

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	CASE NO. 2005-2264
)	
Plaintiff-Appellee,)	DEATH PENALTY CASE
)	
vs.)	
)	
NICOLE DIAR)	
)	
Defendant-Appellant.)	

ON APPEAL FROM THE COURT OF COMMON PLEAS, LORAIN COUNTY, OHIO
CASE NUMBER 04CR065248

MERIT BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On April 30, 2004, the Lorain County Grand Jury indicted Appellant on two (2) counts of Corrupting Another with Drugs, violations of R.C. 2925.02, felonies of the second degree; two (2) counts of Felonious Assault, violations of R.C. 2903.11, felonies of the second degree; one (1) count of Murder, a violation of R.C. 2903.02, an unspecified felony; two (2) counts of Aggravated Arson, violations of R.C. 2909.02, felonies of the first degree; three (3) counts of Aggravated Murder, violations of R.C. 2903.01, unspecified felonies with capital specifications; and one (1) count of Tampering with Evidence, a violation of R.C. 2921.12, a felony of the third degree. One (1) count of Corrupting Another with Drugs was dismissed prior to trial.

On September 26, 2005, Appellant's case proceeded to jury trial before the Honorable Kosma J. Glavas, a visiting judge before the Lorain County Court of Common Pleas. The trial was conducted over a span of fifteen (15) days.

On October 17, 2005, the jury returned a guilty verdict as to the remaining counts and specifications contained in the indictment. On October 24, 2005, Appellant filed a Motion for New Trial. The trial court denied this motion on October 27, 2005.

On November 1, 2005, the mitigation phase commenced. On November 3, 2005, the jury returned a recommendation of death. On the same date, the trial court imposed the jury's recommended sentence of death. Appellant also received an additional sixteen (16) year term of incarceration to be served concurrently with her death sentence.

On December 2, 2005, Appellant timely filed her notice of appeal with the Ohio Supreme Court. On January 16, 2007, Appellant timely filed her merit brief. Appellee now responds.

STATEMENT OF FACTS

Frank Griffith is a firefighter with the Lorain Fire Department and has been so employed for six (6) years. (Tr. 1301). Griffith underwent basic firefighter classes and EMT certification, as well as participating regularly in additional on the job training relating to firefighting. (Tr. 1302). Griffith has been married to his wife for twelve (12) years and has three (3) young daughters. (Tr. 1302).

On August 27, 2003, Griffith was on duty at the central fire station off of Broadway Avenue in Lorain, Ohio. (Tr. 1303). On that date, Griffith was assigned to the search and rescue ventilation team. (Tr. 1303). At 9:06 a.m., Griffith received a call regarding a fire. (Tr. 1303, 1304). Griffith went to his assigned fire truck and began putting on his bunker gear. (Tr. 1304). Griffith's gear consisted of a jacket, hood, pants and boots. (Tr. 1305). Griffith was also wearing his air pack which enabled him to breathe in smoke filled structures and had his million candle watt power flashlight. (Tr. 1305, 1311). Griffith also tried to learn as much as he could regarding the scene of the fire. (Tr. 1306, 1307). Griffith was aware prior to arriving at 914 W. 10th Street, in the city of Lorain, Lorain County, Ohio that a child was possibly trapped inside the fire. (Tr. 1304).

Upon arrival, Griffith noticed smoke emanating from the structure. (Tr. 1304). Griffith also noticed other firefighters who arrived prior to himself. (Tr. 1304). Griffith was ordered to find out where the child was last seen in the residence. (Tr. 1305). To discover this, Griffith spoke with Appellant. (Tr. 1305, 1306). Appellant stated that she last saw Jacob, her son in the downstairs of the residence, in the back. (Tr. 1306, 1325, 1326). Griffith relayed this information to his partner, Lassen. (Tr. 1306, 1307, 1310,

1326). Griffith and his partner intended to begin their search of the residence for Jacob in this area. (Tr. 1306).

A few feet from the stairs to the residence, Appellant pulled back Griffith's arm. (Tr. 1307, 1326). Appellant then stated that Jacob was last seen in the upstairs of the residence. (Tr. 1307, 1326, 1327). Appellant was adamant regarding this information. This information prompted Griffith and Lassen to begin their search for Jacob in the upstairs of the residence. (Tr. 1307).

Griffith and Lassen then entered the front door of the residence. (Tr. 1309, 1310). This led the men into the living room of the residence. (Tr. 1308). Three (3) other firefighters were in the residence and near the seat or base of the fire. (Tr. 1309, 1326). Since no water from the pumper truck had been utilized, the residence was engulfed in heavy fire and smoke. (Tr. 1309). The fire was coming from the floor and rolling up and across the ceiling. (Tr. 1309). This is unusual unless the fire started on the floor of the residence. (Tr. 1309).

Due to the extreme conditions in the residence, Griffith quickly approached the stairs to the second floor of the residence. (Tr. 1310, 1311). When Griffith tried to tell Lassen that he was ascending the stairs, he discovered that he had become separated from Lassen. (Tr. 1310, 1311). Griffith then informed Lt. Nunez that he was ascending the stairs to located Jacob. (Tr. 1310). Griffith broke a rule by ascending the stairs without his partner but felt compelled to do so because the fire was now coming across the ceiling of the living room and heading toward the stairway he had to utilize if he had any chance of rescuing Jacob. (Tr. 1310, 1311).

The upstairs of the residence was filled with light smoke and had visibility of approximately two (2) feet. (Tr. 1311). Things were strewn all over. (Tr. 63). Griffith began his right hand search of the second floor. (Tr. 63). Griffith was trained to conduct a right hand search so that he did not become disoriented or confused in the fire. (Tr. 1311). Griffith could then reverse direction and follow his left hand back out. (Tr. 1311, 1312). Griffith was using his free hand and his axe to locate Jacob. (Tr. 1312, 1313).

During his search of the second floor, visibility worsened rapidly. (Tr. 1312). Visibility became zero. (Tr. 1312). Griffith discovered a window that he opened to clear some of the smoke and to improve his visibility. (Tr. 1312, 1313). Griffith finished his search. (Tr. 1313). Griffith did not encounter Jacob or his body on the second floor of the residence. (Tr. 1314). Griffith then proceeded down the stairs on his backside. (Tr. 1314).

Griffith's descent was quickly halted due to fire coming up the stairway. (Tr. 1314). The fire was glowing orange, which could signify a flashover, and emitted a very intense heat. (Tr. 1314). A flashover occurs when burning items reach a certain temperature and ignite everything in their presence. (Tr. 1315). Any item in the flashover is vaporized. (Tr. 1315). Griffith then crab walked back up the stairway. (Tr. 1314).

The second floor was completely black with smoke. (Tr. 1315). The smoke was so thick that Griffith's million candle watt flashlight could not penetrate the darkness. (Tr. 1315, 1316). The heat intensified. (Tr. 1315). Griffith could feel his pores opening up and sweat releasing inside his gear. (Tr. 1315). Griffith tried to radio his colleagues for assistance but discovered that he had lost his radio. (Tr. 1316). Griffith knew he was

trapped on the second floor of the burning residence and had to find a way out. (Tr. 1316).

Due to his dire situation, Griffith began to panic. (Tr. 1316). Griffith began to breathe heavily, which was problematic as he would use his air pack more quickly. (Tr. 1316, 1317). Griffith needed the air to garner him time to find an exit. (Tr. 1317). Griffith tried to find a way out, but felt as if he explored the same spot over and over. (Tr. 1317). This spot obviously contained no exit. At some point, Griffith actually lay down on the floor and thought that he would die in the fire. (Tr. 1317).

As he lay in the smoke filled burning residence, Griffith thought of his wife, children, and father, a fellow firefighter. (Tr. 1317, 1318). Griffith became determined to get out of the residence. (Tr. 1318). Griffith then tried to kick out the ceiling. (Tr. 1318). Griffith eventually stumbled upon a window. (Tr. 1318). Griffith exited the burning residence through the window and stepped onto the roof. (Tr. 1318). Griffith had to remove his mask immediately as he could not see due to the soot on the mask. (Tr. 1318). Griffith then jumped the ten (10) to twelve (12) feet down to the ground. (Tr. 1319). Griffith landed hard on his heels and back. (Tr. 1319). This caused injury to Griffith. (Tr. 1319). Griffith suffered injuries to his heels, tendons, back, and neck. (Tr. 1319). To date, Griffith's tendons in his legs still bother him despite physical therapy. (Tr. 71319, 1320). Griffith also suffered what visually appeared to be sunburn, but was a type of burn from the sweat in his gear boiling and turning to steam. (Tr. 1322).

Griffith's gear was melted, burned, and warped from the immense heat from the fire. (Tr. 1322). Griffith, despite being injured, had to remove his own gear because it was so hot other firefighters not wearing gloves could not touch him. (Tr. 1322).

Griffith also suffered emotional damage from the fire as well. (Tr. 1321). Griffith stated that he would feel panic when the alarm would sound in the fire station summoning the firefighters to a call. (Tr. 1321). Griffith felt that he failed when he emerged from Appellant's home and did not rescue Jacob. (Tr. 1321, 1322). Griffith was unaware that Jacob was dead before the fire even commenced.

Joseph Colon is a firefighter with the Lorain Fire Department and has been so employed for ten (10) years. (Tr. 1328). Colon underwent basic firefighter classes and EMT certification, as well as participating regularly in additional on the job training relating to firefighting. (Tr. 1329).

On August 27, 2003, Colon was on duty at the central fire station off of Broadway Avenue. (Tr. 1329, 1330). On that date, Colon was assigned to the search and rescue ventilation team. (Tr. 1329). In addition to search and rescue, Colon also was responsible for setting up a high pressure fan at the scene of the fire. (Tr. 1329). This fan helps to evacuate smoke from the residence for visibility purposes. (Tr. 1329).

At 9:06 a.m., Colon received a call regarding a fire. (Tr. 1330). The fire was reported at 914 W. 10th Street. (Tr. 1330). En route to the scene, Colon recalled donning his gear and observing what a beautiful summer day August 27, 2003 was. (Tr. 1330, 80). Upon arrival, Colon immediately placed the high pressure fan into position. (Tr. 1330, 1331). In the area of the fire, Colon observed chaos. (Tr. 1331). A lot of fire was blowing out of the residence. (Tr. 1331). Colon also recalled a lady stating, "get my kid out". (Tr. 1331). This lady was Appellant. (Tr. 1331). Appellant was dressed in light colored clothing and was visually clean. (Tr. 1331, 1333).

Colon then entered the residence. (Tr. 1331). Inside was a free burn; cabinets and surrounding items were afire. (Tr. 1331, 1335). This was abnormal as residential fires typically just generate significant smoke. (Tr. 1331). The residence became very hot, so hot that Colon had to drop to his knees. (Tr. 1332). When he did, the carpet melted to his gear. (Tr. 1332).

Colon made his way to the second floor of the residence. (Tr. 1336). The second floor was comprised of clutter and clothing; it was an absolute mess. (Tr. 1336). Despite looking for Jacob, Colon was unsuccessful in locating Jacob. (Tr. 1336). The second floor was filled with dense smoke. (Tr. 1336). By the time Colon returned to the first floor, other firefighters were beginning to utilize water to extinguish the fire. (Tr. 1337, 1338). Colon wanted to ensure that the fire was extinguished prior to starting the high pressure fan. (Tr. 1334, 1335). For obvious reasons, to start the fan when the fire was still active would do more harm than good. (Tr. 1334, 1335).

When Colon exited the residence, he observed Griffith being treated by the ambulance service. (Tr. 1338). Colon retrieved a new air container and returned to the residence. (Tr. 1338). Colon assisted in the creation of a hole in the roof of the residence to vent some of the heat. (Tr. 1338, 1339). While fighting the fire, Colon became dizzy and exhausted. (Tr. 1339, 1340). This was due to the heavy gear Colon was wearing, coupled with the heat of the fire and the heat of the day. (Tr. 1339). Colon exited the residence and fell to his knees. (Tr. 1340). Colon required an IV to rehydrate him. (Tr. 1340). As Colon was being tended to, he observed Appellant, visually clean, leave the scene of the fire. (Tr. 1340, 1341).

John May is a firefighter with the Lorain Fire Department and has been so employed for eighteen (18) years. (Tr. 1343, 1344). May underwent basic firefighter classes and EMT certification, as well as participating regularly in additional on the job training relating to firefighting. (Tr. 1344). During his career, May has responded to hundreds of fires. (Tr. 1344). May had also been at the scene of fires where a child has been trapped in a burning structure and the parent managed to escape. (Tr. 1345). The parents are usually hysterical, excited, and panicky. (Tr. 1345).

On August 27, 2003, May was on duty at the central fire station off of Broadway Avenue. (Tr. 1345). On that date, May was assigned to operate pumper truck number four (4). (Tr. 1345). May was not wearing his gear but had it with him. (Tr. 1346). During this time, May observed Appellant wearing rather brief clothing. (Tr. 1346, 1347).

May also spoke with Appellant; Appellant appeared to be calm, clean, and stated that someone was in the residence to the right and under a chair. (Tr. 1347, 1348, 1349). Appellant had no trouble breathing and did not smell of smoke. (Tr. 1348, 1349). Judging from her physical appearance, Appellant did not appear to have been in the burning residence, based on May's prior experience fighting fires. (Tr. 1348, 1349). Appellant smelled of neither smoke nor gasoline. (Tr. 1348, 1349).

James Davis is a firefighter with the Lorain Fire Department and has been so employed for twenty eight (28) years. (Tr. 1354). Davis holds the title of lieutenant and had held that title for approximately seven (7) or eight (8) years at the time of trial. (Tr. 1354).

On August 27, 2003, Davis had the day off, but was later called in to assist with the fire at Appellant's residence. (Tr. 1355). When Davis arrived, the fire had been extinguished. (Tr. 1356). Davis was asked by Assistant Fire Chief Cuevas, who is also a Fire Marshal, to assist with the investigation. (Tr. 1356).

Upon entering 914 W. 10th Street, Davis immediately noticed the smell of gasoline. (Tr. 1357, 1364). Based upon Davis' experience, gasoline is generally used to accelerate fires. (Tr. 1357, 1358, 1364). An accelerant is typically utilized to get a fire going rapidly. (Tr. 1358). Gasoline vapors ignite; liquid gasoline usually does not burn as the source of ignition is extinguished before combustion can occur. (Tr. 1358, 1359, 1360).

When individuals from the State Fire Marshal's Office arrived, Davis assisted them with their investigation. (Tr. 1360, 1361, 1370). Davis noticed an obvious burn pattern in the first floor bedroom as well as others areas of the first floor. (Tr. 1361, 1362, 1363, 1364). No other obvious burn patterns were located in the residence. (Tr. 1365, 1366). No container for gasoline or accelerant was recovered from the residence. (Tr. 1373). Accelerant sniffing dogs were then utilized. (Tr. 1364). Subsequently, Davis sketched a brief layout of the residence. (Tr. 1365).

In the first floor bathroom, Davis noticed only heat damage, no fire damage was observed. (Tr. 1366, 1373, 1374). This means that no actual flame was burning inside the first floor bathroom. (Tr. 1366). Heat and smoke fill a room from the top down; whereas, damage from fire is observed to travel from the point of ignition up and then from the top down. (Tr. 1367). Damage caused by heat and smoke was readily visible in the first floor bathroom. (Tr. 1367, 1368).

In the first floor bedroom, Jacob's body was discovered. (Tr. 1368). Jacob was difficult to see. (Tr. 1368, 1369). Jacob was in a fetal position on his left side with severe burns to his body. (Tr. 1368). While clothed, it was difficult to differentiate where clothing existed due to the condition of Jacob's body. (Tr. 1369). Due to the severity of the burns, it was impossible to separate Jacob's body from the mattress upon which he lay. (Tr. 1370). Bolt cutters were utilized to cut away a portion of the mattress containing Jacob's body. (Tr. 1370). Jacob and the mattress portion were then removed from the residence. (Tr. 1370).

After the horrific discovery of Jacob's body, Davis uncovered the body of a small puppy underneath the same bed from which Jacob's body was recovered. (Tr. 1371). The puppy's body was not severely burned. (Tr. 1371, 1372). The puppy was protected from the flames and had no flammable liquids on it. (Tr. 1371, 1372).

Anthony Cuevas of the Lorain Fire Department has been with the Department for approximately twenty seven (27) years and is an Assistant Fire Chief. (Tr. 1379). Cuevas began his career as a firefighter and advanced to the position of Inspector working in the Fire Prevention Bureau. (Tr. 1379). As an Inspector, Cuevas conducted safety and fire inspections as well as arson investigations from 1985 through 1990. (Tr. 1379). Cuevas also attended Ohio courses regarding arson. (Tr. 1379). Cuevas is also the current local Fire Marshal. (Tr. 1380). This involves working with the State Fire Marshal when necessary. (Tr. 1380, 1381).

Cuevas responded to the fire at Appellant's home on August 27, 2003, due to the fact that a four (4) old child seemingly perished in the fire. (Tr. 1381). Upon arrival, Cuevas noticed that the high pressure fans were in use. (Tr. 1381). Cuevas entered the residence through the front door. (Tr. 1382). When the noise from the fans made communications difficult, Cuevas ordered that the fans be turned off. (Tr. 1382, 1383). When Cuevas re-entered the residence, he noticed the smell of gasoline. (Tr. 1383). There was no reason that Cuevas should smell gasoline in a residence. (Tr. 1383).

Cuevas notified Lorain Police Department officers and then notified that State Fire Marshal and the Lorain County Coroner. (Tr. 1383, 1384). It was then decided that everyone would remain outside of the residence until the State Fire Marshal arrived. (Tr. 1385).

Cuevas later showed law enforcement officers the unusual burn pattern on the dining room floor. (Tr. 1386). This was outside of the first floor bedroom. (Tr. 1386). This pattern and the depth of the burn into the floor were indicative of the presence of an accelerant. (Tr. 1386). An unusual burn pattern was also present on the floor entering the first floor bedroom as well as the living room. (Tr. 1387, 1388).

Cuevas explained that when a fire occurs without the use of an accelerant, the fire wants to burn up and out. (Tr. 1387). This produces a "v" shaped pattern. (Tr. 1387). The point of the "v" is the point where the fire started. (Tr. 1387). When an accelerant is utilized, large burn areas on the floor are present. (Tr. 1388). These areas are not consistent with a non accelerant induced fire, because of the absence of the "v" pattern. (Tr. 1388, 1389, 1390, 1391).

The heavy charring to certain portions of the first floor area was also consistent with the use of an accelerant. (Tr. 1388). The condition in which Jacob's body was discovered, charred so severely that it was difficult to identify him as a child, bespoke of the use of an accelerant. (Tr. 1389). Further, it was not possible to remove Jacob's body from the mattress because the intense heat had fused his body to the mattress and necessitated the use of bolt cutters to cut the mattress springs to recover his small body. (Tr. 1389). This too is indicative of an accelerant based fire which produces heat far more intense than what normal combustibles in a residence would produce. (Tr. 1390, 1391). This heat is capable of destroying any container that might have held the gasoline used to set the fire. (Tr. 1391).

Cuevas also explained that in a fire, smoke travels upwards until it hits resistance, such as a ceiling or roof. (Tr. 1389, 1390). Once the smoke encounters resistance, it will back its way back down. (Tr. 1389, 1390). As the smoke returns to the floor level, it leaves a line of soot. (Tr. 1389). This, aptly enough, is called a soot line. (Tr. 1389). A firefighter can tell from the soot line how far the smoke traveled back down towards the floor. (Tr. 1389).

Cuevas stated that when a fire is extinguished, the fire is blasted with water under 100 psi or pounds per square inch. (Tr. 1397). Firefighters also use pipe pulls and axes to open walls to find hidden sources of fire. (Tr. 1397). Walls and ceilings are pulled down. (Tr. 1397). Significant destruction occurs during the extinguishment of a fire. (Tr. 1397). Objects within the structure are often shoveled outside while searching for hidden sources of fire. (Tr. 1397). While firefighters and investigators examine the debris removed from the structure, Cuevas was not surprised that a container containing

gasoline was not recovered from Appellant's residence based on the severity of the fire. (Tr. 11396, 1397, 1398, 1400, 1401).

On cross examination, Cuevas revealed that he had investigated a previous fire at 914 W. 10th Street that occurred prior to Appellant residing in the residence. (Tr. 133, 1393, 1394, 1395). The fire occurred in the garage and was purposely set. (Tr. 1393, 1394, 1399). No accelerant was used in that fire. The fire in the garage in May 2003 was less severe than the fire that occurred in Appellant's residence on August 27, 2003.

Mark Nunez is a firefighter with the Lorain Fire Department and has been so employed for eighteen (18) years. (Tr. 1402, 1403). Nunez is a lieutenant with the Lorain Fire Department. (Tr. 1403). On August 27, 2003, Nunez responded with other Lorain firefighters to 914 W. 10th Street, Appellant's residence. (Tr. 1403, 1404).

Upon arrival, Nunez positioned his pumper truck in front of Appellant's residence as this was the best position to attack the fire. (Tr. 1406). Hoses were then laid out so that water could be used to extinguish the fire. (Tr. 1406). During this critical time, Nunez also tried to learn any information to assist him in extinguishing the fire. (Tr. 1406).

During his information gathering, Nunez met with Appellant. (Tr. 1407). Appellant told Nunez her baby was inside the residence. (Tr. 1407, 1416). Nunez noted that Appellant was dressed in clean light colored clothes and was not screaming or crying for her child. (Tr. 1407). Appellant did not smell of smoke or gasoline. (Tr. 1408, 1416). Nunez then met with other firefighters outside the residence and they entered the burning residence together. (Tr. 1406, 1408).

Upon entry, smoke billowed out of the front door to the residence. (Tr. 1408, 1409). Heavy dark smoke was present throughout the upper portions of the residence. (Tr. 1409). This prompted Nunez and the other firefighters to crawl. (Tr. 1409). Heavy fire and intense heat was discovered on the west side of the building. (Tr. 1409). This was the location of the first floor bedroom. (Tr. 1414). The floor upon which Nunez crawled was so heated that it caused his kneepads to melt to the ground. (Tr. 1410). The fire in the residence was on the ground which was unusual. (Tr. 1410). Due to the extreme nature of the fire, Nunez abandoned efforts to discover the seat of the fire and retreated from the residence. (Tr. 1410). Water was the utilized to attack the fire. (Tr. 1410). Yet, the search for Jacob continued. (Tr. 1410, 1411).

Nunez began to follow the hose line through the first floor of the residence. (Tr. 1411). The residence was extremely dark and smoky. (Tr. 1411). When Nunez entered the first floor bedroom, the fire was very low, very hot, and burning on the ground. (Tr. 1411, 1412). Nunez knew that the fire in Appellant's residence on August 27, 2003 was not accidental. (Tr. 1412).

Once the fire was extinguished, Nunez and Lt. DeWitt of the Lorain Fire Department began to overhaul the scene. (Tr. 1413). Overhauling consists of taking apart the residence looking for hot spots as well as looking for the cause of the fire. (Tr. 1413). Nunez also went upstairs to look for Jacob and Firefighter Griffith. (Tr. 1413, 1414). Nunez discovered heavy smoke but no Griffith or Jacob. (Tr. 1414). Nunez then learned that Jacob's body had been discovered in the first floor bedroom. (Tr. 1414, 1415). When Nunez looked into the room, he could hardly distinguish Jacob's body despite having seen numerous charred bodies. (Tr. 1415).

Priscilla Bidlake is the director of operations for Life Care Ambulance in Lorain, Ohio. (Tr. 1421, 1422). Bidlake has been employed with Life Care as a director for ten (10) years. (Tr. 1421, 1422). Bidlake herself is a paramedic that supervises approximately seventy five (75) paramedics and EMT's employed by Life Care. (Tr. 1422). Bidlake is a state and nationally certified EMT paramedic. (Tr. 1422).

In the city of Lorain, Ohio, Life Care responds to fire scenes as standby for the firefighters as well as possible victims of fire. (Tr. 1423). On August 27, 2003, Bidlake had just entered the Life Care conference room located at 640 Cleveland Street, Elyria, Ohio for the 9:00 a.m. meeting. (Tr. 1424). The phone rang. (Tr. 1424). A squad in Lorain, Ohio had requested a supervisor. (Tr. 1424). Bidlake responded directly to the fire scene, located at 914 W. 10th Street, in the city of Lorain. (Tr. 1424).

At the scene, Bidlake learned from her crew that a child was possibly in the burning residence and they were awaiting further orders from the Lorain Fire Department. (Tr. 1426). Bidlake then learned that the child's mother, Appellant, was located in the area. (Tr. 1426). Appellant was wearing a light colored tank top and light colored shorts. (Tr. 1426). Assistant Chief Shlapack requested that Bidlake inform Appellant that Jacob was dead. (Tr. 1426).

Bidlake then approached Appellant and asked her to come to the ambulance that Bidlake had brought to the scene. (Tr. 1427). Bidlake was focused on how to break the news to Appellant that her son Jacob was dead. (Tr. 1428). Appellant's mother also accompanied the women. (Tr. 1428).

Before Appellant entered the ambulance, Bidlake put a towel down over the bumper to protect Appellant's bare feet. (Tr. 1428, 1434). Bidlake then helped Appellant into the ambulance. (Tr. 1428). Bidlake then entered the ambulance herself. (Tr. 1428). Bidlake noticed that both Appellant and her clothing were clean. (Tr. 1429). Appellant did not smell of smoke. (Tr. 1429). Appellant exhibited no physical signs of having been in a fire. (Tr. 1429, 1430). Bidlake placed her arm around Appellant before she informed Appellant that Jacob had died. (Tr. 1431). During this time, Appellant's head was on Bidlake's shoulder. (Tr. 1431). Still, Bidlake smelled no smoke in Appellant's hair. (Tr. 1431). Bidlake also smelled no singed or burnt hair. (Tr. 1431, 1439). Appellant left no soot transfer on Bidlake's light colored shirt. (Tr. 1434).

Moreover, after Bidlake told Appellant that Jacob had died, Bidlake did not recall seeing any tears on Appellant's face. (Tr. 1432, 1433, 14365, 1437). Appellant then told Bidlake that she had been in the residence and had been woken up by black smoke. (Tr. 1433). Appellant then began to look for Jacob and yelled his name. (Tr. 1433). Appellant looked for Jacob behind a large chair and thought she saw fire coming out of a vent. (Tr. 1433). Appellant stated that she called for Jacob until the smoke drove her from her residence. (Tr. 1433). These statements were not consistent with Appellant's physical appearance.

Another EMT checked Appellant's vital signs, which were good. (Tr. 1430, 1431). Appellant's lungs were clear Appellant did not need any medication or IV's. (Tr. 1432). Bidlake confirmed that Appellant left the scene of the fire before Jacob's body was recovered. (Tr. 1438, 1441, 1442). Bidlake had never seen this happen before. (Tr. 1442).

Jason Bishop is a paramedic and a firefighter. (Tr. 1445). In August 2003, Bishop was employed by Life Care as a paramedic. (Tr. 1446). On August 27, 2003, Bishop was dispatched to 914 W. 10th Street in response to a fire at Appellant's residence. (Tr. 1447, 1448).

Upon arrival at the scene, Bishop and his partner, Frabotta readied the ambulance to receive Jacob. (Tr. 1448). It was anticipated that Jacob may have sustained burn injuries. (Tr. 1448). Bishop then requested additional squads to respond in order to treat any injured firefighters. (Tr. 1448). Priscilla Bidlake, or "PC", arrived on scene for additional support. (Tr. 1449). Bidlake then took control of the scene. (Tr. 1450).

