

IN THE SUPREME COURT OF OHIO

07-2446

STATE OF OHIO,

APPELLEE,

VS.

ROGER K. MARSHALL,

APPELLANT

On Appeal From the Lawrence County
Court of Appeals, Fourth Appellate
District

Court of Appeals No. 06 CA 23

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROGER K. MARSHALL**

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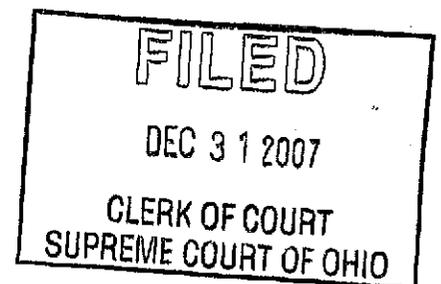


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That standard of voluntariness for consent to a search is analogous to the standard applied to defendant's statements, in that the totality of the circumstances determine whether a consent to search was voluntarily given. Schneckloth v. Bustamonte, 412 U.S. 218,248-49, 93 S. Ct. 2041, 2059, 36 L. Ed. 2d 556, 875(1973).....7

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The proponent of expert testimony must demonstrate its reliability in light of accepted scientific standards, regardless of the qualifications of the expert. Daubert v. Merrell Dow Pharmaceuticals, Inc., (1993), 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469; Valentine v. Conrad, 110 Ohio St. 3d 42, 44, 2006-Ohio-3561; State v. Adams, 103 Ohio St. 3d 508 , 2004-Ohio-5845; State v. Hartman (2001), 93 Ohio St. 3d 274, 284 2001-Ohio-1580.

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Proposition of Law No. 5:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident.....9

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EXPLANATION WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellant Roger K. Marshall was indicted by a Lawrence County grand jury on October 16, 2004, on three counts of aggravated murder with specifications and twelve counts of arson in connection with a fire that occurred at the Lyle Motel on South Third Street in Ironton, Lawrence County, Ohio in the early morning hours of August 2, 2004.

After widespread publicity, Marshall was found guilty of the charges against him. In the sentencing phase of the trial, the jury deadlocked on the question whether Marshall should receive the death penalty. He was eventually sentenced to two life sentences without the possibility of parole plus ten years by the trial judge.

Although the case is no longer one with the possibility of a death penalty, the case is one that presents several important issues there has been great interest in the area of the venue of the trial and the case presents several important issues of major import and of substantial constitutional stature. In addition, the case involves multiple felonies with numerous meritorious issues and merits the exercise of the Court's discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

On September 1, 2004, Roger K. Marshall, the appellant herein, came into a local bar in Ironton, Ohio, where he remained drinking until close to the time the bar closed at 2:00 a.m. Later in the day, Lolaetta Hicks, aka Lolaetta Corbin, and John Meyers, two of the victims in the fire that was the basis for the indictment of appellant, came into the bar.

Hicks has previously been seeing defendant Marshall and had stayed at his house with him, but had been dating Meyers recently and had been staying with him on occasion in his room at the Lyle Motel. Although the exact times when these individuals left the bar is not clear, Meyers left before Hicks, who left before Marshall.

There was also testimony concerning Marshall's purchase of gasoline and a lighter at a local gas station and testimony of a man who lived near the motel who testified that he saw a man going to the motel with a gas can. Although he testified that he never caught a front view of the man, he testified that the man in the cruiser (Marshall) seemed the same as the man he saw. The time of the incident, he testified, was 2:21 a.m.

The first call on the fire at the Lyle Motel came at 1:59 a.m. Meyers, Hicks, and James Reed were killed in the blaze. The owner of the bar and its bartender came to the scene from the bar, which was within walking distance. Concerned that Hicks might have been in the fire, they went to Marshall's residence looking for her.

When the women arrived at the Marshall residence, his appearance had changed to the point that they did not recognize him. When they told him they thought Hicks was dead, he

became very upset and began yelling obscenities, calling Meyers an SOB.

The two went back to the scene of the fire, and spoke to Ironton Police Captain Chris Bowman. Captain Bowman went to the Marshall residence and interviewed him. Marshall was burnt and was wearing a pair of shorts.

Captain Bowman asked Marshall to accompany him to the motel, which he did. While Marshall was at the motel, he was interviewed, pictures were taken of him, he signed a consent to search and from there he was eventually transported to a hospital in Portsmouth for treatment and from there to a hospital in Columbus, Ohio..

Captain Bowman and a fire investigator later returned to the Marshall residence, where clothing and a motorcycle were seized. A second search of the residence was later conducted.

Prior to the trial, Marshall's statements and items seized by the police were the subject of a lengthy motion to suppress, which was denied by the trial court.

The guilt phase of trial began on February 15, 2006. Following a seven day trial, defendant was found guilty of twelve counts of aggravated arson and three counts of aggravated murder with specifications.

By judgment entry of February 27, 2006, the trial court dismissed the jury until April 5, 2006 at which time the sentencing phase of the trial was to commence. The delay was on account of injuries received by the defendant, who had been assaulted while he was in jail.

During this hiatus, the issue of jury conduct came up and the trial court denied the defendant's motion for mistrial, but dismissed one juror immediately and another at the close of the penalty phase of the trial immediately prior to deliberations. The penalty phase of the hearing began April 5, 2006. The jury eventually deadlocked and a mistrial was declared as to the penalty

phase of the trial on April 10, 2006. By entry of April 24, 2006, the Court indicated it did not have the power imposed a sentence of death because of the impasse on the part of the jury and sentenced the defendant to two life sentences without the possibility of parole and ten years.

ARGUMENT

Proposition of Law No. 1:

The test of voluntariness of a statement made by a suspect requires an examination of the totality of circumstances surrounding his interrogation. Haynes v. Washington, (1963), 373 U.S. 503 83 S. Ct. 1336, 10 L. Ed. 2d 513, followed.

Under the totality of circumstances, any statements made by defendant were not voluntary. Around 4:00 A.M., in the middle of the night, Marshall was transported to the scene of the fire for which he was ultimately charged. There he was interrogated by law enforcement personnel, with other law enforcement personnel (MS-78). His injuries were apparently severe enough that Captain Bowman saw them when he first went to defendant's home (MS-17-25). They were severe enough to require his transfer to a hospital in Columbus. (MS 83-89). Given that defendant was not given medical treatment until after he was arrested, his faculties were clearly impaired. Given that he was questioned by law enforcement officers in the middle of the night at the scene of the crime for which he was charged, it is clear that given the inherent course of nature of this interrogation, it is clear that the defendant's decision to waive his privilege against self-incrimination was not voluntarily made because his will was overborne and his capacity for self determination was critically impaired. See State v. Otto (1996), 74 Ohio St. 3d 555, 562, 660 N.E.2d 711. Any statements made the night of the fire while in police custody should have been suppressed by the court below. The failure to do so was obviously prejudicial to the defendant and warrants a new trial.

