

[Cite as *State v. Miller*, 2016-Ohio-8544.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

CHRISTOPHER L. MILLER

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS:

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CASE NO. 14 CO 0047

OPINION

Criminal Appeal from the Court of
Common Pleas of Columbiana County,
Ohio
Case No. 14 CR 57

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee

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Columbiana County Prosecutor
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For Defendant-Appellant

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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 27, 2016

{¶1} Defendant-Appellant, Christopher L. Miller, appeals the judgment of the Columbiana County Court of Common Pleas convicting him of aggravated murder and sentencing him accordingly. On appeal, Miller asserts eight assignments of error. One concerns the trial court's failure to grant a continuance, five involve evidentiary rulings, and the final two challenge his aggravated murder conviction as being unsupported by sufficient evidence or against the manifest weight of the evidence. For the following reasons, all of Miller's assignments of error are meritless. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} On October 26, 2013, Matthew Bailey was discovered bludgeoned to death near a remote oil well access road and cornfield off of Hartley Road, in Butler Township, Columbiana County. In connection with this homicide, in March 2014, a grand jury indicted Miller on one count each of aggravated murder, R.C. 2903.01(A) and murder, R.C. 2903.02, both unclassified felonies, along with one count of tampering with evidence, R.C. 2921.12(A)(1), a third-degree felony. The case was tried to a jury beginning June 18, 2014. The jury returned a guilty verdict on the tampering charge; however, the jury could not reach a unanimous decision on the aggravated murder and murder charges. Thus, the trial court declared a mistrial on the aggravated murder and murder counts only, and proceeded immediately to sentence Miller to 36 months in prison on the tampering charge and set a second jury trial for the aggravated murder and murder charges for November 3, 2014.

{¶3} Prior to the second trial, there was a flurry of motions by both sides. Among other things, the State filed a motion in limine to prohibit any testimony regarding misconduct of the victim outside of the scope of the indictment. The trial court granted the State's motion, notifying counsel that it would "tightly control any testimony about [the victim's misconduct]."

{¶4} The State also filed a motion in limine requesting permission to call Patti Colon, the defendant's girlfriend at the time of the alleged offenses, as an adverse witness pursuant to Evid.R. 611(C). The prosecutor alleged that during a

recent trial preparation meeting, Colon admitted she had contact with Miller subsequent to the first trial, that she did speak with him but was "done cooperating," and that she refused to disclose the nature or substance of the conversation except to defense counsel.

{¶15} At trial, after arguments held outside of the presence of the jury, the trial court granted the State's motion to declare Colon as an adverse witness; and the State proceeded to question her accordingly.

{¶16} A final pre-trial hearing was held on November 3, 2014, the day before trial was scheduled to commence. At that hearing, Miller himself requested a continuance, alleging he had not had time to adequately prepare for trial with counsel. Upon further questioning by the trial court, it was revealed that Miller's main qualm about going forward with trial was that he believed evidence of the victim's prior misconduct or unrelated criminal investigations into the victim should be admissible at trial. Miller also voiced his belief that everything contained in the discovery packet from the State should be admissible at trial and it appeared he wanted time to convince his attorneys to adopt this position. The trial court attempted to explain to Miller that counsel and the court had a duty to follow the rules of evidence. Further, the trial court noted that since Miller had previously been tried on the same charges arising out of the same events, the second trial was "largely going to be the same or close" to the first. Accordingly, the trial court overruled Miller's request and ordered trial to begin the next day, as scheduled.

{¶17} Following jury selection, a jury view of the area where the body was found took place. The following pertinent evidence was adduced at trial. On the afternoon of October 26, 2013, residents of Butler Township discovered a body lying in a ditch off of an oil access road off of Hartley Road. Neighboring property owner, Charles Smith, testified that Miller was familiar with the area around that access road from working on cars on his property, which used to contain a salvage yard and auto repair shop.

{¶18} Law enforcement responded to the location and, later, identified the

body as Matthew Bailey. Officers observed severe trauma to Bailey's head and face, and blood spatter in the trees and tall grass near the location of the body.

{¶9} Detectives investigating at Bailey's apartment spoke with Jonathon Phillips, who testified he observed Bailey and Miller drive away from Bailey's apartment in a black Ford SUV at approximately 8:45 a.m. on the morning of October, 26, 2013. He said Miller was wearing a pair of jeans with a western-style belt.

{¶10} Colon testified Miller arrived at the mobile home where she and Miller resided between 10:15 a.m. and 10:30 a.m. that day. She said Miller was wearing a pair of black bib overalls, a thermal shirt and a pair of boots. Colon was upset because Miller, who had been driving Colon's Ford Escape SUV the previous night, was supposed to be home with the vehicle much earlier that morning so that Colon could prepare for a party she was planning for her daughter that day. Miller had also promised to return with money for party supplies; Colon had saved money for the occasion, but Miller, who had a drug problem, had spent it. Colon sent several text messages to Miller asking him why he was not home yet. At 6:42 a.m., Miller responded: "I'm fine. I drank too much. I passed out." And shortly thereafter, she received another message from Miller stating "I'll be home after a bit." Miller did not have a cellular service plan on his phones and could only use messaging applications to communicate where he had access to Wi-Fi.

{¶11} Miller also texted Colon using the victim Matthew Bailey's cell phone at 9:40 a.m. and 9:42 a.m., which is around the time it is believed that Bailey was killed. In those texts, Miller asked Colon what time she needed to pick up her daughter and told Colon he was getting cash and coming home.

{¶12} When Miller finally returned home, Colon observed a fresh injury on the back of Miller's head. He said he had tripped and fallen while drunk, but was evasive about it. Miller did not have the money he owed Colon, but Colon was able to find some money she had forgotten about to buy some of the supplies for her daughter's party. On the way to the store to purchase them, Miller, who was driving her in the

Ford SUV, reached across her and attempted to wipe blood off the passenger window only to realize it was on the outside of the window. Miller explained that it was probably his blood. While they were driving, Colon received a phone call from Miller's cousin, Ronny Lacey, who told Miller that Bailey's body had been found that morning. Thereafter, Miller became agitated and upset. Colon believed this agitation was more drug-related; she thought that Miller needed a "fix."