Prior to her arrival, Bishop was aware that Jacob was dead. (Tr. 1450). As such, the matter was now in the hands of the Lorain County Coroner; Life Care would not assist. (Tr. 1450). Bishop confirmed that Bidlake was asked to break the news to Appellant that Jacob had died. (Tr. 1450). Bishop recognized Appellant immediately due to the scarring on her neck. (Tr. 1451). Bishop had previously transported Appellant and Jacob to the Cleveland Clinic for medical treatment for Jacob. (Tr. 1451). Bishop recalled that Jacob's diagnosis was unspecified abdominal pain. (Tr. 1451).

Bishop and Bidlake approached Appellant and escorted her to Bidlake's ambulance. (Tr. 1453). Bishop recalled that Appellant was wearing orange toenail polish on her feet as she climbed barefoot into the ambulance. (Tr. 1454). Appellant's feet and legs were clean. (Tr. 1454, 1455). Appellant was soot free and did not smell of smoke, singed hair, or gasoline. (Tr. 1454, 1455, 1456).

Bishop recalled checking Appellant's vital signs. (Tr. 1456, 1457). The vital signs were normal. (Tr. 1456, 1457). Appellant was not treated for smoke inhalation. (Tr. 1457, 1458). Bishop recalled Appellant's eyes tearing when Bidlake informed her Jacob died. (Tr. 1459). This lasted for a few moments until law enforcement began questioning Appellant. (Tr. 1459, 1463). Appellant stated she was asleep on the living room couch and awoke to thick, black smoke. (Tr. 1460). Appellant began to yell for Jacob and could not find him. (Tr. 1460). Appellant was driven from the residence by the smoke and ran to call 911 from her neighbor's residence. (Tr. 1460).

Officer Smith has been with the Lorain Police Department for nineteen (19) years. (Tr. 2020, 2021). Smith was dispatched to the fire at Appellant's residence, 914 W. 10th Street, Lorain, Ohio on August 27, 2003. (Tr. 2021, 2022). Smith was ordered to remain with Appellant once upon scene. (Tr. 2022). Appellant was seated on Leroma Penn's front porch. (Tr. 2023). Appellant appeared very casual and to be lost in her thoughts; she was not crying or hysterical. (Tr. 2023, 2024, 2025). Appellant did not appear to have been in the fire; her clothing and body were free from soot and smoke. (Tr. 2024, 2025, 2026). Appellant did not cry or sob until Leroma appeared. (Tr. 2025, 2027). Appellant then asked Smith if they got her son out. (Tr. 2025).

Leroma Penn resided at 912 W. 10th Street in August 2003. (Tr. 1479). Leroma resided there with her husband and four (4) children. (Tr. 1478). Leroma acknowledged a prior felony record consisting of attempted carrying of a concealed weapon and trafficking. (Tr. 1478, 1479). Leroma's neighbor was Appellant. (Tr. 1479). Appellant moved into 914 W. 10th Street at the end of spring/beginning of summer 2003. (Tr. 1479). Appellant resided there with her four (4) year old son, Jacob. (Tr. 1479, 1480).

Jacob was a sweet, vibrant, energetic boy. (Tr. 1480, 1508). Jacob would often come to Leroma's residence to play with her children, to get "cool cups" and to get snacks. (Tr. 1480, 1481, 1528). A cool cup is a frozen cup of Kool-aid. (Tr. 1480, 1528). Jacob came over to Leroma's residence every day he was home. (Tr. 1480). Jacob often came over alone around 7:30 a.m. (Tr. 1481, 1528, 1529, 1538).

Leroma also spent a considerable amount of time in Appellant's residence. (Tr. 1481). Leroma observed that Jacob rarely spent time in the first floor bedroom. (Tr. 1481). Jacob refused to enter the room alone; he would call for Appellant or someone else to enter the first floor bedroom with him. (Tr. 1481, 1482). Jacob also avoided the second floor of the residence. (Tr. 1482). As a result of his fear, Jacob slept on the couch or chaise lounge and dressed each day in the living room. (Tr. 1482, 1545, 1546). This enabled Jacob to be near his mother, who he loved to be around. (Tr. 1482).

When Leroma observed Jacob, he was usually wearing shorts or, as Jacob preferred, no clothing at all. (Tr. 1482, 1483, 1542). Jacob did not like to wear a lot of clothing. (Tr. 1482, 1483, 1542, 1547). Jacob also loved to take baths and frequently asked Appellant to take a bath. (Tr. 1483).

On August 26, 2003, the day before the fire, Leroma saw Appellant and Jacob on and off. (Tr. 1483). Before Jacob arrived home, Appellant had stated that she wanted to replace the locks on her residence. (Tr. 1484, 1511, 1517). Leroma offered to change Appellant's locks for her. (Tr. 1484). Leroma and Appellant went to Willow Hardware to purchase new locks for Appellant's residence. (Tr. 1484, 1485). Appellant believed that someone had stolen the keys to her residence and her vehicle. (Tr. 1511, 1516). Appellant purchased a dead bolt and a doorknob with a lock. (Tr. 1484, 1485, 1513).

Leroma installed both of these locks around 9:00 p.m. on August 26, 2003. (Tr. 1485, 1517). The doorknob with the lock was installed on the front door and the dead bolt was installed on the back door. (Tr. 1485).

As she installed the locks, Leroma noticed pry marks on the door and the old dead bolt. (Tr. 1485). At Appellant's request, Leroma did not change the strike plate on the back door. (Tr. 1486). Appellant wanted to keep the old strike plate because it stuck and made noise when opened. (Tr. 1486). Appellant felt this noise would wake her if anyone tried to enter her residence while she was asleep. (Tr. 1486).

Due to her missing vehicle keys, the night before the fire Appellant parked her vehicle across the street from her residence. (Tr. 1544, 1545). Although her vehicle and residence keys had been missing for days, until the night of August 26, 2003, Appellant had consistently parked her vehicle in her yard or in front of her residence. (Tr. 1545).

After installing the locks, Leroma tried both locks to make sure they were functional. (Tr. 1486, 1487). Leroma then had Appellant try both locks; the locks worked for Appellant. (Tr. 1486, 1487). Leroma gave the keys to both locks to Appellant or put them on Appellant's table. (Tr. 1487). Leroma went home. (Tr. 1487).

Later that evening, Leroma returned to Appellant's residence. (Tr. 1487). Appellant had put Jacob to bed on the couch. (Tr. 1487, 1488, 1519). Jacob was wearing a t-shirt, not jeans and a long velvet type zippered sweatshirt. (Tr. 1542). Jacob's puppy was asleep on the floor. (Tr. 1488).

Appellant and Leroma then went and sat on the porch. (Tr. 1489, 1520). Leroma had brought some alcoholic drinks with her. (Tr. 1489). These drinks consisted of banana rum and Kahlua. (Tr. 1489, 1520). Leroma prepared the drinks at her home. (Tr. 1489). Leroma had two and one half (2 ½) drinks that evening; Appellant had one and one half (1 ½) drinks that evening. (Tr. 1489). Leroma left Appellant's residence around 1:00 a.m. (Tr. 1489, 1490). Appellant was on the couch with Jacob. (Tr. 1490, 1521). The door to the residence was closed and locked. (Tr. 1490, 1518). Leroma also testified that there were no open windows in Appellant's residence on August 26, 2003. (Tr. 1537). A fan was used to cool the residence. (Tr. 1537).

That night, Leroma's large pit bull that barks when people are around, was quiet. (Tr. 1505, 1522). Leroma's dog was also quiet the morning before the fire. (Tr. 1505, 1522).

The next morning, August 27, 2003, Leroma called Appellant about their planned trip to Grace College. (Tr. 1490, 1522). Appellant did not answer the phone. (Tr. 1490, 1491, 1523). It was 8:09 a.m. (Tr. 1491). Leroma was getting her kids off to school as well as cleaning her residence and washing clothes. (Tr. 1492, 1522). Leroma's washer and dryer were in the basement. (Tr. 1492).

Leroma then walked her children to the front of the residence and watched them until they turned the corner. (Tr. 1493). The time was around 8:50 a.m. (Tr. 1493). Leroma noticed nothing unusual from Appellant's residence. (Tr. 1493, 1494, 1495). Leroma then re-entered her residence. (Tr. 1495). Leroma went to the basement to sort clothes and put clothes into the dryer. (Tr. 1495). Leroma then heard a voice yelling "Ro, Ro". (Tr. 1495, 1496, 1523). Leroma recognized Appellant's voice. (Tr. 1496).

Leroma went outside to see what was wrong. (Tr. 1496, 1524). Appellant stated that her residence was on fire and she could not find Jacob. (Tr. 1496, 1497, 1524). Appellant looked worried. (Tr. 1497). Appellant had no soot on her clothing, the beige shirt and skirt from the night before. (Tr. 1497, 1543, 1544). Leroma contacted 911 for assistance. (Tr. 1497).

Smoke was visible from Appellant's residence. (Tr. 1498). Smoke was coming out of the front door of Appellant's residence. (Tr. 1498). Leroma's husband, Edgar Penn, then came downstairs dressed in shorts. (Tr. 1499). Edgar asked Appellant where Jacob was. (Tr. 1499). Appellant said that Jacob was between the living room and the dining room. (Tr. 1499, 1525). Edgar then ran around Appellant's residence to the side furthest from the Penn residence. (Tr. 1499, 1500). Edgar ran to the back of the residence, kicked the back door in, and called for Jacob. (Tr. 1500, 1528). When Edgar returned he had soot on his face, chest, and shorts. (Tr. 1500). Edgar appeared to have been in a fire. (Tr. 1500).

In speaking with Appellant, Leroma learned that Appellant woke up in her residence and the residence was filled with smoke. (Tr. 1500). There was no physical indication that Appellant had been inside her burning residence. (Tr. 1501). While waiting for the fire department to arrive, Appellant used Leroma's phone to call her mother. (Tr. 1501). Appellant appeared to be upset. (Tr. 1502). Appellant and Leroma then stood on Leroma's porch with other neighbors. (Tr. 1503). Eventually, Appellant's mother arrived and Appellant was escorted to an ambulance. (Tr. 1503).

Later that day, Leroma visited with Appellant at Appellant's mother's residence. (Tr. 1503). Appellant was lying in bed crying. (Tr. 1503). Appellant had tears in her left eye. (Tr. 1503). Appellant was not hysterical. (Tr. 1504). When Leroma observed Appellant at Jacob's funeral, Appellant cried. (Tr. 1504). Appellant's sister, Becky was "tore up". (Tr. 1504). Becky appeared on the verge of a nervous breakdown; Appellant did not. (Tr. 1504).

Leroma also revealed that Becky frequently cared for Jacob. (Tr. 1506, 1540, 1541). Becky's residence was also closer to the school Jacob was to attend the morning of the fire yet Jacob returned to Appellant's residence the day before school commenced. (Tr. 1506).

On cross examination, Leroma testified that although she and Appellant were friends, they had disagreements. (Tr. 1507, 1508). Appellant and Leroma disagreed about broken glass in Appellant's tree lawn. (Tr. 1508, 1539). Appellant would let Jacob walk barefoot over the broken glass. (Tr. 1539). When chastised by Leroma, Appellant merely responded that she could not clean up the glass. (Tr. 1539).

Leroma also acknowledged that her friendship with Appellant cooled after the fire. (Tr. 1509, 1539). Leroma had heard that Appellant suggested that the police look at Leroma and Edgar for causing the fire. (Tr. 1509). Appellant has also suggested that the drinks she and Leroma shared the night before the fire were altered. (Tr. 1509, 1510). Leroma learned both of these details after she had provided her information to law enforcement. (Tr. 1539, 1540).

Edgar Penn is married to Leroma Penn. (Tr. 1550). Edgar, his wife, and their children resided at 912 W. 10th Street, Lorain, Ohio in August 2003. (Tr. 1550). Edgar was at home the morning of August 27, 2003. (Tr. 1550, 1567). Edgar was asleep in bed when he heard Leroma scream. (Tr. 1551, 1567, 1568). Edgar then stuck his head out of the window and smelled a strange scent. (Tr. 1552). As smoke wafted across his face, Edgar threw on some clothing. (Tr. 1552, 1568). When Edgar arrived downstairs, he saw the fire at Appellant's residence. (Tr. 1552). Appellant and Leroma were standing in front of the Penn residence. (Tr. 1552, 1553). Appellant stated Jacob was in the front chair in the living room. (Tr. 1553, 1569, 1570). Appellant also told Edgar that Jacob was upstairs and that he could be anywhere in the residence. (Tr. 1554, 1555, 1556, 1569, 1570, 1571). Edgar told Appellant he was going to try and get Jacob out of the residence. (Tr. 1553, 1568, 1571).

Edgar could not see in the front door due to black smoke, so he ran around to the rear door. (Tr. 1553, 1555, 1556, 1562). When Edgar ran around the side of the residence closest to Appellant's other neighbor, the flames were intense, like a blowtorch. (Tr. 1557, 1558, 1559, 1562, 1563, 1564). Edgar planned to work his way to the front of the residence by gaining access to the home through the rear door. (Tr. 1553). Edgar gained access to the residence by kicking in the rear door. (Tr. 1553, 1557, 1558, 1564). Edgar felt as if he had been hit by a car after he kicked open the rear door due to the smoke billowing out. (Tr. 1557, 1565, 1568). When Edgar touched the floor to crawl inside to search for Jacob, the floor was hot. (Tr. 1558, 1559, 1565). Edgar was not able to make entry into the residence due to the heat; Edgar could only stick his head into the residence. (Tr. 1558, 1565, 1569). Edgar was unsuccessful in locating Jacob. (Tr.

1553). Edgar related that all the windows in the residence were closed. (Tr. 1554, 1555). No smoke escaped out of the windows until the window closest to his residence blew out. (Tr. 1554, 1557).

When Edgar retreated from the residence, he went home. (Tr. 1559, 1560). Edgar did not realize that he was covered with soot until he tried to put a shirt on. (Tr. 1560). Edgar then washed the soot from himself. (Tr. 1560). Edgar was soot covered just from sticking his head through the door. (Tr. 1560). This caused Edgar to wonder why Appellant had no soot on her when she had allegedly been inside the burning residence. (Tr. 1560, 1561).

Edgar was familiar with Jacob as Jacob often came to Edgar's home in the mornings to get a cool cup and play with Edgar's children. (Tr. 1556, 1571, 1572, 1573). Jacob mainly dressed in only shorts and did not wear much clothing. (Tr. 1556). Edgar heard no smoke detectors alerting. (Tr. 1573). Edgar also stated that the family dog did not bark the morning of the fire. (Tr. 1573, 1575, 1576). The family dog always barks when he hears strange noises. (Tr. 1575, 1576).

Edgar also revealed that he kept gasoline in a can in the back of his truck for his lawn mower. (Tr. 1573). Edgar told law enforcement that when he checked the gas can, it still had some gas in it. (Tr. 1574, 1575). Edgar did not look in the can to see exactly how much gas was left. (Tr. 1575, 1577, 1581, 1582).

Lee Bethune is an investigator with the State of Ohio, Division of State Fire Marshals, Fire and Investigations Bureau. (Tr. 1584). Bethune investigates fires and explosions in the state of Ohio and has done so for approximately eight and one half (8 ½) years. (Tr. 1584). Bethune was previously employed with the city of Akron Fire Department for twenty three (23) years; during ten (10) of those years, Bethune was assigned to the Arson Bureau. (Tr. 1584). Bethune attended schools throughout the state of Ohio and United States, the National Fire Academy, Federal Law Enforcement Training Center, the University of Akron, and programs through the State Fire Marshal's Office. (Tr. 1584). Bethune has testified as an expert witness on numerous occasions in twenty (20) counties in the state of Ohio. (Tr. 1584, 1585).

Bethune became involved in the investigation of the fire that occurred at Appellant's residence, when he received a call from the City of Lorain Fire Department requesting assistance. (Tr. 1585). Bethune arrived on scene a few hours later. (Tr. 1585). Bethune was met and briefed by Deputy Fire Chief Cuevas. (Tr. 1585, 1586).

Bethune then conducted an examination of the exterior of the residence. (Tr. 1586). Bethune observed signs of smoke and fire venting from the residence. (Tr. 1586). Bethune noted that the fire vented out of the west side of the residence, the rear second story window and the east side of the residence. (Tr. 1586, 1587, 1618). Bethune retrieved his fire gear when he was met by Detective Garcia of the Lorain Police Department. (Tr. 1586, 1587). When Bethune encountered Garcia, he immediately smelled gasoline. (Tr. 1587). Garcia stated that he had been inside the residence and was wearing protective booties over his shoes. (Tr. 1587). Bethune collected Garcia's

booties as evidence. (Tr. 1587). Gasoline is not normally present in a residence unless one rides their Harley through the residence on a regular basis. (Tr. 1666).

Bethune then entered the residence and examined the fire scene from the areas of least damage to the areas of most damage. (Tr. 1587). Bethune started in the living room, at the front of the residence, as this was the room with the least damage. (Tr. 1588). No fire damage was present in the living room, but smoke damage was present. (Tr. 1598, 1599). A lighter was recovered. (Tr. 1640). This lighter was not tested for fingerprints because any prints that may have been on the lighter would have been destroyed in the fire and subsequent extinguishment of the fire. (Tr. 1642, 1643, 1662). Fingerprints are only oil from the hands which can dry out and/or be washed away. (Tr. 1642).

Bethune then entered the dining room. (Tr. 1588). The dining room suffered more damage than the living room and had minimal furnishings. (Tr. 1588). Bethune examined the dining room furnishings as the fire appeared to have been floor level. (Tr. 1588, 1606, 1607). A floor level fire supports the use of an accelerant or an ignitable, flammable liquid. (Tr. 1588, 1589, 1606, 1607). Fire does not generally burn on the floor unless aided by a flammable liquid on the floor; fire burns up and out. (Tr. 1589, 1590). Bethune observed blistering and alligating (an irregular characteristic burn pattern down low at the floor level coming up, but more severe at the floor level) on the dining room table and chairs. (Tr. 1589, 1601, 1610, 1612, 1613). This was also consistent with an accelerant being used. (Tr. 1590, 1601).

Bethune then entered the basement, kitchen, and first floor bathroom. (Tr. 1590). These areas suffered smoke damage but no fire was present in these rooms. (Tr. 1590, 1603, 1604, 1605). Accordingly, the fire did not originate in any of these areas. (Tr. 1590, 1591). Water was present in the bathtub, but was not from extinguishing the fire. (Tr. 1630). Bethune stated that it appeared someone in the residence took a bath prior to the fire. (Tr. 1630, 1631). Bethune then entered the first floor bedroom. (Tr. 1591).

In the first floor bedroom, Bethune discovered Jacob's remains as well as the remains of his puppy. (Tr. 1591, 1613). Unlike Jacob's remains, the puppy's remains were well preserved as the puppy was shielded from the fire by the mattress and items underneath the bed. (Tr. 1613, 1614). The room was also severely damaged from the fire to the point that a possible flashover had occurred. (Tr. 1591). A flashover means that all the items in the room had been ignited and burned until the fire was suppressed. (Tr. 1591). Bethune also noticed irregular burn patterns on the floor. (Tr. 1591, 1592, 1631, 1632, 1633). The floor was carpeted, but the wood tongue and groove flooring underneath was burned away in several spots. (Tr. 1591, 1592, 1615, 1616, 1631, 1632). This again indicated the presence of a heavy concentration of accelerant. (Tr. 1592, 1616, 1617). In fact, the fire was so hot in the first floor bedroom, it burned away the gutters. (Tr. 1618, 1629). The temperature required to burn aluminum gutters had to equal or exceed eleven hundred (1100) degrees. (Tr. 1618).

Bethune then examined the stairwell and both second floor bedrooms. (Tr. 1592). No fire damage was present. (Tr. 1592). Smoke damage was present where the smoke from the dining room and first floor bedroom had traveled upstairs. (Tr. 1592).

Bethune then returned to the first floor and met a colleague, Brian Peterman, who had arrived with Ashes, an accelerant sniffing dog. (Tr. 1592, 1593). Ashes is certified to detect areas of hydrocarbons on the floor that may be ignitable liquids. (Tr. 1593). Ashes confirmed the presence of accelerants in the areas Bethune had previously identified. (Tr. 1593).

Bethune also examined the couch in the living room. (Tr. 1593, 1594). Bethune kept detecting a smell of gasoline from the couch and a rug in front of the couch. (Tr. 1594, 1605, 1606). Around this time, Bethune began to photograph the residence. (Tr. 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619).

Bethune also removed samples from various items in the residence to be submitted for further testing. (Tr. 1610, 1611, 1612). Bethune authenticated documents showing that the State Fire Marshal's Forensic Lab received the samples taken from Appellant's residence by Bethune. (Tr. 1619, 1620, 1621). The booties worn by Garcia, carpet from the living room floor, fire debris from the dining room floor, fire debris and flooring from the first floor bedroom, a wooden furniture leg from the first floor bedroom, a couch cushion, Appellant's clothes, and Jacob's clothes were all sent for testing. (Tr. 1621, 1622, 1623, 1624). The analysis from the lab did not dispel Bethune's beliefs that an accelerant had been used in the 914 W. 10th Street fire. (Tr. 1626).

Bethune concluded that the fire on August 27, 2003 at Appellant's residence was started by direct human hand, using a flame device and ignitable, flammable liquid. (Tr. 1635). The flammable liquid was identified to be gasoline. (Tr. 1635). The bedroom was the targeted area with a trail being poured from the dining room and the living room. (Tr. 1635). Bethune testified that the fire originated in the living room, traveled through the dining room, around the corner to the first floor bedroom, and onto the bed. (Tr. 1635, 1636, 1648, 1651). Due to his focus on the first floor bedroom, Bethune incorrectly identified the origin of the fire as the first floor bedroom in his report but clarified this issue during his trial testimony. (Tr. 1635, 1636, 1647, 1648, 1660, 1661, 1666). Bethune realized this after his report was complete but did not want to change the report. (Tr. 1635, 1636, 1649, 1650, 1664, 1665).

Bethune also explained that the couch and rug in the living room did not ignite because the pour pattern in the bedroom, dining room, and living room did not extend to the couch and rug area. (Tr. 1636). The front door was also open at the time the fire was lit. (Tr. 1636, 1644, 1645). All other doors and windows were closed and locked. (Tr. 1645, 1646). This allowed the vapors to escape, not collect and ignite. (Tr. 1636, 1661). Bethune indicated that he examined the debris in Appellant's residence for the remnants of a gasoline can but did not find any, although Bethune did find what he believed to be the remains of a smoke detector. (Tr. 1637, 1641, 1647, 1656, 1657, 1658). Bethune estimated that it would have only taken approximately one (1) quart of gasoline to create a fire to produce the same effects. (Tr. 1637, 1652, 1653).

Bethune also indicated that the gasoline on the couch was extremely pungent. (Tr. 1637, 1638, 1654). The items taken for testing were so pungent that they had to be bagged several times. (Tr. 1637, 1638, 1654). Bethune would have expected anyone who claimed to have been lying on the couch to have a noticeable odor of gasoline about their person, clothing, and hair. (Tr. 1638). Bethune also indicated that individuals involved in fires are typically covered in soot and smell of smoke. (Tr. 1639, 1645).

Christa Rajendran is employed with the State Fire Marshal Forensic Lab and has been employed there since 1994. (Tr. 1668). Rajendran is a lab supervisor who supervises criminal analysis in the lab as well as conducts analysis on fire debris. (Tr. 1669). Rajendran has a Ph.D. in chemistry from North Dakota State University. (Tr. 1669). Rajendran has analyzed samples from fire scenes to determine whether an ignitable liquid was present. (Tr. 1669).

Rajendran utilizes a two (2) step process to determine the presence of an ignitable liquid. (Tr. 1670). The first step involves analyzing the water components of the sample provided along with a room temperature head space analysis. (Tr. 1670). The second step involves extracting the ignitable liquid, if any, from the sample. (Tr. 1670). Rajendran discovered the presence of an ignitable liquid on the blue bootie worn by Garcia, the carpet from the living room, the cushion from the couch, the clothing worn by Jacob and the mattress pad. (Tr. 1671, 1672, 1673).

Dr Paul Matus has been licensed to practice medicine in the state of Ohio for twenty nine (29) years. (Tr. 1677, 1678). Matus is currently the Lorain County Coroner and has been since 1992. (Tr. 1678). Matus attended Oberlin College and the University of Cincinnati College of Medicine. (Tr. 1678). Matus then completed his residency in

Columbus, Ohio. (Tr. 1678). Matus has worked at the Ohio State University Hospital, the Elyria Memorial Hospital, the Veteran's Hospital in Cincinnati, the Shriners' Burn Center, the University Hospital of Cincinnati, and the Good Samaritan Hospital. (Tr. 1679).

Matus returned to Lorain County and established a practice in emergency and family medicine and assisted the former Lorain County Coroner Dr. Kishman. (Tr. 1678). Matus then assisted subsequent Lorain County Coroners Drs. Thomas and Buchanan. (Tr. 1678, 1679). Matus performed his first autopsy in 1974 and continued to perform them until the present day. (Tr. 1678, 1679). Matus has performed over one thousand (1,000) autopsies during his career. (Tr. 1679).

An autopsy consists of a systematic examination of a decedent to determine a cause of death. (Tr. 1679). The decedent is examined externally and internally. (Tr. 1679, 1680). Matus conducted an autopsy on Jacob Diar. (Tr. 1680). The autopsy was performed on August 28, 2003. (Tr. 1681). Matus also authenticated a number of photographs taken of Jacob during the autopsy. (Tr. 1689, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704).

Matus determined that Jacob died of homicidal violence of an undetermined origin. (Tr. 1681, 1688, 1689). Matus determined that something was done to end Jacob's life prior to the fire because he was not alive at the time of the fire. (Tr. 1682, 1702). Jacob's mouth and nostrils were free from soot and debris indicative of those inhaling smoke. (Tr. 1707, 1702, 1703, 1704). Matus determined that Jacob's death was not natural or suicide. (Tr. 1682, 1683, 1690, 1691). No toxic substances were present in Jacob's blood. (Tr. 1684, 1715). The placement of Jacob's body and the clothing Jacob

was wearing was not indicative of an accidental or natural death. (Tr. 1684). Late August evenings are very warm, yet Jacob was dressed in long pants, a t-shirt, and a hooded sweatshirt. (Tr. 1685). The hood of the sweatshirt was pulled down over Jacob's face. (Tr. 1685). Matus could smell the gasoline on Jacob's remains and factored this into his determination. (Tr. 1705).

Jacob's body also sustained catastrophic damage to the skull and brain. (Tr. 1686). Matus was initially unsure if this damage was inflicted on Jacob prior to the fire or caused by the fire. (Tr. 1686). Law enforcement was aware of the damage to Jacob's head and investigated at Matus' request. (Tr. 1686, 1687, 1710, 1714, 1715, 1720). Matus consulted with other coroners and pathologists to determine that the damage to Jacob's head and brain was caused by the fire. (Tr. 1687, 1688, 1709). Matus was not able to examine some of Jacob's body as carefully as he would have liked because parts of Jacob's body were consumed by the fire. (Tr. 1698). For example, Jacob's eyes were consumed by the fire so Matus could not examine them for petechia or little hemorrhages of the blood vessels in the eyes. (Tr. 1698). The amount of destruction to Jacob's body was caused by a great amount of heat. (Tr. 1709).

Matus also testified that Alprazolam is a tranquilizer and could be given to an individual who has gone through a traumatic event. (Tr. 1716, 1717). Matus also testified that Tylenol with Codeine can be used to put someone to sleep. (Tr. 1718). Tylenol with Codeine should not be given to an individual without a prescription as it is a controlled substance. (Tr. 1718, 1719). Codeine can make individuals woozy, lethargic, and sleepy. (Tr. 1719). Codeine is also a gastric irritant in some people. (Tr. 1720). Some individuals who take codeine suffer acute gastritis or an inflammation of the

stomach. (Tr. 1719, 1720). Tylenol with Codeine remains in the body for approximately four (4) to six (6) hours; subsequent to that time frame it can remain in the body at undetectable levels. (Tr. 1722).