Proposition of Law No. 2:

Under Ohio law, when police rely on a consent to search, they are limited to, by any conditions, expressed or implied, attached to the consent. A person consenting can set limits on the time, duration, area and intensity of the search,

At some time during the proceedings in the early morning hours of September 2, 2007, Marshall executed a consent form for a search. Assuming arguendo that the execution of the consent might be held to be voluntary, the numerous searches went beyond the scope of the consent and the results therefore should be suppressed. The form was filled out by Mark Wilson of the Ironton Police Department except for the very bottom of the form, the words "for clothing" were written. Lieutenant Wilson testified that the reason for adding this that they were going to take the clothing that the defendant had on, a rather inept way of accomplishing this goal. Deputy Fire Marshall, Bob Lawless, testified that he wrote the words on the form, but , he said, they were not meant to limit the search and it was to get the clothing when they went down to the residence. (MS-351-353).

However these unconvincing, subjective explanations should not cloud the interpretation of the consent form from the common-sense, everyday meaning which would be to allow a search for clothing but nothing else. The search having exceeded the scope of any consent limited to clothing, the materials other than the clothing seized on the first occasion should be suppressed.

Proposition of Law No. 3:

That standard of voluntariness for consent to a search is analogous to the standard applied to defendant's statements, in that the totality of the circumstances determine whether a consent to search was voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 2059, 36 L. Ed. 2d 556, 875 (1973).

The trial court denied Marshall's motion to suppress evidence seized at 2102 North Second Street, Ironton, Ohio (defendant's residence). Numerous forays were made by law enforcement personnel into the Marshall residence seeking evidence. The sole authority for so doing was a consent to search signed by the defendant at 4:30 a.m. on the same day as the fire for which defendant was charged. According to Captain Bowman, it was signed before defendant was placed under arrest, but defendant was de facto already in custody, being seated in the cruiser in the middle of the night being interrogated by fire investigators while other law enforcement officers looked on. It was also signed before defendant began receiving medical treatment for his burns. Marshall was apparently not advised that he could require a search warrant.

Captain Bowman, Sargent Wilson, and Inspector Hobbs went to the Marshall residence the same morning after the fire after the consent was signed (MS-102-103). They went to look at the motorcycle and any other evidence in his house, including his clothing (MS-112). On that trip, Inspector Hobbs picked up boots and a shirt from the closet (MS-123-124). That same evening, Bowman, Marcum and Carey went to the home again to look for firearms. The group did not find guns or ammo, but Captain Bowman seized a waste can in the bathroom that appeared to contain hair (MS-130-143).

Captain Bowman and Officer Wilson made another entry into the residence about 6:00

p.m. on the day of the fire. Crawford and Eifler went into the residence again the next day about 9:00 am, seizing three shirts from Marshall's bed.

Under these circumstances, the consent to the search could hardly be classified as voluntary. The defendant was visibly injured during the entire time he was at the scene of the fire, he was interrogated by law enforcement with several looking on, and he was not told that he could require a search warrant. Under the totality of circumstances, the consent to search was not voluntarily given.

Proposition of Law No. 4

The proponent of expert testimony must demonstrate its reliability in light of accepted scientific standards, regardless of the qualifications of the expert. Daubert v. Merrell Dow Pharmaceuticals, Inc., (1993), 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469; Valentine v. Conrad, 110 Ohio St. 3d 42, 44, 2006-Ohio-3561; State v. Adams, 103 Ohio St. 3d 508 , 2004-Ohio-5845; State v. Hartman (2001), 93 Ohio St. 3d 274, 284 2001-Ohio-1580.

In the course of his testimony, Kenneth Crawford of the State Fire Marshall's office offered numerous opinions concerning the fire that killed the three decedents, including how the fire started, the presence of accelerants, and the speed of the fire.

Previously, however, in voir dire, Crawford was questioned at length about whether he could state an opinion to a reasonable degree of scientific certainty and the basis for his opinions. He could not refer to any tests, or other scientific evidence other than "years of training, experience" as the basis for his opinion.

Such a basis, if once sufficient, is no longer, in light of the United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, that the proponent of expert testimony must demonstrate its reliability in light of accepted scientific standards, regardless of the qualification of the expert.

The Ohio Supreme Court has cited Daubert with approval numerous times. See, e.g., Valentine v. Conrad, 110 Ohio St. 3d 42, 44, 2006-Ohio-3561; State v. Adams, 103 Ohio St. 3d 508 79, 2004-Ohio-5845; State v. Hartman (2001), 93 Ohio St. 3d 274, 284 2001-Ohio-1580.

For the crucial aspects testified to by Crawford. the unverifiable, unsubstantiated, and non-falsifiable (in the Popperian sense)¹ opinions were not sufficient. Marshall deserves a new trial.

¹ Daubert quotes Popper with approval, K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ([T]he criterion of the scientific status of a theory is its falsifiability or refutability or testability.)

Proposition of Law No. 5:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident.

During the latter stages of the trial, the State called a witness one week prior to the fire he had been present at another bar where he saw Marshall grab Hicks and strike her. He had no idea what the dispute was over. Another witness testified that on the day before the fire defendant Roger Marshall and

Hicks argued and he pulled her hair on two occasions. The first time she got some men in the bar to help her and the second time she threatened to call the law on him and told him to stop. While this was going on, she testified, he said, "You will pay for what you are doing to me." She testified that on that occasion the defendant also quarreled with Meyers but there was no physical confrontation between them. After the two incidents of hair pulling, Marshall stayed and did not bother Hicks anymore. Another witness testified about the same incident as one of the other witnesses but said, "I just broke the argument up when the bartender asked me, that was all." He grabbed Marshall by the arm and pulled him to the side, which was apparently was the end of the incident.

On cross-examination, he testified that there had not been any problems between defendant and Myers and Hicks on the night of the fire. (1028)

This other acts testimony was objected to by the defendant but the trial court overruled the objections and granted the defendant a continuing objection. This extended testimony concerning Marshall's alleged aggressions against the decedent was inadmissible under Evid. Rule 404(B):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident.

Neither is the evidence admissible under O.R.C. 2945.59, which largely tracks the exceptions of the Rule:

In 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 or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

The exceptions to inadmissibility are to be construed strictly against the State. State v. Broom (1988), 40 Ohio St. 3d 277, 281-282 (“Because R. C. 2945.59 and Evid. R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict.”).

The case of State v. Nields, (2001), 93 Ohio St.3d 6, 200-Ohio-1291 is not to the contrary. In that case, the State presented testimony of from a police officer who had responded to a domestic call involving the defendant and the decedent at the decedent’s home several weeks before the murder. The Supreme Court found this to be proper since the evidence tended to show evidence of his motive to murder the decedent. It also tended to prove the absence of accident and was evidence suggesting intent.

In the present case, there were ample evidence that defendant previously dated decedent Hicks and that she had begun to date decedent Meyers. and that defendant didn’t like it. For example, Malone testified that defendant was “bothered” by the fact that Hicks was now seeing Meyer and Bradford testified that he was jealous.