{¶13} That day, after dropping Colon off at the party, Miller contacted Wanda Bender by telephone to ask if her husband had any work for him; and visited the homes of Mark Menough and Mervin and Gayle Hilliard. At the Hilliards' home, Miller borrowed a router, which is a wood-working tool. The Hilliards testified that Miller was wearing a long-sleeved shirt and black coveralls and work boots. Miller said he was cold and sat by the wood burner. The Hilliards could not tell whether Miller was wearing jeans under the coveralls.

{¶14} A forensic evaluation of Miller's smart phone showed internet searches for local news stations at around 5:20 p.m. that day.

{¶15} That evening, Miller picked up Colon from the party and the two drove back to their mobile home. Not long after their arrival, officers arrived, having determined by then that the black Ford SUV seen by Phillips at Bailey's apartment was registered to Colon. Knowing that Miller had an active arrest warrant for a failure to appear charge, police approached the mobile home to execute the warrant. As police knocked on the front door, Miller attempted to escape out of the back door, but ran back inside when confronted by officers and was ultimately found hiding in a bedroom. Officers took Miller into custody, but did not mention the Bailey homicide. At this time it was discovered that Miller had two cell phones in his possession, one of which had a micro-SD cell phone card containing self-portrait photos ("selfies") of Matthew Bailey.

{¶16} Colon consented to a search of the mobile home. During the search, police discovered a white thermal shirt belonging to Miller with blood stains. Police also observed blood stains on the front window of the black Ford SUV, which was

parked in front of the mobile home. Agent Carlini later determined that the blood spatter on the outside of the vehicle, like that found in the trees, was "castoff."

{¶17} Inside the vehicle, there was evidence of bloodstaining in the front passenger seat area. Blood stain spots were also found on Miller's boots. DNA testing determined that some of the blood stains in the SUV and on Miller's clothing matched the DNA of Matthew Bailey.

{¶18} Based on the forensic evidence as a whole, Agent Carlini concluded that Bailey bled inside of the Ford SUV; was likely dumped outside near the oil well; and then assaulted there, causing the blood castoff on the trees and the outside of the SUV.

{¶19} Dr. Dorothy Dean, the medical examiner, a forensic pathologist, testified there were no defensive wounds on Bailey and that Bailey was struck about the head and torso with a blunt object at least 30 times, ultimately causing his death.

{¶20} On October 27, 2013, while in the Columbiana County jail on the failure to appear charge, Miller indicated that he wanted to speak with detectives. Miller subsequently gave three conflicting statements about the events of October 26, 2013.

{¶21} During the first interview on October 27, 2013, Miller stated he and Bailey left Bailey's apartment on the morning of the 26th, and they met a woman at the nearby Suburban Food Mart, who left her car there and rode with them to the remote oil access road to use drugs. He explained that Bailey was a methamphetamine "cook." According to Miller, "a dude in a white truck" pulled up behind them while Miller was outside of the Ford SUV trying to get a Wi-Fi signal on his phone. Suddenly, Miller said he was hit on the back of the head and lost consciousness. When he awoke he found his car door open, his money gone and Bailey lying on the ground bleeding and gurgling. He said he drove away. He then cleaned off the car, picked up Colon and went about his day. He only gave a vague description of the "dude," as an older bald male with a goatee. He kept referring to the woman as "that chick," eventually saying he thought her name might be Michelle

or Melissa. He could not explain why he did not go to police and tell them what happened other than to state that he hoped it would all go away and that he did not want to implicate himself.

{¶22} The next day, October 28, Miller again requested to talk to detectives, but changed his story about what happened. Notably this was after detectives informed him that forensics experts from BCI were collecting evidence from the Ford SUV. Instead of meeting the woman at the Suburban Food Mart, he said she was driving a grey car and she met up with Bailey and Miller (who was driving the Ford SUV) on Georgetown Road. He said Bailey had about \$1000.00 in cash on his person.

{¶23} He said the female left her car on the side of Georgetown Road and rode with Miller and Bailey to the oil access road where they met the male in the white pickup truck, which he said was a small, Ford Ranger type pickup, with a Stark County sticker and a dent in the passenger bed. Miller said the man had prison tattoos and was over six feet tall. At this point, Miller said he was in the driver's seat, Bailey was in the passenger side front and the male and female were in the back seat of the car. At some point, Miller said Bailey got hit in the head and the male grabbed Miller and tried to pull him into the back seat, ultimately striking him in the head and knocking him out. When Miller awoke, he said he was half in and half out of the SUV and heard the pair discussing what they were going to do with him. He stated at that point he turned the car on and drove away. He came back to the scene a short while later, saw the white truck was gone and found Bailey dead. He then left, cleaned out the SUV and went home.

{¶24} Detectives searched for the male and female described by Miller, along with the pickup truck, but were unable to find any leads.

{¶25} Miller gave a third and final statement on February 4, 2014. In this version, he had no contact with Bailey's alleged assailants (i.e., the unnamed male and female from the prior stories). Rather, Miller stated that he and Bailey went to a motel on Route 62 and Bailey borrowed his SUV, while Miller stayed back at the

motel. Miller said he knew Bailey was going to the area off of Hartley Road and assumed it was drug-related. After about 40 minutes, Miller said he became anxious that Bailey had not returned and began to walk down Route 62, where someone picked him up and dropped him off on Hartley Road. He told detectives it was someone he knew, but he did not say the person's name or what kind of vehicle he was driving. Miller said from Hartley Road, he could see his Ford SUV on the oil access road, noticed the door open and walked up to it. He found Bailey dead by the side of the road and then got in his vehicle and drove away. He then cleaned out the SUV and spent the rest of the day as he described it in the first two interviews.