David Garcia is an investigator with the Lorain County Prosecutor's Office. (Tr. 2059). In 2003, Garcia was a Detective with the Lorain Police Department. (Tr. 2059). Garcia was with the department for twenty eight (28) years; ten (10) of those years were spent in the detective bureau. (Tr. 2059, 2060).

On August 27, 2003, Garcia became involved in the investigation of the death of Jacob Diar. (Tr. 2060). Garcia made initial contact with Appellant the morning of the fire. (Tr. 2060). Garcia had additional contact with Appellant later that same day at her parents' residence in South Amherst, Ohio. (Tr. 2060, 2061). These conversations were tape recorded. (Tr. 2061, 2062).

Upon his arrival at the scene of the fire, Garcia observed a number of Lorain Fire Department trucks and firefighters. (Tr. 2090, 2091). It was very noisy and confusing. (Tr. 2090, 2091). Garcia met Appellant approximately fifteen (15) to twenty (20) minutes after arriving. (Tr. 2091). Appellant was leaning against a fire truck with her back to Garcia. (Tr. 2091). Appellant was making crying sounds. (Tr. 2091).

The morning of the fire, Garcia only spent a few moments with Appellant. (Tr. 2062). Garcia spoke with Appellant in the ambulance. (Tr. 2091, 2092). Bidlake, Frabotta, and Marilyn Diar were present. (Tr. 2092). Appellant was wearing a beige top and what appeared to be a pair of jean shorts. (Tr. 2093). Appellant was free from any soot as well as the odors of burnt hair, smoke, or gasoline. (Tr. 2093, 2098). Appellant asked Garcia how her son had died. (Tr. 2097). When Garcia did not respond, Appellant

asked if he was burned beyond recognition. (Tr. 2097, 2103). Garcia stated that he did not know. (Tr. 2097). Appellant and her mother then left the scene before Jacob's body was recovered. (Tr. 2097, 2098). During this time, Garcia saw no tears from Appellant only muffled sounds of crying. (Tr. 2099).

When Garcia tried to contact Appellant for a meeting later in the day, Garcia had difficulty getting a hold of Appellant. (Tr. 2062). Garcia understood that Appellant went to the emergency room in Amherst, Ohio seeking medical treatment per request of Dr. Matus. (Tr. 2062, 2099). Garcia and his supervisor, Sgt. Carpentiere, responded to the hospital in an effort to speak to Appellant and was refused by hospital staff. (Tr. 2062, 2100). Garcia requested to be notified upon completion of her treatment. (Tr. 2062). Garcia then contacted the hospital later only to learn that Appellant had left the hospital. (Tr. 2063). No notification of her release was provided to Garcia. (Tr. 2063). Appellant had indicated that if law enforcement wanted to speak with her, they would have to find her. (Tr. 2063). Garcia eventually found Appellant at her parent's residence. (Tr. 2064).

When Garcia, Carpentiere, and Lt. Rohner from the Lorain Police Department arrived, the situation was very tense. (Tr. 2064, 2065). The hostility was evident. (Tr. 2064). Garcia was eventually allowed some private time with Appellant. (Tr. 2064, 2103). This occurred in a bedroom while Appellant rested on a bed. (Tr. 2064, 2065, 2093). Appellant was covered by a blanket up to her nose; Garcia sat next to the bed on a chair. (Tr. 2064, 2066, 2067, 2093). Garcia could not see how Appellant was clothed. (Tr. 2064). The conversation was tape recorded and lasted fifteen (15) to twenty (20) minutes. (Tr. 2066, 2103). Garcia noted that Appellant made sounds as if she was crying, but he did not recall seeing any tears. (Tr. 2068, 2139).

Garcia asked Appellant if she was wearing the clothes from the fire scene; Appellant responded affirmatively. (Tr. 2067). Appellant then pulled the blanket down, showed Garcia her clothing, and further described what she was wearing. (Tr. 2067, 2093, 2094). Before Garcia left the residence, he asked for Appellant's clothing, which she voluntarily turned over to law enforcement. (Tr. 2067, 2094, 2138, 2139).

Appellant told Garcia that she woke up to black smoke everywhere and she tried to find her son. (Tr. 2096). Appellant looked behind a chair but was overcome by the smoke. (Tr. 2096). Appellant fled her residence through the front door. (Tr. 2096). Appellant then entered and exited her residence on several occasions trying to find her son. (Tr. 2096). This statement gave Garcia pause as the clothing Appellant wore in the fire was clean and still on Appellant's body as they spoke. (Tr. 2096).

Appellant revealed to Garcia that Jacob had returned home from his Aunt Becky's residence after a ten (10) day stay, on the night of the fire. (Tr. 2141, 2142). Appellant also suggested that an individual by the name of Jonathan Walker may be responsible for setting her residence on fire and killing Jacob. (Tr. 2068, 2069, 2125, 2128, 2145, 2154, 2155, 2156). Garcia investigated this lead but learned that Walker was in Oberlin, Ohio with family members at the time of the fire. (Tr. 2069). This was confirmed by Walker's family members. (Tr. 2069).

During the course of the investigation, Appellant advanced three (3) stories to Garcia regarding the status of her residence and vehicle keys. (Tr. 2144, 2146). Appellant stated that Jacob lost the keys, that she lost the keys, and that she simply could not find her keys. (Tr. 2144, 2153, 2154). As part of the lost keys story, Appellant indicated that she lost the keys to her residence and despite searching Walker and everywhere she could not find her keys. (Tr. 2069, 2125, 2126, 2145, 2146). Other individuals were also questioned regarding Appellant's missing keys. (Tr. 2131, 2132). It is unclear how anyone could have gained access to Appellant's residence the night of the fire using the keys to locks that had been removed the night before the fire. (Tr. 2146).

Appellant then decided that the alleged intruder must have somehow acquired the keys to her new locks and entered her home to murder Jacob and set fire to the residence. Appellant now attempted to implicate Leroma Penn as she was the only individual present in Appellant's residence the night before the fire. This new theory contradicted Appellant's prior statements to law enforcement that no one other than herself and Jacob were in her residence the night before the fire. (Tr. 2150, 2151). Garcia eventually recovered three (3) keys belonging to the new locks in Appellant's residence from Appellant and her family some time subsequent to the fire. (Tr. 2135, 2136, 2137, 2141). This was subsequent to Appellant's family's intensive questioning as to whether law enforcement had inventoried her purse at the time of the fire.

Appellant also contended that she parked her vehicle across the street from her residence the night before the fire because the key was missing. (Tr. 2138, 2147). This was allegedly to protect the vehicle from vandalism. (Tr. 2147). It is unclear how the vehicle would be "safer" parked across the street in plain view of any passerby or alleged vandal than in the safety of the detached garage Appellant had access to at her residence and typically utilized to secure her vehicle during the night hours. (Tr. 2147, 2148).

As part of the investigation, Garcia attended Jacob's autopsy. (Tr. 2087). During the autopsy, Dr. Matus indicated that Jacob may have suffered a potential blow to his head. (Tr. 2087). A hematoma resulted. (Tr. 2087). Garcia conveyed this information to Sgt. Rivera and Lt. Rohner, despite Matus later finding that the fire caused the injury to Jacob's head. (Tr. 2088). Since this determination had not been made, officers proceeded to question Appellant regarding head injury and hematoma. (Tr. 2088).

A third interview was conducted with Appellant on September 3, 2003 at the Lorain Police Department. (Tr. 2072). Sgt. Rivera, Garcia, and Appellant were present. (Tr. 2072). During the interview, officers engaged in tactics to place information before Appellant that would make ease her into being more forthcoming about the events of August 27, 2003. (Tr. 2088, 2089, 2106, 2107, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117). Via this law enforcement technique, officers advanced the idea of the hematoma and an intruder to Appellant. (Tr. 2089, 2106, 2107, 2110, 2111, 2112, 2113, 2114, 2115, 2116). This did not mean that law enforcement gave credence to either theory. (Tr. 2089, 2106, 2107, 2110, 2111, 2112, 2113, 2114, 2115, 2116). Garcia also related that he never saw Appellant cry any actual tears during the interview. (Tr. 2089, 2090).

Garcia also revealed that as part of his investigation he reviewed reports regarding the fire in the garage of 914 W. 10th Street, Lorain, Ohio that occurred in May 2003, prior to Appellant taking possession of the residence. (Tr. 2122, 2123). Garcia did not feel that this was significant as the investigation revealed that the fire appeared to have been set by neighborhood children. (Tr. 2123, 2124, 2146).

Detective McCoy is a detective with the Lorain Police Department as well as a crime scene technician. (Tr. 2261). McCoy has been employed with the Lorain Police Department for sixteen (16) years. (Tr. 2261). McCoy trained with the Metropolitan Police Institute in Metro Dade Florida and the Southern Police Institute through the University of Louisville. (Tr. 2261, 2262). This included training in the processing, identification, development, and lifting of fingerprints. (Tr. 2262).

On August 27, 2003, McCoy was summoned to 914 W. 10th Street, Lorain, Ohio as a secondary detective. (Tr. 2262). McCoy was eventually assigned to be the evidence technician at the crime scene. (Tr. 2262). McCoy created state's exhibit twelve (12) a video taken of the crime scene at the behest of his supervisor, Lt. Rohner. (Tr. 2263) McCoy also authenticated a number of photographs taken of the crime scene as well as diagrams prepared of the crime scene. (Tr. 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280). All of the windows in the residence were closed and/or locked except the window in which an air conditioning unit was placed. (Tr. 2317, 2318, 2326). McCoy also related that himself and other officers tried to utilize an overhang to the residence to gain access to the second story of the home to permit access through a second story window but were unsuccessful.

(Tr. 2323, 2324, 2329, 2330, 2331). It did not appear that anyone could gain access to the second story without a ladder. (Tr. 2330, 2331, 2332).

McCoy also removed the door knob from the front door and the dead bolt from the back door. (Tr. 2281, 2282, 2283). The locks were installed as Leroma Penn testified. Keys to the residence were provided to McCoy at a later date. (Tr. 2282). The old locks to the residence were discovered inside the residence. (Tr. 2284). The keys provided to McCoy were for the new locks. (Tr. 2285, 2286, 2309). The purse belonging to Appellant that McCoy found at the scene was checked for contraband but not inventoried. (Tr. 2286, 2324).

McCoy recovered a lighter from the living room of the residence. (Tr. 2287, 2288). The lighter was covered in soot and water. (Tr. 2288, 2289). McCoy believed, based on his training and experience that the lighter was of no value for fingerprints due to its exposure to water, soot, and heat. (Tr. 2289, 2290, 2299, 2300, 2302, 2307, 2308). Those three (3) things are elements that destroy fingerprints. (Tr. 2289, 2290). Heat causes fingerprints to evaporate; soot covers fingerprints up; and water dissolves fingerprints. (Tr. 2289, 2290).

McCoy further explained that friction ridges on the tips of the fingers enable individuals to pick up slippery items. (Tr. 2290). These friction ridges, along with our fingers, contain lipids or oils. (Tr. 2290). When an individual's fingers touch an item, a transfer of the oils may result leaving behind a fingerprint. (Tr. 2290, 2291). Heat causes the oils to evaporate as it does other liquids. (Tr. 2291).

McCoy was also assigned to investigate donation jars. (Tr. 2293). McCoy stopped by a Mr. Hero fast food restaurant and a Marathon gas station. (Tr. 2293). These were located in Amherst, Ohio. (Tr. 2293). It was believed that the jars had been placed by Appellant. (Tr. 2297). McCoy also spoke with an individual who knew Appellant and had made a donation. (Tr. 2297). McCoy authenticated photographs taken of the donation jars. (Tr. 2298, 2299).

Bud Cunningham is an investigator with the Lorain County Prosecutor's Office. (Tr. 2335, 2336). Prior to that, Cunningham was a law enforcement with the Elyria Police Department for twenty four (24) years. (Tr. 2336). Cunningham picked up the smoke detector recovered by Genevieve Bures, a private arson investigator, from Appellant's home. (Tr. 2337). Cunningham surrendered the detector to Lt. Rohner of the Lorain Police Department. (Tr. 2337).

Lt. Rohner has been employed with the Lorain Police Department for twenty three (23) years. (Tr. 2339). Rohner became involved in the investigation of Jacob Diar's death by virtue of his supervising the Detective Bureau of the Lorain Police Department. (Tr. 2340). Rohner actively participated in the investigation of the case. (Tr. 2340).

Rohner related that he spoke with Alicia Huff, Appellant's best friend during the course of the investigation. (Tr. 2340). Huff sought information regarding the investigation from Rohner. (Tr. 2341). Rohner did not divulge specifics of the investigation, such as that gasoline was present on Jacob's body. (Tr. 2341, 2365, 2366, 2368).

Rohner also accompanied Garcia to the Diar residence in Amherst, Ohio the day of the fire. (Tr. 2341, 2342). Upon arrival, Rohner and Garcia were met by Ed and Chad Diar, Appellant's father and brother, respectively. (Tr. 2342). Law enforcement had difficulty gaining access to Appellant. (Tr. 2344). Rohner stood outside of the bedroom in which Garcia questioned Appellant because Chad kept trying to enter the room. (Tr. 2344, 2380). Appellant's purse was returned to her family. (Tr. 2343, 2355, 2363, 2374, 2375). The return of the purse was a bargaining chip that law enforcement used to gain access to Appellant.

Rohner eventually received keys for the new locks to Appellant's residence from Ed and Chad Diar. (Tr. 2344, 2345). Prior to receiving the keys, Rohner had several conversations with Chad. (Tr. 2345, 2346). Rohner advised Chad that he was unsure if Appellant's purse had been inventoried prior to its return to her the night of the fire. (Tr. 2345, 2363). Chad would not acknowledge that they had the keys or relinquish the keys until Rohner informed him of the inventory status of Appellant's purse. (Tr. 2345, 2357, 2362). Rohner did not receive the keys from Chad until October 2, 2003, some five (5) weeks after the fire. (Tr. 2346, 2357, 2358, 2364, 2382, 2383).

Rohner was also involved in the investigation of Jonathan Walker and his alleged involvement with Appellant's missing keys to the old locks. (Tr. 2347, 2349, 2351). It was learned, after speaking with Walker that he was not in the area when Appellant claimed he stole her keys. (Tr. 2347). This information was verified by speaking to Walker's family members. (Tr. 2347).

Rohner checked the caller ID from Appellant's residence. (Tr. 2348). The caller ID revealed that Appellant received a call the morning of the fire at 8:09 a.m. (Tr. 2348). Appellant also received calls at 1:03 a.m. and 1:11 a.m., after Leroma Penn left. (Tr. 2348, 2349). This is consistent with interviews of Appellant, who stated that she did not go to bed until 1:30 a.m. the morning of the fatal fire. (Tr. 2349).

Rohner confirmed that law enforcement officers attempted to gain access to the second floor of Appellant's home at his direction from the exterior of the residence. (Tr. 2349, 2350). Rohner tried to climb to the second floor of the residence by using a post in front of the residence. (Tr. 2350). Rohner testified that it would have been very difficult, if not impossible, to climb around the overhang. (Tr. 2350). The gutters on the residence were also too flimsy to support an individual in their quest to climb to the second floor of the residence. (Tr. 2350). The only way to gain access to the second floor of Appellant's residence from the exterior of the residence was with a ladder. (Tr. 2350).

Genevieve Bures is a self employed fire investigator. (Tr. 1736). Bures has been investigating fires for twenty three (23) years. (Tr. 1738). During this time frame, Bures has investigated between three thousand (3,000) and four thousand (4,000) fires. (Tr. 1739). Bures determines where and how fires start. (Tr. 1736, 1741).

Bures has a Bachelor's degree in fire science. (Tr. 1737). Bures is a certified fire investigator through the International Association of Arson Investigators since 1988 and was the first female to become certified. (Tr. 1737). Bures teaches at the Ohio Fire Academy and the International Association of Arson Investigators. (Tr. 1737). Bures is also a member of the board of directors of the International Association of Arson Investigators. (Tr. 1737).

Bures devoted five (5) years of her life in order to gain her certification,. (Tr. 1737). Bures was required to attain a certain number of hours in training, be recognized as an expert in trial and deposition, write books and/or periodicals, and teach. (Tr. 1737). Application must be made to the International Association of Arson Investigators and references supplied. (Tr. 1737, 1738). Subsequent to this process, Bures was eligible to sit for the examination. (Tr. 1737, 1738). Bures is also required to re-certify every five (5) years. (Tr. 1738). Bures has testified as an expert witness roughly eighty (80) times. (Tr. 1739).

The majority of business Bures handles is from insurance companies. (Tr. 1738). In fact, Bures investigated the fire at Appellant's residence, 914 W. 10th Street, Lorain, Ohio at the behest of American Family Insurance Company. (Tr. 1739, 1740). 914 W. 10th Street was owned by Charles Hassler, not Appellant. (Tr. 1740). In speaking with American Family, Bures learned that the State Fire Marshal was on the scene due to a child's death. (Tr. 1740). Bures then contacted Lee Bethune, the Deputy Fire Investigator. (Tr. 1740). This was on August 28, 2003. (Tr. 1740).

Bures reported to the fire scene on August 29, 2003, per Bethune's instructions. (Tr. 1740). Bures also contacted American Family and requested an electrical expert since Jacob initially appeared to have died in the fire. (Tr. 1740, 1741). American Family agreed and Bures contacted Ralph Dolence. (Tr. 1741). Dolence met Bures and her associate, Jill Munteanu, at the fire scene on August 29, 2003. (Tr. 1741, 1742). Bures and Munteanu were wearing firefighter's gear to conduct their investigation. (Tr. 1742). It took Bures twelve (12) hours to process the scene. (Tr. 1742).

Initially, Bures walked around the exterior of the residence. (Tr. 1743). Bures then photographed the exterior of the residence. (Tr. 1742). Bures examined the exterior of the residence for venting. (Tr. 1742). Bures also examined the detached garage. (Tr. 1742). Bures then proceeded to conduct an examination of the interior of the residence. (Tr. 1744). Bures entered through the front door and photographically documented the interior of the residence. (Tr. 1744). Munteanu interviewed Hassler. (Tr. 1744). Bures then documented the appliances in the basement. (Tr. 1745). Munteanu created a sketch of the residence. (Tr. 1745). The electrical systems were also documented. (Tr. 1745, 1746).

Based on her investigation, Bures concluded that the area of the residence that demonstrated the heaviest venting was the first floor bedroom window. (Tr. 1746, 1747). This is the side of the residence furthest from the Penn's residence. Venting occurs when a fire burns through a window or door because of its natural tendency to burn up and out. (Tr. 1747). Damage will be present on the exterior of the window or door where venting occurs. (Tr. 1747).

Bures related in order to have fire, fuel, oxygen, heat, and an unimpeded chemical reaction is required. (Tr. 1747, 1748). Bures noted the strong smell of gasoline in the bedroom and living room of the residence. (Tr. 1789).

The dining room revealed flame impingement. (Tr. 1766). This occurs when there is severe fire. (Tr. 1766). Flame impingement is where carbon left on items in a fire is actually burned off of them. (Tr. 1766). The plaster and lath walls were also burned through. (Tr. 1765, 1766). Plaster and lath walls repel fire for a long time as opposed to drywall. (Tr. 1765, 1766). Bures also determined that something was holding

the fire on the floor of the dining room because fire does not stay at floor level unless something keeps it there. (Tr. 1767).

In the first floor bedroom, the plaster and lath walls and ceiling were also severely damaged. (Tr. 1771, 1772). Due to the amount of flame impingement on the north side of the window, something burned at a greater intensity in that area. (Tr. 1773). An irregular burn pattern was quite prevalent in the bedroom, dining room and living room and indicative of an ignitable liquid. (Tr. 1787, 1788, 1789, 1790, 1791, 1792, 1794).

Bures authenticated a number of photographs taken during the course of her investigation. (Tr. 1748, 1749, 1751, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807).

Bures also authenticated a number of samples she removed from the residence for purposes of testing. (Tr. 1807, 1808, 1809, 1810). A piece of carpeting under the leg of the couch from the living room; upholstery material from the couch; a washcloth; and a piece of wood from the bedroom floor were all identified as samples taken. (Tr. 1815, 1816). The results from the testing of these samples caused Bures to further believe that the fire that occurred on August 27, 2003 at 914 W. 10th Street, Lorain, Ohio was intentionally set. (Tr. 1817). Bures related that she came to this conclusion based upon the depth of the char, the flame travel, the fire patterns, the burn patterns, as well as the smell of gasoline present in the residence. (Tr. 1817, 1818).

Bures also discovered a second smoke detector in the basement. (Tr. 1778, 1779, 1781). Bures also found the smoke detector that was present on the first floor. (Tr. 1781, 1782). Bures did not test this due to the damage the detector sustained from the fire. (Tr. 1782, 1783).

Ralph Dolence is employed by Dolence Electrical Technical Consultants as a forensic radiographer, fire cause and origin expert, and as an electrical expert. (Tr. 1822). A forensic radiographer is an individual that examines inanimate objects via x-ray to determine if an explosive device is contained within that object. (Tr. 1822).

Dolence attended St. Joseph High School and graduated in 1968. (Tr. 1823). Dolence then enlisted in the United States Marine Corp after graduation. (Tr. 1823). In the Marine Corp, Dolence trained as an instrument technician. (Tr. 1823). Subsequent to the Marine Corp, Dolence was employed as a design draftsman position with Reliance Electric. (Tr. 1823). Dolence then gained employment with Gould, Inc. as a configuration design analyst. (Tr. 1823). Dolence worked on the "Mark 48" torpedo project, in connection with the United States Navy. (Tr. 1823, 1824). During this time, Dolence also worked as a firefighter for the city of Willowick. (Tr. 1824).

Dolence then left Gould to become a career firefighter with the city of South Euclid. (Tr. 1824). Dolence worked there for eighteen (18) years. (Tr. 1824). Dolence was in charge of the fire and arson investigations. (Tr. 1824). Dolence is also a master electrician licensed in five (5) or six (6) counties in the state of Ohio. (Tr. 1824). Dolence then left his employ with the city of South Euclid to devote his full energy to Dolence Electric Technical Consultants, a forensics company that investigates electrical fires and electrocutions as well as the cause and origins of fires. (Tr. 1825).

Dolence is an instructor for Alcohol, Firearms, and Tobacco, ATF, a federal agency. (Tr. 1825, 1826). Dolence is a consultant for crime labs in Washington and Walnut Creek in San Francisco, California. (Tr. 1825). Dolence is an expert in the firing mechanisms of bombs and wire mechanisms. (Tr. 1826). Dolence has a top secret security clearance with the United States government. (Tr. 1826). Dolence is involved with the International Association of Arson Investigators. (Tr. 1826, 1827).

As of 1994, Dolence has investigated over sixteen thousand (16,000) fire investigations. (Tr. 1826). After 1994, Dolence stopped counting the number of investigations he works on, although he works on several hundred per year. (Tr. 1826, 1840, 1841).

In regards to Appellant's residence, Dolence was to conduct an electrical analysis. (Tr. 1825). Dolence first conducted an examination of the exterior of the residence to see where the fire vented, signs of any forcible entry, and/or anything else significant. (Tr. 1827). Dolence then entered the residence and went from areas in the home with the least fire damage to the most. (Tr. 1827). Dolence examined the electrical panel, traced the circuits, took the furnace apart, as well as examined the gas meter and hot water tank. (Tr. 1827, 1828).

Dolence then examined the branch circuits or the wires that go to the different rooms. (Tr. 1828). All circuits were examined and traced back. (Tr. 1828). It was quite obvious that the electrical system did not cause the damage because it was not damaged. (Tr. 1828). All outlets from the first floor were removed and analyzed. (Tr. 1828). The outlets from the first floor were in working order. (Tr. 1828, 1829, 1830). After a full electrical examination of the residence, Dolence could find no evidence of any electrical activity that would be characteristic of anything that could cause a fire. (Tr. 1831, 1836, 1837).

Dolence also testified that most smoke detectors are destroyed in fires and are almost impossible to test if a detector is recovered due to damage from the fire. (Tr. 1832, 1833, 1834, 1835, 1836). Dolence also relayed that he smelled an odor of gasoline in the residence on August 29, 2003 while conducting his electrical inspection of the residence. (Tr. 1833, 1834). Dolence determined that the fire originated in the residence in the dining room outside of the first floor bedroom and spread to the first floor bedroom and living room. (Tr. 1839, 1840).

Charles Hassler owns 914 W. 10th Street, Lorain, Lorain County, Ohio. (Tr. 1844). Hassler purchased this residence in April 2003. (Tr. 1844). Prior to purchase, Hassler had a home inspection conducted. (Tr. 1844, 1845). Prior to purchasing the residence, Hassler required the seller to make the windows operable. (Tr. 1845, 1846, 1862, 1863). At the time of inspection, the residence contained a smoke detector. (Tr. 1846, 1847). Hassler made sure the smoke detector was in working order before leasing the residence to Appellant. (Tr. 1847). Hassler also installed an additional smoke detector. (Tr. 1847, 1848). Additional remodeling work was completed prior to

Appellant taking possession of the residence. (Tr. 1848). Hassler leased this residence to Appellant effective on July 1, 2003. (Tr. 1849). Appellant and her son were to reside in the residence. (Tr. 1850).

The monthly rent for the residence was six hundred (\$600) dollars. (Tr. 1849). Hassler also required a six hundred (\$600) dollar security deposit. (Tr. 1849). Appellant paid Hassler the first month's rent and a portion of the security deposit. (Tr. 1850). Appellant planned to do the same for the month of August. (Tr. 1850). Appellant paid Hassler in cash or money orders at his request. (Tr. 1850, 1851). Hassler demonstrated to Appellant that the smoke detectors were operable in the residence before she took possession. (Tr. 1851, 1852, 1853).

On August 26, 2003, Hassler received a phone call from Appellant. (Tr. 1853). Hassler then went to the locksmith and had duplicate keys made for the W. 10th Street residence. (Tr. 1853). Hassler dropped off the duplicate key to Appellant. (Tr. 1854, 1860). Appellant informed Hassler that the residence had been broken into the night before and showed Hassler pry marks on the door. (Tr. 1854, 1860, 1865). This would have been August 25, or 26, 2003. (Tr. 1854, 1855). Appellant stated that her keys and money orders for rent had been taken. (Tr. 1855, 1864). Appellant stated that she reported the money orders stolen and made a police report. (Tr. 1855, 1856).

Hassler stated that Appellant later informed him that she would like to change the locks to the residence. (Tr. 1865, 1866). Hassler was agreeable to Appellant doing so. (Tr. 1865, 1866).

Hassler testified that a fire that had occurred in the garage of the residence in May 2003. (Tr. 1856). Hassler believed it to be the work of kids as some of the materials in the garage were burnt slightly. (Tr. 1856).

Michelle Gregory was Charles Hassler's girlfriend in August 2003. (Tr. 1957). Gregory was aware that Hassler owned a rental property on W. 10th Street in Lorain, Ohio. (Tr. 1958). Gregory took Appellant's call on August 25 or 26, 2003. (Tr. 1958). Appellant relayed that a friend had lost her keys and she needed a new set of keys. (Tr. 1959).

Luis Agosto was fourteen (14) years old in 2003. (Tr. 1869, 1873). Agosto knew Appellant in the late spring/early summer of 2003. (Tr. 1869, 1871). Agosto lived near the Beavercrest Apartments in Lorain, Ohio, where Appellant's sister, Becky Diar resided. (Tr. 1878). Agosto knew Appellant through Chris Shreves, Rachel Wise, and Appellant's sister, Becky. (Tr. 1869, 1870). Agosto also knew Jacob Diar. (Tr. 1870, 1871). Agosto first met Jacob at Becky's residence and saw him there frequently thereafter. (Tr. 1871). Agosto also knew that Becky had a daughter, Taylor. (Tr. 1871).