There was no need to present additional evidence concerning motive and the only possible reason for the admission of this evidence was to imply that because defendant had aggressed against Hicks in the past, that he had therefore done so on the occasion of the fire. This clearly is illicit under (404)(B).

Even if the testimony had some incremental effect to show motive, it clearly should have been held inadmissible under (403)(B), since the danger of unfair prejudice outweighed any such slight probative value.

The State has not met its heavy burden to show the admissibility of this evidence, and this Court should find there to be jurisdiction to correct this error.

Proposition of Law No. 6:

All jury misconduct is presumed to be prejudicial and a prevailing party has the burden to demonstrate that the misconduct was not prejudicial under the circumstances.

On the day scheduled for the penalty phase of the trial to begin, February 27, 2006, the trial was continued because Marshall had received injuries from an assault upon him in the jail.. Following of the granting of a continuance, the Court received information from juror Debbie Hasenauer who had heard that Lowe, another juror, had been at a party over the weekend and made statements concerning the case by indicating that his mind had been made up about the issues. Lowe was questioned by the Court, who denied the statement. Hasenauer, the juror who reported the misconduct to the court, indicated that she had been at the gas station when she was approached by Chris Destocki, who had been a prospective juror on the case. Destocki told her that at a private party jury Lowe was at that party going around saying that defendant Marshall “going to the electric chair, I’m going to fry him.”

In sworn testimony, Destocki verified that he had spoken with juror Hasenhauer and that he had been at a party on the previous Saturday night on Fourth and Washington. Lowe was present at the party. He asked a couple of people their view on the death penalty and said that he,

“had made up his mind and however long it took him to sit and talk everybody else is what he would be willing to do.”

After polling the jurors about their knowledge of any misconduct, the trial court excused Lowe as a juror and deferred ruling on a motion to disqualify Hasenhauer, whom he eventually excused.

When Lowe was polled, he denied being at a party with Destocki but admitted that he and Destocki were friends.

The trial court erred in refusing to grant a mistrial when juror misconduct became known. The trial court’s error is plainly shown by the case of State v. Taylor, 73 Ohio App. 3d 827 (Pike 1991). In that case, the trial court refused to grant a new trial based upon the alleged misconduct of three jurors. This court held that the misconduct must be prejudicial and held that the better rule is that all jury misconduct is presumed to be prejudicial and a prevailing party has the burden to demonstrate that the misconduct was not prejudicial under the circumstances. Id. at 832

Although this court in Taylor affirmed the trial court’s finding of no right to a new trial, it did so on grounds that clearly are not present here. As to the first juror, whom it was alleged that he had indicated his decision concerning the case, this court held that the trial court’s determination that the first juror had committed no juror misconduct would be deferred to because the trial court had had opportunity to hear the witnesses, observe their demeanor, and apparently believed the juror. As to the other two jurors who had spoken to a defense witness, the record indicated they did not obtain any information and the conversation did not involve matters related to the proceedings below. Id. at 833.

In the present case, it was clear from the judge's rulings that he did not believe Lowe's protestations that he had not had conversations concerning the case.

Nor can the fact that the comment was made during the period between the trial phase and the penalty phase of the case reason for finding there is no prejudice. The vehemence with which Lowe expressed his opinion concerning the death penalty for defendant would suggest strongly that he had held that opinion all along and, given the secrecy of the deliberations of the jury, must be held to have infected the deliberations during the trial phase as well.

Justice requires that defendant be given a new trial, with a fresh slate and an impartial jury.

CONCLUSION

For the reasons stated above, this case involves matters of public and great general interest and substantial constitutional questions. Appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits..

Respectfully submitted,



David Reid Dillon (0005713)
COUNSEL FOR APPELLANT
ROGER K. MARSHALL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21 th day of December, 2007, a true and correct copy of the foregoing Brief of Appellant Roger K. Marshall was hand-delivered to J.B. Collier, Prosecuting Attorney, Lawrence County Courthouse, One Veteran Square, Ironton, Ohio 45638.



David Reid Dillon

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Jr

IN THE COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO

COMMON PLEAS COURT
04 CR 199
06 MAY 10 PM 2:54

STATE OF OHIO,

PLAINTIFF,

VS.

ROGER K. MARSHALL,

DEFENDANT.

CLERK OF COURTS
LAWRENCE COUNTY
JUDGMENT ENTRY
CASE NO. 04-CR-199
FINAL APPEALABLE ENTRY

Judge W. Richard Walton

The trial of this matter commenced before this Court on February 15, 2006, with all parties present; the Defendant appeared with his counsel, Charles H. Knight and William N. Eachus, and the State was represented by J. B. Collier, Jr., Prosecuting Attorney and W. Mack Anderson, Assistant Prosecuting Attorney.

Prior to submitting the case to the jury for deliberations, the State moved to dismiss Count Six of the Indictment which was granted by the Court.

The Defendant was found guilty by a jury of his peers on February 23, 2006 of the remaining counts of the Indictment as charged against him.

The matter came on for sentencing on April 24, 2006. Upon hearing from counsel for the State and the Defendant, as well as from the Defendant himself, and after a review of the facts in this matter and the verdict rendered by the jury, as well as the general rules set down by the legislature in Chapter 2929 of the Revised Code, the Court makes the following findings.

In Counts One through Five and Seven through Twelve, the Defendant was found guilty of violating Ohio Revised Code Section 2909.02 (A)(1), Aggravated Arson, each being a first degree felony and can be punishable by a term of imprisonment of between three (3) and ten (10) years in the appropriate penal institution with a permissive fine of \$20,000.00 and costs. There is a presumption under the law of the State of Ohio in favor of a penal sentence.

In these cases, the victims neither induced or facilitated the offenses, the Defendant did not

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act under strong provocation; the Defendant should have known his acts would cause or were expected to cause harm to person(s) and/or property; there were no grounds to mitigate the Defendant's conduct against these victims.

Further, the Defendant was under probation concerning acts against Lolaetta Corbin, victim herein, when these acts were committed.

As exhibited by his demonstrations in Court, the Defendant does not accept the responsibility for his acts. While he may be sorry that Lolaetta Corbin is deceased, he has exhibited no remorse for his actions upon the other victims. The Court finds the Defendant's actions were done out of spite and that his reaction to rejection could occur in the future.

With respect to Counts Thirteen, Fourteen and Fifteen, each charging a violation of Ohio Revised Code Section 2903.01 (B), Aggravated Murder with aggravating circumstances, the Court finds that consecutive sentences are necessary to protect the public from future crimes and to punish the Defendant. Further, consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct and to the danger he poses to the public. The harm of the multiple offenses are so great or unusual that no single prison term would adequately reflect the seriousness of the Defendant's acts.

WHEREFORE, IT IS THE ORDER OF THIS COURT THAT THE DEFENDANT, ROGER K. MARSHALL, is hereby sentenced as follows:

With respect to Counts One, Two, Three, Four, Five, Seven, Eight, Nine, Ten, Eleven and Twelve, each charging a violation of Ohio Revised Code Section 2909.02 (A)(1), Aggravated Arson, felonies of the first degree, the Defendant is sentenced to serve a term of incarceration of ten (10) years in the appropriate state penal institution on each count.

