

[Cite as *State v. Trouten*, 2005-Ohio-6592.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 04 JE 18
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
SHAWN TROUTEN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 03CR138.
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Attorney Thomas R. Straus Prosecuting Attorney Jefferson County Justice Center 16001 State Route 7 Steubenville, OH 43952
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For Defendant-Appellant:	Attorney David Vukelic Powell & Vukelic Ohio Valley Towers, Suite 502 Steubenville, OH 43952
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: December 7, 2005

[Cite as *State v. Trouten*, 2005-Ohio-6592.]
DeGenaro, J.

{¶1} This timely appeal matter comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Appellant Shawn Trouten appeals the decision of the Jefferson County Court of Common Pleas finding him guilty of aggravated murder and an accompanying gun specification and sentencing him to a term of three years for the gun specification to run consecutive to a term of life in prison.

{¶2} Shawn challenges his conviction on several grounds. His first four assignments of error focus on the weight and sufficiency of the evidence. However, these fail as there is adequate evidence to support both counts.

{¶3} Shawn also contests the trial court's decision not to instruct the jury on negligent homicide. Because Shawn argued that he accidentally shot his wife and because it is not a lesser included offense of aggravated murder, the trial court did not err by refusing to give the instruction.

{¶4} Next, Shawn claims that the trial court erred by refusing to suppress evidence that was collected during a warrantless search occurring subsequent to Shawn's departure from the residence. This argument also fails, because the police only collected evidence that was in plain view during their initial entry into the home during their emergency response to Shawn's call to 911.

{¶5} Finally, Shawn claims that he received ineffective assistance of counsel. Because any alleged mistakes that were made by counsel could be deemed as strategic, this claim must also fail. Accordingly, Shawn's conviction is affirmed.

FACTS

{¶6} On June 29, 2003, police and EMT's were summoned to the home of Michelle and Shawn Trouten in response to a call Shawn had made to 911 stating that he had just shot his wife. Shawn claimed that it was an accident while the State argued that the shooting was done with prior calculation and design. On July 9, 2003, Shawn was indicted with one count of aggravated murder in violation of R.C. 2903.01(A) along with a gun specification in accordance with R.C. 2941.145. A jury trial was conducted and multiple witnesses took the stand on behalf of the State and the defense.

Witnesses for the State

Simon Carpino

{¶7} Carpino lived two blocks away from the Troutens. On the morning of the shooting he had to be at work by 7:00 A.M. On his way to work, Carpino drove past the Troutens' home. He saw a blonde woman who looked like Michelle in the driveway with her back to him and Shawn on the front porch leaning on the banister. They were both dressed in street clothes.

Eric Allen Jeffers

{¶8} Jeffers testified he was the 911 dispatcher who received Shawn's call at around 7:30 A.M. He thought it was a woman crying. He muted the phone and told his partner to send an officer to the residence. He then testified that Shawn told him he didn't want to live. He was struggling with a gun with his wife and she'd been shot. Shawn told him she was upstairs and he didn't know if she was still breathing. He stayed on the line with Shawn until the police officers arrived.

Frank Kovalchik

{¶9} Kovalchik was employed as a volunteer firefighter and was dispatched to the home after Shawn's call to 911. Officer Harter and Officer Britt were at the scene when he arrived. He noticed Shawn lying on the floor in the fetal position. He went up to the bedroom where he saw the EMT's doing CPR on Michelle. They told him that they needed a back board to place her on and immobilize her, so he went downstairs to retrieve it. While downstairs, Kovalchik asked Shawn how many shots have been fired so that the EMT's would know how many wounds to look for. He was told by Shawn that two shots had been fired. He stated that Shawn was quite distraught and crying a whiney type of cry and still in a fetal position.

Joyce Kovalchik

{¶10} She was employed as a registered nurse and was also dispatched to the scene. When she arrived she was told to go upstairs. She noticed a cold beer bottle opened on the night stand. She also saw four or five people trying to resuscitate Michelle, who was nude except for a nightshirt. They were applying cardiac monitors to her body. When it was determined that Michelle had no shockable heart rhythm, the team decided to transport Michelle to the hospital. She was placed in an ambulance where CPR was continued. When they arrived with Michelle at the hospital, they detected a shockable rhythm and a defibrillator was then used on Michelle. The attempt to resuscitate her failed and she was pronounced dead. Joyce testified that throughout the process the entire team was gentle with Michelle because she had a head injury. She didn't witness anyone grabbing, bruising, or doing anything violent to Michelle's body.

Peggy Stewart

{¶11} Stewart was the first EMT to arrive at the scene. When she arrived she saw Shawn down on his knees crying hysterically. She went upstairs and witnessed a gun lying on the bed. The gun was at the foot of the bed, next to Michelle, who appeared to be dead. She asked Officer Harter if she could move it. Michelle was lying perpendicular on the bed with her legs draped over the edge. There was blood all around her head.

Officer Timothy Britt

{¶12} Britt was the second police officer to arrive at the scene. He was met at the front door by Officer Harter. They both approached the front door and knocked. Shawn answered the door crying and very upset. He said save his wife. Officer Harter then went upstairs to check on Michelle. Shawn went into the living room, got on his knees, put his hands over his head and moaned and cried. Britt stayed in the living room with Shawn. Shawn kept saying "save her - - you got to save her." When Kovalchik came down and asked Shawn how many times Michelle had been shot, Britt heard Shawn respond that his finger was on the trigger of the rifle, Michelle grabbed the gun, and the gun fired twice.

{¶13} After Michelle was brought down on a stretcher, Britt went outside with

Shawn while Officer Harter helped put Shawn in a squad car. Britt remained at the house and began securing the scene. It took him ten minutes to secure the residence. When Shawn was returned to the house, Britt transported him to the Yorkville jail. Britt returned to the scene sometime in the early afternoon and helped Officer Harter clear the scene and collect evidence. He left the scene at around 1:45.

{¶14} Britt testified that, later that day, Shawn's brother Tony came down to the station to tell the police about a phone call he received the night before at 3:59 A.M. Tony showed them the caller I.D. from his phone with Shawn's phone number on it. Tony told Britt that Michelle called and said the two were arguing and that Tony needed to come get his brother. Michelle said that she was going to kill Shawn if Tony didn't come and pick him up.

Brian Watson

{¶15} Watson was another officer called to the scene that day. When he arrived, Officer Comminsky was going to look for a gun that had supposedly been thrown over the riverbank behind the Trouten residence. Watson went down over the riverbank and found a 12 gauge shotgun laying there. The gun was loaded.

Donna Rose

{¶16} Rose is employed as a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation. She performed gun shot residue tests on both Shawn and Michelle. The results were as follows:

{¶17} "Particles highly indicative of gunshot primer residue were not identified on the left hand or right hand samples from Michelle Trouten. Particles highly indicative of gunshot primer residue were identified on the right hand sample from Shawn Trouten. Particles highly indicative of gunshot residue were not identified on the left hand sample from Shawn Trouten."

{¶18} Rose further noted in her report that:

{¶19} "the presence of gunshot primer residue on a person's hands is consistent with that individual having discharged a firearm, having been in the vicinity of a firearm

when it was discharged or having handled an item with gunshot primer residue on it. The absence of gunshot primer residue on a person's hands does not preclude the possibility of that person having discharged a firearm."

Andrew Chappell

{¶20} Chappell is employed as a forensic scientist at BCI specializing in firearms. He examined the rifle that was found in the Trouten's bedroom. He testified that it was a Remington Brand, model 1022, semi-automatic rifle, that fires 22 long rifle caliber cartridges. Chappell then explained how the rifle is loaded and how it operates. He stated that the trigger must be pulled each time you want to fire a cartridge. More specifically, one has to release the trigger so that the parts will realign and then pull the trigger again to fire another cartridge. He explained this was so because the gun was designed with a disconnect for safety.