Agosto revealed that he and his friends used to baby sit for Jacob. (Tr. 1872). Appellant specifically asked Agosto to care for Jacob because Becky and Appellant wanted to go out. (Tr. 1872, 1873, 1874). Appellant told Agosto to give Jacob some medicine from what appeared to be a cough syrup bottle. (Tr. 1874, 1875). Appellant stated that the medication was to curb Jacob's hyperactivity. (Tr. 1876). Appellant instructed Agosto to give Jacob a teaspoon full. (Tr. 1875). Agosto called his friends, Rachel and Chris to help. (Tr. 1874). Agosto gave Jacob the medicine but Jacob threw

the medicine up. (Tr. 1875, 1876, 1877). Jacob then became very tired and was put to bed. (Tr. 1878). Agosto had no emergency number to contact Appellant. (Tr. 1879).

After Jacob threw up, Shreves took the bottle of medicine and flushed the contents down the toilet. (Tr. 1876). Agosto never saw the bottle again. (Tr. 1876). Agosto revealed that Appellant would pay for baby sitting services with cigarettes. (Tr. 1877).

Rachel Wise was sixteen (16) years old in 2003. (Tr. 1881). Wise knew Appellant through Destiny Faulkner, juvenile female. (Tr. 1882, 1909). Wise also recalled seeing Appellant around the Beavercrest Drive apartment complex. (Tr. 1882). Wise also knows Chris Shreves, Luis Agosto, and Becky Diar. (Tr. 1883). Appellant and Becky lived near each other in the complex. (Tr. 1884, 1908). Wise also knew Jacob Diar. (Tr. 1884). Wise saw Jacob frequently at the Beavercrest Drive apartment complex, running around playing, unsupervised at the age of four (4). (Tr. 1884, 1885, 1915).

Wise also observed Jacob interact with Becky and Appellant. (Tr. 1885). Jacob behaved around Becky, but not so much with Appellant. (Tr. 1885). Jacob also spent far more time with Becky than Appellant. (Tr. 1885, 1914). Wise also provided child care services for Appellant. (Tr. 1886, 1906). Wise often spent the night because Appellant would not return home until 3:00 a.m. or 4:00 a.m. (Tr. 1886, 1914). Appellant left no emergency contact numbers. (Tr. 1887). Wise also had no transportation and Appellant left no food for Jacob. (Tr. 1887).

Wise recalled the day Agosto gave Jacob Codeine. (Tr. 1888, 1910). Wise recalled that the bottle the Codeine came from was a prescription medicine bottle for Taylor Diar. (Tr. 1888, 1910, 1915, 1916). Agosto gave Jacob a tablespoon of the medicine. (Tr. 1912, 1913). Jacob threw the medicine up. (Tr. 1888, 1889). Wise also recalled that Jacob was hyper when she watched him and disliked wearing lots of clothes. (Tr. 1889). Wise stated that Jacob also loved to take baths and took baths frequently. (Tr. 1890).

Wise also babysat Jacob after Appellant moved to the W. 10th Street residence. (Tr. 1890). Jacob always slept on the couch and refused to sleep in the first floor bedroom. (Tr. 1890). When Wise put a sleeping Jacob in the first floor bedroom, he woke up screaming. (Tr. 1890, 1891).

Wise attended Jacob's funeral. (Tr. 1891). Becky, Jacob's aunt, cried and shook; Appellant, Jacob's mother, did not appear to be shook up. (Tr. 1891, 1892).

Destiny Faulkner was fifteen (15) years old in 2003. (Tr. 1920). Faulkner frequented Appellant and Becky Diar's apartments. (Tr. 1920). Faulkner met Appellant in the store her grandfather operates. (Tr. 1920, 1921). Faulkner babysat at Appellant's residence and Appellant would transport Faulkner to baby sit. (Tr. 1921). Faulkner babysat at Appellant's apartment in the Beavercrest Drive complex. (Tr. 1921, 1922). Faulkner babysat Jacob on a regular basis. (Tr. 1922, 1923, 1938). This consisted of at least four (4) times per week. (Tr. 1922). When Faulkner babysat during the day, Appellant would pose as Faulkner's mother and call her off of school. (Tr. 1931, 1932, 1955). Faulkner was aware that Appellant also used Chris Shreves, Luis Agosto, Rachel Wise, and Ashley Bullard to baby sit Jacob. (Tr. 1923).

When Faulkner babysat Jacob, Appellant sometimes left emergency numbers to get a hold of her. (Tr. 1923). Faulkner had a problem when she tried to reach Appellant during an emergency. (Tr. 1923). Jacob was sick and throwing up; Faulkner could not reach Appellant. (Tr. 1923, 1924). This worried Faulkner. (Tr. 1924). When Faulkner spoke to Appellant about this upon her arrival home, Appellant acted indifferent. (Tr. 1924). Appellant did not check on Jacob but went straight to bed. (Tr. 1924).

Faulkner stated that Jacob seemed like a bother to Appellant. (Tr. 1924, 1925, 1933). Appellant had friends and things to do. (Tr. 1925). Appellant had to arrange a baby sitter for Jacob to keep up her social life. (Tr. 1925). Appellant also liked to spend a lot of time on the computer in chat rooms. (Tr. 1933). Appellant once pushed Jacob from her lap when he tried to climb up as she tried to "work" or chat on the computer. (Tr. 1933). Faulkner testified that Jacob also spent a considerable amount of time with Becky. (Tr. 1925).

Faulkner recalled the day Agosto babysat for Jacob. (Tr. 1925). Faulkner accompanied Becky and Appellant to Lakeview park. (Tr. 1925). The trio returned that evening. (Tr. 1926). Shreves and Agosto were upset about a brown medicine bottle. (Tr. 1926, 1927). Faulkner had also been instructed by Appellant to give Jacob a substance from a brown medicine bottle. (Tr. 1926, 1927). The name on the brown medicine bottle was Taylor Diar, Becky's daughter. (Tr. 1927, 1944, 1945, 1946). Faulkner related that she saw more than one (1) brown medicine bottle. (Tr. 1928, 1936, 1945). The name on one (1) of the bottles was scratched off. (Tr. 1928, 1942, 1945).

Appellant had instructed Faulkner to give Jacob Taylor's medicine. (Tr. 1927, 1928). Faulkner was to give Jacob the medicine to make him tired. (Tr. 1927, 1928, 1932). Faulkner gave Jacob Taylor's medicine twice, but really did not want to because Jacob was not sick. (Tr. 1928, 1931, 1932, 1944, 1950, 1951). Appellant told Faulkner that the medicine she was giving to Jacob was Codeine. (Tr. 1928, 1929). Faulkner gave Jacob the amount of medicine as instructed by Appellant; one third (1/3) of the medicine cup, similar to the cup that accompanies a bottle of Nyquil. (Tr. 1929, 1944). The medicine made Jacob sleepy. (Tr. 1929, 1951). Faulkner was instructed to give Jacob the medicine a third time, but opted not to because Jacob was not sick. (Tr. 1931). Faulkner did not tell Appellant that she did not give Jacob the medicine. (Tr. 1931). Faulkner also recalled that Becky and Appellant argued about giving Jacob Taylor's medicine. (Tr. 1946, 1947). Becky did not want Jacob to take the medicine because it made him sick. (Tr. 1947, 1950).

Faulkner loved Jacob because he was happy, energetic, and cared so much. (Tr. 1929, 1939). Jacob also liked to dress in t-shirts and little shorts in the summer. (Tr. 1929). While at the 10th Street address, Jacob never went into the first floor bedroom; Jacob always stayed in the living room. (Tr. 1930). Jacob never slept in the first floor bedroom. (Tr. 1930).

Chris Shreves resided near the Beavercrest apartment complex in which Appellant resided in 2003. (Tr. 1993). Shreves knew both Appellant and her sister Becky because they had approached him about babysitting. (Tr. 1993, 1994). Shreves' mother was a Head Start teacher and he had younger sisters he babysat. (Tr. 1994, 1995). Shreves was around sixteen (16) or seventeen (17) years old. (Tr. 1995). Shreves started babysitting

Becky's daughter, Taylor. (Tr. 1995). Both Becky and Appellant approached Shreves about babysitting for Jacob as well. (Tr. 1995). Shreves knew Agosto, Wise, and Faulkner from the apartment complex. (Tr. 1996, 1997). Shreves babysat Jacob and Taylor on and off for a period of two (2) years. (Tr. 1998).

Shreves babysat for Jacob because Appellant allegedly had to go to school. (Tr. 1998). Shreves later found out this was a lie. (Tr. 1998). Shreves also cared for Jacob when he found him unattended in the complex. (Tr. 1999). Jacob was a fun loving, active child. (Tr. 2000).

Shreves recalled an incident when Agosto was babysitting for Jacob when Jacob threw up. (Tr. 2001, 2003, 2008, 2009). Shreves learned that Agosto gave Jacob medication belonging to Taylor. (Tr. 2002). Shreves emptied out the medicine bottle and threw it away. (Tr. 2002, 2003, 2008). Shreves knew it was not right to give a child medication belonging to another child. (Tr. 2002). The medication was Tylenol Three (3) with Codeine. (Tr. 2002). The medication was prescribed for Taylor Diar. (Tr. 2002). When Shreves tried to discuss the incident with Appellant, she stated it was no big deal and that Jacob would be fine. (Tr. 2005).

Shreves visited Appellant and Jacob after their move to the residence on W. 10th Street. (Tr. 2004). Shreves visited just to see Jacob. (Tr. 2004). Shreves knew that when Jacob lived at Beavercrest he liked to sleep in the living room with cartoons on. (Tr. 2004). Jacob would sleep in underwear or a t-shirt and underwear. (Tr. 2004, 2005).

Shreves also attended Jacob's funeral. (Tr. 2005). Appellant exhibited no emotions whatsoever. (Tr. 2005, 2006). Becky was overdramatic. (Tr. 2006).

Sahar Sarkis is a pharmacist at Rite Aid pharmacy on Broadway Avenue in Lorain, Ohio. (Tr. 2037). Sarkis was working on May 20, 2003. (Tr. 2038). Sarkis had filled a prescription for Taylor Diar on that date. (Tr. 2039, 2040). The prescription was for generic Tylenol with Codeine. (Tr. 2039). Side effects of this drug include upset stomach, vomiting, nausea, gastrointestinal problems, drowsiness, dizziness, slow breathing and slow heart rate. (Tr. 2040). This information is provided to a patient when they fill a prescription. The parties then stipulated that Tylenol with Codeine is a schedule V controlled substance in the state of Ohio. (Tr. 2041).

Detective Mehling of the Lorain County Drug Task Force has thirty three (33) years of law enforcement experience. (Tr. 2042). Mehling primarily investigates pharmaceutical cases and health care fraud. (Tr. 2043). Mehling was asked to investigate prescriptions regarding Taylor Diar. (Tr. 2043). Mehling located a prescription for Tylenol with Codeine for Taylor Diar that was filled at Rite Aid on Broadway Avenue in Lorain, Ohio. (Tr. 2043). Mehling also located another prescription for Taylor Diar from April 2000 for Tylenol with Codeine. (Tr. 2043). This was filled at Higgins Pharmacy in Amherst, Ohio. (Tr. 2044).

Teresa Barthel was present at Lorain Community Health Partners in July 2003. (Tr. 1962). Barthel had taken her mother to the emergency room due to a foot injury. (Tr. 1962). Barthel recalled overhearing conversations in the treatment room next door. (Tr. 1962). Barthel saw Appellant, Jacob, and Marilyn Diar in the room. (Tr. 1962, 1963). Jacob was in a lot of pain, crying and moaning about his stomach. (Tr. 1963). Barthel was very nervous hearing Jacob moan and cry. (Tr. 1963, 1964). Appellant stated that she could not take this anymore. (Tr. 1964, 1969). When the doctors

requested to perform tests on Jacob; Appellant grew adamant and angry, refusing the tests. (Tr. 1964, 1969, 1970). Appellant stated that Jacob had already been through the tests. (Tr. 1965, 1969). Bartel left the emergency room that night. Barthel next recalled Appellant and Jacob when she saw Appellant's picture on the news regarding the fire at 914 W. 10th Street. (Tr. 1966, 1967). Barthel then contacted the police to see if she could be of assistance. (Tr. 1967).

Sally Lash is a records custodian from Lorain Community Health Partners. (Tr. 2047, 2048). Lash provided medical records for Jacob Diar regarding his emergency room visit on July 13, 2003. (Tr. 2047, 2048, 2049). Sharon Slivochka is a records custodian from the Cleveland Clinic Foundation. (Tr. 2084). Slivochka provided medical records for Jacob Diar regarding his medical treatment in July 2003. (Tr. 2084, 2085).

Samantha Garcia met Appellant at church when she was eight (8) years old. (Tr. 1972, 1977). Samantha attended Jacob's funeral. (Tr. 1973). Appellant acted as if she were in her own little world. (Tr. 1973). Appellant did not cry and was not hysterical. (Tr. 1973). Samantha also saw Appellant the night of the funeral at, what can only be termed a dive bar, called Jack and Diane's. (Tr. 1973, 1976). Appellant was wearing tight pants and a fitted shirt. (Tr. 1974). Samantha was with Falisha Bisceglia. (Tr. 1974). Samantha did not speak with Appellant because it was hurtful to see Appellant at the bar the very day she just buried her son. (Tr. 1974).

Appellant appeared to be having a “good old time”. (Tr. 1974). Appellant was laughing, smiling, dancing, and singing. (Tr. 1975, 1979). Appellant was line dancing and singing karaoke. (Tr. 1975, 1978). Appellant had been drinking and appeared drunk. (Tr. 1977, 1978). Samantha pointed out Appellant’s behavior to Falisha because she was so appalled. (Tr. 1975, 1976, 1978, 1979).

Falisha Bisceglia was a patron of Jack and Diane’s bar as well. (Tr. 2014, 2015). Bisceglia saw Appellant at the bar the night of Jacob’s funeral. (Tr. 2015). Bisceglia was with her friend Samantha. (Tr. 2015). Bisceglia observed Appellant line dancing and singing karaoke. (Tr. 2016, 2018).

Joyce Harkless’ son was Jacob’s best friend. (Tr. 1981). Harkless was also a patron of the bar Jack and Diane’s. (Tr. 1982). Harkless was at the bar the night of Jacob’s funeral. (Tr. 1982). Harkless saw Appellant in the restroom. (Tr. 1982). Appellant told Harkless and her friend that she had just lost her son. (Tr. 1983). Yet Harkless saw Appellant drinking, on stage singing the “YMCA” by the Village People, and dancing a line dance known as “the Electric Slide”. (Tr. 1983). Appellant did not appear upset or sad. (Tr. 1983).

Sunshine Cantrell is a bartender at Jack and Diane’s. (Tr. 2245, 2246). Cantrell was employed at Jack and Diane’s in August 2003. (Tr. 2247). Cantrell was working on August 30, 2003. (Tr. 2247). Cantrell was familiar with Appellant because Becky Diar, Appellant’s sister, used to bartend at Jack and Diane’s. (Tr. 2247, 2248). Cantrell saw Appellant and her family at Jack and Diane’s around 8:00 p.m. on August 30, 2003. (Tr. 2248, 2249, 2250, 2251). Appellant was drinking Malibu rum and pineapple juice. (Tr. 2249). Cantrell served Appellant approximately five (5) drinks that evening. (Tr. 2249,

2250). Appellant told Cantrell she had buried her son that day. (Tr. 2251). Cantrell observed Appellant sing karaoke, dance that evening. (Tr. 2251, 2253, 2254). Appellant sang the song "Fancy" by Reba McIntyre. (Tr. 2252). This song concerns a poor mother who encourages her daughter to become a prostitute to gain a "better" life. (Tr. 2252).

Cantrell stated that subsequent to the night at Jack and Diane's she saw Appellant. (Tr. 2256, 2257). Appellant stated that she had been going out and drinking more as she could not stand to stay home after Jacob's death. (Tr. 2256, 2257). This conversation occurred at Jack and Diane's when Appellant was out drinking yet again. (Tr. 2258, 2259).

Dustin Otero was familiar with Appellant in August 2003 because Appellant was friends with Otero's mother. (Tr. 2051). Otero was aware that Jacob had recently died when he saw Appellant at Rebmans' Bowling Alley in Lorain, Ohio. (Tr. 2051, 2052). Appellant was already there when Otero and his friends arrived. (Tr. 2053). Appellant and her friends were bowling, drinking, and having a good time. (Tr. 2053, 2054, 2057). Otero wanted to offer Appellant his condolences about Jacob but decided that she did not need them as she was having such a good time. (Tr. 2054, 2055, 2057). When Otero left the bowling alley that evening, Appellant was still there. (Tr. 2055).

Carol Abfall is employed at Junction Beverage in Amherst, Ohio. (Tr. 2163). Abfall knew of Appellant since their days in high school. (Tr. 2162, 2163). Abfall recalled learning that Jacob, Appellant's son, had died on August 27, 2003. (Tr. 2163). Two (2) days after Jacob's death, Abfall saw Appellant riding in a white limousine that came through the drive thru at Junction Beverage. (Tr. 2163, 2164). Appellant's brother, Chad was driving the limo. (Tr. 2163, 2164). Abfall recognized Chad from previous

encounters at Junction Beverage and from a local laundromat. (Tr. 2164). Chad requested a twelve (12) pack of Diet Pepsi for purchase. (Tr. 2164). When Abfall asked if Chad needed anything else, Appellant stuck the top half of her body out of the moon roof and said "I want the liquor. Don't forget the liquor." (Tr. 2164, 2172). Appellant repeated the phrase "I want the liquor" three (3) times. (Tr. 2165, 2172). Appellant was not sad or crying nor were any other vehicle passengers. (Tr. 2165, 2166, 2169, 2170). Appellant also did not respond negatively to a passenger who stated "whoo, we're partying" during the purchase of the Diet Pepsi. (Tr. 2169, 2170).

Abfall did not report this information to law enforcement until Becky Diar requested to place a can to collect funds from Junction Beverage customers to assist with expenses for Jacob's funeral. (Tr. 2167). When a customer queried if the can was truly for Jacob's funeral expenses and not a scam, the information was then reported to law enforcement. (Tr. 2167, 2168). Abfall also questioned why Appellant needed to collect funds to assist with Jacob's funeral expenses when Abfall was aware of the large sum of settlement money Appellant received as a result of her childhood burn injuries. (Tr. 2170, 2171).

Alicia Huff was Appellant's best friend. (Tr. 2192). Huff's son and Jacob attended day care together. (Tr. 2192). Huff is an armed guard for the government and a police officer for South Amherst, Ohio. (Tr. 2192). Huff lived near Appellant when Appellant resided at the Beavercrest apartment complex. (Tr. 2192).

Huff stated that Jacob was a sweet boy from whom Appellant bought a lot of things and did a lot of things. (Tr. 2193). Despite this statement, Huff acknowledged that Appellant was not around a lot for Jacob and did not keep her residence in the condition necessary to keep a small child safe. (Tr. 2193, 2194, 2195, 2225, 2226). Appellant left Jacob with a lot of babysitters. (Tr. 2193, 2194, 2195, 2226, 2227). Huff's husband also babysat Jacob when Huff and Appellant went out. (Tr. 2194). Huff revealed that in the summer Jacob did not wear heavy clothes and often went without his shirt when he could get away with it. (Tr. 2194).

Huff stated that she saw Appellant on August 28, 2003, the day after Jacob died. Appellant looked upset, but had no tears in her eyes. (Tr. 2196, 2209). Appellant stated that Jacob's death was her fault because she could not get back in the residence. (Tr. 2209). Appellant's family was also "mopey". (Tr. 2196, 2197). Appellant behaved the same at the funeral while her mother and sister were sobbing uncontrollably. (Tr. 2197).

Huff had tried to speak to Appellant about the events from the day of the fire; Appellant said she woke up in a residence full of black smoke, tried to find Jacob, and called law enforcement when she could not find Jacob. (Tr. 2200). Appellant stated that she re-entered the residence several times in an effort to find Jacob but the smoke kept her back. (Tr. 2201). Appellant also stated that two (2) crackheads broke into her residence and killed Jacob. (Tr. 2201, 2211). Appellant later told Huff that Leroma Penn put drugs into her drinks the night before the fire despite the fact that the fire did not start until eight (8) hours later. (Tr. 2204, 2205, 2211).

Subsequent to the funeral, Huff contacted Appellant because she wanted to organize a candlelight vigil and pass out flyers to discover who killed Jacob. (Tr. 2198). Appellant wanted nothing to do with any such idea and said she could not be involved at that time. (Tr. 2198). In fact, Appellant did not speak to Huff for several weeks. (Tr. 2200). This bothered Huff that Appellant did not want to do anything to find Jacob's killer. (Tr. 2199). When Huff text messaged Appellant, the words "I know", Appellant suddenly contacted Huff. (Tr. 2201, 2202). Appellant suddenly wanted to get together. (Tr. 2202). When the women met, Appellant revealed that law enforcement told her someone poured accelerant all over Jacob's body and set him on fire. (Tr. 2203, 2209, 2210). This, despite the fact that, law enforcement had not released any such information to the public.

Huff decided to contact the Lorain Police Department to see if she could help with the investigation because Jacob mattered to her. (Tr. 2199, 2219). When Huff first contacted the Lorain Police Department, she did not identify herself because she did not want law enforcement to think she thought anything negative. (Tr. 2199). Huff initially felt that law enforcement interviewed Appellant improperly based on Appellant's account. (Tr. 2219, 2220). Huff would later revise this opinion.

Huff acknowledged that prior to trial, she sent Appellant two (2) text messages that stated that she would always care about Appellant and that may God be with her. (Tr. 2206). Huff was also present when Appellant turned herself in on the indictment at the Lorain County Jail. (Tr. 2206). At the time, Huff believed that the charges had no merit; Huff revised her opinion. (Tr. 2206, 2207). Huff eventually came to realize that

Appellant, her best friend, was capable of killing someone Huff loved, Jacob. (Tr. 2221, 2222, 2225, 2228, 2229, 2231, 2232, 2234, 2237).

At the conclusion of Appellee's case in chief, Appellant moved for a Crim.R. 29 acquittal. (Tr. 2411, 2412). In relation to the homicide charges and specifications, Appellant asserted that because Appellee did not show how Jacob was killed or that Jacob was purposely killed that Appellee had not met its burden of proof regarding the establishment of the elements of the homicide charges and their accompanying specifications. (Tr. 2412, 2413, 2414, 2415). Appellant also asserted that Appellee failed to demonstrate that she acted with prior calculation and design in relation to Jacob's death. (Tr. 2146).

Appellant also argued that Appellee failed to present evidence that Appellant used a deadly weapon, fire, to cause physical harm to Griffith. (Tr. 2418). Appellant concluded with the assertion that since no bottle was found of the medicine given by the various babysitters that Appellant could not have corrupted Jacob with drugs. (Tr. 2419).

In response, Appellee argued that as to count one (1) Corrupting Another with Drugs, the trial court heard the testimony of Agosto, Faulkner, and Shreves. (Tr. 2422). The testimony of these witnesses revealed that Tylenol with Codeine, belonging to Taylor Diar was administered to Jacob, at Appellant's behest to put him to sleep and/or control his exuberant behavior. (Tr. 2422). At the time Jacob, was four (4) years of age; Appellant was twenty eight (28) years of age. (Tr. 2422). The parties stipulated that Codeine is a Schedule V controlled substance in the state of Ohio. (Tr. 2422).

In response to count two (2), Felonious Assault to Jacob Diar, evidence was presented that Jacob Diar was dead before the fire started. (Tr. 2423). Death is serious physical harm. (Tr. 2423). The evidence from Dr. Matus was quite clear that Jacob did not die from accidental or natural causes or as a result of suicide. (Tr. 2423, 2424). Jacob's death was then covered up with the subsequent fire. (Tr. 2424).

In response to count three (3), Murder, evidence was presented that Jacob was dead and that death occurred during the course of a specifically enumerated felony. (Tr. 2424). In response to count four (4), Aggravated Arson, evidence was presented that a substantial risk of physical harm existed to the city of Lorain Fire Department firefighters when Appellant set her residence on fire. (Tr. 2424, 2425). By virtue of Appellant's own statements, she was the only other person in the residence. (Tr. 2424, 2425). Moreover, the physical evidence did not support Appellant's statements that she entered the residence to search for Jacob. (Tr. 2424, 2425). Additionally, several experts testified that the fire in Appellant's residence was intentionally set and exacerbated by the use of an accelerant. (Tr. 2424, 2425).

In response to count five (5), Arson, evidence was presented that a fire occurred at 914 W 10th Street, Lorain, Ohio that caused physical harm to the occupied structure. (Tr. 2425). Again, per Appellant's own statements, she was the only person in her residence the morning of the fire. (Tr. 2425, 2426). This, accompanied by the physical evidence, supports the inference that Appellant set the fire at her residence. (Tr. 2425, 2426). Obviously, Jacob could not have set the fire as he was dead before the fire started.

In response to count six (6) and seven (7), Aggravated Murder with prior calculation and design of a child under thirteen (13), Appellee's theory of the case was that Appellant either smothered or drowned Jacob. (Tr. 2426, 2427). Evidence was presented that Jacob's death was a homicide of underdetermined means. (Tr. 2426, 2427). Matus was unable determine how Jacob died because of the extensive damage caused by the fire Appellant purposely set. (Tr. 2426, 2427). Moreover, Jacob was redressed in heavy clothing with a hood over his face. (Tr. 2426, 2427). Gasoline was poured on Jacob's body, the bed, and trailed outward to the front door. (Tr. 2426, 2427). Jacob's death was a homicide, which Appellant attempted to conceal with fire, a subject Appellant was very familiar with. (Tr. 2426, 2427).

In response to count eight (8), Tampering with Evidence, evidence was presented that Jacob was redressed in heavy, seasonally inappropriate clothing before his body was mostly consumed by an intentionally set fire. (Tr. 2427). Appellant knew that an investigation was likely to be implemented subsequent to the fire and Jacob's death as Appellant was the one who requested that 911 be contacted. (Tr. 2427).

In response to count nine (9), Felonious Assault to Frank Griffith, evidence was presented that physical harm was caused to Griffith as a result of a deadly weapon, fire. (Tr. 2427). Various members of the Lorain Fire Department testified that fire could be a deadly weapon. (Tr. 2427, 2428). Appellant misdirected Griffith when he went into the burning residence in an effort to save Jacob. (Tr. 2428). This misdirection was a result of Appellant's need for time to permit the fire to consume Jacob's body, the evidence of Aggravated Murder. (Tr. 2428).

In response to count ten (10), Corrupting Another with Drugs, evidence was presented that Appellant furnished Jacob with a controlled substance, Tylenol with Codeine, a schedule V controlled substance. (Tr. 2428, 2429). Jacob, age four (4), was at least two (2) years younger than Appellant, age twenty eight (28). (Tr. 2429). Various babysitters testified that at Appellant's behest they gave him Tylenol with Codeine prescribed for Taylor Diar to make Jacob sleepy and/or control his behavior. This occurred, despite the fact, that Jacob could not tolerate Codeine, as evidenced by his vomiting and stomach pain. (Tr. 2429). Both vomiting and stomach pain are side effects of Codeine per Matus and Sarkis. (Tr. 2429).

In rebuttal, Appellant then argued that Appellee presented no evidence that the body recovered from Appellant's residence was that of Jacob Diar. (Tr. 2430). This is ludicrous as Appellant's own statements establish that the body recovered from her residence was that of her son, Jacob. The trial court correctly denied Appellant's Crim.R. 29 motion and admitted Appellee's exhibits. (Tr. 2431, 2432, 2433).

