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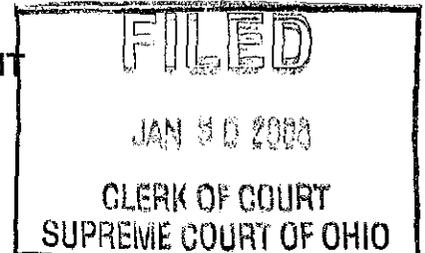
IN THE SUPREME COURT  
OF THE  
STATE OF OHIO

STATE OF OHIO	:	CASE NO.
	:	
Defendant-Appellant	:	
	:	
vs.	:	On Appeal from the Twelfth
	:	District Court of Appeals
LIZ CARROLL	:	For Clermont County
	:	
Plaintiff-Appellee	:	Court of Appeals
	:	Case No. CA2007-02-030

MEMORANDUM IN SUPPORT OF JURISDICTION

ON BEHALF OF DEFENDANT-APPELLANT

LIZ CARROLL



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

Defendant was charged with murder, involuntary manslaughter, kidnaping, felonious assault, and three counts of child endangering, all alleging that she left a foster child restrained in a closet overnight, resulting in his death. She was convicted as charged, and the trial court, imposed consecutive sentences for all offenses except the involuntary manslaughter, for a total of 54 years to life, even though only one victim, and only one act of abuse was charged or proven. Defendant's husband received a 13 year sentence when he chose to plead guilty after Defendant's trial, and a third accomplice was given complete immunity in return for her testimony. Many of these charges clearly describe allied offenses of similar import, or alternative ways of charging the same offense. Imposition of separate and consecutive penalties for all these offenses violates the constitutional prohibition against double jeopardy, and invades the province of the legislature, because the legislature did not intend or foresee such an abuse of the charging power to evade limits on sentencing established by statute.

This Court is currently considering similar issues involving multiple convictions for possession and trafficking in the same drugs in *State v. Cabrales*, 2007-0595 & 2007-0651, which was certified to the Court because of a conflict between districts. The existence of a conflict reflects a need for further direction from this Court on the issue of allied offenses.

Furthermore, Defendant's statements should have been suppressed as involuntary when she was subpoenaed before a grand jury, informed that she must testify, never informed that she was a target or offered counsel, and unusually vulnerable to pressure because she was medicated for psychological problems. The Court improperly denied a

motion for change of venue even though a large number of jurors admitted forming opinions as a result of pretrial publicity. The Court also denied requested instructions on reckless homicide and accomplice testimony, even though they were correct statements of law and supported by the evidence.

Those errors resulted in a verdict based on evidence that was insufficient, as a matter of law, and a verdict that conflicted with the manifest weight of the evidence presented. For all these reasons, this Court should accept jurisdiction and reverse the judgment of the trial court, in part or as a whole.

## STATEMENT OF THE CASE

### 1) PROCEDURAL POSTURE

This matter comes before the Court on appeal from the judgment of the Court of Appeals, Twelfth Appellate District of Ohio. Defendant was charged with: felony murder, R.C. § 2903.02(B); involuntary manslaughter, R.C. § 2903.04(A); kidnaping, R.C. § 2905.01(B)(2); felonious assault, R.C. § 2902.11(A)(1); and three counts of child endangering, R.C. § 2919.22(A), (B)(1) & (B)(3). A motion to suppress Defendant's grand jury testimony was heard and denied on January 3, 2007. A motion for change of venue was similarly denied.

The case was tried to a jury beginning February 12, 2007. Counsel's motions for a verdict of acquittal were overruled. The jury found Defendant guilty as charged on all counts and on February 22, 2007, the court sentenced her to a term of 15-to-life on Count 1, 10 years concurrent on Count 2, and consecutive terms of 10, 8, 8, 8 and 5 years on Counts 3-7.

Timely notice of appeal was filed on February 27, 2007. Defendant filed a Motion for new trial based on juror bias and misconduct, which was denied on March 6, 2007. Defendant filed a Notice of Appeal from that denial on March 16, 2007, and the two appeals were consolidated for briefing and argument. On December 28, 2007, the Twelfth District Court of Appeals merged the manslaughter charge with the murder count, but affirmed the judgment of the trial court in all other respects.

From the decision of the Court of Appeals, Appellant brings this appeal.

## 2) FACTS

On or about May 5, 2006, 3 year old Marcus Feisal was placed in foster care with Defendant, Liz Carroll, and her husband David. Marcus was considered a difficult placement because he suffered from emotional and developmental difficulties and had already been removed from one foster home due to those problems. Placement was monitored by a caseworker who made weekly home visits through August 10, 2006. Those visits revealed no problems. Defendant appeared to the caseworker to be very good with the child and very attached to him.

On August 15, around 1:15 p.m., Deputy Anthony Gardner was dispatched to Juilfs Park in Anderson Township, Hamilton County, for a report of a woman who had collapsed. He found Defendant receiving medical treatment from the fire department paramedics, and several young children who were with her when she collapsed. David Carroll was called to take charge of the children while she was transported to the hospital. After running an errand for another officer, Gardner returned to the park to discover that a child identified as Marcus Feisal was reported as missing. From that point, an extensive hunt was launched throughout the community for this child.

After days of searching and repeated interviews with Defendant, her husband, and an individual named Amy Baker who was living with them, suspicion of some criminal action developed. Prosecutors involved in the investigation decided to subpoena Defendant and Amy Baker to testify before a Hamilton County grand jury. Officers were sent to transport them to the grand jury location, where they were told they must testify. Defendant was never told she was a target of the investigation, nor was she provided with counsel. Amy Baker was provided with counsel and allowed to consult with him about possible

cooperation before she testified. She eventually claimed that Marcus had been left restrained in a closet while the three adults and other children traveled to Kentucky for a family reunion. When they found him dead the following day, she and David Carroll disposed of the body. Defendant, when confronted this testimony, admitted that Marcus died after being left restrained, although she denied being present when he was restrained.

Baker was granted complete immunity from prosecution in return for her cooperation and testimony. She testified Defendant suggested leaving Marcus behind because of his disruptive behavior, and that either David or Liz or both wrapped him in a blanket, bound it with tape, and left him in a playpen in the closet with a fan for ventilation on Friday afternoon. The family drove back early Saturday morning to discover the body. Baker admitted suggesting a place to burn the body, and helping David Carroll do so. Defendant did not participate.

The three discussed ways to conceal the death, according to Baker, after the body was disposed of. Eventually, the disappearance scenario was determined to be the best idea. Liz was chosen to be the primary person involved because she suffered from a cardiac problem that would account for her collapse in the park. Neither Carroll testified, although Defendant's grand jury testimony was read to the jury, and David Carroll's statement made the following day was played for them.

## ARGUMENT

### PROPOSITION OF LAW NO. 1

**CONVICTIONS FOR FELONY MURDER, FELONIOUS ASSAULT, THREE SEPARATE CHILD ENDANGERING COUNTS, AND KIDNAPING WERE IMPROPER UNDER THE DOUBLE JEOPARDY CLAUSE AND R.C. 2941.25(A), WHEN ONLY ONE ACT AND ONLY ONE VICTIM ARE ALLEGED BY THE STATE, AND NO SEPARATE ANIMUS IS PROVEN.**

R.C. 2941.25(A) provides: "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." In the instant case, Defendant was charged with six separate offenses for the single act of leaving her foster child restrained in a closet while she and her husband made an overnight trip out of town. The identical conduct is alleged in whole or in part in each of these charges. In fact, felonious assault, kidnaping and two of the three child endangering charges were all listed by the court as possible predicate offenses which the jury could find to prove the murder count. All three child endangering offenses are contained in subsections of the same statute, and are simply alternate means of proving the same offense. Furthermore, a felonious assault is inherent in every murder.

