[Cite as *State v. Onunwor*, 2010-Ohio-5587.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93937

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CLIFTON ONUNWOR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517054

BEFORE: Kilbane, J., Gallagher, A.J., and Rocco, J.

RELEASED AND JOURNALIZED: November 18, 2010

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MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Clifton Onunwor ("Onunwor"), appeals his convictions for aggravated murder and tampering with evidence in connection with the September 19, 2008 shooting death of his mother, Diane Onunwor ("Diane"), at her home on 10517 Shale Avenue in Cleveland, Ohio. After reviewing the facts and the pertinent law, we affirm.

{¶ 2} On October 23, 2008, a Cuyahoga County Grand Jury charged Onunwor in a three-count indictment alleging one count of aggravated murder, a first degree felony, in violation of R.C. 2903.01, with one- and

three-year firearm specifications, and two counts of tampering with evidence, both third degree felonies, in violation of R.C. 2921.12.

{¶ 3} On July 27, 2009, the case proceeded to jury trial.

{¶ 4} On July 31, 2009, the jury returned a verdict of guilty on all counts and specifications.

{¶ 5} On August 21, 2009, on Count 1, aggravated murder, the trial court sentenced Onunwor to a life sentence without the possibility of parole, and a consecutive three-year sentence on the firearm specifications, which merged for sentencing. On Counts 2 and 3, tampering with evidence, which merged for sentencing, the trial court sentenced Onunwor to two years.

Assignment of Error No. I:

> **"The trial court violated Clifton Onunwor's rights under the fifth, sixth and fourteenth amendments of the constitution, as well as the rules of evidence, when it permitted a police witness to testify as an 'expert' concerning firearms identification evidence purportedly analyzed during the case."**

{¶ 6} In his first assignment of error, Onunwor contends the trial court erred by admitting expert forensic testimony from Cleveland Police Sergeant Nathan Willson ("Sergeant Willson"), who testified that the live rounds and spent shell casings collected in and around the murder scene were consistent with the Smith & Wesson nine millimeter firearm used in the murder of Diane Onunwor. (Tr. 650-654.) Sergeant Willson also testified that microscopic comparison testing between recovered rounds and test shots fired

from the alleged murder weapon were identical to a reasonable degree of scientific certainty. (Tr. 658-666.)

{¶ 7} Although he also alleges a constitutional deprivation in his assignment of error, Onunwor limits his discussion in the body of his appeal to the admission of Sergeant Willson's testimony under Ohio Evid.R. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469.

{¶ 8} The admission of expert testimony is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *State v. Williams* (1996), 74 Ohio St.3d 569, 576, 660 N.E.2d 724. An abuse of discretion requires more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Reiner* (2000), 89 Ohio St.3d 342, 356, 731 N.E.2d 662.

{¶ 9} In this case, Onunwor's counsel filed a motion in limine to exclude or limit expert testimony and a request for a *Daubert* hearing on April 7, 2009, which was never explicitly ruled on by the court or argued by counsel. With respect to this point, we note that "* * * it is well-settled that when a motion is not ruled on, it is deemed to be denied." *State v. Whitaker*, 8th Dist. No. 83824, 2004-Ohio-5016, ¶32. (Internal citations omitted.)

{¶ 10} Sergeant Willson was permitted to testify after an objection by defense counsel at trial. (Tr. 638.) It is clear that the objection was based

upon Sergeant Willson's qualifications, not the scientific validity of his purported conclusions.

{¶ 11} Ohio Evid.R. 702 governs the admissibility of expert testimony, which provides:

> **"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."**

{¶ 12} Onunwor first contests Sergeant Willson's qualifications as an expert witness. Sergeant Willson's qualifications as an expert in the field of firearms and in firearms examination come from his police training, as laid

out in the record, and his position as the officer in charge of the Cleveland police technical section, forensic laboratory. In support of his qualifications, he testified that he worked in the forensic laboratory of the Cleveland Police Department since 2001, that he had been through three different police academies: the Cleveland Police Academy, the National Park Service, and the Ohio Department of Natural Resources; and he received firearms training at each academy. Prior to his career as a police officer, he was employed by a small firearms retailer, where he received training from a certified gunsmith. Before being employed at the forensic laboratory, he testified that he worked under the former superintendent of the laboratory, Victor Kovacic ("Kovacic"), who was then a 40-year veteran of the Cleveland Police Department. Willson testified that he is certified as a Glock Armorer, which is the standard issue weapon used by the Cleveland Police Department, and that he is also a member of the Association of Firearms and Toolmark Examiners, or A.F.T.E.

