

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 2010-2198

Appellee,

vs.

CALVIN McKELTON,

Appellant.

A Death Penalty Case on Appeal from the Court of Common Pleas
of Butler County, Case No. CR2010-02-0189

MERIT BRIEF OF APPELLEE, STATE OF OHIO

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STATEMENT OF FACTS AND PROCEDURAL POSTURE

A. Introduction

In the culmination of a pattern of domestic violence, Appellant Calvin McKelton murdered his live-in girlfriend, attorney Margaret “Missy” Allen. Subsequently, he killed the only eyewitness to his crime, Germaine “Mick” Evans. A Butler County jury convicted him of both homicides and sentenced him to death for the murder of Mick Evans.

B. Statement of Facts

Ziala Danner, the niece of attorney Margaret “Missy” Allen, was thirteen years old at the time she testified at trial. (Tr. 336.) Prior to Margaret’s death, she lived with Margaret, her cousin Terri, and Appellant. (Tr. 337.) One evening, she could hear Appellant yelling at Margaret in the garage, and Margaret screaming. (Tr. 342.) While she could not hear either’s words, she thought that what she was hearing was dangerous. (Id; Tr. 346.) She grabbed the phone from the kitchen (which was adjacent to the garage), ran upstairs, and called 911 from underneath a bed. (Tr. 346-47.) By the time the police arrived, Margaret was gone. (Tr. 353.) Eventually, one of the officers took Ziala to the hospital, where she was reunited with Margaret. (Tr. 354.) Margaret told Ziala she had broken her leg by falling over a bike in the garage. (Tr. 363.)

Fairfield Police Officer Kelly Smith was dispatched to Margaret’s home on May 4, 2008, in response to Ziala’s 911 call. (Tr. 369.) When she arrived at the home, Ziala answered the door. (Tr. 370.) Ziala was visibly shaking, her eyes were wide, and “her knees were actually knocking together. ... [S]he believed there was something in the house that she felt possibly could harm her.”

(Tr. 370-71.) Although Margaret was not home, she called the house and spoke with Ziala while Officer Smith was present. (Tr. 373-74.) After Ziala spoke with Margaret, Ziala handed the phone to Officer Smith. (Tr. 374.) Eventually, Margaret told the officer that during an argument with Appellant, she stepped sideways or backwards over something. (Tr. 377.)

Appellant returned to the house while Officer Smith was present. (Tr. 378.) When he did, he “burst through the door [and] immediately he started yelling Ziala’s name.” (Tr. 379.) In response, Ziala, who had been standing next to the officer, dove next to the kitchen island and was hiding in a crouched position, shaking. (Id.) Appellant asked the officer what “probable cause” there was for her to be in the house. (Tr. 379-80.) He denied any argument between himself and Margaret, and told Officer Smith to “bounce [her] ass out of the house.” (Tr. 380.)

Sherrie Bluester is a part-time screener for Butler County Children Services. (Tr. 398.) On May 4, 2008, she was sent to Mercy Hospital to speak with Margaret. (Tr. 399.) Margaret’s ankle was very swollen, and she had a slight cut on her bottom lip. (Tr. 400.) Margaret denied that there had been any domestic violence. (Tr. 407.) Ms. Bluester and Margaret agreed on a safety plan that precluded Appellant from being near Ziala until an ongoing caseworker visited with the family in the next one to two days. (Tr. 408-09.)

Terri White was nineteen years old at the time of the trial. (Tr. 424.) She is Margaret’s niece, and lived with Margaret in Fairfield. (Tr. 425.) Appellant moved in with her and Margaret when Terri was fifteen. (Tr. 426.) When she moved in, Margaret told her not to tell anyone what went on inside the house. (Tr. 441.) One night during her sophomore year in high school,¹ Terri heard Margaret trying to call her name. (Tr. 430.) When she left her bedroom to find Margaret, she

¹Appellant murdered Margaret during Terri’s junior year of high school. (Tr. 439.)

found Appellant on top of Margaret, choking her. (Tr. 431.) The next day, Appellant told Terri that he was sorry, and that he did not mean for it to happen. (Tr. 433.)

Terri also testified as to other instances of violence by Appellant. In one instance, she, her brother, and her friend were in a car with Margaret and they stopped at a bar to pick up Appellant. (Tr. 434.) Appellant and Margaret argued all the way home. (Id.) The two continued to argue at home. (Tr. 4345.) After some time passed, Margaret called Terri and told her to call the police. (Id.) When she tried to do so, Appellant took the phone out of her hand and threw it on the island in the kitchen. (Tr. 435-36.) Terri walked towards the front door, and Appellant also came to the door, holding Margaret by her arm. (Tr. 436.) Terri went to an upstairs bedroom. (Id.) Appellant followed her, and told her he was sorry. (Tr. 437.) He had a gun with him. (Id.)

Terri was not at home for the ankle-breaking incident, but before a representative from Children Services came to the house, Margaret told her not to tell the worker what went on in the house. (Tr. 445-46.)

Mindie Nagel is a physical therapist at Nova Care Rehabilitation. (Tr. 459.) In 2008, she treated Margaret Allen in connection with her broken ankle. (Tr. 460.) During Margaret's initial visit, she asked Margaret how she had been injured. (Tr. 463.) Margaret told her that she fell down the steps in her garage. (Tr. 464.) Ms. Nagel "felt like what she told [her] didn't quite make sense," as Ms. Nagel "couldn't quite visualize how she had fallen down the steps into her garage or how exactly it happened." (Tr. 464-65.)

Shaunda Luther had known Margaret since 1984. (Tr. 485.) She was with Margaret in November 2006, where Margaret was "reacquainted" with Appellant, whom she had previously dated. (Tr. 487.) Appellant gave Margaret money on several occasions: "a couple grand" for a party

to watch a boxing match (Tr. 490); \$7,000 for gifts for the kids (Tr. 491); \$15,000 once when Margaret was out-of-town (id.); and money for a cruise in 2007 or 2008 (Tr. 500).

After Margaret's broken ankle, Ms. Luther went to Margaret's house for a barbecue. (Tr. 494.) She noticed a blood clot in Margaret's eye that Margaret blamed on her sinuses. (Id.) Ms. Luther once had a similar injury that was caused by being slapped in the face. (Id.)

With regards to the broken ankle, Ms. Luther heard Margaret "tell several stories." (Tr. 496.) Margaret told Ms. Luther, though, that she and Appellant were "play-fighting" in the garage. (Id.) Margaret would refer to Appellant as a "robber boy," meaning a person who robs other drug dealers. (Tr. 498-99.)

The weekend that Margaret disappeared, Ms. Luther called Margaret twice on Saturday to let her know that plans they had previously made had changed. (Tr. 503.) Margaret never returned her call. (Tr. 503-04.) Ms. Luther attended Margaret's funeral; Appellant did not. (Tr. 504.)

Sometime after her ankle was broken, Margaret confided in Ms. Luther that she was pregnant and that she did not know what she was going to do about it. (Tr. 507-09.)

Charia Mam became friends with Margaret in the late 1990's. (Tr. 537.) The night Margaret broke her ankle, she called Ms. Mam and asked her to pick Terri White up from King's Island. (Tr. 539.) Margaret told Ms. Mam that she and Appellant had "got[ten] into it," and that she stepped out of her car into some bicycles. (Tr. 540.) After this incident, Margaret became more distant from Ms. Mam. (Tr. 544.) When the two talked, if Appellant was in the room, Ms. Mam was expected "to speak of nothing that was in depth." (Id.) Margaret also told Ms. Mam that Angelo, Appellant's friend, told Appellant that he and Margaret had slept together; Margaret denied that this was true. (Tr. 545-46.) Instead, Margaret spoke with Angelo only to get information about Appellant. (Tr.

546.)

Margaret also told her that if Appellant ever really believed that she had slept with Angelo, Appellant would kill her. (Tr. 547.) On another occasion, Margaret, sounding “hysterical,” called Ms. Mam because a firefighter had sent her flowers. (Tr. 548.) Margaret was “enraged” and “called the firefighter up and cussed him out.” (Id.) She told Ms. Mam, “[t]hat mother fucker doesn’t know my situation at home. He—he doesn’t know what he could cause me. I could get fucking killed over that shit.” (Id.) Ms. Mam also recounted an instance when she and Margaret attended a bachelorette party together. (Tr. 549.) A stripper danced with the women at the party; he picked Margaret up and some people took pictures. (Tr. 550.) When Margaret learned that pictures had been taken, she made everyone delete them from their cameras out of fear that Appellant would kill her if he saw the pictures. (Id.)

Margaret also confided in Ms. Mam that she was pregnant on July 7, 2008. (Tr. 551.) She said that if Appellant thought she had an abortion without telling him, he would kill her. (Tr. 555.)

Margene Robinson retired as a lieutenant in the Dayton (Ohio) Police Department in 2001. (Tr. 645.) Prior to her retirement, she served the department for twenty-five years. (Id.) For the three years prior to her retirement, she was the chief of the department’s domestic violence unit, which handled around 10,000 cases during that time. (Tr. 646.) She has extensive experience training police officers, probation and parole officers, medical and social work students, and prosecutors and judges about the dynamics of domestic violence. (Tr. 647.) She has also taught at the Ohio Peace Officer Training Academy. (Tr. 648.)