{¶26} Robert Barrett, who was Miller's cellmate in the Columbiana County jail, testified against Miller; in exchange, the prosecutor had agreed not to pursue a potential felony failure to appear charge against Barrett for missing a court appearance while on bond. Detective-Sergeant Jeffrey Haugh testified that Barrett provided investigators with details about the homicide that were not publicly available at that time. Barrett did not initiate contact; rather, the investigators did. According to Barrett, Miller and he became friends in jail and over a period of time, Miller confided in him that he killed Bailey.

{¶27} Miller told him that he and Bailey "had some differences and that * * * nobody cares what happened to him[.]" that Bailey was "a fucking piece of shit." Miller told Barrett he had three main problems with Bailey: (1) he stole from him; (2) he lied to him and stole from his drug supplier, a black man named Pete, from Youngstown; and (3) he had Miller pawn a lawnmower, which he only later found out Bailey had actually stolen from Miller's own grandmother. According to Barrett, Miller said the lawnmower incident, "was the final strike."

{¶28} Miller at one point told Barrett he did not mean for the situation with Bailey to happen as it did, that he "took it too far. He just flipped out, saw red, and he said he just beat him and beat him and beat him there." Barrett also overheard Miller on the phone stating "he didn't mean for any of this to happen and he didn't mean for it to go that far."

{¶29} After one of his interviews with detectives, Miller came back to the cell and said to Barrett: " 'I can't seem to tell the same story twice. They keep picking me apart.' "

{¶30} Michael Main, a recovering heroin addict, testified that Miller was a drug debt collector for a dealer in Youngstown, named P.C. Miller told him there would be "serious consequences" for failing to repay P.C.; Miller "was talking about breaking legs at some point."

{¶31} In addition, Colon testified that Miller had gone to Bailey's house on one occasion to collect a drug debt for this dealer, and that Miller had carried a wrench with him to complete this task, and returned with Bailey's air compressor as payment. According to Phillips, however, Bailey said Miller had actually stolen his air compressor.

{¶32} Phillips, the man who saw Bailey and Miller drive off together at 8:45 on the morning of the murder, testified that it was his understanding that Bailey was months behind in his rent at the time of his death and was preparing to be evicted from his apartment. In an attempt to help Bailey, when Phillips saw him that morning, he offered him an opportunity to earn some money working on a semi-truck that day. Bailey reportedly declined, explaining to Phillips that he and Miller had other plans to make money that day. Phillips overheard Bailey and Miller talking that Miller was going to go get his brother "Pete," to go to Youngstown and that "they were getting half a gram [of some sort of drug], for doing so. Detectives determined that Pete and "P.C." were aliases for the same dealer.

{¶33} Nick Senanefes testified Miller did some work on his minivan for him on Friday, the day before the alleged offenses. He testified that Miller was acting angry and strange and started beating the wheel bearing of his van with a sledgehammer. He said the two got into an altercation after he refused to buy a pair of boots from Miller and that Miller grabbed him by the throat and tried to force him in the car before driving away.

{¶34} After considering all of the evidence, the jury found Miller guilty of both

aggravated murder and murder. Following a sentencing hearing, the trial court merged the aggravated murder and murder counts and sentenced Miller to life without parole on the aggravated murder charge, to be served consecutively to the tampering sentence from the first trial.

Failure to Grant a Continuance

{¶35} In his first of eight assignments of error, Miller asserts:

The trial court erred when it denied Christopher Miller's request for a continuance in violation of his rights to due process and a fair trial. Fifth and Fourteenth Amendments to the United States Constitution; and Section 16, Article I of the Ohio Constitution.

{¶36} "The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge." *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981), citing *Unger v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.E.2d 291 (1964). In *Unger*, the Ohio Supreme Court adopted a multi-factor balancing test to evaluate motions to continue. *Id.* The test includes three considerations: "(1) the existence of any potential prejudice for the defendant; (2) the trial court's right to control its own docket; and (3) the public's interest in ensuring that justice is rendered promptly and efficiently." *State v. Rosine*, 7th Dist. No. 03 MA 00094, 2005-Ohio-568, ¶ 17, citing *Unger* at 67.

{¶37} Further factors that a trial court should consider include:

The length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Unger at 67-68.

{¶38} An appellate court must not reverse a denial of a continuance motion unless there has been an abuse of discretion by the trial court. *Id.* at 67. An abuse of discretion means the trial court's decision is unreasonable based upon the record; that the appellate court may have reached a different result is not enough to warrant reversal. See *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶ 21.

{¶39} Weighing of all the relevant factors, the trial court did not abuse its discretion by denying Miller's continuance request. The date for Miller's jury trial, November 4, 2014, was set by judgment entry on June 26, 2014. A final status conference was held on October 31, 2014. Miller himself (not counsel) requested the continuance on November 3, 2014, the day before the trial was scheduled to begin.

{¶40} Miller did not have a legitimate reason for requesting the continuance. Although he stated at first he needed more time to confer with counsel in light of the fact that he had been imprisoned since the first trial, upon further questioning by the trial court, it was revealed that Miller's main qualm about going forward with trial was that he believed evidence of the victim's prior misconduct or unrelated criminal investigations into the victim should be admissible at trial. Miller also voiced his belief that everything contained in the discovery packet from the State should be admissible at trial and it appeared he wanted time to convince his attorneys to adopt this position. The trial court attempted to explain to Miller that counsel and the court had a duty to follow the rules of evidence. Further, the trial court noted that since Miller had previously been tried before that court on the same charges arising out of the same events, that the second trial was "largely going to be the same or close" to the first trial. Accordingly, the trial court overruled Miller's request and ordered trial to begin the next day, as scheduled.

