

Delaney, J.

{¶1} Appellant Michael Andrew Hewitt appeals his conviction and sentence upon one count of murder with a firearm specification entered in the Stark County Court of Common Pleas on April 25, 2014. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arises from the murder of William Johnson in the parking lot of a Canton mosque on August 31, 2013. The following is adduced from the trial record.

August 30, 2013: Appellant Damages a Car

{¶3} In August 2013, appellant lived at 820 Milton Court NW, Canton, with roommate Jeremy Laird, Laird's girlfriend, and their two children. Next door, at 822 Milton Court NW, lived roommates Cortney Jackson ("Cortney") and William Johnson ("Johnson"), known as "Pie," along with two other roommates and their children. The residents of both homes were friendly with each other. Appellant was briefly involved in a relationship with Cortney.

{¶4} On Friday, August 30, 2013, Cortney and Laird got into an argument over money and Laird drew appellant into the argument. Cortney recently brought home a new car and in the course of this argument, appellant jumped onto the roof of the car and "stomped" on it, running up and down the length of the car and attempting to kick off the side mirrors.

{¶5} Laird testified Johnson remained inside the house during the argument and car-stomping. Cortney testified that Johnson witnessed the episode along with all of her roommates but did not get involved, stating only "Dude, that's not cool, why are you doing that?"

{¶6} Cortney called the police and made a report for criminal damaging. She testified appellant left the scene before the police arrived, driving off on a “mini bike.”

***August 30 and August 31, 2013: Appellant's
Movements via Text Messages***

{¶7} Admitted without objection was State’s Exhibit 7, a disk containing hard copies of all of the data extracted from appellant’s cell phone, including text messages, videos, web histories, etc. A detective also read from State’s Exhibit 20, a printed-out hard copy of appellant’s texts sent and received in the aftermath of the car-stomping episode on August 30. (Appellant still has a California number and cell phone service; thus the time of the texts is not Eastern Standard Time.) The following evidence is adduced from the text messages read at trial.

{¶8} On August 30, 2013, after the criminal damaging incident, appellant skipped work. He texts his boss, Dina Tozzi, to tell her he has “some issues” going on and as a result he will be unable to come to work and he apologizes for “letting her down on a Friday.”

{¶9} Appellant tells his brother D.H.,¹ among others, that Cortney called the police because he stomped on her car. In response to D.H., appellant texts “Yep...drama. I did it in front of pie and britt. Pie didn wanna get involved Britt jus yelled to get down. I guess after I smashed off pie wanted to talk shit n they all sayin they getn some Chicago niggas on me lol.” (*Sic* throughout). In response to someone asking what he did to the car, appellant responds, “Lmao ya got on her shit for hella long y they all watched They talkin bout having Chicago niggas come blaze me lol. Talk

¹ Appellant’s brother D.H. is a minor and was subpoenaed by appellee.

talk talk I hada show em wassup.” (*Sic* throughout). Later, appellant asks D.H. if he can spend the night at the home of D.H. and their father: “* * * I’m layin low cause Jeremy doesn’t want funk over there. I might come stay with yal if dad aient trippn.” (*Sic* throughout).

{¶10} Someone named “Scandra” asks, “U think she’s gonna snitch? Or u only have to worry about Chicago niggas lol.” Appellant responds in two separate texts. First, “She already had the cops come I guess they took a lil report n bounced I’m still layin low for the weekend have some fun see what happens;” and, “I got somewhere to stay n I got my heat.”

{¶11} Appellant worked on August 31, 2013 and left between 8:10 and 8:15 p.m. At 8:23 p.m. Eastern Time on August 31, appellant texts D.H. and states, “I’m walk-in home now.” One minute later, D.H. texts, “Hit up worm he’s bout to go to Walmart soon?” and at 8:41 p.m. from 330-546-5324 (an unidentified caller), “J?” The last two texts are “unread” and the text history stops there.