Appellant then presented a case in chief. (Tr. 2434). Kelly Pitts is a registered nurse with the Hospital for Orthopedic and Specialty Services, formerly known as Amherst Hospital. (Tr. 2435). Pitts was working on August 27, 2003 when Appellant arrived at Amherst Hospital with her mother, Marilyn Diar. (Tr. 2436, 2437). Marilyn was Pitts' co-worker at the time. (Tr. 2437, 2438). Appellant's chief complaint when she appeared for treatment was smoke inhalation. (Tr. 2438). Pitts believed that Appellant smelled faintly of smoke, had chapped lips, appeared dehydrated and treated her for smoke inhalation. (Tr. 2439, 2443). No soot was present on Appellant's person. (Tr. 2443).

Appellant was given a basic assessment upon arrival. (Tr. 2441). This included a pulse oximeter. (Tr. 2441). Appellant's pulse ox was at a level of seventy (70) to seventy nine (79). (Tr. 2441). This was consistent with someone suffering from smoke inhalation. (Tr. 2441, 2442). Appellant was treated with a high flow of oxygen that was decreased over time. (Tr. 2442).

On cross examination, Pitts revealed that despite a pulse ox of seventy (70) to seventy nine (79), Appellant was not intubated because she did not need it. (Tr. 2443, 2444). Despite the pulse ox, Appellant's pulse and blood pressure readings were normal. (Tr. 2444). If the pulse ox were correct, Appellant's blood pressure would have been elevated to compensate for the lack of oxygen in her body. (Tr. 2444). Pitts agreed that the pulse ox was not operating correctly. (Tr. 2444). The pulse ox is supposed to beep if it drops below ninety (90) and it was not doing so when it read between seventy (70) and seventy nine (79). (Tr. 2444). A pulse ox is basically a quick fix and not a confirmatory test. (Tr. 2445).

Moreover, the blood gas (test on arterial blood) taken from Appellant revealed a saturation of oxygen in her blood of ninety eight (98) percent. (Tr. 2445, 2446). This blood gas test was administered before Appellant received any oxygen treatment. (Tr. 2445). The blood gas results were consistent with Appellant's pulse and heart rate. (Tr. 2445).

Further, Pitts noted that Appellant was making a poor inspiratory effort or not taking good deep breaths so that Pitts could get a clear reading of Appellant's lungs. (Tr. 2452, 2453). Nevertheless, Pitts was able to determine that Appellant's lungs were clear. (Tr. 2453). Pitts also noted that no findings were made to show any problems with Appellant's nose and/or throat. (Tr. 2453, 2454).

Pitts revealed that she has treated Appellant in the past and was aware that Appellant was asked by Dr. Matus to seek medical treatment. (Tr. 2446). Appellant did not rush to the hospital because she was in respiratory distress. (Tr. 2446, 2447). Having been at fire scenes before, Pitts was aware that individuals in a fire are covered with soot; Appellant was not. (Tr. 2447, 2448, 2449). Pitts also informed Appellant and her mother that law enforcement was interested in Appellant's medical records. (Tr. 2449, 2450). Pitts informed Marilyn that if Appellant refused to sign a release for her medical records, law enforcement would have to get a court order for the medical records. (Tr. 2450). Appellant did not execute a medical release for law enforcement to obtain her medical records. (Tr. 2450). In fact, when Appellant and Marilyn left the hospital it was stated that if law enforcement wanted to talk to Appellant they could come find her. (Tr. 2450).

Peter Delmonico operates Delmonico's Barber Shop in Lorain, Ohio. (Tr. 2455, 2456). Delmonico was familiar with Appellant and Jacob because he cut Jacob's hair since he was one and one half (1 ½) years old every three (3) to four (4) weeks. (Tr. 2456, 2457, 2458, 2461, 2462). Delmonico stated that Appellant and Jacob were just like any other mother and son during the fifteen (15) minutes he observed them every month or so. (Tr. 2459, 2462). Jacob was warm and bubbly. (Tr. 2459). Delmonico was unaware of Jacob's home life. (Tr. 2463).

Dennis Johnson is the pastor of Fairfield Baptist Church and the senior chaplain for the Lorain Fire Department. (Tr. 2464, 2465). On August 27, 2003, Johnson assisted the Lorain Police Department with the recovery of Officer Brown's body. (Tr. 2466). Officer Brown was a Lorain Police Officer who drowned in a boating accident. (Tr. 2466). Johnson was then called to 914 W. 10th Street, Lorain, Ohio, Appellant's residence. (Tr. 2466, 2467). When Johnson arrived, Appellant was in the ambulance. (Tr. 2467). Johnson thought Appellant appeared to be upset and was sobbing. (Tr. 2467, 2468). Appellant was not on the floor of the ambulance hysterical or beating her chest. (Tr. 2486, 2487).

Johnson related that Appellant was not coughing extensively nor did she cough up dark colored mucous. (Tr. 2472). Appellant was not covered in soot as other individuals Johnson had observed at fires scenes have been. (Tr. 2472, 2473, 2474). Johnson did not smell the odor of singed hair or gasoline on Appellant. (Tr. 2473, 2478). Johnson revealed that despite Appellant's sobbing he did not observe many tears. (Tr. 2475, 2476, 2487).

Nicksa Ortiz met Appellant when they worked together at May Credit. (Tr. 2489, 2490). The women became roommates on two (2) occasions. (Tr. 2490). At the time, Appellant had Jacob. (Tr. 2490). Jacob was about nine (9) months old. (Tr. 2490). Ortiz resided with Appellant the first time for approximately four (4) months. (Tr. 2491). When Ortiz resided with Appellant the second time, Jacob was approximately one and one half (1 ½) years old. (Tr. 2491). The women resided together for a couple of months the second time. (Tr. 2491).

Ortiz stated that Appellant and Jacob were close. (Tr. 2493). Jacob always wanted to be around his mother. (Tr. 2493). Appellant was loving toward Jacob. (Tr. 2493). Appellant was excited to be a mother because she believed that she was incapable of having children. (Tr. 2494). Appellant never utilized babysitters. (Tr. 2494, 2495).

Appellant was also a very sound sleeper. (Tr. 2494). When Jacob cried, Ortiz primarily tended to him because she heard Jacob cry before Appellant ever woke. (Tr. 2494, 2495, 2498). Ortiz also attended Jacob's funeral and observed Appellant crying at the funeral. (Tr. 2495, 2496). Appellant was also in a daze. (Tr. 2497).

Ortiz was unaware that Appellant told law enforcement that she was the lightest sleeper in the world. (Tr. 2498). Ortiz stated that she wanted to believe that Appellant did not hear Jacob crying in the night when she would not get up to tend to his needs. (Tr. 2498). Ortiz also indicated that she thought it was strange that Appellant was bowling and partying so soon after Jacob's funeral. (Tr. 2499).

Ortiz also stated that good mothers have sanitary surroundings for their children. (Tr. 2499, 2500). She told law enforcement that Appellant never cleaned up their residence, leaving food and dishes out for Jacob to rampage through. (Tr. 2500). Ortiz also related that Appellant only fed Jacob fast food. (Tr. 2500). Ortiz was also unaware that Appellant utilized a variety of babysitters after the women ceased to reside together and that Appellant utilized Codeine to put Jacob to sleep. (Tr. 2501). Ortiz then stated that she did not consider Appellant a good mother. (Tr. 2501).

Stacey Mihalic met Appellant through her ex-fiance. (Tr. 2508). Mihalic also resided near Appellant when they both resided in Pinebrook Towers apartment complex. (Tr. 2508, 2509). Jacob and Mihalic's daughter played together often. (Tr. 2509). Mihalic observed that Appellant's house was not the neatest. (Tr. 2510). There were dirty dishes, unfolded clothing lying around, and food on the floor. (Tr. 2515, 2516). Appellant also frequently bought Jacob new clothes and toys. (Tr. 2511). Mihalic last observed Appellant and Jacob in October 2001. (Tr. 2514). Mihalic observed Jacob to be a clingy child. (Tr. 2516).

Marilyn Diar is Appellant's mother. (Tr. 2521). Jacob was Marilyn's grandson. (Tr. 2521). When Appellant was four (4) years old, Marilyn and her husband were in bed and the next thing Marilyn knew, Appellant was screaming. (Tr. 2521). Appellant, in a burning nightgown, ran out of the bedroom in which she was watching cartoons with her brother, Chad. (Tr. 2522). Appellant suffered third degree burns. (Tr. 2523). Appellant was in the burn unit for six (6) weeks. (Tr. 2523). Marilyn stated that Appellant's skin was completely burned away and she had to undergo extensive surgeries to correct the damage. (Tr. 2523). This caused extensive scarring to Appellant and underdevelopment of her breasts. (Tr. 2524). This scarring caused kids to make fun of Appellant. (Tr. 2524). Appellant's family encouraged her not to use her burn scars as a crutch and tried to be very positive with her. (Tr. 2524). Marilyn related that Appellant lived a normal life. (Tr. 2524, 2525).

Later, Appellant became pregnant. (Tr. 2525). Appellant did not believe this to be possible due to the extensive surgeries she had undergone and due to the pain medication she had taken in the hospital. (Tr. 2525). Appellant and her family were very excited. (Tr. 2525, 2526). Marilyn testified that Jacob and Taylor, her grandchildren, were her life. (Tr. 2525, 2526, 2550, 2551).

After his birth, Appellant and Jacob resided with Marilyn. (Tr. 2526). Appellant was a loving and caring mother. (Tr. 2526, 2552, 2553). Eventually, Appellant bought a trailer and moved away from home with Jacob. (Tr. 2527). Appellant ultimately returned to her parent's home with Jacob. (Tr. 2527). Marilyn babysat Jacob frequently. (Tr. 2527, 2528, 2551, 2552, 2560). Marilyn then authenticated a number of family photographs. (Tr. 2529, 2530, 2531, 2532, , 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549).

Marilyn also testified that Appellant's house contained significant clutter and that she utilized young babysitters frequently. (Tr. 2553, 2559, 2560, 2576, 2577). Marilyn testified that Appellant was on generic Xanax at the funeral. (Tr. 2556, 2568). This made Appellant catatonic even though she typically never showed much emotion. (Tr. 2556, 2557, 2558). The night of the funeral, Marilyn stated that Chad made the plans for the group to go out and Marilyn encouraged Appellant to go out drinking despite being on Xanax. (Tr. 2554, 2569, 2570). Marilyn also stated that it is not a good idea to drink while on Xanax. (Tr. 2569). Chad had planned some bowling for the group. (Tr. 2554). The group consisted of Chad, Appellant, Adrian, Meredith, Pat, and Brett. (Tr. 2554, 2555). Marilyn could not state whether Appellant was under the influence of Xanax when she appeared happy and carefree later in the evening. (Tr. 2570, 2571, 2572).

Marilyn claimed to be in the limo with Appellant the evening Abfall testified that Appellant stated she wanted liquor in the Junction Beverage drive thru. (Tr. 2572, 2573). Chad had again encouraged everyone to go for a limo ride to get their minds off things that evening. (Tr. 2591). Marilyn stated that Appellant never requested liquor. (Tr. 2591, 2592). Marilyn confirmed that collection jars were placed in area businesses to assist Appellant with Jacob's funeral expenses. (Tr. 2573, 2574).

Marilyn stated that she was present at the hospital with Appellant and Jacob when Jacob was being treated for stomach problems in July 2003. (Tr. 2574, 2575). Marilyn agreed it was important to inform hospital staff what medication an individual may be taking; yet, Appellant never told staff that she was giving Jacob Tylenol with Codeine that was prescribed for his cousin, Taylor. (Tr. 2574, 2575, 2576).

Marilyn was aware that despite Appellant's income she applied to Unicare, a charity, for assistance with paying Jacob's medical bills in September 2003. (Tr. 2579, 2581, 2583, 2584). In fact, Marilyn even signed the document certifying that she did not assist her daughter financially. (Tr. 2581, 2582, 2583).

Marilyn also stated that Appellant was reluctant to pursue a candlelight vigil or pass out flyers because she was not treated fairly by law enforcement. (Tr. 2558, 2559). This alleged unfair treatment consisted of law enforcement considering Appellant a suspect in Jacob's death. (Tr. 2558, 2559). Appellant, in light of her suspect status, did not want to do the wrong thing, so she did nothing. (Tr. 2558, 2559). Marilyn stated that Appellant paid for Jacob's headstone as quickly as possible after paying for the funeral and had the headstone in place as quickly as possible, approximately eleven (11) months after Jacob's death. (Tr. 2559).

Marilyn also revealed that Jacob was alive on August 27, 2003 at 10:30 p.m. when she spoke with him by telephone prior to him going to bed. (Tr. 2561). When Marilyn responded to the scene of the fire hours later, Appellant kept stating she did not know where Jacob was. (Tr. 2561, 2562). Marilyn also claimed that Appellant sobbed in the ambulance when they told her Jacob was dead. (Tr. 2562). Marilyn admitted that the only reason Appellant sought medical treatment was at the behest of law enforcement the day of the fire. (Tr. 2563). Marilyn admitted that they did not sign the medical release as Appellant had been through too much that day and that law enforcement could speak with her later. (Tr. 2564, 2589, 2590).

Marilyn testified that Appellant dressed as a fireman in the Miss Amherst pageant and that the burn injuries she sustained as a child continued to influence her life. (Tr. 2585). Appellant also taught Jacob not to be around fire and start fires because she worried about him being in a fire. (Tr. 2585). While Marilyn contended that Appellant had black soot under her nose after the fire, Appellant never showered or changed her clothes subsequent to the fire. (Tr. 2588, 2589). Marilyn also did not recall Appellant having any breathing problems. (Tr. 2589).

Ed Diar is Appellant's father. (Tr. 2603). Subsequent to the fire, Ed and Appellant were discussing the possibility that someone entered her residence, killed Jacob, and set the fire. (Tr. 2604, 2638). When Ed asked Appellant about her keys to the new locks, Appellant could only produce three (3) keys. (Tr. 2604, 2638). Ed then tried to contact law enforcement numerous times. (Tr. 2604). Ed then went and spoke to the civil attorney who handled Appellant's civil suit as a result of her burn injuries about the keys. (Tr. 2605). Appellant and her family were eventually put in contact with Attorney

Bradley, trial counsel. (Tr. 2606). Subsequent to speaking with Bradley, Ed then contacted law enforcement and surrendered the keys. (Tr. 2606, 2607).

Ed also revealed that despite possessing a written document containing the alleged dates and times of the calls to law enforcement regarding the keys, Ed could not authenticate any of the handwriting on the document, including his own. (Tr. 2607, 2608, 2609, 2610, 2611, 2612, 2615, 2623). Ed also did not bring any of the billings from his home phone, cell phone, or payroll records to corroborate his alleged calls to law enforcement. (Tr. 2613, 2623). Moreover, despite Appellant regaining custody of her purse on August 27, 2003, the purse was not opened until October 1, 2003. (Tr. 2632, 2633, 2635, 2636, 2637). Ed, however, was forced to concede that he did not conduct twenty four (24) hour per day, seven (7) day per week surveillance on the purse. (Tr. 2636). Ed would later change his story to indicate that Appellant opened her purse on September 3, 2003 and that the purse was disposed of by Appellant sometime later. (Tr. 2641).

After Ed received the call about Jacob's death, he went home from work. (Tr. 2616). Marilyn, Appellant and Becky were present. (Tr. 2617). While Ed did not recall Appellant being covered in soot, he was sure that she did not shower or change her clothes after the fire. (Tr. 2617, 2618, 2619). When confronted with Appellant's clothes, he acknowledged they were not covered in soot. (Tr. 2619, 2620). Appellant was also not taken immediately to the hospital for breathing difficulties. (Tr. 2621).

Darrell Eberhardt has known Appellant and her family for fifteen (15) years. (Tr. 2599, 2600). Eberhardt was married to Appellant's cousin. (Tr. 2600, 2658). Eberhardt remained close to the family after his divorce from Appellant's cousin. (Tr. 2658). Eberhardt also stated that he babysat for Jacob on a few occasions. (Tr. 2659). Eberhardt stated that he was at the Diar residence the day of the fire and did not observe Appellant covered in soot, wearing soot covered clothes, or smelling of gasoline or burned hair. (Tr. 2670, 2671).

Eberhardt stated that Appellant loved Jacob very much and had difficulty in coping with his death. (Tr. 2661, 2662). Appellant cried and grieved at Jacob's funeral. (Tr. 2663). Eberhardt was aware that Appellant went out on the town after Jacob's funeral. (Tr. 2664, 2665). Eberhardt also stated that Appellant and her family discussed the events of the trial daily despite prior family protestations to the contrary. (Tr. 2666, 2667).

Linda Powers is a medical social worker, but not for Appellant. (Tr. 2672, 2696). Powers is also involved with burn camps. (Tr. 2674, 2675). Burn camps are conducted for young burn survivors to focus on acceptance and safety as well as fun activities since many burn survivors do not get out much as society tends to treat them like monsters. (Tr. 2675, 2676). Powers met Appellant through burn camp programs. (Tr. 2677). As Appellant grew older, she acquired more responsibility at burn camp and took on a mentoring role. (Tr. 2677, 2678). Appellant was involved with burn camp until she was eighteen (18) or nineteen (19) years old. (Tr. 2679). Appellant then returned to burn camp a few years later after Jacob's birth. (Tr. 2679). Powers related that Appellant and

Jacob had a typical mother-son relationship based on her limited observation of less than one (1) hour. (Tr. 2680, 2703, 2704, 2705).

Powers had contact with Appellant after Jacob's death. (Tr. 2688, 2696, 2697, 2703). The majority of the contact was by telephone. (Tr. 2688). Powers supported Appellant through her grueling and long grieving process. (Tr. 2689, 2692, 2694). Appellant's focus soon shifted from grieving to proving her innocence. (Tr. 2695).

Powers did not attend Jacob's funeral or was she aware that Appellant went out partying after the funeral. (Tr. 2698). Powers was also not aware that Appellant was partying heavily at the time Powers thought she was at the peak of her grieving process. (Tr. 2699). Powers stated that she has no way of knowing whether Appellant was really crying during the telephone conversations. (Tr. 2700, 2701).

Guy Morton is the senior pastor at the Lakeview Baptist Church in Vermillion, Ohio. (Tr. 2726). Morton has been a senior pastor for forty three (43) years. (Tr. 2726). Morton related that people grieve differently. (Tr. 2729). Morton presided over Jacob's funeral. (Tr. 2730). Appellant appeared to be grieving. (Tr. 2732). Morton also counseled Appellant subsequent to Jacob's funeral and her arrest. (Tr. 2733). During these sessions, Appellant would cry. (Tr. 2733, 2734).

Morton stated that as a pastor he has dealt with sinners. (Tr. 2737). Sinners sometimes carry the weight of the world on their shoulders as Appellant appeared to do. (Tr. 2736, 2737, 2738). Morton also revealed that he had written two (2) or three (3) letters in support of Appellant to local newspapers because he resented individuals determining Appellant's guilt or innocence based on whether they cried. (Tr. 2739, 2740). Morton's testimony concluded Appellant's case in chief.

Appellant then moved again for dismissal of the charges pursuant to Crim.R. 29. (Tr. 2760). On October 17, 2005, the jury returned a guilty verdict as to all charges and specifications contained in the indictment. (Tr. 2896, 2897, 2898, 2899).

On November 1, 2005, the mitigation phase of the capital proceeding commenced. (Tr. 2902). Appellee introduced Jacob's birth certificate, previously admitted at the trial phase of the capital proceeding. (Tr. 2984, 2988, 2989). Appellee also re-introduced state's exhibits two (2), three (3), and four (4), schematics or computer generated diagrams of Appellant's residence. (Tr. 2986). Appellee re-introduced state's exhibit five (5), Bures' report regarding her investigation of the fire. (Tr. 2987). Appellee re-introduced state's exhibit fourteen (14), Matus' protocol along with photographs of the residence and Jacob's body during the mitigation phase of the capital proceeding. (Tr. 2988).

Appellant then presented her case in chief. (Tr. 2990). Dr. Sandra McPherson is a clinical and forensic psychologist. (Tr. 2992). McPherson has testified as an expert witness previously in mitigation hearings in death penalty cases. (Tr. 2993, 2994). McPherson was retained by Appellant to assist with the mitigation hearing.

McPherson related that a minority of victims with severe trauma wind up with severe psychological outcomes. (Tr. 2995). This is related to an individual's ability to withstand stress. (Tr. 2995). Also relevant is the amount of trauma sustained by the individual and the extent of the trauma over time. (Tr. 2996). Environmental support is also important as well as developmental factors of the individual over the course of their life. (Tr. 2996). When children are the victims of trauma, they are powerless because they are still developing and have no control over the care provided to them by their

parents/caretakers. (Tr. 2996, 2997). Children also have fewer coping mechanisms to enable them to deal with trauma. (Tr. 2997, 2998).

McPherson stated that Appellant did not received the kind of super parenting that she needed in supporting and enhancing her coping capabilities after her burn injury. (Tr. 3003). Appellant's records revealed that Appellant's hygiene was not being maintained, exercise routines were not being followed along with cleanliness routines. (Tr. 3003). This was later determined to be referenced on a few pages of Appellant's voluminous medical records. (Tr. 3025, 3026, 3040, 3041, 3042).

Prior to testifying, McPherson had reviewed Appellant's medical reports, photographs, educational reports, and a report from Dr. Bernstein prepared in 1984. (Tr. 2998, 2999). McPherson testified that the nature of the trauma that Appellant suffered made her prone to psychological or psychiatric problems, particularly in the affective realm, i.e. depression and anxiety based problems, for which she was treated twice in 1994 and 1995. (Tr. 3001). The presenting problems appeared to be issues between Appellant and her trustees concerning control of the settlement monies she received as a result of her childhood burn injuries. (Tr. 3028).

McPherson also interviewed Appellant and met with her on three (3) occasions as well as with Appellant's family on a limited basis so not as to duplicate the work of the mitigation specialist, Atty. Pat Snyder. (Tr. 3004, 3028, 3029, 3033, 3035, 3036, 3037). Appellant never expressed remorse regarding her actions. (Tr. 3032). McPherson believed after meeting with Appellant and reviewing her records that she has a personality disorder, not otherwise specified. (Tr. 3005, 3016, 3017). This is a bundle of maladaptive traits. (Tr. 3034, 3035). This disorder is treatable, is not a mental illness or

mental defect, and affects two (2) to four (4) percent of the population. (Tr. 3014, 3023, 3024). McPherson did not hospitalize Appellant or prescribe any medication to treat her condition, despite her opinion that Appellant's personality organization is flawed and her coping mechanisms are maladaptive. (Tr. 3005, 3024, 3025). McPherson believed that Appellant has a personality disorder, not otherwise specified because of her long standing, repetitive traumatic input. (Tr. 3005). This is due to the extreme pain she suffered from her burn injuries as a child. (Tr. 3005). To deal with the pain, Appellant was forced to develop mechanisms to isolate her from the pain and to overcome the pain. (Tr. 3006). Appellant was also not subject to firm limits as to her behavior by her parents as a result of her injury, i.e. spoiling. (Tr. 3006). This caused Appellant to develop maladaptive traits. (Tr. 3006).

McPherson related that Appellant operated on an "as-if" basis. (Tr. 3007). If things are not the way Appellant wants them to be, Appellant utilizes denial, avoidance, and distortions of the world to cope. (Tr. 3007). Appellant then reconfigures things to be the way she wants them to be, states them that way, and then believes that the new way is accurate, when it is not. (Tr. 3007). For example, Appellant needs to see herself as highly intellectually competent when she is not. (Tr. 3007, 3008). When Appellant asked McPherson how she was doing on the tests, McPherson responded "you are functioning within the average range". (Tr. 3007, 3008). Appellant immediately responded "that's not good enough. I'm actually much better than that." (Tr. 3007, 3008). This was upsetting to Appellant because she needs to see herself as exceptional and to appear better than she is. (Tr. 3008). As another example, Appellant related to medical professionals that she divorced Jacob's father when he was seeking treatment at

The Cleveland Clinic, when in fact, they were never married. (Tr. 3008). Appellant believed that this made her appear "better". (Tr. 3008). McPherson believed that Appellant's trauma rendered her unable to cope with stress. (Tr. 3009).

McPherson revealed that Appellant paid her for her services and that she is opposed to the death penalty. (Tr. 3010, 3011, 3030, 3031, 3032).

McPherson defined mental illness as a severe disruption of cognitive or emotional functioning. (Tr. 3018, 3109). These conditions are treatable as an illness. (Tr. 3018). A mental defect refers to mental retardation. (Tr. 3018, 3019). Individuals with mental defects have IQ's that fall below seventy (70) and have the inability to manage daily living demands. (Tr. 3018, 3019). Appellant was not diagnosed with a mental illness or mental defect. (Tr. 3019, 3020). Appellant functions at an average or low average level. (Tr. 3020, 3021, 3022).

Marilyn Diar is Appellant's mother. (Tr. 3044). Marilyn authenticated more family photographs. (Tr. 3044, 3045). Marilyn revealed that she loved her daughter and asked the jury to spare her life. (Tr. 3044, 3045).

Marilyn also testified that she loved Appellant, fed her, clothed her, and housed her. (Tr. 3046). When Appellant was hospitalized, Marilyn did the best she could to take care of her. (Tr. 3046). This concluded the evidence presented by Appellant during the mitigation hearing.

On November 2, 2005, the jury returned a recommendation of death on counts six (6) and seven (7). (Tr. 3085, 3086). On the same date, the trial court sentenced Appellant to a term of seven (7) years incarceration on count one (1); no sentence on counts two (2) and three (3); to a term of nine (9) years incarceration on count four (4); no sentence on count five (5); to death on count six (6); to death on count seven (7); to a term of four (4) years incarceration on count eight (8); to a term of seven (7) years incarceration on count nine (9); and no sentence was imposed on count ten (10). (Tr. 3092). Appellant received an aggregate prison sentence of thirteen (13) years in addition to her dual sentences of death, to which Appellee elected count seven (7). (Tr. 3092, 3093, 3094).

On December 2, 2005, Appellant filed her notice of appeal with this Honorable Court. On January 16, 2007, Appellant timely filed her merit brief with this Court. Appellee now responds.

LAW & ARGUMENT

RESPONSE TO FIRST, SECOND, AND THIRD PROPOSITIONS OF LAW

I, II, III. APPELLANT IS ENTITLED TO A NEW SENTENCING HEARING.

While Appellee does not believe that every contention made by Appellant in these three (3) Propositions of Law contains merit, Appellee does believe that two (2) contentions have merit. These issues are first, the failure of the trial court to properly instruct the jury during the mitigation phase pursuant to this Court's decision in State v. Brooks, 87 Ohio St. 3d 148, 1996 Ohio 134 and secondly, the trial court's non compliance with R.C. 2929.03 in refusing to honor Appellant's request for a pre-sentence

report. Appellee believes that on these two (2) issues alone, the matter must be remanded to the trial court to conduct another mitigation hearing.

RESPONSE TO FOURTH PROPOSITION OF LAW

IV. NO PROSECUTORIAL MISCONDUCT EXISTS.

Appellant contends that her substantive and procedural due process rights to a fair trial were violated when Appellee committed various acts of misconduct during the trial and mitigation phases of her capital proceeding. Appellant's contentions lack merit.

The test for prosecutorial misconduct is whether the remarks/actions were improper and, if so, whether they prejudicially affected the accused's substantial rights. State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084, citing State v. Smith (1984), 14 Ohio St.3d 13. The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor." State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084, quoting Smith v. Phillips (1982), 455 U.S. 209.

Appellant indicates a variety of instances during the trial and mitigation phases of the capital proceeding where she believes that prosecutorial misconduct occurred. Appellee will address each in turn.

In regards to the voir dire, Appellant contends that Appellee committed prosecutorial misconduct when the following statements were made:

Attorney Cillo: [I]f you find that the mitigating factors proven beyond a reasonable doubt, they also need to proven beyond a reasonable doubt, ***outweigh the aggravating circumstances, then you would consider the other potential penalties of life without parole, [thirty] (30) years to life, and [twenty five] (25) years to life? (Tr. 560-561).