{¶41} The potential prejudice to Miller resulting from the denial of his request was low in light of the fact that he had already been tried before using much of the same evidence and had ample time to prepare. Furthermore, the inconvenience to litigants, witnesses, opposing counsel and the court from a continuance was great

since those parties, including Miller's counsel who made no such request, were prepared to proceed with trial the next day. Granting Miller's request for a continuance would have merely served to delay the trial.

{¶42} In sum, when balancing the *Unger* factors, the trial court did not abuse its discretion in denying the continuance motion. Accordingly, Miller's first assignment of error is meritless.

Limiting Testimony about Victim's Prior Misconduct

{¶43} In his second assignment of error, Miller asserts:

The trial court committed reversible error when it didn't allow defense counsel to fully cross-examine the State's witness, and thus impeded Mr. Miller's ability to defend himself against the charges levied against him, in violation of his Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

{¶44} Miller argues that the trial court erred by prohibiting testimony from one of the detectives about a prior investigation involving the victim Matthew Bailey. This issue had been the subject of the State's motion in limine to prohibit any testimony regarding misconduct by Bailey that fell outside of the scope of the indictment.

{¶45} The State acknowledged in the memorandum in support of the motion in limine that Bailey was a suspect in an unrelated homicide three years prior to the offense at issue, but noted there was no evidence that the prior homicide, or the victim of the prior homicide, had any connection with Miller. The State argued that evidence of the victim's misconduct was irrelevant, and even if relevant, would be inflammatory and should be prohibited under Evid.R. 403(B). The trial court granted the State's motion in limine, and notified counsel that it would "tightly control any testimony about [the victim's misconduct]."

{¶46} During trial, this issue came up during Detective David Talbert's testimony. Det. Talbert explained that he was called to help identify a body that was

found on Hartley Road, and that "[m]yself and Detective Sheets had prior contact with who we believed to be the alleged victim at that time * * * ." On cross-examination, Detective Talbert was asked follow-up questions about whether he "ha[d] an idea that it was Matthew Bailey before the positive identification." Defense counsel asked Detective Talbert: "[a]nd I believe from your report it says that was based on the stature of the victim, height, and weight, and the clothing the victim was wearing, and believe that to be consistent with Matthew P. Bailey; is that correct?" Detective Talbert responded, "[c]orrect." Defense counsel further inquired, "[o]kay. What about his clothing made you think that that might have been Matthew Bailey?" and Detective Talbert answered, "I conducted an interview weeks prior with Matthew Bailey and had actually been involved in another investigation with him, and he was known to wear this particular style pants, the Dickey work pants." When defense counsel further inquired of Detective Talbert what type of investigation it was, the State objected, and the trial court sustained the objection.

{¶47} "Evidentiary rulings at trial are typically reviewed on appeal for an abuse of discretion." *State v. Smith*, ---- N.E.3d ----, 2016-Ohio-3418, ¶ 30 (7th Dist.), citing *State v. Beshara*, 7th Dist. No. 07 MA 37, 2009–Ohio–6529, ¶ 55.

{¶48} Miller argues that the trial court erred by prohibiting him from questioning Det. Talbert about his prior investigation of the victim, claiming the State's witness "opened the door" to this line of questioning; and more fundamentally, that testimony regarding the investigation into the victim was relevant to this case and highly probative to support Miller's defense that he did not murder Bailey.

{¶49} First, neither the State, nor its witness, opened the door to questions about the victim's prior alleged misconduct. Det. Talbert made no statement concerning prior misconduct of the victim, and the State's questioning did not attempt to elicit testimony regarding Bailey's criminal history. Rather, when the prior investigation into the victim came up, Det. Talbert was testifying about how the victim's dead body, which was severely disfigured in the attack, was identified.

{¶50} Further, prior specific instances of the victim's conduct would not be

admissible under the character evidence rules. Evid.R. 404(A)(2) does provide: "Evidence of a pertinent trait of character of the victim of the crime offered by an accused * * * is admissible[.]" However, Evid.R. 405 sets parameters regarding the form character evidence of the victim may take:

(A) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(B) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Evid.R. 405(A) and (B).

{¶51} Here the character of the victim is not an essential element of a charge, claim or defense and thus would not come in under Evid.R. 405.

{¶52} Instead, Miller sought to introduce evidence of Bailey's past conduct to demonstrate that someone other than Miller killed Bailey. The State contends such evidence is irrelevant. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Miller asserts that the fact that Bailey was a suspect in a prior murder unconnected to Miller is relevant, as it raises the possibility that someone connected with the prior murder was responsible for Miller's death.

{¶53} Even assuming this meets the low threshold for relevancy, the trial court properly excluded it under Evid.R. 403(A) which provides: "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

When considering the fact that no other evidence was proffered to show that someone connected with the prior murder for which Bailey was accused was responsible for his death, the probative value of Bailey's involvement in that case was minimal. On the other hand, the danger of confusing the issues or misleading the jury was much greater.

{¶54} Thus, the trial court did not err by limiting questioning about the prior murder investigation. Miller's third assignment of error is meritless.

Adverse Witness Designation

{¶55} In his third assignment of error, Miller asserts:

Christopher Miller's right to a fair trial under the Fourteenth Amendment was violated when the trial court improperly deemed Patti Colon an adverse witness under Evidence Rule 611(C).

{¶56} "Evid.R. 611(C) generally prohibits the use of leading questions on direct examination. However, they are permitted '[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.' *Id. State v. McKelton*, Slip Opinion No. 2016-Ohio-5735, ¶ 150. On appeal, a trial court's application of this rule is reviewed for an abuse of discretion. *Id.*

{¶57} The State had filed a motion in limine requesting permission to call Patti Colon, the defendant's girlfriend at the time of the alleged offenses, as an adverse witness pursuant to Evid.R. 611(C). The prosecutor alleged that during a recent trial preparation meeting, Colon admitted she had contact with Miller subsequent to the first trial; that she did speak with him but was "done cooperating" and refused to disclose the nature or substance of the conversation except to defense counsel.