{¶21} Chappell was also asked to examine the shirt Michelle was wearing the morning of the shooting and testify as to the distance from which the shot was fired. Because of the lack of gun shot residue, he concluded that either the shooter was a significant distance away from the victim or that the evidence of gun powder was being masked by something like blood stains.

Doctor Andrea McCollum

{¶22} Doctor McCollum is employed as the deputy coroner at the Cuyahoga County Coroner's Office. After performing an autopsy on Michelle, she concluded that Michelle died from a gunshot wound to the back of the head. She testified that at the time of death Michelle had no undissolved pills or medication in her stomach. She further testified that Michelle's wound indicated that the bullet went left to right toward the front and slightly upward. The doctor was also able to determine from the wound that Michelle was shot from a distance no less than 36 inches. She further stated that Michelle had suffered cutaneous contusions and abrasions all over her body around the time of death. The contusions around her arms were consistent with grabbing. The marks on her arms and back were not consistent with the treatment she received from the EMT's.

Officer Jason Harter

{¶23} Officer Harter was the first person to respond at the scene. When he arrived, he asked where the gun was and Shawn informed him that it was upstairs. He went upstairs and found Michelle lying on her back on the bed, bleeding from her head. He explained that her legs were bent and her feet were hanging off the bed. Her shirt was pulled up to her abdomen. There was a rifle lying next to her. He also found an unfired 22 long rifle cartridge just inside the air vent, a shell casing on the baby changing table, and a shell casing on a clothing rack.

{¶24} After he secured the weapon, Officer Harter went downstairs. He heard Shawn saying things like "why is this happening to me." Harter noticed that Shawn did not have any blood on himself or his clothing. After Michelle was brought down, he asked Shawn to step outside. He took Shawn to the police station and took a statement. The tape was played to the jury. The jury was also shown a videotape of the inside and outside of the Trouten residence.

{¶25} Next, Officer Harter testified regarding the arrest report he created. In his report he stated that there appeared to be a struggle in the kitchen area. His report stated:

{¶26} "In the kitchen the table which was on the southwest side of the room was halfway turned over as if someone had fallen into it. There was blue jean pants lying on the floor in the kitchen as well as a blue shirt, blue women's underwear and a white lace bra which were all ripped as if they had been torn off someone."

{¶27} He further testified that there was a broken chain belt and a broken necklace on the floor. There were also shotgun shells lying in various places. Harter then testified that he proceeded upstairs to the bedroom where he found a shell casing on the baby changing table and one under the table. The doorway was three foot five inches away from the table. He further noted that a small hole which looked to have been made by a small caliber bullet was found in the wall about three feet above the headboard. He didn't believe it was ever proven to be a bullet hole.

{¶28} After the police obtained a search warrant, Harter and other officers collected more evidence. Harter testified that they found a pair of blue jeans in the downstairs bathroom containing \$345.75, a blood swab from the doorway of in the back of the home, and a piece of the wall where the possible bullet hole was found. His report listed the other seized items as follows:

{¶29} "Paint sample from the upstairs master bedroom doorway, a section of mattress where there was a large blood stain, six garbage bags full of clothes from the upstairs bedrooms, one garbage bag full of debris from the upstairs master bedroom, one garage (sic) bag (sic) debris from the upstairs children's room, one Kodak Max flash camera from the kitchen."

{¶30} In describing the immediate area where Michelle was found, Harter stated:

{¶31} "The upstairs bedroom where Michelle Trouten was found was very disarrayed. There was a large amount of clothing laying on the floor area especially over towards the dresser which I noted on the west wall of the bedroom. The drawers, some of them were pulled somewhat opened and had clothing that looked like it had been pulled out partially of the drawers. There was just a lot of clothing laying around. The bed, the sheets and the comforter that Michelle was laying on had been pulled up at some points on the mattress and were exposing the mattress."

{¶32} After collecting and examining the evidence in the case, Harter testified, based upon his own experience and investigation, as follows:

{¶33} "The victim placement, angle at which the bullet entered the neck, and placement of the empty as well as the unfired .22 casings led me to believe that Shawn Trouten shot Michelle Trouten from a distance of about 12 feet away. Michelle Trouten was facing the east when Shawn shot her from behind."

{¶34} Harter then proceeded to discuss photographs taken of a broken door jamb and damaged door frame in the Troutens' bedroom. He also discussed how the door had been opened with such force, despite the fact that there was no locking mechanism on the door, that the door knob put a hole through the bedroom wall. Harter further testified

that the door had been pulled from its hinges. He also testified that there was evidence that someone tried repairing the door.

{¶35} Next, Harter testified regarding the items he recovered from the Trouten's backyard. There was one of the Trouten's checkbooks lying open on the ground. There was also a purse containing Michelle's things and a cloth carrying case for a firearm. Finally, he testified that inside the doorway of the backyard shed, he found an ammunition can. Inside the can, Harter found .22 caliber long rifle hollow points, the same type of bullet found in Shawn's rifle.

Amanda Jenkins

{¶36} Jenkins is employed by the Cuyahoga County Coroner's Office as a toxicologist. She tested Michelle's heart, blood, and urine for traces of drugs. The tests revealed the presence of acetaminophen and hydrocodone. The acetaminophen was in the normal therapeutic range but the hydrocodone was elevated above therapeutic level. Jenkins testified about the effect of a person having hydrocone in their system. She stated:

{¶37} "I can not talk in specifics based upon what you have told me about the individual's weight and height but in general all motor functions would be slowed down. And so your - - one's ability to walk, move arms, legs and so one will be slowed down, there will be some mental clouding, decrease responsiveness, lessening ability to respond to things that are happening."

Curtiss Jones

{¶38} Jones was employed by the Cuyahoga County Coroner's Office as the supervisor in the trace evidence department. He concluded after examining Michelle's shirt and the weapon used to shoot Michelle that the distance between her and the gun had to be at least four feet.

Sheriff Abdalla

{¶39} On the day of the shooting, Abdalla dealt with Shawn while he was at the jail. Shawn's mother phoned Abdalla and let him know that Shawn needed medication

and she would be bringing him a prescription. The Sheriff didn't know where to locate the medicine in Shawn's home so he went to ask Shawn about it at the jail.

{¶40} Abdalla testified that when he went in, Shawn started crying saying that he wanted to kill himself and that it was an accident. He said she was grabbing the gun and the gun went off twice. He then said he didn't realize it went off a second time. Abdalla testified that Shawn physically demonstrated how Michelle was grabbing the gun. Shawn told Abdalla that the reason why she was grabbing the gun was because she was trying to prevent him from committing suicide. Abdalla asked if he meant the rifle and Shawn said no, with the shotgun. Since a shotgun had not been brought up yet by anyone, Abdalla asked Shawn what shotgun he was talking about. Shawn responded that he threw a loaded shotgun over the riverbank in the back of his house. Abdalla left the room and called the officers at the house to alert them about the presence of the other gun.

{¶41} Abdalla testified that when he returned to the home he made measurements of the holes in the wall. He explained that he took them "[f]or the elevation purpose of where his wife had been sitting on the bed and where he was standing in the doorway when he fired the rifle." When asked if he knew Shawn was standing in the doorway when he fired the rifle, Abdalla testified that he was ninety-nine percent certain of that. He explained, however, that the police could never find the second bullet that could have made the hole.

