IN THE SUPREME COURT OF OHIO

STATE OF OHIO Appellee, v. **JAMES TRIMBLE** Appellant.	CASE NO. 05-2436 On Appeal From the Portage County Court of Common Pleas, Case No. 2005 CR 0022 CAPITAL CASE

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STATEMENT OF THE CASE AND FACTS

I. Facts

On the evening of January 21, 2005, Trimble went down into the basement at the 880 Sandy Lake Road, a residence he shared with girlfriend, Renee Bauer and her seven-year-old son Dakota. (Book 11-T.p. 2627). He was the only individual who had access to a locked gun safe and control of the key, which unlocked a separately padlocked ammunition cabinet that were located in the basement. (State's Exhibits 328 A and B). Once in the basement, Trimble unlocked the gun safe, chose an assault rifle from among a large collection of various types of firearms, and closed and locked the gun safe. (State's Exhibits 328 A and B). He then unlocked the ammunition cabinet and removed high powered ammunition and loaded the assault rifle. (State's Exhibits 328 A and B).

Trimble climbed the basement steps up to the first floor of the residence, proceeded to the doorway of the master bedroom and pulled the trigger of the assault rifle nineteen times while the rifle was aimed at Renee and Dakota. Thirteen bullets hit Renee as she attempted to shield Dakota from the gunfire. (Transcript of Trial Proceedings hereinafter referred to as "Book 16-T.p." 3939-3940). As Renee placed her body between Dakota and the killer, she turned to look at Trimble and received a fatal shot to her head and another in her shoulder. (Book 16-T.p. 3939-3940). Eleven more bullets hit Renee in her back.

Renee's head injury was caused by high velocity projectiles and resulted in an explosive injury that was very destructive, fragmenting her skull and tearing her brain tissue. (Book 16-T.p. 3941). When the high velocity bullet struck Renee's head, scalp tissue, brain matter and pieces of her skull were projected in an outward direction from the point of impact to a significant distance away from Renee's body. (Book 17-T.p. 4908-4910).

A group of gunshot wounds to Renee's upper back resulted in injury to the vertebrae, multiple rib fractures, and injuries to the soft tissues of her lungs. (Book 16-T.p. 3957). Another group of gunshots, which entered her abdominal area, injured her bowels and lungs. (Book 16-T.p. 3958). A third group of gunshots entered her lower abdominal area and resulted in injuries to her bladder, rectum, uterus, vagina and devastating fractures to her pelvis. (Book 16-T.p. 3958). All of Renee's gunshots wounds were potentially fatal with the exception of one gunshot that entered her hand.

As Renee was standing between Dakota and Trimble's rifle, her body became an intermediary target. All of Dakota's six gunshot wounds were re-entry wounds caused when the six bullets passed through Renee's abdomen and struck Dakota. Dakota's three fatal wounds were a gunshot wound that entered his neck, traveled up into his chin, damaging his larynx and two major blood vessels. (Book 17-T.p. 4032). And two larger gunshot wounds to his chest area that collapsed his right lung and damaged his windpipe and liver. (Book 17-T.p. 4041). He also received wounds to his chin, right hand and arm from bullets that passed through a teddy bear he was clutching at the time of his death. (Book 17-T.p. 4028-4029, 4046-4067).

Trimble left the two dead bodies on the bedroom floor, returned to the basement and geared up to confront the police. He put on long underwear, heavy camouflage clothes, socks and boots and took an AR-15 assault rifle, a nine millimeter Sig Sauer semi-automatic pistol and over a hundred rounds of ammunition for both weapons along with a cell phone, knife and his dog tags then headed into the woods. Moments after the double murder, Trimble confessed to his mother in a phone conversation, "I have just shot Renee and Dakota." (Book 11-T.p.

2747). Later, Trimble received a cell phone call from his bother and again admitted that he "killed the fuckin' bitch," and the boy was dead too. (Book 11-T.p. 2830).

Attempting to avoid the police, Trimble traveled through the wooded area in his neighborhood and eventually encountered Stephen Reichard and his black Labrador retriever on the edge of Reichard's driveway. Standing in the shadows with the barrel of his assault rifle aimed at the stranger's face, Trimble threatened to kill Reichard. (Book 18-T.p. 4288). As Reichard's mother, Lois Scott, exited the residence looking for her son, Trimble emerged from the shadows and threatened to kill them both. (Book 18-T.p. 4288). After some fast-talking, Reichard and Scott escaped with their lives.

For the next hour and a half, Trimble shot at officers as he moved through the woods. (State's Exhibits 328 A and B). Trimble then came upon a duplex in a rather isolated area surrounded by open fields. Ordinarily three young women occupy the duplex, but on this cold, snowy evening only Sarah Positano, a 22-year-old Kent State coed was home. Trimble broke through a patio door, went up to the second floor, discovered Sarah alone in her bedroom and took her hostage. (State's Exhibits 328 A and B). While holding the loaded nine-millimeter Sig Sauer semi-automatic pistol to her head, Trimble ordered Sarah to call 911. (State's Exhibits 328 A and B).

Sarah called 911 on her cell phone at 11:14 p.m. (State's Exhibit 303). A tape recording of the 911 call depicts a terrified Sarah relaying Trimble's demands to the 911 operator. During the 911 recording, Trimble took the phone from Sarah and said to the 911 operator, "you know what a Sig Sauer P239 is? * * * It's a nine millimeter pistol with no safety, okay, I've got the hammer held back, the trigger pulled, so if the cops shoot me or even attempt to break in here I will let go of the trigger and this innocent girl will die." (State's Exhibit 303).

Around 11:30 p.m., Sergeant Korach, a hostage negotiator, contacted Trimble on his cell phone. Trimble informed Korach that he had killed two people that had fucked with him and later identified these two people as his girlfriend and her son. (Book 18-T.p. 4475-4476). Trimble also informed Korach that he had encounter two other individuals walking their dog in the woods and he could have killed them but he let them go. (Book 18-T.p. 4477). He stated that the only reason he had not killed the couple with the dog was because those two people did what he asked. (Book 18-T.p. 4477).

Taking control of the conversation, Trimble in a calm, clear and direct voice repeated his demands, described the pistol he was holding against Sarah's head, and eventually stated that he would let Sarah go after two hours. (Book 18-T.p. 4475). Shortly after midnight, Trimble hung up with Sergeant Korach. At 12:04 a.m. there was a single gunshot on the tape recording of the 911 call. (State's Exhibit 303). As the recording continued, Sarah screamed and said, "I've been shot." (State's Exhibit 303).

Five minutes later at 12:09 a.m., the recording depicts a series of rapid fire shots. (State's Exhibit 303). Trimble continued randomly shooting his AR-15 assault rifle until it jammed (Book 14-T.p. 3455), and then fired his nine millimeter Sig Sauer until the clip was empty. (Book 14-T.p. 3460). The Swat Team released tear gas into the duplex, found Sarah lying dead from a single gunshot to her neck in the hallway of the second floor and Trimble barricaded in Sarah's bedroom.

Sarah "died from a gunshot wound to the neck with perforation of her carotid artery and left lung." (Book 19-T.p. 4636). Specifically, a single bullet punctured the skin, coursed through thick muscle on the side of Sarah's neck, perforated the carotid artery, and went through the left lung and out the chest cavity between her ribs. (Book 19-T.p. 4632). Ballistics

testing revealed that the fatal bullet was fired from Trimble's Sig Sauer. (Book 17-T.p. 4190-4191).

II. Procedural History

On January 27, 2005, the Portage County Grand Jury indicted Trimble on twelve counts of attempted murder, each with a firearm specification. (Transcript of the docket, journal entries and original papers hereinafter "T.d." 1). Trimble entered a plea of not guilty and the trial court set his bond at three million dollars. (T.d. 17). On February 3, 2005, the Portage County Grand Jury indicted Trimble on three counts of aggravated murder. (T.d. 22). Count Thirteen alleged Trimble murdered Renee Bauer with prior calculation and design and the separate aggravating circumstance that the murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, R.C. 2929.04(A)(5). (T.d. 22). Count Fourteen alleged Trimble purposely caused the death of Dakota Bauer, a child under the age of thirteen and the following two aggravating circumstances: 1) that the murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, R.C. 2929.04(A)(5), and 2) that Trimble was the principal offender who purposely caused the death of another who was under the age of thirteen at the time of the murder, R.C. 2929.04(A)(9). (T.d. 22).

Count Fifteen alleged that Trimble purposefully caused the death of Sarah Positano while committing kidnapping and aggravated burglary. Count Fifteen further alleged the following four aggravating circumstances: 1) that the aggravated murder was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by Trimble, R.C. 2929.04(A)(3), 2) that the aggravated murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, R.C. 2929.04(A)(5),

3) that the aggravated murder was committed while Trimble, the principal offender, was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary, R.C. 2929.04(A)(7) and 4) that the aggravated murder was committed while Trimble, the principal offender, was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping. (T.d. 22).

The Grand Jury also indicted him one count of aggravated burglary with a firearm specification, three counts of kidnapping with firearm specifications, two counts of felonious assault with firearm specifications and one count of having weapons under a disability with a specification. (T.d. 22). Trimble entered a plea of not guilty by reason of insanity to the new ten counts and changed his not guilty plea to a plea of not guilty by reason of insanity to the original twelve counts. (T.d. 35). Prior to trial, the State nolled four counts of attempted murder. (T.d. 341). And on September 28, 2005, Trimble withdrew his plea of not guilty by reason of insanity to all charges and entered a plea of not guilty. (T.d. 339).

The record reflects that Trimble moved the trial court to change venue on March 29, 2005 (T.d. 67), and supplemented the motion on September 14, 2005. (T.d. 323). Following two weeks of voir dire proceedings, a jury was empanelled and the court denied Trimble's motion to change venue. (T.d. 340).

The matter proceeded to a jury trial. After two weeks of voir dire, a jury and four alternates were empanelled on September 29, 2005. The record further reflects that Trimble waived his fifth preemptory challenge during jury selection. (Book 9-T.p. 2482). After its case in chief, the State nolled the remaining eight counts of attempted murder and the single count of having weapons under a disability. (T.d. 384). The trial court denied Trimble's Crim.R. 29

motion and the defense presented its case. At the conclusion of the defense case, Trimble renewed his Crim.R. 29 motion, which was again overruled by the trial court.

On October 25, 2005, the jury returned a verdict of guilty to three counts of aggravated murder and accompanying specifications, three counts of kidnapping, one count of aggravated burglary and two counts of felonious assault. (T.d. 415). The Sentencing Phase of Trimble's trial commenced. On November 4, 2005, Juror No. 11 was excused for medical reasons and Alternate Juror No. 1 was empanelled. (Book 25-T.p. 6184-6191). At the close of the Sentencing Phase, the jury found the aggravating circumstances that Trimble was found guilty of committing outweighed the mitigating factors presented by proof beyond a reasonable doubt for the aggravated murders of Renee Bauer, Dakota Bauer and Sarah Positano. (T.d. 447). The jury further recommended that the sentence of death should be imposed on Trimble. (T.d. 447).

On November 8, 2005, the trial court read its findings of fact and conclusions of law from its independent evaluation and sentenced Trimble to death by lethal injection for the three counts of aggravated murder, a prison term of ten years for aggravated burglary consecutive to the five years for the firearm specification, a prison term of ten years for kidnapping (Count Seventeen) consecutive to the five years for the firearm specification, a prison term of seven years each for the two remaining kidnapping counts consecutive to the five years each for the respective firearm specifications, and a prison term of seven years each for the two counts of felonious assault consecutive to the five years each for the respective firearm specifications. (T.d. 450). The prison terms for the aggravated burglary count, the three counts of kidnapping and the two counts of felonious assault were to run consecutive to each other. (T.d. 450).

Trimble filed a timely notice of appeal with this Court on December 30, 2005. (Supreme Court Case No. 05-2436). The record was filed with this Court on November 28,

2006, and following a requested extension, Trimble filed his brief with this Court on June 18, 2007.

ARGUMENT

Trimble's Propositions of Law Nos. 1 through 5 all involve issues related to voir dire and jury selection. For ease of discussion, the State presents the following summaries of the voir dire procedure and seated jury before responding individually to Trimble's first five propositions of law.

1. Summary of Voir Dire Procedure

In the present case, the trial court held Trimble's motion to change venue in abeyance in order to determine whether pretrial publicity tainted the jury pool. It then conducted a thorough voir dire, as evidenced by the fact that voir dire took two weeks to complete and encompassed nine volumes and approximately 2485 pages of transcript. After the jury was empanelled, the trial court denied Trimble's motion for a change of venue. (T.d. 340; Book 9-T.p. 2386-2389).

The record reflects that the trial court conducted individual voir dire of 116 prospective jurors on the issues of pretrial publicity and the death penalty. (Book 1-T.p. 9 through Book 8-T.p. 2265). The trial court excused 47 prospective jurors for various reasons including but not limited to financial hardship or status as a fulltime student or sole caregiver to elderly or infant family members. (Book 1-T.p. 21, 228, 289; Book 2-T.p. 451, 509, 601, 614; Book 3-T.p. 687, 689; Book 4-T.p. 1046, 1057, 1059, 1084, 1137, 1211; Book 5-T.p. 1268, 1270, 1335, 1402, 1403, 1428, 1468, 1479, 1506; Book 6-T.p. 1564, 1587, 1599, 1618, 1628, 1689, 1723, 1765; Book 7-T.p. 1836, 1850, 1899, 1994, 2013, 2011, 2054, 2069, 2096; and Book 8-T.p. 2154, 2181, 2227, 2231, 2233, 2234.)

The record further reflects that during the individual voir dire, Defense Counsel challenged for cause ten prospective jurors. Defense Counsel challenged Prospective Jurors Nos. 26, 28, 81 and 104, for cause on the grounds of pretrial publicity. (Book 1-T.p. 221, 265; Book 3-T.p. 706, 987). The trial court sustained the defense challenge for cause and excused Prospective Juror No. 26 on the grounds that this prospective juror closely followed the media coverage of the case and could not put aside what was learned from the media. (Book 1-T.p. 221). The trial court overruled the challenge for cause on Prospective Jurors Nos. 28, 81 and 104.

Defense Counsel challenged for cause, Prospective Jurors Nos. 14, 19, 25, 26, 36, 28, and 81, on the grounds that these jurors would automatically impose the death penalty upon a finding of guilt in the first phase of the trial. (Book 1-T.p. 94, 135, 213, 309, 265; Book 3-T.p. 706). The trial court sustained three of these challenges and made the express finding that Prospective Jurors Nos. 25, 26, and 36 views on the death penalty would substantially impair their ability to be a juror on the case and excused them. (Book 1-T.p. 213, 221, 313). Prospective Jurors Nos. 14, 19, 28 and 81 remained in the jury pool because the trial court found these prospective jurors met the *Adams-Witts* standard.

The State challenged for cause Prospective Jurors Nos. 132, 157 and 166, on the grounds that these individuals could not vote to impose the death penalty. (Book 4-T.p. 1158; Book 5-T.p. 1466, Book 6-T.p. 1586-1587). The trial court sustained the challenges and excused Prospective Jurors Nos. 132 and 157, finding that both prospective jurors unequivocally could not impose the death penalty (Book 4-T.p. 1158; Book 5-T.p. 1466) and that Prospective Juror No. 166's views on the death penalty would affect and substantially impair his ability to perform his duties in accordance with the law, specifically he could not

follow instructions regarding the weighing of mitigating and aggravating circumstances. (Book 6-T.p. 1587).

General voir dire was conducted. (Book 8-T.p. 2266). The trial court excused an additional 14 Prospective Jurors before seating the jury. (Book 8-T.p. 2293, 2302, 2307, 2334, 2341, 2343, 2344, 2379; Book 9-T.p. 2385, 2401, 2429, 2432). At the beginning of the peremptory challenges, the jury was seated with Prospective Jurors Nos. 63, 14, 17, 21, 23, 24, 55, 35, 62, 45, 47, and 51. First peremptory challenge, the State excused Prospective Juror No. 45 who was replaced by No. 65 and Defense excused Prospective Juror No. 14 who was replaced by No. 68. (Book 9-T.p. 2479). Second peremptory challenge, the State excused Prospective Juror No. 63 who was replaced by No. 72 and Defense excused Prospective Juror No. 51 who was replaced by No. 81. (Book 9-T.p. 2479-2480).

Third peremptory challenge, the State excused Prospective Juror No. 47 who was replaced by No. 84 and Defense excused Prospective Juror No. 55 who was replaced by No. 85. (Book 9-T.p. 2480). Fourth peremptory challenge, the State excused Prospective Juror No. 34 who was replaced by No. 91 and Defense excused Prospective Juror No. 91 who was replaced by No. 97. (Book 9-T.p. 2481).

Fifth peremptory challenge, the State excused Prospective Juror No. 97 who was replaced by No. 98 and the Defense waived its fifth peremptory challenge. (Book 9-T.p. 2481-2482). Sixth peremptory challenge, the State excused Prospective Juror No. 98 who was replaced by No. 101 and Defense excused Prospective Juror No. 101 who was replaced by No. 104. (Book 9-T.p. 2482). Four alternates were seated and following the peremptory challenges, Prospective Jurors Nos. 139, 134, 115, and 136 remained as Alternate Jurors. (Book 9-T.p. 2485).

Finally, during voir dire and throughout the trial, the judge repeatedly admonished prospective and seated jurors to avoid exposure to information about the case outside the courtroom and to advise the court of any incidents of exposure. No incidents were reported, and nothing in the record indicates that jurors did not follow the judge's instructions.

2. Trimble Jury

The following is a list of the jurors in Trimble's trial with reference to their assigned number on the jury and corresponding prospective juror number:

Juror No. 1 – Prospective Juror No. 72
Juror No. 2 – Prospective Juror No. 68,
Juror No. 3 – Prospective Juror No. 17,
Juror No. 4 – Prospective Juror No. 21,
Juror No. 5 – Prospective Juror No. 23,
Juror No. 6 – Prospective Juror No. 24,
Juror No. 7 – Prospective Juror No. 85,
Juror No. 8 – Prospective Juror No. 104,
Juror No. 9 – Prospective Juror No. 62,
Juror No. 10 – Prospective Juror No. 65,
Juror No. 11 – Prospective Juror No. 84,
Juror No. 12 – Prospective Juror No. 81,
Alternate Juror No. 1 – Prospective Juror No. 139,
Alternate Juror No. 2 – Prospective Juror No. 134,
Alternate Juror No. 3 – Prospective Juror No. 115,
Alternate Juror No. 4 – Prospective Juror No. 136.

After the jury rendered a verdict of guilty in the first phase of the trial, Juror No. 11 was excused due to illness and was replaced by Alternate Juror No. 1, for the sentencing phase of the trial. (Book 25-T.p. 6191-6192).

The record reflects that Defense Counsel only raised challenges for cause on three Jurors who were actually involved in Trimble's trial. Specifically, Defense Counsel challenged Jurors Nos. 8, 12 and Alternate Juror No. 1 on the grounds of pretrial publicity and additional challenged for cause Alternate Juror No. 1 on the ground that he would automatically vote to impose the death penalty. The trial court overruled these challenges. (Book 3-T.p. 706, 721,

986-987, Book 5-T.p. 1331). The State raised no challenges for cause on any of the Jurors who were actually involved in Trimble's trial.

With regards to pretrial publicity and knowledge gained through exposure to the media: Jurors Nos. 1 and 3 knew nothing about the case (Book 1-T.p. 95; Book 2-T.p. 638), Jurors Nos. 4, 6, and 7 were aware of the case from initial media reports in January 2005, but could not recall any specific details (Book 1-T.p. 140, 175; Book-T.p. 751), Jurors Nos. 2, 5, 8, 10, 11 and Alternate Juror No. 1 were aware of only general information that three people were shot and killed including a girlfriend, child and Kent State University student. (Book 1-T.p. 159-160; Book 2-T.p. 581, 616; Book 3-T.p. 725, 968-969; Book 5-T.p. 1303).

Juror No. 9 lived near the Sandy Lake Road crime scene and was interested in the news stories when the crime occurred in January of 2005, because of his familiarity with the area. (Book 2-T.p. 534). He recalled Trimble supposedly shot two women and a boy before being arrested. He also recalled that the events started in Trimble's home on Sandy Lake Road where two people were shot and that Trimble moved to Ranfield Road. He further recalled that Trimble barricaded himself in the young woman's apartment before giving up to the police. (Book 3-T.p. 534).

Juror No. 12 also lived within a mile of the Ranfield Road crime scene. (Book 3-T.p. 694). She recalled hearing a noise the night of the murders that she believed was fireworks. After a friend phoned and said that someone was shooting people, Juror No. 12 looked for information on the TV and internet but found nothing. (Book 3-T.p. 696). She read an internet article posted by the Record Courier newspaper the next morning and recalled that Trimble had shot and killed his girlfriend and her son and then went on a two-hour shooting spree in the

woods. (Book 3-T.p. 699). She also stated that Trimble took a girl hostage and killed her. (Book 3-T.p. 701).

With regards to the death penalty, Jurors Nos. 5 and 12 stated they had mixed feelings about the death penalty (Book 1-T.p. 162; Book 3-T.p. 717), and Jurors Nos. 3, 4, 9, and 10 stated that this was the first time they were asked to publicly state an opinion about the death penalty. (Book 1-T.p. 105, 152; Book 2-T.p. 538, 584). However, the twelve jurors and the first alternate all met the *Adams-Witt* standard for death qualifying a jury by stating that their views on capital punishment would not prevent or substantially impair their performance of the jury duties in accordance with the jury instructions and oath. (Book 1-T.p. 98, 143-144, 160, 176; Book 2-T.p. 536-537, 582-583, 620-621, 639-640; Book 3-T.p. 703-704; 730-731, 752-754, 970-971; Book 5-T.p. 1312-1313).

RESPONSE TO PROPOSITION OF LAW NO. 1:

In proposition of law one, Trimble attacks the trial judge's decision to deny his motion for a change of venue. In support of his contentions, Trimble points to alleged pervasive pretrial publicity and argued this Court should find presumptive prejudice pursuant to *Rideau v. Louisiana* (1963), 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, thereby relieving him of the burden of showing actual bias of one of his jurors. Although there may have been a great deal of publicity about the murders in Portage County at the time the murders occurred, Trimble failed to demonstrate that the media coverage of the murders so saturated the county and influenced the potential venire that he was deprived of a fair trial.

Standard of Review

A trial court's ruling on a motion for a change of venue pursuant to Crim.R. 18(B) will not be disturbed on appeal unless the trial court abused its discretion. *State v. Lundgren* (1995), 73 Ohio St.3d 474, 479, 653 N.E.2d 304; *State v. Landrum* (1990), 53 Ohio St.3d 107, 116, 559 N.E.2d 710. The Supreme Court of Ohio has long held that a careful and searching voir dire examination provides the best test of whether prejudicial pretrial publicity prevents the seating of a fair and impartial jury from the community. *State v. Lynch* (2003), 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, at ¶35; *Landrum*, 53 Ohio St.3d at 117, 559 N.E.2d 710; *State v. Swiger* (1966), 5 Ohio St.2d 151, 214 N.E.2d 417, paragraph one of the syllabus.

A defendant claiming that pretrial publicity denied him a fair trial must show that one or more jurors were actually biased. *State v. Treesh* (2001), 90 Ohio St.3d 460, 464, 739 N.E.2d 749. Pretrial publicity, even pervasive, adverse publicity, does not inevitably lead to an unfair trial. *Nebraska Press Assn. v. Stuart* (1976), 427 U.S. 539, 554, 96 S.Ct. 2791, 49 L.Ed.2d 683. Only in rare cases may prejudice be presumed. *Treesh*, 90 Ohio St.3d at 464, 739 N.E.2d 749. "[D]eference must be paid to the trial judge who sees and hears the juror." *Wainwright v. Witt* (1985), 469 U.S. 412, 426, 105 S.Ct. 844, 853, 83 L.Ed.2d 841.

Analysis

1. Failure to Exhaust Peremptory Challenges Resulted In a Waiver of Venue Issue

The record reflects that Defense Counsel timely filed a motion requesting the court to order a change of venue in the trial of the case. (T.d. 67, 323). At trial, after the exercise of four peremptory challenges, Defense Counsel waived his fifth peremptory challenge to which he was entitled by Crim.R. 24. (Book 9-T.p. 2481-2482). That choice waived the motion for change of venue and any appellate issues regarding venue. *State v. Getsy* (1998), 84 Ohio St.3d

180, 189, 702 N.E.2d 866, overruled on other grounds, *Getsy v. Mitchell* (C.A.6, 2006), 456 F.3d 575. Accordingly, Trimble's first proposition of law is without legal merit.

2. *Rideau* Principle of Presumptive Prejudice Not Applicable to Present Case

On appeal, Trimble relies on *Rideau v. Louisiana* (1963), 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 and *Irvan v. Dowd* (1961), 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751, for the proposition that this Court should apply presumptive prejudice from the pretrial publicity in his case. In *Rideau,* the United State's Supreme Court, "without pausing to examine a particularized transcript of the voir dire examination of members of the jury," overturned the conviction of a habeas petitioner whose uncounseled confession had been filmed, recorded, and then telecast three times by the local television station to large audiences in the Louisiana parish from which the jury was drawn and in which he was tried less than two months later. *Id.*, 373 U.S. at 727, 83 S.Ct. at 1419-1420, 10 L.E.d.2d 663.