Attorney Nolan: [I]f you and the other jurors determine that the aggravating circumstance does not outweigh the mitigating evidence, you would have to consider the other [three] (3) life sentences. (Tr. 653).

Attorney Nolan: And conversely, should you and the other jurors, or some of the other jurors, if all find that the defendant has produced evidence, or evidence has been produced wherein the aggravating circumstance does not outweigh the mitigating evidence, you could consider the other life sentences. (Tr. 887).

Preliminarily, it must be noted that trial counsel did not object to any of the above, now allegedly objectionable, statements. (Tr. 560-561, 653, 887). Since no objection was lodged by trial counsel as to the above statements, this Honorable Court may only review these statements for error pursuant to a plain error standard. State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853. An error is plain error only if it is obvious, State v. Barnes, 94 Ohio St.3d 21, 27, 2002 Ohio 68, and, "but for the error, the outcome of the trial clearly would have been otherwise." State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853, quoting State v. Long (1978), 53 Ohio St.2d 91.

Here, Appellant is not able to meet a plain error standard of review. Appellant has not, and cannot, demonstrate that the result of the trial would have been otherwise had the statements not been made during voir dire. Moreover, this Court has held that any misstatements of law made several days earlier during voir dire, do not affect the mitigation phase of a capital proceeding. State v. Bryan, 101 Ohio St. 3d 272, citing State v. Campbell, 90 Ohio St.3d 320, 2000 Ohio 183. See also State v. Jones, 91 Ohio St.3d 335, 2001 Ohio 57, ("[s]tatements made during voir dire cannot reasonably be thought to affect sentencing verdicts").

Additionally, it is difficult to view the voir dire process piecemeal, as Appellant attempts here. As this Court is fully aware, the voir dire process in a capital proceeding is a long, tenuous process for both parties to the proceeding. Each party has an interest in

selecting fair and impartial jurors, yet at the same time, jurors who seem receptive to each parties respective arguments. It is clear when viewed in its entirety that the voir dire process accurately informed jurors as to what their duties would be if selected to sit for the within matter. This is further evidenced by the fact that the voir dire process encompasses pages 12-1236 of the official transcript and yet Appellant can only assign alleged error to less than one (1) page of statements by Appellee.

Further, the statements at issue made by Appellee are largely accurate. State v. Jackson, 107 Ohio St. 3d 300, 2006 Ohio 1. Appellee is fully cognizant that the statements may not convey the legal concepts as clearly as this Court would like. Yet, the statements made by Attorney Cillo and Attorney Nolan, while not adhering to the language established in R.C. 2929.03, do relay to the members of the venire that should they not find that the aggravating circumstance outweighs the mitigating evidence, then they would be required to consider a life sentence option. Likewise, the statements made by Attorney Nolan conveys to the venire members the legally accurate notion that the individual jurors have the ability to determine whether they will support a death sentence. As such, no error may be predicated on this contention.

In regards to the trial phase opening statement, it must be noted that trial counsel did not object during Appellee's opening statement. (Tr. 1262-1285). Since no objection was lodged by trial counsel during Appellee's opening statement, this Honorable Court may only review this contention for error pursuant to a plain error standard. State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853. An error is plain error only if it is obvious, State v. Barnes, 94 Ohio St.3d 21, 27, 2002 Ohio 68, and, "but for the error, the outcome

of the trial clearly would have been otherwise." State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853, quoting State v. Long (1978), 53 Ohio St.2d 91.

Here, Appellant is not able to meet a plain error standard of review. As this Honorable Court has previously held, the prosecutor is allowed to foreshadow what the evidence is and what he believes the evidence will establish during opening statements. State v. Tenance, 109 Ohio St. 3d 255, 2006 Ohio 2417. Moreover, the trial court instructed the jury that opening statements are not evidence. State v. Tenance, 109 Ohio St. 3d 255, 2006 Ohio 2417, citing State v. Jalowiec, 91 Ohio St.3d 220, 2001 Ohio 26. (Tr. 2868). Appellant has not, and cannot, demonstrate that the result of the trial would have been otherwise had Appellee's opening statement not conveyed the facts it believed would be established by the evidence to be presented during trial. As such, no error may be predicated on this contention.

In regards to alleged leading questions during the trial, it again must be noted that Appellant failed to object to any leading questions that occurred during the direct examination of Dr. Matus, the Lorain County Coroner. (Tr. 1677-1705). Appellant also failed to object to the question posed to Destiny Faulkner as well as to the question posed to Joyce Harkless (Tr. 1931, 1983). Trial counsel also did not object to the questions asked of Detective Garcia on pages 2068, 2088-2090, 2411-2146, 2148, 2149, 2160).

In terms of the alleged leading questions that trial counsel did lodge an objection, these consist of questions posed to Garcia on pages 2147, 2148, 2150. These objections were sustained. Trial counsel specifically objected to a question the trial court determined to be leading in regards to a question posed to Carol Abfall. (Tr. 2170). Trial counsel also lodged an objection to leading questions posed to Alicia Huff on pages

2195, 2221, 2223, 2224, 2225, 2226, and 2243 Trial counsel lodged an objection to a question posed to Sunshine Cantrell on page 2258. All of the objections were sustained. (Tr. 2147, 2148, 2150, 2170, 2195, 2221, 223, 2224, 225, 2226, 2243, 2258). It is unclear how error can be predicated on objections resolved in Appellant's favor.

In terms of the alleged leading questions that Appellant failed to object to, this Honorable Court may only review any error pursuant to a plain error standard. State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853; State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084. An error is plain error only if it is obvious, State v. Barnes, 94 Ohio St.3d 21, 27, 2002 Ohio 68, and, "but for the error, the outcome of the trial clearly would have been otherwise." State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853, quoting State v. Long (1978), 53 Ohio St.2d 91.

Here, Appellant is not able to meet the plain error standard of review. A leading question is "one that suggests to the witness the answer desired by the examiner." State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084., quoting 1 McCormick, Evidence (5th Ed.1999) 19, Section 6. Under Evid.R. 611(C), "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084. However, the trial court has discretion to allow leading questions on direct examination. State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084, citing State v. D'Ambrosio, 67 Ohio St.3d 185, 1993 Ohio 170; State v. Jackson, 92 Ohio St. 3d 436, 2001 Ohio 1266. "The term 'abuse of discretion' * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable." State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853, quoting State v. Adams (1980), 62 Ohio St.2d 151, citing Steiner v. Custer (1940), 137 Ohio St. 448.

Moreover, no plain error exists when leading questions help to develop the witness's testimony, and the answers concern matters easily proved by other testimony. State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084., citing State v. Smith, 80 Ohio St.3d 89, 1997 Ohio 355 (no abuse of discretion in permitting leading questions on direct where the witness appeared nervous with answers). When viewed in the context of the entire trial, it cannot be said that Appellant's substantial rights were violated by alleged leading questions. Appellant has not, and cannot, demonstrate that the result of the trial would have been otherwise had Appellee not asked alleged leading questions of witnesses during direct and re-direct examination. As such, no error may be predicated on this contention.

In regards to the closing argument during the trial phase, Appellant's failure to object during closing argument waives all but plain error. (Tr. 2765-2800; 2844-2863). State v. Tenance, 109 Ohio St. 3d 255, 2006 Ohio 2417. Appellant must be able to show that but for the alleged error, the results of the proceeding would have been different.

It is important to note that "[p]rosecutors are entitled to latitude as to what the evidence has shown and what inferences can reasonably be drawn from the evidence." State v. Elmore, 111 Ohio St. 3d 1515, 2006 Ohio 6207, quoting State v. Smith, 80 Ohio St.3d 89, 1997 Ohio 355. See State v. Clemons, 82 Ohio St.3d 438, 1998 Ohio 406. The prosecutor may comment on "what the evidence has shown and what reasonable inferences may be drawn therefrom." State v. Tenance, 109 Ohio St. 3d 255, 2006 Ohio 2417, quoting State v. Lott (1990), 51 Ohio St.3d 160, quoting State v. Stephens (1970), 24 Ohio St.2d 76. A prosecutor can also respond to issues raised by an accused. State v.

Newton, 108 Ohio St. 3d 13, 2006 Ohio 81, citing State v. Awkal, 76 Ohio St.3d 324, 1996 Ohio 395; State v. Lundgren, 73 Ohio St.3d 474, 1995 Ohio 227.

Here, Appellant has not demonstrated that but for Appellee's closing argument during the trial phase that the result of the proceeding would have been different. Appellant takes issue with the fact that Appellee drew reasonable inferences from evidence presented during the trial in its closing argument. For example, Appellee stated "And I understand that there was a point brought up that she said I don't want to put him through this anymore. What could have been worse than the screaming that he was already going through that drew the attention of a perfect stranger that thought the child was basically dying at this point? Nothing." (Tr. 2770). While Barthel did not testify that she thought Jacob was dying, she did testify that Jacob was crying and moaning in obvious pain. (Tr. 1963, 1964, 1967). Barthel's experience with Jacob at Community Health Partners made enough of an impression that she immediately recalled the encounter some time later when she saw his picture on the news. (Tr. 1966, 1967, 1970). It is certainly a reasonable inference, and hardly improper, to argue that Barthel believed Jacob to be in imminent distress based on the crux of her testimony.

Appellant also takes issue with Appellee's argument regarding prior calculation and design. Appellant contends that Appellee argued facts not in evidence when Appellee advanced its theory that Appellant either smothered or drown Jacob. This, again, is a reasonable inference from the facts presented. Dr. Matus testified that he could find no injury to Jacob's body that resulted in his death, yet Matus determined that Jacob died as a result of homicidal violence. (Tr. 1682, 1702). Moreover, Matus determined that Jacob's death was not natural or suicide. (Tr. 1682, 1683, 1690, 1691).

No toxic substances were present in Jacob's blood. (Tr. 1684, 1715). In light of Matus' findings, very few acts remained to have caused Jacob's death. Those remaining acts consisted of drowning, evidence was presented at trial that the first floor bathtub was full of water, or smothering. It is unclear how Appellee committed prosecutorial misconduct by arguing this reasonable inference during closing argument.

Appellant next takes issue with Appellee's characterization of Alicia Huff's testimony. During closing, Appellee argued that Huff believed that Appellant had murdered Jacob. Again, this was an accurate representation of Huff's testimony. (Tr. 2201, 2202). Huff testified that the charges against Appellant had merit. (Tr. 2206, 2207). Huff also testified that she eventually came to realize that Appellant, her best friend, was capable of killing someone Huff loved, Jacob. (Tr. 2221, 2222, 2225, 2228, 2229, 2231, 2232, 2234, 2237). It is unclear how these remarks regarding Huff's testimony constituted prosecutorial misconduct when they accurately represented a summary of Huff's actual trial testimony.

Appellant then takes issue with comments Appellee made during its rebuttal closing argument. Appellee directly challenged statements made by Appellant during her closing argument. Appellee is permitted to respond to issues raised by Appellant during closing argument and challenge those issues. Appellant stated during closing argument that " ***she understands the concept of how scary it is to be a citizen of this country and to have to face the State of Ohio and all of their resources and all the investigators and all the forensic investigators and everyone else and have to somehow prove you are not guilty ***" (Tr. 2842). Appellant also referenced the movie "A Cry in the Dark" extensively during closing argument suggesting that even though the evidence against

Appellant was overwhelming, she was still innocent of killing her child just as Meryl Streep was in the movie. (Tr. 2815-2817; 2840). Appellant also stated “***[w]hat we want is the government, who’s pointing the finger, to be able to prove that case and to prove it all beyond a reasonable doubt.” (Tr. 2842).

In response, Appellee did make the above statements that Appellant now alleges are improper and result in Appellee committing prosecutorial misconduct. This is simply not so. The remarks Appellant takes issue with from Appellee’s rebuttal closing argument are in direct response to Appellant’s closing argument. This Honorable Court has held that this type of action is perfectly proper and does not constitute prosecutorial misconduct.

In sum, Appellant has failed to demonstrate how any of the remarks made during Appellee’s closing argument rise to the level of plain error. Since Appellant has failed to meet her burden, no error may be predicated on this contention.

In response to the alleged penalty phase misconduct, this issue is moot. Appellee has already conceded error in the mitigation phase and requested this Honorable Court to remand the matter to the trial court so that a new mitigation hearing might be conducted.

RESPONSE TO FIFTH PROPOSITION OF LAW

V. THE TRIAL COURT PROPERLY ADMITTED THE OTHER ACTS EVIDENCE.

Appellant contends that she was denied her right to a fair trial, due process, and a reliable determination of her guilt because the trial court erred when it admitted the other acts evidence and when it failed to give a limiting instruction on the use of the other acts

evidence to the jury during the trial phase of the capital proceeding . Appellant's contentions lack merit.

"The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." State v. Craig, 110 Ohio St. 306, 2006 Ohio 4571, quoting State v. Sage (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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." (Emphasis added.) State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853.

In the case at bar, Appellant filed a motion in liminie to prevent Appellee from using other acts evidence during the trial phase of the proceeding. Appellant sought to prevent Appellee from presenting and/or eliciting testimony from witnesses concerning "whether [Appellant] was a good residencekeeper; whether [Appellant] left her son with babysitters more often than not; whether [Appellant] gave babysitters cigarettes; whether [Appellant] went out to bars with her girlfriends; whether [Appellant] went out to bars after her son's death; problems [Appellant] had in managing money, which included things like not being able to pay for a headstone; *** whether [Appellant] behaved unlike a grieved mother after the fire." (September 23, 2005 Tr. 4).

In response to Appellant's motion in liminie, Appellee responded that it planned to use the above referenced types of evidence to establish motive. (September 23, 2005 Tr. 9). Motive evidence is always relevant. (September 23, 2005 Tr. 9). It was Appellee's theory of the case that Appellant had grown tired of the burdens of

motherhood during the course of Jacob's four (4) year life span and decided to kill her son. Obviously, evidence concerning Appellant's excessive use of babysitters, poor care of Jacob, use of controlled substances to control Jacob's behavior, excessive partying with friends, and excessive partying subsequent to Jacob's death, including the night of his funeral, was inextricably related to the crime charged and intertwined to such an extent that it was necessary to give a complete picture of what occurred. State v. Wilkinson (1980), 64 Ohio St. 2d 308. This evidence indicated that Appellant had a strong motive to murder Jacob. This motive, however, did not develop instantaneously; rather, Appellant's motive to murder Jacob grew over the course of his life as Appellant was forced to accommodate her life and finances to care for Jacob. The trial court agreed with Appellee and properly deemed the evidence admissible. Appellant never challenged the admissibility of the evidence during the trial phase, such as objecting for the record prior to each witness's testimony or noting a continuing objection to a line of questioning.

Appellant also alleges that the trial court should have given the jury a limiting instruction concerning Appellee's use of other acts evidence and that the trial court's failure to do so constitutes error. This is not accurate. Appellant never requested that the trial court give a limiting instruction regarding the other acts evidence. (Tr. 2864-2895). It has been recognized that a defendant may decide, as a matter of trial strategy, not to request a limiting instruction because of concerns that it will only emphasize in the juror's minds the evidence of other criminal acts committed by defendant to which the instruction applies, thereby reinforcing the prejudice." State v. Boykin, 2nd Dist. No. 19896, 2004 Ohio 1701, quoting State v. Tisdale, 2nd Dist. No. 19346, 2003 Ohio 4209,

internal citations omitted. Moreover, by failing to request a limiting instruction, Appellant has waived this issue for purposes of appeal." State v. Kidd (July 11, 1997), 2nd Dist. No. 96-CA-62, quoting State v. Davis (1991), 62 Ohio St. 3d 326. Even under a plain error standard, Appellant's contention of error still fails. Appellant cannot demonstrate that the results of the proceeding would have been different had the trial court given the jury the limiting instruction.

The trial court properly admitted other acts evidence during the trial phase of Appellant's capital proceeding. The variety of other acts evidence established why Appellant would commit such a reprehensible act; the murder of her own child. Without evidence of motive, it would have made the presentation of Appellee's case in chief difficult, if not impossible. Appellee would have only been able to effectively say that Appellant killed her son and could have never told the jury why. It is clear that the "why" would be important to a juror wrestling with the difficult situation of determining guilt of an individual so depraved as to kill their own child. This type of individual is typically outside the average juror's frame of reference. The other acts evidence presented to the jury was vital to the jury obtaining a complete picture of the events leading up to and concluding with Jacob's death.

Moreover, some of the other acts evidence of which Appellant complains was direct evidence of charges contained within the indictment, specifically the two (2) counts of Corrupting Another with Drugs. The testimony of the babysitters was directly related to whether or not Appellant corrupted another with drugs when she instructed various babysitters to ply Jacob with Tylenol with Codeine, a schedule V controlled substance not prescribed for him, in order to keep him under control. Simply because

this direct evidence, i.e. the babysitters' testimony, may have cast Appellant in a negative light does not render the evidence inadmissible. If this were the standard for admissibility, i.e. no evidence that casts a defendant in a negative light, any criminal prosecution would be precluded.

Further, Appellant cannot predicate error upon the trial court's failure to give the jury a limiting instruction during the jury instructions during the trial phase of the capital proceeding because Appellant did not request the trial court to give such an instruction. (Tr. 2864-2895). Appellant cannot demonstrate that the results of the proceeding would have been different had the trial court given the jury such an instruction. As such, Appellant's Fifth Proposition of Law must be denied.

RESPONSE TO SIXTH PROPOSITION OF LAW

VI. APPELLANT'S CONVICTION IS SUPPORTED BY SUFFICIENT EVIDENCE.

Appellant contends that her right to due process and right to be free from cruel and unusual punishment have been violated because her conviction is supported by insufficient evidence. Appellant's contention lacks merit.

In reviewing a record for sufficiency, "[t]he 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. Tenance, 109 Ohio St. 3d 255, 2006 Ohio 2417, quoting State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following Jackson v. Virginia (1979), 443 U.S. 307. "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." State v. Tenance, 109 Ohio St. 3d 255, 2006 Ohio 2417, quoting State v. DeHass (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence. State v. Tenance, 109 Ohio St. 3d 255, 2006 Ohio 2417, citing State v. Carter (1995), 72 Ohio St.3d 545, 1995 Ohio 104; State v. Thompkins, 78 Ohio St.3d 380, 1997 Ohio 52.

Here, Appellant challenges her convictions for Aggravated Murder as being supported by legally insufficient evidence because Appellee could not determine what exactly caused Jacob's death. Appellant contends that Matus' determination the Jacob's death was caused by homicidal violence of an unknown origin is legally insufficient on which to base convictions for Aggravated Murder.

The evidence presented at trial revealed that Appellant had motive for killing Jacob. By her own admission, Appellant was not supposed to be able to have children due to the steroids and pain medication she took as a child as treatment for the burn injuries she suffered. Appellant initially referred to Jacob as "her miracle baby". Appellant soon grew less enamored of Jacob the older he became. For example, when Jacob was nine (9) months old, Nicksa Ortiz, Appellant's roommate would tend to Jacob when he cried in the middle of the night. Appellant would not get out of bed to tend to her son's needs. Rather, Appellant let Ortiz believe that she was such a heavy sleeper that she could not hear Jacob's cries. Yet, in an interview with law enforcement, Appellant claimed to be the world's lightest sleeper who slept with her eyes open. Based on Appellant's own statement, she would have readily heard Jacob's cries, as an infant, during the night. At the age of nine (9) months, crying would have been the only mechanism Jacob possessed to communicate with his mother, yet she ignored her child's needs. Appellant preferred to have a friend provide for Jacob's care and well being.

As Jacob grew older, Appellant relied heavily on baby sitters and family members to provide care for Jacob. Appellant utilized a number of teenage babysitters to care for Jacob. Appellant rarely left any emergency contact numbers while she was gone. Appellant told the babysitters that she worked long hours, but it was later learned that Appellant was not even employed when she utilized their services to provide care for Jacob. Appellant also instructed these babysitters to ply Jacob with Tylenol with Codeine prescribed for Taylor Diar to control Jacob's behavior because Jacob was a typically, exuberant four (4) year old child.

Individuals who observed Jacob and Appellant interact recounted that Appellant appeared bothered by Jacob and annoyed when Jacob wanted to be near her. It is certainly normal for a four (4) year old child to want to be close to either, especially their mother who typically provides a majority of their care. Appellant also preferred to spend money for toys and clothes to pacify Jacob rather than give him what her wanted and needed, her time and attention. It was also established that Appellant maintained a poor home environment. Appellant's home was often cluttered with toys, clothes, trash, and old food. In addition, Appellant often fed Jacob fast food. Appellant also allowed Jacob to go next door to the Penn residence while unattended at 7:30 in the morning as well as permitted him to walk barefoot through broken glass scattered across the tree lawn because "she could not pick it up".

Appellant also showed little, if any remorse, the day of Jacob's death and the days following. Several firefighters, paramedics, and law enforcement personnel testified that they did not see Appellant cry when informed that Jacob was dead. Other individuals reported that Appellant did not cry at Jacob's funeral. Rather, Appellant was observed

riding in a limo and asking for liquor at a drive thru beverage store before the funeral. The night of Jacob's funeral, Appellant was observed line dancing in tight clothes, pounding back Malibu Rum and pineapple juice, and singing karaoke songs about encouraging a young girl into a life of prostitution. Subsequent to Jacob's funeral, Appellant was observed bowling with friends.

Appellee also presented credible evidence that Appellant had the best and only opportunity to commit Jacob's murder. Per Appellant's own statement, the only people in the residence the morning of the fire were herself and Jacob. Obviously, Jacob did not set the fire because he was dead before it started. This leaves Appellant as the only person who could have set the fire. When the fire investigators and law enforcement examined Appellant's home they discovered no unlocked windows, save for the window occupied by the air conditioning unit. Appellant's back door was locked until forced open by Edgar Penn. The front door to Appellant's home was open. Appellant stated that this door was opened by her as she allegedly fled the fire in her residence. However, physical evidence contradicted that Appellant was ever in the residence while it was aflame.

Evidence presented also revealed that Appellant who normally parked her vehicle in front of her residence or in the detached garage belonging to her residence parked her vehicle across the street from her residence the night before the fire. This would distance Appellant's prized vehicle from any damage the fire she would set subsequent to Jacob's death could inflict. It was also established Jacob had only returned to home the night before the fire after a ten (10) day stay with his Aunt Becky, despite the fact that Jacob

was to attend school the day of the fire and his school was closer to Aunt Becky's residence.

Dr. Matus determined that Jacob died of homicidal violence of an unknown origin. Matus arrived at this conclusion after careful examination of Jacob's severely charred remains and from toxicology reports. Matus was certain that Jacob was dead before the fire began because his body exhibited no evidence of any smoke inhalation. Matus was also able to rule out suicide, natural and accidental causes of death for Jacob as well as death by poisoning. Due to the severely charred condition of Jacob's remains, Matus was unable to determine if Jacob had been smothered or drowned. Jacob's eyes were nearly consumed by the fire making it impossible for Matus to examine the eyes for petechia. Matus also considered how Jacob was dressed and positioned on the bed in making his determination. The jury could have easily found from the evidence presented that Appellant murdered Jacob and then set her residence on fire, utilizing an accelerant to increase the damage produced by the fire, to conceal the nature of her heinous crimes.

The above referenced evidence presented by the State amounts to competent, credible evidence from which the jury could conclude that Appellant caused the death of Jacob with prior calculation and design and that Jacob was a child under the age of thirteen (13), as demonstrated by a copy of his birth certificate submitted as evidence during trial, at the time of his death. Based upon the evidence presented at trial, it cannot be said that the jury lost its way in convicting Appellant on two (2) counts of Aggravated Murder. Also, it cannot be said that a reasonable juror viewing the evidence in a light most favorable to the State could not have found Appellant guilty beyond a reasonable

doubt. Appellant's convictions were not supported by insufficient evidence. As such, Appellant's Sixth Proposition of Law must be overruled.

RESPONSE TO SEVENTH PROPOSITION OF LAW

VII. APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant contends that her right to effective assistance of counsel was violated when trial counsel failed to meet the prevailing standards of practice. This contention lacks merit.

Reversal of a conviction for ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. State v. Elmore, 111 Ohio St. 3d 515, 2006 Ohio 6207, citing Strickland v. Washington (1984), 466 U.S. 668; State v. Bradley (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

Appellee would disagree that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases is the appropriate standard of review in which to assess trial counsel's performance in the instant matter. This Court has not adopted any such standard of review. Rather, this Court has examined each individual allegation of ineffective assistance of counsel and made its determination accordingly. This is the position to which this Court should continue to adhere.

Appellee also would correct appellate counsel's notion that trial counsel were appointed to represent Appellant. Trial counsel was privately retained by Appellant.

Under the first prong of the Strickland test, trial counsel's performance did not fall below an objective standard of reasonable representation. Trial counsel's performance did not involve a substantial violation of any trial counsel's essential duties to Appellant. This Court is required to indulge in the presumption that trial counsel's action is, in fact, sound trial strategy. Here, Appellant cites to a number of instances in the record to support her contention that trial counsel was ineffective. Appellee will address each instance in turn.

PRE-TRIAL & VOIR DIRE

In regards to the alleged ineffective assistance of trial counsel during the pre-trial hearings in connection with the capital proceeding, Appellant contends that trial counsel was ineffective for opposing Appellee's request for a gag order, subsequent to the trial court's denial of Appellant's Motion for Change of Venue. (June 2, 2004 Tr. 5-23). Trial counsel was also ineffective for failing to renew his Motion for Change of Venue subsequent to conducting voir dire.

It is unclear how trial counsel's opposition to the gag order violated any of trial counsel's essential duties to Appellant when the parties were able to seat a fair and impartial jury in the instant matter. Trial counsel's decision to oppose Appellee's Motion for a Gag Order afforded trial counsel the opportunity to make public comment on the matter, if need be, in furtherance of the case. Trial counsel's decision to oppose Appellee's request for a gag order can be best characterized as a matter of trial tactics. "[D]ebatable trial tactics do not establish ineffective assistance of counsel." State v.

Johnson, 112 Ohio St. 3d 210, 2006 Ohio 6404, citing State v. Conway, 109 Ohio St. 3d 412, 2006 Ohio 2815, citing State v. Hoffner, 102 Ohio St.3d 358, 2004 Ohio 3430; State v. Campbell, 90 Ohio St.3d 320, 2000 Ohio 183. And, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Johnson, 112 Ohio St. 3d 210, 2006 Ohio 6404, quoting Strickland (1984), 466 U.S. at 689. It is unclear how trial counsel was deficient in this regard.

It is equally unclear how trial counsel was ineffective for failing to renew Appellant's Motion for Change of Venue after jury selection. In Re Strum, 4th Dist. No. 05CA35, 2006 Ohio 7101. A review of the record reveals that Appellant's counsel initially filed a motion for change of venue because of the extensive local media coverage concerning the case. Id. In fact, some of the potential jurors had heard or seen some media coverage concerning the allegations against Appellant. Id. However, each juror selected stated that he or she could set aside their opinions and listen to the evidence in an impartial manner. Id. (Tr.50-1236). Notwithstanding, the absence of defense challenges indicated that the defense, after voir dire was completed, was not particularly troubled by the jury's exposure to pretrial publicity. State v. McKnight, 107 Ohio St. 3d 101, 2005 Ohio 6046, citing State v. Adams, 103 Ohio St.3d 508, 2004 Ohio 5845; State v. Lynch, 98 Ohio St.3d 514, 2003 Ohio 2284. Therefore, even if trial counsel had renewed the motion, it would have been denied. In Re Strum, 4th Dist. No. 05CA35, 2006 Ohio 7101. Counsel is not required to perform vain acts. Id. Thus, counsel was not deficient in this regard. Id.