Amy Parsons

{¶42} Parsons was at Paradise Hills, the same bar as Shawn and Michelle, the night before the shooting. Parsons testified that Michelle was wearing the shirt that the police took into evidence, but that it wasn't ripped when she was wearing it. She also testified that Michelle was wearing the same jeans that the police found in the Trouten's bathroom. She further testified that she could see Michelle's neck and shoulder area that night and there was no bruising or marks.

Chris Kopyar

{¶43} Kopyar was the bartender at Paradise Hills the evening before the shooting

and served drinks to Shawn and Michelle. Shawn started by ordering a beer for each of them. He came back to the bar a few more times to order more beer and would also order jager bombs, a shot made with red bull and jagermeister, for himself. The couple stayed and drank at the bar for four hours. Shawn drank about five shots. Shawn would drink the shot and then throw the cup at the bartender after he turned around.

Joe Zeroski

{¶44} Zeroski is Michelle's cousin. He was with the couple the night before the shooting celebrating his brother's birthday. He explained that prior to going out he stopped at the Trouten residence to confirm their plans for the evening. When he stepped onto the back porch, Shawn opened the back door and told Zeroski that he had come at a bad time. Shawn said that he and Michelle were in a pretty heated argument. Shawn explained that Michelle was upset about an incident that occurred earlier in the day at her mother's house. Apparently Shawn made the couple late for dropping off presents at her aunt's house. Shawn told Zeroski that going out that evening was "up in the air."

{¶45} While Zeroski was standing on the back porch, a couple pulled up into the driveway. The man came up on the back porch, Michelle threw money out the door at him, and Shawn picked up the money and handed it to the man. That's when Zeroski decided to leave.

{¶46} He testified, however, that he saw the couple later that night at the bar, Paradise Hills. He said everything seemed fine between the couple. He didn't discuss what had happened earlier that day, but commented that he thought their arguing was "normal protocol." That night, however, he testified they seemed happy and were hugging and kissing. At the end of the night, he made plans with Shawn and Michelle to take their kids to a Fourth of July fireworks show. Michelle gave him a hug and said she needed to go home and make a sandwich.

{¶47} Later that night, around 3:30 A.M., he received a call from Shawn. Zeroski testified:

{¶48} "I didn't hear the phone right away. It was Shawn and he was leaving a message. He said 'hey, it's kind of important, give me a call.' Soon as I heard it I went to pick up the phone and it was Shawn. You know, just picked up the phone and he said 'Tell Michelle I'm not on any drugs.' I said 'That's fine. Everything all right?' He said 'Just tell her.' And then I heard Michelle in the background saying 'He thinks I'm cheating on him and he hit me.' I said 'Shawn, what's going on man?' He says 'I don't know what's going on. I didn't hit her.' I didn't know what to think, I never seen him before, you know, hit her or anything. I didn't know what to think. I didn't know whether to believe him or not. But obviously I never seen it happened before so I just took it for, you know, they were just in an argument."

{¶49} Zeroski then testified that it got quiet and then Shawn asked him to come over. Zeroski hung up and called back 15 minutes later but nobody answered the phone. Finally, Zeroski testified that the last time he saw Shawn's rifle it was stored in the shed behind the house.

Alicia Krupinski

{¶50} Alicia was Michelle's mother and Shawn's mother-in-law. She testified that the day before the shooting, the couple and their two children visited her house. They stayed at her house all day and left the children there for the evening. Alicia stated that Shawn was "huffy" with Michelle and Michelle was likewise "huffy" with Shawn. When they left, Shawn was angry with Michelle. Alicia did not notice any bruising on Michelle's neck or shoulders when she hugged her daughter goodbye.

{¶51} Alicia further testified that she was aware that Michelle had been taking Vicodin for her back pain. She explained that she was also taking Vicodin at the time of the shooting. When Michelle would run out of pills, Alicia would give her some of her medication.

Sam Krupinski

{¶52} Sam was Michelle's father and Shawn's father-in-law. He likewise didn't notice any bruising on Michelle the day before the shooting when she and Shawn came to

visit. He testified that Shawn tried to aggravate Michelle that day.

{¶53} He further testified that he was aware that Michelle was taking Vicodin and that he was also taking Vicodin. She would sometimes ask him for extra pills.

Edward Lulla

{¶54} Lulla was employed by the Ohio Bureau of Criminal Identification and was called to report to the Trouten residence the day of the shooting. He was asked to examine a hole in the wall to determine if it was a bullet hole. He cut that portion of the wall out but could find no bullet or bullet fragments. He concluded that the hole was not caused by a bullet. On cross-examination, however, Lulla testified that if it were in fact a bullet hole, it could only have been caused by someone who was shooting from down on the floor.

James Joseph Ice

{¶55} Ice was the booking officer that dealt with Shawn after the shooting. He testified that when Shawn came in he was wearing only shorts. When he bagged the shorts he noticed they had, what he thought was blood on them. While questioning Shawn, Shawn informed Ice that he had contemplated suicide.

Samuel Krupinski, Jr.

{¶56} Samuel was Michelle's brother. He testified that he was at the Trouten's residence two days before the shooting and the bedroom door was not broken or damaged at that time.

Christa Pasco

{¶57} Christa was Michelle's best friend. She saw the Trouten's on an almost daily basis. She testified that the kitchen table wasn't broken a month before the shooting, the last time she was inside the house. She likewise testified that the dresser in the bedroom was not in the same condition after the shooting. Christa explained that Michelle took meticulous care of her clothes and they would not be hanging out of the dresser drawers.

{¶58} She also testified that she had witnessed Shawn and Michelle fight about

once or twice per week. Shawn would end some of the fights by saying, "I might as well just blow my brains out, not getting anywhere." Michelle would respond, "Go ahead." She testified that she never witnessed any physical contact during the arguments. However, Shawn admitted to punching a hole through a wall during an argument. She claimed that:

{¶59} "The best times that they got along would be Michelle was very lovey dovey when she was drinking and they had a pristine relationship at those times. The kids weren't around and they were out celebrating something."

{¶60} When questioned about Michelle's use of Vicodin, Christa admitted to giving Michelle extra pills when her prescription would run out. She never heard Shawn mention anything about Michelle's Vicodin use. After Christa's testimony, the state rested.

{¶61} Christa took the stand again as a rebuttal witness and testified about seeing Shawn put a shovel through the children's bedroom wall out of anger while they were doing work in the room. She further testified that Shawn filed a worker's compensation claim for an injured hand after he put his hand through the side mirror of his truck while fighting with his brother Todd.

Witnesses for the Defense

Douglas Dugan

{¶62} Dugan was employed as a firefighter EMT. He responded to the 911 call the morning of the shooting. He testified that he did not notice any other injuries to Michelle other than the gunshot wound. He testified that when he first observed her, her body was positioned as if she had just fallen back from a seated position.

Tony Trouten

{¶63} Tony is Shawn's brother. He received a phone call from Michelle the night before the shooting. She told Tony to come and pick up his brother before she killed him.

Terry Trouten

{¶64} Terry is Shawn's father. Shawn called him at 5:24 A.M., the morning of the shooting and asked him to come over to make amends to their estranged relationship.

He stayed there until 7:05 A.M. He did not hear Michelle while he was outside talking on the porch with Shawn. He told Shawn to bring Michelle and the kids over sometime and then he left.

Larry Dehus

{¶65} Dehus is a forensic scientist hired by the defense. Dehus testified that the hole above the Trouten's headboard appeared to be made by a bullet. He performed tests on that portion of the wall and testified that he recovered lead fragments consistent with a .22 caliber bullet from the wall. Dehus then attempted to determine a trajectory path for the bullet. He concluded that,

{¶66} "The trajectory path from that hole in the north wall being six feet four and a half inches above the floor was in a downward direction. The path dropped approximately one and a half inches for each foot or every twelve inches for each foot or every twelve inches, and the lateral direction was towards the east wall or towards the * * * towards the southeast corner of the room."