The principle taken from this holding by Federal and state courts subsequently discussing the case is that where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, jury prejudice is presumed and there is no further duty to establish bias. When the *Rideau* principle applies, the petitioner need not show that the pervasive community prejudice actually entered the jury box.

As virtually every case of any consequence will be the subject of some press attention, the *Rideau* principle of presumptive prejudice is only rarely applied and confined to those instances where the petitioner can demonstrate an "extreme situation" of inflammatory pretrial publicity that literally saturated the community in which the trial was held. *Nebraska Press Assn. v. Stuart*, 472 U.S. at 554, 96 S.Ct. at 2800, 49 L.Ed.2d 638.

This Court has never applied the *Rideau* principle to reverse a conviction. In *Lundgren*, this Court specifically rejected the Defendant's presumptive prejudice argument. *Lundgren*, 73 Ohio St.3d at 479, 653 N.E.2d 304. The *Lundgren* case involved the murders of five family members who had been invited to dinner at the Lundgren residence and then one by one were escorted to the barn, shot and buried. Lundgren had developed a religious cult that engaged in paramilitary training to prepare for an assault on their "temple." Several years after the murders, one member of the cult left and reported the murders to the FBI.

The discovery of this murdered family resulted in massive, inflammatory, statewide publicity. The local Lake County News Herald printed a total of 227 Lundgren related items, including 61 front page stories. The Plain Dealer, a Cleveland based newspaper with wide circulation in Lake County, published 123 articles, including 31 on the front page. At this same time, Channel 43 had 66 stories, Channel 5 had 112 stories and Channel 8 had 169 stories. The Lundgren case was referred to in the media as "the Kirtland Massacre."

The trial court denied Lundgren's motion for a change of venue. This Court acknowledged that a change of venue may have been prudent; however, held that the trial court did not abuse its discretion in denying the motion. *Id.*, 73 Ohio St.3d at 479, 653 N.E.2d 304. This Court further held that Lundgren had, "not established the rare case in which prejudice is presumed." *Id.*, 73 Ohio St.3d at 480, 653 N.E.2d 304. After reviewing the extensive voir dire of the jury, this Court found that the trial court was in the best position to judge each juror's demeanor and fairness.

In the present case, Trimble supported his motion for a change of venue with approximately 33 articles in the Record Courier newspaper including 26 on the front page and in the Akron Beacon Journal, an Akron based newspaper with circulation in Portage County, 23

articles including 13 on the front page. (T.d. 67, 323). These stories included details of the crime (such as the coroner's report of the number of bullets recovered from the victims), trial court proceedings, gag order information, Trimble's alleged drug and alcohol abuse, Trimble's prior conviction, information regarding the murder weapons and memorial service information. (T.d. 67, 323). At a hearing on the change of venue motion, Defense Counsel also presented testimony from the local television stations regarding their coverage of the January 2005 murders. Approximately 195 news programs aired on the local television stations. (April 25, 2005 Motion Hearing, T.p. 19).

In the present case, there were a total of approximately 77 articles from two newspapers in approximately 8 months and 195 television news stories in three months. In comparison, in *Lundgren* there were 300 stories on three television stations and 270 articles in two newspapers in the same time period. A review of the media coverage in the present case reveals it was not even close to the amount and type of coverage that this Court rejected as grounds for presumptive prejudice in *Lundgren*. As Trimble failed to present the rare case in which prejudice is presumed, absent a showing of actual bias of one of his jurors a change of venue was not proper. Accordingly, the trial court did not abuse its discretion in denying the motion for change of venue on this basis.

3. <u>Denial of Motion to Change Venue Was Not an Abuse of Discretion</u>

To support his claim that fairness was lacking and that pretrial publicity impaired the trial court's ability to seat an impartial jury, Trimble cites the voir dire of Prospective Jurors Nos. 81 and 104. These two prospective jurors were empanelled on Trimble's jury, Prospective Juror No. 81 served as Juror No. 12 and Prospective Juror No. 104 served as Juror No. 8. (Book 9-T.p. 2480, 2482).

A review of Prospective Juror No. 81's individual voir dire reveals that she lived approximately one mile from the Ranfield Road crime scene. (Book 3-T.p. 694). The evening of the murders, Prospective Juror No. 81 was at home with her new baby and heard a noise she believed was fireworks. (Book 3-T.p. 699). After a friend phoned and said that someone was shooting people, Prospective Juror No. 81 looked for information on the TV and internet but found nothing. (Book 3-T.p. 696). She read an internet article posted by the Record Courier newspaper the next morning and recalled some media coverage at the time of the crimes, nothing recent.

Prospective Juror No. 81 stated that Trimble had shot and killed his girlfriend and her son and then went on a two hour shooting spree in the woods. (Book 3-T.p. 699). She also stated that Trimble took a girl hostage and killed her. (Book 3-T.p. 701). Despite her knowledge of this information, Prospective Juror No. 81 said that she could be fair and impartial believing that everyone was entitled to a fair trial. (Book 3-T.p. 702). If seated as a juror in the case, she would listen to the evidence to hear what really happened and felt that the trial evidence could make someone forget what they had previously heard from the media. (Book 3-T.p. 702).

Defense Counsel challenged this prospective juror pursuant to two causes listed in Crim.R. 24(C). First, as a person who was a witness to the events of the crime and second, as a person evincing a bias toward the defendant based as a result of her exposure to the pretrial publicity. (Book 3-T.p. 704, 721).

Crim.R. 24(C)(8) provides that a person called as a juror may be challenged for cause when, "[t]hat juror has been subpoenaed in good faith as a witness in the case." Crim.R. 24(C)(8). The rule further provides that a person called as a juror may be challenged for cause

when the juror "is possessed of a state of mind evincing enmity or bias toward the defendant or the state." Crim.R. 24(C)(9). However, if an examination of the person satisfies the trial court that the person "will render an impartial verdict according to the law and evidence submitted to the jury at the trial," the fact that the person has previously formed or stated an opinion regarding the guilt or innocence of the defendant can not be grounds for disqualification. Crim.R. 24(C)(9).

The record reflects that Prospective Juror No. 81 had not been subpoenaed as a witness by either party. (Book 3-T.p. 705). Defense Counsel then claimed that she could be subpoenaed now that the Defense was aware of her existence. (Book 3-T.p. 705-706). As such a subpoena would not have been in good faith, the trial court properly denied the Defense challenge for cause on this ground. (Book 3-T.p. 706). The fact that a prospective juror has heard about some aspects of the case prior to trial does not necessarily reflect bias or lack of impartiality. *State v. Ahmed* (2004), 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.Ed.2d 637, at ¶ 37-41. Although Prospective Juror No.81 was aware of the media reports concerning this case at the time that the murders occurred, she stated that she was not aware of any recent media coverage and could put aside her prior media knowledge to determine the case on the evidence presented at trial if she were seated as a juror. The trial court properly denied the Defense challenge for cause on knowledge from pretrial publicity.

Furthermore, the record reflects that Prospective Juror No. 81 was seated on the jury as Juror No. 12 at the time that Defense Counsel waived his fifth peremptory challenge. (Book 9-T.p. 2480-2482). Despite raising a challenge for cause on pretrial publicity grounds, Defense Counsel did not exhaust his peremptory challenges and left Prospective Juror No. 81 on the jury, indicating that the Defense was not particularly troubled by the juror's exposure to pretrial

publicity once voir dire was completed. *Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.Ed.2d 1185, at ¶ 37.

A review of Prospective Juror No. 104 reveals that he was exposed to media reports of the murders in the Beacon Journal newspaper, on 93.1 radio station, on Fox 8 news at noon, via a pop up headline on the internet and through conversations that he either overheard or had with co-workers. (Book 3-T.p. 959-968). Although approximately 35 articles had appeared in the Akron Beacon Journal, Prospective Juror No. 104 stated that he had maybe glanced at some of them. (Book 3-T.p. 966). He listened to the radio on the way to work, but stated he was not influenced by the station's coverage of the murders. (Book 3-T.p. 967).

He recalled that three people died from being shot and that Trimble was accused of shooting them. (Book 3-T.p. 968). When asked whether he had formed an opinion about the case, Prospective Juror No. 104 stated, "[j]ust a brutal killing" from what he had seen and read in the paper at the time of the murders. (Book 3-T.p. 969). As Prospective Juror No. 104 stated that he could follow the trial court's instructions and determine the case based only on the evidence and testimony presented at trial, the trial court properly denied the Defense challenge for cause on the grounds of pretrial publicity.

A thorough review of the record demonstrates that many prospective jurors who were questioned concerning pretrial publicity had, indeed, obtained some form of information regarding Trimble's crimes as a result of pretrial publicity. However, the record shows that a significant number of the prospective jurors were not influenced by the publicity, and that some knew nothing about the crimes. Furthermore, the record supports the conclusion that the impartiality of the members of the jury ultimately selected in the case at bar was not compromised by the pretrial publicity.

This Court has found no abuse of discretion when virtually every prospective juror had read or heard media reports regarding the case. *Landrum*, 53 Ohio St.3d at 116-117, 559 N.E.2d 710. Even when there was significant coverage of a little girl's disappearance and the community's search for several days followed by the media revealing that a defendant confessed, took authorities to the location of the body and had a prior record of sexual conduct with a child, this Court did not find abuse of discretion regarding pretrial publicity. *Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, at ¶35.

The trial court's decision denying Trimble's motion to change venue reflects an application of the test this Court recognized in *State v. Lockett* (1976), 49 Ohio St.2d 48, 358 N.E.2d 1062, reversed on other grounds (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973. In *Lockett*, this Court reaffirmed its belief that where the record on voir dire establishes that prospective veniremen have been exposed to pretrial publicity but affirmed they would judge the defendant solely on the law and evidence presented at trial, it is not error to empanel such veniremen. The best test for a change of venue is the ability to seat an impartial jury.

In this case, Trimble was apparently satisfied with the jury panel in that he did not find it necessary to exercise all of his peremptory challenges. *State v. Maurer* (1984), 15 Ohio St.3d 239, 251, 473 N.E.2d 768. In short, this is not a case in which there is a reasonable likelihood that Trimble did not receive a fair trial. Trimble has failed to demonstrate actual bias of one of his jurors. Accordingly, the trial court did not abuse its discretion in denying the motion for change of venue. Trimble's first proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 2:

In his second proposition of law, Trimble argued that the trial court's failure to excuse for cause prospective jurors that favored the death penalty created a jury that was predisposed towards death. He further argued that the trial court's failure to excuse for cause prospective jurors who were biased or prejudiced against him was an abuse of discretion.

Standard of Review

The standard for qualifying a jury in a capital case in Ohio is derived from Ohio statutory law as well as case law. According to R.C. 2945.25(C), a person called as a juror in a criminal case may be challenged for cause if:

> [i]n the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

R.C. 2945.25(C).

The appropriate standard for determining whether a prospective juror may be excluded for cause is whether that juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *State v. Rogers* (1985), 17 Ohio St.3d 174, 478 N.Ed.2d 984, paragraph three of the syllabus, vacated and remanded on other grounds (1985), 474 U.S. 1002, 106 S.Ct. 518, 88 L.Ed.2d 452. This standard is referred to as the *Adams-Witt* standard, and is the current standard for death qualifying a jury in a capital case in Ohio. *Adams v. Texas* (1980), 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 and *Wainwright v. Witt* (1985), 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841.

R.C. 2313.42(J) contemplates that "good cause" exists for the removal of a prospective juror when, "he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court." A prospective juror challenged for cause should be excused "if the court has any doubts as to the juror's being entirely unbiased." R.C. 2313.42, *State v. Cornwell* (1999), 86 Ohio St.3d 560, 564, 715 N.E.2d 1444.

Determinations of a prospective juror's bias depend largely on the trial court's assessment of the potential juror's demeanor and credibility. Therefore, great deference is given to the trial court's determination of whether to excuse a prospective juror. *State v. Combs* (1991), 62 Ohio St.3d 278, 285-286, 581 N.Ed.2d 1071. A trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion. *State v. Wilson* (1972), 29 Ohio St.2d 203, 211, 280 N.Ed.2d 915.

An abuse of discretion is "more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.Ed.2d 144. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.Ed.2d 748.

Analysis

1. Trimble Waived Trial Court Rulings on Challenges for Cause by Failing to Exhaust Peremptory Challenges

"A defendant in a criminal case cannot complain of an error in the overruling of a challenge for cause if such ruling does not force him to exhaust his peremptory challenges." *State v. Eaton* (1969), 19 Ohio St.2d 145, 249 N.E.2d 897, paragraph one of the syllabus,

vacated on other grounds (1972), 408 U.S. 935, 92 S.Ct. 2857; *State v. Poindexter* (1988), 36 Ohio St.3d 1, 5, 520 N.E.2d 568.

On appeal, Trimble asserted that the trial court abused its discretion in failing to remove for cause Prospective Jurors Nos. 14, 19, 41, 133, 139, 200 and 213, as individuals that would automatically impose the death penalty, Prospective Juror No. 205 as a person who would impose the death penalty for all child killers and Prospective Jurors Nos. 28 and 81 as individuals that held opinions against Trimble.

Of these ten prospective jurors only two, Nos. 81 and 139, were seated on Trimble's jury. (Book 9-T.p. 2479-2480, 2485). As the jury selection process was completed with Prospective Juror No. 139, Trimble's arguments regarding Prospective Jurors 200, 205 and 213 are irrelevant. (Book 9-T.p. 2485).

Prospective Jurors Nos. 14 and 133 were initially seated as Jurors No. 2 and Alternate Juror No. 1, respectively. Defense Counsel removed Prospective Juror No. 14 with his first peremptory challenge and removed Prospective Juror No. 133 with his first peremptory challenge for the alternate jurors. (Book 9-T.p. 2479, 2485). Trimble's alleged Sixth Amendment claims regarding Prospective Jurors Nos. 14 and 133 are precluded because the challenged prospective jurors were eliminated by defense peremptory challenges and therefore did not sit on the jury. See *Ross v. Oklahoma* (1988), 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80.

Ohio law recognizes that only, "where the defense exhaust its peremptory challenges before the full jury is seated, the erroneous denial of a challenge for cause in a criminal case may be prejudicial." *Cornwell*, 86 Ohio St.3d at 564, 715 N.E.2d 1444. The record reflects that Defense Counsel failed to exhaust its peremptory challenges when it waived its fifth peremptory

challenge. (Book 9-T.p. 2481-2482). As Trimble did not exhaust his peremptory challenges, the trial court's rulings on challenges for cause are waived. *Eaton*, 19 Ohio St.2d at 149, 249 N.Ed.2d 897. Trimble's second proposition of law is without merit.

2. Trial Court Did Not Abuse Its Discretion Ruling on Challenges for Cause

Assuming *arguendo* that this Court reaches the merits of the second proposition of law, the State submits the following response. Before either party was allowed to question the prospective jurors, the trial court informed the prospective juror that there would be an inquiry into the person's views on capital punishment. The trial court questioned each person and then allowed the State and Defense to ask questions.

a. Prospective Jurors Removed With Defense Peremptory Challenge

Prospective Juror No. 14

As stated above, Prospective Juror No. 14 was initially seated on Trimble's jury as Juror No. 2 and was removed with Defense Counsel's first peremptory challenge. (Book 9-T.p. 2479).

In response to the trial court's initial death penalty questions, Prospective Juror No. 14 stated that she held neither moral nor religious reasons to oppose the death penalty, she would not disregard the evidence or law and automatically vote for the death penalty, and she would follow the trial court's instructions. (Book 1-T.p. 81-82). Prospective Juror No. 14's responses indicated that this was the first time she was asked to publicly state her view on the death penalty. (Book 1-T.p. 88).

Her general opinion was that she believed in the death penalty. (Book 1-T.p. 82). When asked to describe the types of cases where the death penalty would be appropriate, she replied, "if a person has really murdered people and stuff." (Book 1-T.p. 83). She further explained

that it would depend on the facts of the case. Prospective Juror No. 14 understood the difference between aggravating circumstances and mitigating factors and that a jury on this case would have the responsibility of weighing those two things. (Book 1-T.p. 84).

In response to Defense questioning, she further attempted to describe the types of cases where the death penalty would be appropriate. She did not believe that the death penalty would be appropriate in every murder, rather it would depend on the facts of the case. (Book 1-T.p. 87). In her attempts to clarify, Defense Counsel got her to agree that absent a legitimacy accompanying the killing, the death penalty would be appropriate. (Book 1-T.p. 87).

Outside the presence of the prospective juror, Defense Counsel challenged her for cause as a juror that would automatically impose the death penalty and the trial court asked her to return to the courtroom where she stated that she would follow his instructions regarding the death penalty. (Book 1-T.p. 14). The trial court overruled the Defense challenge as she disclosed by her answers that she could be a fair and impartial juror and would follow the law as given to her by the court.

In failing to dismiss Prospective Juror No. 14, the trial court observed that the standard to excuse an individual is not whether the person is for or against the death penalty, "but if they will follow my instructions." (Book 1-T.p. 94). Prospective Juror No. 14 did state that she would follow the trial court's instructions and her credibility in making such statements was a matter for the trial judge. *Wainwright*, 469 U.S. at 426, 105 S.Ct. at 853, 83 L.Ed.2d 841. Accordingly, Trimble failed to demonstrate that the trial court abused its discretion in denying the challenge for cause of Prospective Juror No. 14.

Prospective Juror No. 133

The record reflects that after individual voir dire on pretrial publicity and capital punishment, Prospective Juror No. 133 was asked to return for the general voir dire. Following the selection of the twelve jurors, Prospective Jurors Nos. 105, 112, 115 and 125 were seated as the four alternate jurors. Prospective Juror No. 133 became Alternate Juror No. 1 following the State's first peremptory challenge for the alternate jurors. (Book 9-T.p. 2484). Then, Defense Counsel exercised his second alternate, peremptory challenge removing Prospective Juror No. 133. (Book 9-T.p. 2484).

In response to the trial court's initial death penalty questions, Prospective Juror No. 133 stated that he held neither moral nor religious reasons to oppose the death penalty, he would not disregard the evidence or law and automatically vote for the death penalty, he would follow the trial court's instructions and could impose a life sentence. (Book 4-T.p. 1160-1161).

When initially asked to explain his position on the death penalty, Prospective Juror No. 133 stated that he believed in the death penalty, described it as an "eye for an eye." (Book 4-T.p. 1162). Although he initially stated the death penalty in terms of "an eye for an eye," he then learned throughout the voir dire process that the death penalty was only available in aggravated murder cases not plain murder cases and that if seated as a juror there would be a trial stage to determine the guilt or innocence and then a penalty stage. (Book 4-T.p. 1162-1168).

The record reflects the following attempts by Defense Counsel to characterize Prospective Juror No. 133's philosophy on capital punishment:

> Defense Counsel: And are you - - you're of the opinion that any time someone takes the life of someone they should give their own life, is that your basic philosophy?

Prospective Juror 133: No, a little bit further - - when the attorney, who was the other gentleman questioning me?

Defense Counsel: The prosecutor.

Prospective Juror 133: The prosecutor when he was questioning me, like I said, I think the punishment should fit the crime.

Defense Counsel: Okay.

Prospective Juror 133: More so an eye for an eye type of thing.

Defense Counsel: I'm sorry, could you say that again? I didn't hear the first part of what you said.

Prospective Juror 133: The punishment should fit the crime is what I said.

Defense Counsel: Right.

Prospective Juror 133: Is what I said and I said more along that lines when I was referencing an eye for an eye.

* * *

Defense Counsel: Would you say your belief is more if you commit a murder you should pay for that murder with your own life, is that your belief?

Prospective Juror 133: No, my belief is that the punishment should fit the crime, all right? There are various types of murder obviously.

(Book 4-T.p. 1171-1172). Despite Defense Counsel's two attempts to characterize this prospective juror as a person that would automatically impose the death penalty, Prospective Juror No. 133 remained firm in his belief that the punishment should fit the crime. He further stated that not all murders were violent and the manner of the death would be an important factor in his consideration of the death penalty. (Book 4-T.p. 1173).

He repeatedly stated that he would follow the trial court's instructions and not automatically impose the death penalty upon a finding of guilt at the trial stage of the case. He also explained that he believed that there were things that the defendant could present as

mitigating factors that he would assign weight to in his consideration of the death penalty. (Book 4-T.p. 1180). The trial court overruled Defense Counsel's challenge for cause that Prospective Juror No. 133 would automatically vote for the death penalty. (Book 4-T.p. 1184).

The questioning reveals this prospective juror's greater understanding of his role as a juror and his willingness to follow the law as voir dire progressed. *State v. Johnson* (2006), 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, at ¶192. Prospective Juror No. 133's responses to the questions posed do not necessarily indicate that if he were a member of the jury, he would refuse to listen to the mitigating evidence in violation of his instructions and oath. Nor do they indicate that he had irrevocably made up his mind to sentence Trimble to death in the event of his conviction. Taken as a whole, the record does not show that the trial judge abused its discretion when it overruled Trimble's challenge for cause. *State v. Wilson* (1972), 29 Ohio St.2d 203, 211, 280 N.E.2d 915.

b. Prospective Juror Excused Before General Voir Dire

Prospective Juror No. 19

The record reflects that after individual voir dire on pretrial publicity and capital punishment, Prospective Juror No. 19 was asked to return for the general voir dire. However, before general voir dire commenced, Prospective Juror No. 19 presented the court with a letter from his employer indicating that he would not be paid while serving on jury duty. (Book 8-T.p. 2299). Further inquiry revealed that this was a new job, he was the sole provider of his family of four and was trying to catch up on past debts. (Book 8-T.p. 2301-2302). Without objection from either party, the trial court excused him for financial hardship. (Book 8-T.p. 2302). As this prospective juror was excused, the trial court's ruling for cause could not have resulted in any prejudice to Trimble.

c. **Prospective Jurors With Numbers Higher Than 139**

As the trial jury was seated with Prospective Juror No. 139, Trimble cannot establish prejudice resulted from the trial court's rulings on the challenges for cause of Prospective Jurors Nos. 200, 205 and 213. *State v. Scott* (1986), 26 Ohio St.2d 92, 99, 497 N.E.2d 55, *denial of habeas corpus affirmed* by *Scott v. Mitchell* (C.A.6, 2001), 250 F.3d 1011.

Prospective Jurors Nos. 200 and 213

The record reflects that Prospective Juror No. 200 was excused without challenge or objection from either party after informing the court that her exposure to the pretrial publicity would affect her ability to be fair and impartial. (Book 6-T.p. 1765). Assuming *arguendo* that Trimble mistakenly attributed Prospective Juror No. 201's individual voir dire to Prospective Juror No. 200, the record reveals that although the trial court did not remove Prospective Juror No. 201 for cause, the trial court did excuse her for medical reasons because she suffered from scoliosis. (Book 7-T.p. 1899-1900).

Similarly, Prospective Juror No. 213 informed the court following his individual voir dire that his 91-year-old mother was being transferred to a long term nursing facility for extended rehab and he was requesting to be excused from jury service due to her poor health. (Book 7-T.p. 2009-2010). Without objection from either party, the trial court excused Prospective Juror No. 213. (Book 7-T.p. 2011).

Prospective Juror No. 205

In response to the trial court's initial questions on the death penalty, Prospective Juror No. 205 stated that he held neither moral nor religious reasons in opposition to the death penalty, he would follow the trial court's instructions and after weighing the aggravating and mitigating circumstances he could impose either a life sentence or the death penalty as the

circumstances warranted. (Book 7-T.p. 1905-1906). After learning that the death penalty was not automatic upon a finding of guilt at the first stage of the trial, this prospective juror stated that he would follow the court's instructions and weigh the aggravating and mitigating factors in the sentencing phase. (Book 7-T.p. 1916-1917, 1919-1920). Although Prospective Juror No. 205 acknowledged that it would be very difficult to impose a life sentence following a verdict of guilty in the first stage, he "would have to follow [the court's] instruction even though in the back of my mind I didn't want to." (Book 7-T.p. 1916).

Comparing the voir dire of Prospective Juror No. 205 with the test set forth by the Supreme Court in *Adams* and *Witt*, the trial court did not err in refusing to excuse this prospective juror. However, even if the trial court erred, that error cannot have prejudicially affected Trimble in the outcome of the trial, since Prospective Juror No. 205 was not seated on the panel hearing Trimble's case. *Scott*, 26 Ohio St.2d at 99, 497 N.E.2d at 61.

d. Prospective Jurors Removed Because They Could Not be Fair and Impartial

Prospective Jurors Nos. 28 and 41

The record reflects that after individual voir dire on pretrial publicity and capital punishment, Prospective Jurors Nos. 28 and 41 were asked to return for the general voir dire. Prospective Juror No. 28 was initially seated as Juror No. 7 and Prospective Juror No. 41 was initially seated as Juror No. 9 for general voir dire. (Book 9-T.p. 2393-2394). Following the trial court's preliminary question regarding the graphic photographs that would be involved in the case, Prospective Juror No. 28 informed the court that graphic photographs would affect her ability to be fair and impartial. (Book 9-T.p. 2397).