The Evidence Corresponds to the Texts: August 31, 2013

{¶12} Appellant went to work at Tozzi’s Downtown on the evening of Saturday, August 31, 2013. He arrived at 5:00 p.m. At 7:45 p.m., his boss gave him the option of leaving and testified appellant left somewhere around 8:10 to 8:15 p.m. She said appellant usually brought a backpack to work with him but she didn’t think he had it that night. When she last saw appellant, he was wearing black or dark grey pants that ended just below the knee, black boots, and a white button-down shirt with a blue pinstripe.

L.M. Witnesses a Fight and a Murder

{¶13} Sometime after 8:00 p.m., a female neighbor, L.M., called 911 to report two men were fighting in the parking lot of a mosque located near the corner of 7th and Brown Streets N.W., Canton. L.M. testified the fight began on the corner and moved into the parking lot, under a tree. She saw one man lift his shirt up and flash a gun, which he then tried to get out of his pants. L.M. laid on the floor, still talking to the 911 operator, and heard two shots fired. She looked out again and saw one man, alone, lying in the parking lot under the tree. The man on the ground was black.

{¶14} L.M. described the men fighting as a white man and a black man. At trial, she said “I thought [the shooter] was white then,” explaining she learned from news reports the suspect was biracial. She said the “brighter-skinned” guy was the one with the gun. He had curly light-brown hair to his shoulders and was wearing a white “button-up” shirt. The gun she saw was silver or gray but not black because she recalled it was “bright.”

{¶15} L.M.’s 911 call was played at trial as State’s Exhibit 1.

E.F. Sees a Young Man Run Away

{¶16} A male neighbor, E.F., was on his porch on Brown Street when he heard what he thought were fireworks coming from the area of the mosque. He observed a young man with light skin and dark brown hair running very fast from the direction of the mosque, heading west on 7th Street on the other side of the road from E.F. He said the young man wore a loose-fitting tank top and shorts.

{¶17} E.F. walked toward the mosque and saw a man laying on the ground. He ran up to the man and saw he had been shot in the face. E.F. called 911 and the

dispatcher said they were already aware of the shooting. Police arrived on the scene moments later. E.F. told police the man ran toward McGregor Street, “into darkness” because the street is not lit.

{¶18} While police worked at the crime scene in the mosque parking lot, E.F. saw what he believed to be the same young man walk up toward the scene several times and then retreat. The young man then entered some shrubs and trees by a wood-processing factory and E.F. heard a "lawnmower" start up. The young man came out from the shrubbery on what E.F. described as a “homemade moped” which made the lawnmower noise.

{¶19} E.F. described the young man as having straight hair, wearing a hat, and with a scraggly beard. He was not asked to look at a photo lineup because he told police he would not recognize the man again. At trial, E.F. identified appellant as the young man he saw the night of the murder, although he acknowledged he looked “different” than he did that night. On cross examination, E.F. was shown a photograph of appellant taken very soon after the murder and agreed appellant has curly hair in the photo, thus appellant was not the person he saw. (T. 479-480).

Police Quickly Arrive on the Scene and Find a Cell Phone

{¶20} Police were at the mosque within approximately three minutes of the 911 calls reporting shots fired. Detective Weirich of the Canton Police Department I.D. Bureau was on the scene collecting evidence when he observed a cell phone in the middle of the parking lot playing music. Weirich testified the phone was face-down and playing music continuously; he picked it up, turned it over, and read the screen saver: “Michael Hewitt.” Police also collected a black t-shirt from the roadway.

{¶21} Witnesses including L.M. and E.F. came forward and reported what they saw.

{¶22} Weirich reported the name on the cell phone to Detective Prince, who looked up the name in Canton Police databases and discovered a “Michael Hewitt” who lived at 1222 Ford N.W., Canton, but did not match the description of the suspect. Prince learned Michael Hewitt Sr. had a son with the same name, appellant, who was named in an incident report from the previous day: the criminal damaging to Cortney’s car.