{¶67} On cross examination, Dehus admitted that the trajectory path did not come close to the bed. He further admitted that he could not tell where the person who discharged the weapon into the wall would have been standing.

Shawn Trouten

{¶68} Shawn was the final witness to take the stand. When questioned whether the bedroom door was off its hinges on June 27th, he said yes explaining:

{¶69} "Because Michelle when she went to open the door it was hard to close and when it is closed it's real hard to open. You have to use both hands. I could do it but I seen her do it a couple of times and sometimes when she did it she put her hip up against it and that's what - - and the screws were already loose to begin with and it just knocked it off."

{¶70} Shawn claimed that he repaired the door. He said that he had not placed dry wall screws into the door after the last time Sam Krupinski was in the house. The last time he repaired the door was sometime within the past year.

{¶71} Shawn was asked about the money that Michelle threw out the door the evening before the shooting. He explained that Ernie Carney had given her 40 Vicodin and she was paying him back with the \$80. He claimed that Michelle was receiving Vicodin from several people. According to Shawn, they argued frequently about her Vicodin use because he wanted her to stop. He admitted that when they argued, he would threaten to kill himself. She would respond, "Go ahead."

{¶72} The night before the shooting, Shawn claimed that he and his wife were getting along "Outstanding." He testified, "We were all over each other, hugging, kissing, we were playing darts, and socializing, just doing stuff." He was smoking marijuana and drinking. He said they left the bar around 1:30 or 1:45. They then went to Sandy's bar. On the way there, they fought over something that happened previously involving Shawn's brother, Todd. He told Michelle, "Why don't you just take another pill * * * Or are you out." He said Michelle just started screaming. He claimed they continued arguing when they got to Sandy's about who was providing her with her drugs. They then left for home.

{¶73} They argued inside the house and then Michelle went out onto the back porch to have a cigarette. Shawn then went outside. Michelle went in and tried to grab car keys so that she could leave. He wouldn't let her leave because he didn't want her to get a D.U.I. He blocked the door and spun her around and said, "You might as well just get undressed and get your night clothes on and go to bed cause you're sleeping this off."

Shawn claimed that Michelle took her clothes off in the kitchen. He ripped his shirt off. He then claims she ripped her shirt off and went into the bathroom and locked the door. He further testified that he ripped her bra in two and ripped off and broke his necklace.

{¶74} While she was locked in the bathroom he sat and waited between the table and the stove for her to come out. When she came out of the bathroom, she startled Shawn. He claims he jumped up and pushed himself off of the table. That's when he claims the table broke.

{¶75} Michelle went outside wearing her nightgown. Shawn went outside in his

cut off jogging pants. He then testified:

{¶76} "We were arguing on the front porch about her problem and I said 'What if I tell your mom and dad about your little problem?' And she says 'You do that I'll make you wish you were dead.' So I said 'You want me dead, huh?' So I said 'I'll make you happy.' I went back in the house and got my - - underneath my microwave by the refrigerator in the kitchen there's a drawer on the left of the microwave, my junk drawer, there's a box of 12 gauge shells, deer slugs. I grabbed them. I don't remember - - I just grabbed them and just threw the rest and where they landed I don't know. I got - - went out to the building and got my twelve gauge out of my gun case thing. * * * My out building outside. And then as I was putting it in walking towards the house she came outside."

{¶77} He testified that he loaded his shotgun and then:

{¶78} "Michelle came outside on the back porch from the kitchen and I went to the steps of the porch. She like saw me load it. I said 'You ain't got nothing to worry about here in a second.' And she tried to take the gun off of me and I wasn't giving it up. I held it tight to me and she got between me and the gun, like her back towards my chest, and she pushed it away from me and she took the gun off of me. I was holding on to it. She was strong. She did take it off of me."

{¶79} He went back into the house and claims that he found out later she put the gun in the back of his truck. She then called his brother Tony. Shawn claims he did not hear any of the conversation. Shawn says that later Michelle told him that he couldn't get along with anyone, not even his father. At that point Shawn called his estranged father and told him that he wanted a relationship with him. His father then came over and they talked for about an hour and a half. He says he thought Michelle was probably listening in on the conversation because she didn't want Shawn dragging other people into their problems.

{¶80} When his father left, Shawn yelled upstairs for Michelle to come down. She told him to F- off. He then went outside and got his 12 gauge and walked towards the rivers edge. He sat there and contemplated suicide. He decided not to and threw the

gun over the bank. He went back inside and testified that:

{¶81} "I walked upstairs and I was talking to Michelle, she was sitting there on the bed. She goes 'I wish you wouldn't have called your father.' I said 'I didn't say nothing about you, Michelle.' I said 'I was just showing you that I can make the first step, that I can get along with somebody that I don't want to get along with.' I was showing her that I could do something that I didn't want to do. I was gonna show her. Then I told her, I said 'There's no way I can kill myself.' I said 'We got too much to live for.' And she said 'I knew you couldn't do it anyhow.'"

{¶82} At that point he went downstairs and got his 22, went out to the out building, retrieved one bullet and went back upstairs. He stood by the side of the bed and loaded the gun. He noticed there was already a magazine in the gun so he tossed the bullet over his shoulder. He told Michelle "I'm going to lay down beside you and put one through the roof of my mouth". He claims at this point that she dove off of the bed. He put the gun over his head so that she wouldn't grab it. She wrapped her arms around Shawn's waist and said "no baby, no, don't do it. I promise I'll quit. I promise I'll quit. I'll do anything." She let go of Shawn and got back on the bed.

{¶83} Shawn claims that they made up and she asked him to come to bed. He said he had to put the gun away and go to the bathroom. He took a step back, he got caught in something like a blanket, and fell backwards. The gun went off. Michelle got on her stomach and asked Shawn if he was okay. She then rolled over onto her back and sat up and then as Shawn was getting up, he claims the gun went off again. He claims Michelle hit the floor but her knees and her feet were still on the bed. He said "Michelle, Michelle, Michelle," and pulled her back onto the bed by her legs.

{¶84} When he saw her bleeding from the side of the head, he ran downstairs and called 911. He told the operator that he didn't want to live anymore. He also said they were fighting over a gun. After being taken to the police department he vaguely remembers being interviewed by the police. He remembers telling the Sheriff that he threw a gun down the hill in the backyard. He claims his wife's death was an accident

and he was never given the chance to explain to law enforcement how the shooting happened.

{¶85} On cross examination, Shawn was questioned about what happened when he retrieved his gun from the basement. He said he left the gun inside while he went outside to get the bullet. He propped his foot up on the bed to load the rifle. He claimed he did not fire the rifle, it just went off. He admitted that his finger was on the trigger.

{¶86} Shawn was then questioned about a conversation he purportedly had with Ryan West. The state asked Shawn if he told Ryan that if Michelle ever tried to leave him, he would kill her and then kill himself. Shawn denied this ever happened.

{¶87} Shawn then said that he didn't remember the conversation he had with 911, but that when he told 911 that Michelle was shot while fighting over the gun that was inaccurate. Shawn then recalled, from the videotape, that when asked during the interview with the police that it took him one minute and twenty-eight seconds to respond to the officer asking him what happened. He then recalled, from the videotape, that he stated they were wrestling over the gun and it went off. He explained that the story that he gave 911 was not incorrect; it was just out of chronological order. Shawn couldn't explain why his version of the story he gave the police at the station was inaccurate.

{¶88} Shawn then testified that he didn't mention his wife's drug problem to the police because he didn't want to expose her problem.

{¶89} He then testified that Michelle never touched the .22 caliber weapon that night.