Ms. Robinson, after being qualified as an expert by the trial court, testified regarding the “cycle of violence” present in domestic violence cases. The first phase is the “tension building

phase,” in which tension builds in the home over an economic or domestic issue. (Tr. 656-57.) The second phase, or “battering phase,” usually includes some sort of abuse—verbal, sexual, or physical—against the victim. (Tr. 658.) In the third phase, the “honeymoon phase,” the abuser may become remorseful, and may give gifts and make promises to change. (Tr. 659.) Often, this lures the victim into a false sense of security. (Id.) Ms. Robinson testified that domestic violence victims often fail to disclose to others the abuse they are suffering. (Tr. 665-66.) Victims will also often deny or minimize the abuse, feeling that the abuse is their own fault. (Tr. 657.) This minimization is also often the result of fear of reprisal by the perpetrator. (Tr. 658.)

David Gregory is a Cincinnati Police Officer assigned to the homicide unit. (Tr. 680.) He and Jenny Luke were the prime investigative team assigned to investigate the murder of Margaret Allen. (Tr. 681.) On July 27, 2008, he was summoned to respond to a homicide. (Id.) Two people had found a dead body near Schmidt Field at the intersection of Riverside Drive and Winter Street in Cincinnati. (Id.) That location is the dead end of a street that sits right on the river. (Tr. 686.) Detective Gregory is familiar with the area because of drug activity there. (Id.)

When Detective Gregory arrived, he observed that the body—later identified to be that of Margaret Allen—was wearing shorts and a shirt, and wrapped in a piece of plastic that resembled a shower curtain liner. (Tr. 689.) Near the body, police found counterfeit drugs (or “fleece”) in a plastic baggie. (Tr. 670.) Detective Gregory noticed that Margaret’s feet, which were bare, were not dirty, which led him to conclude that she was not killed at the site. (Tr. 693-94.)

Although Detective Gregory knew Margaret, he was unable to identify her body. (Tr. 697-98.) One of Margaret’s relatives opened the door to Margaret’s home for police. (Tr. 698.) Upon entering, Detective Gregory immediately noticed “an overwhelming smell of gasoline and kind of

burnt plastic.” (Tr. 700.)

Brook Elhers, a forensic chemist at the Miami Valley Regional Crime Laboratory in Dayton, Ohio tested multiple items submitted by Fairfield police and found that they were positive for gasoline. (Tr. 716-23 & Ex. 32.) Mark Squibb is the laboratory supervisor of the DNA and trace evidence sections at Miami Valley Regional Crime Laboratory. (Tr. 730.) He testified that he determined that, to a reasonable degree of scientific certainty, samples submitted by the Fairfield police originated from Margaret Allen. (Tr. 734.) Dr. Jan Gorniak is the Franklin County Coroner. (Tr. 1422.) She performed an autopsy on Margaret Allen. (Tr. 1424.) At the time of the autopsy, she was a part-time employee of the Hamilton County Coroner’s Office. (Tr. 1436.) She determined that the cause of Margaret’s death was strangulation. (Tr. 1436.) The insect activity on the corpse was consistent with the body having been dumped for one-and-a-half to two days before being discovered. (Tr. 1442.)

Rebecca Ervin is a detective with the City of Fairfield Police Department. (Tr. 779.) She participated in the search of Margaret’s house on July 28, 2008. (Tr. 780.) As she entered the house, she observed an “overwhelming” odor of gasoline. (Tr. 795.) In the house, she observed several items of value, including jewelry, a digital camera, a DVD player, and DVD’s, that had not been taken, indicating to her that a burglary had not occurred at the residence. (Tr. 788-89.) On the kitchen counter, officers discovered paperwork pertaining to a procedure Margaret’s OB/GYN performed. (Tr. 791.) Police did not locate a gas container anywhere in the house. (Tr. 796.)

Toby Williamson is a detective with the City of Fairfield Police Department. (Tr. 859.) Margaret’s car (a black BMW) was not at the residence when officers arrived. (Tr. 861.) Fairfield officers reported the vehicle as stolen, and were notified by police in Golf Manor shortly after

midnight on July 29, that the vehicle had been located. (Tr. 861-62.) Detective Williamson went to Golf Manor to assist in recovering the car. (Tr. 862.) When he arrived, he observed that the doors were locked, and that neither the doors nor the steering column appeared to have been tampered with. (Tr. 863.)

On July 29, Appellant appeared at the Fairfield Police Department. (Tr. 866.) After reading him his *Miranda* rights, Detective Williamson interviewed him. (Tr. 867-70.) Appellant asked Detective Williamson if there was an outstanding warrant for his arrest, but declined to answer any of the detective's questions. (Tr. 870-75.) Appellant did not ask about whether Margaret had been found, nor did he report any items from his home as stolen or missing. (Tr. 874.) While Appellant was being photographed, he told an officer that an abrasion on his hand was a burn mark. (Tr. 879.)

Andre Ridley was a friend of Germaine "Mick" Evans. (Tr. 903.) According to Mr. Ridley, Germaine was "like a son" to him. (Id.) One day in 2008, a few days after Margaret's body was found, Germaine called Mr. Ridley and asked him to meet to discuss a problem. (Tr. 908, 911.) Mr. Ridley agreed, and when he met with Germaine, Germaine told him that "I was there at the house when Calvin killed that girl." (Tr. 908.) Mr. Ridley described his conversation with Germaine:

And when he told me he was there, and he said Calvin, he said, I was there when Calvin killed that girl. I said, What Happened? He said, I was in another room, and he said, they was in there fighting. And then he said after a while, he came out the room. And when he came out the room, he seen Calvin choking Margaret. And I saw, What you do? He said, I just stood there because I didn't know what to do.

And he said after that, when he was choking her and he said like—he didn't give me no time frame, he said Calvin just started smacking her, you know, saying wake up, Missy, wake up. Wake up. Wake up, Missy. And he said Calvin was crying like, Please, Missy, wake up. Wake up. Please wake up.

(Tr. 909.)

Germaine told Mr. Ridley that following the murder, he and Appellant staged the scene to make it look like a robbery. (Tr. 910.) Germaine and Appellant knocked over furniture as if someone was searching for drugs or money. (Id.) They wrapped Margaret's body up, put the body in a car, and Appellant set fire to the house. (Id.) Afterwards, Appellant gave Germaine 20 ounces of cocaine, which Mr. Ridley estimated to be worth between \$20,000 to \$40,000 on the street, depending on how it was prepared and sold. (Tr. 913.) Appellant told Germaine that he threw "dope" down near Margaret's body when he dumped it because he heard a reference to doing so in a rap song. (Tr. 915.)

At the time of trial, Charles Bryant had known Appellant for seven years. (Tr. 986.) One day while two were drinking and smoking marihuana together, Appellant told Mr. Bryant that Margaret "was scandalous and running her mouth." (Tr. 989.) Later, he told Mr. Bryant that he had choked her after the two had argued about her pregnancy. (Tr. 990.)

Crystal Evans was 22 years old at the time of the trial. (Tr. 1030.) Appellant is the father of her son. (Tr. 1031.) Germaine Evans was her brother. (Tr. 1039.) One morning as Ms. Evans was getting ready for school, she received a phone call from Cincinnati Police Detective Jennifer Luke, who told her that she was with the homicide unit and was looking for Germaine. (Tr. 1042-43.) After speaking with Detective Luke, Ms. Evans called Germaine. (Tr. 1045.) Appellant was living with Ms. Evans at the time; he was home and was able to hear her phone conversation. (Tr. 1046.)

Once he was arrested for the murders of Margaret and Germaine, Appellant sent Ms. Evans a letter from jail in which he coached her regarding his alibi. (Tr. 1148-49, Ex. 50.) In that letter, he wrote:

I got some things that Rich [Appellant's counsel Richard Goldberg] dropped off to me (phone logs). From the phone logs, it looks like Mick died at 10:00. Babe, we were home asleep at 10. I got my phone logs, too. I have so many missed calls. Now, you know the only way I'm going to miss my calls is if I'm asleep. You of all people should know that I didn't do it. I was home with you. They have to charge me with Mick to open up the case with Margaret. It was no way they could charge me with Margaret, cause I didn't do it. But you got people saying I did that to Mick to cover up the case with Margaret. That's all they needed to tie them both together so they can charge me with both.

(Id.)

Additionally, after Ms. Evans had spoken with the police and set up an interview with an assistant prosecuting attorney, Appellant called her from jail complaining that Ms. Evans' decisions were the reason he was incarcerated. (Tr. 1154-58, Exs. 52.)

During Detective Luke's investigation of Margaret's death, she received a lead causing her to want to talk to Germaine. (Tr. 1250-52.) She called Germaine's sister, Ms. Evans, and explained that she was investigating Margaret's death and asked her to have her brother contact her. (Tr. 1252.) Detective Luke was not able to locate Germaine, and on March 2, 2009, she learned that Germaine had been murdered. (Tr. 1253.) That day, Detective Luke interviewed Ms. Evans, who told her that she and Appellant were both home by 9:00 pm the night of Germaine's death. (Tr. 1257-58.) The next day, however, Ms. Evans called Detective Luke and left a voicemail message, admitted that she had been out until at least 10:00. (Tr. 1260.)