When the legislature prescribed the maximum penalties for various offenses, it clearly did not intend for the sentencing statutes to be circumvented by the simple expedient of filing multiple duplicate charges, or splitting a single statute into component parts with a separate charge and sentence for each. The existence of R.C. 2941.25 proves that the legislature foresaw the possibility of multiple charges and specifically provided for merger to prevent multiple punishment. When unchecked by the courts, such prosecutorial

overreaching violates the separation of powers between executive and legislative branches of the state. When the courts actively participate in circumventing the legislative intent by imposing consecutive sentences for duplicate charges, the judicial branch also infringes on the prerogatives of the legislature. When the court imposes multiple punishments that were not intended by the legislature, those punishments also violate the prohibition against double jeopardy in both the state and federal constitutions.

## **PROPOSITION OF LAW # 2**

**DEFENDANT'S STATEMENTS ARE INVOLUNTARY WHEN SHE IS SUBPOENAED BEFORE A GRAND JURY, INFORMED THAT SHE MUST TESTIFY, NEVER INFORMED THAT SHE IS A TARGET OR OFFERED COUNSEL, AND UNUSUALLY VULNERABLE TO PRESSURE BECAUSE SHE IS MEDICATED FOR PSYCHOLOGICAL PROBLEMS.**

Confessions must be accompanied by an independent determination of voluntariness. Before offering any statement of the Defendant the State must prove voluntariness by a preponderance of the evidence.<sup>1</sup> Part of this showing is proof that Defendant understood her rights and voluntarily waived them. Additionally, statements obtained through coercion or improper inducements are not voluntary and are inadmissible. Such coercion or inducement taints any later waiver of Defendant's rights, and renders any statements unreliable.

In the instant case, Defendant was interrogated in custodial surroundings. She was served with a subpoena, told she had no choice but to testify, and held in a locked room until called, without counsel, at a period of time when she was emotionally devastated, psychologically impaired, heavily medicated and vulnerable. She was never informed that

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<sup>1</sup>*Lego vs. Twomey* (1972), 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618.

she was a target or suspect. Although she never requested counsel, or refused to answer, she had no reason to believe that any request would be honored under these circumstances, and any waiver of those rights was involuntary. Any statements made are fruit of unconstitutional interrogation, and must be suppressed.

### **PROPOSITION OF LAW NO. 3**

**DEFENDANT DOES NOT RECEIVE A FAIR TRIAL WHEN THE JUROR POOL IS SO TAINTED BY PRETRIAL PUBLICITY THAT IT IS IMPOSSIBLE TO SEAT A JURY WHICH HAS NOT BEEN EXPOSED TO SUCH PUBLICITY TO THE EXTENT THAT JURORS SEATED HAVE ADMITTED FORMING OPINION ABOUT DEFENDANT'S GUILT, EVEN IF THEY AGREE TO TRY TO PUT THOSE OPINIONS ASIDE.**

Defense counsel filed for a change of venue due to the extensive and pervasive nature of the pretrial publicity surrounding the disappearance of Marcus Feisal, the intense community manhunt, interviews with the Defendant who described the fictitious incident and pleaded for his safe return, and the subsequent discovery of his remains. During voir dire, at least 41 of the 100 jurors initially questioned on hardship and publicity issues indicated that they had knowledge about the case from some source, usually news reports. At least 23 of those indicated that they had either formed an opinion or would have trouble setting aside what they had heard or read.

Challenges for cause were rejected in many of these cases, even when jurors made comments which cast strong doubt on their ability to be objective. Juror #1, who said all three adults in the Carroll home were untrustworthy, lying, cold and selfish, and could only say "I think I can (keep an open mind)" was passed for cause over objection by defense. Juror #6 had formed an opinion but was "willing to hear" the evidence. Juror #55 was convinced that Defendant "had something to do with it" and that she and her husband

“were both involved.” Juror #71 had actually participated in the search for Marcus, and had read a transcript of Defendant’s grand jury testimony on the internet, from which he had formed an opinion that Defendant was guilty. Juror #72 indicated on the questionnaire that Defendant needed to be locked up for life. Juror #77 believed, based on news and gossip that both Carrolls were guilty. Juror #81 participated in the search and admitted that as an adopted child and parent of an adopted child she had a distinct bias. Juror #90 admitted to forming opinions based on the news that “may be difficult” to set aside. Juror #93 admitted that it would be difficult to keep an open mind because the alleged acts were “too horrible.” Juror #96 admitted hearing that the Carrolls killed Marcus by putting him in a closet. All these jurors were passed for cause by the court because they eventually stated that they could try to put their preconceived opinions aside.

The Supreme Court of the United States has held a presumption of prejudice can arise from extensive pretrial publicity, despite the sincerity of jurors who stated that they could be “fair and impartial” to the defendant.<sup>2</sup>

A biased juror is unable to apply the facts to the law and deliberate under the constitutionally required burden of proof.<sup>3</sup> The trial judge has a “duty to protect [the accused] from [this type of] inherently prejudicial publicity . . . .” that renders the jury unfair in its deliberations.<sup>4</sup> Whether it is or is not likely that the Defendant would be convicted in another venue is irrelevant. The right to a fair and impartial jury is

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<sup>2</sup>*Irvin v. Dowd* (1961), 366 U.S. 717, 725-28, 81 S.Ct. 1639, 6 L.Ed.2d 751.

<sup>3</sup>*In Re Winship* (1970), 387 U.S. 358, 90 S.Ct.1068, 25 L.Ed.2d 368

<sup>4</sup>*Sheppard v. Maxwell* (1966), 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600.

fundamental. The denial of that right is a structural error that is never harmless.<sup>5</sup>

As in *Irvin*, prejudice from the weight of adverse publicity must be presumed in this case. Unlike *Irvin*, this Court need not rely on presumption alone. Juror comments published in the local newspaper after the trial amply demonstrate that at least one juror who agreed to be impartial totally failed to either set aside her preconceived notions or to follow the instructions of the trial court. The trial court erred in denying counsel a hearing on his motion and a chance to further develop suggestions in that interview that other jurors may have been similarly predisposed to guilt. Therefore, this Court should reverse Defendant's convictions and remand for a new trial in another venue.

#### **PROPOSITION OF LAW NO. 4**

**JURY INSTRUCTIONS ON RECKLESS HOMICIDE AND ACCOMPLICE TESTIMONY WHICH WERE ACCURATE STATEMENTS OF LAW AND SUPPORTED BY THE EVIDENCE SHOULD BE GIVEN WHEN REQUESTED BY DEFENDANT.**

**(A) The evidence presented at trial supported instruction on reckless homicide as a lesser included offense of murder.**

"[A] criminal defendant is entitled to an instruction on a lesser included offense whenever the trial court: (1) determines that the offense on which the instruction is requested is necessarily lesser than and included within the charged offense, \*\*\*, and (2) after examining the facts of the case, ascertains that the jury could reasonably conclude that the evidence supports a conviction for the lesser offense and not the greater."<sup>6</sup>

Many Ohio courts have considered whether reckless homicide is a lesser included

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<sup>5</sup>*Arizona v. Fulminante* (1991), 499 U.S. 279, 290, 111 S.Ct. 1246, 113 L.Ed.2d 302.