{¶90} When asked about the bedroom door being taken off the hinges, he claimed he didn't know when it happened. He said Michelle did it because his kids couldn't have done it. He then says that Sam Krupinski was lying when he said the door was not broken on the 27th. When asked if Michelle broke the door with her hip then why was the damage done in the shoulder area of the door, Shawn did not know. Shawn then changed his response and said she broke it with her hip and her shoulder.

{¶91} The State then questioned Shawn about whether he was jealous of

Michelle. He denied calling Michelle at her parents' home twenty two times in a two hour period.

{¶92} Shawn was then asked whether he knew how the safety on his rifle worked, how to unload it, and how to remove the magazine. He replied yes to all three questions. When asked why he didn't do these things after the first shot went off, he explained there wasn't enough time.

{¶93} The State then asked Shawn how Michelle was shot in the back of the head to which Shawn responded:

{¶94} "I really - - I remember her laying on her stomach talking to me when I was on the ground the first time. And then she rolled over on her back and did a sit up position and that's the last thing I know. Next thing it went off. "

{¶95} Shawn testified that he pulled her back up onto the bed by her feet. Shawn then admitted that since he was able to see her feet up on the bed and her body was off the bed, her head would have been bleeding somewhere along the ground where he drug the body back up onto the bed. He didn't try to stop the bleeding. He just went downstairs and called 911.

{¶96} When asked why he pulled her body all the way across the bed so that her legs were hanging off the other side of the bed, Shawn responded that he didn't know he did that.

{¶97} Shawn then admitted that he was mad at Michelle, upset with Michelle, and frustrated with Michelle that evening. He accused her that evening of cheating but had nothing to base his accusation on.

{¶98} The State then questioned Shawn about why he would lay the gun next to Michelle on the bed before he pulled her back up onto the bed. Shawn has no explanation for this.

{¶99} Shawn admitted that Michelle's Vicodin use was ruining their relationship and was a financial burden. He wasn't sure if she was actually injured or not. He suspected that she might have been lying to her doctor to get the prescription.

{¶100} Shawn said he did not have an anger problem but admitted to punching a hole through a wall. He doesn't remember putting a shovel through a wall but admits that it's a possibility. He then admitted to a nine millimeter gun being thrown into the river during an argument with Michelle. He then claimed that it was Michelle that threw it in the river after he threatened to kill himself with it.

{¶101} The State then asked Shawn about the evening of the shooting and how he prevented Michelle from leaving the house. She had attempted to take the car keys and leave but Shawn blocked the door. He denied, despite his previous testimony to the contrary that, he told her she was going to sleep this one off. He said instead that he told her to change her clothes.

{¶102} The cross-examination went on for several more pages and Shawn appeared to get more and more flustered and confused by the questions. At the conclusion of redirect, the defense rested. After hearing all of this testimony, the jury returned a verdict on May 12, 2004 finding Shawn guilty on the murder count and the gun specification. Shawn was then sentenced to a prison term of three years for the gun specification and life for the aggravated murder.

Sufficiency of the Evidence: Prior Calculation and Design

{¶103} As his first of seven assignments of error, Shawn asserts:

{¶104} "There was insufficient evidence to support Appellant's conviction."

{¶105} When reviewing the legal sufficiency of the evidence to support a criminal conviction, "the relevant question 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 beyond a reasonable doubt." " *State v. Herring*, 94 Ohio St.3d 246, 252, 2002-Ohio-796, quoting *Jackson v. Virginia* (1979), 443 U.S. 307, 319. In conducting this review, an appellate court does not weigh the evidence but, rather, determines whether reasonable minds could reach the trier of fact's conclusion. *State v. LaMar*, 95 Ohio St.3d 181, 1972002-Ohio-2128. "The weight and credibility of the evidence are left to the trier of fact." *State v. Waddy* (1992), 63 Ohio St.3d 424, 430,

citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶106} In this case, Shawn challenges the sufficiency of the evidence supporting his conviction of aggravated murder. Shawn more specifically focuses on the state's alleged failure to prove that there was prior calculation and design. R.C. 2903.01(A) defines the crime of aggravated murder, in pertinent part, as follows:

{¶107} No person shall purposely, and with prior calculation and design, cause the death of another * * *.

{¶108} The Supreme Court has held, "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph three of the syllabus.

{¶109} Although the statute does not define "prior calculation and design," in *Cotton*, the Supreme Court held that instantaneous deliberation is not sufficient to constitute prior calculation and design. *Id.*, paragraph two of the syllabus. The phrase requires more than a few moments of deliberation. *Id.* at 11. It is not required that a prolonged thought process be present. Even when a defendant only has instants to design the death of the victim, it will be sufficient. *State v. Bailey* (1992), 90 Ohio App.3d 58, 73. A momentary deliberation is insufficient although neither the length of time nor degree of care are critical factors. *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185. There is no bright-line test that distinguishes between the presence or absence of prior calculation and design. Each case turns on the particular facts and evidence presented at trial. *State v. Taylor* (1997), 78 Ohio St.3d 15, 20

{¶110} Nonetheless, Shawn contends that under *Taylor*, three inquiries must be made before we can uphold a finding that he killed Michelle with prior calculation and design: (1) whether the accused and victim knew each other, and, if so, whether their

relationship was strained, (2) whether the accused gave thought or preparation to choosing a murder weapon or murder site, and (3) whether the act was drawn out as opposed to being an almost instantaneous eruption of events. Shawn claims that the State failed to put on evidence tending to prove any of these three factors. However, it would appear that the state did in fact put evidence of all three into the record.

{¶111} First, there was testimony regarding the couple's argument at Michelle's mother's house and after they returned home from the bar demonstrating a strained relationship. Second, there was evidence that Shawn deliberately got a gun and loaded it prior to the shooting and proceeded upstairs where Michelle was apparently getting ready for bed. And finally, there was evidence that the couple had been arguing throughout the night as demonstrated by the late night phone calls, torn clothing, and broken kitchen table.

{¶112} The Ohio Supreme Court upheld a conviction with similar evidence of prior calculation and design in *Taylor*. In that case, the defendant shot an acquaintance several times in the thighs and torso with a semiautomatic .9 mm pistol. Several shots had been fired while the victim was standing, and several other shots were fired after the victim fell to the floor. The killing occurred after a brief (two- to three-minute) argument in a bar. The Supreme Court determined that the evidence in that case was more than sufficient to support the finding of prior calculation and design. *Id.* at 20-23.

{¶113} Likewise in *State v. Braden*, 2003-Ohio-1325, 98 Ohio St.3d 354, the Supreme Court found that the evidence supported the jury's determination of prior calculation and design where the defendant murdered his girlfriend and her father by firing five shots at the father and one shot at the back of his girlfriend's head. The court further took into account the fact that the defendant was upset about his girlfriend's decision to end their relationship. They had argued twice a few hours before the murders. The defendant and the father were hostile to each other. The defendant had earlier asked a security guard whether he looked like a murderer. And finally the court noted that the defendant had parked his van about one block from the victims' residence

where he shot them.

{¶114} The First District in *State v. Griffin* (June 20, 2003), 1st Dist. No. C-020084 similarly found the evidence to be sufficient to support an aggravated murder conviction where the defendant claimed his wife had attempted suicide. In that case, the court noted that the location of the victim's wound on the right side of her head with the gun lying on her left side indicated that the victim could not have shot herself. No markings were found on the victim's thumb to suggest that she had pulled the gun's trigger. Evidence was presented that there had been a physical struggle between the defendant and the victim before the fatal shot was fired. The defendant had been relatively calm after his wife's death. The defendant changed his story on how the victim died several times. And finally, evidence was presented concerning the defendant's abusive and threatening behavior towards his wife immediately before she died.