Eric Karaguleff is a homicide detective with the Cincinnati Police Department. (Tr. 1299.) Along with Detective Witherell, he was one of two primary detectives assigned to investigate the murder of Germaine Evans. (Id.) Detective Karaguleff was dispatched to investigate a deceased body that had been found in Inwood Park in Cincinnati. (Tr. 1300.) He found Germaine's body, with an apparent gunshot wound to the head. (Tr. 1309.) While Detective Karaguleff was at the

crime scene, Germaine's family arrived. (Tr. 1316.) They told the detective that they believed Germaine had been killed by Appellant, because Germaine had helped Appellant move Margaret's body. (Tr. 1316.)

Gretel Stephens is a forensic pathologist with the Hamilton County Coroner's Office. (Tr. 1570.) Dr. Stephens performed the autopsy on Germaine Evans. (Tr. 1572.) A gunshot to the back of Germaine's head caused his death. (Tr. 1576.)

Robert Lehnhoff is a firearms examiner for the Hamilton County Coroner's Office. (Tr. 1583.) All four shells found near Germaine's body were fired from the same firearm. (Tr. 1587.) He was able to conclude to a scientific certainty that the bullet fragments found in Germaine's head had been fired by a .40 caliber Smith & Wesson Sigma Series semiautomatic pistol. (Tr. 1592.)

Denise Burns is assigned to the criminalistics unit of the Cincinnati Police Department. (Tr. 1357-58.) She responded to the scene where Germaine's body had been found, and took for processing four .40 caliber shell casings, a Doritos bag, and a burnt piece of paper. (Tr. 1359.) No latent fingerprints were found from the piece of paper or the Doritos bag. (Id.) There were also no fingerprints found on the shell casings. (Tr. 1362.)

Audrey Dumas is an ex-girlfriend of Appellant. (Tr. 1367.) The two dated for six years, on and off. (Id.) They ended their relationship in the beginning of 2010. (Id.) Ms. Dumas is also known by the nicknames "50" and "Munch." (Tr. 1368.) Ms. Dumas was with Appellant after 11:00 pm on Friday, July 25th, but does not know where Appellant was before then. (Tr. 1463.) She was with him until 3:00 or 4:00 the next morning. (Id.)

Keith Witherell is assigned to the homicide unit of the Cincinnati Police Department. (Tr. 1511.) With his partner Eric Karaguleff, he was one of the investigating detectives assigned to work

on the homicide of Germaine Evans. (Tr. 1511-12.) After Detective Witherell investigated Donte Terry, he conducted no further investigation of him. (Tr. 1526.)

Once Appellant was arrested, Detective Witherell monitored the mail Appellant sent and received through the Butler County jail. (Tr. 1528.) In one letter, Appellant proposed marriage to Crystal Evans. (Tr. 1528 & Ex. 47.) In another, also written to Ms. Evans, Appellant described a “jump-the-five” code that he intended to use in future communications with her. (Tr. 1530-32 & Ex. 48.) In another letter, he reminds Ms. Evans that they were together on the night of Margaret’s murder. (Tr. 1535 & Ex. 50.) In code at the bottom of that letter, Appellant wrote “throw away.” (Tr. 1536.)

In a third letter, Appellant wrote to Ms. Evans, “[y]ou have to stop saying certain shit on them phones to me. You be coming at me like you don’t know for sure I was at home with you. Do you ever tell people that I was at home with you when they say that shit happened?” (Tr. 1538 & Ex. 51.) Finally, Appellant also wrote to Ms. Evans about a witness list he had obtained. (Tr. 1539 & Ex. 49.) As Detective Witherell interpreted the letter, Appellant wrote, “[I]n July when we find out everyone they are using, we—and there is a word I can’t decipher. We act or we get, excuse me, get the records and post them all—up all over Battles CO period, which I interpreted as—I’m assuming that he meant company, Battles Company.” (Tr. 1544.) July 2010 was significant, because that was the effective date of Crim.R. 16, which required the State to turn over witnesses statements to defense counsel. (Tr. 1545-46.) Detective Witherell believed Appellant wanted to post the names of witnesses on a funeral home in order to scare witnesses. (Tr. 1568-69.) “I think the underlying message is—although it’s subtle, but I think the message exists that we’re going to put this witness list up at the funeral home, and that’s meant for people to draw their own conclusions in terms of

their safety.” (T.p 1569.)

Marcus Sneed, who was incarcerated at the time of trial, grew up in the same neighborhood as Appellant and had known him “for a long time.” (Tr. 1596-97.) Sometime after the death of Margaret Allen, he encountered Appellant at Vito’s bar in Cincinnati. (Tr. 1597.) He asked Appellant if he had killed Margaret. (Tr. 1598.) Initially, Appellant did not want to talk about it, but subsequently admitted to having murdered Margaret. (Tr. 1599.) He said that he and Margaret got into a “heated argument,” and that “he choked her and didn’t mean to.” (Tr. 1600.) Appellant told Mr. Sneed that Margaret had threatened him about robberies and other murders about which he had confided in Margaret. (Id.)

After the discovery of Germaine’s body, Mr. Sneed again ran into Appellant at Vito’s. (Tr. 1602.) He asked about Germaine’s death, and Appellant admitted that “he had to” because he was “the only guy that could link him to the murder.” (Id.)

Gerald Wilson was incarcerated in the Hamilton County Justice Center at the time of trial. (Tr. 1648.) Although Mr. Wilson had previously told police that Appellant had confessed to the murders of both Margaret and Germaine in his presence, on the witness stand he claimed that he had fabricated the story at the request of a fellow inmate named Quincy Jones. (Tr. 1657-58 & Ex. 15.)

Lemuel Johnson was incarcerated at the time of trial. (Tr. 1732.) Mr. Johnson knew of Appellant because he and Appellant both sold drugs in the downtown Cincinnati area from the late 1990's until the time of trial. (Tr. 1733-34.) Prior to being incarcerated, Mr. Johnson had attempted to intervene to settle a dispute between a friend, Ricardo “Little Rick” Williams, and Appellant. (Tr. 1734.) In doing so, Mr. Johnson agreed to sell drugs with Appellant. (Tr. 1738-39.)

During the course of their conversations, Mr. Johnson told Appellant that Mr. Johnson’s

brother had been convicted of a crime. (Tr. 1739-40.) Appellant told Mr. Johnson that he knew of the witnesses in Mr. Johnson's brother's case, and that because Appellant needed money, he would "take care of witnesses" if Mr. Johnson so requested. (Tr. 1745-46.) When Mr. Johnson hesitated in accepting this proposition, Appellant started to "talked about some things that he did ... just to kind of get my confidence in him." (Tr. 1747.)

Appellant told Mr. Johnson that after Margaret's murder, he was present when Germaine's sister received a phone call from a detective attempting to locate Germaine. (Tr. 1747-48.) Mr. Johnson testified about Appellant's response to the phone call he overheard:

He said basically that reaction was that he needed—he said he needed to, you know, to get—to get to Mick before the detective—before the detective did, because he knew because he had to kill Mick before—he knew that Mick was beginning to be a weak link, and he knew he had to get to him. Mick be the only person that can connect him to Missy murder.

(Tr. 1748.)

On cross-examination, Mr. Johnson recounted Appellant's "exact words":

Look, I did this, you know. I was over—I was over Mick's sister house, and when the officers, the detectives called and I knew that he was a weak link. I knew he was a weak link. So when they called and talked to him, they called and said they wanted to meet with him. They wanted to meet with Mick. I knew I had to go and meet with him first, because I knew I had to kill him because he was—they was going to—he was a weak link to Missy's murder. He was going to be able to connect me to Missy's murder.

(Tr. 1777-78.)

When one of the State's witnesses, Michael Nix, failed to appear for trial, Detective Gregory was recalled to the stand outside the presence of the jury. (Tr. 1671.) The purpose of this mid-trial hearing was to determine whether Detective Gregory could testify regarding statements made to him by Mr. Nix under the forfeiture by wrongdoing doctrine. The detective testified that he first met with Nix in the Hamilton County Justice Center in January 2009. (Tr. 1673.) Mr. Nix was emotional,

and told him that he would help with the investigation against Appellant but would not testify. (Id.) Mr. Nix was arrested again in July 2009 and again spoke with Detective Gregory; he remained “adamant” against testifying. (Id.) He would not permit Detective Gregory to tape-record either of the first two interviews. (Id.) In June 2010, however, Detective Gregory conducted another interview, and Mr. Nix permitted that one to be tape recorded. (Tr. 1675.) Mr. Nix felt a little safer at that time because Appellant had been arrested. (Id.)

On September 17 and 24th, 2010, Mr. Nix met with Detective Gregory and prosecutors. (Tr. 1676-77.) At that time, he was willing to testify. (Id.) On September 25th, though, Mr. Nix called Detective Gregory. (Tr. 1678.) Mr. Nix was “very emotional, very upset,” and told Detective Gregory that he had just been shot at and that the detective needed to come pick him up. (Id.) When Detective Gregory brought him back to the office, Mr. Nix told him that he was at a birthday party, and an associate that both he and Appellant knew asked him about the upcoming trial. (Tr. 1680.) The man left, and about twenty minutes later, Mr. Nix left the party alone. (Tr. 1681.) A car came down the street, and shots were fired from that vehicle at Mr. Nix. (Id.) As a result of the incident, Detective Gregory arranged for payment for a hotel room for four nights for Mr. Nix. (Tr. 1682.)