{¶58} Just prior to her testimony at trial, after questioning her outside of the presence of the jury, the trial court ruled that Colon was an adverse witness. Miller challenges this ruling on appeal on the grounds that he and Colon were no longer romantically involved by the time of the second trial.

{¶59} This is somewhat similar to an argument rejected by the Supreme Court

of Ohio in *McKelton*. There the trial court deemed the defendant's former girlfriend an adverse witness, and the Court upheld this determination on appeal:

Here, the record supports the trial court's finding that Dumas [the former girlfriend] was identified with McKelton [the defendant]. Dumas testified that they had ended a six-year romantic relationship earlier that year, and they were still close. She visited McKelton in jail, sent him money, exchanged letters with him, and spoke to him on the telephone. Indeed, she had even spoken with him since his trial began four days earlier.

McKelton at ¶ 151.

{¶60} Similarly, Colon had a five-year relationship with Miller prior to the commission of the offenses at issue here. Although she claimed the relationship had ended by the time of the second trial, she admitted she kept in contact with Miller, and that she recently told him by phone that she loved him, though she qualified this by saying she meant that "as a friend."

{¶61} It was well within the trial court's discretion to deem her an adverse witness and permit the State to ask her leading questions. Accordingly, Miller's third assignment of error is meritless.

Impeachment versus Refreshing Recollection

{¶62} In his fourth assignment of error, Miller asserts:

Christopher Miller's right to a fair trial under the Fourteenth Amendment was violated when the State improperly impeached Patti Colon without demonstrating genuine surprise and affirmative damage under Evidence Rule 607.

{¶63} Miller argues that the State's questioning of Patti Colon, its own witness, violates Evid.R. 607 which provides in pertinent part: "The credibility of a witness may be attacked by any party except that the credibility of a witness may be

attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage." Because this is a challenge to an evidentiary ruling it is subject to an abuse of discretion review. See *Smith, supra* at ¶ 30.

{¶64} When a witness has been deemed to be an adverse witness, a prosecutor is free to ask leading questions, but cannot "circumvent the constrictions of Evid.R. 607(A) * * * under the guise of leading an adverse witness to develop testimony consistent with the witness's prior statement." *In re K.S.*, 8th Dist. No. 97343, 2012-Ohio-2388, ¶ 17.

{¶65} Miller claims the State improperly impeached Colon with her prior testimony from the first trial. Miller argues there can be no showing of "surprise and affirmative damage," since she was known to be adverse to Miller, and therefore the questioning was improper under Evid.R. 607(A). The State counters that it was merely using the testimony to help refresh Colon's recollection, which is permissible under Evid.R. 612.

{¶66} Miller takes issue with the following lines of questioning by the prosecutor, which involve details of what happened the night Miller was arrested. Specifically, with regard to discussions Colon had with Columbiana County sheriff's deputies after searching her home, the State asked: "[y]ou indicated to them, before you would speak to them, that you wanted to know what they were going to do about your safety, and you asked them that several times." Colon responded, "No. No, they lied to me and told me they would unhandcuff [sic] me if I signed permission for them to search my house. Yeah. That's what happened."

{¶67} The State then produced a transcript of Ms. Colon's conversation with the deputies and had her review a portion of that conversation.

Q I'm going to show you, Mrs. Colon, what for purposes of identification we have labeled Exhibit #146. Do you recognize that to be a transcript of your interview with deputies that evening?

A Yeah.

Q Would you take for a moment, take a moment and look —

A Yeah, this was after they handcuffed me. After they made me sign a consent to this

Q Okay. I want you to take a moment and I want to ask you to review this portion, the bottom portion of the first page of that transcript.

DEFENSE COUNSEL: Your Honor, I'm going to object at this point. I think this is improper use of impeaching his own witness and I -- unless there's some other reason for it, I don't believe this is the proper use of the exhibit.

THE COURT: This is an adverse witness.

PROSECUTOR: Yeah, and I'm not yet impeaching her. We'll see if we get to that stage. Thank you.

A I've read this.

Q You've read that. Now, having read that, ma'am, does that refresh your recollection about whether you asked the deputies several times - -

A Yes, I'm not - - I'm not disputing - -

Q Let me - -

A - - that I asked about my safety.

Q Mrs. Colon, let me finish the question first.

A Okay.

Q Does that help refresh your recollection about whether in fact you contac- -- or you indicated to the deputies that you were concerned about your own safety in providing answers about what had happened on October the 26th.

A I'm not - -

Q Yes or no?

A Yes, I'm not disputing that.

Q Okay. And in fact, didn't you tell the deputies that you were concerned for your own safety, and you wanted to know what they were going to do about preserving your safety, if you talked to them about what happened?

A I'm not disputing that.

{¶68} Miller also takes issue with another occasion during redirect examination, where the State was questioning Colon about phone conversations she had with Miller while he was in the county jail. As background, on direct examination the State had asked Colon whether Miller had refused to tell her what happened with Bailey, because he didn't want Colon to have to testify against him.

{¶69} On cross-examination, defense counsel questioned Colon about the State's characterization of their conversation, and Colon testified as follows:

Q And did the conversation go the way that Mr. Gamble explained it, that Mr. Miller specifically told you, "I want to tell you what happened." Did Mr. Miller tell you he wanted to tell you?

A It was kind of taken out of context, but.

Q Well, how is it taken out of context?

A Chris didn't want to discuss it because he didn't want to put me in a position where I would have to be forced to say something that I didn't want to. It's not that he didn't -- hiding anything, he just didn't want me to be put in a bad position.