<sup>6</sup>*State v. Johnson* (1988), 36 Ohio St.3d 224, 225, 522 N.E.2d 1082.

offense of felony murder, and have concluded that it is. Furthermore, the evidence presented is more consistent with a reckless mental state than with a knowing act. The jury could have found against the state on the commission of a violent felony of requisite degree but have found that Defendant's actions were reckless. For that reason, the trial court erred when it denied counsel's request for an instruction on reckless homicide.

**(B) The evidence presented at trial supported instruction on accomplice testimony, when the state's case relied heavily on the testimony of a witness who admitted complicity in at least some of the offenses charged against Defendant, and who was not named in the indictment only because she received immunity in return for her testimony.**

The state contends that no accomplice instruction is proper because Amy Baker was not charged with any criminal conduct in this indictment or the indictment brought in Hamilton County. This argument is specious. Baker was not indicted solely because she agreed to testify for the state. This is exactly the situation which led to creation of the accomplice testimony instruction—a co-conspirator with a strong motive to cast blame on someone else to avoid prosecution herself. The state, by offering immunity for her testimony, seeks to shield that testimony from scrutiny by a jury properly instructed to view her credibility in light of that motive. That argument ignores the substance and intent of the law in this regard. In this case counsel made a timely request for the required instruction. Failure to instruct under these facts is reversible error.

#### **PROPOSITION OF LAW NO. 5**

**THE TRIAL COURT SHOULD GRANT A MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE EVIDENCE PRESENTED WAS INSUFFICIENT, AS A MATTER OF LAW, TO ESTABLISH DEFENDANT'S GUILT OF FELONIOUS ASSAULT AND KIDNAPING BEYOND A REASONABLE DOUBT, OR GRANT A**

**NEW TRIAL WHEN THE VERDICTS RENDERED WERE NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.**

The case presented by the State of Ohio against Defendant fails to eliminate reasonable doubt on those counts of the indictment which require knowing conduct. For that reason, the evidence was insufficient, as a matter of law to support the verdict of the jury on those counts. At the very least, those verdicts were against the manifest weight of the evidence. The jury's assessment of the weight and credibility of the evidence in the instant case must be viewed in light of massive pretrial publicity, which caused a number of the selected jurors to have formed an opinion of Defendant's guilt before being called to serve on this jury.

Viewed impartially, there is no evidence to support a conclusion that Defendant knowingly caused or attempted to cause serious physical harm to her foster child, nor that she restrained his liberty knowing that such harm was likely to result. Indeed, even the state's theory of the case negates such a conclusion, since the state posits that Defendant failed to use respite care as an alternative to restraint because she depended on the income generated by caring for Marcus. The state also presented evidence that similar restraints had been used in the past without adverse effect, so that Defendant would have no reason to believe serious physical harm would result.

An impartial trier of fact can only conclude that the manifest weight of the evidence did not support verdicts of guilty on these counts of the indictment. In fact, no evidence of the requisite mental state was presented by the state. For that reason, this Court should vacate the judgment of the trial court on those counts and enter verdicts of not guilty, or order a new trial on all such counts.

## CONCLUSION

Defendant did not receive a fair trial or a just result in the instant case. The lack of informed and voluntary waiver should have excluded her statements. The jury was tainted by pretrial publicity, and defense counsel was forced to exercise peremptory challenges to remove jurors with obvious predisposition to convict. The trial court refused to give requested jury instructions that were supported by the evidence. These errors resulted in verdicts unsupported by the evidence. Considering all these facts and circumstances, due process requires that the Defendant's conviction be reversed. Even if the court finds no grounds for reversal, Defendant's sentences violate double jeopardy and the separation of powers because the trial court improperly imposed consecutive sentences for duplicate charges and allied offenses.

For all these reason, Defendant respectfully suggests that this Court accept jurisdiction, and reverse the decision of the Court of Appeals.



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## CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing instrument was delivered to the office of the Prosecuting Attorney this 22nd day of JANUARY, 2028.



ELIZABETH E. AGAR

# APPENDIX

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : CASE NOS. CA2007-02-030  
 : CA2007-03-041  
 :  
 - vs - : OPINION  
 : 12/28/2007  
 :  
 LIZ M. CARROLL, :  
 :  
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS  
Case No. 2006 CR 000729

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Elizabeth E. Agar, 1208 Sycamore Street, Olde Sycamore Square, Cincinnati, Ohio 45210, for defendant-appellant

**BRESSLER, J.**

{¶1} Defendant-appellant, Liz M. Carroll, appeals her convictions in the Clermont County Court of Common Pleas for murder, involuntary manslaughter, kidnapping, felonious assault, and three counts of endangering children.

{¶2} On April 22, 2006, Marcus Fiesel, who was almost three years old, was removed from his home and placed in foster care by Lifeway for Youth, Inc. ("Lifeway"). On May 5, 2006, Marcus was placed in the custody of appellant and her husband, David Carroll, who were licensed foster caregivers living in Clermont County.

{¶3} On Friday, August 4, 2006, appellant, David Carroll, their four children, and Amy Baker traveled to Kentucky for a family reunion. Before leaving Ohio that evening, appellant and David Carroll wrapped Marcus in a blanket from his neck to his ankles, and then wrapped tape around the blanket to restrain him. Marcus was then placed in a playpen inside a closet in his bedroom. When the group returned from Kentucky around 6:00 a.m. on Sunday, August 6, Marcus was dead.

{¶4} David Carroll took Marcus's body out of the playpen and wrapped it in another blanket and put the body inside a box along with clothing. David Carroll and Amy Baker then traveled to Brown County, where they used gasoline to burn Marcus' body in a chimney. David Carroll and Amy Baker later returned to Brown County to collect Marcus' remains, which they then discarded in the Ohio River.

{¶5} On August 10, 2006, a Lifeway caseworker arrived at appellant's home for a scheduled visit with Marcus. Appellant told the caseworker that Marcus was sick and sleeping in his second-floor bedroom. The caseworker visited with appellant for a short time and then left.

{¶6} On August 15, 2006, appellant took three children to a park in Hamilton County. At around 1:00 in the afternoon, appellant fell to the ground and pretended to be unconscious. When appellant feigned regaining consciousness, she stated she had three children with her. However, when David Carroll arrived at the park, he reported to authorities that appellant had taken four children to the park, including Marcus, and that Marcus was now missing. When questioned by a law enforcement official, appellant stated that she had four children with her at the park, and asked if something was wrong with Marcus. Over the next several days, law enforcement officials and community members participated in a massive search for Marcus.

{¶7} During the investigation into Marcus' disappearance, law enforcement officials

subpoenaed appellant and Amy Baker to testify before the Hamilton County Grand Jury. On August 28, 2006, Amy Baker testified before the grand jury as to the cause of Marcus's death and stated that his apparent disappearance on August 15, 2006 was a fabrication. When appellant was called to testify before the grand jury the same day, she initially stated that Marcus was with her on August 15 and disappeared when she passed out. However, when prosecutors questioned appellant about the events surrounding the trip to Kentucky, appellant testified that when she and David Carroll left Marcus alone in his bedroom closet he was alive, and that Marcus was dead when they returned from Kentucky.

{¶8} Subsequently, appellant was indicted by the Clermont County Grand Jury on the following counts: felony murder in violation of R.C. 2903.02(B) ("Count 1"); involuntary manslaughter in violation of R.C. 2903.04(A) ("Count 2"); kidnapping in violation of R.C. 2905.01(B)(2) ("Count 3"); felonious assault in violation of R.C. 2903.11(A)(1) ("Count 4"); endangering children in violation of R.C. 2919.22(B)(1) ("Count 5"); endangering children in violation of R.C. 2919.22(B)(3) ("Count 6"); and endangering children in violation of R.C. 2919.22(A) ("Count 7").