Detective Gregory also testified that prior to trial, he reviewed a call Appellant made from the Butler County jail to an acquaintance, Michael Howe, in which Howe told Appellant that “they know how to John Brown a case.” (Tr. 1684.) Detective Gregory explained that John Brown was a defendant who went to trial. (Id.) According to Detective Gregory, “[s]ome of the witnesses were alleged to have been paid off and threatened. Therefore, [John Brown] won his case.” (Id.)

After the forfeiture-by-wrongdoing hearing conducted by the trial court, Michael Nix was found and arrested by the Cincinnati Police Department. (Tr. 1785.) Mr. Nix acknowledged that

he did not want to be at the trial, but refused to explain why. (Id.) Outside the presence of the jury, Mr. Nix repeatedly told the court that he was refusing to testify. (Tr. 1786.) The trial court, after examining Mr. Nix, determined that he was unavailable and that his prior statements would be admissible because his unavailability was due to the wrongdoing of Appellant “and his associates for purposes of preventing the witness from intending to testify.” (Tr. 1793-94.)

Detective Gregory was called again to testify, this time in the jury’s presence. (Tr. 1796.) He explained that in the course of two, untaped interviews, Mr. Nix told him that Germaine was “like a brother” to Mr. Nix. (Tr. 1801.) He told the detective that the day that Margaret’s body was found, Appellant came to Mr. Nix’s home on Central Parkway driving a black BMW, looking for Germaine. (Tr. 1801-02.) Later that day, Mr. Nix and Appellant had a conversation about Margaret’s death. Appellant told Mr. Nix that “there was an argument. Shit had got out of hand, and he didn’t mean to do it.” (Tr. 1803.)

In a third interview (which was taped but not played for the jury) Mr. Nix also told Detective Gregory that on the night of February 27, 2009, Appellant, Germaine, Brian Adams, and Lamar “Mouse” Simmons were present at Mr. Nix’s home. (Tr. 1805.) All four left together in a white panel van. (Tr. 1806.) Mr. Nix never saw Germaine again. (Tr. 1807.)

Finally, Detective Gregory described for the jury the incident on September 26th, when Mr. Nix called him to report that someone had fired a gun at him. (Id.) Gregory reiterated the story, but this time for the jury that Nix was at a birthday party when a mutual acquaintance of Mr. Nix and Appellant approached Mr. Nix and asked him about Appellant’s trial. (Tr. 1813.) Mr. Nix denied any involvement in or knowledge of the trial. (Id.) Twenty minutes later, Mr. Nix walked outside and cars were fired at him from a car that drove past him. (Tr. 1813.) As a result, Detective Gregory

arranged a hotel room for Mr. Nix. (Tr. 1815.) After a few days, Mr. Nix suddenly and unexpectedly disappeared from the hotel. (Id.) He was located the morning of Detective Gregory's testimony. (Id.)

Sheridan Evans was Germaine's mother, and also knew Appellant since he was four or five years old. (Tr. 1826.) Four or five days after July 28th, 2008, Appellant, in Sheridan's presence, said that "he loved Missy and it was a mistake. ... And he said, I tried to revive her for 10 minutes, but I couldn't bring her back. And he just was crying." (Tr. 1829-30.) Later that day, Sheridan reported her conversation to Germaine. (Tr. 1833.) Germaine told her that he "was going to do the right thing." (Id.) After Germaine's death, Appellant again talked with Sheridan. (Tr. 1839.) He denied killing her son, but warned her, "I don't want to see nothing else happen to none of your kids." (Tr. 1839-40.) Sheridan interpreted this as a threat towards her family. (Tr. 1840.)

On February 1, 2010, a Butler County grand jury returned an 11-count indictment against Appellant, charging him with the murder of Margaret Allen and the aggravated murder, with death specification, of Germaine Evans. Following a jury trial, Appellant was convicted of all counts and sentenced to death for the murder of Germaine Evans. This appeal followed.

ARGUMENT

Proposition of Law I:

A defendant's rights are not violated when a trial court, in the sound exercise of its discretion, refuses to order the substitution of appointed counsel because the defendant refuses to cooperate with his current counsel and denies a request for a continuance that was intended to subvert the intent of Crim.R. 16.

In his first proposition of law, Appellant argues that the trial court committed two separate errors: first, in declining to permit his attorneys to withdraw, and second, in refusing to grant motions for continuances. After detailing the procedural history pertaining to Appellant's continuance request and the trial court's appointment of counsel, the State will address each in turn.

A. History

Following Appellant's indictment, he appeared for his arraignment with retained counsel, Richard Goldberg. (February 16, 2010, Arraignment Hearing Tr. 3.) On behalf of his client, Mr. Goldberg requested that the trial court appoint additional counsel:

The Court: Okay. Now, the first thing I wish to do today is discuss the issue of counsel, because I think as a preliminary matter we need to address that issue. So Mr. Goldberg, since we've never had a record of this case, can you go ahead and make a representation to the Court of the nature of your representation?

Mr. Goldberg: Yes, you Honor. I am Mr. McKelton's attorney. I represent him on this indictment, and I have in the past represented him.

Since this is a capital case or a death penalty case that I really just officially learned this morning when the indictment was unsealed, I don't really specialize in capital cases. And I asked—and Mr. McKelton at this point is indigent, and he cannot pay for experts at this point on his behalf or in his defense, especially with the nature of the indictment. So I would ask—I'll ask, your Honor, if you would consider appointing counsel. I'm not sure what the rule number is.

The Court: Rule 20.

Mr. Goldberg: Rule 20, to represent him in addition to myself. If he can have counsel appointed based on his indigency, that would be my request. And I would

be—I'd ask the Court permission to stay on as his counsel in addition to the counsel appointed by the Court, if that is okay with the State.
(Id. at 5-6.)

Subject to Appellant's submission of an affidavit of indigency, the trial court indicated that it would grant the request, appointing John Gregory Howard as "lead counsel" and Melynda Cook as "co-counsel." (Id. at 6-8; March 1, 2010 Appointment of Trial Counsel in a Capital Case.) The trial court also immediately approved the expenditure of funds for an investigator, a mitigation specialist, a mental health professional, and a forensic expert. (February 16, 2010 Arraignment Hearing Tr. 8-9.)

On August 30, 2010, the State filed a motion confirming, pursuant to an earlier on-the-record conversation (8/16/2010 Hearing Tr. 10-24) that Mr. Goldberg's "continued participation as counsel for the Defendant in this matter will result in a conflict of interest between his duties to the Defendant and his duties to one or more current or former clients." (State's Motion #6: Notice Confirming Defense Counsel's Conflict of Interest and Request for Hearing.) At a hearing on the State's motion, Mr. Goldberg suggested that to remedy the conflict, "they [the State] should just not call this witness or witnesses." (9/10/10 Hearing Tr. 7.) This was required because, according to Mr. Goldberg, Appellant's "right to counsel is paramount to what they're doing here." (Id.) In response, the State argued in part:

No. The State is not going to agree to that as a remedy. Again, this was the remedy that Mr. Goldberg himself proposed. And frankly, it doesn't matter about Mr. McKelton's right to counsel. Number one, he's got two appointed, competent, qualified death penalty certified counsel already being provided him. So it wouldn't be a matter if Mr. Goldberg stepped aside here five weeks ahead of trial that Mr. McKelton would somehow be forced to go to a trial without adequate representation of counsel ..."

(Id. at 7-8.)

Before the hearing concluded, the court granted a recess so that Mr. Goldberg, Ms. Cook, and Mr. Howard could confer. (Id. at 19.) Once the hearing resumed, Mr. Goldberg informed the court that despite the State's representations, he would remain as Appellant's counsel "until such time as a conflict becomes more imminent." (Id. at 20.)

On September 14, 2010, Appellant's trial counsel filed Defendant's Motion to Withdraw, Motion to Appoint New Counsel, and Motion for Continuance. On September 16, 2010, Appellant, acting pro se, filed a motion requesting that the trial court remove his trial counsel. The trial court held a hearing on these motions on September 17, 2010. At that hearing, Mr. Goldberg requested leave to withdraw because of the potential conflict of interest that had been previously disclosed by the State. (9/17/10 Hearing Tr. 3-4.) Appellant assented to this request. (Id. at 5.)

Ms. Cook and Mr. Howard also sought leave to withdraw. (Id. at 6-9.) Appellant personally addressed the court in support of his efforts to have trial counsel removed and to delay the start of his trial. (Id. at 12-20.) After hearing from Appellant and his trial counsel, the court denied the motion, stating:

And the only issue this [sic] in this particular case that I can see that has broken down is that you [Appellant] have decided now that you don't like the legal advice of your counsel. The only thing I would ask you to do is to consider the advice of counsel, that these people are very experienced when it comes to capital litigation. And the consequences can be very severe if you're convicted of what you're charged with. And if they would recommend to you something other than a trial, you certainly do not have to listen to them. But you certainly should listen to them and the wisdom of their counsel. And I don't know what was said, and I don't want to know what was said in the privacy of that room.