{¶70} On redirect examination, the State brought up Colon's prior testimony, stating:

Q Okay. You indicated in your testimony to Attorney Gorby that you had a discussion with the Defendant on the telephone from the county

jail -- you referred to it previously -- about the death of Matthew Bailey. And you indicated that the Defendant made some response to you. And I want to ask you to again review your previously-sworn testimony as it relates to that matter on Pages 63 and 64 of that transcript.

A Okay.

Q Okay. Do you recall that sworn testimony under oath -

A Uh-huh.

Q -- concerning your telephone call and your contact with the Defendant in the county jail on that mobile phone?

A Yes.

Q Do you recall that being the nature of this question and answer?

A Yes.

Q Did you recall then testifying that the Defendant said he didn't want to talk about it because he doesn't want you to know anything, because he doesn't want you to have to testify against him?

{¶71} Defense counsel objected and the trial court overruled the objection.

{¶72} Miller argues that the State improperly circumvented the constrictions of Evid.R. 607(A) under the guise of leading Colon to develop testimony consistent with her prior statements. Miller likens this case to *In re K.S., supra*, where the Eighth District concluded the prosecutor used improper impeachment techniques. *Id.* at ¶ 18-20. However, that case is distinguishable because there the adverse witness's prior inconsistent statements were read into the record, and admitted into evidence. Here, Colon was merely presented with her prior testimony.

{¶73} In the end, while there is a "fine distinction between 'impeaching a witness with a prior inconsistent statement and leading [an adverse] witness to develop * * * testimony consistent with [the witness's prior] statement[.]" *id.* at ¶ 17 (citation omitted), the trial court reasonably concluded that the prosecutor did not cross that line in this case. Accordingly, Miller's fourth assignment of error is meritless.

Prior Acts Evidence

{¶74} In his fifth assignment of error, Miller asserts:

The trial court erred when it admitted irrelevant and prejudicial evidence, denying Christopher Miller his rights to due process and a fair trial.

{¶75} Miller asserts that the trial court erred by permitting Colon to testify about Miller's prior acts or misconduct. "[A]ppellate review of a trial court's decision regarding the admissibility of other crimes, wrongs, or acts under Evid.R. 404(B) is conducted under an abuse-of-discretion standard." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 1.

{¶76} Evid.R. 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶77} The Ohio Supreme Court set forth a three-step analysis reviewing courts should employ when considering so-called "other acts" evidence:

The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. See Evid.R. 403.

State v. Williams, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶78} Miller takes issue with the fact that Colon was permitted to testify about: (1) prior verbal and physical altercations between Colon and Miller, including whether Colon feared for her safety; (2) Miller's practice of driving on back roads to avoid police; (3) Miller's past collection of debts from Bailey; and (4) Miller's purchasing and use of prescription painkillers. He claims the State sought to use her testimony about Miller's prior misconduct merely to show he had criminal propensities.

{¶79} The past altercations between the two are relevant insofar as Colon testified that at the time of Bailey's murder her relationship with Miller was strained due to Miller's heroin addiction, more specifically, due to the money required to satisfy his drug habit. One theory of the case advanced by the State at trial was that Miller's motive for the killing was financial in nature, that he killed Bailey in an attempt to get money either to reimburse Colon the money that she needed for the Halloween party that day, or to support his illegal drug habit. Accordingly, this evidence was admissible to show motive, which is one of the exceptions listed in Evid.R. 404(B). The probative value of this evidence is not substantially outweighed by the danger of unfair prejudice to Miller. During his interviews with investigators, Miller was upfront about his drug problem and the issues he had with Colon.

{¶80} With regard to Colon's testimony about Miller's practice of driving on back roads, this came up when Colon was asked whether, on the morning of Bailey's murder, Miller took the most direct route from their mobile home park to pick up Colon's daughter. Colon agreed that Miller typically drove the back roads to avoid contact with the police, because he lacked a valid driver's license. This evidence was relevant in that it could establish Miller's knowledge of the remote areas of Columbiana County and his tendency to use those roads. Such knowledge is related to the location where the victim's body was discovered: a secluded oil access road in a remote location in Columbiana County. This could be used to demonstrate that Miller had the opportunity to kill Bailey. It is also probative of prior calculation and design, in other words, his plan to kill Bailey in a remote area. Knowledge,

opportunity and plan are all Evid.R. 403(B) exceptions. The probative value of this evidence is not substantially outweighed by the danger of unfair prejudice to Miller especially considering Miller mentioned driving on the back roads during his statements to detectives.

{¶81} With regard to Colon's testimony about Miller's collection of debts from Bailey, this was relevant to establish that the relationship between Miller and Bailey was both drug-related and strained. Additionally, this evidence showed that Miller was an enforcer, a debt collector, and that he carried blunt instruments as enforcement weapons when collecting drug debts, which could be admissible as evidence of Miller's plan, motive or modus operandi, all Evid.R. 404(B) exceptions. There was testimony from other witnesses about Miller's role as a drug debt collector and thus probative value of this evidence is not substantially outweighed by the danger of unfair prejudice to Miller.

{¶82} Finally, Colon's testimony about Miller's drug use was relevant to the State's theory that Bailey's murder was drug-related and thus could be admissible to show motive under Evid.R. 404(B). As discussed above in the context of Colon's past altercations with Miller, there is ample other evidence of Miller's drug use, including in the statements Miller himself made to detectives; thus, this testimony was not unfairly prejudicial either.

{¶83} Accordingly, the trial court did not abuse its discretion regarding these evidentiary rulings, and Miller's fifth assignment of error is meritless.

Demonstrative Evidence

{¶84} In his sixth assignment of error, Miller asserts:

The trial court erred when it allowed the use of unfairly prejudicial demonstrative evidence and thus denied Christopher Miller his rights to due process and a fair trial.

{¶85} Miller argues the trial court erred by permitting the State to use a hammer as a demonstrative prop at trial where there was no conclusive evidence

presented that a hammer was used to kill Bailey—in fact, the murder weapon was never recovered. Miller asserts that the production of the hammer was unfairly prejudicial, confusing, and misleading to the jury and that the trial court erred by permitting it.