{¶9} After a jury trial, appellant was convicted on all counts. Appellant appeals her convictions, raising six assignments of error. For ease of discussion, we address appellant's sixth assignment of error before her fifth assignment of error.

{¶10} Assignment of Error No. 1:

{¶11} "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS HER GRAND JURY TESTIMONY."

{¶12} In her first assignment of error, appellant argues that the trial court erred in denying a motion to suppress her grand jury testimony because she alleges her statements were involuntary. Appellant maintains that she was forced to testify before the grand jury, was not informed that she was a target of an investigation, was not offered an attorney, and

was vulnerable to pressure because of medication she was taking for psychological problems.

{¶13} An appellate court's review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Howard*, Preble App. No. CA2006-02-003, 2006-Ohio-5656, ¶12, citing *State v. Long* (1998), 127 Ohio App.3d 328, 332. Because a trial court assumes the role of the trier of fact when considering a motion to suppress, and is therefore in the best position to resolve factual questions and evaluate witness credibility, an appellate court accepts the trial court's findings of fact so long as they are supported by competent, credible evidence. *Id.* However, an appellate court independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, "whether, as a matter of law, the facts meet the appropriate legal standard." *Id.*, quoting *State v. Curry* (1994), 95 Ohio App.3d 93, 96.

{¶14} A witness is a putative defendant if, at the time she appears before the grand jury, the witness is potentially the focus of an investigation and subject to a potential indictment. *State v. Huggins*, Cuyahoga App. No. 88068, 2007-Ohio-1289, citing *State v. Cook* (1983), 11 Ohio App.3d 237. A putative witness testifying at a grand jury proceeding must be advised that she has a constitutional right to refuse to answer any question that might incriminate her, after being sworn, but prior to any questioning. *Id.* Further, the witness must be advised that any incriminating answers or statements made at the hearing can be used against her in a subsequent prosecution. *Id.* Finally, the witness must be advised that she may have an attorney outside the grand jury room, and that she may consult with her attorney if she wishes. *Id.*

{¶15} Contrary to her claims, the record indicates that appellant was informed that she could refuse to answer questions that might incriminate her, and that she was entitled to an attorney. In fact, appellant was advised of additional *Miranda* warnings at the grand jury

hearing, even though this was not required. Immediately after appellant was sworn, the following transpired:

{¶16} "[PROSECUTOR]: Tell us your name, please.

{¶17} "[APPELLANT]: Liz Carroll.

{¶18} "Q: Okay. Liz, before we ask you any questions, I know you've been questioned a lot by the police so far; is that correct?

{¶19} "A: (Nodding head affirmatively.)

{¶20} "Q: Have they ever read you your Miranda rights when they question you?

{¶21} "A: Um, yeah.

{¶22} "Q: Are you familiar with what those are?

{¶23} "A: Uh-huh.

{¶24} "Q: You know you have a right to remain silent?

{¶25} "A: Uh-huh.

{¶26} "Q: You know anything you say in here can be used against you?

{¶27} "A: Uh-huh.

{¶28} "Q: You know you have the right to an attorney?

{¶29} "A: Uh-huh.

{¶30} "Q: And if you cannot afford an attorney, you can have one appointed for you?

{¶31} "A: Uh-huh.

{¶32} "Q: I'm going to ask you some questions and if at any point you want to stop answering those questions and get an attorney, you know you can do that?

{¶33} "A: (Nodding head affirmatively.)

{¶34} "Q: You also understand that you are under oath now, which is a little bit different than the other statements you gave, and if you lie under oath that in and of itself is a

crime; you understand that?

{¶35} "A: (Nodding head affirmatively.)

{¶36} "Q: Crime of perjury?

{¶37} "A: (Nodding head affirmatively.)

{¶38} "Q: And you know \* \* \* there is a chance you could be charged[,] [T]his is a grand jury[,] [T]here is a chance you could be charged with a criminal offense by these people, okay?

{¶39} "A: (No response.)

{¶40} "Q: So you understand all that?

{¶41} "A: Yeah."

{¶42} Further, the following occurred later in the hearing:

{¶43} "Q: Now, understanding what \* \* \* we said before, that if in here you say something that is not true, that's perjury?

{¶44} "A: Uh-huh.

{¶45} "Q: You also understand that you have a right to not incriminate yourself?

{¶46} "A: (Nodding head affirmatively.)

{¶47} "Q: If you want to stop any time we ask you a question, you can. You have no problem so far answering questions?

{¶48} "A: Right."

{¶49} It is clear from the transcript of the grand jury proceedings that appellant was aware that she did not have to answer questions that might incriminate her, and that she also had the right to speak to an attorney. Appellant also was informed that she could be criminally charged as a result of her testimony.

{¶50} Appellant's additional arguments are likewise unsupported by the record. The

record indicates that appellant was not interrogated in custodial surroundings, as appellant claims. Rather, the record indicates that appellant was transported to the Hamilton County Prosecutor's Office by a detective who had previously provided transportation for appellant. At the motion to suppress hearing, the detective testified that he did not place appellant under arrest, nor did he interrogate appellant in any way, but merely had a conversation with appellant about what she might expect at the grand jury hearing. Further, the detective indicated that appellant's mental state seemed normal, and that she did not appear to be intoxicated or under the influence of drugs.

{¶51} In addition, the court reporter who transcribed the hearing testified that appellant appeared calm, composed, and cooperative throughout the questioning. The court reporter also testified that the prosecutors who questioned appellant did not badger her.

{¶52} After reviewing the record, we find that appellant's testimony at the grand jury hearing was voluntary, and that the waiver of her rights with respect to self-incrimination and to an attorney was also voluntary. Accordingly, we find that the trial court did not err in overruling appellant's motion to suppress her grand jury testimony.

{¶53} Appellant's first assignment of error is overruled.

{¶54} Assignment of Error No. 2:

{¶55} "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A CHANGE OF VENUE, AND FOR A NEW TRIAL BASED ON JUROR PREDISPOSITION."

{¶56} In her second assignment of error, appellant argues she did not receive a fair jury trial, because the jury pool was so tainted by pretrial publicity that seating a fair and impartial jury was impossible. Appellant claims she is entitled to a new trial because members of the jury admitted to forming a predisposed opinion regarding appellant's guilt. Further, appellant maintains the pretrial publicity in this case was so pervasive in the venue of Clermont County that a presumption of prejudice in the jury panel should have been found.

{¶57} Upon motion by either party, or by the trial court itself, a change of venue is appropriate where, "it appears that a fair and impartial trial cannot be held in the court in which the action is pending." Crim.R. 18(B); see, also, R.C. 2901.12(K). It is within the trial court's discretion to determine whether to grant a motion for change of venue, and "appellate courts should not disturb the trial court's [venue] ruling \* \* \* unless it is clearly shown that the trial court has abused its discretion." *State v. Lundgren*, 73 Ohio St.3d 474, 479, 1995-Ohio-227, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 250. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶58} In "relatively rare" cases, adverse pretrial publicity can be so pervasive that a presumption of prejudice exists. *Lundgren* at 479, citing *Nebraska Press Assn. v. Stuart* (1976), 427 U.S. 539, 554, 96 S.Ct. 2791, 2800. "A change of venue is not automatically granted when there is extensive pretrial publicity." *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶235. Pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial. *Nebraska Press Assn.* at 553.