Further inquiry revealed that she would not be able to view autopsy photographs and remain fair and impartial. Without objection from either party, the trial court excused Prospective Juror No. 28. (Book 9-2399).

Prospective Juror No. 41 also informed the court that he would experience difficulty if he had to view graphic photographs. Specifically, he had lost two young friends when he was eleven years old and endured great suffering. (Book 9-T.p. 2401). He stated that he would not be able to separate his feelings of his own experience from this case, which also involved a child's death. (Book 9-T.p. 2401). This would effect his ability to be fair and impartial. (Book 9-T.p. 2401). Without objection from either party, the trial court excused this prospective juror. (Book 9-T.p. 2401).

As both Prospective Jurors No. 28 and 41 were excused before general voir dire was conducted, the trial court's ruling for cause could not have resulted in any prejudice to Trimble.

e. Prospective Jurors Who Served on Trimble's Jury

Prospective Juror No. 81

The record reflects that Defense Counsel challenged for cause Prospective Juror No. 81 because she lived within a mile of the Ranfield Road crime scene. The trial court overruled the challenge and she was seated as Juror No. 12 during peremptory challenges. (Book 9-T.p. 2480). She was present on the jury panel when Defense Counsel waived his fifth peremptory challenge. (Book 9-T.p. 2480-2482). As Juror No. 12, she rendered a guilty verdict after the trial phase of the case and recommended a sentence of death after the penalty phase of the case.

On appeal, Trimble argued that Prospective Juror No. 81 held a bias or prejudice against Trimble because of her pretrial exposure to the case. Prospective Juror No. 81's questionnaire stated, "[t]he murders happened less than a mile away from my house," a friend called her the

evening of the murders to report that a man was shooting people, and she stated, "I could hear it going on. I thought it was fireworks going on, then I found out he was shooting." (Book 3-T.p. 699).

Prospective Juror No. 81 was not a witness subpoenaed by either party. Contrary to Trimble's assertion that this prospective juror's individual voir dire answers revealed a bias or prejudice towards him, her answers indicated nothing more than she heard a noise the evening of the crimes that she believed was fireworks and was unable to confirm a report from a friend that someone was shooting people until Prospective Juror No. 81 read an internet article the following morning. (Book 9-T.p. 699-702). Although her present view of the case had been shaped by the media and conversations with friends, Prospective Juror No. 81 indicated that she would listen to the evidence presented at trial believing that, "everyone is given a fair trial." (Book 3-T.p. 701).

The fact that a prospective juror has heard about some aspects of the case prior to trial does not necessarily reflect bias or lack of impartiality. *Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.Ed.2d 637, at ¶ 37-41. Trimble has failed to demonstrate that Prospective Juror No. 81 who served as Juror No. 12 was biased or prejudiced against him. The trial court did not abuse its discretion in overruling Defense Counsel's challenge for cause.

Prospective Juror No. 139

Prospective Juror No. 139 was seated as Alternate Juror No. 1 on Trimble's jury. (Book 9-T.p. 2485). After the jury rendered a verdict of guilty in the first phase of the trial, Juror No. 11 was excused due to illness and was replaced by Alternate Juror No. 1 for the sentencing phase of the trial. (Book 25-T.p. 6191-6192).

With regards to pretrial publicity, Prospective Juror No. 139 stated that he was aware that Trimble had been accused of killing a mother, son and college student. (Book 5-T.p. 1303). He recalled no specific facts or any timeline of events in relation to the case. (Book 5-T.p. 1308). After learning that he had been summoned for jury duty, he overheard co-worker's discussing the case and stated "[f]rom what I understand that he's already guilty, but he's just trying to figure out if he's - - if it's insanity or not." (Book 5-T.p. 1304). Knowing that everything he sees on the news or hears from co-workers is not always accurate or complete, Prospective Juror No. 139 agreed that he could put that aside, "a man, unless you can prove him guilty then he's innocent." (Book 5-T.p. 1305).

The record reflects Trimble had entered a plea of not guilty by reason of insanity to the twenty-two count indictment. (T.d. 35). Five days after Prospective Juror No. 139's individual voir dire, Trimble withdrew his plea of not guilty by reason of insanity to all charges and entered a plea of not guilty. (T.d. 339).

Defense Counsel questioned this prospective juror regarding the prospective juror's seemingly tentative answers that he thought he could put the pretrial publicity aside if seated as a juror. (Book 5-T.p. 1310-1311). A defendant is entitled "to a jury that will hear his case impartially, not one that tentatively promises to try." *Wolfe v. Brigano* (C.A.6, 2000), 232 F.3d 499, 503. However, Prospective Juror No. 139 did more than merely promise to try to be impartial. When the trial court asked, "can you listen to the evidence and be fair and impartial and set aside what you have read in the newspaper and heard from your coworkers?" he said, "Yes, I could do that." (Book 5-T.p. 1312). Prospective Juror No. 139 stated he could be impartial and set aside the pretrial publicity, unlike the three prospective jurors in *Wolfe* that offered only tentative statements that they would try to decide the case on the evidence

presented at trial. *Id.*, 232 F.3d at 503. The record reflects that the trial court could reasonably conclude that Prospective Juror No. 139 understood his obligation to disregard pretrial newspaper articles and coworker's comments and render a verdict free of any prejudgment.

In response to the trial court's initial death penalty questions, Prospective Juror No. 139 stated that he held neither moral nor religious reasons in opposition to the death penalty, he would follow the trial court's instructions and after weighing the aggravating and mitigating circumstances he could impose either a life sentence or the death penalty as the circumstances warranted. (Book 5-T.p. 13132-13143).

In his opinion, the death penalty should exist because, "if you take a life why should you be allowed to live." (Book 5-T.p. 1318). However, this prospective juror learned throughout his voir dire examination that in Ohio not every murder was eligible for the death penalty. Rather, if seated as a jury on this case, he would be required to listen to the evidence presented in the sentencing phase before making up his mind on the appropriate penalty. (Book 5-T.p. 1319-1320). He then stated that he could listen to the evidence, weigh the aggravating circumstances and mitigating factors, and then vote for either a life sentence or the death penalty depending on the evidence presented. (Book 5-T.p. 1320-1321).

Prospective Juror No. 139 informed Defense Counsel that this was the first time that he had ever been asked about his views on the death penalty. (Book 5-T.p. 1322). He characterized his beliefs about the death penalty as, "an eye for an eye" but also stated, "[y]ou have to be very careful when somebody's life is on the line." (Book 5-T.p. 1323-1324). Some of this prospective juror's responses indicate that in trying to fully comprehend the mechanics of the two part system utilized in capital cases he became confused with Defense Counsel's questions.

DEFENSE COUNSEL: In other words, prior calculation and design, purposeful killing of two or more persons, committed in the course and conduct of an aggravated burglary or kidnapping, you understand those specifications?

PROSPECTIVE JUROR 139: If he knew - - what you guys are saying, if he already knew what he was doing, or whatever, then he should get the death penalty. But if he's like for some reason off and whatever, then maybe just prison or something like that, is that what you mean?

DEFENSE COUNSEL: No. What I am trying to explain to you, to make sure that you understand how the process works, in order to get to the penalty, you have to make the finding of guilt for aggravated murder and the specifications that are attached to that beyond a reasonable doubt, you understand that?

PROSPECTIVE JUROR 139: Has to be guilty before you go to step two.

* * *

DEFENSE COUNSEL: Your beliefs that you have indicated are that if you take a life you shouldn't be allowed to live, is that - - that is a fair statement of your beliefs, correct?

PROSPECTIVE JUROR 139: Ahhh ...

DEFENSE COUNSEL: That is what you said.

PROSPECTIVE JUROR 139: If it was planned and knew what they were doing, yeah.

DEFENSE COUNSEL: That is what you said on a few occasions, correct?

PROSPECTIVE JUROR 139: Right.

DEFENSE COUNSEL: Okay. How are you gong to be able then to move into that second stage and consider both sides evidence presentations when you have already made the determination of guilt beyond a reasonable doubt on the aggravated murder and specifications?

PROSPECTIVE JUROR 139: I have to listen to that. He's got to be guilty first.

DEFENSE COUNSEL: And I understand that, and you have already made that determination. That is the only way you get to the weighing process.

PROSPECTIVE JUROR 139: Right.

DEFENSE COUNSEL: My question to you is based upon your beliefs, how are you going to be able to do that in this case?

PROSPECTIVE JUROR 139: [no answer]

DEFENSE COUNSEL: Are you going to be able to do that in this case?

PROSPECTIVE JUROR 139: Are you asking - - -

THE COURT: I don't think he understands your question, make it a little clearer.

(Book 5-T.p. 1327-1328).

Despite Defense Counsel's confusing questions, Prospective Juror No. 139 was able to describe, in his own words, the duty of a juror seated on a capital case, first stage of the trial "[w]e find him guilty, now we go to the second, see which sentence he gets" and second stage of the trial, "[i]f he knew what he was doing at the time, had a clear head, knew exactly, planned out, then he should get the death penalty. But if he was under the influence or something, or not quite right in the head, if you can prove that, then maybe it shouldn't be so harsh. Either way is bad but then you get the prison time." (Book 5-T.p. 1329-1330).

Defense Counsel challenged this prospective juror for cause on both pretrial publicity and as an automatic vote for the death penalty. (Book 5-T.p. 1331-1332). The trial court overruled both challenges specifically finding that Prospective Juror No. 139 would follow the trial court's instructions, consider and weigh the factors in mitigation, and require the State to prove beyond a reasonable doubt the aggravating circumstances. (Book 5-T.p. 1332-1333).

The United States Supreme Court has recognized that, "[p]rospective jurors represent a cross section of the community, and their education and experiences vary widely. Also unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand." *Patton v. Yount* (1984), 467 U.S. 1025, 1039, 104 S.Ct. 2885, 2893, 81 L.Ed.2d 847. Accordingly, Jurors "cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially." *Id.*, 467 U.S. at 1039, 104 S.Ct. at 2893, 81 L.Ed.2d 847.

It is true that Prospective Juror No. 139 equivocated. However, where a prospective juror gives contradictory answers on voir dire, the trial judge need not accept the last answer elicited by counsel as the prospective juror's definitive word. *State v. White* (1999), 85 Ohio St.3d 439, 709 N.E.2d 140, citing *State v. Scott* (1986), 26 Ohio St.3d 92, 97-98, 497 N.E.2d 55. Rather, "it is for the trial court to determine which answer reflects the juror's true state of mind." *State v. Jones* (2001), 91 Ohio St.3d 335, 339, 744 N.E.2d 1163.

Prospective Juror No. 139 was initially unaware that only aggravated murders were eligible for the death penalty and that capital cases involved two separate proceedings for guilt and sentencing. Although he did not use the terms, "aggravating" or "mitigating" in his explanation of the two stages of a capital case, the substantial testimony supports the trial court's ruling with regards to both the pretrial publicity and death penalty challenges for cause.

Conclusion

As Trimble failed to preserve for appeal the trial court's ruling on challenges for cause, this Court should overrule his second proposition of law. Assuming *arguendo* that this Court reaches the merits of Trimble's second proposition of law, Trimble has failed to demonstrate

prejudice resulted from the trial court's rulings on the challenges for cause of Prospective Jurors Nos. 14, 19, 28, 41, 81, 133, 139, 200, 205 and 213. Accordingly, the trial court did not abuse its discretion; Trimble's second proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 3:

In his third proposition of law, Trimble argued that Prospective Juror No. 166 was improperly excused for cause due to his opposition to the death penalty. In particular, Trimble contends that the challenge for cause should not have been granted, since Prospective Juror No. 166 initially stated that he could follow the instructions of the court in considering whether to impose the death penalty.

Standard of Review

As stated in the prior proposition of law, the standard for determining whether a prospective juror should be removed for cause due to his or her views regarding the death penalty is whether those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 420, 105 S.Ct. at 850, 83 L.Ed.2d 841; *Adams*, 448 U.S. at 45, 100 S.Ct. at 2526, 65 L.Ed.2d 581; *Rogers*, 17 Ohio St.3d 174, 478 N.E.2d 984, paragraph three of the syllabus. In reviewing challenges for cause based upon prospective jurors' views on capital punishment, the trial judge's ruling will not be disturbed on appeal unless it constitutes an abuse of discretion. *State v. McNeill* (1998), 83 Ohio St.3d 438, 445, 700 N.E.2d 596.

Analysis

1. Trimble Waived Trial Court Rulings on Challenges For Cause by Failing to Exhaust Peremptory Challenges

The record reflects that Defense Counsel failed to exhaust its peremptory challenges when it waived its fifth peremptory challenge. (Book 9-T.p. 2481-2482). As Trimble did not exhaust his peremptory challenges, any alleged errors regarding the trial court's rulings on challenges for cause are waived for purposes of appeal and Trimble's third proposition of law is without merit. *Eaton*, 19 Ohio St.2d at 149, 249 N.Ed.2d 897.

2. Trial Court Did Not Abuse Its Discretion Excusing Prospective Juror No. 166 for Cause

Assuming *arguendo* that this Court reaches the merits of the third proposition of law, the State submits the following response. Even if the trial court's ruling was error, as Trimble's jury was seated by Prospective Juror No. 139, he cannot show prejudice resulted from the trial court's decision to excuse Prospective Juror No. 166 for cause. *Scott*, 26 Ohio St.2d at 99, 497 N.E.2d 55.

The record supports the trial court's decision to excuse this prospective juror for cause based upon his moral opposition to the death penalty. Although he initially stated that he would follow the trial court's instructions, Prospective Juror No. 166 was adamant in his opposition to the death penalty. (Book 6-T.p. 1576). Further questioning revealed that regardless of the facts of a murder case, he could not impose the death penalty. (Book 6-T.p. 1578-1579). Even in a situation like the Oklahoma Bomber where hundreds of people died, Prospective Juror No. 166 would not impose the death penalty. (Book 6-T.p. 1579). Specifically, he stated that the weighing of the mitigating and aggravating circumstances would be influenced by his strong

moral beliefs to the point that he would be predisposed in favor of the mitigating circumstances so he would not have to consider recommending the death penalty. (Book 6-T.p. 1586).

The trial judge is in the best position to observe the demeanor and body language to determine that the prospective juror could not be impartial and follow the law. *State v. Williams* (1997), 79 Ohio St.3d 1, 8, 679 N.E.2d 646. As Prospective Juror No. 166 stated that he could not fairly consider the death penalty given his moral beliefs, the trial court did not abuse its discretion in excusing this prospective juror for cause. Trimble's third proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 4:

In his fourth proposition of law, Trimble argued that the trial court denied Defense Counsel the opportunity to voir dire Prospective Juror No. 210 on mitigation evidence. Trimble further asserted that the trial court's alleged limitation on this prospective juror's voir dire resulted in a jury that was skewed toward imposing the death penalty.

Standard of Review

A trial court has "great latitude in deciding what questions should be asked on voir dire." *State v. Wilson* (1996), 74 Ohio St.3d 381, 386, 659 N.E.2d 292, quoting *Mu'min v. Virginia* (1991), 500 U.S. 415, 424, 111 S.Ct. 1899, 1904, 114 L.Ed.2d 493. Crim.R. 24(A) requires that counsel be given an opportunity to question prospective jurors or to supplement the court's voir dire examination. However, the scope of voir dire falls within the trial court's sound discretion and varies depending on the circumstances of a given case. *State v. LaMar* (2002), 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, at ¶41.

While restrictions on voir dire have generally been upheld, any limits on voir dire must be reasonable. *State v. Jackson* (2005), 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶27; *State v. Gross* (2002), 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, at ¶31. Absent a clear abuse of discretion, prejudicial error cannot be assigned to the examination of the venire. *State v. Durr* (1991), 58 Ohio St.3d 86, 89, 568 N.E.2d 674; *State v. Beuke* (1988), 38 Ohio St.3d 29, 39, 526 N.E.2d 274.

An abuse of discretion is "more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Adams*, 62 Ohio St.2d at 157, 404 N.Ed.2d 144. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d at 621, 614 N.Ed.2d 748.

Analysis

1. Trimble Waived Alleged Error in Voir Dire Process by Failing to Exhaust Peremptory Challenges

The record reflects that Defense Counsel failed to exhaust its peremptory challenges when it waived its fifth peremptory challenge. (Book 9-T.p. 2481-2482). As Trimble did not exhaust his peremptory challenges, any alleged errors regarding the manner in which the trial court conducted voir dire is waived for purposes of appeal and Trimble's fourth proposition of law is without merit. *Eaton*, 19 Ohio St.2d at 149, 249 N.Ed.2d 897.

2. Trial Court Did Not Abuse Its Discretion In The Individual Voir Dire of Prospective Juror No. 201

Assuming *arguendo* that this Court reaches the merits of the fourth proposition of law, the State submits the following response. The record reveals that Prospective Juror No. 201

suffered from scoliosis. Without objection from either party, the trial court excused her for medical reasons before general voir dire commenced. (Book 7-T.p. 1899-1900).

In this proposition of law, Trimble refers this Court to the individual voir dire of only one prospective juror. Based on this single citation to the record, Trimble then invites this Court to accept his general conclusion that the Defense Counsel's inquiry regarding mitigation evidence was limited by the trial court during individual voir dire of all prospective jurors. A review of the individual voir dire of the remaining 165 prospective jurors reveals that Trimble's general conclusion is incorrect.

Here, the trial court allowed individual voir dire in the death-qualification process. The trial judge asked the prospective jurors several questions about their views on capital punishment, their willingness to consider mitigating evidence, the death penalty, and their commitment to follow instructions as given. The trial court also allowed counsel to inquire into these matters.

Contrary to Trimble's reliance on *Morgan v. Illinois* (1992), 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492, *Morgan* does not require judges to allow individual voir dire on separate mitigating factors. The detailed questioning that occurred in this case was adequate to expose faults that would render a juror ineligible. *Rogers*, 17 Ohio St.3d 174, 478 N.E.2d 984, paragraph three of the syllabus. *Morgan* imposes no further requirements on voir dire.

This Court has rejected prior attempts to find an abuse of discretion in similar circumstances. *State v. Bedford* (1988), 39 Ohio St.2d 122, 129, 529 N.E.2d 913. "Jurors weigh mitigating factors together, not singly, and do so collectively as a jury in the context of a penalty hearing. Realistically, jurors cannot be asked to weigh specific factors until they have heard all the evidence and been fully instructed on the applicable law." *Lundgren*, 73 Ohio

St.3d at 481, 653 N.E.2d 304. Further, a juror need not give any weight to any particular mitigating factor although instructed to consider such factors. "[E]vidence of an offender's history, background and character" not found mitigating "need be given little or no weight against the aggravating circumstances." *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph two of the syllabus. Accordingly, Trimble's fourth assignment of error lacks legal merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 5:

In his fifth proposition of law, Trimble argued that Defense Counsel's failure to exercise his fifth peremptory challenge resulted in the ineffective assistance of counsel. Specifically, Trimble asserted that the failure to exhaust all peremptory challenges resulted in a jury that was biased against him and predisposed to impose the death penalty.

Standard of Review

A two-step process is employed in determining whether the right to effective counsel has been violated.

> [1] First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. [2] Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674.

In demonstrating prejudice, the defendant must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. In addition, the court must evaluate "the reasonableness of counsel's challenged

conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d 674. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d 674.

Analysis

"The use of peremptory challenges is a matter of strategy." *McNeill*, 83 Ohio St.3d at 449, 700 N.E.2d 596. Debatable trial tactics do not constitute ineffective assistance of counsel. *Id.*, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189. It is the duty of defense counsel to determine whether and when the prospective panel of jurors appears best suited to afford the accused a fair and favorable hearing. It is not the role of this Court to second-guess the strategic decisions of trial counsel. *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965.

The fact that the consequence of the waiver of the Defense Counsel's fifth peremptory challenge caused Trimble's motion to change venue to be unavailable to him as argument on appeal does not constitute ineffective assistance of counsel. The core of the duty of trial counsel is to insure that his client receives a fair trial. If after voir dire, Defense Counsel concluded that the jury panel could produce a fair trial and unbiased verdict, this Court should not question that judgment absent evidence of record manifestly to the contrary. *McNeill*, 83 Ohio St.3d at 449, 700 N.E.2d 596. None exists here.

Trimble has failed to demonstrate that Defense Counsel's failure to exhaust the peremptory challenges was deficient performance or that this alleged deficiency resulted in prejudice. Trimble's fifth proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 6:

In his sixth proposition of law, Trimble argued that the trial court abused its discretion in admitting firearms and ammunition recovered by the police at the 880 Sandy Lake Road crime scene. Specifically, he asserted that the evidence was not relevant, unduly prejudicial and should not have been permitted pursuant to Evid.R. 401 and 403.

Standard of Review

The trial court has broad discretion in the admission and exclusion of evidence. *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126. An appellate court will not disturb evidentiary rulings absent an abuse of discretion. *Id.* An abuse of discretion is "more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Adams*, 62 Ohio St.2d at 157, 404 N.Ed.2d 144. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d at 621, 614 N.Ed.2d 748.

Analysis

1. **Admission of Firearms and Ammunition Evidence Was Not an Abuse of Discretion**

The record reflects that during the direct examination of Agent Saraya, the trial court admitted State's Exhibits 102 and 104 through 125. (Book 14-T.p. 3403-3418). These exhibits consisted of the collection of pistols, rifles, revolvers, semi-automatic and automatic firearms and ammunition that was recovered from the 880 Sandy Lake Road crime scene. (Book 14-T.p. 3403-3418). Pursuant to a search warrant, officers gained access to the guns after a locksmith opened the gun safe. (Book 14-T.p. 3402). The State's Exhibits 102 and 104 through 125 were individually identified by Agent Saraya and then placed on a table adjacent to the jury. (Book

14-T.p. 3418-3419). Following Agent Saraya's identification of the last firearm, the trial court recessed for lunch. The record further reflects that when the court recessed for lunch, State's Exhibits 102 and 104 through 125 were removed from the courtroom along with the tables that had been used for display purposes. (Book 14-T.p. 3419).

Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Evid.R. 403 provides:

> (A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or misleading the jury.
>
> (B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

Evid.R 403.

The trial court did not abuse its discretion in admitting the ammunition and firearms seized from the 880 Sandy Lake Road crime scene. Trimble's possession of the large quantity and various types of ammunition and firearms showed that he not only had access to firearms but also familiarity with using firearms. *State v. Drummond* (2006), 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, at ¶84; *State v. Hartman* (2001), 93 Ohio St.3d 274, 281, 754 N.E.2d 1150. The variety of firearms and ammunition and their location in and around a gun safe and a separately locked ammunition cabinet also tended to prove the element of prior calculation and design, a required element of Count Thirteen.

Where "evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill,

a finding by the trier of fact of prior calculation and design is justified." *State v. Cotton* (1978), 56 Ohio St.2d 8, 381 N.E.2d 90, paragraph three of the syllabus. As instantaneous deliberation is not sufficient to constitute prior calculation and design, the State was required to present testimony and evidence to demonstrate Trimble's prior calculation and design.

At trial, the State played an audio tape recording of an interview between Trimble and Sheriff Kaley. (Book 13-T.p. 3157; State's Exhibits 328 A and B). Without objection from Defense Counsel, the trial court also permitted the State to hand out transcripts of the tape recording to each Juror to follow during the playback of the tape. (Book 13-T.p. 3155; Court's Exhibit 3). The interview was recorded on two separate tapes and was conducted on January 24, 2005, two days after the murders. The record reflects that Trimble requested to speak with Sheriff Kaley.

The recording on the second tape reveals Trimble expressly admitting that he retrieved both murder weapons, the AR-15 assault rifle and the Sig Sauer pistol, from the gun safe located in the basement:

Kaley: Where did you retrieve the AR-15 from?

Trimble: I'm sure it was in the gun safe. I kept all the guns in the gun safe.

Kaley: How about the . . .

Trimble: The 9 mm was in the gun safe too.

Kaley: OK, they were both in the gun safe that night?

Trimble: Yea.

Kaley: Who all had the combination to that gun safe?

Trimble: Just me.

Kaley: OK, so you had to retrieve them from there.

Trimble: Yea.

(State's Exhibits 328 A and B). Trimble also admitted on the tape recording that he retrieved the ammunition for the weapons from a cabinet that was locked with a padlock:

Kaley: Where would the ammunition have been?

Petitioner: It was in a, like a cabinet by the, by the gun safe. I had locks on it.

Kaley: What kinds of locks?

Petitioner: Padlocks.

Kaley: Keys?

Petitioner: Yea, keys.

Kaley: Who had the keys?

Petitioner: Just me.

(State's Exhibits 328 A and B). The only person that had access to the gun safe and the ammunition cabinet was Trimble. (State's Exhibits 328 A and B).

Evidence at trial also established that Darrell French, a neighbor and friend of Trimble, had once observed, "the whole bedroom floor was full of guns, 20 or 30 guns." (Book 11-T.p. 2651). Mr. French recalled seeing pistols, assault rifles, military weapons and huge amounts of ammunition the first day that Trimble was at the 880 Sandy Lake Road residence working on the roof. (Book 11-T.p. 2652). This was before Renee and Dakota had moved in or any furniture had been delivered to the house. (Book 11-T.p. 2652).