{¶86} The hammer was presented to the jury during the course of the forensic pathologist's testimony. Dr. Dean had described the "roundish nature of the bruising" on the victim's head and explained "that the weapon or weapons has a roundish and a long part to it possibly." The State then produced the hammer as an example of the type of weapon that could cause such injuries. The State clarified, over defense counsel's objection, that the hammer was being offered for demonstrative purposes only. The forensic pathologist then testified that a hammer, similar to the one produced by the State, could have been used to kill the victim. She did not testify that the hammer produced killed the victim. Rather, she testified that more than one weapon could have been used to kill the victim. The forensic pathologist also testified that the injuries to the victim could have been caused by another weapon, specifically "a dull machete type instrument* * *."

{¶87} Miller also takes issue with the prosecutor's statement during rebuttal closing argument: "[w]ell, is there any doubt in your minds that this man was bludgeoned to death with a blunt instrument, and probably a hammer, as Dr. Dean suggested?"

{¶88} A trial court's ruling on demonstrative evidence is reviewed under an abuse-of-discretion standard. *State v. Herrig*, 94 Ohio St.3d 246, 254, 762 N.E.2d 940 (2002).

{¶89} Stated generally, demonstrative evidence is "an object, picture, model, or other device intended to clarify or qualify facts for the jury." *In re A.H.*, 2d Dist. No. 2014–CA–146, 2015-Ohio-2174, ¶ 54, quoting *State v. Agee*, 7th Dist. No. 12 MA 100, 2013-Ohio-5382, ¶ 39. Demonstrative evidence is merely an aid in understanding certain facts. *In re A.H.* at ¶ 54. This is in contrast to "substantive evidence," which has been defined as "something (as testimony, writings, or objects)

presented at a judicial or administrative proceeding for the purpose of establishing the truth or falsity of an alleged matter of fact." *Id.*

{¶90} "Demonstrative evidence is admissible if it satisfies the general standard of relevance set forth in Evid.R. 401 and if it is substantially similar to the object or occurrence that it is intended to represent. The admission of demonstrative evidence is subject to Evid.R. 403." *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 82 (footnotes and citations omitted.)

{¶91} It is less clear whether those evidentiary rules apply in situations like this one, where the demonstrative exhibit is merely used as a prop at trial to aid the jury in its understanding of the facts, and is never admitted into evidence.

{¶92} Regardless, the hammer meets the standards set forth in Evid.R. 401 and 403. Relevant evidence, according to Evid.R. 401, is that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Even relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

{¶93} Here, the hammer was relevant to aid the jury in understanding the manner in which the victim was killed. Specifically, because no murder weapon was recovered, the demonstration with the hammer was helpful to show the jury the type of blunt instrument that could be used to cause injuries consistent with those of the victim. The forensic pathologist testified that a hammer, similar to the one produced by the State, could have been used to kill the victim. Thus, it is "substantially similar to the object or occurrence that it is intended to represent." *Jones, supra* at ¶ 82.

{¶94} The danger of prejudice to Miller, confusion of the issues, or of misleading the jury, was low because the jury was aware that there was no murder weapon recovered, the hammer used in court was not the murder weapon, and that the victim's injuries may have been caused by a hammer or some other blunt instrument. Further, the exact nature of the murder weapon was not a critical issue at

trial. Miller's defense was that he did not kill the victim at all.

{¶95} Finally, with regard to the prosecutor's reference to a hammer as a probable weapon during its rebuttal closing argument, defense counsel failed to object, so a plain error review applies. *State v. Ballew*, 76 Ohio St.3d 244, 255, 667 N.E.2d 369 (1996). Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *State v. Moreland*, 50 Ohio St.3d 58, 62, 552 N.E.2d 894 (1990).

{¶96} Generally, counsel is entitled to considerable latitude in closing argument. *Id.* Counsel may freely comment on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990). This is precisely what the prosecutor was doing by referencing the hammer in its closing argument.

{¶97} Thus, the trial court did not abuse its discretion by permitting the State to use a hammer as a demonstrative aid during trial. Miller's sixth assignment of error is meritless.

Sufficiency and Manifest Weight: Aggravated Murder

{¶98} Finally, Miller's seventh and eighth assignments of error involve identical testimony and evidence; thus, for clarity of analysis they will be discussed together; they assert, respectively:

Christopher Miller's conviction for aggravated murder for the death of Matthew Bailey was supported by insufficient evidence in violation of Mr. Miller's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and Section 10, Article 1 of the Ohio Constitution.

Christopher Miller's conviction for aggravated murder for the death of Matthew Bailey was against the manifest weight of the evidence in violation of Mr. Miller's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and Section

10, Article 1 of the Ohio Constitution.

{¶99} A challenge to the sufficiency of the evidence tests whether the state has properly discharged its burden to produce competent, probative, evidence on each element of the offense charged." *State v. Petefish*, 7th Dist. No. 10 MA 78, 2011–Ohio–6367, ¶ 16. Thus, sufficiency is a test of adequacy. *State v. Thompson*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997).

{¶100} Conversely, "[w]eight of the evidence concerns the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other." (Emphasis sic.) *State v. Thompson*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id.* This is so because the triers of fact are in a better position to determine credibility issues, since they personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶101} Thus, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompson* at 387. However, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99 CA 149, 2002–Ohio–1152, *2, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Under these circumstances, the verdict is not against the manifest weight

and should be affirmed.

{¶102} Miller challenges only his aggravated murder conviction as being against the sufficiency and weight of the evidence. R.C. 2903.01(A) defines the offense as "purposely, and with prior calculation and design, caus[ing] the death of another * * *."