With respect to Counts Thirteen, Fourteen and Fifteen, each charging a violation of Ohio Revised Code Section 2903.01 (B), Aggravated Murder, the Defendant is hereby sentenced to life imprisonment without eligibility of parole on each count.

Further, the sentences as imposed under Counts One and Thirteen concern the victim, James M. Reed, and shall be served concurrently with each other.

The sentences as imposed under Counts Two and Fifteen involve the victim, John Meyer, and shall be served concurrently with each other.

The sentences as imposed under Counts Three and Fourteen involve the victim, Lolaetta Corbin, and shall be served concurrently with each other.

The sentences as imposed under Counts Two, Fifteen, Three and Fourteen shall be served concurrently with each other, however, shall be served consecutively to the sentence imposed under Counts One and Thirteen.

The sentences as imposed hereinabove under Counts Four, Five, Seven, Eight, Nine, Ten, Eleven and Twelve shall be served concurrently with each other, however, shall be served consecutively with the sentences imposed under Counts One, Two, Three, Thirteen, Fourteen and Fifteen.

Thus, the total period of incarceration as Ordered herein is two (2) life sentences without the possibility of parole and an additional ten (10) years.

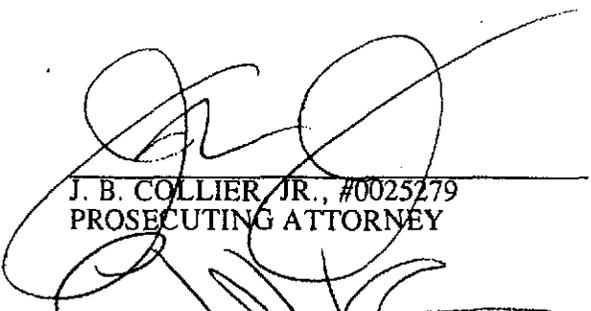
The Defendant is given credit for time served, to-wit: 631 days (08/12/04 - 05/05/06). It is further Ordered that the Defendant pay all the costs of this prosecution for which execution is hereby awarded.

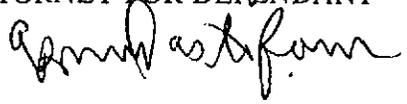
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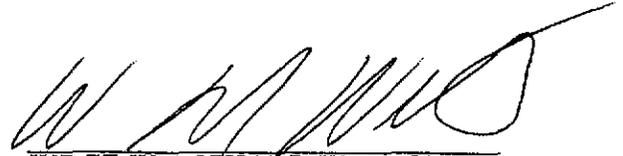
Bond discharged.

The Court advised the Defendant of his right to appeal and to do so without cost, to obtain counsel for an appeal and that counsel will be appointed without cost if he is unable to obtain counsel, and his right to documents required in that appeal without cost, and his right to have Notice of Appeal timely filed on his behalf.

As a result of these admonishments and the Defendant's replies thereto, appellate counsel was requested, however, not yet appointed.


J. B. COLLIER, JR., #0025279
PROSECUTING ATTORNEY

CHARLES H. KNIGHT, #0011345
ATTORNEY FOR DEFENDANT



JUDGE W. RICHARD WALTON

and 5) not declaring a mistrial, as to the guilt phase of the trial, because of jury misconduct.

{¶2} Because Appellant's statements and his permission to search his residence, before receiving medical treatment, were made voluntarily, his first and second assignments of error are without merit. Further, because the expert testimony, which was objected to, met the requirements for certainty and reliability under Evid.R. 702, Appellant's third assignment of error is without merit. Similarly, because testimony concerning Appellant's past bad acts was admitted for purposes of proving motive and intent, and not for purposes of demonstrating Appellant's character, his fourth assignment of error is also without merit. Finally, because the trial court determined there was no jury misconduct during the guilt phase of the trial, and because the court properly dismissed two jurors due to alleged misconduct during the sentencing phase, Appellant's fifth assignment of error is without merit. Accordingly, we overrule each of Appellant's assignments of error and affirm the decision of the trial court.

I. Facts

{¶3} In the early afternoon of August 1, 2004, Appellant Roger Marshall entered a bar he frequented, the JAB. Witnesses testified that Appellant remained at the bar the rest of the day, drinking and playing pool

until after midnight. At some point during that day, while Appellant was at the JAB, Lolaetta Hicks and John Meyer also entered the bar.

{¶4} Lolaetta Hicks and Appellant had been involved in a romantic relationship which spanned several years, but that relationship had recently ended. Hicks was now seeing John Meyer and often stayed with him at the Lyle Motel. No one observed any confrontational exchanges between Appellant and Hicks and Meyer the night of August 1. However, the previous night, at the same bar, Appellant was seen arguing with both Hicks and Meyer and Appellant pulled Hicks' hair on two occasions. Further, Appellant was heard telling Hicks, "[y]ou will pay for what you're doing to me." The exact times Hicks and Meyer left the JAB on August 1 is uncertain, but both left before Appellant. According to the bartender, Melinda Malone, Appellant stayed at the JAB until sometime between 1 and 2 a.m., the early hours of August 2.

{¶5} On August 2, at approximately 2 a.m., the Ironton Fire Department responded to a call reporting a fire at the Lyle Motel. The fire extensively damaged the building and caused the deaths of Hicks, Meyer and James Reed, another occupant of the motel.

{¶6} After she closed the JAB that night, Melinda Malone noticed the fire trucks and activity at the Lyle Motel and informed the owner of the

JAB, Joyce Bradford. Malone and Bradford became aware that John Meyer might have been killed in the fire. Knowing that Lolaetta Hicks was often with Meyer, Malone and Bradford were concerned that Hicks might have also been a victim. Hoping she was instead with Appellant, they went to his residence at approximately 3 a.m.

{¶7} When the women arrived at Appellant's residence, they were startled and scared by his altered appearance. His hair looked like it was wet or greased and his face was covered with beads of fluid. His appearance was so different that they did not initially recognize him. Malone and Bradford asked Appellant if Hicks was there and told him that if she wasn't she might have been killed in the Lyle Motel fire.

{¶8} Malone and Bradford then went back to the scene of the fire and told Ironton Police Captain Chris Bowman what they had observed when they spoke to Appellant. Bowman then went to Appellant's residence and, after reading him his Miranda Rights, interviewed him. Bowman testified that Appellant appeared to have burn injuries. Appellant told Bowman he had been injured by a carburetor back-fire while working on his motorcycle. Bowman observed no fire damage to the motorcycle, but he did see what appeared to be skin hanging from the handlebars.

{¶9} Bowman asked Appellant to accompany him to the scene of the fire and Appellant agreed to do so. There, Appellant gave a different explanation for his burn injuries. He told Assistant Chief Kenneth Crawford of the Fire Marshall's office that his motorcycle had run out of gas and he had pushed it to a gas station. He claimed that when he put gas into the motorcycle, some of it spilled onto the engine and the motorcycle caught fire. According to Appellant, this happened at approximately 5:30 p.m. on August 1st. An attendant from the gas station testified that no such fire took place.