{¶115} In light of these cases, it is clear that in the present case, the State did in fact place enough evidence into the record to support a finding of prior calculation and design. Accordingly, this assignment of error is meritless.

{¶116} Closely related to this assignment of error is Shawn's claim that:

{¶117} "The Trial court erred in denying Appellant's Motion for a New Trial."

{¶118} In making this argument, Shawn relies upon Crim.R. 33(A)(4), which states that a new trial may be granted on a motion of the defendant for any of the following causes affecting materially his substantial rights if the verdict is not sustained by sufficient evidence. This standard has been explained as "whether a rational fact-finder, viewing the evidence in a light most favorable to the prosecution, could have found that the essential elements of the crimes were proven beyond a reasonable doubt." *State v. Thomas*, 1st Dist. No. C-010724, 2002-Ohio-7333, at ¶ 16. Based on our previous analysis of the sufficiency of the evidence, this argument must also fail.

{¶119} Shawn's next assignment of error asserts:

{¶120} "The trial court erred in overruling Appellant's motion for acquittal."

{¶121} Criminal Rule 29(A) provides that "[t]he court on motion of a defendant or

on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶122} A trial court's decision to deny a motion of acquittal made pursuant to Crim.R. 29 "will be upheld if, after viewing the evidence in a light most favorable to the State, the reviewing court finds that any rational fact finder could have found the essential elements of the charge proven beyond a reasonable doubt." *State v. Magers* 3rd Dist. No. 13-03-48, 2004-Ohio-4013, at ¶ 26, quoting *State v. Myers* (Mar. 30, 2000), 3rd Dist. No. 7-99-05, 2000-Ohio1677, quoting *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶123} Once again, because we conclude that there was sufficient evidence to support the conviction; this assignment of error is also meritless.

Manifest Weight

{¶124} Shawn's next assignment of error asserts:

{¶125} "Appellant's conviction was against the manifest weight of the evidence."

{¶126} In contrast to a sufficiency-of-the-evidence argument, an argument based on manifest weight of the evidence requires an appellate court to determine whether the state appropriately carried its burden of persuasion. A court reviewing a question of weight is not required to view the evidence in a light most favorable to the prosecution, but may consider and weigh all of the evidence produced at trial. A manifest-weight-of-the-evidence argument involves determining whether there exists a greater amount of credible evidence to support one side of an issue rather than the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387.

{¶127} It is not a question of mathematics, but depends on its effect in inducing belief. *Id.* A reviewing court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the fact-finder clearly lost his or her way and created such a manifest

miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. A new trial is warranted only in the exceptional case where the evidence weighs heavily against conviction. *Id.*

{¶128} In the present case, Shawn argues that the jury was not faced with conflicting testimony which would require a credibility determination. Instead, he argues that the only direct evidence of what happened that night came from his own testimony and that the State could only provide circumstantial evidence of the alleged crime. This argument is of little consequence because circumstantial evidence is of equal probative value to direct evidence. *State v. Jenks* (1991), 61 Ohio St.3d 259.

{¶129} Interestingly, Shawn has called attention to the fact that his testimony is the only direct testimony regarding the fatal shooting. However, a review of the transcript in this case demonstrates that his testimony is probably the least trustworthy. During Shawn's questioning at trial, the prosecution pointed out inconsistencies in his responses to smaller details about what was said and what precisely happened prior to the shooting. The prosecution also pointed out larger inconsistencies like how the bedroom door was broken. The prosecutor further noted that Shawn's prior acts of violent behavior, like putting holes in walls and mirrors, were inconsistent with his claim that he did not have an anger problem. Even more damaging to Shawn's credibility was his admission that he was mad, upset and frustrated with Michelle the night of the shooting.

{¶130} However, the most damaging portion of Shawn's testimony were his conflicting statements about how the actual shooting occurred. The prosecution pointed out that Shawn told both the 911 dispatcher and police that he and Michelle were on the bed struggling over a gun when she was shot. Only after forensic evidence was given at trial refuting that story did Shawn testify that Michelle had never placed her hands on the gun. This inconsistency alone would appear to be enough to convince the jury that Shawn could have been fabricating the entire story.

{¶131} Because the State placed in enough forensic and circumstantial evidence to support the jury's finding of guilt and because the only evidence demonstrating

Shawn's innocence is somewhat incredible, we cannot say that the trier of fact clearly lost its way in resolving these conflicts in favor of the State. Therefore, the conviction is not against the manifest weight of the evidence. This assignment of error is meritless.

Jury Instruction: Negligent Homicide

{¶132} As his next assignment of error, Shawn claims:

{¶133} "The trial court erred in denying Appellant's request for a special jury instruction."

{¶134} More specifically, Shawn claims the trial court erred by failing to give an instruction on negligent homicide. Notably, Shawn concedes that negligent homicide is not a lesser included offense of aggravated murder under the Supreme Court's holdings in *State v. Tyler* (1990), 50 Ohio St.3d 24 and *State v. Koss* (1990), 49 Ohio St.3d 213. Nonetheless, Shawn maintains that the trial court's denial was still error as it prevented him from presenting a defense.

{¶135} Shawn's claim must fail, however, as the trial court allowed Shawn to advance the defense of "accident". The Fifth District addressed this same claim in *State v. Glagola* (Nov. 10, 2003), 5th Dist. No. 2003CA00006 and concluded the trial court properly refused the requested charge of negligent homicide during a murder trial. The court reasoned that such an instruction would have represented an unreasonable compromise between the State's position that the defendant knowingly killed the victim, and the defendant's position that the killing was purely accidental. Thus the charge would have been inconsistent with either the State's or the defendant's evidence.

{¶136} Several other courts have come to the same conclusion that a defendant's defense of accident would have contradicted a charge of negligent homicide because the defense of accident is a complete defense and such a defense would contradict an instruction that the homicide occurred negligently. These courts have concluded, therefore, that no instruction on negligent homicide is required when the theory of the defense is predicated on an accident. *State v. Gay* (Nov. 2, 1990), 11th Dist. No. 88-P-2043, citing *State v. Hill* (1987), 31 Ohio App.3d 65. See also *State v. Wiley* (Mar. 4,

2004), 10th Dist. No. 03 Ap-340; *State v. Georgekopulos* (Nov. 25, 1998), 9th Dist. No. 18797; *State v. Samuels* (Sept. 24, 1987), 8th Dist. No. 52527.

{¶137} In the present case, the record reflects that Shawn clearly chose to advance the defense of accident. Following the logic of many of our sister districts, Shawn was not entitled to receive instructions on both accident and negligent homicide. Accordingly, the trial court did not err by failing to give the additional instruction. This assignment of error is meritless.

Exigent Circumstances

{¶138} As his next assignment of error, Shawn asserts:

{¶139} "The trial court erred in denying Appellant's Motion to Suppress Evidence."

{¶140} This court's standard of review with respect to a motion to suppress is limited to determining whether the trial court's findings are supported by competent, credible evidence. *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100; *State v. Winand* (1996), 116 Ohio App.3d 286, 288, citing *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 608. Such a standard of review is appropriate as "[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653.

{¶141} As a reviewing court, this court must accept the trial court's factual findings and the trial court's assessment of witness credibility. *State v. Brown* (Sept. 7, 1999), 7th Dist. No. 96BA22, citing *State v. Anderson* (1995), 100 Ohio App.3d 688, 691. However, once this court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. *State v. Williams* (1993), 86 Ohio App.3d 37, 41.

{¶142} Here, Shawn argues that several items should have been excluded from evidence because they were obtained without a search warrant. These items include several articles of clothing, photographs/videos of the home, a can of ammunition, a

purse, shell casings, and a soft gun case.