* * *

So the answer is that I believe that if there are any issues in this case, it's because Mr. McKelton has refused to cooperate with his counsel. Based upon what I've seen in this case, counsel is prepared to go forward with trial. Certainly Mr. Goldberg is no

longer present in this case, but Mr. Goldberg has known and the defense has known for a significant period of time that it was not likely he would be involved in this case. And that the Court certainly discussed with the other two attorneys the necessity of being prepared to go forward. So for the record, the Court is going to deny the defendant's motion to withdraw and that Mr. McKelton can choose other attorneys of his choice.

(Id. at 32-34.)

Appellant did not file any further written motion for a continuance. However, he orally renewed his motion just prior to voir dire and again just prior to opening statements. (10/14/10 Hearing Tr. 23; Tr. 299-300.) Both requests were denied.

B. The Trial Court Correctly Denied Appellant's Motion To Discharge Counsel.

This Court has held that in order to discharge appointed counsel, "the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel." *State v. Coleman*, 37 Ohio St.3d 286, 525 N.E.2d 792 (1988), paragraph four of the syllabus. Further, an indigent defendant "has no right to have a particular attorney represent him and therefore must demonstrate 'good cause' to warrant substitution of counsel." *State v. Cowans*, 87 Ohio St.3d 68, 72, 1999-Ohio-250, 717 N.E.2d 298. A trial court's decision regarding the replacement of counsel is reviewed for abuse of discretion. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 150. "Disagreements between the attorney and client over trial tactics or approach also do not warrant a substitution of counsel." *Id.*, quoting *State v. Evans*, 153 Ohio Spp.3d 226, 2003-Ohio-3475, 792 N.E.2d 757, ¶ 32 (7th Dist.).

On appeal, the only good cause to replace his counsel advanced by Appellant is his trial counsel's alleged fear of him. (Appellant's Brief at 15-16.) This contention, however, is belied by the record. Prior to the hearing on Appellant's motion to remove his trial counsel, the State sought leave to place Appellant in a stun belt during the trial. (9/16/10 State's Supplemental Memorandum

in Opposition to Defendant's Motion Q.) In justifying its request, the State wrote in part:

The Defendant has already attempted to use the mail to solicit others to smuggle contraband into the jail through court proceedings. In recent conversations recorded by the jail's phone system, the Defendant is highly agitated and emotional regarding his case, the impending trial, and his attorneys.

The State believes the use of a stun belt is warranted in this case to not only protect the safety of his own attorneys and other courtroom personnel, but also to prevent the Defendant from engaging in an intentional outburst in the hopes of causing a mistrial or other delay in the proceedings.

(Id. at 3.)

In arguing on behalf of Appellant's motion to remove his trial counsel, Mr. Howard never expressed fear of his client. Instead, he referenced the State's request to use a stun belt in support of his argument that Appellant was refusing to cooperate with his attorneys:

He's failing to cooperate with us to the point where he's alleged that we are in allegiance with the prosecutor; that we don't know what we're doing; that we're not prepared for trial; that we're saying things about him that aren't true; that—I don't know what he's saying on the phone that's been recorded by the jail's phone system.

I don't know if there have been threats to me, if there's been threats to Ms. Cook, if there's been threats to Mr. Goldberg, I have no idea, but in the next statement, they've [the State] indicated that the use of stun belt [sic] is warranted in this case to not only protect the safety of his own attorneys, so I'm only going to assume that he's made threats to me and threats to Ms. Cook and possibly Mr. Goldberg over the phone to various people.

(9/17/10 Hearing Tr. 23-24.)

The State immediately assured trial counsel and the trial court that no such threats had been made: "There were no threats in those phone calls. That was not the intent of those. I want to allay both fears of counsel and any concerns that the Court has." (Id. at 25.) The State reiterated that point: "[i]t [the calls] was not about threats to the defense attorneys at all. It was that he's speaking about them in same nature [sic] he has today, in the context of doing things to either derail the case, continue the case, or set up an appeal at a later date." (Id. at 26.)

Appellant argues that this Court's decision in *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, mandates reversal. *Williams*, however, presents an entirely different fact pattern. In that case, following a guilty verdict, the defendant punched one of his attorneys. *Id.* at ¶ 130. His trial attorneys told the court that they could not continue to effectively represent their client. *Id.* at ¶ 132. The attorney who had been punched also stated that he could not consult with the defendant without fearing another assault, and that his fear "would almost inevitably be communicated to the jury." *Id.* at ¶ 133. In that circumstance, this Court held that trial counsel should have been permitted to withdraw, as "he was afraid of Williams, and he had good reason to be." *Id.* at ¶ 136.

In contrast, in the present case neither trial attorney expressed fear of Appellant. Moreover, no reason existed for them to be afraid of their client, as was made clear by the State. Instead, the primary reason Appellant gave the trial court for his request to replace his court-appointed counsel was his disagreement over their recommendation that he consider a plea that would spare him the possibility of the death penalty. (9/17/10 Hearing Tr. 12-20.) Appellant's argument is thus foreclosed by *Ketterer*, in which this Court made clear that such a disagreement is not grounds to discharge counsel. "A lawyer has a duty to give the accused an honest appraisal of his case. Counsel has a duty to be candid; he has no duty to be optimistic when the facts do not warrant optimism. If the rule were otherwise, appointed counsel could be replaced for doing little more than giving their clients honest advice." *Ketterer*, 2006-Ohio-5283, at ¶ 150 (internal citations omitted). Trial counsel merely gave their client advice regarding the probability of success at trial. Doing so did not create grounds for her withdrawal or discharge.

Appellant also suggests that the trial court erred when it "violated" Superintendence Rule 20

by appointing Ms. Cook and Mr. Howard to represent Appellant even though he had retained Mr. Goldberg. (Appellant's Brief at 13.) But the trial court did not take this action on its own; to the contrary, counsel was appointed to work with Mr. Goldberg because Appellant asked the trial court to appoint counsel. (February 16, 2010, Arraignment Hearing Tr. 5-6.) It is difficult to comprehend how Appellant was prejudiced by the appointment of attorneys who have been certified by this Court as competent to represent defendants in capital litigation to supplement the efforts of retained counsel who had no apparent experience in such cases. But even assuming such prejudice existed, Appellant cannot "take advantage of an error that he himself invited or induced." *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶ 10, quoting *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, 775 N.E.2d 517, ¶ 27.

The trial court did not abuse its discretion in denying Appellant's motion to discharge his appointed attorneys. To the extent Appellant's first proposition of law argues otherwise, it should be overruled.

C. The Trial Court Correctly Denied Appellant's Motion For A Continuance.

In ruling on a motion for a continuance, a trial court must consider "the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel, and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." *State v. Unger*, 67 Ohio St.2d 65, 67-68, 423 N.E.2d 1078 (1981). This Court reviews such a decision for abuse of discretion. *Id.*, 67 Ohio St.2d at 67.

The State first informed trial counsel Mr. Goldberg could pose a conflict of interest in light of one or more witnesses the State intended to call at trial on August 16, 2010, seven weeks prior to the beginning of the trial. (8/16/2010 Hearing Tr. 10-24.) The State confirmed this in a written filing on August 30, 2010. (State's Motion #6: Notice Confirming Defense Counsel's Conflict of Interest and Request for Hearing.) For the first time on appeal, Appellant now claims that the disclosure of this conflict mandated a continuance.

Appellant's motion for new counsel included a request for a continuance of the trial date. This request, however, was not premised on Mr. Howard's and Ms. Cook's inability to be prepared for trial; instead, the request was tied directly to the assumption that Appellant's motion for new counsel would be granted:

Lastly, the Defendant requests that this Court grant a Continuance of his Trial date to begin October 4, 2010. The Defendant submits that a continuance of the Trial date is necessary as it is scheduled to begin in 4 weeks time and this is not sufficient time for a set of new attorneys to fully review, comprehend, investigate, and defend him. The Defendant states that a continuance is not unreasonable as there have been no prior continuance requests in this case, appointed counsel as well as the current retained counsel are the only attorneys that have been involved in this case from the defense standpoint, and the case was scheduled for trial at the defendant's initial appearance before this Court in February 2010.

(Defendant's Motion to Withdraw, Motion to Appoint New Counsel, and Motion for Continuance at 2.)

At the hearing on the motion, trial counsel never indicated to the court that they needed additional time to prepare Appellant's defense. Such a suggestion was not made until October 4, 2010, and was based entirely on the fact that some of the State's witnesses were not disclosed until the commencement of trial.

Prior to trial, the State had certified under Crim.R. 16(D), that the disclosure of certain witnesses and their statements would jeopardize the safety of those witnesses. As is required by

Crim.R. 16(F), a hearing was conducted seven days prior to trial, and the trial court (through a judge not assigned to hear the case itself) determined that the State had not abused its discretion in making this certification. (9/17/10 Hearing.) Crim.R. 16(F)(5) requires that under these circumstances, the names of witnesses and their statements are to be disclosed to the defendant “no later than the commencement of trial.” This was undertaken in this case. Appellant now claims that such a process left him without adequate time to prepare. However, as argued more fully in Section II, *infra*, the State and the trial court followed the procedures set forth in Crim.R. 16. Permitting a continuance after the State disclosed witnesses it had previously certified it was not disclosing would stand the protective purpose of Crim.R. 16(D)(1) on its head. Thus, the trial court correctly denied this request for a continuance.