{¶10} After being interviewed and signing a consent to search his residence, Appellant was placed under arrest at the fire scene. He was then transported to a hospital for treatment for his burns. Two paramedics testified that, during the ride to the hospital, Appellant started to cry and stated: "I'm sorry I did it. Lolaetta is dead." When asked to repeat what he had said, Appellant answered: "I didn't say anything."

{¶11} After his arrest, investigators returned to Appellant's residence where they seized evidentiary materials including clothing, boots, a wastebasket containing singed hair and Appellant's motorcycle.

{¶12} On October 16, 2004, Appellant was indicted on three counts of aggravated murder with specifications and twelve counts of

aggravated arson for the Lyle Motel fire. The guilt phase of trial began on February 15, 2006. After a seven day trial, the jury found Appellant guilty on all counts.

{¶13} The jury was dismissed until the sentencing phase of the trial, which was to start in April. During this recess, Appellant made a motion for mistrial due to jury misconduct. The trial court denied the motion but excused the juror responsible for the alleged misconduct and eventually dismissed another juror who was aware of the alleged misconduct.

{¶14} The sentencing phase of the trial began in April. The jury was unable to reach a consensus and deadlocked. As a result, the trial court declared a mistrial as to the penalty phase and discharged the jury. After declaring the mistrial, the trial court sentenced Appellant to two life sentences without the possibility of parole plus ten years. Appellant then filed the current appeal.

II. Assignments of Error

{¶15} "I. THE TRIAL COURT'S REFUSAL TO SUPPRESS DEFENDANT'S STATEMENTS WAS ERRONEOUS, PREJUDICIAL, AND WARRANTS REVERSAL OF THE JUDGMENT BELOW.

{¶16} II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN REFUSING TO SUPPRESS THE

EVIDENTIARY ITEMS SEIZED AT DEFENDANT'S
RESIDENCE.

{¶17} III. THE TRIAL COURT ERRED IN ADMITTING EXPERT
TESTIMONY WITHOUT PROPER FOUNDATION AS TO
CERTAINTY OR RELIABILITY.

{¶18} IV. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE
OF BAD ACTS ON THE PART OF THE DEFENDANT IN
VIOLATION OF THE RULES OF EVIDENCE.

{¶19} V. THE TRIAL COURT ERRED IN REFUSING TO GRANT A
MISTRIAL REQUESTED BY DEFENDANT BECAUSE OF
JURY MISCONDUCT.”

III. First Assignment of Error

{¶20} In his first assignment of error, Appellant argues the trial
court should have suppressed certain statements made to law enforcement
officers because they were not voluntarily given.

{¶21} Captain Bowman of the Ironton Police Department
informed Appellant of his Miranda rights before he began questioning him
at his residence the night of the fire. Appellant told Bowman he
understood his rights and was willing to answer questions. He was not
placed under arrest at the time. Appellant was obviously burnt, but
understood the questions and responded appropriately. He did not appear
angry, confused or upset. Appellant was repeatedly asked if he required
medical attention, but declined all such offers. Bowman asked Appellant
to accompany him to the scene of the fire and he agreed. He rode to the

scene in the passenger seat of Bowman's car. Appellant was questioned further at the fire scene. Shortly after giving consent to search his apartment, he was placed under arrest.

{¶22} Appellant does not challenge that he was mirandized prior to being questioned. Rather, he based his motion to suppress on the claim that none of his statements were voluntary. Appellant was not treated for his burn injuries until after he was placed under arrest and he contends the severity of these injuries clearly impaired his faculties. He claims his capacity for self-determination was impaired and, therefore, all his statements before treatment were, in effect, made involuntarily.

{¶23} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Book*, 165 Ohio App.3d 511, 847 N.E.2d 52, 2006-Ohio-1102, at 9; *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. In a motion to suppress, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8; *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Appellate courts must accept a trial court's factual findings so long as competent and credible evidence supports those findings. *State v. Metcalf* (1996), 111 Ohio App.3d 142,

145, 675 N.E.2d 1268; *State v. Harris* (1994), 98 Ohio App.3d 543, 546, 649 N.E.2d 7. A reviewing court then conducts a de novo review of the trial court's application of the law to the facts of the case. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691, 654 N.E.2d 1034.

{¶24} Whether a statement was made voluntarily and whether a person knowingly, voluntarily, and intelligently waives his right to counsel and his right against self-incrimination are different issues. *State v. Eley* (1996), 77 Ohio St.3d 174, 178, 672 N.E.2d 640. As such, even if Miranda warnings were required and given, a defendant's statements may be made involuntarily and, thus, be subject to exclusion. *State v. Kelly*, 2nd Dist. No. 2004-CA-20, 2005-Ohio-305, at ¶11.

{¶25} “The test for voluntariness under a Fifth Amendment analysis is whether or not the accused's statement was the product of police overreaching.” *State v. Finley* (June 19, 1998), 2nd Dist. No. 96-CA-30, at *8. “A suspect's decision to waive his Fifth Amendment privilege is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct.” *State v. Dailey* (1990), 53 Ohio St.3d 88, 91, 559 N.E.2d 459. “In determining whether a suspect's statement was made voluntarily, a court should consider the totality of the circumstances. These

circumstances include ‘the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.’” *State v. Sneed*, 166 Ohio App.3d 492, 2006-Ohio-1749, 851 N.E.2d 532, at ¶31, quoting *State v. Edwards* (1976), 49 Ohio St.2d 31, 3 O.O.3d 18, 358 N.E.2d 1051.

{¶26} In the case at bar, though Appellant contends, because of his burns, he was incapable of making statements voluntarily, the evidence shows otherwise. Appellant contends that ‘[g]iven that defendant was not given medical treatment until after he was arrested, his faculties were clearly impaired.’” However, Appellant, though obviously burned, was observed to be coherent, cooperative and responsive by multiple witnesses. He answered questions intelligently and appropriately and witnesses observed no signs of impairment. Further, Appellant refused offers of medical treatment numerous times. There is no evidence that, during questioning, Appellant ever complained of pain or distress due to his injuries. Before his arrest, Appellant was questioned at his home and at the scene of the fire. The questioning was neither intense nor lengthy. There is no evidence Appellant was threatened or coerced in any manner into making his statements. In light of the multiple offers of medical attention,

any physical deprivation was intelligently and consciously chosen by Appellant.

{¶27} Considering the totality of the circumstances, there is no evidence of the kind of police overreaching necessary to conclude Appellant's statements were made involuntarily. The evidence shows Appellant's will was not overborne and his capacity for self-determination was not critically impaired. As such, the statements made by Appellant, before receiving medical treatment, were properly admitted. Appellant's first assignment of error is overruled.