{¶143} In response to that challenge, the State claims that not only were the objects in plain view during the initial lawful entry, they would have been inevitably discovered the next day when the search warrant was issued. The trial court sided with the State. In its judgment entry, the trial court denied the motion to suppress the items based upon the plain view exception and the doctrine of inevitable discovery.

{¶144} In the present case, however, Shawn is not simply challenging whether the requirements for plain view or inevitable discovery were met. He is also challenging the timing of the items' seizure. More specifically, what makes this case so different from other plain view cases is that the police officers arguably saw the items in plain view while responding to Shawn's 911 call but did not seize the items until sometime later.

{¶145} Neither party appears to dispute that the officers and EMTs were justified in entering Shawn's home to discern whether the victim needed assistance after Shawn informed them that he had shot his wife. The officers responded to a 911 call to investigate a possible murder which would certainly provide them a reasonable basis to enter Shawn's home. However, Shawn argues that the permissible warrantless entry into his home ended once his wife's body was removed from the home. Shawn further claims that any search of his home after this time was impermissible and that any evidence seized as a result of the search should be suppressed. This argument is meritless, however, given the facts unique to this case.

{¶146} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution require the police to obtain a warrant based upon probable cause before they conduct a search. However, the warrant requirement is subject to a number of well-established exceptions. *Coolidge v. New Hampshire* (1971), 403 U.S. 443; *Katz v. United States* (1967), 389 U.S. 347. One of those exceptions would be when exigent circumstances require that officers take immediate action.

{¶147} While officers are permitted to make a warrantless search when they have a reasonable basis to believe that a victim is in need of aid, such a search must be

"strictly circumscribed by the exigencies which justify its initiation." *Terry v. Ohio* (1968), 392 U.S. 1, 25-26. An officer may seize any evidence that is in plain view during the course of their legitimate emergency activities. *Michigan v. Tyler* (1978), 436 U.S. 499, 509-510, 98 S.Ct. 1942, 56 L.Ed.2d 486.

{¶148} The initial requirement for such a seizure is that "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California* (1990), 496 U.S. 128, 136. In addition, the officer must be lawfully located in a place from which the object can be plainly seen, and must also have a lawful right of access to the object itself. *Id.* at 137. Finally, the incriminating character of the evidence in plain view must be "immediately apparent." *Id.* at 136.

{¶149} As was previously stated, the officers and EMTs were justified in entering Shawn's home to determine if the victim was in need of assistance. There is no indication in the record that the officers intended to conduct a warrantless search by using the "emergency" exception to the warrant requirement as a pretext. Rather, the record reflects that the officers entered Shawn's home solely out of concern for the safety of the victim. The search of Shawn's home was limited only to what was necessary to effectuate the purpose of the entry, which was to locate the victim to determine if she needed medical attention.

{¶150} Moreover, Shawn's claim that all evidence collected after the officers removed the body should have been suppressed is erroneous. Shawn is correct that once the officers removed the victim's body, the emergency situation that necessitated the entry into Shawn's home terminated. However, according to the Ohio Supreme Court, police officers may reenter a residence and collect evidence in plain view, even when the emergency situation that justified the initial intrusion has terminated. *State v. Sage* (1987), 31 Ohio St.3d 173, 185-186. The condition is that during the reentry, the officers are limited to the scope of their initial entry. *Id.*

{¶151} Shawn fails to cite the holding in *Sage* in his brief and instead relies upon the United States Supreme Court's holdings in *Mincey v. Arizona* (1978), 437 U.S. 385

and *Thompson v. Louisiana* (1984). 469 U.S. 17. In those two cases, the Supreme Court held that evidence seized during a warrantless reentry into a structure must be suppressed when a search is conducted. The Supreme Court in *Thompson* at 22, infers that the fact that a new search, different in scope from the original intrusion, occurs is the pivotal detail that makes the present case distinguishable from both *Thompson* and *Mincey* stating:

{¶152} " * * * To be sure, this action would have justified the authorities in seizing evidence under the plain view doctrine while they were in petitioner's house to offer her assistance. In addition, the same doctrine may justify seizure of evidence obtained in the limited 'victim-or-suspect' search discussed in *Mincey*. However, the evidence at issue here was not discovered in plain view while the police were assisting petitioner to the hospital, nor was it discovered during the 'victim-or-suspect' search that had been completed by the time the homicide investigators arrived. * * *"

{¶153} We conclude, given the facts in this case, that a new search was not conducted under the holding in *Sage* and that the officers were lawfully in Shawn's home during their second entry. Now, we must determine whether the items recovered were in fact in plain view.

Plain View

{¶154} The "plain view" doctrine allows police officers, under particular circumstances, to seize an article of incriminating character which is not described in a search warrant. The doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost. *State v. Halczyzak* (1986), 25 Ohio St.3d 301, 303. Thus, police may seize evidence, instrumentalities, or fruits of a crime without the necessity of having first obtained a search warrant specifically naming such items. *Ker v. California* (1964), 374 U.S. 23.

{¶155} Under the plain view exception to the search warrant requirement, it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and, (3) the incriminating nature

of the evidence was immediately apparent. *Halczyszak*, at 303.

{¶156} In the present case, Officer Jason Harter testified at the suppression hearing that he was called to the Trouten residence by a 911 dispatcher. He was told there had been a shooting. When he and Officer Britt knocked on the door, Trouten immediately answered the door and told them, when asked, that the gun was upstairs and "You have to help her."

{¶157} As Officer Harter was walking up the stairs he testified that he could see the kitchen area. It appeared as if there had been some type of a struggle. He could see shotgun shells lying around the kitchen area. He could also see the den area and the dining area upon entering and walking up the stairs. Once he arrived at the top of the stairs, he saw a gun lying on top of the bed in one of the rooms. There was also a woman lying on the bed. There was a large puddle of blood under her head area. The officer also observed a blood stained sheet, a blood soaked bedspread on the bed and another with a small amount of blood on the ground.

{¶158} Officer Harter was questioned about what other items he could see in plain view. He testified that he could see a 22 long rifle bullet inside an airvent but did not initially remove it. He explained that he did not move it at that time because his number one concern was the victim on the bed. There was also a 22 long rifle casing found on the floor below a clothing rack that the officer testified was laying in plain view.

{¶159} Officer Harter then testified that he returned to the bottom of the stairs. From there he could see several items lying in the kitchen including a white bra that had been torn in half, a pair of women's underpants, a pair of blue jeans, a broken belt and a broken necklace. He could also see a woman's blue shirt lying in the kitchen doorway. Along with the items of clothing, the officer testified that he could see a shotgun shell lying in a pan on the stove.

{¶160} Officer Harter then explained that he later left the residence. Before he left, however, he secured the scene with police tape and had Officer Britt remain at the scene to make sure no one, including himself, entered the residence. While he was

taping off the back porch, Officer Harter noticed a rifle case lying open in the backyard, as well as a purse which turned out to be Michelle's. He testified that all of these items stood out in his mind because they were indicative of a struggle.

{¶161} Later, when Officer Harter returned to the house and the police were informed that Shawn had thrown a gun down the river embankment, Officer Harter was directed by another officer to a shed in the backyard where a can of ammunition was found. The door to the shed was opened when the officer arrived. The ammo can, along with the other items found inside the residence, was not collected by the police until they later returned with Shawn. A search warrant, which granted access to the entire property, was issued soon after and the police returned the following day to collect additional evidence. Although admittedly, some of the items were not initially in plain view during his first trip to the house, Officer Harter explained that all of the things that were collected the day before would have been discovered in the areas covered by the search warrant.