{¶23} Prince learned appellant lived next door to Cortney at 820 Milton N.W. with Jeremy Laird, who drove a green minivan. Police immediately went to appellant’s address and observed the green minivan, driven by Laird, appear a few minutes later. Prince testified Laird was “acting peculiar” and going in and out of the house. Police approached to make contact with Laird. As they did so, they noticed a commotion from next door at 822 Milton N.W., as occupants learned Johnson had been shot and killed. Police told Laird they were looking for appellant and Laird said he had just dropped appellant off around the corner on 7th Street N.W.

{¶24} Police thought appellant might have gone to his father’s house at 1222 Ford Court N.W. and eventually found him there. Appellant was brought in to the Canton Police Department around 1:20 a.m. in the morning.

The Search Warrants: Firearms Found, but not the Murder Weapon

{¶25} In the meantime, Laird gave police permission to search the residence and they obtained a search warrant for the basement area where appellant lived. Police discovered and photographed a number of firearms throughout the residence. A search

warrant was also obtained for appellant's father's residence at 1222 Ford Court N.W. Police photographed several firearms and where they were found.

{¶26} Police suspected a revolver was used in the murder because no shell casings were discovered at the scene and a revolver, when fired, does not spit out a shell casing; casings must be manually ejected. No revolvers were recovered from either house. At trial, a criminalist from the Stark County Crime Lab testified that he tested six firearms recovered in this case for operability; all were operable but none were revolvers and none were involved in the murder. Thus, the criminalist concluded, because no shell casings were recovered, the scene was pristine, and there was no time for the shooter to pick up any shell casings, the murder weapon was most likely a revolver. The murder weapon was never found.

{¶27} The criminalist examined pieces of jacketed hollow-point bullets recovered from the autopsy of the victim. Both came from the same firearm, likely a .38 special caliber firearm manufactured by Smith and Wesson or SportsArms or a .357 magnum revolver manufactured by Smith and Wesson, Ruger, or Taurus. No such weapon was located. The criminalist was shown State's Ex. 8-C, a photograph of several firearms taken from appellant's cell phone. The criminalist testified he could not determine whether the gun in the photo fired the bullets without actually having the gun to examine.

Appellant's Actions upon Arrest

{¶28} Appellant was arrested for the criminal damaging offense from the day before and brought into an interview room at the Canton Police Department in handcuffs. Sgt. Prince told appellant he would be obtaining a search warrant for a

D.N.A. standard from appellant and also for a gunshot residue test (G.S.R.). Upon learning of the impending G.S.R. test, appellant wiped his hand on the hospital gown he was wearing.

{¶29} Prince advised appellant of his Miranda rights; appellant requested counsel and declined to make a statement.

{¶30} Police photographed appellant and observed scratches to his trunk and face, redness on his face, and injuries to his hands. The D.N.A. standard was also obtained.²

D.N.A. Evidence Ties Appellant to Johnson and the Scene

{¶31} Victim William “Pie” Johnson received two separate shotgun wounds with two entrance wounds and no exit wounds: one to his right thigh and one to the left side of his head. The coroner observed stippling to the head wound indicating the firearm was approximately two and a half to four inches away when it was fired. The coroner did not observe any other signs of injury to Johnson.

{¶32} A forensic scientist from B.C.I. analyzed the D.N.A. evidence in the case. Appellant’s D.N.A. was found on the inside collar of the black t-shirt collected from the scene. She found D.N.A. consistent with appellant and Johnson under Johnson’s right fingernails. D.N.A. under Johnson’s left fingernails contained a mixture from Johnson and another unknown individual.