IV. Second Assignment of Error

{¶28} Appellant's second assignment of error involves a motion to suppress evidentiary items taken from his residence. Appellant argues though he signed a consent to search form, this consent was not voluntarily given. He also claims language that was handwritten on the form should have limited the scope of the search.

{¶29} When Appellant was questioned at the scene of the fire, Deputy Fire Marshall Bob Lawless asked him for permission to search his residence. Lawless testified that Appellant stated: "I have no problem with that because I didn't do anything." Appellant verbally gave permission to search his residence and also signed a consent to search form. Before

Appellant signed the form, Lawless read it to him in its entirety. The form read in part: “I specifically give my consent and authorize these persons to inspect and remove *any items of evidence* which maybe related, directly or indirectly, to the investigations of the circumstances and/or the cause of the fire.” (Emphasis added). Lawless testified that Appellant in no way asked to limit the scope of the search. After Appellant signed the consent to search form, Lawless hand-wrote the words “for clothing” on the bottom of the form. Lawless testified he did so in order to ensure Appellant’s clothing was also retrieved. Lawless testified that in no way did he intend for those words to limit the scope of the search. Soon after signing the consent to search form, Appellant was put under arrest.

{¶30} We stated the appropriate standard of review for a motion to suppress in the previous assignment of error. We next examine the validity of the consent to search form.

{¶31} “Warrantless seizures are unreasonable under the Fourth Amendment except for a few well-delineated exceptions. (Internal citation omitted). One exception is a search conducted by consent.” *State v. Smith*, 1st Dist. No. C-061032, 2007-Ohio-3786, at ¶13. “ * * *[A] search of property without a warrant or probable cause but with proper consent having been voluntarily obtained does not violate the Fourth Amendment.”

State v. Felder, 8th Dist. No. 87453, 2006-Ohio-5332, at ¶16. “Where the state relies upon consent to justify a warrantless search, it bears the burden to show that consent was freely and voluntarily given. (Internal citation omitted). Whether consent was voluntary or was the product of duress or coercion is a question of fact a court must determine from the totality of the circumstances.” *Smith* at ¶13. Whether an individual voluntarily consented to a search is a question of fact, not a question of law. See *Ohio v. Robinette* (1996), 519 U.S. 33, 40, 117 S.Ct. 417.

{¶32} Following the analysis of the previous assignment of error, considering the totality of the circumstances, we find that Appellant’s decision to sign the consent to search form was freely and voluntary given. Appellant was not under arrest at the time he gave his consent. Appellant gave his consent to search both verbally and in writing. Fire Marshall Lawless read the contents of the consent to search form out loud to him. Appellant rationally and appropriately carried on conversations and answered questions during this time and multiple witnesses testified that Appellant demonstrated no impairment. Because the record supports the trial court’s findings, we agree that Appellant’s consent to search his residence was voluntary.

{¶33} Appellant claims that even if his consent was voluntary the scope of the search was limited due to Fire Marshall Lawless writing “for clothing” on the bottom of the form. As previously noted, Lawless testified that he wrote those words only to ensure Appellant’s clothes were retrieved. He testified they had no bearing on the scope of the search. Both Lawless and Officer Wilson of the Ironton Police Department testified that the words “for clothing” were added after Appellant had already signed the consent form. Further, Wilson and Lawless testified that Appellant in no way asked to limit the scope of the search.

{¶34} “The standard for measuring the scope of consent under the Fourth Amendment is objective reasonableness, i.e., what a typical reasonable person would have understood by the exchange between the officer and the suspect.” *Felder* at 17. In the case at hand, a reasonable person would not have concluded the scope of search was to be limited to clothes only. The text of the consent to search form, which was read aloud to Appellant, stated “any items of evidence” potentially related to the fire could be removed and the evidence shows Appellant signed the form with this understanding. The hand-written words “for clothing” were not written at the request, or under the direction, of Appellant, but were written

simply to ensure that his clothes were collected in addition to any other relevant evidence.

{¶35} Because Appellant voluntarily gave consent to search his residence, and because there is no evidence that Appellant intended to limit the scope of the search, the trial court properly denied his motion to suppress evidentiary items removed from his apartment. As such, Appellant's second assignment of error is overruled.

V. Third Assignment of Error

{¶36} In his third assignment of error, Appellant argues the trial court improperly admitted expert testimony without proper foundation as to certainty or reliability. Kenneth Crawford, Assistant Chief with the Investigations Bureau of the State Fire Marshall's Office, testified regarding certain aspects of the fire. After observing the fire scene, he concluded an accelerant had been used. Appellant contends he deserves a new trial because Crawford's testimony was unverifiable, unsubstantiated and non-falsifiable. We disagree.

{¶37} "The determination of the admissibility of expert testimony is within the discretion of the trial court. Evid.R. 104(A). Such decisions will not be disturbed absent abuse of discretion." *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, at ¶9. "Abuse of

discretion' suggests unreasonableness, arbitrariness, or unconscionability. Without those elements, it is not the role of this court to substitute its judgment for that of the trial court." Id.

{¶38} Evid.R. 702 governs the admissibility of expert testimony.

That rule provides: "A witness may testify as an expert if all of the following apply: (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons; (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply: (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) The design of the procedure, test, or experiment reliably implements the theory; (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result." Evid.R. 702.

{¶39} Assistant Chief Crawford's testimony easily meets the requirements of 702(A) and (B). He testified as to burn patterns, speed and other aspects of fire, matters clearly beyond the knowledge and experience of laypersons. Further, he was eminently qualified to testify due to his specialized knowledge, experience, training, and education. He had over twenty five years of experience as an arson investigator and he estimated he had two thousand hours of formal training in arson investigation and other criminal matters. He had testified numerous times as an expert witness in other arson cases. Further, Assistant Chief Crawford estimated he had investigated one thousand to fifteen hundred arsons in which some type of flammable liquid had been used as an accelerant. Therefore, the only requirement of Evid.R. 702 which Appellant can reasonably challenge is 702(C); witness testimony must be based on reliable scientific, technical, or other specialized information.

{¶40} Assistant Chief Crawford testified that, in his opinion, the fire had been set deliberately and an accelerant had been used. He based this conclusion on a number of factors including: the burn patterns indicated a fast-burning fire that had spread very rapidly; variations in smoke damage and fire damage indicated the fire was mainly confined to the landing and stairway; the most serious damage occurred at the top of

the stairs, on the landing, on the doors of the apartment and the ceiling, and; there was no “fire load” or combustible material at the scene that would have burned that rapidly without an accelerant.

{¶41} Ohio courts have found expert testimony admissible in similar situations. In *State v. Hinkle* (August, 23, 1996), 11th Dist. No. 95-P-0069, fire investigators testified that a fire had probably been intentionally set. “Upon consideration of the entire record, we cannot say that the trial court abused its discretion in admitting the testimony of [the investigators]. It is our view that the factual foundations for their opinions were sufficiently established. Their credentials as experts were acceptable, their investigative methods were adequate, and the extent of their investigations, while not as comprehensive as could have been performed, were nevertheless reasonable. Further, any doubts or concerns regarding the regularity of their investigative techniques would go to the weight of their testimony and not the admissibility.” *Id.* at *4.