{¶59} "[A] careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality." *Frazier* at ¶235, citing *State v. Bayless* (1976), 48 Ohio St.2d 73, 98. Further, a defendant claiming that pretrial publicity has denied her a fair trial must show that one or more jurors were *actually* biased. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶29. See, also, *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶67.

{¶60} Nothing in the record supports appellant's allegations that she was denied a fair and impartial trial because of pretrial publicity. The trial court held a preliminary voir dire to exclusively focus on the issue of pretrial publicity before holding the general voir dire. The record indicates that ten jurors were challenged for cause, and the trial court granted eight of

those challenges, and denied challenges for cause with respect to jurors #1 and #55. However, appellant later excluded these two jurors with peremptory challenges during the general voir dire.

{¶61} Appellant argues that several statements made during voir dire indicate juror bias. However, despite appellant's claim, with the exception of jurors #1 and #55, appellant did not raise challenges for cause with respect to these jurors. Nonetheless, a review of the record reveals that each of these jurors, including jurors #1 and #55, indicated a willingness to disregard what they had heard about this case in the media, and the intent to rely instead on evidence and law presented in court during the trial. Accordingly, the trial court did not abuse its discretion in failing to dismiss these jurors for cause. See *State v. McGlothlin*, Hamilton App. No. C-060145, 2007-Ohio-4707, ¶¶11-12.

{¶62} Moreover, appellant has failed to demonstrate that one or more jurors were actually biased. Appellant has not cited anything in the record, nor have we found anything in our review, to indicate any actual bias on the part of any juror. While appellant points to jurors' comments in a newspaper article published after the trial, appellate review is strictly limited to the record, and this court cannot consider matters outside the record that were not part of the trial court proceedings. See *State v. Moore*, Cuyahoga App. No. 88160, 2007-Ohio-2919, ¶5; *State v. Ishmail* (1978), 54 Ohio St.2d 402.

{¶63} Next, appellant argues that the trial court erred in denying her motion for a new trial based on juror misconduct without holding a hearing on the matter. We disagree.

{¶64} The decision whether to grant a new trial based on Crim.R. 33 is within the sound discretion of the trial court. *State v. Wood*, Preble App. No. CA2005-11-018, 2006-Ohio-3781, ¶34; *State v. Blankenship* (1995), 102 Ohio App.3d 534, 556. "An appellate court may not disturb a trial court's decision denying a motion for a new trial absent an abuse of discretion." *Blankenship*, 102 Ohio App.3d at 556, citing *State v. Shepard* (1983), 13 Ohio

App.3d 117, 119.

{¶65} Crim.R. 33 provides in relevant part:

{¶66} " \* \* \* A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶67} " \* \* \*

{¶68} "(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

{¶69} " \* \* \*

{¶70} " \* \* \* The causes enumerated in subsection (A)(2) \* \* \* must be sustained by affidavit showing their truth, and may be controverted by affidavit."

{¶71} We find no basis for appellant's motion for a new trial based on alleged juror misconduct. Appellant failed to file an affidavit in support of her motion for a new trial as required by Crim.R. 33(C). Moreover, the use of juror testimony to impeach a jury verdict is generally prohibited. Evid.R. 606(B); *State v. Robb*, 88 Ohio St.3d 59, 2000-Ohio-275.

{¶72} Evid.R. 606(B), the aliunde rule, provides:

{¶73} "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not

be received for these purposes."

{¶74} As the Ohio Supreme Court held in *State v. Hessler*, 90 Ohio St.3d 108, 123, 2000-Ohio-30, "[t]he purpose of the aliunde rule is to maintain the sanctity of the jury room and the deliberations therein. \* \* \* The rule is designed to ensure the finality of jury verdicts and to protect jurors from being harassed by defeated parties. The rule requires a foundation from nonjuror sources. Thus, we have held that 'the information [alleging misconduct] must be from a source which possesses firsthand knowledge of the improper conduct.'" (Internal citations omitted.)

{¶75} Appellant did not provide either an affidavit to support her motion for a new trial, or a source possessing firsthand knowledge of improper conduct. Accordingly, we find the trial court did not abuse its discretion in overruling appellant's motion for a new trial.

{¶76} Appellant's second assignment of error is overruled.

{¶77} Assignment of Error No. 3:

{¶78} "THE TRIAL COURT ERRED IN ENTERING SEPARATE CONVICTIONS AND SENTENCES FOR MURDER AND INVOLUNTARY MANSLAUGHTER."

{¶79} In her third assignment of error, appellant argues that because involuntary manslaughter is a lesser included offense of felony murder, she cannot be convicted of both murder and involuntary manslaughter. On this issue, the state agrees.

{¶80} The Double Jeopardy Clauses of the United States and Ohio Constitutions preclude the imposition of multiple punishments in a single proceeding for the same substantive offense. See *Blockburger v. United States* (1931), 284 U.S. 299, 52 S.Ct. 180; *United States v. Benz* (1930), 282 U.S. 304, 51 S.Ct. 113; *Brown v. Ohio* (1977), 432 U.S. 161, 166, 97 S.Ct. 2221.

{¶81} "An 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. Accord*, Fayette App. No. CA2005-05-019, 2006-Ohio-2250, ¶5, citing *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph three of the syllabus.

{¶82} This court has previously held that involuntary manslaughter under R.C. 2903.04(A) is a lesser included offense of murder. See *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶49, citing *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶79.

{¶83} In Count 1, appellant was charged with felony murder in violation of R.C. 2903.02(B), which provides in relevant part, "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree \* \* \*."

{¶84} In Count 2, appellant was charged with involuntary manslaughter in violation of R.C. 2903.04(A), which provides in relevant part, "[n]o person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony."

{¶85} According to the jury verdict and judgment entry on verdict and sentencing, appellant was found guilty of committing both Count 1 and Count 2. At the sentencing hearing, the trial court stated, "[On] Count 1, you are to serve not less than 15 years or more than life in prison for the crime of murder. [On] Count 2, while I am imposing 10 years, I feel that [this count] \* \* \* is an allied offense, so I'm going to determine that it merges, [and the sentence] is to be served concurrently \* \* \*."

{¶86} While the trial court found that Count 2 should merge with Count 1 at the sentencing hearing, the judgment entry on verdict and sentencing does not reflect that Count 2 merged with Count 1. We find this to be error, and consequently, Count 2 shall be merged

with Count 1, and appellant's sentence on Count 2 is vacated. Since the trial court ordered appellant's sentence on Count 2 to be served concurrently with her sentence for Count 1, this modification does not reduce the length of appellant's sentence.

{¶87} Appellant's third assignment of error is sustained.

{¶88} Assignment of Error No. 4:

{¶89} "THE TRIAL COURT ERRED IN ENTERING SEPARATE CONVICTIONS AND SENTENCES FOR MURDER, INVOLUNTARY MANSLAUGHTER, KIDNAPING [SIC], FELONIOUS ASSAULT, AND THREE COUNTS OF CHILD ENDANGERING, WHEN ALL CHARGES RESULTED FROM THE IDENTICAL CONDUCT AGAINST A SINGLE VICTIM."

{¶90} In appellant's fourth assignment of error, she argues that the crimes for which she has been convicted are allied offenses of similar import, because they are derived from the same course of conduct.