Laird's Account of Appellant's Movements on August 31, 2013

{¶33} Laird testified as a witness for appellee. He said he saw appellant before work that night and then again between 11:30 p.m. and midnight; appellant wore no

² The record is devoid of any mention whether a G.S.R. test was performed on appellant and any result.

shirt, black work shorts, no shoes, and tube socks. They planned to return to their house to "smoke weed" and drove together in Laird's green minivan. Laird testified that he and appellant were driving home when appellant mentioned he lost his cell phone on 7th Street. He didn't say how he lost the phone but he and Laird cursorily looked for it from the windows of the van. Laird dropped appellant off a short distance from the house to avoid "drama" with the neighbors and was then intercepted by police.

{¶34} Laird testified that the firearms found at 820 Milton were appellant's, not his, and that appellant usually kept them in his bedroom but lately had them scattered throughout the house for "protection." Laird agreed that appellant sometimes carried a firearm with him in a green bag. Laird was asked about a green drawstring bag that was found in his minivan; Laird said appellant had not been carrying the bag that night and the bag was not found to contain a firearm. Laird testified appellant was not agitated and had no blood on him. Laird also confirmed that appellant intended to stay at his father's residence for the time being due to the trouble with the neighbors.

Indictment, Trial, and Conviction

{¶35} Appellant was originally charged by indictment with one count of murder pursuant to R.C. 2903.02(B) and one count of felonious assault pursuant to R.C. 2903.11(A)(2). Both counts were accompanied by firearms specifications pursuant to R.C. 2941.145. A superseding indictment was filed charging appellant with one count of murder pursuant to R.C. 2903.02(A) and a firearm specification pursuant to R.C. 2941.145. Appellant entered a plea of not guilty.

{¶36} Appellant filed motions to suppress his un-Mirandized gesture while in custody, the photo line-up, and the search of his cell phone. He also filed a motion in

limine to prevent mention of the criminal damaging incident. A hearing was held on December 30, 2013; appellant withdrew the motion to suppress the photo line-up. The trial court ruled evidence of the criminal damaging incident was admissible and the gesture of wiping his hand on his clothing in response to being told of the G.S.R. test did not implicate *Miranda*.

{¶37} The case proceeded to trial by jury; the jury deadlocked, the trial court declared a mistrial, and a second trial was scheduled. In the second trial appellant was found guilty as charged. He was sentenced to an aggregate prison term of 18 years to life.

{¶38} Appellant now appeals from the judgment entry of his conviction and sentence.

{¶39} Appellant raises four assignments of error:

ASSIGNMENTS OF ERROR

{¶40} “I. THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS, THE PROBATIVE VALUE OF WHICH WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.”

{¶41} “II. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF AND ARGUMENT ABOUT ‘OTHER ACTS’ PROHIBITED BY EVIDENCE RULE 404.”

{¶42} “III. THE TRIAL COURT ERRED BY NOT GRANTING APPELLANT’S MOTION TO SUPPRESS THE GESTURES HE MADE WHILE IN CUSTODY.”

{¶43} “IV. THE TRIAL COURT’S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.”

ANALYSIS

I.

{¶44} In his first assignment of error, appellant argues the trial court erred in admitting photographs of unrelated firearms into evidence because the probative value of the photos was outweighed by the danger of unfair prejudice to appellant. We disagree.

{¶45} We begin our analysis by noting appellant has not identified the specific photos or exhibits he challenges but refers generally to photos of guns which are not the murder weapon and a photo of “appellant posing with guns.” Upon our review of the trial record, we find the following relevant exhibits were admitted by appellee:

- 1) State’s Ex. 8-C: photo from appellant’s cell phone of shotguns and black revolver
- 2) State’s Ex. 8-D: photo from appellant’s cell phone of appellant firing a revolver at a shooting range
- 3) State’s Ex. 10-A: photo from search of 820 Milton showing grill on front porch inside which was discovered ammunition unrelated to murder
- 4) State’s Ex. 10-B: photo from search of 820 Milton showing close-up of shotgun on closet shelf
- 5) State’s Ex. 10-C: photo from search of 820 Milton showing same closet in different view than above
- 6) State’s Ex. 10-D: photo from search of 820 Milton showing shotgun and blue firearm case