{¶ 13} Prior to his testimony in this case, Sergeant Willson had been qualified as an expert witness over 132 times on firearms and firearms examination in state court and twice in federal court. We find no abuse of discretion in his admission as an expert.

{¶ 14} Onunwor also contests the reliability of Sergeant Willson's expert opinion. To determine the reliability of expert scientific testimony, a court must assess whether the reasoning or methodology underlying the testimony

is scientifically valid. *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 611, 687 N.E.2d 735, citing *Daubert* at 592-593. To make that assessment, several factors are to be considered: (1) whether the theory or technique has been tested; (2) whether it has been subjected to peer review; (3) whether there is a known or potential rate of error; and (4) whether the methodology has gained general acceptance. Id.; see, also, *Valentine v. PPG Industries, Inc.*, 158 Ohio App.3d 615, 2004-Ohio-4521, 821 N.E.2d 580, at ¶25. None of these factors are determinative. *Coe v. Young* (2001), 145 Ohio App.3d 499, 504, 763 N.E.2d 652. Rather, the inquiry is flexible, focusing on the underlying principles and methodologies and not on the resulting conclusions. *Miller* at 611.

{¶ 15} Sergeant Willson testified that the unique tool markings on the inside of the barrel of the Smith & Wesson nine millimeter gun matched the same etchings on shell casings found at the murder scene. This, coupled with the testimony of David Pennington ("Pennington"), who unwittingly lent Onunwor the same type of weapon responsible for firing the shots that killed the victim and which was recovered by police, allowed the jury to essentially place Onunwor at the scene with the alleged murder weapon.

{¶ 16} To combat this, Onunwor argues that no reliable scientific method exists that would permit an expert to testify about ballistics matches to an "absolute certainty," and therefore, Sergeant Willson's testimony was

inherently unreliable. We disagree. Sergeant Willson did not testify to an absolute certainty about the ballistics matches fired from the murder weapon and the shell casings and bullets recovered from the scene; he testified to a reasonable degree of scientific certainty. While Onunwor cites to a New York federal case, *U.S. v. Glynn* (S.D.N.Y. 2008), 578 F.Supp.2d 567, arguing that the "reasonable degree of ballistic certainty" or "scientific certainty" language is inappropriate, and that any ballistics expert should be required to testify that their conclusions are "more likely than not" ballistics matches, as opposed to being matches to a "reasonable degree"of scientific or ballistic certainty, no Ohio court — state or federal — has ever barred a ballistics expert on this basis. Id. We decline to do so now.

{¶ 17} Onunwor does not specifically attack the comparison testing done at the forensic laboratory in which test slugs were fired from the murder weapon and checked against those found at the scene, he references scientific reports questioning the absolute reliability of such findings.

{¶ 18} In this case, Sergeant Willson was a properly qualified expert whose testimony helped the jury understand a matter beyond the knowledge or experience of most lay people, and he employed a widely-accepted and accurate test in doing so. He was properly admitted under Ohio Evid.R. 702, and his comparison testing is a generally accepted method of forensic analysis. The trial court did not abuse its discretion in admitting this

testimony or in allowing Willson to testify. Onunwor's first assignment of error is overruled.

Assignment of Error No. II:

> **"Clifton Onunwor's right to due process and a fair trial were violated by the jury's exposure to gruesome and unfairly prejudicial crime scene photographs that had at best limited relevance to the prosecution's case."**

{¶ 19} While Onunwor argues that the photographs unfairly prejudiced the jury against him, denying him due process and a right to a fair trial, we find that the admission of these photographs was not prejudicial. The photographs showed that Diane was severely beaten before being killed, and that she was shot eight times at close range. They illustrated the coroner's testimony and were helpful to the jury in making its determination. They were probative of the manner and circumstances of the victim's death and, thus, were admissible at trial. The Ohio Supreme Court has repeatedly ruled that in such instances, the admission of such photographs is permissible. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242.

{¶ 20} Even if the admission of such evidence did inflame the jury, we would find the admission of such evidence harmless error based upon the significant amount of additional evidence against Onunwor. See *State v. Thompson* (1987), 33 Ohio St.3d 1,9, 514 N.E.2d 407. Onunwor's second assignment of error is overruled.