{¶91} R.C. 2941.25, Ohio's allied offense statute, protects against multiple punishments for the same criminal conduct, which could violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. R.C. 2941.25 provides:

{¶92} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶93} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶94} When considering whether offenses are of similar import under R.C. 2941.25(A), a court must compare the statutorily defined elements of the offenses and

determine whether they "correspond to such a degree that the commission of one crime will result in the commission of the other." *State v. Rance*, 85 Ohio St.3d 632, 638, 1999-Ohio-291, quoting *State v. Jones*, 78 Ohio St.3d 12, 14, 1997-Ohio-38.

{¶195} "[T]he statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*." (Emphasis sic.) *Rance* at 638. "[I]f the elements do so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus." *Id.* at 638-639, citing R.C. 2941.25(B) and *Jones* at 14.

{¶196} Appellant urges this court to depart from the *Rance* test, and argues that rather than comparing the elements of the offenses in the abstract, this court is required to analyze the particular facts of this case to determine if the acts or animus for each crime are separate. In support of this argument, appellant relies on the Ohio Supreme Court's decision in *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, where the court examined the defendant's conduct in response to a claim that the crimes for which he was convicted are allied offenses of similar import.

{¶197} However, appellant's reliance on *Cooper* is misplaced. *Cooper* does not abrogate the *Rance* test of comparing the elements of crimes in the abstract to determine if they are allied offenses. In fact, as the court stated in *Cooper*, "[the] acts [for which the defendant was convicted] are not the 'same conduct \* \* \* constitut[ing] two or more allied offenses of similar import' within the meaning of R.C. 2941.25(A) and, thus, do not involve analysis under *State v. Rance*." *Id.* at ¶2. The court later explained, "[h]ere, [the defendant's] convictions did not originate from a single act, but rather, in accordance with the evidence, from his separate acts of slamming Jordan against a hard surface, which provided the basis of the underlying offense of child endangering in connection with the involuntary manslaughter conviction, and shaking Jordan, as a separate count of child endangering. Our

decision does not alter our holding in *Rance*, because *Rance* is not implicated by the facts of this case." Id. at ¶29.

{¶98} The court continued, holding, " \* \* \* that R.C. 2941.25(A) applies when the state obtains multiple convictions arising out of the same conduct of a defendant that can be construed to constitute two or more allied offenses of similar import. Where the state has not relied upon the same conduct of the defendant to support a conviction for the offense of involuntary manslaughter involving child endangering and a separate conviction for child endangering, the defendant may be convicted of both crimes and sentenced on each."

{¶99} In this case, appellant has been convicted on multiple counts based on the same conduct. Accordingly, the Supreme Court's analysis in *Cooper* is inapplicable. Instead, we continue to rely on the *Rance* analysis to compare the statutory elements of each offense in the abstract. *Rance* at 638.

{¶100} With respect to Count 1, felony murder, and Count 2, involuntary manslaughter, our resolution of appellant's third assignment of error renders appellant's argument under this assignment of error moot.

{¶101} Appellant argues that Count 4, felonious assault, must be merged with felony murder, because felony assault is a predicate offense to felony murder. This court rejected the same argument in *State v. Gomez-Silva*, Butler App. No. CA2000-11-230, 2001-Ohio-8649. In *Gomez-Silva* at 26, we stated:

{¶102} "Upon review of the elements of the charges of felony murder and felonious assault, we find that the two charges are not allied offenses of similar import. Felony murder requires causing death while committing a first or second-degree felony of violence, whereas felonious assault requires knowingly causing serious physical harm to another. The commission of one crime does not result in the commission of the other. R.C. 2945.25."

{¶103} Further, we stated:

{¶104} "Appellant argues that felonious assault was a necessary precursor to felony murder and thereby an allied offense of similar import. We reject appellant's argument based upon *State v. Keene* (1998), 81 Ohio St.3d 646, 668 (felony-murder under R.C. 2903.01(B) is not an allied offense of similar import to the underlying felony, and R.C. 2941.25 authorizes punishment for both crimes)."

{¶105} Likewise, felony murder and child endangering are not allied offenses. *State v. Hoover-Moore*, Franklin App. No. 03AP-1186, 2004-Ohio-5541. In *Hoover-Moore* at ¶50, the Tenth Appellate District held:

{¶106} "A comparison of the elements of R.C. 2903.02(B) and 2919.22(B)(1) in the abstract reveals that the two offenses are not allied offenses because the commission of one will not automatically result in the commission of the other. Here, one of the elements of felony murder is proof of an underlying offense of violence that is a felony of the first or second degree, other than voluntary or involuntary manslaughter. However, the underlying offense of violence need not be child endangering. Further, felony murder requires that a death occur; child endangering does not. By contrast, child endangering requires a victim under 18 years of age; felony murder does not. Consequently, under *Rance*, the commission of one offense can occur without the commission of the other, and therefore, these offenses are not allied offenses of similar import."

{¶107} Similarly, after comparing the elements of child endangering under R.C. 2919.22(A) and R.C. 2919.22(B)(3) with the elements of felony murder under R.C. 2903.02(B), we find that neither child endangering crime is an allied offense of felony murder, as commission of one will not automatically result in the commission of the other.

{¶108} Also, felonious assault and child endangering are not allied offenses. *State v. Garcia*, Franklin App. No. 03AP-384, 2004-Ohio-1409. As the Tenth Appellate District held in *Garcia* at ¶41:

{¶109} "Although the two offenses both have causation and the resultant serious physical harm in common, a conviction of felonious assault requires proof that appellant acted knowingly while the child-endangering conviction only requires proof that appellant acted recklessly. 'Although proof of knowledge may suffice to prove recklessness, proof of recklessness is not sufficient to prove knowledge.' \* \* \* Given these different culpable mental states, it cannot be said that an act of child endangering in violation of R.C. 2919.22(B)(1) results in the commission of a felonious assault. In addition, one can commit an act of felonious assault on someone over the age of 18 and not be guilty of child endangering. \* \* \* Accordingly, because the statutory elements of the crimes do not correspond to such a degree that the commission of one crime will result in the commission of the other, the offenses are not allied offenses of similar import." (Internal citations omitted.)

{¶110} Similarly, after comparing the elements of child endangering under R.C. 2919.22(A) and R.C. 2919.22(B)(3) with the elements of felonious assault under R.C. 2903.11(A)(1), we find that neither child endangering crime is an allied offense of felonious assault, as commission of one will not automatically result in the commission of the other.

{¶111} Likewise, kidnapping under R.C. 2905.01(B) is not an allied offense of child endangering using the *Rance* analysis. Kidnapping under R.C. 2905.01(B)(2) requires proof that the defendant knowingly used force, threat, or deception, or by any means when the victim is under the age of 13, to restrain the victim such that the restraint creates a substantial risk of serious physical harm or causes serious physical harm when the victim is under 13. In comparison, child endangering under R.C. 2919.22(B)(1) requires that the defendant recklessly abused the child, and R.C. 2919.22(B)(3) requires that the defendant acted recklessly (rather than knowingly) in physically restraining a child for a prolonged period of time. Child endangering under R.C. 2919.22(A), does not require proof of restraint,

and also requires proof that the defendant was a guardian, custodian, parent, or someone in loco parentis, which is not an element of kidnapping. Therefore, none of the child endangering crimes are allied offense of kidnapping, as commission of one will not automatically result in the commission of the other.

{¶112} Further, using the *Rance* analysis, the child endangering crimes under R.C. 2919.22(B)(1), R.C. 2919.22(B)(3), and R.C. 2919.22(A) are not allied offenses of each other, as each requires proof of an element that the others do not require. Accordingly, commission of one will not automatically result in the commission of the other.

{¶113} Appellant's fourth assignment of error is overruled.