- 7) State's Ex. 10-E: photo from search of 820 Milton showing two shotguns laying on blue case
- 8) State's Ex. 10-F: close-up photo of gas grill on porch at 820 Milton inside which ammunition was found
- 9) State's Ex. 10-G: photo of lid of gas grill raised revealing box of "Blazer" ammunition
- 10) State's Ex. 11-B: photo of black pistol on T.V. tray found at 1222 Ford Court.
- 11) State's Ex. 11-C: close-up of black pistol above on T.V. tray found at 1222 Ford Court.
- 12) State's Ex. 11-D: shotgun and damaged target found at 1222 Ford Court.
- 13) State's Ex. 11-E: different view of T.V. tray showing black firearms case on the floor of 1222 Ford Court.

{¶46} Appellee's brief states the photo exhibits were admitted without objection, but we note the trial prosecutor refers to a hearing on a motion in limine regarding "what phone, what pictures from the gun, what pictures of guns could be used from the phone. And I specifically went through the Court and explained why I wanted the pictures that I chose, how they linked up to this particular crime." (T. 176). We have thoroughly reviewed this trial record and are unable to find this discussion, although the trial court noted immediately prior to trial all rulings in the first jury trial were incorporated into the second trial. (T. 4).

{¶47} We have not been provided with the record of the hearing on this motion in limine which may have been helpful in shedding light on appellee's purpose in admitting the photos. Providing the record is appellant's responsibility, however. In *Knapp v. Edwards Laboratories* the Ohio Supreme Court stated: "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶48} Nevertheless, even if there was a motion in limine regarding the gun photos, appellant did not renew any objection when appellee introduced the photos and has thus waived all but plain error. "In general, the ruling on a motion *in limine* does not preserve the record on appeal and an appellate court need not review the ruling unless the claimed error is preserved by an objection at trial." *State v. Pyo*, 5th Dist. Delaware No. 04CAA01009, 2004-Ohio-4768, ¶ 19, citing *State v. Grubb*, 28 Ohio St.3d 199, 503 N.E.2d 142 (1986), paragraph two of the syllabus; *State v. Leslie*, 14 Ohio App.3d 343, 344, 471 N.E.2d 503 (2nd Dist.1984); *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988), paragraph three of the syllabus; *State v. Maurer*, 15 Ohio St.3d 239, 259, 473 N.E.2d 768 (1984).

{¶49} Our standard of review in this case is therefore plain error. Criminal Rule 52(B) provides that "plain errors or defects effecting substantial rights may be noticed although they were not brought to the attention of the court." In order to prevail under a plain error analysis, appellant bears the burden of demonstrating the outcome of the trial clearly would have been different but for the error. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a

manifest miscarriage of justice. *State v. Simmons*, 5th Dist. Stark No. 2001CA00245, 2002-Ohio-3944, at ¶ 11, citing *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph 3 of the syllabus; *State v. D'Ambrosio*, 67 Ohio St.3d 185, 191, 1993-Ohio-170, 616 N.E.2d 909.

{¶50} Admission of inflammatory evidence with no legitimate probative value may contaminate the integrity of a verdict. In *State v. Hurt*, the appellant was convicted upon one count of unlawful sexual conduct with a minor and the evidence at trial established appellant, a male, engaged in sexual conduct with a male minor. 158 Ohio App.3d 671, 2004-Ohio-4266, 821 N.E.2d 1033 (2nd Dist.). Over objection, the state entered photos of male genitals found on the appellant's computer even though the photos were not probative of any issue in the case; i.e., there was no allegation these photos had been shown to the minor or were of the minor. The state argued admission of the photos was permissible under Evid.R. 613(C) as extrinsic evidence of conduct inconsistent with the testimony of a witness, offered solely for impeachment, because possession of images of men and male genitalia on his computer was inconsistent with appellant's testimony at trial. The appellate court disagreed, finding "no reasonable basis for the prosecution to have proceeded along these lines" because the photographs have no probative value as to whether Hurt engaged in sexual conduct with N.F. or any other person." Not only, therefore, were the pictures not admissible under Evid.R. 613, but "[b]ecause the verdict was based primarily on the jury's assessment of the credibility of the witnesses and because the improper admission of the pictures could have negatively affected the jurors' determination of [appellant's]