Assignment of Error No. III:

> **"Mr. Onunwor's right to due process and a grand jury indictment violated [sic] when prosecutors amended counts two and three after trial."**

{¶ 21} Crim.R. 7(D) sets forth the procedures for amending indictments. This rule provides in part:

> **"The court may at any time before, during, or after a trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged."**

{¶ 22} This rule clearly allows the amendment of an indictment after trial, as long as the amendment makes no change in the name or identity of the crime charged.

{¶ 23} Onunwor argues that the trial court impermissibly allowed Counts 2 and 3, tampering with evidence, to be amended to include the specific evidence that Onunwor was charged with tampering — two shell casings and one bullet in Count 2, and the Smith & Wesson nine millimeter firearm in Count 3.

{¶ 24} Here, the amendment of the indictment to state a more specific piece of evidence on these counts did not change the name or identity of the crime charged. The amendment was necessary so that the indictment would conform to the specific evidence. The charge of tampering with evidence remained the same before and after the amendment. The identity of the crime was likewise not changed by the amendment. Further, the amendment neither changed the penalty nor the degree of the offense. Thus,

the amendment was proper pursuant to Crim.R. 7(D). See *State v. O'Brien* (1987), 30 Ohio St.3d 122, 508 N.E.2d 144; *State v. Broom* (Dec. 13, 1990), 8th Dist. No. 57766. Onunwor's third assignment of error is overruled.

Assignment of Error No. IV:

"Appellant's convictions were against the manifest weight of the evidence."

{¶ 25} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶81. (Internal citations and quotations omitted.)

{¶ 26} Although we consider the credibility of the witnesses in a manifest weight challenge, we are mindful that the determination regarding witness credibility rests primarily with the trier of fact. *State v. Hill* (1996), 75 Ohio St.3d 195, 205, 661 N.E.2d 1068. The trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections. Those observations are critical to a resolution of each

witness's credibility. *State v. Antill* (1964), 176 Ohio St. 61, 66, 197 N.E.2d 548.

{¶ 27} In the instant case, in addition to the expert testimony of Sergeant Willson regarding the forensic evidence, other significant evidence linked Onunwor to the killing.

{¶ 28} The facts revealed at trial showed that Onunwor worked as an armed security guard for T.D. Security at the Wilkoff and Sons Scrapyard on East 47th Street and Woodland Avenue, in Cleveland, Ohio. According to coworker, Andrew Savoca, who was working the 11:00 p.m. to 7:00 a.m. shift at the scrapyard and whose shift overlapped with Onunwor's, Onunwor was absent from work for approximately two and one-half to three hours around the approximate time of the murder on September 18, 2008, and that he never had been away from work that long before.

{¶ 29} Specifically, Savoca testified that he was working the 8:00 p.m. to 4:00 a.m. shift, and Onunwor was working the 11:00 p.m. to 7:00 a.m. shift. On the night of the murder, Onunwor arrived at work between 11:30 p.m. and 11:45 p.m., wearing tan pants and an Izod brand shirt, as opposed to his usual uniform, and that he left approximately one-half hour later. (Tr. 502-503.)

{¶ 30} Savoca testified that on the night of the murder, he and Onunwor were posted in a guard tower at Wilkoff and Sons and, before leaving during his shift, Onunwor asked Savoca if he would call his cell phone in

approximately one-half hour. When Savoca did so, he saw Onunwor's cell phone lying on the desk of the guard tower. Savoca testified that Onunwor did not return to work until sometime after 2:30 a.m.

{¶ 31} Savoca also testified that in the time preceding the murder, Onunwor was desperate to borrow Savoca's firearm or trade guns with Savoca for some unknown reason, but that Savoca would not agree to do so. Savoca also recalled that Onunwor repeatedly asked him if he knew anyone who was selling a gun, and that after returning to work on the night of the murder, Onunwor again asked Savoca if he could borrow his gun.

{¶ 32} The State also presented the testimony of David Pennington, who admitted that in August 2008, he let Onunwor borrow his Smith & Wesson nine millimeter firearm in exchange for the use of Onunwor's Glock 17 firearm. After learning from Onunwor that he was in jail on suspicion of murder, Pennington panicked and threw Onunwor's Glock 17 in a dumpster on East 104th and St. Clair Avenue in Cleveland, Ohio. He later admitted to the Cleveland police that he did so out of fear.