{¶103} "Rather than instantaneous deliberation, 'prior calculation and design' requires a scheme designed to implement the calculated design to kill." *Cotton* at 11. The evidence must reveal "the presence of sufficient time and opportunity for the planning of an act of homicide." *Id.* at paragraph three of the syllabus. In other words, "[p]rior calculation and design requires 'some kind of studied analysis with its object being the means by which to kill.'" *State v. Moore*, 7th Dist. No. 07 MA 136, 2009-Ohio-1177, ¶ 36, quoting *State v. Ellenwood*, 10th Dist. No. 98AP-978, *8, (Sept. 16, 1999), quoting *State v. Jenkins*, 48 Ohio App.2d 99, 102, 355 N.E.2d 825.

{¶104} While the Ohio Supreme Court has declined to find "prior calculation and design" in "explosive, short-duration situations," the Court has nonetheless upheld a finding of prior calculation and design in "short-lived emotional situations" that do not fit the classic mold of a "planned, cold-blooded killing." *Taylor* at 19-20. For example, the nature of an attack can suggest it was the result of prior calculation and design. See, e.g., *State v. Jackson*, 92 Ohio St.3d 436, 2001-Ohio-1266, 751 N.E.2d 946 (2001) (defendant's decision to carry out execution-style killings was indicative of prior calculation and design).

{¶105} In sum, there is simply "no bright-line test for discerning the presence or absence of prior calculation and design[;]" instead, courts must undertake "a unique analysis of the facts of each case." *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 56. That said, the Supreme Court of Ohio has set forth several pertinent considerations to determine whether prior calculation and design exists: " '(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or 'an almost

instantaneous eruption of events?" *Franklin*, quoting *State v. Taylor*, 78 Ohio St.3d 15, 19, 676 N.E.2d 82 (1997), citing *State v. Jenkins*, 48 Ohio App.2d 99, 102, 2 O.O.3d 73, 355 N.E.2d 825 (1976).

{¶106} Regarding Miller's sufficiency challenge, much of the evidence of prior calculation and design is circumstantial. But ultimately, viewing the evidence in a light most favorable to the State, the following sufficiently supports this element. First, Miller confessed to Barrett that he killed Bailey, and further disclosed that his relationship with Bailey was strained. More specifically, Miller told Barnett that he and Bailey "had some differences and that * * * nobody cares what happened to him[.]" that Bailey was "a f*cking piece of sh*t." Miller told Barrett he had three main problems with Bailey: (1) he stole from him; (2) he lied to him and stole from his drug supplier; and (3) he had Miller pawn a lawnmower, which he only later found out Bailey had actually stolen from Miller's own grandmother. According to Barrett, Miller said the lawnmower incident, "was the final strike."

{¶107} Second, on the morning Bailey was killed Phillips testified he saw Miller driving Bailey away from Bailey's apartment. Bailey's body was found off of a remote access road that Miller was familiar with. Smith, a neighboring property owner, testified that Miller used to work on cars near that access road, which used to contain a salvage yard and auto repair shop. Evidence that Miller took Bailey to a remote location to kill him is strongly probative of prior calculation and design.

{¶108} Third and finally, the forensic evidence supports a finding of prior calculation and design. The blood evidence where the body was found indicated that Bailey first bled inside of the Ford SUV but was ultimately killed in the remote area where the body was found. This supports the State's theory of the case that the attack began inside the vehicle but was completed outside in the remote area. In addition, as demonstrated by photographs of the body and the medical examiner's testimony, the wounds were concentrated on Bailey's head and face which could demonstrate that Miller planned to obscure the victim's identity.

{¶109} With regard to manifest weight, at trial there were several versions or

theories presented regarding the circumstances that led to Bailey's death. As discussed in detail above, Miller gave three conflicting stories to detectives, none of which were supported by the evidence. The first two stories involved two other vague participants "dude" and "chick," who were never found despite investigations by the homicide and drug task force detectives. Further, the location of blood staining in the SUV contradicts Miller's first story. And Miller's second story was crafted after he learned that BCI was analyzing the blood evidence in the SUV. Finally, Miller's third story, in which he states he was at a nearby motel while Bailey was killed, fails to account for how he was able to text Colon from Bailey's cell phone at around the time Bailey was killed. All three stories were vague about the parties involved and contained internal inconsistencies.

{¶110} Another version of events was reported by Barrett, Miller's cellmate. According to Barrett, Miller confessed to him that he killed Bailey. As Miller argues on appeal, some of Miller's account to Barrett (along with the phone conversation overheard by Barrett) could more closely support a conviction for murder or perhaps voluntary manslaughter, i.e., that Miller told him he did not mean for the situation with Bailey to happen as it did, that he "took it too far. He just flipped out, saw red, and he said he just beat him and beat him and beat him there." Barrett also overheard Miller on the phone stating "he didn't mean for any of this to happen and he didn't mean for it to go that far."

{¶111} On the other hand, Miller also told Barrett that he had been angry with Bailey for some time before he killed him, and that the incident with his grandmother's lawnmower was "the final strike." This would support the State's theory of prior calculation and design—and therefore aggravated murder—which is outlined in more detail in the sufficiency discussion, above.

{¶112} Ultimately, the jury chose to believe the State's version of events and there is ample evidence to support this theory. The jury did not lose its way in convicting Miller of aggravated murder; his conviction is not against the manifest weight of the evidence. Accordingly, based on the above, Miller's seventh and eighth

assignments of error are meritless.

{¶113} In sum, all of Miller's assignments of error are meritless. The trial court did not abuse its discretion by deeming Patti Colon to be an adverse witness and permitting the State to ask her leading questions. Nor do the other evidentiary rulings raised by Miller constitute an abuse of discretion. There was sufficient evidence of prior calculation and design such that any rational fact-finder could have found Miller guilty of aggravated murder. Finally, Miller's aggravated murder conviction is not against the manifest weight of the evidence. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P. J., concurs.

Waite, J., concurs.