The testimony and evidence at trial revealed that the evening of the murders, Trimble went to the basement, unlocked the gun safe, chose a high power assault rifle from his vast collection of firearms, closed and locked the gun safe, unlocked the padlock to open the ammunition cabinet, retrieved ammunition for the assault rifle, loaded the assault rifle, ascended

the basement steps to the first floor of the residence, proceeded to the doorway of the master bedroom and fired nineteen shots at Renee and her son. This testimony and evidence, including the firearms and ammunition evidence, clearly demonstrated that Trimble had adopted a specific and calculated plan to murder Renee and her son. *State v. Toth* (1977), 52 Ohio St.2d 206, 371 N.E.2d 831, overruled on other grounds, *State v. Muscatello* (1978), 55 Ohio St.2d 201, 378 N.E.2d 738, fn.3.

As the trial court did not abuse its discretion in admitting State's Exhibits 102 and 104 through 125, Trimble's sixth proposition of law is without merit and should be overruled.

2. <u>Harmless Error</u>

Assuming *arguendo* that this Court determines that the admission of the firearms and ammunition evidence was an abuse of discretion, the State submits that the identification and brief display of the weapons and ammunition was harmless. The record reflects that the challenged firearms and ammunition were individually identified by Agent Saraya and placed on a table. (Book 14-T.p. 3418-3419). The trial court called a lunch recess following Agent Saraya's identification of the last firearm and the evidence and display tables were removed from the courtroom. (Book 14-T.p. 3419). The testimony regarding this evidence encompassed 15 pages of the approximate 3103 pages of the guilt phase transcript of Trimble's trial, a brief portion at the end of a morning session of a trial that lasted four weeks. (Book 10-T.p. 2547 through Book 22-T.p. 5650).

Under Evid.R. 103(A) and Crim.R. 52(A), error is harmless unless substantial rights of the defendant are affected. For nonconstitutional errors, the test is whether "there is substantial evidence to support the guilty verdict even after the tainted evidence is cast aside." *State v. Cowans* (1967), 10 Ohio St.2d 96, 104, 227 N.E.2d 201.

A review of the record absent State's Exhibits 102 and 104 through 125 reveals substantial evidence to support the guilty verdict. The question of Trimble's guilt is not close in this case. Strong evidence exists, including Trimble's admission to his mother and later to his brother that he shot and killed Renee and her son (Book 11-T.p. 2747, 2830); his admission to the hostage negotiator, Michael Korach, that he had killed two people (Book 18-T.p. 4475-4476), and the recording of Sarah's death by a single shot fired from Trimble's Sig Sauer pistol. (State's Exhibit 303; Book 17-T.p. 4190-4191). Additionally, Trimble further admitted in his January 24, 2005 interview with Sheriff Kaley that he was the only individual with access to the gun safe and ammunition cabinet located in the basement of the 800 Sandy Lake Road crime scene. (State's Exhibits 328 A and B). Trimble admitted retrieving both murder weapons and ammunition from the locked gun safe and padlocked ammunition cabinet in the basement. (State's Exhibits 328 A and B).

As the State's case was so strong against Trimble, even if this Court were to find that admission of the challenged exhibits was error, the error was harmless beyond a reasonable doubt. Trimble's sixth proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 7:

In his seventh proposition of law, Trimble argued that the display of State's Exhibits 102 and 104 through 125 combined with the trial court's statements to the spectators prior to the display of the crime scene and autopsy photographs created a prejudicial atmosphere. Specifically, he asserted that in this alleged prejudicial atmosphere his guilt was not determined solely on the evidence introduced at trial.

Standard of Review

When an emotional outburst takes place in court, the issue is whether the outburst "deprived the defendant of a fair trial by improperly influencing the jury." *State v. Scott* (2004), 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, at ¶44. This "is a factual question to be resolved by the trial court, whose determination will not be overturned absent clear, affirmative evidence of error." *State v. White* (1999), 85 Ohio St.3d 433, 440, 709 N.E.2d 140.

Analysis

In support of this proposition of law, Trimble refers this Court to the following three portions of the trial transcript pages 2799, 2862 and 3931. During the direct examination of Officer Peterman, the State published to the jury, via an overhead projector, State's Exhibit 13, a photograph of Renee and Dakota's bodies at the crime scene. (Book 11-T.p. 2796). A spectator then stated, "Oh, Dakota!" and began crying. (Book 11-T.p. 2796). The trial court called counsel up to the bench for a sidebar and Defense Counsel moved for a mistrial based on the spectator's outburst. (Book 11-T.p. 2797-2798). The trial court overruled the motion for a mistrial and declared a two minute recess.

When the court reconvened the trial court gave the following instruction:

> Ladies and gentlemen, as we told you in voir dire there will be some graphic photographs and testimony that will be hard for all people to hear. You are instructed that you are to listen to the evidence as it comes from the witness stand, and the exhibits admitted throughout the trial and ignore any reaction that would happen in the spectator's area. It is important that you not be influenced by this at all. Again, listen and watch the pictures as you see them here in court.
>
> The Court would instruct the spectators from here on out I did not know there were any family members in the background, if there are, we'll take a break to give you a chance to leave. If you do not wish to look at the pictures we'll tell you that beforehand. I was unaware that was going to go up that quick.

> So, again you're instructed. I'll try to give you a break; if you wish to leave the courtroom, you can. The jury is instructed to disregard any reaction from the spectators.

(Book 11-T.p. 2799-2800).

In accordance with this instruction, the trial court continued to inform the spectators throughout the trial when photographs were about to be placed on the overhead projector. During Detective Carrozzi's direct examination, the State commented that he was about to place a picture on the screen "that may cause some reaction" and the trial court inquired of the spectator area, "[a]nybody want to leave?" (Book 11-T.p. 2862). During the Summit County Medical Examiner's direct examination, the trial court instructed the spectators before Renee's autopsy photographs were projected, "I will warn everyone in the spectators, these are graphic." (Book 16-T.p. 3931).

In the present case, the trial court responded to this single spectator disruption immediately with a recess followed by jury instructions to disregard spectator reactions. A thorough review of the trial transcript reveals the trial court took additional steps to address the issue of projected photographs thereby eliminating any further courtroom disruptions. There is no indication that the three references mentioned by Trimble influenced the jury's verdict.

Moreover, the trial judge was clearly in a position to determine whether the jury was improperly influenced; the record indicates that the judge was satisfied with the way the situation was handled and with the subsequent proceedings. Trimble has failed to present clear, affirmative evidence that he was denied a fair trial by the behavior of certain courtroom spectators. And as previously discussed under the sixth proposition of law, the identification and brief display of State's Exhibits 102 and 104 through 125 did not improperly influence the

jury. Accordingly, Trimble's seventh proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 8:

In his eighth proposition of law, Trimble argued that the trial court erred in admitting autopsy and crime scene photographs in addition to a videotape recording of the 880 Sandy Lake Road crime scene that were allegedly gruesome, cumulative and repetitive.

Standard of Review

The standard the State must overcome to have photographic evidence admitted in a capital case is stricter than the general standard applied pursuant to Evid.R. 403. *State v. Morales* (1987), 32 Ohio St.3d 252, 257-258, 513 N.E.2d 267. This Court has held that photographs are admissible in a capital case when: 1) they are relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative to testimony and other evidence; 2) the danger of material prejudice to a defendant is outweighed by the probative value of the photographs; and 3) the photographs are not repetitive and cumulative. *State v. Maurer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768, paragraph seven of the syllabus.

Decision on the admissibility of photographs are "left to the sound discretion of the trial court." *State v. Slagle* (1992), 65 Ohio St.3d 597, 601, 605 N.E.2d 916.

Analysis

In discovery, the State provided approximately 1,383 photographs including autopsy photographs of three victims, aerial photographs and crime scene photographs of three separate crime scenes. The State offered 199 photograph exhibits at trial. However, at trial, the court sustained Defense Counsel's objection and excluded State's Exhibit 60 a crime scene

photograph of Dakota's sweatshirt and chin (Book 14–T.p. 3350), and State's Exhibit 286 an autopsy photograph depicting Dakota's chest and neck (Book 17–T.p. 4014).

1. Crime Scene Photographs

880 Sandy Lake Road Crime Scene

Trimble complained that the trial court abused its discretion in admitting the following sixteen crime scene photographs: 13, 19, 21-24, 32-34, 44, 59, 65, 183, 186, 187 and 209. On appeal, Trimble asserted that "the enormity of the amount of photographs" was significant and established the repetitive nature of the photographs. Although the sheer number of photographs admitted may constitute error when they are needlessly cumulative, the mere fact that there are numerous photographs will not be considered reversible error unless the defendant is prejudiced. *State v. Thompson* (1987), 33 Ohio St.3d 1, 9, 514 N.E.2d 407. The following review of the challenged photographs reveals no cumulative, repetitive or gruesome images and therefore no prejudice to Trimble.

State's Exhibit 13 was a photograph taken by Brimfield Police Department depicting the position of Renee and Dakota's bodies. (State's Exhibit 13). This photograph was identified by Officer Peterman as depicting the crime scene. (Book 11-T.p. 2779). As the State published the photograph to the jury, via an overhead projector, there was an outburst from a spectator. (Book 11-T.p. 2797). The record reflects that this was the first photograph of the trial that actually depicted Renee and Dakota's bodies. Rather than being particularly gruesome, it was the fact that this was the first photograph of the murder victims that evoked the outburst from the parent of Dakota's best friend, who was in the spectator area of the courtroom. Accordingly, the trial court did not abuse its discretion in admitting State's Exhibit 13.

State's Exhibits 19, 21, 22, 24, 32, 33 and 34 were photographs taken by an agent with the Bureau of Criminal Investigation and Identification ("BCI"). State's Exhibit 23 was a photograph taken by the Brimfield Police Department. These eight photographs were identified during Agent Saraya's direct examination. (Book 13-T.p. 3293). State's Exhibit 19 depicts the view of the master bedroom from the bedroom door which is visible in the frame. Also visible in the picture is the bed, a chest, Renee, a window and nightstand. (State's Exhibit 19; Book 13-T.p. 3296).

State's Exhibit 21 was taken from a position in front of the closet door. (State's Exhibit 21; Book 13-T.p. 3297). It depicts the dresser, nightstand, hallway door to the right side of the frame and the bathroom door to the left side of the frame. (State's Exhibit 21; Book 13-T.p. 3297). Dakota's left, bent leg is also visible near the dresser.

State's Exhibit 22 was taken directly overhead looking down on Renee and Dakota as they were found when Agent Saraya arrived at the crime scene. (State's Exhibit 22; Book 13-T.p. 3298). It depicts Dakota's position as partially under Renee's jacket and several of Dakota's stuffed animals. (State's Exhibit 22; Book 13-T.p. 3298). State's Exhibit 23 was taken at the corner of the bed looking down over the edge of the bed. (State's Exhibit 23; Book 13-T.p. 3298). It depicts primarily Dakota, a portion of Renee's right side, the path leading to the bathroom, and empty shell casings. (State's Exhibit 23; Book 13-T.p. 3298).

State's Exhibit 24 was taken from the bathroom door, which is visible in the bottom of the frame, looking out into the master bedroom. (State's Exhibit 24). It depicts the edge of the dresser, bone fragments, a shell casing and a portion of Renee's elbow in the very top of the frame. (State's Exhibit 24; Book 13-T.p. 3299).

State's Exhibit 32 was taken by the bed looking down on Renee and Dakota, Renee's foot is visible along with a shell casing. (State's Exhibit 32; Book 13-T.p. 3306). State's Exhibit 33 was taken from a slightly different angle. It depicts Renee's legs and a new shell casing on top of Renee's pant leg. (State's Exhibit 33; Book 13-T.p. 3306-3307). State's Exhibit 34 was taken from the foot of the bed looking over Dakota. (State's Exhibit 34). It depicts two shell casings on the floor, a third casing under the dresser and a fourth casing at the edge of the carpet along with pieces of tissue adhered to the base of the dresser. (State's Exhibit 34; Book 13-T.p. 3308).

The record reflects that Defense Counsel objected to State's Exhibits 19, 22, 23, 32, 33, and 34 on the ground that they were cumulative and also objected to State's Exhibit 22 on the ground that it was gruesome. (Book 13-T.p. 3294-3295). As to the remaining photographs which included State's Exhibits 21 and 24, Defense Counsel stated, "[n]o objection to the balance." (Book 13-T.p. 3295). As Defense failed to object to State's Exhibits 21 and 24 at the trial court level, Trimble has waived all but plain error for purposes of this appeal. A review of the record reveals that admission of State's Exhibits 21 and 24 did not rise to the level of plain error.

In his opening statement, Defense Counsel alleged that "a violent physical fight occurred between Renee and Jim in the master bedroom" before Trimble ever grabbed the gun and "this violent struggle moved from the bathroom to the bedroom where the deadly shots were fired." (Book 10-T.p. 2583). Several photographs of the murder scene were necessary to depict the location of not only the victims, shell casings and tissue or bone fragments but also the condition of the bedroom and bathroom. The photographs of the crime scene belied the Defense Counsel's account of a physical struggle prior to the murders.

As State's Exhibits 19, 22, 23, 32, 33, and 34 are illustrative of the State's witnesses testimony concerning the evidence found at the 880 Sandy Lake Road murder scene and the condition of the victims' bodies, the trial court did not abuse its discretion in admitting these photographs, which were neither cumulative nor repetitive.

The trial court also did not err in admitting State's Exhibit 22, over Defense Counsel's objection that the image was gruesome. This Court has defined a gruesome photograph as a photograph that depicts a body or a body part. *State v. DePew* (1988), 38 Ohio St.3d 275, 281, 528 N.E.2d 542. The sole fact that a photograph is gruesome, however, does not render it inadmissible. Instead, gruesome photographs are admissible in capital cases as long as the probative value of each photograph outweighs the danger of material prejudice to the accused. *Morales*, 32 Ohio St.3d at 258, 513 N.E.2d 267.

State's Exhibit 22 depicts the two murder victims in the condition Agent Saraya found them upon arriving at the murder scene. The record reflects that Trimble fired nineteen shots from an assault rifle that was aimed at Renee and Dakota. The force of the high velocity projectiles resulted in devastating injuries to both murder victims. Accordingly, the injuries to the victims were graphic and bloody. However, the probative value of the photographs depicting the crime scene outweighed the danger of a material prejudice to Trimble. *Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768, paragraph seven of the syllabus

In support of his argument that the trial court abused its discretion in admitting gruesome and cumulative photographs at his trial, Trimble referred this Court to State's Exhibit 44. (Appellant's Brief, pg. 57). However, a review of the record reveals that State's Exhibit 44 was not a photograph but rather, a fired .223 Remington cartridge case taken into evidence at

the 880 Sandy Lake Road crime scene. (State's Exhibit 44, Book 14–T.p. 3346). Accordingly, this exhibit has no relevancy to Trimble's eighth proposition of law.

Prior to the admission and publication of State's Exhibits 59 and 65, the trial court provided Defense Counsel an opportunity to review the photographs and raise objections. The record reflects that Defense Counsel objected to State's Exhibit 59 on the ground that the image was cumulative and gruesome. (Book 14-T.p. 3351). As to State's Exhibit 65, Defense Counsel raised no objection to the image at trial stating, "State's Exhibit 65, photograph of Renee Bauer in the position where she was found after the removal of Dakota's body. No objection to that photograph." (Book 14-T.p. 3353). As Counsel raised no objection to the photograph at trial he waived all but plain error on appeal and a review of the image reveals that the trial court did not commit plain error in its admission.

State's Exhibit 59 was taken by Agent Saraya and identified and admitted during his direct examination at trial. (State's Exhibit 59; Book 14-T.p. 3359). The photograph depicts Dakota after the stuffed animals were removed. Specifically it illustrates a defect in the sleeve of Dakota's sweatshirt that was pictured in State's exhibit 57 and a new defect visible in the front of the sweatshirt. (State's exhibit 59; Book 14-T.p. 3359). The image was neither cumulative nor gruesome. It accurately captured the evidence revealed as the crime scene was processed by BCI. The defect on the front of the sweatshirt was not visible in previous images due to the stuffed animals. Accordingly, the trial court did not abuse its discretion in admitting State's Exhibit 59. *Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768, paragraph seven of the syllabus.

Ranfield Road Crime Scene

The last four crime scene photographs relate to the murder scene at Ranfield Road. State's Exhibits 183, 186, 187 and 209 were also taken by Agent Saraya and identified and admitted during his direct examination at trial. (Book 14-T.p. 3453-3454). Before State's Exhibits 168, 170, 172, 174, 175, 178, 180, 181, 183, 184, 186, 187, 189, 191, 193, 195, 196, 200, 202, 203, 205, 206, 209, 211, 213, 215, 217, 220, 221 and 222 were admitted and published to the jury, Defense Counsel had an opportunity to preview the images and raise objections. (Book 14-T.p. 3444-3445). Defense Counsel objected to only State's Exhibit 221. Therefore, Trimble has waived all but plain error as to State's Exhibits 183, 186, 187 and 209.

State's Exhibit 183 depicts the center and corner area of the north bedroom in Sarah's apartment. (State's Exhibit 183; Book-T.p. 3453). It further depicts placards Nos. 23 and 25 identifying the location of shell casings and placard No. 24 identifying the general location of Trimble's AR-15 rifle in relation to the entire bedroom. (State's Exhibit 183; Book-T.p. 3453). State's Exhibit 186 depicts the location and exact position of Trimble's AR-15 rifle and magazine on the floor of the bedroom. (State's Exhibit 186; Book 14-T.p. 3454).

State's Exhibit 187 is a close-up view of the ejection port of the AR-15 rifle, the firearm used to murder Renee and Dakota. (State's Exhibit 187). Agent Saraya stated that he found a live round still in the magazine and determined that the weapon had malfunctioned when the bolt and a live round got jammed. (Book 14-T.p. 3545). This image further depicted that due to the position of the ejection port, spent casings would be ejected from the chamber to the right. (Book 14-T.p. 3545). State's Exhibit 209 depicts Trimble's Sig Sauer nine millimeter handgun located between the commode and the bathtub. (State's Exhibit 209; Book 14-T.p. 3460). Trimble used this firearm to murder Sarah.

As these four images reveal the location and condition of the two murder weapons, the photographs were highly relevant. As the probative value of these images outweighed any danger of material prejudice to Trimble, the trial court did not abuse its discretion in admitting these four images. Accordingly, Trimble failed to demonstrate plain error with respect to these images.

2. Autopsy Photographs

On appeal, Trimble argued that the trial court erred in admitting autopsy photographs of Dakota, State's Exhibits 161–181; autopsy photographs of Renee, State's Exhibits 131–160; and autopsy photographs of Sarah, State's Exhibits 315–327. (Appellant's Brief, pg. 57). However, a review of the record reveals that Trimble's references to Dakota and Renee's autopsy photographs are incorrect. Specifically, Dakota's autopsy photographs were State's Exhibits 279–299 not 161–181; and Renee's autopsy photographs were State's Exhibits 248-277 not 131–160. Furthermore, Defense Counsel offered and the trial court admitted three of Renee's autopsy photographs as Defense Exhibits H5, Q6, and R6.

The State begins by noting that only a small percentage of the available autopsy photographs were used at trial and on appeal, Trimble failed to raise a specific argument as to the series of autopsy photographs admitted for each murder victim. As stated previously, this Court has defined the term gruesome photograph as a photograph that depicts a body or a body part. *DePew*, 38 Ohio St.3d at 281, 528 N.E.2d 542. Given this definition, the content of all autopsy photographs will be gruesome. "However, the mere fact that a photograph is gruesome or horrendous is not sufficient to render it per se inadmissible." *Maurer*, 15 Ohio St.3d at 265, 473 N.E.2d 768.

Renee Bauer

The record reflects that 30 autopsy photographs of Renee were admitted at trial during the direct examination of Dr. Sterbenz, the Medical Examiner that performed the autopsy. (Book 16-T.p. 3926; State's Exhibits 248-277). At trial, Dr. Sterbenz identified and indexed the following 13 gunshot wounds:

> Gunshot Wound A – high velocity projectile striking the head in a front to back path, explosive in character and very destructive to scalp and brain tissue;
>
> Gunshot Wounds B, C, and D – entrance wounds in upper back traveling back to front through chest and upper abdomen with some projectiles reaching neck area;
>
> Gunshot Wounds E, F, and G – wounds traveling back to front through the abdomen cavity injuring the bowel and lungs;
>
> Gunshot Wounds H, I, J, K and L – wounds traveling back to front through lower abdomen and pelvis causing internal injury to bladder, ovary, uterus and pelvis fracture; and
>
> Gunshot Wound M – entrance wound to right hand near top of hand and exited by thumb.

(Book 17-T.p. 3920-3936).

The thirty autopsy photographs included the following images. Renee's intake condition (State's Exhibit 248) and four photographs of her head wound area including Gunshot Wound A at various stages of the autopsy (State's Exhibits 249-252). Two photographs of her back area depicting Gunshot Wounds B, C, and D (State's Exhibits 253 and 254) and three photographs of her neck and front side of her torso depicting exit wounds. (State's Exhibits 255-257). Five photographs of her right hand and arm injuries including Gunshot Wound M (State's Exhibits 258-261, 265), and three photographs of the extensive bruising on her legs (State's Exhibits 262-265). Six photographs of the bullet fragments in her abdominal cavity, chest, scapula, neck

and intra-cranial area (State's Exhibit 266-271), and six photographs were x-rays. (State's Exhibits 272-277).

Defense Counsel raised objections to only 13 of Renee's autopsy photographs. Specifically, he objected to State's Exhibits 248, 249, 250 on the grounds that the images were gruesome because they depicted Renee's head wound including the damage to her skull and brain matter and objected to State's Exhibits 251 and 252 as images of the head wound that were gruesome and cumulative. (Book 16-T.p. 3912-3914). Defense Counsel objected to State's Exhibits 254-257, exit wound images, and 259-261, hand and arm images, as cumulative. (Book 16-T.p. 3914-3915). The last image he objected to as both gruesome and cumulative was State's Exhibit 264, image of Renee's thigh. (Book 16-T.p. 3916).

These photographs illustrated the medical examiner's testimony and provided an overall perspective of the victim's wounds. *State v. Hartman* (2001), 93 Ohio St.3d 274, 289, 754 N.E.2d 1150. State's Exhibits 248-252 depicted the devastating head wounds and, although graphic, were probative of Trimble's intent and manner and circumstances of Renee's death as he chose an assault rifle loaded with high velocity projectiles. *State v. Jackson* (2005), 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶85.

The trial court could have reasonably found that the substantial probative value of each of the autopsy photographs outweighed any prejudicial impact on the jury. Thus, the trial court did not abuse its discretion in admitting these photographs. *State v. Gapen* (2004), 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶90; *State v. Hughbanks* (2003), 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, at ¶74.

As Defense Counsel did not object at the trial level to 17 of Renee's autopsy photographs, this Court is limited to a plain error analysis of State's Exhibits 253, 258, 262,

263, 265-277). *State v. Gross* (2005), 97 Ohio St.3d 121, 2005-Ohio-5524, 776 N.E.2d 1061, at ¶49. The defense motion in limine to exclude crime-scene and gruesome photographs did not preserve this issue for these 17 photographs. *Gable v. Gates Mills* (2004), 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, at ¶34. Trimble has failed to demonstrate that these images were improper and further failed to demonstrate the existence of plain error with these seventeen images.

Dakota Bauer

The record reflects that 20 autopsy photographs of Dakota were admitted during Dr. Sterbenz's direct examination. (State's Exhibits 279-285, 287-299; Book 17-T.p. 4020). The record reflects that Defense Counsel did not raise objections at trial to eight of the photographs. (State's Exhibits 280, 281, 291, 293, 296-299; Book 17-T.p. 4012, 4015-4017). This Court is limited to a plain error analysis of these eight photographs. *Gross*, 97 Ohio St.3d 121, 2005-Ohio-5524, 776 N.E.2d 1061, at ¶49; *Gable*, 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, at ¶34. The record does not support a finding of plain error regarding these eight photographs.

At trial, Dr. Sterbenz identified six individual gunshot wound injuries and he indexed the injuries for purposes of identification as Gunshot Wounds A-F:

> Gunshot Wound A – grazing injury that traveled through lower jaw and took two exit routes, one below the left ear and the other through the left cheek;
>
> Gunshot Wound B – large entrance wound on right side of neck traveled up through the neck into the face and exited slightly in front of left ear causing damage to larynx and major blood vessels;
>
> Gunshot Wound C – large entrance wound at upper chest damaged right lung traveling up the windpipe and exited in two locations at back of neck;
>
> Gunshot Wound D – large entrance wound mid-chest damaged lung, liver and fragmented inside his body;

Gunshot Wound E - entered right palm and exited side of hand by thumb; and

Gunshot Wound F – entered left arm above palm and exited out the back of arm, fractured the bones as it passed through the arm.

(Book 17-T.p. 4028-4048). He further identified abrasions on Dakota's lips, neck, chest and right arm.