credibility, we cannot find this error to have been harmless." *State v. Hurt*, 158 Ohio App.3d 671, 2004-Ohio-4266, 821 N.E.2d 1033, at ¶ 40 (2nd Dist.).

{¶51} In this case, what we will refer to as "photos of unrelated guns" were not probative of any element in the case. Appellant did not testify and there was no claim on his behalf that he had no access to guns; in fact, Laird, D.H., and appellant's father testified that appellant, his father, and his brother owned a number of firearms. The victim was shot and killed by a revolver, and one eyewitness recalls that the revolver used was silver or otherwise "bright" and shiny and not black "because she would not have been able to see it." (T. III, 438). All of the pictured revolvers are black. Appellee's witnesses admitted there was no way to determine whether any of the revolvers pictured were the murder weapon. The question is, therefore, why did appellee admit the photos of unrelated guns?

{¶52} Here, appellee responds the photos of unrelated guns were relevant because "it was incumbent on the state to demonstrate that [appellant] was familiar with weapons, possessed them and had access to them." (Brief, 15). Appellee also asserts the gun shown in the photo of appellant at a firing range, State's Ex. 8-C, "was particularly relevant as a revolver was believed to be used in the killing of Mr. Johnson." State's Ex. 8-C was shown to L.M. and she said it was not the gun she saw used to shoot the victim (T. III, 438). The criminalist from the Stark County Crime Lab testified the revolver in State's Ex. 8-C is capable of firing the type of cartridges that killed Johnson, but without examining the weapon, he could not determine whether it is the same gun. (T. II, 331).

{¶53} We also note that the "photos of unrelated guns" include photos not depicting revolvers at all. Appellee directs our attention to *State v. Trimble*, in which the Ohio Supreme Court considered the admissibility of numerous weapons that were unrelated to the crime charged. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242. The Court disagreed with the state's arguments that the guns were relevant to show prior calculation and design and to show the appellant's familiarity with firearms; however, the Court did accept the state's argument that the unrelated weapons the appellant's possession of a large number of firearms tended to show that he was familiar with using such weapons, evidence the state could use to rebut claims he accidentally shot the victim. *Id.* at ¶ 110. The *Trimble* Court based its conclusion in part on its rationale in *State v. Kamel*, in which the issue of the defendant's drug use was put into issue by defendant, and therefore, the topic of the defendant's drug use "became open to all relevant inquiry in the discretion of the trial court." *State v. Kamel*, 12 Ohio St.3d 306, 312, 466 N.E.2d 860, (1984).

{¶54} Appellee argues appellant put his access to guns into question and points to the following in appellant's opening statement: "The issue is [appellant]--there is, obviously, at some point a gunshot. However, [appellant] didn't have a gun. [Appellant] didn't fire a gun." (T.I, 129). The defense goes on to state that appellant was at the scene and got scared and ran away, but he did not fire a gun that night. (T. I, 130). In the context of the entire opening statement, therefore, appellant was not claiming he didn't own a gun at all, only that he didn't have one with him, or use one, the night of the murder.

{¶55} The *Trimble* Court also opined that even if the evidence of other firearms should not have been admitted, the admission was harmless because there was overwhelming evidence of the appellant's guilt. *Trimble*, supra, 2009-Ohio-2961 at ¶ 110.

{¶56} In the instant case, we find the photos of other guns were not relevant to appellee's case and were not entered to rebut argument by appellant.³ The issue remaining, therefore, is whether appellant has met his burden of demonstrating the outcome of the trial clearly would have been different but for admission of the photos of other guns. We find the answer is no. Admission of the photos of other guns was therefore harmless error.