{¶114} Assignment of Error No. 6:

{¶115} "THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE WHEN IT DENIED COUNSEL'S MOTIONS FOR A VERDICT OF ACQUITTAL, AND AGAIN WHEN IT ACCEPTED AND JOURNALIZED VERDICTS OF GUILTY WHICH WERE NOT SUPPORTED BY RELEVANT AND CREDIBLE EVIDENCE AND WHICH WERE RENDERED AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶116} In her sixth assignment of error, appellant argues that the state presented insufficient evidence to establish appellant's guilt with respect to the crimes of felonious assault and kidnapping. Further appellant argues that the jury's verdicts convicting appellant of these crimes were not supported by the manifest weight of the evidence.

{¶117} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶33. The review of a court's denial of a motion for acquittal under

Crim.R. 29 is governed by the same standard as that used for determining whether a verdict is supported by sufficient evidence. *Haney*, 2006-Ohio-3899, ¶14; *State v. Jenks* (1991), 61 Ohio St.3d 259, syllabus. In reviewing a record for sufficiency, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶118} While the test for sufficiency requires a determination as to whether the state has met its burden of production at trial, a manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *Wilson* at ¶34. In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* In such a review, an appellate court considers the credibility of the witnesses and the weight to be given the evidence. *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. "However, these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence presented." *Id.*, citing *State v. DeHass* (1967), 10 Ohio St.2d 230. The discretionary power to overturn a conviction based on the manifest weight of the evidence is to be invoked only in those extraordinary circumstances to correct a manifest miscarriage of justice where the evidence presented weighs heavily in favor of acquittal. *Id.* at ¶25, citing *Thompkins*, 78 Ohio St.3d at 387.

{¶119} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of

sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Wilson* at ¶35, citing *State v. Lombardi*, Summit App. No 22435, 2005-Ohio-4942, ¶9.

{¶120} As we have previously stated, appellant was convicted of kidnapping in violation of R.C. 2905.01, which provides in relevant part:

{¶121} "(B) No 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 knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

{¶122} \* \* \*

{¶123} "(2) Restrain another of his liberty \* \* \*"

{¶124} Further, appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(1), which provides in relevant part, "[n]o person shall knowingly \* \* \* [c]ause serious physical harm to another \* \* \*."

{¶125} Appellant disputes that the state proved, beyond a reasonable doubt, that she *knowingly* committed kidnapping and felonious assault, and that the jury's finding that appellant knowingly committed these crimes is against the manifest weight of the evidence.

{¶126} R.C. 2901.22 (B) provides, "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." Further, as this court stated in *State v. Sutton* (2001), 145 Ohio App.3d 408, 415:

{¶127} "Unlike the higher degree of culpability of 'purposely,' 'knowingly' does not require the specific intent to commit the crime. \* \* \* 'Under the common law, crimes

committed with "knowledge" were classified as crimes of general intent, and culpability could be inferred from the voluntary performance of the act itself \* \* \*, "regardless of [the defendant's] purpose" in so doing." (Internal citations omitted.)

{¶128} According to appellant's grand jury testimony, appellant admitted that she and David Carroll left Marcus in a playpen inside a closet wrapped in a blanket, and that when they returned from Kentucky, Marcus was dead. Further, at trial, Amy Baker testified that appellant and David Carroll wrapped Marcus in a blanket, then wrapped tape around the blanket, and placed Marcus in a playpen inside a closet. Amy Baker also testified at trial that Marcus was dead when they returned from Kentucky.

{¶129} In addition, a Lifeway caseworker testified that when Marcus was placed with appellant and David Carroll, she explained to appellant that Marcus was developmentally delayed, and that although the child was almost three years old, he functioned as a 18-month old child. Consequently, the caseworker instructed appellant that Marcus should be continuously monitored, and that he should never be left alone.

{¶130} After reviewing the entire record, including these facts, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice by finding that appellant knowingly restrained Marcus and that doing so would probably cause Marcus to suffer serious physical harm when left alone. We find that a reasonable juror could infer from the evidence presented that appellant, who is a mother of three, a daycare provider, and a certified foster caregiver, knew that leaving a young child alone for an extended period of time would likely result in the child suffering serious physical harm. Accordingly, we find that appellant's convictions for kidnapping and felonious assault are not against the manifest weight of the evidence.

{¶131} Having found that appellant's convictions for kidnapping and felonious assault are not against the manifest weight of the evidence, we also find that the evidence presented

was sufficient for a rational trier of fact to find the elements of kidnapping and felonious assault proven beyond a reasonable doubt. Appellant's convictions are supported by sufficient evidence, and the trial court properly denied appellant's Crim.R. 29 motion.

{¶132} Appellant's sixth assignment of error is overruled.

{¶133} Assignment of Error No. 5:

{¶134} "THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE WHEN IT DENIED COUNSEL'S REQUEST FOR JURY INSTRUCTIONS ON RECKLESS HOMICIDE AND ACCOMPLICE TESTIMONY."

{¶135} Appellant argues the evidence presented at trial supported an instruction on reckless homicide as a lesser included offense of murder.

{¶136} A jury instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser included offense. *State v. Carter*, 89 Ohio St.3d 593, 600, 2000-Ohio-172. In determining whether to give an instruction on a lesser included offense, the trial court must consider the evidence in a light most favorable to the defendant. *State v. Davis* (1983), 6 Ohio St.3d 91, 95-96.

{¶137} After reviewing the record, we find that a jury instruction on reckless homicide was not supported by the evidence presented at trial, as the evidence did not support an acquittal on the felony murder charge. As we stated previously, appellant was convicted of felony murder in violation of R.C. 2903.02(B), which provides in relevant part, "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree \* \* \*." Further, we have already determined that appellant's convictions for kidnapping and felonious assault are supported by sufficient evidence, and there is no evidence in the record to dispute that the commission of these crimes was the proximate cause of Marcus' death.

Accordingly, we find that the evidence did not support an acquittal on the felony murder charge.

{¶138} Next, appellant argues that the evidence presented at trial supported an instruction on accomplice testimony. Appellant maintains that the state's case relied heavily upon the testimony of a witness who was offered immunity from prosecution in return for her testimony. Appellant argues the trial court should have given a special jury instruction on Amy Baker's testimony, as she was an accomplice. We disagree.

{¶139} R.C. 2923.03(D) provides:

{¶140} "If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:

{¶141} "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

{¶142} "It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

{¶143} As this court stated in *State v. Sillett*, Butler App. No. CA2000-10-205, 2002-Ohio-2596, ¶17:

{¶144} "[T]his court has previously held that the above instruction is not required when the witness is not charged with complicity as a result of involvement with the defendant's criminal activities." *State v. Royce* (Dec. 27, 1993), Madison App. Nos. CA92-09-023, CA92-09-024, CA92-09-025, CA92-09-026. Likewise, several other appellate courts

have determined that the requirement that this instruction be given is not applicable unless the witness has been indicted. *State v. Gillard* (Mar. 3, 2000), Erie App. Nos. E-97-132, E-98-038; *State v. Howard*, Marion App. No. 9-99-12, 1999-Ohio-848; *State v. Goodwin*, Mahoning App. No. 99-CA-220, 2001-Ohio-3416; *State v. Hinkle* (Aug. 23, 1996), Portage App. No. 95-P-0069; *State v. Lordi*, 140 Ohio App.3d 561, 572, 2000-Ohio-2582, ¶41. The rationale behind these rulings is based on the Ohio Supreme Court's definition of an accomplice. In *State v. Wickline* (1990), 50 Ohio St.3d 114, 118 \* \* \*, the Court held that "at the very least, an accomplice must be a person indicted for the crime of complicity."