State's Exhibit 279 depicts Dakota's condition upon intake at the Medical Examiner's office in Summit County. (State's Exhibit 279). Although the image was similar to Dakota's condition at the crime scene, Dr. Sterbenz was not at the crime scene and could not otherwise identify Dakota's condition before the autopsy was performed without State's Exhibit 279. (Book 17-T.p. 4021).

State's Exhibit 282 depicts Dakota's head and neck injuries at a later point in the progression of the autopsy and Dakota's jaw has been manipulated into an upwards direction for purposes of the photograph. (State's Exhibit 282; Book 17-T.p. 4035). This image shows the path of Gunshot Wound A, which caused a grazing injury to the face and impacted the bone beneath the chin, fracturing Dakota's mandible. (Book 17-T.p. 4029). The photograph shows the entry and exit wounds of Gunshot Wounds A and B.

State's Exhibit 283 depicts the irregular abrasions on Dakota's lips caused by broken pieces of the projectile impacting his lips which was indicative of a re-entry gunshot wound. (Book 17-T.p. 4034). Although State's Exhibit 283 and 282 both depicted the entry wounds of Gunshot Wounds A and B, only State's Exhibit 283 revealed Dakota's lip abrasions. (State's Exhibit 283, Book 17-T.p. 4034). Dr. Sterbenz explained that the reason some of the photographs depicted the abrasions better than others was a factor of time with regards to when the photograph was taken during the course of the autopsy. (Book 17-T.p. 4042).

State's Exhibit 284 depicts the wound tract of Gunshot Wound B including the unusually large entrance and exit wounds, injury to the major blood vessels and a second area of fracture to Dakota's mandible. (State's Exhibit 284; Book 17-4030-4033). Large entrance and exit wounds are indicative of high velocity projectiles. (Book 17-T.p. 4048). State's Exhibit 285 depicts the two large entrance wounds on Dakota's chest, Gunshot Wounds C and D. (State's Exhibit 285; Book 17-T.p. 4039). The grazing wound on Dakota was depicted in State's Exhibit 295. (State's exhibit 295). The two areas at the base of Dakota's neck indicated the multiple exit tracts of Gunshot Wound C in State's Exhibit 287. (State's Exhibit 287; Book 17-T.p. 4043).

State's Exhibit 288-290 depicted the right arm injuries including a close-up view of the grazing injury to Dakota's right arm (State's Exhibit 288; Book 17-T.p. 4049); the entrance wound of Gunshot Wound E (State's Exhibit 289) and the location of injuries to each other. (State's Exhibit 290; Book 17-T.p. 4046). The entrance wound of Gunshot Wound F is shown in State's Exhibit 292 and the irregularly lacerated exit wound and a portion of the fractured bone are visible in State's Exhibit 294. (State's Exhibits 292, 294; Book 17-T.p. 4047).

Dr. Sterbenz testified that all the autopsy images assisted his testimony. *Hartman*, 93 Ohio St.3d at 289, 754 N.E.2d 1150. The trial court could have reasonably found that the substantial probative value of each of the autopsy photographs outweighed any prejudicial impact on the jury. Thus, the trial court did not abuse its discretion in admitting these photographs. *Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶90; *Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, at ¶74.

Sarah Positano

The record reflects that 13 autopsy photographs of Sarah were admitted at trial during the direct examination of Dr. Dean, the Medical Examiner that performed the autopsy. (Book 19-T.p. 4619; State's Exhibits 315-327). Defense Counsel raised objections to eleven of the photographs. Specifically, he argued that State's Exhibits 315, 317, 318, 320, and 323 were cumulative; that State's Exhibits 319, 321, and 322 were both cumulative and gruesome; that State's Exhibits 324 and 325 were gruesome; and that State's Exhibit 326 did not depict an injury and therefore was irrelevant. (Book 19-T.p. 4612-4615).

Upon arrival at the Medical Examiner's office a photograph is taken from above the body to memorialize the intake condition. State's Exhibits 315 and 316 are the top and bottom halves of this intake photographing. (State's Exhibits 315, 316; Book 19-4622). As the body is processed her clothing was removed, photographed and sent to BCI for testing. State's Exhibit 317 depicts the front of Sarah's fleece jacket and State's Exhibit 318 shows a close-up section of the damage to the collar area of the jacket. (State's Exhibits 317, 318; Book 19-T.p. 4624). The importance of these images was to show the location of several holes on the collar and the black staining. (Book 19-T.p. 4624).

State's Exhibit 319 depicts Sarah's face and neck including the entrance gunshot wound to her neck. (State's Exhibit 319). The image reveals no gunpower residue suggesting an intermediary target between the gun and the entrance wound. (Book 19-T.p. 4626). State's Exhibit 320 is a close-up view of the oval injury indicating an entrance wound due to the abrasions and the fact that the wound could not be pushed back together. (State's Exhibit 320; Book 19-T.p. 4628).

State's Exhibit 321 shows Sarah lying on her back with her left arm stretched over the body to indicate the location of the exit wound. (State's Exhibit 321). State's Exhibit 322 depicts a close-up image of the exit would with its crisp, sharp edges formed as the bullet tore the skin open. (State's Exhibit 322; Book 19-T.p. 4630). State's Exhibit 323 documents that the edges of the gunshot wound can be put back together, confirming that the injury was an exit wound. (State's Exhibit 323; Book 19-T.p. 4630). State's Exhibit 326 depicts Sarah's back and indicates the degree of liver mortis, the pooling of blood by gravity. (State's Exhibit 326; Book 19-T.p. 4630).

The final two photographs were taken during the internal examination portion of the autopsy. State's Exhibit 324 shows/ with the assistance of a metal probe, the internal path of the bullet piercing the carotid artery and causing severe damage. (State's Exhibit 324; Book 19-T.p. 4634). State's Exhibit 325 depicts Sarah's left, injured lung with a collection of almost a quart of blood in the lung. (State's Exhibit 325; Book 19-T.p. 4634).

The State's Exhibits assisted Dr. Dean describe to the jury the autopsy procedure and her specific findings regarding Sarah's fatal injury. *Hartman*, 93 Ohio St.3d at 289, 754 N.E.2d 1150. The trial court could have reasonably found that the substantial probative value of each of the autopsy photographs outweighed any prejudicial impact on the jury. Thus, the trial court did not abuse its discretion in admitting these photographs. *Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶90; *Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, at ¶74.

3. Crime Scene Video

On appeal, Trimble challenged the trial court's decision to play a videotape recording of the 880 Sandy Lake Road crime scene. Specifically, he argued that the video illustrated the

same images as the crime scene photographs thereby making the video repetitive and cumulative. However, a review of the record reveals that it was necessary to play the videotape of the 880 Sandy Lake Road crime scene because the owner of the residence, Trimble's mother, refused to give permission for a jury view of her property. (T.d. 329).

At a pretrial hearing on August 22, 2005, as the trial court was ruling on the State's motion for a jury view of the three crime scenes (T.d. 272), Defense Counsel stated, "I think it is fair to note and it's appropriate to note that the owner of the property at 880 Sandy Lake Road, Elizabeth Trimble Bresley, is not willing to have a jury come through her property, and I want to make mention of that to the Court and I have previously given notice to the Prosecutor's Office." (August 22, 2005 Motion Hearing, T.p. 11-12). Trimble's mother then identified herself for the record and stated, "I'm Mrs. Trimble and I do not want the jurors or him [the Prosecutor] in my house." (August 22, 2005 Motion Hearing, T.p. 12).

Although the jury was able to visit Reichard's property and the Ranfield Road crime scene, they were only permitted to briefly view the exterior of 880 Sandy Lake Road from their windows as the jury bus drove by the house. Accordingly, the trial court did not err in allowing the jury to watch State's Exhibit 17. (T.d. 329).

Trimble failed to demonstrate any error with the trial court's admission of the challenged photographs and videotape. The State's photographic evidence was relevant and of probative and the photographs were illustrative to testimony and other evidence presented at trial. The photographs were neither cumulative nor repetitive and the danger of material prejudice to Trimble was outweighed by the probative value of the photographs. Accordingly, Trimble's eighth proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 9:

In his ninth proposition of law, Trimble argued that the trial court erred in failing to grant a mistrial following a State's witness's testimony that Trimble had a prior conviction.

Standard of Review

This Court has made the following observation regarding mistrials:

> [i]n evaluating whether the declaration of a mistrial was proper in a particular case, this court has declined to apply inflexible standards, due to the infinite variety of circumstances in which a mistrial may arise. * * * This court has instead adopted an approach which grants great deference to the trial court's discretion in this area, in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial.

(Citations omitted.) *State v. Glover* (1988), 35 Ohio St.3d 18, 19, 517 N.E.2d 900. Thus, the decision whether to grant or deny a mistrial under Crim.R. 33 is within the sound discretion of the trial court. *Id.* A jury is presumed to follow the instructions, including curative instructions, given it by a trial judge. *State v. Loza* (1994), 71 Ohio St.3d 61, 75, 641 N.E.2d 1082. Mistrials should only be declared when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1.

Analysis

The record reflects the following from Defense Counsel's cross-examination of Agent Saraya:

> Counsel: Now, Agent Saraya, during your direct examination the prosecutor brought out several firearms which he had you identify and then they were displayed on two cafeteria tables in front of the jury box, do you recall that?
>
> Saraya: Yes, sir.
>
> Counsel: I would like to refer to those firearms. State's Exhibit 109, which you identified as a Beretta .22 caliber pistol, do you recall that?
>
> Saraya: Yes, sir.

Counsel: Okay, would you explain to the jury how that firearm figured into the shootings in this case? * * *

Saraya: During the processing of the Ranfield Road address, after Mr. Trimble had been taken into custody, it was found that he had other weapons at home and having a prior conviction - -

Counsel: Objection.

Prosecutor: Objection.

The Court: Sustained. Jury is instructed to disregard.

(Book 16-T.p. 3857-3858).

The trial court called counsel up to the bench for a sidebar discussion. Defense Counsel moved for a mistrial on the basis of Agent Saraya's testimony that Trimble had a prior conviction because the indicted charge of having weapons under disability had been severed form the aggravated murder trial. (Book 16-T.p. 3859). The State argued that Defense Counsel invited the answer by asking how the firearm "figured into the shootings of this case?" The trial court recessed for lunch and before trial reconvened, overruled the motion for mistrial finding that he had reviewed the transcript, instructed the jury to disregard and sustained the objection. (Book 16-T.p. 3860). As cross-examination of Agent Saraya continued, he testified that none of State's Exhibits 102 and 104 through 125 were involved in the shootings. (Book 16-T.p. 3861-3866).

1. **Defense Counsel's Open Ended Question on Cross-Examination Invited the Alleged Error**

Defense Counsel invited Agent Saraya's response by pursuing this line of questioning with his open-ended question, "explain to the jury how that firearm figured into the shootings in this case?" (Book 16-T.p. 3857-3858). Trimble's gun collection and ammunition was taken

into evidence pursuant to a search warrant of 880 Sandy Lake Road because Trimble was under a weapons disability due to a prior conviction.

"Under the invited-error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *State ex rel. Bitter v. Missia* (1995), 72 Ohio St.3d 249, 254, 648 N.E.2d 1355. Accordingly, any error with respect to the prior conviction statement was invited by Defense Counsel and not properly before this Court on appeal.

2. <u>Trial Court Did Not Abuse Its Discretion Denying the Motion for a Mistrial</u>

Assuming *arguendo* that this Court finds that Defense Counsel did not invite the alleged error, the trial court's denial of a mistrial in the present case was not an abuse of discretion. This Court has held a trial court did not abuse its discretion in denying a motion for mistrial following similar objectionable testimony. *State v. Garner* (1995), 74 Ohio St.3d 49, 59, 656 N.E.2d 623. In *Garner*, the defendant objected and moved for a mistrial after an officer testified about the defendant's prior police record. The trial court immediately sustained the objection and admonished the jury not to consider the testimony. This Court affirmed the trial court's denial of a mistrial finding that "the reference to the defendant's prior arrests was fleeting and was promptly followed by a curative instruction. *Id.*

In the present case, as in *Garner*, the reference to Trimble's prior conviction was a brief isolated remark followed by a curative instruction from the court. The mere mention of Trimble's prior conviction, without more, did not unfairly prejudice Trimble so as to warrant a mistrial. Trimble's ninth proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 10:

In his tenth proposition of law, Trimble maintains that the trial court improperly admitted "other acts" evidence in violation of Evid.R. 404(B). He further asserted that the probative value of this evidence was substantially outweighed by the risk of unfair prejudice. Evid.R. 403(A).

Contrary to Trimble's assertion on appeal that Darrell French's testimony presented other acts evidence, the State contends that nothing in French's testimony was evidence of other crimes, wrongs or acts presented to prove Trimble's character or conformity therewith. Assuming *arguendo* that this Court reaches the merits of Trimble's tenth proposition of law, the State offers the following response to Trimble's "other acts" argument.

Standard of Review

Evid.R. 404(B) provides:

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evid.R. 404(B). Such evidence may be admissible, however, for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* The exceptions allowing the evidence "must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682, paragraph one of the syllabus.

Evid.R. 404(B) is in accord with R.C. 2945.49, which provides:

> [i]n any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they

> are contemporaneous with or prior to subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

R.C. 2945.49.

Thus, if the other acts evidence tends to show by substantial proof any of those enumerated items, the other act may be admissible. *Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682, paragraph one of the syllabus.

Nevertheless, the admission of evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that had created material prejudice. *State v. Issa* (2001), 93 Ohio St.3d 49, 64, 752 N.Ed.2d 904. Thus, this Court's inquiry is confined to determining whether the trial court acted unreasonably, arbitrarily, or unconscionably in deciding the evidentiary issues about which Trimble complains. *State v. Barnes* (2002), 94 Ohio St.3d 21, 23, 759 N.E.2d 1240.

Analysis

1. Darrell French's Testimony

At trial, French testified that his family lived one house away from the 880 Sandy Lake Road residence. (Book 11-T.p. 2638). He had been friends with Renee for approximately 18 years and was a grade behind Trimble in school. (Book 11-T.p. 2639-2640). In October of 2003, French reconnected with Trimble after seeing Trimble working on the 880 Sandy Lake Road residence, owned by Trimble's mother. The two became close friends who would often help each other with daily projects. (Book 11-T.p. 2641).

French recalled that the first day he saw Trimble working on the house, Trimble invited French inside to show him a room full of guns and ammunition. Displayed on the floor of a back bedroom, French observed twenty to thirty guns including pistols, assault rifles and

military weapons and hundreds of rounds of ammunition. (Book 11-T.p. 2651-2652). Without objection from Defense Counsel, French stated that Trimble was very interested in guns and very knowledgeable about all types of guns and ammunition. (Book 11-T.p. 2651-2652). He recalled Trimble boasting that he could convert a regular weapon into an automatic weapon and often requested materials to make parts for his guns. (Book 11-T.p. 2652). Trimble was also able to make his own ammunition. (Book 11-T.p. 2652).

French and his wife introduced Renee and Trimble, who hit it off immediately and started dating. (Book 11-T.p. 2642). Renee and her son, Dakota, moved into the 880 Sandy Lake residence that she was renting from Trimble's mother. Shortly thereafter, Trimble also moved into the house. (Book 11-T.p. 2643). French and his wife spent time socializing with Renee and Trimble. Dakota and French's daughter, Hannah, were best friends who played together everyday. (Book 11-T.p. 2645).

French described Renee and Trimble's relationship as good at first but then it disintegrated until there was nothing left between them. (Book 11-T.p. 2648). He recalled as the relationship fell apart, Trimble's visits became a constant venting session about Renee who Trimble referred to as, "the fucking bitch." (Book 11-T.p. 2647). Rather than fixing things or working on projects, the time French and Trimble spent together was consumed with Trimble's complaints about Renee. (Book 11-T.p. 2647). French dreaded visits with Trimble. (Book 11-T.p. 2649).

At trial, French stated that each year when his wife's family from Maryland visited the French family had a two day party which included pumpkin carving, bonfires and birthday celebrations. At the October 2004 annual party, French recalled Renee and Dakota arrived at the party without Trimble. (Book 11-T.p. 2650). Renee was not happy that French's wife had

invited Renee's ex-husband, Jerry Bauer, to the annual party. (Book 11-T.p. 2672). After work, Trimble joined the festivities. While at the party, Trimble and Renee got into an argument that ended with Renee and Dakota leaving the party. (Book 11-T.p. 2650). French believed that Renee left in part because of her argument with Trimble and in part because her ex-husband was at the party. (Book 11-T.p. 2673).

Trimble remained at the party, drinking and complaining about Renee for another two or three hours. (Book 11-T.p. 2650). Before leaving, Trimble stated that "he was in a mood to go home and blow something up." (Book 11-T.p. 50-51). French was embarrassed by Trimble's comment and the fact that after Trimble left, he heard shoots being fired from the woods behind their houses. He recalled stating Trimble "is back there blowing off some guns back in the woods." (Book 11-T.p. 2651).

2. <u>French's Testimony Did Not Rise to the Level of Plain Error</u>

On appeal, Trimble complains that Darrell French's testimony demonstrated his propensity to disrespect Renee and his infatuation with guns. In support of his proposition of law, Trimble referred this Court to the following three portions of French's testimony: (1) Trimble's interest and knowledge of guns and ammunition, (2) Trimble's references to Renee as "the fucking bitch" (Book 11-T.p. 2647), and (3) Trimble's conduct at and after the October 2004 party (Book 11-T.p. 2649-2650). Trimble also referenced pages 2643, 2647, 2648, 2649 and 2650 as "a series of objections * * * all of which were overruled." (Trimble's Brief, pg. 63).

Contrary to Trimble's characterization of Defense Counsel's objections, the record reflects that the trial court sustained Defense Counsel's objections to leading questions and rephrasing of the witness's testimony on pages 2647 and 2648. (Book 11-T.p. 2647, 2648).

The record also reflects the absence of an objection on page 2650. (Book 11-T.p. 2650). Furthermore, Defense Counsel raised no objection to the entire series of questions regarding Trimble's interest and knowledge of guns and ammunition beginning with line 11 on page 2651 through line 17 on page 2654, limiting this Court to a plain error review of that testimony. (Book 11-T.p. 2651-2654).

And although there was an objection to the challenged testimony that Trimble referred to Renee as "the fucking bitch," Defense Counsel objected on the basis that the State was misquoting French by saying "f-ing bitch" rather than "fucking bitch." (Book 11-T.p. 2647). There was no objection based on Evid.R. 404 or 403, the grounds raised in this appeal. Because Defense Counsel failed to object at trial on the specific ground raised on appeal, Trimble has forfeited the issue, limiting this Court to a plain error analysis. *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 161, 749 N.E.2d 226.

This Court's review of the challenged testimony under a plain error analysis is discretionary. Crim.R. 52(B) places three limitations on a reviewing court's decision under a plain error analysis:

> [f]irst, there must be an error, i.e., a deviation from a legal rule. *** Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. *** Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial. (Internal citations omitted).

Barnes, 94 Ohio St.3d at 27, 759 N.E.2d 1240. Even if a forfeited error satisfies these three prongs, Crim.R. 52(B) does not demand that an appellate court correct it. The reviewing court's discretionary power to notice plain error should be used "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. Reversal is

warranted only if the outcome of the trial clearly would have been different absent the error. *Id.* at paragraph two of the syllabus.

In the present case, Trimble's familiarity with many types of firearms including how to manufacture parts and convert regular weapons into automatic weapons tended to show his level of knowledge and expertise in handling, maintaining and operating firearms. Trimble's ability to manufacture his own ammunition further demonstrated his wealth of information on the subject of weapons and ammunition.

His brother, Aurthur Trimble, testified without objection that "we grew up in a family of - - my father was an outdoorsman. Taught us how to shoot, clean weapons, do things in that nature." (Book 11-T.p. 2828). It is not surprising that Trimble's mother expressly recalled one of the things Trimble spent time doing with Dakota was teaching Dakota firearm safety. (Book 11-T.p. 2762, 2764). It is also not surprising that Trimble's neighbors were aware of Trimble's familiarity with weapons as Trimble was the only neighbor who went into the woods to shoot. (Book 11-T.p. 2677).

Trimble's expertise with firearms and ammunition tended to prove that he had the intent and opportunity to use his weapons and ammunition. His knowledge of the firearms and ammunition tended to show the absence of a mistake or accident regarding the shootings of Renee, Dakota and Sarah. As this alleged other acts evidence tends to show by substantial proof opportunity, intent, motive and absence of mistake or accident the alleged other act evidence was admissible. *Broom*, 40 Ohio St.3d at 282, 533 N.E.2d 682. Trimble has therefore also failed to demonstrate that the "error" would have affected the outcome of the trial, the third prong of plain-error analysis.

Trimble's anger and name calling with regard to Renee was relevant to a noncharacter issue and therefore proper evidence. French's testimony indicated that Trimble hated Renee. The testimony was probative of Trimble's motive to kill. *State v. Ahmed* (2004), 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, at ¶ 81. Therefore there was no plain error regarding this testimony.

3. **Trial Court's Failure to Provide a Limiting Jury Instruction Did Not Rise To the Level of Plain Error**

Trimble further asserted that the record was not clear on whether the court gave a limiting instruction as to the challenged portions of French's testimony. However, the record is clear that Trimble failed to request a limiting instruction regarding the alleged "other acts" evidence. (Book 11-T.p. 2638-2682). Crim.R. 30(A) provides in relevant part:

> [a] party may not assign as error the giving or failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Crim.R. 30(A). Having failed to request a limiting instruction, Trimble waived all but plain error on appeal. *State v. Frazier* (1995), 73 Ohio St.3d 323, 339, 652 N.E.2d 1000. Even if the trial judge erred in failing to give a limiting instruction on the evidence, the lack of instructions was not so grievous that it amounts to plain error. *Id.*

4. **Trial Court Did Not Abuse Its Discretion in Allowing French's Testimony of Trimble's Conduct At and After the October 2004 Party**

The last challenged portion of French's testimony, Trimble's conduct at and after the October 2004 party, is not an example of propensity evidence in violation of Evid.R. 404(B) or prejudicial evidence in violation of Evid.R. 403(A). French's testimony regarding Trimble's conduct at and after the party included Trimble's anger with Renee at the party, his complaints about her after Renee and Dakota left the party, his "mood to go home and blow something up"

and the corresponding gunfire in the woods. Trimble's conduct at the party tended to show motive, opportunity and plan. When Trimble's anger was focused on a single individual it could escalate into a destructive mood and corresponding destructive conduct. (Book 11-T.p. 50-51). As this alleged other acts evidence tends to show by substantial proof opportunity, intent and motive this alleged other act evidence was admissible. *Broom* 40 Ohio St.3d at 282, 533 N.E.2d 682.

5. Harmless Error

Moreover, even if this Court decided that the trial court erred in permitting the challenged portions of French's testimony, the "other act" evidence complained of is of minor significance compared to the gravity of the aggravated murder counts against Trimble. Any error would be harmless beyond a reasonable doubt. *Tibbetts*, 92 Ohio St.3d at 161, 749 N.E.2d 226. Trimble's tenth proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 11:

Trimble argued in his eleventh proposition of law that he was entitled to a jury instruction on the lesser included offense of reckless homicide for Count 15, the murder of Sarah Positano.

Standard of Review

R.C. 2945.11 requires that a trial court's jury charge "state to it all matters of law necessary for the information of the jury in giving its verdicts." R.C. 2945.11. This means its instructions "must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duties as the fact finder." *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus.

Parties can request that the trial court instruct the jury on a particular matter. "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law and set forth in requests." Crim.R. 30(A). However, a trial court may omit any requested instruction if it is not a correct, pertinent statement of the law appropriate to the facts governing the case. *Scott*, 26 Ohio St.3d at 11, 497 N.E.2d 55.

When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. An abuse of discretion is "more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Adams*, 62 Ohio St.2d at 157, 404 N.Ed.2d 144. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d at 621, 614 N.Ed.2d 748.

Analysis

1. **Reckless Homicide is a Lesser Included Offense of Aggravated Murder**

"[A] criminal offense may be a lesser included offense of another if: (1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus.

In the present case, after a comparison of the elements of the crime with which Trimble was charged in Count 15, aggravated murder, to the offense Trimble claims is a lesser included offense, reckless homicide, it appears that reckless homicide is a lesser included offense of aggravated murder. The aggravated murder statute provides, "[n]o person shall purposely, and with prior calculation and design, cause the death of another." R.C. 2903.01(A). The reckless homicide statute provides, "[n]o person shall recklessly cause the death of another." R.C. 2903.041.

First prong, reckless homicide is a third degree felony that carries a lesser penalty than aggravated murder. Second prong, one cannot commit aggravated murder without also committing reckless homicide. If one purposefully causes the death of another with prior calculation and design, then one necessarily also recklessly causes the death of another. Third prong, to commit reckless homicide, one need not commit the offense with prior calculation and design. Because all three prongs of the lesser included offense test are satisfied, reckless homicide is a lesser included offense of aggravated murder. *Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus.