{¶57} The evidence in this case is circumstantial, but upon our review of the trial record and exhibits, we find it to be compelling. The evidence established appellant was at the scene of the murder; the defense admitted as much in opening statement. Appellant's D.N.A. was on the t-shirt found nearby and his cell phone was found at the scene. The female neighbor saw two men fighting and no one else in the area; as they fought, the "brighter-skinned man" pulled a gun from his pants and shot the black man. All of this happened within moments: the assailant drew the weapon, the witness hit the floor, and gunshots were fired. The conclusion we must draw is the person who fought with the victim is the person who shot him.

{¶58} We further conclude the evidence demonstrates appellant is the shooter. The timing of appellant's texts has him walking home at 8:23 p.m. and then the texts

³ Appellee points out appellant used the "photos of other guns" also throughout trial, but appellant was left with little choice after the photos were introduced in appellee's case in chief.

become unanswered and unread; the phone is shortly thereafter found at the scene of the murder, still playing music. The evidence supports the conclusion appellant encountered Johnson as he walked home and they fought in the mosque parking lot. This evidence is underscored by appellant's D.N.A. under the Johnson's fingernails and the photos taken of appellant shortly after arrest with injuries to his hands, face, and trunk.

{¶59} We cannot conclude that absent the photos of other guns, appellant would have been found not guilty; these are not the exceptional circumstances which would give rise to a finding of plain error. Admission of the photos was therefore harmless, and appellant's first assignment of error is overruled.

II.

{¶60} In his second assignment of error, appellant argues evidence of the criminal damaging to Cortney's vehicle was admitted in violation of Evid.R. 404(B) and R.C. 2945.59. We disagree.

{¶61} Prior to trial, appellant filed a motion in limine arguing the jury should not hear evidence of the criminal damaging to Cortney's vehicle which occurred the day before. The trial court overruled the motion, finding the incidents are related and could give rise to motive and identification of appellant as the shooter. (12/30/13 Motions, T. 17). The trial court reserved the option of making a limiting instruction as to the reason the evidence was introduced.

{¶62} We concur with the trial court. Evid.R. 404(B) states in pertinent part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible

for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. * * * *.” The Rule is in accord with R.C. 2945.59, which states:

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

{¶63} In this case, the paramount issue is the identity of the shooter, and the criminal damaging incident only one day before sets the scene for the entire episode. Appellant points out that Johnson was not involved in the criminal damaging incident and according to Laird and Cortney, either didn't witness it or was unwilling to get involved. Nevertheless, other evidence shows the criminal damaging incident gave rise to motive. Appellant's text messages establish a threat existed: he says he committed the criminal damaging in front of "Pie," and that threats were made to get "Chicago n---s" to "blaze" appellant. Appellant took this threat seriously because he planned to leave the house he shared with Laird to go to his father's, telling D.H. he needed to "lay low" for a while. Laird, too, testified that now appellant's weapons were spread around the house, instead of in his bedroom, because appellant perceived a need for protection.

Finally, appellant texted Scandra, “I got somewhere to stay n I got my heat.” It is apparent the criminal damaging incident gave rise to more hostility than the witnesses acknowledged.

{¶64} The evidence of the criminal damaging was properly admitted as proof of motive, intent, and the identity of appellant as the shooter.

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

III.

{¶66} In his third assignment of error, appellant argues the trial court should have granted his motion to suppress evidence of his hand-wiping gesture when police informed him of a possible gunshot-residue test. We disagree.

{¶67} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams*, 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶68} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See, *Williams*, supra. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry*, 95 Ohio App.3d 93, 96,620 N.E.2d 906 (8th Dist.1994).