{¶ 33} The State also presented the testimony of Onunwor's neighbor, Joshua Hanna ("Hanna"). Hanna testified that he has known Onunwor for over 15 years, having grown up on the same street. On the day of the murder, he testified that he saw police tape cordoning off the Onunwor house and became concerned, so he stopped. As Hanna stood with another neighbor, Harry Jones, Onunwor approached them and asked Hanna if he

would hold something. Onunwor then produced between four and six bullet casings or "gun shells," as Hanna described them. (Tr. 368.) Hanna asked Onunwor, "What do you want me to do with these?" Onunwor replied that he wanted Hanna to keep them, and that he would come and get them the next day. (Tr. 369.) After Onunwor walked away, Hanna testified that he tossed the shell casings in a yard nearby, because he did not want anything to do with the situation. (Tr. 370.) He told police about the encounter and described where he had tossed the shell casings. Later, the police recovered the shells. (Tr. 371.) Hanna testified that Onunwor's body language and conversation were subdued, and that he did not cry or have any emotional outbursts at the murder scene. (Tr. 373.)

{¶ 34} State's witness Ron Gilson ("Gilson") testified that his cousin Tabia Gilson-Williams was dating Onunwor at the time of the murder, and that he and Onunwor were friends. He testified that on Friday, September 19, 2008, he received a text message from Onunwor stating: "move da toys out of da house now — even mine now." (Tr. 588-590.) Gilson took this message to mean that Onunwor wanted Gilson to remove all the guns from the house in which Gilson and his cousin lived and where Onunwor occasionally stayed. Upon receiving the message, Gilson went to his cousin Tabia's bedroom and removed a nine millimeter pistol from a tote bag, which was later proven to be the murder weapon. Gilson placed the gun under the seat of his truck.

When Cleveland Police detectives questioned Gilson about the weapon, he led them to it.

{¶ 35} When we review the record, we find substantial evidence upon which a jury could reasonably conclude that all the elements of aggravated murder and tampering with evidence have been proved beyond a reasonable doubt. Onunwor disappeared from work at the time of the murder, and asked a coworker to call his cell phone while he was gone. There was clear, unrebutted evidence that Onunwor was the only individual who could have possessed the alleged murder weapon at the time of the offense, and there was expert forensic testimony linking the gun to the murder. Additionally, the testimony regarding Onunwor's demeanor at the crime scene, the encounter with the neighbors where he actively tried to remove evidence from the crime scene, and the text message request of a friend to move the guns, all show that the jury did not commit a manifest injustice in convicting Onunwor. Based upon the evidence, we cannot say that Onunwor's conviction must be reversed and a new trial ordered. Onunwor's fourth assignment of error is overruled.

Assignment of Error No. V:

"The prosecutor's remarks to the jury, first during voir dire and later in summation, constituted misconduct which violated Clifton Onunwor's rights under the fifth, sixth and fourteenth amendments of the constitution."

{¶ 36} The standard of review for prosecutorial misconduct is whether the comments and questions by the prosecution were improper, and, if so, whether they prejudiced appellant's substantial rights. *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001-Ohio-4, 739 N.E.2d 749. Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record. *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78.

A. Voir Dire Statements

{¶ 37} Onunwor contends that during voir dire, the prosecutor repeatedly asked prospective jurors if they were willing to give the State a fair trial, and that this question prejudiced his right to a fair trial. (Tr. 154-156.) It has been well settled law for nearly 100 hundred years that the State is entitled to ask for a fair trial. The Ohio Supreme Court first articulated this principle in *State v. Schaeffer* (1917), 96 Ohio St. 215, 117 N.E. 220, and affirmed it in *State v. Webster* (1951), 91 Ohio App. 541, 102 N.E.2d 736.

> **"Giving the defendant the benefit of presumptions to which he is entitled in a criminal case, we are constrained to keep in mind the admonition that while a trial must be fair to the defendant in a criminal case, it must also be fair**

to the people of the State, whose welfare is similarly involved." *Webster* at 547.

{¶ 38} In light of the entire record, we fail to see how articulating this legal principle in the form of a question to the jury during voir dire deprived Onunwor of a fair trial.