2. <u>An Instruction on Reckless Homicide Not Warranted in Present Case</u>

While a crime may constitute a lesser included offense, it does not follow that a lesser included offense instruction is mandatory; "[a]n instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal of the crime charged and a conviction on the lesser included offense." *State v. Carter* (2000), 89 Ohio St.3d 539,600, 734 N.E.2d 345. Moreover, the lesser included offense instruction is not warranted every time "some evidence" is presented to support the inferior offense. *State v. Shane* (1992) 63 Ohio St.3d 630, 632, 590 N.E.2d 272. Rather, a court must find "sufficient

evidence" to "allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included (or inferior degree) offense." *Id.*, 63 Ohio St.3d at 632-633, 590 N.E.2d 272. In making the determination whether the instruction was required, the reviewing court must view the evidence in a light most favorable to the defendant. *State v. Smith* (2000), 89 Ohio St.3d 323, 331, 731 N.E.2d 645.

Trimble asserted that the Defense firearms and ballistics expert, Larry Dehus's, testimony regarding a shot being fired from inside the apartment combined with Trimble's statements to Sarah on the 911 recording that he would let her go after two hours demonstrated a reckless firing of the Sig Sauer that caused Sarah's death.

At issue in this proposition of law is Count Fifteen which charged Trimble with the aggravated murder of Sarah Positano. Specifically, the charge alleged that on January 22, 2005, Trimble purposely cause the death of Sarah Positano while committing or attempting to commit or fleeing immediately thereafter the offenses of kidnapping, aggravated burglary or burglary. (T.d. 22). In comparison, Trimble asserted that he was entitled to a jury instruction on the lesser included offense of reckless homicide, "no person shall recklessly cause the death of another." R.C. 2903.041. The difference between the two offenses is the offender's level of culpability. These two mental states are defined as:

> 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. * * *
>
> 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.

R.C. 2901.22(A) and (C).

Trimble referred this Court to the testimony of defense expert Dehus and the 911 recording as the sufficient evidence necessary to allow a reasonable jury to find Trimble not guilty of aggravated murder and guilty of reckless homicide with regards to the killing of Sarah Positano. With regards to Dehus, Trimble cited the testimony on page 5261. In this portion of his examination, Dehus stated that the point of origin for the bullet defect on the north wall of the stairwell, "could not have entered the room from the outside through the patio door but had to have originated along the trajectory path within the interior of the living room." (Book 21-T.p. 5261). Trimble argued that this testimony along with the 911 recording which indicated that Trimble would release Sarah following a two hour period of time demonstrated that Sarah's murder was reckless not purposeful. The record belies this argument.

Dehus's Testimony

At trial, over the State's objection, the trial court allowed Dehus to testify as an expert in the area of firearms examinations and ballistics. (Book 21-T.p. 5225). Dehus, the owner and operator of a testing and consulting laboratory called Law/Science Technologies was hired by the Defense to review the crime scenes, test the murder weapons and determine whether Trimble's 9MM could fire if dropped. (Book 21-T.p. 5260-5270). In preparation for his testimony, Dehus received summaries of the State's witnesses from Defense Counsel, reviewed photographs and Agent Saraya's report, visited the crime scenes where he took measurements, and test fired the murder weapons.

Dehus opined that a bullet defect located on the north wall of the stairwell inside Sarah's apartment originated from a weapon that was shot from inside the apartment on the first level near the patio door. (Book 21-T.p. 5261). This opinion was based on two of Agent Saraya's measurements (Book 21-T.p. 5304), Dehus's own measurements of the apartment (Book 21-

T.p. 5299), and Dehus's approximation for the location of the north wall-bullet fragment because he "could not determine where those holes were with a hundred percent confidence." (Book 21-T.p.5305).

In support of this opinion, Dehus prepared a scale drawing of the inside of Sarah's apartment. (Defense Exhibits G7). Later in his direct-examination, Dehus presented a second version of this scale drawing. (Defense Exhibit I7). On cross-examination, Dehus admitted that in his original scale drawing, the arrow indicating the North direction was actually facing South and that the revised drawing was made during the court's afternoon recess. (Book 21-T.p. 5241, 5251). Unable to attest to the exactness of Agent Saraya's measurements, Dehus further admitted that his trajectory calculations regarding the point of origin being inside the apartment could be off by four to six inches. (Book 21-T.p. 5297, 5310).

Dehus also provided testimony regarding the experiment he conducted with Trimble's 9MM pistol. After inspecting the firearm for overall condition and operability, he tested the gun to determine if the gun would discharge by dropping the weapon and simply letting go of the hammer from the cocked position. (Book 21-T.p. 5269). As the gun would not fire without the trigger also being depressed, Dehus, as close to simultaneous as possible, removed his thumb from the hammer and his finger from the trigger to see if the gun would discharge as it fell to the floor. (Book 21-T.p. 5270). Despite testifying on direct examination that the weapon discharged, on cross-examination, Dehus admitted that he conducted this test two times and one time the gun discharged while the other time it did not. (Book 21-T.p. 5308).

911 Recording

A review of the 911 recording reveals Trimble either personally stating or ordering Sarah to state no less than six times that the pistol he was holding against Sarah's head had the

trigger pulled and the hammer pulled back. (State's Exhibit 303). The recording reflects Sarah saying that she was going to throw up which Trimble responded, "Your gonna die." (State's Exhibit 303). At one point in the conversation Trimble yelled into the phone "[s]he will die. I've got the hammer pulled and the fucking trigger hold back" and another time he took the phone away from Sarah and asked the operator, "[y]ou know what a sig sauer P239 is?" (State's Exhibit 303). When the operator stated she was unaware of that, Trimble said "ok, it's a 9MM pistol with no safety, okay, I've got the hammer held back, the trigger pulled, so if the cops shoot me or even attempt to break in here I will let go of the trigger and this innocent girl will die." (State's Exhibit 303).

While Sarah was allowed to remain on the phone with the 911 operator, Trimble was talking on his cell phone to Sergeant Korach, a METRO Swat hostage negotiator. Sergeant Korach testified at trial, that he had two telephone conversations with Trimble while Sarah was being held hostage. (Book 18-4473). The first call consisted of Sergeant Korach identifying himself and learning that Trimble had one hand on the trigger, no safety on his P239 and if anyone came into the house he would kill Sarah. (Book 18-T.p. 4473). Trimble hung up, ending the first phone conversation.

Sergeant Korach reinitiated contact by placing a second call to Trimble's cell phone number. In this second call, Trimble ordered Sergeant Korach to call him "Camo Jim." (Book 18-T.p. 4475). Trimble informed Korach that he had killed two people that had fucked with him and later identified these two people as his girlfriend and her son. (Book 18-T.p. 4475-4476). Sergeant Korach asked Trimble to identify the hostage by name at which time Trimble asked Sarah her name and then relayed it to Korach. (Book 18-T.p. 4476). Trimble also informed Korach that he had encounter two other individuals walking their dog in the woods

and he could have killed them but he let them go. (Book 18-T.p. 4477). He stated that the only reason he had not killed the couple with the dog was because those two people did what he asked. (Book 18-T.p. 4477). Trimble vehemently refused Sergeant Korach's offer to throw a safety phone into the house so they could maintain their communications. (Book 18-T.p. 4477-4478).

Sergeant Korach described Trimble's demeanor as assertive and direct while being able to maintain a conversation that was clear, controlled and descriptive. (Book 18-T.p. 4478). As the second conversation progressed, Trimble offered, "if you give me a couple hours to get my shit together, I'll let her go." (Book 18-T.p. 4479). When Sergeant Korach asked Trimble to promise, Trimble replied, "if I can, you know, if I can get the time, yeah." (Book 18-T.p. 4479).

In the background of the recorded 911 conversation, you can hear portions of Trimble's conversations with Sergeant Korach. The recording clearly captured Trimble asking Sarah her name and refusing the throw phone Sergeant Korach was offering. (State's Exhibit 303). The 911 recording also contains Trimble saying, "Sarah, listen in two hours you're gonna go home," to which Sarah responds, "I'm gonna go home." (State's Exhibit 303). Sarah then related this information to Sergeant Baron, "He said in two hours * * * He's gonna let me go home if the cops don't come up here." (State's Exhibit 303).

Shortly after midnight, Trimble hangs up with Sergeant Korach. Moments before the fatal gunshot, Trimble can be heard telling Sarah she will leave in two hours. The next thing heard on the 911 recording is Trimble stating "you'll get there in a minute." (State's Exhibit 303). At 12:04 a.m., there is a single gunshot on the tape recording. (State's Exhibit 303). As the recording continues, Sarah screams and says, "I've been shot." (State's Exhibit 303). Sarah

is gasping her last breaths of life while Sergeant Baron unsuccessfully attempted to get a response from her. (State's Exhibit 303). Five minutes later at 12:09 a.m., the recording depicts a series of rapid fire shots. (State's Exhibit 303).

Viewing the evidence in the light most favorable to the defendant, as the law requires, Trimble failed to present sufficient evidence to allow the jury to reasonably reject the charge of aggravated murder and find Trimble guilty of reckless homicide regarding the death of Sarah Positano. In a light most favorable to Trimble, a shot was fired from inside the apartment on the first level near the patio door that hit the north wall of the stairwell and Trimble told Sarah that she would go home in two hours. Even if a shot was fired from inside the apartment, it was not the shot that killed Sarah nor the alleged shot that caused Trimble to drop his 9MM pistol and accidentally discharge. The first sound of gunfire in the 911 recording is a single shot at 12:04 a.m. (State's Exhibit 303). Five minutes pass and at 12:09 a.m., the recording depicts a series of rapid fire shots. (State's Exhibit 303). If someone shooting from inside the apartment caused Trimble to drop his 9MM pistol that shot would not have been fired five minutes after Sarah was murdered.

The Medical examiner testified that Sarah "died from a gunshot wound to the neck with perforation of her carotid artery and left lung." (Book 19-T.p. 4636). Specifically, a single bullet punctured the skin, coursed through thick muscle on the side of Sarah's neck, perforated the carotid artery, and went through the left lung and out the chest cavity between the ribs in an area under her left arm. (Book 19-T.p. 4632). The general path of the bullet was front to back, downward, and right to left. (Book 19-T.p. 4632).

Jeff Gardner, a forensic scientist who works in the firearms section of the BCI, testified as the State's firearms expert. (Book 17-T.p. 4126 to Book 18-T.p. 2484). He identified State's

Exhibit 233 as the 9MM bullet recovered from the area next to Sarah's left shoulder at the crime scene. (Book 17-T.p. 4192). This bullet was fired from Trimble's Sig Sauer 9MM pistol (Book 17-T.p. 4193), from a location less than twelve inches from Sarah's neck. (Book 17-T.p. 4197-4198).

Gardner also described the operation of State's Exhibit 210, Trimble's Sig Sauer nine millimeter pistol, and stated that this model contained two internal safeties. (Book 17-T.p. 4185). With regards to the basic operation of the 9MM pistol, as long as the trigger is depressed, when the hammer falls, the weapon will discharge. (Book 18-T.p. 4273). However, Gardner stated that if the 9MM pistol was dropped while the hammer was pulled back and the trigger was not depressed the gun would not discharge because the trigger would fall forward and the hammer would drop onto the internal safety notch preventing discharge. (Book 18-T.p. 4273).

The 911 recording indicates that Trimble was aware of the mechanics of firing the 9mm pistol. He had Sarah inform the 911 operator, "he says to keep telling you that he had the trigger pulled and the only thing that's keeping me from being shot is the hammer's held back." (State's Exhibit 303).

The first gunshot heard on the 911 recording was the fatal 12:04 a.m. shot fired from Trimble's 9MM pistol, which would have only discharged as long as the trigger was depressed. Furthermore, the 911 recording revealed that Trimble was holding the weapon at Sarah's head with the trigger depressed and the hammer pulled back and that he intended to kill her. (State's Exhibit 303). The record supports a purposeful killing of Sarah. Accordingly, Trimble has failed to present sufficient evidence, even when viewed in a light most favorable to him, that would allow a jury to reasonably reject aggravated murder and find reckless homicide for Count

Fifteen. The trial court did not err in failing to instruct the jury on reckless homicide for Count Fifteen. Trimble's eleventh proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 12:

In his twelfth proposition of law, Trimble asserted numerous instances of prosecutorial misconduct in the penalty stage of this case. He argued that the cumulative effect of the alleged instances of prosecutorial conduct deprived him a fair penalty stage of his trial.

Standard of Review

The test for prosecutorial misconduct is whether the conduct complained of deprived the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, 514 N.E.2d 394. In determining whether reversal is justified, the prosecutorial misconduct, if any, must be viewed in light of the entire case and there must be a showing of prejudice to the defendant. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293. Reversal is warranted only if the prosecutorial misconduct "permeates the entire atmosphere of the trial." *Id.*

Analysis

On appeal, Trimble directed this Court's attention to the following alleged instances of prosecutorial misconduct: (1) State's cross-examination of Trimble's mother regarding Trimble's Air Force career and his marriage to Susan McCoy, (2) State's request on page 5836, to pursue a line of character questions and (3) State's cross-examination of Dr. Smith. A review of these challenged portions of Trimble's penalty stage proceedings reveals that the State did not engage in prosecutorial misconduct that jeopardized the fairness of the penalty stage proceedings.

1. Cross-Examination of Trimble's Mother

On direct-examination at the penalty stage, Trimble's mother, Mrs. Bresley testified regarding Trimble's service in the Air Force. (Book 23-T.p. 5776). She stated that he entered the Air Force around age nineteen, to "finish his education." (Book 23-T.p. 5777). Mrs. Bresley described her relationship with her son at this stage of his life as "very close." They spoke on the phone every week and the two frequently exchanged letters. (Book 23-T.p. 5778). She found her conversations with Trimble had a relaxing effect and it was "nice to know that he was getting along okay." (Book 23-T.p. 5779). Direct examination inquiries included, "*upon leaving the Air Force*, you indicated that he stayed in Texas in the Dallas Fort-Worth area" and "what did he do for a living *after his service ended with the Air Force*." (Emphasis added), (Book 23-T.p. 5781).

Following Mrs. Bresley's testimony, the State informed the court at a sidebar discussion that it intended to inquire into Trimble's past criminal conduct because his mother had put Trimble's character in issue. (Book 23-T.p. 5805). In response, Defense Counsel objected and argued that Mrs. Bresley had only testified regarding Trimble's history and not his character. (Book 23-T.p. 5805). The trial court held that the Defense had not yet opened the door to character evidence and sustained the objection. (Book 23-T.p. 5806).

Over objections by Defense Counsel, the trial court allowed the State to ask whether Mrs. Bresley was aware that Trimble left the Air Force by court martial with a bad conduct discharge. (Book 23-T.p. 5806). The trial court sustained Defense Counsel's objection to the State's inquiry whether Mrs. Bresley was aware that Trimble was sentenced to six months hard labor and instructed the jury to disregard Mrs. Bresley's response. (Book 23-T.p. 5807). At sidebar, Defense Counsel moved for a mistrial asserting the Prosecutor's question was improper

and purposeful. The trial court overruled the motion for a mistrial and again instructed the jury to disregard the State's question and the witness's response. (Book 23-T.p. 5808).

On direct-examination after testifying that Trimble's second marriage was to Susan McCoy, Defense Counsel had asked "what happened to that marriage?" (Book 23-T.p. 5785). Mrs. Bresley answered, "[i]t was a divorce." (Book 23-T.p. 5785). On cross-examination, the State inquired:

> Prosecutor: And were you aware under what circumstances that marriage ended?
>
> Mrs. Bresley: They got a divorce, sir.
>
> Prosecutor: Were you aware of any domestic violence in that?
>
> Mrs. Bresley: No, sir.

(Book 23-T.p. 5808). The trial court sustained Defense Counsel's objection and called counsel to the bench and stated that "any further procedure in this is going to constitute a mistrial." (Book 23-T.p. 5809). The court then instructed the jury to disregard the question and response.

This Court has held that in the penalty stage of a capital trial, a prosecutor may rebut false or incomplete statements regarding the defendant's criminal record only where the defense offers a specific assertion, by a mitigation witness or by the defendant that misrepresents the defendant's prior criminal history. *State v. Depew* (1988), 38 Ohio St.3d 275, 286-287, 528 N.E.2d 542. Permitting a mitigation witness to make a false or incomplete statement regarding the defendant's criminal history would present to the jury something less than a full picture. *Id.*

As R.C. 2929.03 accords the prosecutor great latitude in presenting the State's case in the penalty stage as well as the guilt stage, the Prosecutor's inquiry of Trimble's mother in the present case was not error. An incomplete picture was presented to the jury during direct examination. Specifically, that Trimble voluntarily left the Air Force after his term of service

was completed and that his marriage to Susan McCoy merely ended in divorce. The State's cross-examination of Mrs. Bresley attempted to reveal the complete picture that Trimble's Air Force career ended in a court martial where Trimble entered a guilty plea to the charge of transporting marijuana, was sentenced to six months hard labor, placed on probation for nine years and discharged from service with a bad conduct discharge.

Furthermore, the complete picture of Trimble and Susan McCoy's marriage would include Trimble's guilty plea and conviction for deadly conduct in the State of Texas. He committed violence against Susan, violated a protection order and fled to the woods on their property after initially holding her and two other people at gunpoint. Trimble negotiated his surrender to authorities hoping to be placed in a psychiatric hospital rather than be criminally charged. (Book 25-T.p. 6139-6140). However, he incurred both state and federal criminal charges for the incident. Trimble served two years in a Texas state prison for the February 8, 2002, deadly conduct conviction and was then transferred to McKeon Federal Correction Institution to serve his federal sentence on the October 1, 2002, Federal firearm conviction. (Book 25-T.p. 6140). Accordingly, the State's inquiry into these two topics was not error although the trial court sustained the Defense objections.

Assuming *arguendo* that this Court would find that these two questions were improper, such error viewed in the context of the entire penalty stage, as the law requires when prosecutorial misconduct is alleged, does not rise to the level of prosecutorial misconduct that permeated the entire atmosphere of the penalty stage. *Lott*, 51 Ohio St.3d at 165, 555 N.E.2d 293. The record reflects that the trial court instructed the jury to disregard the questions and corresponding responses and the jury is presumed to have followed the court's instructions.

2. State's Request to Pursue Character Questions on Page 5836

The State begins by noting that Trimble's citation to the record coupled with a reference that the transcript citation occurred prior to the cross-examination of Aubrey Bryce is incorrect. (Appellant's Brief, pg. 69). Specifically, Trimble's citation to the record at page 5836 (Appellant's Brief, pg. 69), is actually a citation to the State's request to pursue a certain line of character questions at the conclusion of the direct examination of Defense witness, Mark Brazle. A review of the record reveals that no such request was made by the State prior to its cross-examination of Bryce. (Book 23-T.p. 5822).

The State did approach the bench before cross-examining Trimble's minister, Mark Brazle, because Brazle had provided the following character evidence on direct examination. (Book 23-T.p. 5836). Brazle testified on direct-examination that he was the minister of a nondenominational church in Cuyahoga Falls, where Trimble was a member. (Book 23-T.p. 27). He first met Trimble through a "widow and widowers group" when Trimble attended "a Wednesday night Bible study." (Book 23-T.p. 5828). Brazle recalled that Trimble "would come and help on Fridays with folding the newsletter and he was there several consecutive Sundays" before indicating that he wanted to become a member of the church. (Book 23-T.p. 5829). Trimble attended church regularly and also brought Dakota to Christmas functions and children's Bible study.

Brazle also knew Trimble "to be a handyman" who "offered to do work at church and had helped various [*sic*], especially elderly people with different things, really anything they needed, it was known that he would be willing to help." (Book 23-T.p. 5831). While Trimble was in jail awaiting trial, he received weekly visits from the minister and some parishioners. Trimble had requested "copies of hymns because it was an encouragement for him spiritually to

sing hymns" which Brazle supplied and stated that on visits they "discussed some Biblical topics." (Book 23-T.p. 5834).

Specifically, Brazle has counseled Trimble, "trying to come to terms with forgiveness and such a thing as having that relationship with God through what has happened and just a strong sense of remorse for what has happened." (Book 23-T.p. 5835). They have spoken "about what God expects" and Trimble shared with Brazle that "he sees that God's forgiveness is available even though he has a hard time forgiving himself." (Book 23-T.p. 5835).

Following this direct examination, the State argued at sidebar that the Defense had put character in issue by indicating with the minister's testimony that Trimble was a man of good, religious and moral character. As trial court refused to allow the State to cross-examine the minister regarding his knowledge of Trimble's true character, no cross-examination was conducted. (Book 23-T.p. 5836).

3. Cross-Examination of Robert Smith

The trial court accepted Robert Smith as an expert in the field of clinical psychology and the field of chemical dependence and addiction. (Book 24-T.p. 6028). Dr. Smith was hired by the Defense to conduct a psychological and chemical evaluation to determine whether Trimble met the criteria for insanity. (Book 24-T.p. 6029). Dr. Smith opined Trimble did not meet the legal definition of insanity. He further opined that at the time of the offense, Trimble was suffering from several psychological conditions, was acutely intoxicated, had ingested alcohol, methamphetamine, Ativan, and Vicodin "and that these substances and his bi-polar II disorder contributed to his commission of the offense; and that it diminished his ability to conform his conduct to the requirement of the law." (Book 24-T.p. 6058-6059). Dr. Smith testified that his

opinions were based on three personal interviews with Trimble, administration of tests and reviewing a series of documents identified in Smith's report. (Book 24-T.p. 6031).

Although the State was not permitted to cross-examine Smith as to Trimble's prior convictions, the trial court ruled that the State would be allowed to inquire into prior instances that were considered by Smith in his examination. (Book 25-T.p. 6135). The trial court's ruling was in accord with Evid.R. 705 that provides, "the expert may testify in terms of opinion or inference and give his reasons therefore after disclosure of the underlying facts or data." Evid.R. 705. Pursuant to this ruling, Smith stated that his opinion was based in part on the following information: an indication of some violence in Trimble's marital relationships with Susan McCoy and Kelly Penn (Book 25-T.p. 6146), Trimble left the Air Force with a bad conduct discharge after testing positive for marijuana (Book 25-T.p. 6168), and that Trimble was able to refrain from drug use for 48 hours before undergoing urine drug screens. (Book 25-T.p. 6028).

As the State's inquiry into the underlying facts and data of Smith's opinion was proper, Trimble has failed to demonstrate prosecutorial misconduct regarding the cross-examination of Smith. Contrary to Trimble's allegations, the record revealed no instances of prosecutorial misconduct in the penalty stage of Trimble's case. Trimble's twelfth proposition of law is without merit and should be overruled.

Assuming *arguendo* this Court finds error with the State's cross-examination of Trimble's mother or determines that the State's inquiry into the underlying facts of Dr. Smith's expert opinions was error, Trimble cannot demonstrate prejudice resulted from said error. The record reflects that Defense Counsel instructed it's own witness to inform the Jury that Trimble

served time in a federal prison. The following exchange occurred when Defense Counsel re-directed Dr. Smalldon, the Defense's second expert witness at the penalty stage:

> Defense: And also do you have Doctor Resnick's report available to you there?
>
> Smalldon: I do. Okay, I have it.
>
> Defense: Could you turn to page 32 on that report, Doctor?
>
> Smalldon: Yes.
>
> Defense: And in the first paragraph, under diagnostic impression, about a third of the way down in the paragraph which starts with Mr. Trimble reported, do you see where I'm referencing?
>
> Smalldon: Yes.
>
> Defense: Could you read that sentence?
>
> Smalldon: Yes, reads: Mr. Trimble reported that some of these episodes occurred when he was free of alcohol and illegal substances when he was in *federal prison.*

(Emphasis added) (Book 26-T.p. 6496-6497). Any error in allowing the State's cross-examinations of Trimble's mother and Dr. Smith, to elicit testimony regarding Trimble's prior criminal behavior was not prejudicial when Defense Counsel instructed a mitigation witness to inform the Jury that Trimble had served time in a federal prison. Trimble's twelfth proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 13:

In his thirteenth proposition of law, Trimble argued that this Court's independent review of the mitigation evidence would result in a finding that the sentence of death was not appropriate in his particular case. In support of this proposition of law, Trimble summarized

mitigation witnesses' testimony and emphasized the mitigation evidence and testimony regarding his methamphetamine use.

Standard of Review

R.C. 2929.05(A) mandates that this Court independently review the death sentence on each count of aggravated murder. As to each count, this Court must determine: (1) whether the evidence supports the jury's finding of aggravating circumstances, (2) whether the aggravating circumstances outweigh the mitigating factors and (3) whether the death sentence is proportionate to those affirmed in other similar cases. R.C. 2929.05(A). A defendant must establish the existence of a mitigating factor by a preponderance of the evidence. *Stumpf*, 32 Ohio St.3d at 102, 512 N.E.2d 598.

Analysis

1. Evidence Supported the Jury's Finding of the Aggravating Circumstances For Counts Thirteen, Fourteen and Fifteen

Count Thirteen: Aggravating Circumstance of Renee Bauer's Murder

Trimble was convicted of aggravated murder with prior calculation and design of Renee Bauer. He was also convicted of the separate aggravating circumstance that the murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, R.C. 2929.04(A)(5).