{¶42} In *State v. Simpson*, 10th Dist. No. 01AP-757, 2002-Ohio-3717, the appellant argued the trial court erred in admitting testimony of an expert regarding the cause of a fire. The court found “[the investigator’s] conclusion was based on valid and reliable information resulting from an adequate investigation. He testified that he based his conclusion on his

training, his investigation of the scene * * * and his elimination of other causes. This is reliable information sufficient to support the admissibility of his testimony.” Id. at 76. See, also, *State v. Campbell*, 1st Dist. No. C-020822, 2003-Ohio-7149; *State v. Nelson*, 9th Dist. No. 04CA0001-M, 2004-Ohio-4967.

{¶43} As already noted, over the course of his career, Assistant Chief Crawford had observed between one thousand and fifteen hundred arson fires in which an accelerant had been used. Further, he had participated in numerous training fires using accelerants. After viewing the scene, he testified that the characteristics of those fires were consistent with the characteristics of the fire in this case. In light of his experience, observations and explanations for his conclusions, we find that his testimony was based on reliable scientific, technical, or other specialized information. As such, his testimony was properly admitted and Appellant’s third assignment of error is overruled.

VI. Fourth Assignment of Error

{¶44} In his fourth assignment of error, Appellant argues the trial court erred in admitting evidence of past bad acts. Specifically, Appellant objects to the testimony of three witnesses regarding these acts. The testimony of: Larry White, who stated he saw Appellant grab Lolaetta

Hicks and strike her a few days before the fire; Teresa Arbaugh, who testified that, the day before the fire, she saw Appellant argue with Hicks and pull her hair on two occasions, saw Appellant argue with John Meyers and who, on the same occasion, heard Appellant tell Hicks “[y]ou will pay for what you’re doing to me,” and; Eddie Thibodaux, who testified he help break up a fight between Appellant and Hicks a few days before the fire.

{¶45} As a general rule, evidence of prior crimes, wrongs or bad acts is inadmissible if it is wholly independent of the charge for which an accused is on trial. *State v. Aliff* (April 12, 2000), 4th Dist. No. 99CA8, at *10. Evid. R. 404(B) states “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Evid. R. 404(B). “Thus, while evidence of other crimes, wrongs or acts committed by the accused is not admissible to show that the accused has a propensity to commit crimes, it may be relevant to show: motive, intent, the absence of a mistake or accident, or a scheme, plan, or system in committing the act in question.” *State v. Dunham*, 4th Dist. No. 04CA2931, 2005-Ohio-3642, at ¶29. “When other acts evidence is relevant for one of those limited

purposes, the court may properly admit it, even though the evidence may show or tend to show the commission of another crime by the accused.”

Id.

{¶46} “[E]vidence of other crimes and acts of wrongdoing must be strictly construed against admissibility. (Internal citations omitted). Such evidence is only admissible if the other act tends to show by substantial proof any of those things enumerated, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” *State v. Moore*, 7th Dist. No. 02CA152, 2004-Ohio-2320, at ¶44. “It is never admissible when its sole purpose is to establish that the defendant committed the act alleged of him in the indictment.” Id. However, “the decision to admit Evid.R. 404(B) prior acts evidence rests in the trial court's sound discretion and that decision should not be reversed absent an abuse of discretion.” *State v. Hairston*, 4th Dist. No. 06CA3089, 200-Ohio-3707, at ¶38.

{¶47} In the case sub judice, Appellant contends the testimony of Larry White, Teresa Arbaugh and Eddie Thibodaux, concerning Appellant's threats, violent acts and confrontational behavior, prior to the fire, was inadmissible under Evid.R. 404(B). In similar situations, we, and other Ohio courts, have found otherwise.

{¶48} In *State v Aliff*, the appellant, convicted of aggravated murder, claimed the trial court abused its discretion in allowing the prosecution to introduce evidence of past bad acts. In *Aliff*, the appellant was angry at his wife's involvement with another man. He attempted to fight with the other man and assaulted his wife within weeks of her death. We found the testimony regarding this incident was admissible. "This testimony demonstrates that appellant was angry that his wife was involved with Mr. Hager. This anger directed at both Mrs. Aliff and Mr. Hager demonstrates that appellant had a motive to kill his wife and was, therefore, admissible under Evid.R.404(B)." *Aliff* at *10. The appellant in *Aliff* also argued that a tape recording, in which he threatened his wife's life, was evidence of a past bad act and should be inadmissible under 404(B). We stated "[t]his tape demonstrates a clear intent to kill Mrs. Aliff and shows an absence of mistake. As it qualifies under these two exceptions delineated in Rule 404(B), it was properly admitted." *Id.* at *11. See, also, *State v. Moore*, 7th Dist. No. 02CA152, 2004-Ohio-2320 (evidence of previous fight admissible under 404(B) as motive for murder and intent to cause physical harm).

{¶49} In *State v. Nicely*, 4th Dist. No. 03CA779, 2004-Ohio-3847, the appellant was convicted of arson. A witness testified that, the night of

the fire, the appellant came by his house brandishing a gun and making threats. We found the testimony both relevant and admissible under 404(B). “We note that [the witness] testified that shortly before the fire, appellant came to his house intoxicated, waved a gun and threatened to kill the ‘M.F.’er.’ While the identity of the ‘M.F.’er’ to whom appellant referred was not definitively revealed, this evidence established that appellant was angry at someone that evening-angry enough to kill that person or, possibly, to burn down his home.” *Id.* at ¶19.

{¶50} In *State v. Brown*, 3rd Dist. No. 9-02-02, 2002-Ohio-6765, the appellant was found guilty of murdering her boyfriend. The appellant argued that evidence of her threats and violence in the months preceding her boyfriend’s death was inadmissible under 404(B) because it merely showed she had a predisposition for violence. The prosecution contended the boyfriend’s death was the final result of the appellant’s jealousy, possessiveness, and attempts to control him and the evidence established motive and intent. The court agreed with the prosecution stating that, because the prosecution argued the appellant’s motive was driven by her boyfriend’s rejection, “[t]he nature of their relationship bore directly on whether she had a motive to harm him or acted knowing that her actions would cause physical harm.” *Id.* at ¶27. “It is well established that

evidence of a defendant's threats, violence, or other obsessive behavior in the months preceding a murder is probative of the defendant's motive or intent * * *." Id.

{¶51} The case at hand closely parallels the authority cited above. Appellant was angry that Lolaetta Hicks had ended their relationship and was seeing John Meyers. Appellant's jealousy caused him to argue with and physically assault Hicks on numerous occasions in the days immediately prior to the fire. Further, he specifically told Hicks "[y]ou will pay for what you're doing to me." Testimony recounting these acts of violence and threats was clearly relevant to show Appellant's motive and intent in setting the fire which ultimately killed Hicks and Meyer. Because this testimony was probative of Appellant's motive and intent, it is admissible under 404(B).