{¶69} Appellant moved to suppress evidence of the hand-wiping gesture, arguing the gesture was a coerced "statement" in violation of his Miranda rights. Evidence at the hearing established appellant was arrested for criminal damaging and brought into an interview room in handcuffs. Sgt. Prince told appellant he would seek search warrants for appellant's D.N.A. and for a gunshot-residue test, at which point appellant wiped his right hand on his clothing. Prince testified he had not Mirandized appellant at that point because he had not asked him any questions; upon the beginning of questioning, he did Mirandize appellant and appellant immediately requested counsel. Prince's statement about the GSR test was not intended to elicit a response and Prince was merely explaining what would be happening.

{¶70} It is well-established that the state may not introduce statements of an accused unless the accused was informed of his constitutional rights to counsel and against self-incrimination and effectively waived these rights. *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, law enforcement officers need only inform the accused of these rights when the accused is subject to custodial interrogation. *Id.* The *Miranda* court defined “custodial interrogation” as “ * * * questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom to act in any significant way.” *Id.* Further, law enforcement officers need not give warnings where the accused volunteers the statements without questioning. *Id.* at 479.

{¶71} In addition, the right against self-incrimination during custody extends only to interrogation and its “functional equivalent.” *Rhode Island v. Innis* (1980), 446 U.S. 291, 301, 100 S.Ct. 1682, 1690, 64 L.Ed.2d 297, 308. The term “interrogation” refers not only to “express questioning” but also “words or actions on the part of the police * * * reasonably likely to elicit an incriminating response from the suspect.” *Id.* “Interrogation,” for purposes of *Miranda*, must reflect a measure of compulsion above and beyond that inherent in custody itself. *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980).

{¶72} The issue in this case is whether Prince should have known his statement about the G.S.R. test was reasonably likely to provoke an incriminating response. “A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the

definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301-02, 100 S.Ct. 1682, 1690, 64 L.Ed.2d 297 (1980). We find appellant's gesture in response to Prince's statement was just such an "unforeseeable result."

{¶73} We agree with the trial court that appellant's gesture was not made in response to interrogation; that is, we find the officer would not necessarily have known his statement about a pending G.S.R. test was reasonably likely to elicit an incriminating response. The trial court thus properly overruled the motion to suppress.

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

IV.

{¶75} In his fourth assignment of error, appellant argues his conviction upon one count of murder is against the manifest weight of the evidence and is not supported by sufficient evidence. We disagree.

{¶76} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry

is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.”

{¶77} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the “thirteenth juror,” and after “reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered.” *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the “exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

{¶78} Appellant points to a number of inconsistencies and gaps in the evidence. With regard to the believability of appellee's witnesses, it is axiomatic that both the weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 231, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79.

{¶79} As we have addressed in our discussion of appellant's first and second assignments of error, appellant admitted he was present at the scene. The jury could reasonably find that he was also the shooter based upon the timing of events: the 911 call indicates two men were fighting, one man shot the other, and police were on the scene very quickly. They found appellant's cell phone and his t-shirt left behind. Appellant's D.N.A. was under the victim's fingernails, sufficient evidence to allow the

jury to conclude appellant fought with the victim and shot him. Also relevant is the sense of threat appellant obviously felt, evidenced by his decision to lay low at his father's house for a few days and to keep his "heat" with him.

{¶80} We acknowledge there are questions not answered by the evidence, but this does not render the jury's verdict against the manifest weight or sufficiency of the evidence. "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. Burden*, 5th Dist. Stark No. 2011-CR-1447, 2013-Ohio-1628, ¶ 80, citing *State v. Craig*, 10th Dist. 99AP-739, 2000 WL 297252 (Mar 23, 2000).

{¶81} Upon viewing the evidence in a light most favorable to appellee, we conclude any rational trier of fact could have found the essential elements of murder with a firearms specification proven beyond a reasonable doubt. We also find the jury did not clearly lose its way and create such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered.

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

CONCLUSION

{¶83} Appellant's four assignments of error are overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J. and

Wise, P.J.

Baldwin, J., concur.