Testimony and evidence at the guilt phase of Trimble's trial established that on the evening of January 21, 2005, Trimble went down into the basement at the 880 Sandy Lake Road residence he shared with girlfriend, Renee Bauer and her seven-year-old son Dakota. (Book 11–T.p. 2627). He was the only individual who had access to a locked gun safe and control of the key, which unlocked a separately padlocked ammunition cabinet that were located in the basement. (State's Exhibits 328 A and B). Once in the basement, Trimble unlocked the gun

safe, chose an assault rifle from among a large collection of various types of firearms, and closed and locked the gun safe. (State's Exhibits 328 A and B). He then unlocked the ammunition cabinet and removed high powered ammunition and loaded the assault rifle. (State's Exhibits 328 A and B).

Trimble climbed the basement steps up to the first floor of the residence, proceeded to the doorway of the master bedroom and pulled the trigger of the assault rifle nineteen times while the rifle was aimed at Renee and Dakota. Thirteen bullets hit Renee as she attempted to shield Dakota from the gunfire. (Book 16-T.p. 3939-3940). As Renee placed her body between Dakota and the killer, she turned to look at Trimble and received a shot to her head and another in her shoulder. (Book 16-T.p. 3939-3940). Eleven more bullets hit Renee in her back.

Renee's head injury was caused by high velocity projectiles and resulted in an explosive injury that was very destructive, fragmenting her skull and tearing her brain tissue. (Book 16-T.p. 3941). When the high velocity bullet struck Renee's head, scalp tissue, brain matter and pieces of her skull were projected in an outward direction from the point of impact to a significant distance away from Renee's body. (Book 17-T.p. 4908-4910).

A group of gunshot wounds to Renee's upper back resulted in injury to the vertebrae, multiple rib fractures, and injuries to the soft tissues of her lungs. (Book 16-T.p. 3957). Another group of gunshots, which entered her abdominal area, injured her bowels and lungs. (Book 16-T.p. 3958). A third group of gunshots entered her lower abdominal area and resulted in injuries to her bladder, rectum, uterus, vagina and devastating fractures to her pelvis. (Book 16-T.p. 3958). All of Renee's gunshots wounds were potentially fatal with the exception of one gunshot that entered her hand.

As Renee was standing between Dakota and Trimble's rifle, her body became an intermediary target. All of Dakota's six gunshot wounds were re-entry wounds caused when the six bullets passed through Renee's abdomen and struck Dakota. Dakota's three fatal wounds were a gunshot wound that entered his neck, traveled up into his chin, damaging his larynx and two major blood vessels. (Book 17-T.p. 4032). And two larger gunshot wounds to his chest area that collapsed his right lung and damaged his windpipe and liver. (Book 17-T.p. 4041). He also received wounds to his chin, right hand and arm from bullets that passed through a teddy bear he was clutching at the time of his death. (Book 17-T.p. 4028-4029, 4046-4067).

Trimble left the two dead bodies on the bedroom floor, returned to the basement and geared up to confront the police. He put on long underwear, heavy camouflage clothes, socks and boots and took an AR-15 assault rifle, a nine millimeter Sig Sauer semi-automatic pistol and over a hundred rounds of ammunition for both weapons along with a cell phone, knife and his dog tags then headed into the woods. Moments after the double murder, Trimble confessed to his mother in a phone conversation, "I have just shot Renee and Dakota." (Book 11-T.p. 2747). Later, Trimble received a cell phone call from his bother and again admitted that he "killed the fuckin' bitch," and the boy was dead too. (Book 11-T.p. 2830).

Attempting to avoid the police, Trimble traveled through the wooded area in his neighborhood and eventually encountered Stephen Reichard and his black Labrador retriever on the edge of Reichard's driveway. Standing in the shadows with the barrel of his assault rifle aimed at the stranger's face, Trimble threatened to kill Reichard. (Book 18-T.p. 4288). As Reichard's mother, Lois Scott, exited the residence looking for her son, Trimble emerged from

the shadows and threatened to kill them both. (Book 18-T.p. 4288). After some fast-talking, Reichard and Scott escaped with their lives.

For the next hour and a half, Trimble shot at officers as he moved through the woods. (State's Exhibits 328 A and B). Trimble then came upon a duplex in a rather isolated area surrounded by open fields. Ordinarily three young women occupy the duplex, but on this cold, snowy evening only Sarah Positano, a 22-year-old Kent State coed was home. Trimble broke through a patio door, went up to the second floor, discovered Sarah alone in her bedroom and took her hostage. (State's Exhibits 328 A and B). While holding the loaded nine-millimeter, Sig Sauer, semi-automatic pistol to her head, Trimble ordered Sarah to call 911. (State's Exhibits 328 A and B).

Sarah called 911 on her cell phone at 11:14 p.m. (State's Exhibit 303). A tape recording of the 911 call depicts a terrified Sarah relaying Trimble's demands to the 911 operator. During the 911 recording, Trimble took the phone from Sarah and said to the 911 operator, "you know what a Sig Sauer P239 is? * * * It's a nine millimeter pistol with no safety, okay, I've got the hammer held back, the trigger pulled, so if the cops shoot me or even attempt to break in here I will let go of the trigger and this innocent girl will die." (State's Exhibit 303).

Around 11:30 p.m., Sergeant Korach, hostage negotiator, contacted Trimble on his cell phone. Trimble informed Korach that he had killed two people that had fucked with him and later identified these two people as his girlfriend and her son. (Book 18-T.p. 4475-4476). Trimble also informed Korach that he had encounter two other individuals walking their dog in the woods and he could have killed them but he let them go. (Book 18-T.p. 4477). He stated that the only reason he had not killed the couple with the dog was because those two people did what he asked. (Book 18-T.p. 4477).

Taking control of the conversation, Trimble in a calm, clear and direct voice repeated his demands, described the pistol he was holding against Sarah's head, and eventually stated that he would let Sarah go after two hours. (Book 18-T.p. 4475). Shortly after midnight, Trimble hung up with Sergeant Korach. At 12:04 a.m. there was a single gunshot on the tape recording of the 911 call. (State's Exhibit 303). As the recording continued, Sarah screamed and said, "I've been shot." (State's Exhibit 303).

Five minutes later at 12:09 a.m., the recording depicts a series of rapid fire shots. (State's Exhibit 303). Trimble continued randomly shooting his AR-15 assault rifle until it jammed (Book 14-T.p. 3455), and then fired his nine millimeter Sig Sauer until the clip was empty. (Book 14-T.p. 3460). The Swat Team released tear gas into the duplex, found Sarah lying dead from a single gunshot to her neck in the hallway of the second floor and Trimble barricaded in Sarah's bedroom.

Sarah "died from a gunshot wound to the neck with perforation of her carotid artery and left lung." (Book 19-T.p. 4636). Specifically, a single bullet punctured the skin, coursed through thick muscle on the side of Sarah's neck, perforated the carotid artery, went through the left lung and out the chest cavity between her ribs. (Book 19-T.p. 4632). Ballistics testing revealed that the fatal bullet was fired from Trimble's Sig Sauer. (Book 17-T.p. 4190-4191).

Trimble's simultaneous killing of two victims in a single incident clearly established the course-of-conduct specification. See, generally, *State v. Sapp* (2004), 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239. The evidence at trial supported the Jury's finding of the R.C. 2929.04(A)(5) aggravating circumstance.

Count Fourteen: Aggravating Circumstances of Dakota Bauer's Murder

Trimble was convicted of purposely causing the death of Dakota Bauer, a child under the age of thirteen. He was also convicted of the following two aggravating circumstances: (1) that the aggravated murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, R.C. 2929.04(A)(5) and (2) that Trimble, the principal offender, purposely caused the death of another who was under the age of thirteen at the time of the commission of the aggravated murder, R.C. 2929.04(A)(9).

As Trimble was also convicted of the course-of-conduct aggravating circumstance for Dakota's murder, the previous discussion of evidence and support for Renee's course-of-conduct aggravating circumstance is incorporated by reference in this discussion as it equally applies to Dakota.

At trial, Robin Bare, Renee's sister testified that Dakota was born on May 23, 1997, and a certified copy of Dakota's birth certificate was admitted into evidence. (Book 11-T.p. 2624, State's Exhibit 243). As Dakota was born on May 23, 1997, he was seven years old on January 21, 2005 when Trimble murdered him. Evidence at trial further reflected that Trimble was the sole, principal offender who purposely chose to pull the trigger of an assault rifle loaded with high-powered ammunition nineteen times while the rifle was aimed at Renee and Dakota. This established the R.C. 2929.04(A)(9), child-murder aggravating circumstance. *State v. Fitzpatrick* (2004), 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, at ¶ 85.

Count Fifteen: Aggravating Circumstance of Sarah Positano's Murder

Trimble was convicted of purposefully causing the death of Sarah Positano while committing kidnapping and aggravated burglary. He was also convicted of the following four aggravating circumstances: 1) that the aggravated murder was committed for the purpose of

escaping detection, apprehension, trial or punishment for another offense committed by Trimble, R.C. 2929.04(A)(3), 2) that the aggravated murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, R.C. 2929.04(A)(5), 3) that the aggravated murder was committed while Trimble, the principal offender, was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary, R.C. 2929.04(A)(7) and 4) that the aggravated murder was committed while Trimble, the principal offender, was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, R.C. 2929.04(A)(7). The trial court merged aggravating circumstance R.C. 2929.04(A)(3) and both (A)(7) specifications prior to sentencing. (T.d. 450).

As Trimble was also convicted of a course-of-conduct aggravating circumstance for Sarah's murder, the discussion of evidence and support for Renee's course-of-conduct aggravating circumstance is incorporated by reference in this discussion. The evidence at trial shows that Trimble purposely killed Renee and Dakota and then proceeded to evade officers for several hours before breaking into Sarah's apartment. Upon discovering Sarah alone in her upstairs bedroom, Trimble took her hostage and held his 9MM pistol at her head for approximately thirty minutes until he fired a single shot from the pistol killing Sarah. (State's Exhibit 303). During the thirty minutes that Trimble had a loaded 9MM pistol aimed at Sarah's head he repeatedly stated that the trigger was pressed and the hammer was cocked back. (State's Exhibit 303, Book 18-T.p. 4475). He even told Sarah, "Your gonna die." (State's Exhibit 303). This evidence satisfies the R.C. 2929.04(A)(5) course-of-conduct aggravating circumstance. *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 248, 714 N.E.2d 867.

The jury found two separate felony-murder aggravating circumstances by finding Trimble committed Sarah's murder while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping and aggravated burglary. R.C. 2929.04(A)(7).

R.C. 2905.01, the offense of kidnapping provides:

> [n]o person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:
>
> (1) To hold for ransom, or as a shield or hostage;
>
> (2) To facilitate the commission of any felony or flight thereafter;
>
> (3) To terrorize, or to inflict serious physical harm on the victim or another.

R.C. 2905.01(A)(1), (2), (3).

A review of the recording of the 911 call reveals that before murdering her, Trimble terrorized Sarah saying, "Your gonna die" and "the only thing keeping [Sarah] from being shot is the hammer's held back." (State's Exhibit 303). Sarah said that she was scared and pleaded with Trimble, "can you not put that gun to my head?" (State's Exhibit 303). When Sarah again pleaded, "could you not point that gun at my head I'm gonna throw up" Trimble replied, "I have too." (State's Exhibit 303). He had ordered Sarah to contact 911 to report his location and the fact that she was being held at gunpoint so Trimble could use Sarah as a hostage to negotiate with the police. (State's Exhibit 303). But he refused to give his name saying only, "they know who it is" and telling Sergeant Korach he could call him "Camo Jim." (Book 18-T.p. 4475; State's Exhibit 303).

Sarah informed the 911 operator that there was a man in her house and "he has a gun and he told me to tell you guys to tell the police to back off." (State's Exhibit 303). Trimble

had narrowly escaped apprehension by the police for two hours as he sought cover in the woods of his neighborhood. Trimble kidnapped Sarah after committing a double murder, with the purpose to use her as a hostage, and before killing her (inflicting serious physical harm), he terrorized Sarah with a loaded 9MM pistol. Accordingly, the evidence supports the jury's finding of the kidnap-murder aggravating circumstance, R.C. 2929.04(A)(7).

R.C. 2911.11, the offense of aggravated burglary provides:

> [n]o person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
>
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
>
> (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

R.C. 2911.11.

Evidence at trial established that Trimble broke through the patio door to Sarah's apartment while Sarah was in her upstairs bedroom. (State's Exhibits 328 A and B). Without privilege, he knowingly remained inside the apartment. While forcibly trespassing in Sarah's apartment, Trimble had a loaded assault rifle and a loaded 9MM pistol that he used to kill Sarah. (State's Exhibit 303). Accordingly, the evidence supports the jury's finding that Trimble murdered Sarah while committing the offense of aggravated burglary, R.C. 2929.04(A)(7).

Evidence at trial also supported the jury's finding that Trimble murdered Sarah for the purpose of escaping detection, apprehension, trial or punishment for murdering Renee and Dakota, R.C. 2929.04(A)(3). Trimble took Sarah as a hostage to escape apprehension by the

police. The resulting failure to escape apprehension does not diminish his purpose behind taking Sarah as a hostage. Although Trimble confessed to Sergeant Korach that he had murdered his girlfriend and her son, he had refused to identify himself to the 911 operator or Sergeant Korach. Therefore, Sarah was the only person who had seen Trimble face to face as he confessed to the prior murders. Murdering Sarah advanced his purpose of escaping trial or punishment for the double murders because it eliminated the State's eyewitness to Trimble's confession. To further escape apprehension, Trimble would need to travel alone and eliminating Sarah would accomplish this and remove the only person who could direct the police toward Trimble's escape route. Accordingly, the evidence supported the jury's finding of the R.C. 2929.04(A)(3) aggravating circumstance.

2. Aggravating Circumstances Outweighed the Mitigating Factors

This Court should consider and weigh against the aggravating circumstances: 1) the nature and circumstances of the offenses, 2) the history, character and background of Trimble, 3) whether at the time of committing the offenses, Trimble, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, R.C. 2929.04(B)(3) and 4) any other factors that are relevant to the issue of whether Trimble should be sentenced to death, R.C. 2929.04(B)(7). R.C. 2929.04(B).

Evidence Presented in Mitigation

The centerpiece of Trimble's case in mitigation was Trimble's alleged drug abuse and addiction to various substances, most importantly his methamphetamine use. In support of Trimble's alleged methamphetamine use, the Defense presented testimony and evidence regarding a hair analysis that was performed by Omega Laboratory, a blood analysis performed

by National Medical Services, a motivational speaker and testimony from experts in the fields of clinical psychology, neuropsychology and chemical dependence and addiction.

Hair samples were obtained from Trimble on April 15, 2005. One sample was cut from Trimble's head and another from under his arm. (Book 24-T.p. 5926). At Omega Laboratory, Lauren Vinsick, the Laboratory Manager, performed the hair analysis and testing. (Book 24-T.p. 5934). The State objected to the hair analysis evidence as Vinsick testified that she was only licensed to perform urine analysis and the Omega Laboratory carried only a New York State license for hair analysis, a procedure that was not federally approved. (Book 24-T.p. 5941). The evidence was admitted over the State's objection.

The protocol for hair analysis at Omega Laboratory involved measuring a sample from the collected hair and performing a color test to indicate the presence of drugs. If the result of the color test was a presumptive positive for drugs, another sample was cut and run through a gas chromatogrph mass spectrometer ("GCMS") to confirm the initial results. (Book 24-T.p. 5959). When testing for methamphetamine, only the presence of 1 nanogram of methamphetamine per ten milligrams of hair will register on the GCMS.

The hair cut from under Trimble's arm showed no presence of methamphetamine while the sample cut from Trimble's head showed the presence of methamphetamine at 12 nanograms of methamphetamine per ten milligrams of hair. (Book 24-T.p. 5960-5962). Again over the State's objection, the trial court permitted Vinsick to testify that based on the rate of hair growth, the results of Trimble's head-hair sample indicated ingestion of methamphetamine by Trimble within sixty days of the sample collection. (Book 24-T.p. 5968).

On cross-examination, Vinsick admitted that Omega Laboratory did not perform tests on hair follicles and that without the hair follicle attached to sample collected from Trimble, she

had no way of knowing which end of the collected hair sample was the end cut closest to the scalp. (Book 24-T.p. 5971-5973). Furthermore, as the hair samples were collected from Trimble on April 15, 2005, a 60-day window would go back to February 15, 2005, so Vinsick had no clue as to how much if any methamphetamine was in Trimble's system on January 21 and 22, 2005, when he committed the murders. (Book 24-T.p. 75). She also had no explanation why the hair testing indicated Trimble had ingested methamphetamine in a 60-day period of time, all of which Trimble had spent in the Portage County Jail.

The blue tee shirt worn by Trimble the night of the murders was tested and the parties' stipulated that the blood stains on the tee shirt were Trimble's. (Book 24-T.p. 5978). Lee Blum, a toxicologist with National Medical Services, testified that the Defense requested he test the tee-shirt's blood stains for the presence of drugs. (Book 24-T.p. 5987). Blum explained the protocol used for testing the tee shirt. First, he analyzed the tee shirt to see if methamphetamine could be extracted from the tee shirt material. This was accomplished by cutting a sample of the tee shirt that did not contain the blood stain, dividing the sample into three sections and applying a little amount of methamphetamine to the first section, a greater amount of methamphetamine to the second section and nothing to the third section. (Book 24-T.p. 5990-5992). Further testing of the three sections revealed the presence of methamphetamine from all three sections of tee shirt material. These were unexpected results. As no methamphetamine had been applied to third section of material, this plain section should not have tested positive for the presence of methamphetamine. (Book 24-T.p. 5993).

Blum explained that methamphetamine could have come to be on the plain section of the tee shirt by Trimble's perspiration or by an external contamination like wearing the shirt in a room containing methamphetamine smoke or coming into contact with a solid form of

methamphetamine that settled on the shirt. (Book 24-T.p. 5993-5994). Despite results that had already proven the entire tee shirt would test positive for methamphetamine, at Defense Counsel's request, Blum repeated the testing protocol on a sample of the tee shirt containing the blood stain. (Book 24-T.p. 6000).

Test results of the blood stained sample of Trimble's tee shirt indicated the presence of amphetamine, a metabolite of methamphetamine, and a presumptive positive for the presence of opiates, cocaine, and cannabinoids. (Book 24-T.p. 6000). However, without conducting further tests to confirm the presence of the opiates, cocaine and cannabinoids, Blum could not state with a degree of scientific certainty that any of those substances were actually present on the blood stain sample. (Book 24-T.p. 6015). The Defense did not request any further testing to confirm the presence of these elements.

On cross-examination, Blum admitted that he did not know when or how the methamphetamine came to be on Trimble's tee shirt. He opined that Trimble could have bumped into someone who had methamphetamine on his or her clothing that was then deposited on Trimble's shirt or Trimble's shirt could have been stored in a container with other items that had already been contaminated with methamphetamine. (Book 24-T.p. 6012). Furthermore, Blum testified that several over-the-counter medications will give a positive result for the presence of methamphetamine when tested and there was no way to differentiate between a positive result from the methamphetamine street drug and an over-the-counter medication. (Book 24-T.p. 6016). Accordingly, Blum agreed that the presence of methamphetamine on Trimble's tee shirt could have come from an over-the-counter medication. (Book 24-T.p. 6016).

Dr. Robert Smith, testified at the penalty stage as an expert in the field of clinical psychology and the field of chemical dependence and addiction. (Book 24-T.p. 6028). The Defense contacted Dr. Smith to perform a psychological and chemical evaluation of Trimble to determine whether he met the legal criteria for insanity. (Book 24-T.p. 6029). Smith conducted three personal interviews with Trimble on July 28, 2005, August 7, 2005 and September 1, 2005. (Book 24-T.p. 6039). Each interview lasted approximately four to five hours. He also administered tests and reviewed records before reaching an opinion. Dr. Smith stated that, "in forming an opinion regarding a diagnosis what you want to be able to do is have as much information as possible to support your final conclusion so that you feel confident that you're accurate in the diagnosis." (Book 24-T.p. 6032).

Dr. Smith provided his diagnostic impressions of Trimble in two categories: 1) bi-polar disorder II recurrent major depressive episode with hypomanic episode and 2) substance use. (Book 24-T.p. 6035). He explained that the first category, bi-polar disorder, was characterized by mood swings and an individual experiencing a hypomanic episode would be agitated, unable to sleep, have lots of energy and rapid, disorganized thought processes. (Book 24-T.p. 6037-6038).

Dr. Smith identified the following five disorders under the second category of substance abuse: 1) alcohol dependence, 2) methamphetamine dependence, 3) anxiolytic abuse with the primary drug being Ativan, 4) opiod abuse with the primary drug being Vicodin and 5) cannabis dependence that was sustained in full remission. (Book 24-T.p. 6036). As Trimble had been in the Portage County Jail since his January 22, 2005 arrest, his alleged alcohol and methamphetamine dependence were in a state of "early sustained remission" due to his confinement in a "controlled environment." (Book 24-T.p. 6036).

He further explained the difference between abuse and dependence of a substance. Substance abuse causes problems in the person's life, the person recognizes the abuse is causing the problems but continues using the substance. (Book 24-T.p. 6040). However, dependence means the individual is responding to the substance different on a physical level and the individual builds a tolerance to the substance. Substance dependence results in major problems in most areas of the individual's life and a majority of time and energy is focused on obtaining and using the substance. (Book 24-T.p. 6041).

Methamphetamine is a manmade stimulant that effects the central nervous system. (Book 24-T.p. 49). Dr. Smith stated that the positive effects of methamphetamine included having additional energy, feeling euphoric, powerful and in control of situations. He also described the negative effects of methamphetamine as an inability to sleep, mood swings, disorganization and feelings of agitation and irritability. (Book 24-T.p. 6049-6050). A person using methamphetamine can be very aggressive and violent in reaction to minor provocations. (Book 24-T.p. 6049-6050). Dr. Smith also described the phenomenon known as "tweaking." Tweaking occurs when a methamphetamine user is sleep deprived and simultaneously under the influence of the drug. A "tweaking" person is very dangerous and should be approached in a cautious manner because the person can be unpredictable in his behavior and actions. (Book 24-T.p. 6051).

In reaching his diagnosis that Trimble had methamphetamine dependence, Dr. Smith testified, "[w]hen you take a look at the history that becomes very significant." (Book 24-T.p. 6044). However, it is important to note that all of Dr. Smith's information regarding Trimble's personal history and substance abuse history came from Trimble's own self-reporting. Dr. Smith did not speak with or review any materials submitted by Trimble's mother, brother or two

ex-wives. (Book 25-T.p. 6073, 6259). Although he contacted no one to verify or corroborate Trimble's self-reporting, Dr. Smith relied on the following personal history. Trimble began using substances at the age of thirteen and when he was sixteen he used alcohol and marijuana several times a week. (Book 24-T.p. 6041). By the age of 22, Trimble was using methamphetamine and alcohol regularly. (Book 24-T.p. 41). Trimble reported that as his methamphetamine use increased, he stopped using marijuana and started adding prescription dugs, specifically sedatives (Ativan, Valium, Librium and Xanax) and painkillers (Vicodin). (Book 24-T.p. 6041).

Trimble also reported the following information regarding his substance abuse in relation to the murders. From Monday, January 17, 2005, until his arrest in the early morning of Saturday, January 22, 2005, Trimble used methamphetamine everyday and did not sleep for five straight nights. (Book 25-T.p. 6218). On the night before the murders, Thursday night, January 20, 2005, Trimble reported using one half gram of methamphetamine and instead of sleeping, he remained awake all night cleaning his guns and wandering in the woods. (Book 25-T.p. 6218-6219).

January 21, 2005, Trimble worked at an abandoned house in Akron and at 1:00 p.m. allegedly snorted half a gram of methamphetamine. (Book 25-T.p. 6220). After quitting work at 3:00 p.m. he bought and drank an entire twelve-pack of beer and took 2 Ativan pills and 2 Vicodin pills. (Book 25-T.p. 6220). Before returning home, Trimble purchased another twelve-pack of beer for him and Renee. During the evening, Trimble reported consuming an additional six beers, and snorted approximately one to two grams of methamphetamine. (Book 25-T.p. 6220).

As the evening progressed, the family ordered a pizza and ate. (Book 25-T.p. 6176). Trimble reported that he went to the basement and that at some point during the evening he and Renee argued about his methamphetamine use. (Book 25-T.p. 6176). Allegedly Renee was angry about his use and asked him to leave the house. As he had been drinking, Trimble did not want to leave fearing that he would get a D.U.I. (Book 25-T.p. 6176). He went into the basement and the next thing that he remembers was being in the woods. He informed Dr. Smith that although he has no memory of shooting at Renee and Dakota, "he believes he killed them." (Book 25-T.p. 6176-6177).

All that Trimble recalled about the phone conversation with his mother following the murders was that his mother made a sound like a scream and that he hung up. (Book 25-T.p. 6178). Although Trimble was able to report specific details regarding Sarah's murder he appeared to be suffering from what Dr. Smith labeled, a substance induced blackout, with regards to Renee and Dakota's murders. (Book 24-T.p. 6059). Dr. Smith stated that he found Trimble cooperative during their interviews and did not suspect Trimble was a malinger or using a loss of memory regarding Renee and Dakota's murders in a self serving manner. (Book 25-T.p. 6223).