An additional oral request for a continuance was made just prior to the commencement of opening statements. (Tr. 299-300.) As was explained to the trial court, the State had failed to disclose the statement of a witness the night before trial, when it had made available the statements of its previously non-disclosed witnesses. (Tr. 301.) However, the statement was provided as soon as the State received it, on the morning of opening statements. (Id.) The trial court denied a request for a continuance, noting that under Crim.R. 16, the defense had not been entitled to the statement until the previous day. (Id.)

The trial court did not abuse its discretion in denying this last request for a continuance. The 12-hour delay in turning over a witness statement did not cause any discernible prejudice to Appellant. The witness’s name had been disclosed the previous day; it was only her three-page statement that was disclosed a half-day late. The witness testified the day after her statement was disclosed. (Tr. 536.) Thus, Appellant’s counsel had the opportunity to review the statement and to

use it in cross-examining the witness. In fact, that is precisely what happened:

Q. When you gave your written statement to the police back in August of '08, you didn't mention or write out the statement that you've given today that Missy [Margaret Allen] told you not to tell Terri that she had gotten into it with Calvin. Do you recall not relaying that detail?

* * *

Q. And I think your statement was something about Angelo had told Calvin that they had slept together, but it wasn't true according to Missy?

* * *

Q. Okay. If I showed you your statement indicating when that was, would that help refresh your memory?

(Tr. 571-72.)

Appellant has not articulated any manner in which cross-examination would have proceeded differently if the statement had been provided 12 hours earlier than it was.

The trial court did not abuse its discretion in denying Appellant's written or oral motions for continuances. Accordingly, Appellant's first proposition of law should be overruled.

Proposition of Law II:

Ohio Rule of Criminal Procedure 16 does not violate a defendant's constitutional rights, and those rights are not violated when the State certifies the disclosure of certain witnesses when disclosure could threaten the witnesses' safety.

In his second proposition of law, Appellant challenges the constitutionality of discovery as provided by Ohio's newly enacted version of Criminal Rule 16. Appellant frames this challenge in a manner that asks this Court to create new discovery rights that are neither provided for in the Constitution nor Ohio Crim.R. 16. As such, this Court should deny Appellant's invitation to create a new right out of whole cloth, and overrule this proposition of law.

In Ohio, the Rules of Criminal Procedure at their outset explain their purpose: "[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay." Crim.R. 1(B). This general mantra is echoed in the July 1, 2010 staff notes to the amendments to Crim.R. 16 (Division A), where it is stated that "[t]he new rule balances a defendant's constitutional rights with the community's compelling interest in a thorough, effective, and just prosecution of criminal acts." As such, when the Ohio Association of Criminal Defense Lawyers, the Ohio Prosecuting Attorneys Association, and the Commission on the Rules of Practice and Procedure all undertook the authoring, debating, modifying, and adopting of the new Crim.R. 16, the ideals of fair, just, and simple rules were enacted.

However, Appellant now asks this Court to either strike down Crim.R. 16(D) or to find that the State violated its discretion in protecting witnesses. As Crim.R. 16(D) is a fair and just rule, the State will argue that it should not be modified. Further, as the State and the trial court followed

Crim.R. 16(D) to the letter in this case, no abuse of discretion should be found.

A. Constitutional Discovery?

Appellant ends his arguments under the current proposition of law with a Constitutional challenge to Criminal Rule 16. While it is not ferreted out clearly, Appellant seemingly argues that the new law violates the Due Process Clause and possibly the Confrontation Clause. Although Appellant makes these arguments last, the State believes that the issue of constitutionality, and specifically the constitutionality of witness disclosure, should begin this discussion as it would not matter that the prosecutor acted properly if he did so inside of an unconstitutional law. As such, it is proper to begin with the declaration that Crim.R. 16 does not violate the Constitution.

The United States Supreme Court explained that “[i]t does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the [Supreme] Court wrote recently, ‘the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded....’ *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 37 L.Ed.2d 82 ... (1973).” *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837 (1977). As such, non-disclosure of witness names pre-trial does not amount to either a violation of the due process clause, or a *Brady* violation. See, e.g., *State v. Craft*, 149 Ohio App.3d 176, 2002-Ohio-4481, 776 N.E.2d 546, ¶ 11 (agreeing that “[t]here is no general constitutional right to discovery in a criminal case * * *.”)

Therefore, “aside from the requirements imposed by *Brady* and its progeny, the appropriate scope of defense discovery is, basically, a matter of legislative or judicial policy with each state free

to reach its own resolution of the matter. *See, e.g.*, 2 LaFave & Israel, Criminal Procedure (1984) 481, section 19.3(a).” *State v. Lagore*, 4th Dist. No. 1719, 1992 WL 42780, *9 (March 2, 1992); *see also State v. Dunn*, 154 N.C.App. 1, 5, 571 S.E.2d 650 (2002) (finding that “[w]ith the exception of evidence falling within the realm of the *Brady* rule, ... there is no general right to discovery in criminal cases under the United States Constitution, thus a state does not violate the Due Process Clause of the Federal Constitution when it fails to grant pretrial disclosure of material relevant to defense preparation but not exculpatory”).

What is more, Appellant’s Confrontation Clause argument against Criminal Rule 16 must also fail. Again, the Supreme Court has explicated that the inability to secure pretrial discovery material does not present a Confrontation Clause issue. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *See also United States v. Mejia*, 448 F.3d 436 (D.C.Cir.2006) (concluding that denying a criminal defendant the opportunity to review classified discovery does not present a Confrontation Clause issue).

In *Washington v. Walsh*, 08 Civ. 6237(DAB), 2010 WL 423056, *8–9 (S.D.N.Y. Feb. 5, 2010) (emphasis added), the court followed *Ritchie*, and noted that:

In *Ritchie*, the Supreme Court upheld a trial court’s decision not to disclose confidential records, despite the defendant’s contention that he needed the information to impeach or undermine a witness’s testimony. The Court stated:

‘The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination ... The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.’

Ritchie, 480 U.S. at 52-53, 107 S.Ct. at 999 (emphasis in original; internal citations and footnote omitted). Disclosure of government controlled evidence, which is either favorable or exculpatory, and is material to guilt or innocence, is governed by the

Due Process Clause of the Fourteenth Amendment. See *Brady v. Maryland*, 373 U.S. 83, * * *, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (holding that the suppression of evidence by the prosecution that is favorable to the accused violates due process where the evidence is material to guilt); see also *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867-69, 102 S.Ct. 3440, 3447, 73 L.Ed.2d 1193 (1982).

After espousing the Supreme Court's logic, the *Walsh* court came to the conclusion that Walsh's claim that withholding the detectives' names in discovery theoretically deprived him of an opportunity to uncover information that would be useful in cross-examination, "is beyond the scope of the Confrontation Clause." *Walsh*, 2010 WL 423056, *8.

Following the logic of the Supreme Court and other appellate courts, it becomes clear that Ohio Criminal Rule 16(D)'s protection of non-disclosure, does not enter the realm of a Confrontation Clause issue.² As such, Appellant's Constitutional argument should be denied. Non-disclosure under Criminal Rule 16 is not a violation of the Due Process or Confrontation Clauses.

² Appellant also appears to make an argument that because the prosecutor gets discretion of whom to list for non-disclosure, the rule is somehow flawed. However, not only is the prosecutor's discretion reviewable by a court, but as this Court has previously stated in terms of discovery "In the typical case where a defendant makes only a general request for exculpatory material under *Brady* * * *, it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Thus, the prosecution, not the trial judge, ordinarily bears the duty of examining documents for potential *Brady* material. *State v. Lawson*, 64 Ohio St.3d 336, 343, 595 N.E.2d 902 (1992). * * * Thus, the state's decision on the disclosure of *Brady* material should have been final." *Craft*, 2002-Ohio-4481, ¶¶ 23-25.

This discretion is also recognized in the staff notes to Crim.R. 16(F): "[t]he prosecution of a case is an executive function. The rule's nondisclosure provision is a tool to ensure the prosecutor is able to fulfill that executive function. * * * the rule vests in the prosecutor the authority for seeking protection by the nondisclosure, and deference when making a good faith decision about unpredictable prospective human behavior."

B. No Arbitrary Use of Discretion

Appellant next argues that the State abused its discretion in certifying the witnesses for non-disclosure, arguing that the State's decision was arbitrary. However, as the State's decision to so certify the witnesses was not arbitrary, and as Judge Nastoff held that the State's decision was justified, this argument should be overruled.

The abuse of discretion standard is well ferreted out in appellate law. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations." *State v. Jenkins*, 15 Ohio St.3d 164, 222 (1984), quoting *Spalding v. Spalding*, 355 Mich. 382, 384-385 (1959). In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias. *Id.*; *See also Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993); *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996). When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons*, 66 Ohio St.3d 619.

Therefore, to find in Appellant's favor, this Court would have to find that the State of Ohio's decision to certify witnesses for non-disclosure under Crim.R.16 (D) was "more than an error of law or of judgment" on the part of the State; but rather, that the State's decision displayed a "perversity of will, passion, prejudice, partiality, or moral delinquency" such that it clearly is "unreasonable, arbitrary or unconscionable." *See State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980);

Pons, 66 Ohio St.3d 619, 621.

