a structural error mandates a finding of per se prejudice." *Fisher* at ¶ 9.

(Internal quotation marks omitted). See, also, *State v. Wamsley*, 117 Ohio St.3d 388, 884 N.E.2d 45, 2008-Ohio-1195 at ¶ 15. In *Wamsley*, the Ohio Supreme Court noted,

¶123 “We have previously held that if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis. *State v. Hill* (2001), 92 Ohio St.3d 191, 197, 749 N.E.2d 274), quoting *Rose v. Clark* (1986), 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460. Moreover, as we stated in *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, [c]onsistent with the presumption that errors are not structural, the United States Supreme Court ha[s] found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases. *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel)); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction).” *Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 18, quoting *Neder v. United States* (1999), 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35.” *State v. Wamsley*, supra 117 Ohio St.3d at 391-392, 884 N.E.2d at 48-49, 2008-Ohio-1195 at ¶ 16. [Internal quotation marks omitted].

{¶124} In *Wamsley*, supra, the Ohio Supreme Court further noted, “this court has rejected the concept that structural error exists in every situation in which even serious error occurred. See *State v. Hill*, 92 Ohio St.3d at 199, 749 N.E.2d 274, quoting *Johnson v. United States*, 520 U.S. at 466, 117 S.Ct. 1544, 137 L.Ed.2d 718.

{¶125} In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings. Crim.R. 52(A), which governs the criminal appeal of a non-forfeited error, provides that “[a]ny error * * * which does not affect substantial rights shall be disregarded.” (Emphasis added.) Thus, Crim.R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an “error”- i.e., a “[d]eviation from a legal rule.” *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770, 123 L.Ed.2d 508. Second, the reviewing court must engage in a specific analysis of the trial court record-a so-called “harmless error” inquiry-to determine whether the error “affect[ed] substantial rights” of the criminal defendant. In *United States v. Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333, the Court defined the prejudice prong of the plain error analysis. “It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding. See *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991) (giving examples). Otherwise, relief for error is tied in some way to prejudicial effect, and the standard phrased as ‘error that affects substantial rights,’ used in Rule 52, has previously been taken to mean error with a prejudicial effect on the outcome of a judicial proceeding. See *Kotteakos v. United States*, 328 U.S. 750 (1946). To affect “substantial rights,” ..., an error must have

“substantial and injurious effect or influence in determining the ... verdict.” *Kotteakos*, supra, at 776.” *United States v. Dominguez Benitez*, supra 542 U.S. 74, 81, 124 S.Ct. at 2339. See, also, *State v. Barnes* (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240; *State v. Fisher*, 99 Ohio St.3d 127, 129, 2003-Ohio-2761 at ¶ 7, 789 N.E.2d 222, 224-225. Thus, a so-called “[t]rial error” is “error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” *Fulminante*, 499 U.S. at 307-308, 111 S.Ct. 1246, 113 L.Ed.2d 302. *State v. Naugle* (2009), 182 Ohio App.3d 593, 913 N.E.2d 1052, 2009-Ohio-3268 at ¶ 16. (Citing *State v. Ahmed*, Stark App. No. 2007-CA-00049, 2008-Ohio-389).

{¶126} The application of the harmless error rule is simple if, in the absence of all erroneously admitted evidence, there remains "overwhelming" evidence of guilt. *State v. Morris*, Medina App. No. 09CA0022-M, 2010-Ohio-4282 at ¶36. Where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless “beyond a reasonable doubt” if the remaining evidence alone comprises “overwhelming” proof of defendant's guilt. *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983) (quoting *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969)).

{¶127} In the case at bar, Shawna Lewers saw appellant shoot twice while standing over Cole. Further, appellant did not request a continuance due to the information Mr. Short provide at trial. Dr. Murthy also testified concerning the position of the appellant and Mr. Cole at the time the fatal shots were fired.

{¶128} We have reviewed the record and we find there is no reasonable probability that Mr. Short's testimony concerning the position of the shooter or the victim contributed to the accused conviction. Accordingly, appellant's substantial rights were not violated by the admission of Mr. Short's testimony concerning the position of the appellant and Mr. Cole at the time the fatal shots were fired.

{¶129} Appellant's fourth assignment of error is overruled.

V.