{¶162} Given this testimony, we conclude that the officers lawfully seized all of the bullets and casings from the home as they were reporting to the scene of a shooting. Because it was a domestic situation, it would also make sense to collect the torn articles of clothing as they tend to demonstrate signs of a struggle, as did the purse and checkbook found in the middle of the backyard.

{¶163} With that being said, it would appear that anything found in the backyard would also be admissible as Shawn told one of the officers at the station that there was a loaded weapon in the backyard. Accordingly, the officers' search of the backyard could fall under the exigent circumstances exception.

{¶164} Finally, the officers retrieved a can of ammunition from the shed. It is not clear whether the door was opened by the police or not. Because Officer Harter was the only one to testify regarding this and his testimony was unrefuted, the trial court could have believed his story that he saw the ammunition can through the open door to the shed.

{¶165} Accordingly, it appears that all of the evidence obtained by the officers

during their second entry into the house was constitutionally seized under the plain view doctrine and a discussion of inevitable discovery is not warranted. This assignment of error is meritless.

Ineffective Assistance of Counsel

{¶166} As his final assignment of error, Shawn claims:

{¶167} "Appellant's trial counsel rendered ineffective assistance."

{¶168} The standard of review of an ineffective assistance of counsel claim is well-established. Pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 687, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, i.e., errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶169} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St.3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶170} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley*, at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

{¶171} Moreover, decisions which constitute trial strategy do not generally rise to the level of ineffective assistance of counsel. A reviewing court must adopt a deferential attitude to the strategic and tactical choices counsel made as part of a trial strategy. *State v. Griffie* (1996), 74 Ohio St.3d 332.

{¶172} In the present case, Shawn advances five arguments in support of his claim of ineffective assistance of counsel. First, Shawn claims that his counsel prejudiced him during voir dire by stating on two occasions that Shawn shot his wife and by asking the following question:

{¶173} "Do you have any problems if you conclude beyond a reasonable doubt the (sic) he caused (sic) death of his wife (sic) go back out in the community should you find him not guilty?"

{¶174} Shawn claims this nullified the jury by asking them to acquit him despite any evidence of guilt. However, Shawn has taken that statement out of context. Immediately before he asked that question he first asked the following:

{¶175} "If you hear testimony, beyond a reasonable doubt, that Mr. Trouten caused the death of his wife and that's only one of the elements of the case but there are other elements such as whether he did it purposely, whether he did it with prior calculation and design, or whether it occurred in any other manner. Do you have problems with listening to each of the elements and weighing it to see if each of the elements are proven beyond a reasonable doubt?"

{¶176} When the question Shawn challenges is read in context, it appears that what defense counsel was attempting to find out is whether the potential juror had a problem with accepting the defense of accident when a fatal shooting had occurred. It is difficult to see how such a question could have prejudiced Shawn.

{¶177} Second, Shawn claims he was prejudiced when counsel elicited inadmissible hearsay and established that Shawn and Michelle were fighting fiercely before the shooting. During cross-examination of Officer Britt, the following exchange occurred:

{¶178} Q: Did you in the course of your investigation that morning learn of what else might have occurred in that household that night in terms of any telephone calls made out of that household to any source?

{¶179} A: Shawn's brother Tony Trouten arrived at my station while Shawn was at

my building. Sheriff Abdalla was present at that time. Tony advised that Shawn had called Michelle, excuse me- * * * He states that he received a call at Tony Trouten residence at approximately 3:59 a.m. * * * From what he advised, he said Michelle had said that the two were arguing at the house, Shawn's house, and he needs to come and get his brother.

{¶180} Q: Why?

{¶181} A: Because they were involved in an argument.

{¶182} Q: You have your report in front of you. Come on. What's in your report? You can use your report to refresh your memory.

{¶183} A: Says "While Sheriff Abdalla is in my office Shawn's brother Tony showed up and filled out a statement as Michelle Trouten Calling Tony saying that Michelle is going to kill his brother if he, Tony, didn't come pick up his brother."

{¶184} However, this testimony does not appear to be prejudicial to Shawn's case as it clearly demonstrates that Michelle was upset and wanted to injure Shawn. If anything, this testimony would seem to support his initial defense theory that they had struggled over the weapon. Thus, it could be considered strategic.

{¶185} Third, Shawn claims he was prejudiced by counsel's failure to object to the opinion testimony elicited from Officer Harter. More specifically, Shawn objects to the state questioning Officer Harter, based upon his experience and investigation, what his conclusion was about the case, to which the witness responded:

{¶186} "The victim placement, angle at which the bullet entered the neck, and placement of the empty as well as unfired shell casings led me to believe that Shawn Trouten from a distance of about 12 feet away. Michelle Trouten was facing the east when Shawn shot her from behind."

{¶187} Shawn challenges this testimony by claiming that it is inadmissible lay opinion given by a non-expert. In *State v. Berry* (June 23, 1988), 10th Dist. No. 87AP-924, the Tenth District discussed the rules governing the use of opinion testimony by both lay witnesses and expert witnesses:

{¶188} "Certainly, opinion testimony is not rendered inadmissible per se because it pertains to an ultimate issue. Evid.R. 704; *State v. Rohdes* (1986), 23 Ohio St.3d 225, 229, 492 N.E.2d 430. However, such testimony in the form of an opinion must be 'otherwise admissible.' Evid.R. 704 per Evid.R. 701 or 702.

{¶189} "If the opinion testimony is offered by a lay witness, the opinion must be (a) rationally based on the witness' own perceptions, and (b) helpful to a clear understanding 'of his testimony' or the determination of a factual issue. Evid.R. 701. If the opinion is elicited from an expert witness, he must be 'qualified' as such and provide 'scientific, technical, or other specialized knowledge' which will assist the jury in understanding the evidence or determining a fact. Evid.R. 702; *Lee v. Baldwin* (1987), 35 Ohio App.3d 47, 519 N.E.2d 662." *Id.* at 5.

{¶190} It would appear that at least part of the Officer's response was inadmissible as it was expert opinion testimony given by a lay witness. The very same testimony was given by ballistics experts who placed on the stand to explain the bullet trajectories and the distance from which Michelle had been shot. Assuming this was in fact inadmissible testimony, we must still decide whether Shawn was prejudiced by its introduction into evidence. Considering that experts reached the same conclusions, it is difficult to say that Shawn was significantly prejudiced by the cumulative testimony of the officer.

{¶191} Fourth, Shawn claims that he was prejudiced when counsel elicited an inadmissible opinion from Sheriff Abdalla. He argues this occurred when counsel asked the Sheriff where Shawn was standing when Shawn fired the rifle. Sheriff Abdalla responded that he was 99 percent sure that Shawn was standing in the doorway. This question and response present the precise issue dealt with in the above argument. Sheriff Abdalla's statement, although probably inadmissible as expert testimony, was cumulative to the testimony given by the ballistics experts.

{¶192} Finally, Shawn claims he was prejudiced when counsel elicited evidence that contradicted his defense. More specifically, Shawn claims that counsel

inappropriately called his father to the stand to testify what state of mind he may have had prior to the shooting. Shawn claims this contradicts his theory that he was suicidal and could not form the requisite intent to murder his wife. However, Shawn is mistaken about what defense he actually put forth. He never argued that he couldn't form the requisite intent based upon any diminished capacity. Rather, he argued that the shooting was merely an accident. It would appear that counsel's decision to place Shawn's dad on the stand would further the accident defense in that Shawn and Michelle had not been actively fighting in the hour immediately preceding the shooting.

{¶193} Because it does not appear to be a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different, Shawn's final assignment of error must also be deemed meritless.

{¶194} Accordingly, the judgment of the trial court is affirmed.

Vukovich, J., concurs.

Waite, J., concurs.