B. Vouching for the Credibility of a Witness

{¶ 39} Onunwor next argues that during closing argument, the prosecutor allegedly vouched for the credibility of witness Harry Jones by declaring to the jury that he "stepped up to the plate" in going to the police and then testifying about his encounter with Onunwor.

{¶ 40} We first note that Onunwor failed to object at trial to these comments. As a result, he must demonstrate that the error rises to the level of plain error. Crim.R. 52(B); *State v. Slagle* (1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916. The standard for plain error reversal, however, is the same for reversal for prosecutorial misconduct, that is, whether the accused's substantial rights are so adversely affected as to undermine the fairness of the guilt determining process. *State v. Swanson* (1984), 16 Ohio App.3d 375, 377, 476 N.E.2d 672.

{¶ 41} We agree that a prosecutor commits misconduct by improperly expressing his or her personal belief regarding the credibility of a witness. See *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883; *State v. McDade* (June 26, 1998), 11th Dist. No. 96-L-197. However, we fail to see

how it was improper in these examples, which were not evidence, but argument. With respect to the testimony of Jones and Pennington, it is the jury's duty to determine who was being truthful and to decide what inferences could be drawn from a witness's testimony. *State v. Boston* (1989), 46 Ohio St.3d 108, 129, 545 N.E.2d 1220.

{¶ 42} Our focus, however, upon review is whether the prosecutor's comments deprived Onunwor of a fair trial such that there is a reasonable probability that, but for the prosecutor's misconduct, the result of the proceeding would have been different. *State v. Loza* (1994), 71 Ohio St.3d 61, 78-79, 641 N.E.2d 1082, overruled on other grounds. In these instances, we do not believe the prosecutor's comments affected the outcome of the trial. In reviewing the prosecutor's closing argument, it is clear that the prosecutor also reminded the jury to evaluate all of the evidence presented and decide for themselves if Onunwor committed the crimes. Onunwor's fifth assignment of error is overruled.

Assignment of Error No. VI:

> **"Ohio's reasonable doubt standard invites the jury to find guilt on less than proof beyond a reasonable doubt thereby depriving Vernon Brown [sic] of his liberty without due process of law."**

{¶ 43} Onunwor challenges the trial court's "reasonable doubt" instruction, and argues that the instruction given actually sets forth the lesser standard of "clear and convincing evidence."

{¶ 44} R.C. 2901.05(E) defines "reasonable doubt" as follows:

> **"(E) 'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."**

{¶ 45} In this matter, the instruction given to the jury tracked this statute exactly. (Tr. 894.)

{¶ 46} Onunwor insists that the "firmly convinced" language represents only the clear and convincing evidence standard, and not the beyond a reasonable doubt standard. We note, however, that the Ohio Supreme Court has approved the use of the statutory definition of reasonable doubt in jury instructions. See *State v. Awkal* (1996), 76 Ohio St.3d 324, 667 N.E.2d 960. Accord *State v. Gross* (May 24, 1999), Muskingum App. No. CT 96-055. See, also, *State v. Brown*, 8th Dist. No. 93007, 2010-Ohio-2460.

{¶ 47} Onunwor's sixth assignment of error is overruled.

Assignment of Error No. VII:

> **"Clifton Onunwor's rights under the fifth, sixth, and fourteenth amendments as well as Ohio's rules of evidence were violated when the prosecution introduced his pre-arrest pre-*Miranda* silence as substantive evidence of his guilt in the State's case-in-chief."**

{¶ 48} As we noted above, Onunwor's counsel failed to object at trial to these comments and, as a result, he must demonstrate that the error rises to the level of plain error. Crim.R. 52(B); *Slagle*. In determining whether the trial court committed plain error, we must determine whether the accused's substantial rights are so adversely affected as to undermine the fairness of the guilt determining process. *Swanson*.

{¶ 49} The first issue Onunwor raises deals with the testimony of Cleveland Police Detective Arthur Echols ("Detective Echols"). At trial, Detective Echols stated that on September 19, 2009, Onunwor voluntarily agreed to be interviewed regarding his mother's death. Onunwor was not *Mirandized* before the interview. He did not arrive with counsel and never requested counsel before, during, or after the interview.

{¶ 50} Detective Echols testified that in the course of the interview, Onunwor did not respond when asked about giving Hanna the shell casings or about sending Gilson the text message about removing the guns. Finally, Detective Echols testified that he asked Onunwor if he wanted to get to the bottom of who killed his mother, and Onunwor fell silent. (Tr. 731, 733, 734.)