Crim. R. 16(D) allows for the prosecuting attorney's certification of nondisclosure when:

* * *the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

(1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;

(2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;

(3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;

(4) The statement is of a child victim of sexually oriented offense under the age of thirteen;

(5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

Additionally, the staff notes to Crim.R.16(D) detail the deference accorded to the prosecutor in this section: “[t]he prosecutor should possess extensive knowledge about a case, including matters not properly admissible in evidence but highly relevant to the safety of the victim, witnesses, or community. Accordingly, the rule vests in the prosecutor the authority for seeking protection by the nondisclosure, and deference when making a good faith decision about unpredictable prospective human behavior.”

Pursuant to the Rule, the Common Pleas Court held a hearing to determine whether the State had abused its discretion in non-disclosing witnesses. At said hearing, the State explained that witnesses 59, 61, 62, 66, 68, 69, 70, and 71 were being non-disclosed. (Tr. 8, September 27, 2010)

The State explained to the trial court that it possessed “reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion.” *See* Crim.R. 16(D). When the State began to explain the exact grounds for this belief, it was clearly guided by the rules examples that “reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.”

With that standard in mind, the State explained that Appellant had a past incident of witness intimidation that resulted in a conviction. (*Id.*, at 22) The facts of this previous conviction include physically grabbing a person and stating “if he went in and told the Court what his brother had done to him that he would, quote, have him murdered.” (*Id.*, at 22)

The State also presented the Court with the recent events that surrounded Michael Nix. Shortly after the State disclosed Nix’s name, he was at a party where he was asked by one of Appellant’s friends how Appellant’s trial was going. (*Id.*, at 20-21) When Nix left the party, he became the target of a drive by shooting. (*Id.*, at 20-21) This scenario fit within Appellant’s modus operandi, which is often not pull the trigger himself, but to have others do it for him. As the State explained, that is why Appellant is still dangerous when he is inside of the jail. (*Id.*, at 23)

The State also informed the court about a letter that Appellant wrote to his girlfriend which stated that he has to take action. Appellant stated in the letter that he needs to get the witness list and post it at a Cincinnati funeral home, Battles and Co. (*Id.*, at 23-24) Appellant even references in the letter that this will happen come July, which is when the new discovery rules came into effect, giving him additional information about potential witnesses. (*Id.*, at 24)

The trial court also learned that Appellant had a phone conversation with a close associate of his, Michael Howell, where he says that they are going to “John Brown” the case. The State explained that “Cincinnati police homicide unit knows exactly what that is in reference to because they had a homicide case in which the defendant’s name was John Brown. They had all lined up and were ready to try it and the day before trial, all of -- they had witnesses either not show up or get on the stand and recant their statements and that person was acquitted. The defendant’s name was John Brown.” (*Id.*, at 25)

What is more, the charges in the present case were that Appellant murdered a witness (Germaine Evans) to one of his alleged crimes (murder). (*Id.*, at 24) This was yet another example of the lengths Appellant has gone to in silencing and intimidating witnesses.

In the face of this overwhelming evidence that non-disclosure was not only proper, but necessary, Appellant argues that it was arbitrary because it was not specific to any witness. This Court has multiple times defined and refined the term arbitrary as it applies to decision making. In one particular decision, this Court defined the term arbitrary as “[w]ithout fair, solid, and substantial cause and without reason given; without any reasonable cause; in an arbitrary manner.” *Thomas v. Mills*, 117 Ohio St. 114, 121, 157 N.E. 488 (1927), quoting 4 Corpus Juris, 1475. Appellant cannot demonstrate that the State acted in an arbitrary manner.

Further, by making this argument, Appellant is demonstrating a misreading or misunderstanding of Crim.R. 16(D). The Rule by its specific language does not intend the focus of non-disclosure to be on the individual witnesses; but rather, on the defendant and their potential for intimidation and coercion. Again, it must be reiterated that the rule clearly lists some basic grounds for non-disclosure: “the nature of the case, the specific course of conduct of one or more parties,

threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.”

In evaluating these reasons, it is clear that they apply to the defendant themselves, and not to individual witnesses to be protected. For example, “the nature of the case” clearly is indicative to looking at the defendant’s case, and what the defendant is charged with. The “specific course of conduct of one or more parties” references parties to a case, which is again, the defendant. “Threats or prior instances of witness tampering,” only makes sense when applied to the defendant. No court would order a witness disclosed because they have a prior instance of tampering, it would not be logical. And finally, “whether the defendant is pro se” is a clear illustration that these factors focus on the defendant and not on the witnesses.

Once the focus is properly on Appellant, it is clear that no abuse of discretion occurred in the present case.³ Appellant has a past conviction for witness intimidation, has written letters outlining a plan to intimidate witnesses, has spoken over the phone about a plan to intimidate witnesses, has

³ Even if this Court were to evaluate the witnesses themselves the State offered the following arguments as to their specific circumstances:

MR. SALYERS: I would tell you that witnesses 59 and 61 were extremely afraid to have their names disclosed, and if they knew their names were going to be disclosed before trial, probably would not have agreed to testify. I will tell you that for the rest of the witnesses, whether they are incarcerated or some are incarcerated, some are not, the argument was made in the defendant's filing, hey, if those witnesses are incarcerated, they are safe too. Number one that's wishful thinking. The notion that violence doesn't occur or intimidation doesn't occur in jails or prisons, we wish that was the case.

But more importantly those folks, those ones who are incarcerated and I will go ahead and tell the Court that witness number 62, 68 and 69 are incarcerated. Each indicated a fear, not just for themselves, in fact, maybe not even for themselves. More importantly for the family that they have who are not incarcerated. The sisters, the mothers, the baby's mothers, the babies themselves, their concerns are less about themselves and more about the folks they have on the outside who are known, who live in the neighborhood, who would be, you know, would be the targets of any efforts. (*Id.*, at 27-28)

had a witness in the present case be the target of a drive by shooting shortly after being disclosed, and was awaiting a trial that included a capital specification of murdering a witness to a crime.

Based upon all of this information, the trial court was correct when it found that:

What I can say is that the nature of the case in this instance is more specific than simply a murder case. It's a capital murder case where the specification involves specifically killing a witness. So, I think that that is a unique factor. Separate and apart from that, it talks about a specific course of conduct of one or more parties and threats or prior instances of witness tampering or intimidation, and appears that both of those provisions can be said to apply in this case. * * * but the fact of the matter is, is that it's a prior instance of intimidation of a witness and a felony charge in which he was convicted. It did result in criminal charges.

* * *

That these eight witnesses, in their opinion, would not be available to them to prosecute the case if disclosure were made. Not just because of -- because something could happen to them. They are positioned in such a way, according to the State, that they are fearful of participating, and in fact, would not participate absent the State seeking these protections.

I'm going to find that the State has not abused its discretion with regard to these enumerated witnesses in this case pursuant to 16(F)(5).

(*Id.*, at 38-39)

Based upon all of the aforementioned reasons which follow the espoused reasons contained in Crim.R. 16 (D) to a tee, the State clearly did not act arbitrarily when it certified eight witnesses for non-disclosure.

C. Disclosure Of Non-Disclosed Witnesses

Criminal Rule 16 (F)(5) clearly states that “[i]f the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial.” However, in light of this clear and unquestioned guidance, Appellant now argues, with no support, that he was entitled to the names of the non-disclosed witnesses earlier. The State disagrees.

First and foremost, the ability to non-disclose witnesses until the commencement of trial has previously been approved by this Court under the previous version of Criminal Rule 16. *See State v. Williams*, 23 Ohio St.3d 16, 490 N.E.2d 906 (1986). In *Williams*, this Court found “appellant argues that he was denied his right to confront witnesses by the trial court’s protective order as to two of the State’s witnesses. Confrontational rights are guaranteed to an accused through the Sixth and Fourteenth Amendments to the United States Constitution, *Pointer v. Texas* (1965), 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, and by Section 10, Article I of the Ohio Constitution. Such rights are legitimately constrained by Crim.R. 16(B)(1)(e) which provides the trial court with authority to forbid disclosure of the names and addresses of witnesses ‘if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion.’” *Id.*, at 18.

Appellant cites to no reasons why the logic and timing that was approved by *Williams* should be any different under the new version of Crim.R. 16, as there is none. In fact, logic would dictate that the non-disclosed names should be protected as long as possible. The reasoning behind non-disclosing the witnesses names is so that they do not become subjected to intimidation, coercion, or in this case, death. Having to give the names over well in advance would clearly frustrate this rule and lead to more situation such as what occurred with Michael Nix becoming the target of a drive by shooting. This sentiment is echoed in the staff notes to Division F of the rule which states that the “protective purpose of this process would be destroyed if courts routinely granted continuances of a trial date after conducting the seven-day nondisclosure review.” Therefore, in the interest of justice, non-disclosure is a legitimate constraint on discovery which is tailored to protecting witnesses.

Additionally, in the present case, the State of Ohio provided the non-disclosed witnesses, their statements, and criminal histories the night before opening statements took place. (*Id.*, at 281-288) This is clearly within the bounds of the current rule, and past precedent from this Court. As such, the Appellant's argument must fail.

D. Ineffective Assistance of Counsel Due To Non-Disclosure.

Finally, Appellant argues that the State's nondisclosure of witnesses implicated his right to the effective assistance of counsel. To prevail on such a claim, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Appellant is unable to articulate any "error" committed by trial counsel with respect to their handling of the State's nondisclosure of certain witnesses. His argument thus fails at its inception.