In regards to the alleged failure to conduct a proper voir dire of the venire and to correct juror's concepts concerning what constitutes mitigation, a reviewing court generally will not second-guess counsel's judgments about what questions to ask on voir dire. State v. Johnson, 112 Ohio St. 3d 210, 2006 Ohio 6404, citing State v. Evans (1992), 63 Ohio St.3d 231; State v. Coleman, 85 Ohio St.3d 129, 1999 Ohio 258. See also State v. Adams, 103 Ohio St. 3d 508, 2004 Ohio 5845, citing State v. Mason, 82 Ohio St.3d 144, 1998 Ohio 370. (We do not second-guess trial strategy decisions such as those made by counsel during voir dire). "[T]he conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked." State v. Hand, 107 Ohio St. 3d 378, 2006 Ohio 18, citing State v. Cornwell, 86 Ohio St.3d 350, 1999 Ohio 125, quoting State v. Evans (1992), 63 Ohio St.3d 231. Moreover, "counsel is in the best position to determine whether any potential juror should be questioned and to what extent." State v. Hand, 107 Ohio St. 3d 378, 2006 Ohio 18, quoting State v. Murphy, 91 Ohio St.3d 516, 2001 Ohio 112. Further, at the early stage of a trial, it is not required to completely instruct the jury, for example, by defining mitigation. State v. Bryan, 101 Ohio St. 3d 272, 2004 Ohio 971, citing State v. Mason, 82 Ohio St.3d 144, 1998 Ohio 370. As such, trial counsel was not deficient in this regard.

In regards to the failure to challenge Juror Takacs and Prospective Juror Yarber Hogan for cause, trial counsel carefully questioned Juror Takacs and Potential Juror Yarber Hogan regarding their ability to fairly receive the evidence in the case and their ability to fairly consider the death penalty as well as the other life sentence options. Both Juror Takacs and Potential Juror Yarber Hogan assured both the trial judge and counsel

that he or she would be able to set aside those views and follow the instructions of the court. (Tr. 221-232; 335-347). Trial counsel's failure to challenge these jurors for cause was not incompetence. State v. McGraw (June 2, 1992), 4th Dist. No. 1726. As such, this Court should not find that trial counsel violated their duties to Appellant.

In regards to trial counsel's alleged lack of knowledge of what constitutes mitigation, the presentation of mitigating theory and evidence is a matter of trial strategy and does not constitute ineffective assistance of counsel. State v. Hand, 107 Ohio St. 3d 378, 2006 Ohio 18, citing State v. Keith, 79 Ohio St.3d 514, 1997 Ohio 367. Moreover, statements made during voir dire cannot be reasonably thought to affect sentencing verdicts. See State v. Jones, 91 Ohio St.3d 335, 2001 Ohio 57. Since trial counsel was afforded wide discretion in determining their theory of mitigation to present to the jury, no error can be predicated on trial counsels' actions. Moreover, any statement made by trial counsel during the voir dire process cannot be reasonably thought to affect the sentencing verdict. As such, this Court should not find that trial counsel violated their duties to Appellant.

In regards to the failure to object to Appellee's alleged misstatements of law, "[t]he failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel." State v. Tenance, 109 Ohio St. 3d 255, 2006 Ohio 2417, quoting State v. Fears (1999), 86 Ohio St.3d 329, 1999 Ohio 111, quoting State v. Holloway (1988), 38 Ohio St.3d 239. Appellee would also respectfully refer this Honorable Court to its prior discussion regarding Appellee's comments during voir dire contained in the Response to Fourth Proposition of Law. As such, this Court should not find that trial counsel violated their duties to Appellant.

TRIAL

In regards to the failure to object to prosecutorial misconduct, "[t]he failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel." State v. Tenance, 109 Ohio St. 3d 255, 2006 Ohio 2417, quoting State v. Fears (1999), 86 Ohio St.3d 329, 1999 Ohio 111, quoting State v. Holloway (1988), 38 Ohio St.3d 239. Appellee would also respectfully refer this Honorable Court to its prior discussion regarding Appellee's comments during voir dire contained in the Response to Fourth Proposition of Law. As such, this Court should not find that trial counsel violated their duties to Appellant.

In regards to the failure to object to the admission of graphic, cumulative, and repetitive photographs, this Court has held in capital cases, relevant, nonrepetitive photographs are admissible, even if gruesome, as long as the probative value of each photograph outweighs the danger of material prejudice to the accused. State v. Cunningham, 105 Ohio St. 3d 197, 2004 Ohio 7007, citing State v. Maurer (1984), 15 Ohio St.3d 239, paragraph seven of the syllabus; State v. Morales (1987), 32 Ohio St. 3d 252. Decisions on the admissibility of photographs are left to the sound discretion of the trial court. State v. Cunningham, 105 Ohio St. 3d 197, 2004 Ohio 7007, citing State v. Slagle (1992), 65 Ohio St.3d 597. See also State v. Myers, 97 Ohio St. 3d 335, 2002 Ohio 6658.

Here, the photographs, some of which could be considered gruesome, were highly relevant and nonrepetitive in nature. As this Court will recall, Appellant's residence was a two story home. The fire that raged on August 27, 2003 produced a great amount of

damage to the residence. Numerous photographs were taken of the residence by law enforcement, the fire department, the State Fire Marshal, by private fire investigator Bures, and by the forensic electrician Dolence. As explained during the witnesses' testimony, multiple pictures were taken of certain areas of the residence as well as items in the residence to try and accurately depict the vast amount of destruction the fire wrought on the residence. This destruction was not immediately evident with the submission of a single photograph of the item or area.

Contrary to Appellant's assertion, mere testimony was insufficient to convey to the jury what the investigators saw in the residence that led them to believe that the fire was intentionally set and that an accelerant was utilized. In fact, as this Court is fully aware, photographs often do not truly convey to the jury, the experience of actually viewing an item or scene depicted. It was necessary for the jury to consider each and every photograph submitted for consideration in making their determination that Appellant murdered her son and then set fire to her rented residence to conceal her actions. It is clear that the trial court was well within its discretion when it admitted the photographs into evidence.

As previously iterated, "[t]he failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel." State v. Tenance, 109 Ohio St. 3d 255, 2006 Ohio 2417, quoting State v. Fears (1999), 86 Ohio St.3d 329, 1999 Ohio 111, quoting State v. Holloway (1988), 38 Ohio St.3d 239. Counsel is also not required to perform a futile act. In Re Strum, 4th Dist. No. 05CA35, 2006 Ohio 7101. In this case, it would have been futile for trial counsel to object to the admission of the photographs. As

such, this Court should not find that trial counsel violated their duties to Appellant by not objecting to the admission of the photographs.

In regards to trial counsel's failure to object to the admission of other acts evidence, the failure to make objections regarding other acts testimony is not alone enough to sustain a claim of ineffective assistance of counsel. State v. Conway, 109 Ohio St. 3d 412, 2006 Ohio 2815, citing State v. Holloway (1988), 38 Ohio St.3d 239; State v. Gumm, 73 Ohio St.3d 413, 1995 Ohio 24. Appellee would also respectfully refer this Honorable Court to its discussion regarding the admissibility of the other acts evidence contained in Response to Proposition of Law Five. As such, this Court should not find that trial counsel violated their duties to Appellant.

In regards to trial counsel's failure to properly cross examine Leroma Penn, the scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel. State v. Conway, 109 Ohio St. 3d 412, 2006 Ohio 2815, citing State v. Hoffner, 102 Ohio St.3d 358, 2004 Ohio 3430; State v. Campbell (2000), 90 Ohio St.3d 320, 2000 Ohio 183. Simply because trial counsel did not cross examine Leroma Penn concerning matters appellate counsel deems vital, does not mean that trial counsel violated any of their essential duties to Appellant. Accordingly, this Court should not find that trial counsel violated their duties to Appellant.

MITIGATION

In response to the alleged ineffective assistance of trial counsel during the penalty phase, this issue is moot. Appellee has already conceded error in the mitigation phase

and requested this Honorable Court to remand the matter to the trial court so that a new mitigation hearing might be conducted.

Under the second prong of the Strickland analysis, Appellant cannot demonstrate that but for any of the alleged errors committed by trial counsel that the result of the proceeding would have been otherwise had the alleged errors not occurred. This is true whether the alleged errors are viewed individually or cumulatively. It is important to note that no trial is perfectly tried, or free from all error. State v. Shannon (June 11, 1980), 9th Dist No. 9537. The law does not require a trial to be free of error, only free of prejudicial error. Id. In this case, Appellant received a trial free from prejudicial error committed by trial counsel. As such, Appellant's Seventh Proposition of Law must be denied.

RESPONSE TO EIGHTH PROPOSITION OF LAW

VIII. THE TRIAL COURT PROPERLY ADMITTED THE PHOTOGRAPHS INTO EVIDENCE.

Appellant contends that the trial court denied her the right to a fair trial, due process, and a reliable determination of her guilt and sentence when the trial court admitted gruesome and cumulative photographs as evidence during the trial and mitigation phases of the capital proceeding. Appellant's contention lacks merit.

"The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." State v. Craig, 110 Ohio St. 306, 2006 Ohio 4571, quoting State v. Sage (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. "Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant

is outweighed by their probative value and the photographs are not repetitive or cumulative in number." State v. Loza, 71 Ohio St. 3d 61, 1994 Ohio 409, quoting State v. Maurer (1984), 15 Ohio St.3d 239, paragraph seven of the syllabus.

Here, the photographs admitted during the trial phase had significant probative value in proving Appellee's case. This court has previously held that "the state must prove, and the jury must find, that the killing was purposefully done.***." Id. at 265, citing State v. Strodes (1976), 48 Ohio St.2d 113, vacated in part on other grounds (1978), 438 U.S. 911. The photographs were probative of the fact that Jacob was dead before the fire started. The photographs were also probative of the fact that the fire was deliberately set with the use of an accelerant. Significant heat was required to produce the type of damage Jacob's body sustained.

Contrary to Appellant's assertion, mere testimony was insufficient to convey to the jury that Jacob was dead before the fire started and to accurately describe the condition of his body due to the intentionally set fire aided by the use of accelerant. As Appellant has repeatedly emphasized, Dr. Matus was unable to determine exactly how Jacob was murdered due to the condition of the body. The jurors were entitled to see why Matus could only make the ruling that Jacob died as a result of homicidal violence of unknown origin. It was necessary for the jury to consider each and every photograph submitted for consideration in making their determination that Appellant murdered her son, as the physical evidence revealed that Jacob was dead before the fire started, and Appellant then set fire to her rented residence to conceal her actions. It is clear that the trial court was well within its discretion when it admitted the photographs Appellant now complains of into evidence.

Moreover, the photographs that were admitted were neither repetitive nor cumulative. Of those that were admitted, some could be considered "gruesome." However, the mere fact that a photograph is gruesome is not sufficient to render it per se inadmissible. State v. Loza, 71 Ohio St. 3d 61, 1994 Ohio 409, citing State v. Maurer (1984), 15 Ohio St.3d 239, paragraph seven of the syllabus. The probative value of each challenged exhibit appears to outweigh any prejudicial impact the photographs may have had.

Further, in State v. DePew (1988), 38 Ohio St.3d 275, it was recognized that repetition of much or all that occurred during the guilt phase would be permissible at the penalty phase, including readmitting trial exhibits such as gruesome photographs. State v. Newton, 108 Ohio St. 3d 13, 2006 Ohio 81, citing State v. Fears, 86 Ohio St.3d 329, 1999 Ohio 111. See, also, State v. Steffen (1987), 31 Ohio St.3d 111 (under R.C. 2929.04(B), "the court is required to review" the nature and circumstances of the offense to determine whether there are any mitigating features [emphasis sic]). Again, the trial court acted well within its discretion when it admitted the trial phase photographs as evidence during the mitigation phase of the proceeding.

Since the trial court properly admitted the photographs into evidence during the trial and mitigation phases of the capital proceeding, Appellant's Eighth Proposition of Law must be overruled.

RESPONSE TO NINTH PROPOSITION OF LAW

IX. THE PROCESS UTILIZED TO IMPOSE THE DEATH SENTENCE UPON APPELLANT WAS RELIABLE AND APPROPRIATE.

Appellant contends that the process utilized to impose the death sentence upon her was unreliable and inappropriate. This contention lacks merit.

R.C. 2929.05(A) provides, in pertinent part:

"* * * The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine * * * whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. * * * The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record * * * that the sentence of death is the appropriate sentence in the case." State v. Stefen (1987), 31 Ohio St. 3d 111.

This Court has held that " R.C. 2929.05 requires the review of the proportionality of death sentences regardless of whether counsel has provided evidence of disproportionality." State v. Stefen (1987), 31 Ohio St. 3d 111, quoting State v. Jenkins (1984), 15 Ohio St. 3d 164, paragraph seven of the syllabus. This Court has also held that "[t]he proportionality review required of the court of appeals pursuant to R.C. 2929.05(A) need not include criminal cases outside its geographical jurisdiction." State v. Stefen (1987), 31 Ohio St. 3d 111, quoting State v. Rogers (1985), 17 Ohio St. 3d 174, at paragraph nine of the syllabus.

The evidence presented during the trial phase established that Appellant was properly convicted of the murder of a child under thirteen (13) years of age. R.C. 2929.04(A)(9). Against this aggravating circumstance, this Court must now weigh the mitigating factors contained in R.C. 2929.04(B). Appellant called two (2) mitigation witnesses, Dr. McPherson and her mother, Marilyn Diar. (Tr. 2990, 3044).

Here, the defense employed a mitigation specialist, an investigator, and a psychologist. Each of these individuals began working on Appellant's case several months prior to the mitigation phase. The defense reviewed Appellant's school records and medical records prior to the mitigation phase. Dr. McPherson, the defense psychologist, testified that "one of the attorneys conducted extensive interviews of a variety of individuals who knew Appellant and obtained background information." (Tr. 3036-3041). Despite being limited in the presentation of mitigation evidence, due to Appellant's unwillingness to acknowledge any guilt or wrongdoing, trial counsel presented the testimony of Dr. McPherson and Marilyn Diar. This testimony illustrated to the jury issues within Appellant's life during her childhood and that she was a human being who had a family that loved her and was worthy of consideration to spare her life. Thus, the record shows that the defense thoroughly as possible prepared for the mitigation phase of the trial.

In contrast, when this Court examines the nature and circumstances of the underlying offense, it will determine that no mitigating information exists. Appellant either smothered or drowned four (4) year old Jacob because she was tired of caring for him. Appellant was not supposed to be medically able to have children and her "miracle baby" Jacob soon grew into an unwanted, time and money consuming burden. Appellant

was forced to curtail her social life to provide care for Jacob. Appellant valiantly tried to maintain her social life by hiring numerous adolescent babysitters and instructing them to ply Jacob with liquid Tylenol with Codeine to control his behavior, ignoring the physical consequences the medication had on Jacob's health. Appellant grew tired of the burdens and demands of motherhood and decided to murder her son because she was simply not willing to tolerate caring for him further. Appellant's ability to locate willing caregivers and ability to utilize the Tylenol with Codeine to control Jacob's behavior were slipping from her grasp. Appellant must have believed that she had to make a choice; herself and her social life as she knew it or Jacob. Appellant, growing more desperate and resentful, chose herself. On August 27, 2003, Appellant either drown Jacob, while engaging in his beloved baths, in the bathtub that witnesses testified was half full of water that was not placed in the tub due to extinguishing the fire or smothered Jacob to death.

After Jacob's death, Appellant then threw gasoline about selected areas on the first floor of her residence and lit the residence on fire. The fire, due to the accelerant, burned so intensely that portions of Jacob's body were actually burned up. Obviously, with heat this extreme, determining a cause of death for Jacob was difficult. Appellant was fully aware of how intensely a fire could burn due to her prior injuries and that is why she chose fire to destroy the evidence of her crime. Thus, Jacob's murder was part of a course of conduct involving the murder of a child under thirteen (13) years of age, as Jacob was age four (4) at the time of his tragic, untimely death.

The statutory mitigating factors are mostly inapplicable to Appellant. The factors enumerated in R.C. 2929.04(B)(1), (B)(2), (B)(3), and (B)(6) are inapplicable to the case at bar. The youth of the offender, R.C. 2929.04(B)(4) is also entitled to little weight, if any, as Appellant was twenty eight (28) years old at the time of the offense. State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084, citing State v. Robb, 88 Ohio St.3d 59, 2000 Ohio 275; State v. Brewer (1990), 48 Ohio St.3d 50 (25-year-old defendant not a "youthful offender").

Pursuant to R.C. 2929.04(B)(7), Appellant presented testimony that she had the love and support of her family. Appellant also presented testimony that she was burned as a child and suffered much pain as a result of her injury. Appellant also presented testimony that she was of average intelligence and that she had been diagnosed with a personality disorder. Appellant never expressed any responsibility or remorse for Jacob's death.

It is clear that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. Appellant's murder of her four (4) year old son, Jacob is a grave aggravating circumstance. No substantial mitigation weighs against this factor. As such, the death penalty is appropriate punishment for Appellant's murder of her young son.

Finally, the death penalty is proportionate to death sentences approved for other child murders under R.C. 2929.04(A)(9). State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084, State v. Fitzpatrick, 102 Ohio St.3d 321, 2004 Ohio 3167 (12-year-old victim); State v. Lynch, 98 Ohio St.3d 514, 2003 Ohio 2284 (six-year-old victim); State v. Smith, 97 Ohio St.3d 367, 2002 Ohio 6659 (six-month-old victim).

Since the death sentence imposed upon Appellant is both appropriate and proportionate, Appellant's Ninth Proposition of Law must be denied.

RESPONSE TO TENTH PROPOSITION OF LAW

X. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SEVER.

Appellant contends that the trial court erred when it denied Appellant's Motion to Sever. Appellant's contention lacks merit.

Preliminarily, it must be noted that "Crim.R. 14 allows for separate trials on multiple counts in an indictment when joinder of the offenses would be prejudicial to the defendant. [Citations omitted.] To preserve the issue of prejudicial joinder for appeal, however, the defendant must renew his motion at the close of all the evidence. When a defendant fails to renew his motion at the conclusion of all the evidence, he waives any error in the trial court's denial of the motion, unless the error rises to the level of plain error under Crim.R. 52(B). [Citations omitted.]" State v. Harris, 1st Dist. No. C-050160, 2006 Ohio 716, quoting State v. Harris, 1st Dist. No. C-040483, 2005 Ohio 6995. As such, this Honorable Court may only review any error pursuant to a plain error standard. State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853. An error is plain error only if it is obvious, State v. Barnes, 94 Ohio St.3d 21, 27, 2002 Ohio 68, and, "but for the error, the outcome of the trial clearly would have been otherwise." State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853, quoting State v. Long (1978), 53 Ohio St.2d 91.

Here, Appellant has failed to preserve the issues of prejudicial joinder for review. Trial counsel did not renew the motion at the close of Appellee's case or at the close of all evidence. (Tr. 2409-2433; 2760-2764). See also State v. Glover, 8th Dist. No. 84413, 2005 Ohio 1984, citing State v. Owens (1975), 51 Ohio App.2d 132 State v. Saade, 8th Dist. Nos. 80705 and 80706, 2002 Ohio 5564; State v. Fortson (August 2, 2001), 8th Dist. No. 78240.

When reviewed pursuant to a plain error standard, Appellant has not demonstrated that the results of the proceeding would have been otherwise had the trial court granted Appellant's Motion to Sever. This is because the trial court properly denied Appellant's Motion to Sever. Pursuant to Crim.R. 8(A):

two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are a part of a course of criminal conduct.

"The law favors joining multiple criminal offenses in a single trial under Crim.R. 8(A)[.]" State v. Prade (2000), 139 Ohio App. 3d 676, quoting State v. Lott (1990), 51 Ohio St. 3d 160; see, also, State v. Torres (1981), 66 Ohio St. 2d at 340. An accused may move to sever under Crim.R. 14 if he can establish prejudice to his rights. State v. Prade (2000), 139 Ohio App. 3d 676, citing State v. Lott, 51 Ohio St. 3d at 163; State v. Wiles (1991), 59 Ohio St. 3d 71.

Appellee may counter the claim of prejudice in two ways. State v. Prade (2000), 139 Ohio App. 3d 676. The first is the "other acts" test, where the state can argue that it could have introduced evidence of one offense in the trial of the other, severed offense under the "other acts" portion of Evid.R. 404(B). Id. The second is the "joinder" test, where the state is merely required to show that evidence of each of the crimes joined at trial is simple and direct. Id. If the state can meet the joinder test, it need not meet the stricter "other acts" test. Id. Thus, an accused is not prejudiced by joinder when simple and direct evidence exists, regardless of the admissibility of evidence of other crimes under Evid.R. 404(B). Id., citing State v. Franklin (1991), 62 Ohio St. 3d 118.

The trial court did not err in refusing to sever the charges because the evidence would have been admissible under the "other acts" provisions of Evid.R. 404(B), which states:

evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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. State v. Prade (2000), 139 Ohio App. 3d 676.

Appellee alleged at trial that one of Appellant's motives for killing Jacob was that Appellant had grown tired of the burdens and responsibilities of motherhood. Appellant was not supposed to be medically able to have children and Jacob's novelty had long since worn off at the age of four (4). Appellee presented evidence that Appellant frequently utilized babysitters to provide care for Jacob. These same babysitters were instructed to control Jacob's behavior by plying him with liquid Tylenol with Codeine. This mechanism of control was slipping from Appellant's grasp because the side effects of the drug was causing health problems for Jacob that Appellant could no longer conceal

and forced her to seek medical treatment for Jacob. Jacob made a hospital visit in July 2003 where hospital staff asked probing questions concerning Jacob's medical history. Obviously, Appellant could not conceal Jacob's use of Codeine for much longer due to Jacob's inability to tolerate the side effects of Codeine. Appellant also was having issues obtaining babysitters to care for Jacob, curtailing her social life. When the burden of caring for Jacob became too much, Appellant simply killed him. Jacob was dead as of August 27, 2003. The evidence supporting the Corrupting Another with Drugs charges would have been admissible during trial regarding the Aggravated Murder charges as evidence of motive pursuant to Evid.R. 404. Because the evidence would have been admitted under Evid.R. 404(B), this negates Appellant's claims of prejudice.

Under the joinder test set forth in Franklin, Appellee could further negate the claim of prejudice suffered by Appellant through joinder. State v. Prade (2000), 139 Ohio App. 3d 676. This Court has noted that "when simple and direct evidence exists, an accused is not prejudiced by joinder[.]" State v. Prade (2000), 139 Ohio App. 3d 676, quoting State v. Lott (1990), 51 Ohio St. 3d 160. The essential problem associated with joinder is not found to be present when "the evidence relative to the various charges is direct and uncomplicated, so that the jury is believed capable of segregating the proof on each charge." State v. Prade (2000), 139 Ohio App. 3d 676., quoting State v. Roberts (1980), 62 Ohio St. 2d 170, citing Drew v. United States (C.A.D.C.1964), 118 U.S. App. D.C. 11, 331 F.2d 85, 88.

The elements of the crimes of Corrupting Another with Drugs and Aggravated Murder are wholly distinct and different from each other. It is beyond credibility to think that the jury would have so confused the evidence related to each crime so as to cumulate the evidence against Appellant and convict her of crimes not fully supported by the evidence. Therefore, because Appellee also met the "joinder test," any prejudice claimed by Appellant was negated.

Because Appellant has not affirmatively established that she was prejudiced or that she provided the trial court with sufficient information upon which to consider the Motion to Sever, Appellant has failed to show that the trial court erred. Appellant has also failed to show how the Motion to Sever impacted her rights during the penalty phase of the capital proceeding. Moreover, no evidence of the facts supporting Appellant's conviction on the Corrupting Another with Drugs was presented during the mitigation hearing. (Tr. 2983-2990). Since Appellant has failed to show that the trial court erred in denying her Motion to Sever, Appellant has not met her burden of proof under a plain error standard as Appellant cannot show that but for the alleged error, the outcome of the trial would have been different. As such, Appellant's Tenth Proposition of Law must be denied.

RESPONSE TO ELEVENTH PROPOSITION OF LAW

XI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON REASONABLE DOUBT.

Appellant contends that her right to due process was violated by the trial court's instruction concerning the definition of reasonable doubt to the jury during the trial and mitigation phase of the capital proceeding. Appellant's contention lacks merit.

Preliminarily, it must be noted that Appellant has waived this issue for appellate review as Appellant failed to object to the reasonable doubt instruction during the mitigation phase of the capital proceeding. (Tr. 3074-3075). This issue is accordingly waived. Appellant did, however, object to the reasonable doubt instruction during the trial phase of the capital proceeding, but not for the reasons enunciated in her Merit Brief. (Tr. 2894).

In relation to the reasonable doubt instruction given during the trial phase, it must be noted that the instruction concerning reasonable doubt conformed to R.C. 2901.05(D), whose constitutionality has been repeatedly affirmed. State v. Hancock, 108 Ohio St. 3d 57, 2006 Ohio 160, citing State v. Stallings, 89 Ohio St.3d 280, 2000 Ohio 164; State v. Van Gundy, 64 Ohio St.3d 230, 1992 Ohio 108.

In relation to the reasonable doubt instruction given during the mitigation phase, Appellant has failed to meet her burden of proof pursuant to a plain error standard. Appellant has failed to show that the results of the proceeding would have been different had the trial court not given an instruction found constitutional by this Honorable Court.

Since Appellant's due process rights were not violated by the trial court's instruction concerning reasonable doubt during the trial and sentencing phases of the capital proceeding, Appellant's Eleventh Proposition of Law must be denied.

RESPONSE TO TWELFTH PROPOSITION OF LAW

XII. THE VERDICT FORMS WERE PROPER.

Appellant contends that her constitutional rights were violated when the trial court supplied the jury with verdict forms that did not require a finding of guilt beyond a reasonable doubt. Appellant's contention lacks merit.

Here, trial counsel did not object to the jury verdict forms. As such, any error regarding the jury verdict forms has been waived. State v. Johnson, 112 Ohio St. 3d 210, 2006 Ohio 6404. It is unclear, however, how counsel's failure to object to the verdict forms constitutes ineffective assistance of counsel. See prior discussion regarding ineffective assistance of counsel contained in Response to Proposition of Law Seven.

The trial court instructed the jury regarding the definition of reasonable doubt. (Tr. 2865). The trial court also instructed the jury that proof beyond a reasonable doubt was necessary to convict Appellant of each of the offenses in the indictment. (Tr. 2871-2886). The verdict forms were then submitted to the jury and the jury commenced their deliberations. (Tr. 2892). The verdict forms were then read aloud once the jury had returned their verdict. (Tr. 2896-2989). The verdict forms indicated that the jury had found Appellant guilty of all offenses and specifications in the indictment. (Tr. 2896-2989). It is unclear how the verdict forms violated Appellant's constitutional rights when the trial court properly instructed the jury to determine Appellant's guilt beyond a

reasonable doubt. (Tr. 2864-2989). See generally State v. Burrow (2000), 140 Ohio App. 3d 466.

Appellant has failed to demonstrate how the jury verdict forms violated her constitutional rights when the jury was properly instructed as to Appellee's burden of proof and the concept of reasonable doubt. Appellant has also failed to demonstrate how trial counsel violated any essential duty to her by failing to object to the jury verdict forms. Appellant has also failed to demonstrate how the failure to object to the jury verdict forms caused her to sustain prejudice when there was ample evidence before the jury to support Appellant's convictions for Aggravated Murder. See Response to Proposition of Law Four. As such, Appellant's Twelfth Proposition of Law must be overruled.

RESPONSE TO THIRTEENTH PROPOSITION OF LAW

XIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THEIR ROLE IN THE PROCESS.