{¶130} In his fifth assignment of error, appellant maintains that his convictions are against the weight of the evidence and are based upon insufficient evidence. We disagree.

{¶131} Appellant argues that the state failed to prove he intended to cause Mr. Cole's death. In support of his argument, he cites inconsistencies in the testimony of the state's witnesses and attacks their credibility.

{¶132} Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, *State v. Jenks* (1991), 61 Ohio St. 3d 259.

{¶133} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce

evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶134} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St. 3d 387, citations deleted. On review for manifest weight, a reviewing court is “to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses’ demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶135} In *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541, the Ohio Supreme Court held “[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary.” *Id.* at paragraph three of the syllabus. However, to “reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three

judges on the court of appeals panel reviewing the case is required." *Id.* at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498

{¶136} The thrust of appellant's argument is that the state failed to prove he purposely killed Mr. Cole. R.C. 2901.22 Culpable mental states, provides:

{¶137} "(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

{¶138} } "Intent need not be proven by direct testimony. *State v. Lott* (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293, 302. Instead, intent to kill 'may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound.' *State v. Robinson* (1954), 161 Ohio St. 213, 53 O.O. 96, 118 N.E.2d 517, at paragraph five of the syllabus; *State v. Eley* (1996), 77 Ohio St.3d 174, 180, 672 N.E.2d 640, 648". *State v. Stallings* (2000), 89 Ohio St.3d 280, 290, 2000-Ohio-159, 731 N.E.2d 159,171.

{¶139} The specific intent to kill may be reasonably inferred from the fact that a firearm is an inherently dangerous instrument, the use of which is likely to produce death. *State v. Mackey* (1999), Cuyahoga App. No. 75300, dismissed, appeal not allowed (2000), 88 Ohio St.3d 1496, 727 N.E.2d 920, citing *State v. Widner* (1982), 69 Ohio St.2d 267, 431 N.E.2d 1025 (finding purpose to kill in passenger's firing gun at individual from moving vehicle); *State v. Dunlap* (1995), 73 Ohio St.3d 308, 316, 652

N.E.2d 988, certiorari denied (1996), 516 U.S. 1096, 116 S.Ct. 1096, 133 L.Ed.2d 765. *State v. Banks*, 10th Dist. No. 01 AP-1179, 2002-Ohio-3341 at ¶ 24.

{¶140} “[T]he act of pointing a firearm and firing it in the direction of another human being is an act with death as a natural and probable consequence.” *State v. Turner* (1997), Franklin App. No. 97APA05-709, dismissed, appeal not allowed (1998), 81 Ohio St.3d 1496, 691 N.E.2d 1058 (finding sufficient evidence of intent to kill in firing a gun from an automobile at a group of individuals), quoting *State v. Brown* (1996), Cuyahoga App. No. 68761, dismissed, appeal not allowed, 77 Ohio St.3d 1468, 673 N.E.2d 135; see, also, *State v. Smith* (1993), 89 Ohio App.3d 497, 501, 624 N.E.2d 1114 (finding that pointing a gun at a group of people less than twenty feet away and shooting at least one shot could be used by the trier of fact as proof of intention to kill). *Banks*, supra, at ¶ 26.

{¶141} In the case at bar, the evidence is undisputed that appellant fired five shots in the direction of Mr. Cole from a short distance away. Viewing this evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed the crimes charged.

{¶142} Appellant cross-examined the State's witnesses in an attempt to show the inconsistencies in the various statements. Further, appellant attempted to demonstrate that the firing of the gun was provoked or as a result of sudden passion or fit of rage at the infidelity of his wife. Appellant argued that he contradicted the State's inference that he purposely caused the victim's death. However, the jury was free to accept or reject any and all of the evidence offered by the appellant and assess the witness' credibility.

“While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence”. *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236. Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke*, Franklin App. No. 02AP1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

{¶143} We conclude the jury, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial. Viewing this evidence in a light most favorable to the prosecution, we further conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant purposely caused the death of Mr. Cole. Accordingly, appellant's conviction for murder was not against the manifest weight of the evidence.

{¶144} Appellant's fifth assignment of error is overruled.

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

By Gwin, P.J.,
Farmer, J., and
Wise, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JOHN W. WISE

WSG:clw 1025