After reviewing this portion of the record, we cannot say that Detective Echols's testimony regarding Onunwor's pre-arrest, pre-*Miranda* silence violated his right against self-incrimination.

{¶ 51} The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." The protections of the Fifth Amendment apply to the states through the Fourteenth Amendment. *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, citing *Malloy v. Hogan* (1964), 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653.

{¶ 52} In *Leach*, the Ohio Supreme Court held the State's "[u]se of a defendant's pre-arrest silence as substantive evidence of guilt [as opposed to its use for impeachment purposes] violates the Fifth Amendment privilege against self-incrimination." Id. at syllabus.

{¶ 53} In *Leach*, during the state's case-in-chief, a police officer testified that he contacted the defendant and told him he wanted to talk to him about events that had occurred on a certain night. The defendant agreed and a time was set up for the next day, but the defendant did not show up for the appointment. Instead, the defendant left a message on the officer's phone that he wanted to speak with an attorney before talking to police.

{¶ 54} In finding that the State violated Leach's Fifth Amendment rights, the Ohio Supreme Court explained:

"The state in this case presented testimony that Leach, who had not yet been arrested or Mirandized, remained silent and/or asserted his right to counsel in the face of questioning by law enforcement. This testimony was clearly meant to allow the jury to infer Leach's guilt. Otherwise, jurors might reason, Leach would have offered his version of events to law enforcement." Id. at ¶25.

{¶ 55} We find the facts in this case are distinguishable from *Leach*. In the testimony complained of, there is no indication whatsoever that Onunwor invoked his right to remain silent when asked these questions. Onunwor met with the detective that day of his own free will, in order to discuss his mother's murder. Unlike *Leach*, where the State attempted to used the defendant's invocation of his Fifth Amendment right against him, Onunwor never invoked that right, never expressed the desire to speak with an attorney before consulting with Detective Echols, and voluntarily faced all questions, regardless of his answer. We therefore do not find that the trial court committed plain error in admitting Detective Echols's testimony regarding his conversation with Onunwor. Onunwor's seventh assignment of error is overruled.

Assignment of Error No. VIII:

"Clifton Onunwor's sixth amendment right to the effective assistance of counsel was violated where trial counsel

failed to raise objections to improper evidence and comments and thereby preserve issues for further review."

{¶ 56} In his final assignment of error, Onunwor argues specifically that his counsel's failure to object to the photographs of the victim, the remarks by the prosecutor during voir dire and closing argument, the reasonable doubt instruction given to the jury, and the testimony regarding Onunwor's pre-arrest silence deprived him of a fair trial. Having already affirmed these assignments of error separately, we must decide whether the cumulative failure to object to their admission prevented Onunwor from receiving a fair trial.

{¶ 57} A claim of ineffective assistance of counsel requires Onunwor to demonstrate both that his attorney's performance fell below an acceptable standard of reasonable representation and that he was prejudiced by that substandard performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. In evaluating counsel's performance, this court will not second-guess his decisions in what are matters of trial strategy. *State v. Stone*, 8th Dist. Nos. 91679 and 91680, 2009-Ohio-2262, ¶12.

{¶ 58} When reviewing the specific acts complained of, we note the independent legal grounds that exist to affirm the above assignments of error regardless of whether Onunwor's counsel objected to their admission. We

have outlined these grounds above and will not recapitulate them here. Moreover, we find that Onunwor's counsel did object to the admission of the photographs. We have already found that the State's firearm expert, Sergeant Willson, was properly qualified and his testimony was properly admitted, so we find no basis for objection on that issue. We note that Sergeant Willson was cross-examined by defense counsel, and the jury was able to make its determination based upon that testimony. Likewise, we have found that the admission of testimony regarding Onunwor's pre-*Miranda* silence is permissible in this case, as were the prosecutor's comments during voir dire and closing statements.

{¶ 59} We do not find that the performance of Onunwor's trial counsel in failing to object to the above evidence fell below an acceptable standard of reasonable representation and that Onunwor was prejudiced by that substandard performance.

{¶ 60} Onunwor's eighth assignment of error is overruled.

{¶ 61} Onunwor's convictions for aggravated murder and tampering with evidence are affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, A.J., and
KENNETH A. ROCCO, J., CONCUR