Appellant contends that the trial court shifted the burden of proof to Appellant when the trial court informed the jury that "[i]n your deliberations you may not discuss or consider the subject of punishment. Your duty is confined to the determination of guilt or innocence. The duty to determine any punishment is placed, by law, upon the Court". (Tr. 2887-2888). Appellant's contends that the trial court's statement violated her constitutional rights. This contention lacks merit.

This Honorable Court has determined that “[t]his instruction is appropriate at the guilt stage to ensure that the question of punishment is not discussed during the jury’s deliberations on the defendant’s guilt or innocence. State v. Hoffner, 102 Ohio St. 3d 358, 2004 Ohio 3430. See also State v. Coley, 93 Ohio St. 3d 253, 2001 Ohio 1340 (this Court has previously rejected complaints of prejudicial error arising from the use of the term “guilt or innocence” in this limited context. See State v. Jones, 91 Ohio St. 3d 335, 2001 Ohio 57; State v. Campbell, 90 Ohio St. 3d at 320, 2000 Ohio 183).

Moreover, trial counsel failed to object to the trial court giving this instruction. (Tr. 2895). Rather, trial counsel objected to the fact that the language “at this phase of the proceeding” was not included in the now maligned instruction. (Tr. 2895). Any review conducted by this Court regarding the instruction would be conducted under a plain error standard. See Crim.R. 52. This Honorable Court has previously determined that the instruction does not constitute plain error. State v. Hoffner, 102 Ohio St. 3d 358, 2004 Ohio 3430, citing State v. Phillips, 74 Ohio St.3d 72, 1995 Ohio 171.

Because this Court has determined that the jury instruction at issue does not constitute error and because Appellant has failed to preserve this issue for appellate review, Appellant’s Thirteenth Proposition of Law must be denied.

RESPONSE TO FOURTEENTH PROPOSITION OF LAW

XIV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE MEANING OF PURPOSELY.

Appellant contends that her right to due process was violated because the jury instructions reduced Appellee’s burden of proof as to whether Appellant purposefully caused Jacob’s death. Appellant’s contention lacks merit.

Preliminarily, Appellant's failure to object to the issue that the trial court's instruction regarding mens rea that improperly reduced Appellee's burden of proof waives any review by this Court, other than plain error. State v. Noling, 98 Ohio St. 3d 44, 2002 Ohio 7044, citing Crim.R. 30(A) and 52(B); State v. Underwood (1983), 3 Ohio St.3d 12, syllabus; State v. Williams (1977), 51 Ohio St.2d 112. (Tr. 2894-2896).

The trial court instructed the jury as follows:

In Count 6 of the indictment the defendant, Nicole Diar, is charged with aggravated murder with a specification. Before you can find the defendant guilty of aggravated murder with a specification as charged in Count 6, you must find by proof beyond a reasonable doubt, the State of Ohio has proved all of the essential elements of Count 6, which are:

1. On or about August 27, 2003;
2. The defendant, Nicole Diar;
3. Did purposely and with prior calculation and design, cause the death of Jacob Diar;
4. And venue: That it occurred in Lorain County, Ohio.

Purpose to cause the death of another person is an essential element of the crime of aggravated murder.

The person acts purposely when it is his or her specific intention to cause a certain result.

It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to cause the death of another person.

When the essence of the offense is a prohibition against conduct of a certain nature, a person acts purposely if his or her specific intention was to engage in conduct of that nature, regardless of what the person may have intended to accomplish by such conduct.

Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself, unless he or she expresses it to others or indicates by his or her conduct.

The purpose with which a person does an act or brings about a result is determined from the manner in which it is done, the means and weapon used, and all the facts and circumstances in evidence.

Proof of motive is not required. The presence or absence of motive is one of the circumstances bearing upon purpose.

No person may be convicted of aggravated murder unless he or she specifically intended to cause the death of another. (Tr. 2876-2878).

Nevertheless, Appellant's contends that the trial court erroneously defined the term "purposely" when defining the elements of aggravated murder. The trial court used the language "the essence of the offense", i.e. the "gist of the offense" language found in R.C. 2901.22(A), which Appellant argues should not be given in an aggravated murder case. State v. Johnson, 112 Ohio St. 3d 210, 2006 Ohio 6404, citing State v. Wilson, 74 Ohio St.3d 381, 1996 Ohio 103; 4 Ohio Jury Instructions (1995) 58, Comment to Section 409.01(3).

However, no plain error exists, i.e. the result of the proceeding would have been different had the instruction been given differently, because in convicting Appellant on count six (6), the jury found that Appellant murdered Jacob with prior calculation and design. Such a finding implies that Appellant had a specific intent to kill Jacob. State v. Johnson, 112 Ohio St. 3d 210, 2006 Ohio 6404. Moreover, no plain error exists in convicting Appellant on count seven (7) because the trial court's instructions emphasized that Appellant must have specifically intended to cause the death of another to be guilty of Aggravated Murder. State v. Noling, 98 Ohio St. 3d 44, 2002 Ohio 7044; State v. Myers, 97 Ohio St. 3d 335, 2002 Ohio 6658. Further, the jury had already determined that Appellant had the specific intention to kill Jacob when it reached its verdict on count

six (6), having determined that Appellant murdered Jacob with prior calculation and design.

Because Appellant has failed to preserve the issues regarding the jury instruction defining purpose for appellate review and because the error, if any, fails to rise to the level of plain error, Appellant's Fourteenth Proposition of Law must be denied.

RESPONSE TO FIFTEENTH PROPOSITION OF LAW

XV. OHIO'S DEATH PENALTY LAW IS CONSTITUTIONAL.

Appellant contends that Ohio's death penalty law is unconstitutional and violates the United States' obligations under international law. These contentions lack merit.

Preliminarily, it must be noted that Ohio's death penalty statute is constitutional "in all respects," State v. Evans (1992), 63 Ohio St. 3d 231, and the expressed public policy is to execute those deserving the death penalty. As quoted by State v. Bey, 85 Ohio St. 3d 487, 1999 Ohio 283. It must also be noted that this Court has rejected the assertion that Ohio's death penalty statutes violate international law and treaties to which the United States is a party. State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084, citing State v. Bey, 85 Ohio St. 3d 487, 1999 Ohio 283; State v. Phillips, 74 Ohio St. 3d 72, 1995 Ohio 171. Appellee will address each of Appellant's remaining claims in turn.

Appellant contends that Ohio's death penalty scheme violates the constitutional prohibition against cruel and unusual punishment in the following ways:

I. Arbitrary and unequal punishment.

Appellant argues that Ohio law permits the death penalty to be imposed in an arbitrary and discriminatory manner. Specifically, Appellant contends that Ohio's death penalty is unconstitutionally arbitrary because (1) it allows prosecutors to exercise uncontrolled discretion; (2) it is racially discriminatory; and (3) it is not supported by a legitimate and compelling state interest (i.e. cruel and unusual punishment that serves no legitimate and compelling state interest). As demonstrated below, Appellant's contentions have no basis in law or fact.

A. Prosecutorial Discretion

The United States Supreme Court has held that the fact that a prosecutor has the power not to charge capital felonies does not indicate that the prosecutor exercises his discretion in a manner that violates the Constitution. Gregg v. Georgia (1976), 428 U.S. 153. In Gregg, the defendant argued that the mere existence of prosecutorial discretion warranted a conclusion that the discretion had to be exercised in an arbitrary way. The Supreme Court rejected this outright. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury will impose the death penalty if it convicts. Id.; see also, State v. Jenkins (1984), 15 Ohio St. 3d 164, (rejecting this argument on the basis of Gregg); McCleskey v. Kemp (1987), 481 U.S. 279.

Without a specific allegation of an improper motive, Appellant's claim fails: It is well settled that the procedural aspects of the administration of criminal justice abound with situations in which the exercise of discretion by a myriad of participants occupies a significant role in determining the destiny of an alleged offender. United States v. Talbot (6th Cir. 1987), 825 F.2d 991.

B. Racial Discrimination Claim

Appellant argues that Ohio law permits the imposition of death in a racially discriminatory manner. She grounds her contention on statistical surveys. In McCleskey v. Kemp (1987), 481 U.S. 279, the United States Supreme Court held that statistical evidence was clearly insufficient to support an inference of racial discrimination in a capital case. The Supreme Court observed:

Finally, McCleskey's statistical proffer must be viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State's criminal justice system. [O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. Gregg v. Georgia, [(1976)], 428 U.S. 153 *** (WHITE, J., concurring). Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose.

Like McCleskey, Appellant asks the Court to preclude a capital sentence in her case based solely on statistical evidence. Appellant offers no evidence that Appellee sought the death penalty in her case with a discriminatory purpose in mind. Accordingly, Appellant's argument is unfounded in law and fact. State v. Keene (1998), 81 Ohio St.3d

646; State v. Steffen (1987), 31 Ohio St.3d 111 (applying McCleskey and rejecting conclusory and statistically based claims).

C. Cruel and Unusual (Fails to Serve Legitimate Purpose) Claim

In Gregg v. Georgia (1976), 428 U.S. 153, the Supreme Court rejected the argument that the death penalty is cruel and unusual: [I]t is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction. The Court, in support of this conclusion, noted that subsequent to its decision in Furman v. Georgia (1972), 408 U.S. 238, at least thirty five (35) state legislatures enacted new death penalty statutes, a statewide referendum in one (1) state (California) adopted a constitutional amendment authorizing capital punishment, and that juries had continued to impose the death penalty. Gregg, supra, at 179, 182.

The legislative judgment that the death penalty serves society is the clearest and most reliable objective evidence of community values. Penry v. Lynaugh (1989), 492 U.S. 302; Stanford v. Kentucky (1989) (plurality opinion), 492 U.S. 361. Ohio's legislature has determined that capital punishment is appropriate.

Appellant argues that the death penalty denies substantial due process because it is not the least restrictive means of achieving the compelling state interests of deterrence, incapacitation, and retribution. This issue has been resolved by the United States Supreme Court, again in Gregg v. Georgia, supra. In Gregg, the argument was made, as it is here, that the death penalty is not the least severe penalty possible. Id. at 175. The Court concluded that the death penalty does serve the purposes of retribution and deterrence and that the death penalty is not "invariably disproportionate to the crime" of murder. Id. at 183 187. Since Gregg, the Court has repeatedly reaffirmed that retribution

and deterrence are valid purposes advanced by the death penalty. See e.g., Enmund v. Florida (1982), 458 U.S. 782; Tison v. Arizona (1987), 481 U.S. 137.

I. Unreliable sentencing procedures.

Appellant cites no authority for the proposition that Appellee is required by the Constitution to prove the absence of mitigating factors, or that death is the only appropriate penalty. In fact, there are no such constitutional requirements. The United States Supreme Court has held that a state law which places the burden of proving mitigating factors on the defendant is not per se unconstitutional. Further, as long as Appellee is required to prove the existence of aggravating circumstances, and required to show that such circumstances outweigh the mitigating factors, Appellee has met its burden to show that death is the appropriate penalty. (Both such requirements are provided by Ohio law.) Thus, as held by the Supreme Court:

So long as a state's methods of allocating the burdens of proof does not lessen the state's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for lenience.

Walton v. Arizona (1990), 497 U.S. 639; see also, State v. Jenkins (1984), 15 Ohio St. 3d 164.

Appellant next contends that Ohio's statutory procedure is arbitrary because it requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. In essence, Appellant maintains that the constitution requires a standard of proof greater than beyond a reasonable doubt. Appellant further contends along similar lines that Ohio's law is arbitrary because it fails to precisely define mitigation, and because juries

have too much discretion in weighing aggravating circumstances versus mitigating factors. Not surprisingly, Appellant cites no compelling authority in support of these contentions, and, in fact, the law is precisely the opposite. The United States Supreme Court has held that at the selection phase of a capital case, the State is not confined to submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion. See Buchanan v. Angelone (1998), 522 U.S. 269 (citing Tuilaepa v. California (1994), 512 U.S. 967)); see also State v. Jenkins, supra.

Finally, Appellant contends that Ohio's death penalty is unreliable because empirical studies prove that juries are incapable of understanding their responsibilities and apply inaccurate standards for decisions. Appellant cites no case in which jury instructions were invalidated based on the study results to which she points. In Gacy v. Welborn (7th Cir. 1993), 994 F.2d 305, a panel of the Seventh Circuit called into question the quality and the relevancy of one such study conducted by Professor Hans Zeisel. Appellant has noted another Seventh Circuit decision, Free v. Peters (7th Cir. 1993), 12 F.3d 700, which discusses the same study. Ironically, here is what that panel had to say:

We are unwilling to overrule Gacy. Indeed, we are unwilling even to consider overruling Gacy, because, even if we did overrule it, that would make no difference to the outcome of the present case. So deficient is Professor Zeisel's study that, even if Teague created no obstacle to the district court's consideration of it, the study would not support the conclusion that the instructions given in Free's case were so confusing as to be constitutionally defective.

Free v. Peters, 12 F.3d at 705.

III. Appellant's right to a jury trial is burdened.

Appellant argues that Ohio's law (specifically Ohio Criminal Rule 11(C)(3)) is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. Appellant argues specifically that a capital defendant who pleads guilty or no contest may obtain dismissal of a capital specification by the trial judge in the interests of justice, whereas a defendant who pleads guilty does not enjoy this option. According to Appellant, this violates United States v. Jackson (1968), 390 U.S. 570 (federal kidnapping statute's capital punishment scheme unconstitutional because it erroneously and unnecessarily encouraged guilty pleas). Appellant's sole support for the latter proposition is Justice Blackmun's concurring opinion in Lockett v. Ohio (1978), 438 U.S. 586.

This Honorable Court has specifically considered and rejected Appellant's Jackson argument. State v. Buell (1986), 22 Ohio St.3d 124, cert. denied, 479 U.S. 871. In fact, the U.S. Supreme Court has held on other occasions that a state is not precluded per se from encouraging guilty pleas:

We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant the possibility or certainty of a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty.

Corbitt v. New Jersey (1978), 439 U.S. 212, 218 (footnote, citations and internal quotation marks omitted).

V. Mandatory submission of reports and evaluations.

Appellant next assails Ohio's capital sentencing procedure because it requires submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. Again, this Court has specifically considered and rejected Appellant's precise contention. State v. Buell (1986), 22 Ohio St.3d 124.

VI. Appellant's Felony-Murder claim.

Tison v. Arizona (1987), 481 U.S. 137, stands as strong authority that the imposition of the death penalty on felony murderers comports with contemporary standards of decency.

The gist of Appellant's argument is described in State v. Jenkins, supra, as follows:

According to appellant, a principal in a felony murder is treated more harshly than a defendant charged with a premeditated murder, since a felony murder constitutes one of the eight aggravating circumstances under R.C. 2924.04, while premeditation is not set forth as an aggravating circumstance. Stated otherwise, appellant argues that aggravating factors for felony murders simply duplicate an element of the offense while a murder by prior calculation and design requires proof of a separate aggravating circumstance in order to justify a death sentence. As such, appellant argues that a single act should not both convict and aggravate.

Section 2903.01 of the Ohio Revised Code provides for two categories of aggravated murder: premeditated murder and "felony murder." Section 2903.01(B) defines "felony murder" as purposely causing the death of another "while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape." Section 2903.01(D) provides that a person

may not be convicted of aggravated murder "unless he is specifically found to have intended to cause the death of another." According to Section 2929.04(A), imposition of the death penalty for aggravated murder is precluded unless one or more of eight (8) listed aggravating circumstances is specified in the indictment and proven beyond a reasonable doubt. Section 2929.04(A)(7) sets forth as an aggravating circumstance that "[t]he offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

Appellant's challenge to the statute focuses on an argued overlap between the aggravating circumstance designated by Section 2929.04(A)(7) and the statutory definition of felony murder. However, as noted by this Court in Jenkins, the United States Supreme Court has upheld a statutory scheme wherein the conduct which convicts also aggravates. Jurek v. Texas (1976), 428 U.S. 262. In any event, the critical question is whether the statutory scheme sufficiently narrows the class of homicides for which the death penalty is available. Here, Ohio's Death Penalty statute does provide for such a narrowing. Even if proof of felony murder also tends to establish an aggravating circumstance supporting the death penalty, Section 2929.04(A)(7) further narrows the type of felony murder subject to capital punishment, e.g., the underlying felony offenses are further narrowed to aggravated burglary, aggravated robbery, or aggravated arson, and the offender must be a principal, or have committed the murder with prior calculation and design.

VII. Vagueness claim regarding R.C. 2929.03(D)(1) and 2929.04.

Appellant claims that language in R.C. 2929.03(D)(1) providing for consideration of the nature and circumstances of the aggravating circumstances is unconstitutionally vague in violation of the Eighth and Fourteenth Amendments to the United States Constitution, thereby giving the sentencer unfettered discretion to weigh a statutory mitigating factor (see R.C. 2929.04(B): 'the nature and circumstances of the offense'] as an aggravator. Appellant contends the language in R.C. 2929.03(D)(1) impermissibly incorporates R.C. 2929.04(B) mitigating factors, making them part and parcel of the aggravating circumstance.

This Honorable Court has overruled this exact proposition in State v. McNeill (1998), 83 Ohio St.3d 438, 1998 Ohio 293. This Court based its decision on Tuilaepa v. California (1994), 512 U.S. 967 and State v. Gumm (1995), 73 Ohio St.3d 413, 1995 Ohio 24. The Court stated:

We do not find the statutory language at issue, or the concepts it conveys, unconstitutionally vague. The reasoning employed in Gumm clarified that the "nature and circumstances of the aggravating circumstances" referred to in R.C. 2929.03(D)(1) are separate and distinct from the "nature and circumstances of the offense" referred to in 2929.04(B). Id. at 416-423 ***. See, also, State v. Wogenstahl (1996), 75 Ohio St.3d 344 ***; State v. Hill (1996), 75 Ohio St.3d 195***.

Accordingly, Appellant's argument is without merit.

VIII. Proportionality and appropriateness review.

Appellant next contends that Ohio's death penalty scheme is unconstitutional because it fails to provide for adequate proportionality review. The United States Supreme Court has held that proportionality review is not a constitutional requirement. Pulley v. Harris (1984), 465 U.S. 37, 46. Where the statutory scheme adequately

channel[s] the sentencer's discretion, such proportionality review is not required. See McCleskey, supra, 481 U.S. at 306. Moreover, the scope of Ohio's statutorily mandated proportionality review has been determined by this Court. See State v. Steffen (1987), 31 Ohio St. 3d 111. Appellant is not free to override this interpretation.

In State v. Steffen (1987), 31 Ohio St.3d 111, this Court held that proportionality review is limited to the pool of cases decided by the appellate court where the death penalty was actually imposed. The court also clarified that proportionality review in this court will be limited to a review of cases already announced. No reviewing court need consider any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not. Id.

There is no constitutional requirement that a sentencer conclude that death is the only appropriate remedy just as there is no requirement that a jury make specific findings. Ohio's statutory mandate to independently review the appropriateness of the sentence is not a constitutional requirement. Indeed, there is not even a requirement that a jury decide a capital sentence. Hildwin v. Florida (1989), 490 U.S. 638; Sochor v. Florida (1992), 504 U.S. 527, (where plain statement that the judgment survives on such an inquiry is clearly preferable to allusions by citation). Lower courts have held that review need not be specifically addressed to the particular defect claimed by the defendant as long as the record shows that such circumstances were considered. Clark v. Ricketts (9th Cir. 1991), 942 F.2d 567, affd, 958 F.2d 851, cert. denied (1992), 506 U.S. 838.

IX. Lethal injection is cruel and unusual punishment.

Appellant contends that R.C. 2949.22 violates her right to be free from cruel and unusual punishment. Appellant contends that death by lethal injection constitutes cruel and unusual punishment because she may feel some pain during the execution process. Tellingly, Appellant cites no case law in support of her contention. Moreover, it is unclear why Appellant believes she is entitled to an absolutely pain free death when her victim, her son Jacob, was not afforded the same consideration. Simply because some pain may be associated with a particular method of execution does not render the method of execution cruel and unusual. Moreover, this Honorable Court the Ohio has upheld the constitutionality of death by lethal injection. State v. Drummond, 7th Dist. No. 05 MA 197, 2006 Ohio 7078, citing State v. Adams, 103 Ohio St.3d 508, 2004 Ohio 5845; State v. Carter, 89 Ohio St.3d 593, 2000 Ohio 172.

X. Ohio's statutory death penalty scheme violates international law.

Appellant contends that Ohio's statutory scheme for imposing the death penalty violates international treaties to which the United States of America is a party. Appellant argues that the imposition of the death penalty violates the Charter of the Organization of American States (OAS) and various treaties and covenants of the United Nations Charter. Specifically, Appellant argues that Ohio's statutory scheme violates the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

Appellant's claim regarding the OAS Charter has been expressly rejected by this Court. In State v. Phillips (1995), 74 Ohio St.3d 72, 1995 Ohio 171, this Court stated that, not only was the declaration not legally binding, but more importantly, it does not contain a specific provision which prohibited the imposition of the death penalty.

Ohio courts have also rejected Appellant's argument concerning the United Nations Charter. In State v. Keene (September 20, 1996), 2nd Dist. No. 14375, the Second Appellate District held that the relevant provisions of the United Nations Charter require only that member nations must respect human rights and fundamental freedoms. This holding is supported by the case law of the United States Supreme Court. In Stanford v. Kentucky (1989), 429 U.S. 361, the United States Supreme Court implicitly rejected an argument that international law should influence rulings under the federal constitution regarding the death penalty. Clearly, the majority of the court rejected the view expressed by the amicus curiae that international law should control rulings on the constitutionality of death penalty statutes. State v. Twyford, (September 25, 1998), 7th Dist. No. 93-J-13; State v. Williams (November 2, 1992), 12th Dist. Nos. CA91-04-060, CA92-06-110. See, also, State v. Dougherty (Sept. 12, 1996), 3rd Dist. No 5-94-2.

More recently, the United States District Court similarly determined that the death penalty does not violate international law. Jamison v. Collins (S.D. Ohio 2000), 100 F.Supp.2d 647. In Jamison, the Court stated as follows:

Finally, Petitioner contends that the State of Ohio violates the Supremacy Clause of the United States Constitution by not following the dictates of (1) the Charter of the Organization of American States (hereinafter, the "OAS Charter"); (2) the American Convention on Human Rights and the Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty (hereinafter, the "American Convention" and the "Additional Protocol"); (3) the American Declaration of the Rights and Duties of Man (hereinafter, the "American Declaration"); and (4) customary international law. The Supremacy

Clause provides, in pertinent part, that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Petitioner alleges that the Supremacy Clause binds courts in the United States to the terms of these documents and Petitioner avers that these documents guarantee the right to life as well as the freedom from inhumane punishment. Having reviewed this portion of Claim Eighteen, though, the Court finds no indication that the international obligations of the United States compel elimination of capital punishment. See People v. Ghent, 43 Cal.3d 739, 778-79, 781, 239 Cal.Rptr. 82, 739 P.2d 1250, 1276, 1277 (1987) (Mosk, J., concurring); see also David Sloss, The Domestication of International Human Rights, 24 Yale J. Int'l L. 129 (1999); Christy A. Short, The Abolition of the Death Penalty, 6 Ind. J. Global Legal Stud. 721 (1999); William A. Schabas, International Law and Abolition of the Death Penalty, 55 Wash. & Lee 797 (1998).

First, without examining whether these documents are self-executing instruments that create private causes of action in the federal courts, see Sloss, *supra*, at 138-152, the Court observes that only one--the Additional Protocol to the American Convention--prohibits the use of the death penalty. Jamison v. Collins (S.D.Ohio 2000), 100 F.Supp.2d 647. Importantly, the United States is not a signatory to the American Convention or its Additional Protocol. Short, *supra*, at 730. Moreover, the Court notes that the United Nation's International Covenant on Civil and Political Rights (hereinafter, the "ICCPR"), which the United States Senate ratified in 1992, does not require its member countries to abolish the death penalty. *Id.* at 725-26; See Ghent at 781, 239 Cal.Rptr. 82, 739 P.2d at 1277 (Mosk, J., concurring). Instead, the ICCPR prohibits cruel, inhumane, or degrading punishment. Jamison v. Collins (S.D.Ohio 2000), 100 F.Supp.2d 647. The United States agreed to abide by this prohibition only to the extent that the Fifth, Eighth, and Fourteenth Amendments preclude cruel and unusual punishment. Short, *supra*, at 726.

Second, the OAS Charter, which makes no mention of capital punishment in its articles, lacks the power to prohibit the death penalty in the United States. State v. Phillips, 74 Ohio St.3d 72, 1995 Ohio 171 (reh'g granted, opinion recalled on other grounds, State v. Phillips (1996), 75 Ohio St.3d 1504. When the United States ratified the OAS Charter, it did so with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states. OAS Charter, 2 U.S.T. 2394 (1951).

Third, as the Court emphasized above, the United States is not a signatory to the American Convention or its Additional Protocol. Fourthly, the American Declaration, which only protects against the arbitrary taking of liberty, is not a treaty and thus cannot legally bind a federal court. Phillips, 74 Ohio St.3d at 104; Short, supra, at 731. Fourth, because about ninety (90) countries across the globe still retain the death penalty, no customary international law yet exists to support the prohibition of the death penalty. Schabas, supra, at 799, 845; see Wills v. Texas (1994), 511 U.S. 1097. Thus, considering all of the above, this Court is bound to hold that international law does not preclude the State of Ohio from establishing and carrying out a capital punishment scheme. Id. at 766-767.

In conclusion, Ohio's death penalty scheme is constitutional and does not violate international law by its imposition. As such, Appellant's Fifteenth Proposition of Law must be denied.

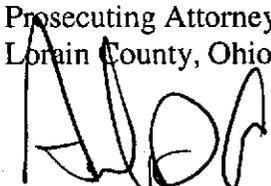
CONCLUSION

For the foregoing reasons, this Honorable Court should affirm Appellant's conviction and remand the matter for a new sentencing hearing.

Respectfully submitted,

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Prosecuting Attorney
Lorain County, Ohio

By:



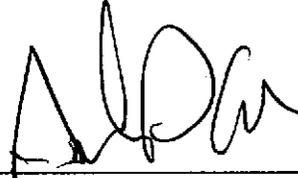
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PROOF OF SERVICE

A copy of the foregoing MERIT BRIEF OF APPELLEE was sent by regular U.S. Mail to the Ohio Public Defender at Office of the Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43266 on this _____ day of May, 2007.



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Counsel of Record

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

-vs-

NICOLE DIAR

Defendant-Appellant.

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CASE NO: 2005-2264

DEATH PENALTY CASE

ON APPEAL FROM THE COURT OF COMMON PLEAS, LORAIN COUNTY, OHIO
CASE NUMBER 04CR065248

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
CRIMINAL LIABILITY

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 2901.22 (2005)

§ 2901.22. Culpable mental states

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

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

HISTORY: 134 v H 511. Eff 1-1-74.

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2909. ARSON AND RELATED OFFENSES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 2909.02 (2006)

§ 2909.02. Aggravated arson

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

- (1) Create a substantial risk of serious physical harm to any person other than the offender;
- (2) Cause physical harm to any occupied structure;
- (3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure.

(B) (1) Whoever violates this section is guilty of aggravated arson.

(2) A violation of division (A)(1) or (3) of this section is a felony of the first degree.

(3) A violation of division (A)(2) of this section is a felony of the second degree.

HISTORY:

134 v H 511 (Eff 1-1-74); 136 v S 282 (Eff 5-21-76); 139 v S 199 (Eff 1-5-83); 146 v S 2 (Eff 7-1-96); 146 v S 269. Eff 7-1-96.

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION
PERJURY

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 2921.12 (2005)

§ 2921.12. Tampering with evidence

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

HISTORY: 134 v H 511. Eff 1-1-74.

OHIO RULES OF CRIMINAL PROCEDURE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

OH Crim. R. 52 (Anderson 2003)

Rule 52. Harmless Error and Plain Error

(A) Harmless error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.