Dr. Smith opined that Trimble did not meet the criteria for insanity at the time he committed the murders. He further opined that Trimble was suffering from diminished capacity:

> [m]y opinion was that Mr. Trimble was suffering from several psychological conditions at the time of the offense: Bi-polar II disorder, alcohol dependence, methamphetamine dependence, abuse of Ativan, abuse of Vicodin; that he was acutely intoxicated at the time of the offense by each of these substances; that he had ingested them just prior to the offense; and that these substances and his bi-polar II disorder contributed to his commission of the offense; and that it diminished his ability to conform his conduct to the requirements of the law.

(Book 24-T.p. 6059). As Trimble suffered from a bi-polar disorder and this condition was worsened by his substance use, the night of the murders he "was impaired in his ability to reason and to think through clearly the consequences of his use of his actions and to fully appreciate what was going on and to make reasonable choices[.]" (Book 25-T.p. 6256).

The flaws in Dr. Smith's opinion and diagnostic impressions were revealed in cross-examination. Although asked to evaluate Trimble for the purpose of determining whether Trimble was legally insane at the time of the murders, Dr. Smith did not feel that it was necessary to review the recording of the 911 call, hostage negotiator Michael Korach's report regarding his conversation with Trimble or the recording and transcript of Trimble's interview with Sheriff Kaley conducted two days after the murders. (Book 25-T.p. 194, 212). Another clinical psychiatrist, Dr. Stafford, also evaluated Trimble on the issue of insanity, reviewed the above listed items and came to a different diagnosis and opinion than Dr. Smith.

Dr. Stafford opined that Trimble's self-reported, bi-polar disorder was an attempt to obtain psychotropic medications and to receive special consideration in criminal matters while in custody. In her opinion, there was "no evidence of psychosis, drug-induced or otherwise, at the time of the alleged offenses." (Book 25-T.p 6267). Dr. Stafford's report stated, "Trimble was voluntarily intoxicated on the combination of alcohol, methamphetamine, Hydrocodone and Ativan * * * on the day of the alleged offense." (Book 25-T.p. 6268). Unlike Dr. Smith, Dr. Stafford opined that "Trimble was not suffering from a severe mental disease or defect at the time of the acts charged." (Book 25-T.p. 6266). Even without reviewing any of these items that Dr. Stafford considered, Dr. Smith testified that nothing in those items would change his opinion because he felt confident and comfortable with the diagnose he had made. (Book 25-T.p. 263).

The State tested Dr. Smith's "blackout theory" and inquired whether Trimble's failure to remember killing Renee and Dakota was belied by reports from Trimble's mother, brother, and Sergeant Korach, all of whom Trimble told he killed Renee and Dakota. (Book 25-T.p. 6175). In response, Dr. Smith stated that he and Trimble did not discuss Trimble's conversations with his mother, brother or Sergeant Korach.

On cross-examination, Dr. Smith testified that he did not use the term "voluntary intoxication" with regards to Trimble because as an addict, Trimble was compelled to use the drug and his choice to use was different than someone who was not an addict. (Book 25-T.p. 6204). However, Dr. Smith admitted that Trimble did have the ability to decide when he would use or refrain from using drugs because Trimble would refrain from drug use for a period of time before having to undergo scheduled urine drug screens. (Book 25-T.p. 6208-6209).

Dr. Smalldon testified at the penalty hearing as an expert in the fields of clinical psychology and neuropsychology. The Defense contacted him to be a consultant on the capital case. Before offering any consultation in the case, Dr. Smalldon reviewed a variety of background records and met with Trimble on three occasions to conduct a clinical interview. (Book 25-T.p. 6318). He also administered psychological and neuropsychological tests, personally interviewed Trimble's mother, brother and minister and reviewed the Mitigation Specialist's summaries of interviews with other individuals. (Book 25-T.p. 6320).

Dr. Smalldon found Trimble to be hyper-cooperative during their interview and testing sessions, recalling that Trimble was constantly seeking approval for his conduct. (Book 26-T.p. 6332). He described Trimble's physical behavior and movements as extremely rigid or militaristic. The results of Dr. Smalldon's neuropsychological testing indicated that despite

Trimble's medical history of repeated head traumas, Trimble did not sustain any clinically significant head injury or underlying injury to his brain. (Book 25-T.p. 6370).

Trimble relayed a similar account of the events on January 21, 2005, to Dr. Smalldon as he did to Dr. Smith. (Book 25-T.p. 6358). As with Dr. Smith, Trimble was unable to specifically recall anything regarding Renee and Dakota's murders. (Book 25–T.p. 6360-6361). Trimble remembered arguing with Renee, going to the basement and then the next thing he recalled was being in the woods. (Book 25–T.p. 6360-6361).

Trimble relayed the following information regarding his memory of the events after murdering Renee and Dakota. Trimble stated that he remembered coming up on a man and a dog and warning the man to stay away from him because he had already killed two people and did not want to kill anyone else. (Book 25-T.p. 6363). Feeling that he was being hunted by the police, he fired at the police officers, but insisted that he was not trying to hurt them and was shooting up in the air to scare them off. (Book 25-T.p. 6364).

Trimble told Dr. Smalldon that he entered Sarah's apartment, discovered her upstairs and immediately ordered her to call 911 to tell the police to stay away. (Book 25-T.p. 6364). Regarding Sarah's death, Trimble stated he had a gun, it was cocked and pointed at Sarah. Although insisting that he had no intention of killing Sarah, Trimble recalled that "he saw a SWAT officer in the house, gunfire was exchanged, he panicked and reached for his other gun and at the time he did that he sort of dropped the pistol he had been holding and it went off and killed Sarah." (Book 25-T.p. 6364-6365).

After reviewing the above listed information, Dr. Smalldon diagnosed Trimble as having 1) bi-polar disorder (probable), 2) substance-induced persisting amnesia, 3) methamphetamine dependence, 4) alcohol dependence, 5) cannabis dependence that is in remission, 6) anxiolytic

abuse and 7) opiod abuse. (Book 26-T.p. 6416-6419). Dr. Smalldon qualified his bi-polar disorder diagnosis as probable because of the discrepancies in Trimble's medical and mental health records and the fact that Trimble's chronic history of substance use complicated a bi-polar diagnosis. (Book 26-T.p. 6418). Dr. Smalldon further identified the presence of the following three personality traits: narcissistic, paranoid and antisocial. (Book 26-T.p. 6420).

The substance-induced persisting amnesia diagnosis refers to either a partial or total memory lapse for a period of time that follows substance abuse and continues when the person is no longer high on the substance. (Book 26-T.p. 6427). Dr. Smalldon believed that Trimble's lack of specific recollection regarding what happened at the time of Renee and Dakota's murders was not a self-serving memory loss, but rather a substance-induced persisting amnesia. (Book 26-T.p. 6429).

Dr. Smalldon opined that on the night of the murders, Trimble was acutely intoxicated on methamphetamine, alcohol, Ativan and Vicodin and his "state of acute intoxication eroded his behavioral controls to some point." (Book 26-T.p. 6430). Although Trimble's intoxication was not the sole reason the murders occurred, his intoxication had a great deal to do with Trimble's "lack of ability to control his impulses and regulate his behavior." (Book 26, T.p. 6431).

On cross-examination, the State inquired how Dr. Smalldon came to the conclusion that Trimble was acutely intoxicated on methamphetamine, alcohol, Ativan and Vicodin the night of the murders. He responded, "Uhm, well, Mr. Trimble himself described his pattern of using those substances throughout the day." (Book 26-T.p. 6443). He testified that he knew Trimble had lied to other medical professionals "because he gave conflicting accounts of his pattern of substance use over time to different mental health professionals who he talked to." (Book 26-

T.p. 6453). Despite being aware of Trimble's history of lying to mental health professionals about his drug use, Dr. Smalldon relied on Trimble's self-reporting to reach his conclusion that Trimble was acutely intoxicated the night of the murders. However, as cross-examination progressed, Dr. Smalldon retreated from this position and agreed that trying to avoid the death penalty could be a sufficient reason for Trimble to have lied to the doctor regarding his substance use the night of the murders. (Book 26-T.p. 6454).

With regards to the bi-polar disorder diagnosis, Dr. Smalldon admitted that he could not state with certainty what portion of Trimble's symptoms were related to his mood disorder and what portion were related to his drug use. (Book 26-T.p. 6475). Dr. Smalldon agreed that due to the similarities in symptoms of a bi-polar disorder and methamphetamine use, if Trimble had reported his symptoms to prior medical professionals and excluded his use of illegal drugs, the resulting diagnosis could have been a bi-polar disorder. (Book 26-T.p. 6475). Cross-examination revealed that Dr. Smalldon, like Dr. Smith did not listen to the recording of the 911 call before reaching a diagnosis or opinion regarding Trimble the night of the murders.

Nature and Circumstances of Offenses

The nature and circumstances of the offenses offer nothing in mitigation. Without any signs of provocation, Trimble pulled the trigger of an assault rifle nineteen times while the rifle was aimed at his girlfriend and her seven-year-old child. He fled the scene, hid in the woods and fired shots at officers for two hours. After choosing to let a couple of neighbors and their dog live, Trimble broke into an isolated apartment and took a hostage. For approximately thirty minutes, Trimble terrorized the hostage and held a loaded pistol with the trigger depressed and the hammer cocked back at her head. Despite reassurances that he would release the hostage in

two hours, Trimble ceased communication with the police and fired a single shot killing the hostage.

Trimble's Unsworn Statement

In his unsworn statement, Trimble apologized to the victims' families. (Book 26-T.p. 6538). He stated that he could not live without drugs. The methamphetamine made him feel good, strong and invincible. (Book 26-T.p. 6539). The drugs took over his life causing him to argue with Renee, distrust everyone and attempt suicide in June 2004. (Book 26-T.p. 6540). Although stating, "I wish I knew all that happened that night," he informed the Jury that everything that he did remember was told to Sheriff Kaley and the doctors. (Book 26-T.p. 6541). He questions God everyday for allowing him to commit the murders and hopes to spend the rest of his time helping others to take a different road than he chose. (Book 26-T.p. 6541).

A capital defendant's unsworn statement is afforded little weight in mitigation. *State v. Gapen* (2004), 104 Ohio St.3d 358, 2004-Ohio-6548, 849 N.E.2d 1047, at ¶180. Although Trimble's apologies to the victims' families are entitled to weight in mitigation, he shows little to no remorse for his actions blaming his conduct on drugs and God. An apology and remorse of this type receives very little weight in mitigation. *State v. Keene* (1998), 81 Ohio St.3d 646, 671, 693 N.E.2d 246.

Relevant R.C. 2929.04(B) Mitigating Factors

With regards to the mitigating factors listed in R.C. 2929.04(B), only two are relevant in this case: (B)(3) "[w]hether, at the time of the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law" and (B)(7) the catch-all factor.

Under the R.C. 2929.04(B)(3) factor, the Defense argued that on the night of the murders, Trimble's bi-polar disorder in combination with his acute intoxication from methamphetamine, alcohol, Ativan and Vicodin diminished his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. In support of this mitigation argument, the Defense relied primarily on Dr. Smith and Dr. Smalldon's diagnosis that Trimble was dependant on methamphetamine and therefore under a physiological compulsion to use the substance thereby negating the fact that Trimble voluntarily ingested these substances the night of the murder.

Both psychologists accepted Trimble's self-reporting of his history of substance abuse throughout his adulthood and on the night of the murders as true. They also agreed that Trimble's acute intoxication on the night of the murders accounted for his memory loss regarding the specific details of Renee and Dakota's murders. However, neither psychologist listened to the recording of the 911 call before reaching a diagnosis or opinion about Trimble's conduct the night of the murders. Had Dr. Smalldon listened to the 911 recording he would have learned that Trimble's account of an "accidental shooting" following an exchange of gunfire was a lie. Listening to the recording he would have heard the fatal gunshot at 12:04 a.m., was the first shot fired and five minutes passed before any other gunshot was heard on the recording. (State's Exhibit 303).

Dr. Stafford, a psychologist that did review the 911 call, Trimble's interview with Sheriff Kaley two days after the murders and Sergeant Korach's report of his conversation with Trimble, did not diagnosis Trimble with a bi-polar disorder. In Dr. Stafford's opinion, "Trimble was not suffering from a severe mental disease or defect at the time of the acts charged." Rather, Trimble voluntarily intoxicated himself the evening of the murders. This

Court has held that voluntary intoxication generally deserves little weight as a mitigating factor. *State v. Dennis* (1997), 79 Ohio St.3d 421, 436, 683 N.E.2d 1096; *State v. Campbell* (2002), 95 Ohio St.3d 48, 51, 765 N.E.2d 334.

Furthermore, evidence at the penalty stage of the trial established that despite an alleged dependence on methamphetamine, Trimble chose to refrain from using this substance before his scheduled urine drug screenings. As the symptoms of bi-polar disorder and methamphetamine use are so similar, Trimble's choice to not inform prior medical professionals of his use of methamphetamine could have resulted in several erroneous bi-polar disorder diagnoses.

On the night of the murders, Trimble was able to conform his conduct to the dictates of the law when he chose not to murder Reichard and his mother. He was also aware of the criminality of his actions as he suited up to face the authorities in his camouflage clothing armed with an assault rifle and 9MM pistol and hundreds of rounds of ammunition for each weapon. He admitted killing Renee and Dakota to his mother and brother shortly after the crimes occurred and again admitted killing them several hours later during his phone conversation with Sergeant Korach, indicating that his memory loss was self serving. As contradictory evidence was presented at the penalty stage regarding Trimble's bi-polar diagnosis and acute intoxication the night of the murders, the Defense failed to prove the R.C. 2929.04(B)(3) factor by a preponderance of the evidence. This factor is entitled to little, if any, weight in mitigation.

Under the R.C. 2929.04(B)(7) catch all factor, this Court has considered a capital defendant's history, character and background. A picture of Trimble's childhood and family life was offered in the penalty stage. Trimble and his mother have maintained a presence in each other's life throughout Trimble's adulthood. The same cannot be said about Trimble's

relationship with his brother. However, the love and support shared between Trimble and his mother is afforded some weight in mitigation. *State v. Myers* (2002), 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, at ¶186.

Although based entirely on Trimble's self-reporting, his history of chronic alcohol and drug abuse is also afforded little weight in mitigation. *State v. Ketterer* (2006), 111 Ohio St.3d 70, 2006-Ohio-5283, 85 N.E.2d 48, at ¶200.

This Court has recently held that factors including Trimble's employment history and redeeming traits of spirituality, politeness and helpfulness hold little weight in mitigation. *Johnson,* 112 Ohio St.3d 220, 2006-Ohio-6404, 858 N.E.2d 1144, at ¶308.

Furthermore, Trimble's military service is afforded no weight in mitigation because he received a bad conduct discharge from the United States Air Force due to use, possession and distribution of marijuana and of drug abuse paraphernalia. *State v. Craig* (2006), 110 Ohio St.3d 306, 2006-Ohio-4071, 853 N.E.2d 621, at ¶146.

Conclusion

After weighing each aggravating circumstance of Counts Thirteen, Fourteen and Fifteen, against the mitigating factors, this Court will conclude, as did the jury and the trial court, that each aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. Accordingly, the death penalty is appropriate in the present case.

3. Death Sentence is Proportionate to the Sentence in Similar Cases

Although Trimble failed to present any argument or legal citations in support of the proportionality section of this Court's independent review, the State submits the following review that demonstrates the sentence of death for Counts Thirteen, Fourteen and Fifteen in this particular case is proportional to the sentence in similar cases.

R.C. 2929.04(A)(5) Course of Conduct Specification

This Court has approved death sentences in cases presenting a course of conduct involving two murders. *State v. Awkal* (1996), 76 Ohio St.3d 324, 667 N.E.2d 960 (defendant killed two people at the same time with the same weapon); *Tibbetts*, 92 Ohio St.3d at 174, 749 N.E.2d 226 (defendant committed two murders in the same house at approximately the same time); *State v. Braden* (2003), 98 Ohio St.3d 654, 2003-Ohio-1325, 785 N.E.2d 439. The present case involved three murders. The death penalty imposed in this case for Counts Thirteen, Fourteen and Fifteen, is both appropriate and proportionate when compared with other course of conduct murders. *State v. Mink* (2004), 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, at ¶130; *State v. Hughbanks* (2003), 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, at ¶145; *State v. Braden* (2003), 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, at ¶162.

R.C. 2929.04(A)(9) Child-Murder Specification

This Court has approved death sentences in three cases where the defendant was convicted of a child-murder specification under R.C. 2929.04(A)(9). The death penalty in this case is both appropriate and proportionate when compared with those three cases. *Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927; *Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2248, 787 N.E.2d 1185; and *State v. Smith* (2002), 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221. The death sentence for Count Fourteen is not disproportionate to the sentence in *Fitzpatrick*, *Lynch* and *Smith*.

R.C. 2929.04(A)(3) Escape Detection Specification

When compared to other cases involving killings to escape detection, apprehension, trial or punishment, the sentence of death for Count Fifteen is proportionate. *State v. Sheppard*

(1998), 84 Ohio St.3d 230, 232, 241, 703 N.E.2d 286; *State v. Burke* (1995), 73 Ohio St.3d 399, 407, 653 N.E.2d 242.

This Court has also upheld the death sentence in cases which combine the same aggravating circumstances involved in Sarah's murder: course of conduct and murder to escape detection, apprehension, trial, or punishment for another offense. *State v. Bethel* (2006), 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, at ¶212; *State v. White* (1999), 85 Ohio St.3d 433, 709 N.E.2d 140. Therefore, Trimble's death sentence for Count Fifteen is not disproportionate to sentences approved in similar cases.

R.C. 2929.04(A)(7) While Committing Aggravated Burglary Specification

The death penalty imposed in this case for Count Fifteen, is both appropriate and proportionate when compared with other aggravated burglary-murders. *State v. Wiles* (1991), 59 Ohio St.3d 71, 95, 571 N.E.2d 97; *Poindexter*, 36 Ohio St.3d at 7, 520 N.E.2d 568 (aggravated burglary and course-of conduct specifications); and *State v. Hooks* (1988), 39 Ohio St.3d 67, 70, 529 N.E.2d 429.

R.C. 2929.04(A)(7) While Committing Kidnapping Specification

The death penalty imposed in this case for Count Fifteen, is both appropriate and proportionate when compared with other kidnapping-murders. *Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, at ¶109; *State v. Hartman* (2001), 93 Ohio St.3d 274, 306, 745 N.E.2d 1150; *State v. Ballew* (1996), 76 Ohio St.3d 244, 258, 677 N.E.2d 369; *State v. Joseph* (1995), 73 Ohio St.3d 450, 462, 653 N.E.2d 285.

4. Conclusion

This Court's R.C. 2929.05(A) independent review will reveal that for Counts Thirteen, Fourteen and Fifteen the evidence supported the jury's finding of aggravating circumstances,

the aggravating circumstances outweighed the mitigating factors and the death sentence is proportionate to those affirmed in other similar cases. Indeed, this senseless, brutal, and incomprehensible act of inhumanity defies the imagination and is unquestionably the type of crime for which the General Assembly intended that a sentence of death could be invoked. Trimble's thirteenth proposition of law it without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 14:

In his Fourteenth proposition of law, Trimble challenged this Court's proportionality review of his sentence of death pursuant to R.C. 2929.05. He argued that the required proportionality review no longer safeguards a capital defendant's right to a meaningful review of his sentence, rather the review has become a justification to impose the death penalty. Trimble further asserted that a proportional review which only includes a comparison to other cases that resulted in a sentence of death without also considering capital cases that resulted in life sentences results in an arbitrary and capricious imposition of the death penalty.

This Court has previously rejected this argument finding that proportionality review needs to entail only those cases in which the death sentence has been imposed. *State v. Jackson* (2006), 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, at ¶126; *State v. Jordan* (2004), 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1, at ¶86; *State v. Steffen* (1987), 31 Ohio St.3d 111, 123-124, 509 N.E.2d 383. Accordingly, Trimble's fourteenth proposition of law is without merit and should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. 15:

In his fifteenth proposition of law, the Appellant raises various constitutional challenges to Ohio's death penalty statutes.

Standard of Review

"When issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case." *Poindexter*, 36 Ohio St.3d 1, 520 N.E.2d 568, at syllabus.

Analysis

Trimble's fifteenth proposition of law begins with an argument that Ohio's death penalty statutory scheme violates the United States and Ohio constitutional prohibitions against arbitrary and unequal punishment. These claims are without merit. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 169-170, 473 N.E.2d 264; *State v. Steffen* (1987), 31 Ohio St.3d 111, 124-125, 509 N.E.2d 383.

He next argued that Ohio's death penalty scheme is unconstitutional because of unreliable sentencing procedures. This Court has rejected these arguments on previous occasions. *State v. Esparza* (1988), 39 Ohio St.3d 8, 12-13, 529 N.E.2d 192; *State v. Stumpf* (1987), 32 Ohio St.3d 95, 104, 512 N.E.2d 598.

Trimble asserted that Ohio's death penalty scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. This argument has been rejected. *State v. Buell* (1986), 22 Ohio St.3d 124, 138, 489 N.E.2d 795; citing *State v. Nabozny* (1978), 54 Ohio St.2d 195, 375 N.E.2d 784, paragraph one of the syllabus.

He challenged Ohio's death penalty statutes because R.C. 2929.03(D)(1) requires submission of defense-requested presentence investigations and mental-health evaluations to the judge or jury. However, this argument is inapplicable to Trimble's case because he declined a presentence investigation and mental-health evaluation prior to sentencing. Moreover, this Court has previously rejected these arguments. *Buell*, 22 Ohio St.3d at 138, 489 N.E.2d 795.

Trimble next disputes the constitutionality of R.C. 2929.04(A)(7), the felony-murder aggravating circumstance, because it repeats the definition of felony murder set forth in R.C. 2903.01(B). Similar arguments have been rejected by this Court. *Jenkins*, 15 Ohio St.3d at 178, 473 N.E.2d 264; *State v. Henderson* (1988), 39 Ohio St.3d 24, 28-29, 528 N.E.2d 1237.

Trimble asserted that the language in R.C. 2929.03(D)(1) is unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor (R.C. 2929.04(B): "the nature and circumstances of the offense") as an aggravator. This Court has overruled this claim. *McNeill*, 83 Ohio St.3d at 453, 700 N.E.2d 596, citing *Tuilaepa v. California* (1994), 512 U.S. 967, 973-980, 114 S.Ct. 2630, 2635-2639, 129 L.Ed.2d 750.

In addition to the challenges made to this Court's proportionality review in his fourteenth proposition of law, Trimble also generally challenges the constitutionality of Ohio's death penalty proportionality review. This claim is without merit. *State v. LaMar* (2002), 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, at ¶23; *Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383, paragraph one of the syllabus.

He argued that death by lethal injection amounts to cruel and unusual punishment. This Court has rejected similar arguments. *State v. Adams* (2004), 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶131; *State v. Carter* (2000), 89 Ohio St.3d 593, 608, 734 N.E.2d 345. On September 25, 2007, the United States Supreme Court accepted for review two death row

inmates' claim that lethal injection as practiced by the State of Kentucky amounted to cruel and unusual punishment. See, *Baze v. Rees*, United States Supreme Court Case No. 2005-SC-0543. After the United States Supreme Court agreed to consider a challenge to this method of execution, this Court reaffirmed its holding that lethal injection in Ohio was constitutional. *State v. Frazier* (2007), --Ohio St.3d --, 2007-Ohio-5048, --N.E.2d --, at ¶245.

Lastly, Trimble contends that his execution will violate international law and treaties to which the United States is a party. This Court has rejected similar arguments. *State v. Issa* (2001), 93 Ohio St.3d 49, 69, 752 N.E.2d 904; *State v. Phillips* (1995), 74 Ohio St.3d 72, 103-104, 656 N.E.2d 643.

As all the issues of law raised by Trimble have been considered and decided by this Court, it is proper to summarily dispose of such issues. Accordingly, Trimble's fifteenth proposition of law is without merit and should be overruled.

CONCLUSION

For the foregoing reasons, this Court should overrule Trimble's fifteen propositions of law. After conducting its independent review pursuant to R.C. 2929.05, this Court should affirm the judgment of the trial court including the sentence of death for Counts Thirteen, Fourteen and Fifteen.

Respectfully submitted,

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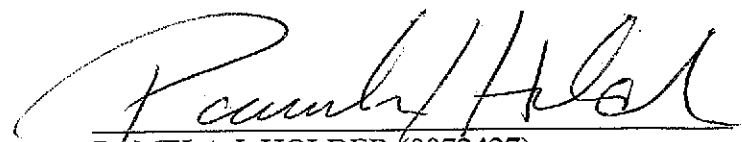

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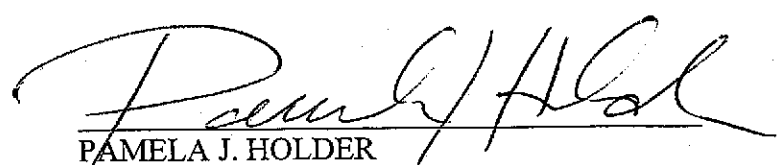
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF has been sent by U.S. mail to Nathan A. Ray and Lawrence J. Whitney at 137 South Main Street, Suite 201, Akron, Ohio 44308, on October 15, 2007.



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