{¶145} Further, we stated in *Sillett* at ¶18:

{¶146} "Previously, R.C. 2923.03(D) required that the testimony of accomplices be corroborated. *State v. Evans* (1992), 63 Ohio St.3d 231, 240-41 \* \* \*. The statute was amended to its current form on September 17, 1986, replacing the corroboration requirement with a requirement that a cautionary jury instruction be given when accomplice testimony is presented. *Id.* We find no reason to distinguish the Ohio Supreme Court's definition of 'accomplice' in one instance from that in the present case. Both the former and the current statute deal with issues surrounding the reliability of accomplice testimony. A new definition of 'accomplice' is not required simply because the legislature chose to replace the corroboration requirement with a cautionary instruction."

{¶147} Appellant urges this court to depart from the *Wickline* requirement that the witness must be indicted for R.C. 2923.03(D) to apply. In support of her argument, appellant relies on *State v. Jones*, Cuyahoga App. No. 88203, 2007-Ohio-1717. In *Jones*, the Eighth Appellate District held that the trial court committed prejudicial error by failing to give a jury instruction on accomplice testimony pursuant to R.C. 2923.03(D) where the state relied heavily on the accomplice's testimony. *Id.* at ¶30-33. However, contrary to appellant's claim, the accomplice in *Jones* was not a witness who was promised immunity from prosecution in

return for testifying against the defendant at trial. Rather, the accomplice in *Jones* was a co-defendant who agreed to plead guilty to attempted murder and aggravated robbery with gun specifications. *Id.* at fn.1, ¶29. Moreover, the accomplice in *Jones* testified that he conspired with the defendant to kill the victim. *Id.* at ¶29. In this case, Amy Baker was neither indicted nor a co-defendant, did not enter into a plea agreement to a lesser charge, and did not admit to taking part in any crime for which appellant has been indicted in Clermont County. Accordingly, we decline to depart from the requirement in *Wickline*, and we hold that the trial court did not err in failing to instruct the jury on accomplice testimony.

{¶148} Appellant's fifth assignment of error is overruled.

{¶149} Having overruled the first, second, fourth, fifth, and sixth assignments of error, we affirm appellant's convictions and sentences for felony murder, kidnapping, felonious assault, and three counts of endangering children. Having sustained the third assignment of error, appellant's involuntary manslaughter conviction is merged into the felony murder conviction and the involuntary manslaughter sentence is vacated.

{¶150} Judgment affirmed as modified.

YOUNG, P.J., and POWELL, J., concur.

STATE OF OHIO,

CASE NO. 06-CR-00729

PLAINTIFF,

VS.

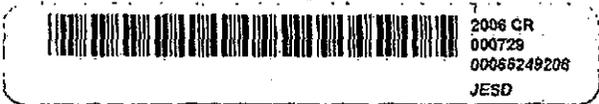
LIZ M. CARROLL,

DEFENDANT.

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BARBARA A. WIEDENGEIN  
CLERK OF COMMON PLEAS COURT  
CLERMONT COUNTY, OHIO

JUDGMENT ENTRY ON  
VERDICT  
AND SENTENCING DEFENDANT



This cause came on for trial before the Court of Common Pleas of Clermont County, Ohio, on the 12th through 21ST days of February, 2007, and the Defendant appeared in open Court represented by Gregory Cohen and the State of Ohio was represented by Daniel J. Breyer and Mark Piepmeyer, Assistant Prosecuting Attorneys.

A jury was duly empaneled and sworn, whereupon evidence was presented to the jury and upon conclusion of all the evidence, the Court instructed the jury as to the law applicable to the charges against the Defendant, and the jury retired to deliberate, and after due deliberation, the jury returned to the Court with their verdict signed by all twelve members of the jury, which verdict was a jury verdict finding the Defendant guilty of the offenses of Ct.#1:Murder, in violation of Section 2903.02(B) of the Ohio Revised Code, an unspecified felony, Ct.#2:Involuntary Manslaughter, in violation of Section 2903.04(A) of the Ohio Revised Code, a felony of the first degree, Ct.#3:Kidnapping, in violation of Section 2905.01(B)(2) of the Ohio Revised Code, a felony of the first degree, Ct.#4:Felonious Assault, in violation of Section 2903.11(A)(1) of the Ohio Revised Code, a felony of the second degree, Ct.#5:Endangering Children, in violation of Section 2919.22(B)(1) of the Ohio Revised Code, a felony of the second degree, Ct.#6:Endangering Children, in violation of Section 2919.22(B)(3) of the Ohio Revised Code, a felony of the second degree, and Ct.#7:Endanging Children, in violation of Section 2919.22(A) of the Ohio Revised Code, a felony of the third degree.

On the verdict of the jury the Court does hereby find the Defendant guilty of the offense of Ct.#1:Murder, in violation of Section 2903.02(B) of the Ohio Revised Code, an unspecified felony, Ct.#2:Involuntary Manslaughter, in violation of Section 2903.04(A) of the Ohio Revised Code, a felony of the first degree, Ct.#3:Kidnapping, in violation of Section 2905.01(B)(2) of the Ohio Revised Code, a felony of the first degree, Ct.#4:Felonious Assault, in violation of Section 2903.11(A)(1) of the Ohio Revised Code, a felony of the second degree, Ct.#5:Endangering Children, in violation of Section 2919.22(B)(1) of the Ohio Revised Code, a felony of the second degree, Ct.#6:Endangering Children, in violation of Section 2919.22(B)(3) of the Ohio Revised Code, a felony of the second degree, and Ct.#7:Endanging Children, in violation of Section 2919.22(A) of the Ohio Revised Code, a felony of the third degree.

APP. 28

cc Counsel, Alke

The Court inquired of the defendant if she had anything to say on her behalf prior to sentencing and the defendant stated she did.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the defendant be and hereby is sentenced to confinement in the Ohio State Reformatory for Women for a period of not less than Ct.#1:fifteen (15) years to life, Ct.#2:ten (10) years, to be served concurrently with Ct.#1, Ct.#3:ten (10) years, to be served consecutively to Ct.#1, Ct.#4:eight (8) years, to be served consecutively to Cts.#1&3, Ct.#5:eight (8) years, to be served consecutively to Cts.# 1,3&4, Ct.#6:eight (8) years, to be served consecutively to Cts.#1,3,4&5, and Ct.#7:five (5) years, to be served consecutively to Cts.#1,3,4,5 & 6 (for a total of fifty-four (54) years to life), also the defendant shall pay the costs of these proceedings taxed at \$\_\_\_\_\_.

Credit time allowed to defendant \_\_\_\_\_ days.

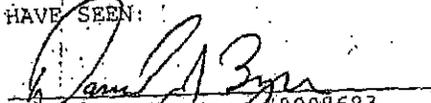
The Court has further notified the defendant that post release control is mandatory in this case up to a maximum of five (5) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control.

The Clerk of Courts of Clermont County, Ohio, is hereby appointed Trustee for the purpose of receiving allotments of the defendant's earnings while confined in said institution under the sentence aforesaid, said allotments to be used for the purpose of paying the costs of this action.

IT IS FURTHER ORDERED, that the defendant be remanded to the custody of the Sheriff of Clermont County, Ohio, to be by her transported to the above institution, together with commitment papers. Bond, if any, may be released.

  
Judge, Robert P. Ringland

HAVE SEEN:

  
Daniel J. Breyer #0008683  
Assistant Prosecuting Attorney