{¶52} Finally, under this assignment of error, Appellant argues that even if admissible under 404(B), the testimony is inadmissible under Evid.R. 403(B). 403(B) states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Though not citing the statute directly, Appellant also indicates the testimony is inadmissible under 403(A). 403(A) states: "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 of misleading the jury.”

{¶53} Under his 403(B) argument, Appellant contends there was no need to present additional evidence concerning motive because there was already testimony that he was unhappy that Hicks was seeing Meyer. We do not find that the testimony concerning Appellant’s threats and acts of violence toward Hicks was simply cumulative with testimony that Appellant was “bothered” by Hicks relationship with Meyer. We also note the decision to exclude evidence under 403(B) is discretionary. Unlike 403(B), the application of 403(A) is mandatory. However, in this instance, the very strong probative value and the highly relevant nature of the testimony, in establishing motive and intent, was not substantially outweighed by the danger of unfair prejudice.

{¶54} The testimony concerning Appellant’s prior acts of violence and threats against Hicks, in the days immediately before the fire, were clearly relevant to show his motive and intent in setting the fire. As such, the testimony was admissible under Evid.R. 404(B). Further, the probative value of the testimony was not substantially outweighed by needless presentation of cumulative evidence and it was not substantially

outweighed by the risk of prejudice. Appellant's third assignment of error is, therefore, overruled.

VII. Fifth Assignment of Error

{¶55} Appellant's fifth assignment of error alleges the trial court erred in not granting a mistrial due to jury misconduct. The trial court was informed of an incident of possible juror misconduct, which occurred after the guilt phase of trial had been concluded and before the penalty phase had begun. A witness testified that, during a party, he overheard Juror Lowe making statements concerning the case. The witness testified that Lowe asked people about their opinion of the death penalty. According to the witness, Lowe stated he had already made up his mind about Appellant's sentence and would not change it, no matter what. The witness informed another juror, Debbie Hasenauer, about Lowe's alleged statements and Juror Hasenauer then brought the matter to the trial court's attention.

{¶56} The court questioned Juror Lowe about the incident. Lowe claimed people had made comments to him about the case in a pool hall, but he told them to keep their comments to themselves and left. He claimed that at no time did he express any opinion about the case. Further, he claimed not to have been at the party where the witness allegedly heard

him discuss the case. After questioning Lowe, the trial court dismissed him from the jury panel. The court also eventually excused Juror Hasenauer, not because of any alleged wrongdoing, but because the witness had informed her of Lowe's alleged comments. After dismissing Lowe, the court questioned each remaining juror individually. Each of the remaining jurors indicated they were unaware of any wrongful conduct during guilt deliberations or during the following recess.

{¶57} An inquiry into alleged juror misconduct requires a two-step analysis. "First the trial court must determine whether misconduct occurred. (Internal citation omitted). Then, if juror misconduct is found, the court must determine whether the misconduct materially affected the appellant's substantial rights." *State v. Coleman*, 4th Dist. No. 05CA3037, 2006-Ohio-3200, at ¶10. "Further, when a juror refuses to consider the evidence or forms an opinion as to guilt or innocence before all the evidence is presented, such activity constitutes misconduct." *State v. Combs*, 5th Dist. No. 2001CA00222, 2002-Ohio-1136, at *3. "Trial courts are given broad discretion when dealing with allegations of juror misconduct. (Internal citation omitted). Thus, its decision when faced with such allegations must be reviewed for an abuse of discretion." *State v. Robinson*, 7th Dist. No. 05 JE 8, 2007-Ohio-3501, at ¶96.

{¶58} In the case at bar, what Juror Lowe stated or did not state was disputed. If he did, in fact, make up his mind as to Appellant's sentence before the sentencing phase had begun, or if he stated he would not consider the evidence, that constituted misconduct. Assuming Lowe did make the alleged statements, we must still determine whether this misconduct materially affected Appellant's substantial rights.

{¶59} Lowe's alleged comments were made during recess, after the guilty verdict was rendered, but prior to the sentencing phase of the trial. Appellant contends Lowe's comments strongly suggest that he was convinced Appellant was guilty all along and that his opinion must have also infected the deliberations during the guilt phase of the trial. Because of this, Appellant contends the trial court should have declared a mistrial.

{¶60} "In cases involving outside influences on jurors, trial courts are granted broad discretion in dealing with the contact and determining whether to declare a mistrial or to replace an affected juror." *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, at ¶159, quoting *State v. Phillips* (1995), 74 Ohio St.3d 72, 88, 656 N.E.2d 643. "It is well established that [t]he trial judge is in the best position to determine the nature of the alleged jury misconduct and the appropriate remedies for any demonstrated misconduct." *State v. Watkins*, 9th Dist. No. 23133,

23145, 2006-Ohio-6380, at ¶8, quoting *State v. McKnight*, 107 Ohio St .3d 101, 2005-Ohio-6046, at ¶184. Here, the trial court excused Juror Lowe because of comments allegedly made after the guilt phase, but before the sentencing phase had begun. The trial court even excused Juror Hasenauer, not due to any misconduct on her part, but simply because she was aware of the alleged comments. The court further interviewed each remaining juror to ascertain if they were aware of any impropriety. Each juror indicated they were aware of none. Further, Appellant provides no evidence of misconduct during the guilt phase of the trial. Lowe's alleged comments only concerned his opinion as to Appellant's sentence.

{¶61} Juror misconduct does not necessarily require reversal. The misconduct must be prejudicial. *State v. Taylor* (1991), 73 Ohio App.3d 827, 832, 598 N.E.2d 818. Here, there was no prejudice. There was no evidence of misconduct during the guilt phase of the trial and the court properly excused two jurors from the sentencing phase due to Lowe's alleged misconduct. Juror Lowe was excused before the sentencing phase had even begun, so none of the remaining jurors were even aware of the alleged misconduct. Further, the trial court interviewed each juror to ensure that deliberations had not been tainted. Under these circumstances,

we cannot say the trial court abused its discretion in denying a motion for mistrial. Thus, Appellant's fifth assignment of error is overruled.

VIII. Conclusion

{¶62} In our view, Appellant has failed to establish any of his assignments of error. While the record shows he had burn injuries, there is no evidence that Appellant's will was overborne and his capacity for self-determination was critically impaired. Accordingly, his statements to authorities and his consent to search his residence were given voluntarily. Furthermore, expert testimony regarding aspects of the fire met the requirements of Evid.R. 702 and, thus, was properly admitted. Similarly, because testimony concerning past bad acts was admitted for purposes of proving motive and intent under Evid. R. 404(B), such testimony was admissible. Finally, Appellant's motion for a mistrial due to juror misconduct, as to the guilt phase of the trial, was properly denied by the trial court. The record reveals no evidence of misconduct during the guilt phase and the trial court dealt with any possible misconduct regarding the sentencing phase by excusing two jurors. Accordingly, we overrule each of Appellant's assignments of error and affirm the decision of the trial court.

JUDGMENT AFFIRMED.