Appellant tries to find support in *Michigan v. Harvey*, 494 U.S. 344 (1990), which examined whether a statement taken in violation of *Michigan v. Jackson*, 475 U.S. 625 (1986) could be used against a defendant to impeach his false or inconsistent testimony. *Harvey* has nothing to do with the discovery rights that must be afforded to a criminal defendant. Given that a defendant has no due process right to the disclosure of inculpatory witnesses, it strains credulity to argue that such a right is somehow embodied in the Sixth Amendment's right to counsel. Accordingly, Appellant's argument should be overruled.

Proposition of Law III:

A capital defendant has no right to individual, sequestered voir dire, and whether to permit voir dire in this manner is a decision left to the discretion of the trial court.⁴

Appellant argues that the trial court erred in denying his motion for individual, sequestered voir dire. Because this Court's precedents preclude such an argument, this proposition of law should be overruled.

This Court has repeatedly declined to craft a rule requiring individual voir dire in death penalty cases:

Independent questioning is not required by Ohio's death penalty statutes, and the United States Supreme Court has not ruled that it is required by the United States Constitution. In fact, many other jurisdictions have held that questioning prospective jurors while gathered as a group is permissible in capital cases. The determination of whether a voir dire in a capital case should be conducted in sequestration is a matter of discretion within the province of the trial judge. The trial judge's determination will not be reversed absent a showing of abuse of discretion. *State v. Mapes*, 19 Ohio St.3d 108, 115, 484 N.E.2d 140, 146 (1985), *modified on other grounds by State v. DePew*, 38 Ohio St.3d 275, 528 N.E.2d 542 (1988) (internal citations omitted).

In an effort to show prejudice, Appellant argues that questions about pretrial publicity and domestic violence somehow tainted the entire panel. This argument resembles that rejected by this Court in *State v. Carter*, 72 Ohio St.3d 545, 1995-Ohio-104, 651 N.E.2d 965. There, the defendant argued prejudice as a result of the "sheer repetition" of the voir dire questions. This Court held that such an argument "assumes that group voir dire is inherently prejudicial, and as such challenges the validity of the court's prior holdings in *Mapes* and" *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988). *Carter*, 72 Ohio St.3d at 555.

⁴Appellant's proposition of law for this section references the legal issue of relevance being left to the jury and is identical to Proposition of Law XVIII. The State believes this to be a typographical error, and that Appellant intended to advance an Eighth and Fourteenth Amendment challenge to the trial court's decision to forego individual, sequestered voir dire.

At trial, Appellant made no objection to questions about pretrial publicity or domestic violence. (In fact, one of the voir dire responses about which he now complains was in response to questions asked by Appellant's trial counsel, not the State. (Appellant's Brief at 33; Tr. 167-70.)) In fact, the State made clear to the jury that news reports were not a reliable source of information:

For those of you who have read stuff, one the reasons [sic] that the Court asks that and brings it up is number one, does everybody understand news reports are not evidence, right? Everybody understand that? News reports are not 100 percent accurate, no offense. That's the nature of the game, right.

Does everybody understand that? Is there anybody who doesn't understand that the news reports don't have access to all the evidence the State has or anything else for that matter? Does everybody understand that?

Okay. And that's why it's critical that whatever you read in the paper this morning or last week or last year, two years ago, you have to consciously set it aside. Does that make sense? Is there anybody here that would say I can't do it. I've got to be honest. I'd like to think I could do it, but I just—I can't say for sure that I can do it? Anybody?

Okay. I ask the record reflect that nobody raised their hand to that question, your Honor.

(Tr. 54.)

The State's efforts to determine whether any jurors had been unduly influenced by pretrial media accounts of Appellant's crimes were entirely proper.

Appellant also seeks to challenge the State's questions about jurors' experience with domestic violence. No objection to these questions was raised before the trial court. Moreover, Appellant does not now identify any question or series of questions that was inappropriate. Instead, Appellant again seemingly takes issue with asking members of the panel about domestic violence in front of other members of the panel, which constitutes an impermissible attack on group voir dire.

Next, Appellant claims that voir dire was "insufficient." (Appellant's Brief at 34.) His chief

complaint is that the trial court refused to submit to the jury his proffered questionnaire. This Court, however, has repeatedly held that such a decision is within the sound discretion of the trial court. *See, e.g., State v. Mills*, 62 Ohio St.3d 357, 365, 582 N.E.2d 972, 981 (1992); *State v. Bedford*, 39 Ohio St.3d 122, 129, 529 N.E.2d 913, 920 (1988). Appellant offers no explanation of how the trial court's decision constituted an abuse of discretion. Appellant also asserts that voir dire did not last long enough. However, the record is devoid of any evidence that the trial court cut short, in any way, trial counsel's questions to the jury or that Appellant sought additional time to conduct voir dire. Moreover, Appellant does not offer any indication of what trial counsel would have asked the members of the venire absent the alleged (though difficult to discern) time limit imposed on voir dire. In the absence of any colorable prejudice to Appellant, no error is present.

The manner in which voir dire is conducted is a discretionary matter for the trial court. Here, the trial court properly exercised its discretion, and this Appellant's third proposition of law should be overruled.

Proposition of Law IV:

When a defendant has killed or threatened a witness in order to prevent him or her from testifying or pursuing criminal charges against him, that defendant has forfeit his right to cross-examine those witnesses.

The Sixth Amendment to the U.S. Constitution provides a defendant the right to be confronted with the witnesses against him. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). This right is not absolute. It can be forfeited by one who intentionally interferes with the ability of the State to provide such confrontation. This has been the law of the United States since 1878, when the United States Supreme Court stated “if a witness is absent by [defendant’s] own wrongful procurement, [defendant] cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.” *Reynolds v. United States*, 98 U.S. 145, 158, 25 L.Ed. 244 (1878). This equitable principle is know as the “forfeiture by wrongdoing” exception to the confrontation clause.

In Ohio, forfeiture by wrongdoing is governed by Evidence Rule 804(B)(6). Specifically, the rule reads:

(6) Forfeiture by wrongdoing. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

Thus, “[u]nder Evid.R. 804(B)(6), a statement offered against a party is not excluded by the hearsay rule ‘if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying.’ Evid.R. 804(B)(6) was adopted in 2001 and is patterned on Fed.R.Evid. 804(B)(6), which was adopted in 1997. Staff Notes (2001), Evid.R.

804(B)(6).” *State v. Hand*, 107 Ohio St.3d 378, 391, 2006-Ohio-18, 840 N.E.2d 151.

The Supreme Court has clarified the predicate proof necessary under the doctrine, holding that uncontroverted hearsay evidence is admissible, despite the requirements of the Sixth Amendment, when the State can show that the declarant’s unavailability was the result of the Defendant’s conduct, and that such conduct was motivated, in part, to make that declarant unavailable. *See Giles v. California*, 554U.S. 353, 359, 128 S.Ct. 2678, 2683, 171 L.Ed.2d 488 (2008). The *Giles* Court noted with approval Ohio’s Evid.R. 804(B)(6), which explicitly incorporates this purpose requirement. *Id.* at 368 n.2.

What is more, twice in recent years, this Court has upheld the use of Evid.R. 804(B)(6) in capital murder cases, holding that the State must prove predicate facts of admissibility by a preponderance-of-the-evidence standard. *Hand*, 107 Ohio St.3d 378, (affirming multiple aggravated murder convictions and death sentence, holding that Evid.R. 804(B)(6) applied even to “potential witnesses” where no judicial proceedings were pending at time of witnesses’ being made unavailable); *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239 (affirming defendant’s convictions and death sentence and upholding use of hearsay evidence pursuant to Evid.R. 804(B)(6) in light of the holding of *Giles v. California*).

Thus, “to be admissible under Evid.R. 804(B)(6), the offering party must show (1) that the party engaged in wrongdoing that resulted in the witness’s unavailability, and (2) that one purpose was to cause the witness to be unavailable at trial.” *Hand*, 107 Ohio St.3d 378, 391 (internal citations omitted); *See also State v. Irizarry*, 8th Dist. Nos. 93353, 93354, 2010-Ohio-5117, ¶ 14.

The standard of review that controls this Court’s review of this issue is abuse of discretion. As a trial court has broad discretion in the admission or exclusion of evidence, so long as the court

exercises that discretion in line with the applicable rules, an appellate court will not reverse absent a clear showing of an abuse of discretion and material prejudice to the complaining party. *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991); *State v. Martin*, 19 Ohio St.3d 122, 129, 483 N.E.2d 1157 (1985). An abuse of discretion is “more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). It does not mean that an appellate court may substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

A. Intent and Purpose Requirement

Appellant argues that the way he killed Allen does not satisfy the intent or purpose requirement of the forfeiture by wrongdoing exception. Appellant argues that at worst, his “heat-of-passion killing” does not demonstrate that he engaged in conduct designed to prevent the witness from testifying. (App. Brief, p. 37) However, Appellant’s understanding of the intent or purpose requirement demonstrates a fatal deficiency in his comprehension of the *Giles* decision as well as completely ignoring the domestic violence exception carved out in *Giles*. For these reasons, his argument must be found wanting.

First and foremost, it must be stated that in order to utilize the forfeiture by wrongdoing exception, the State need not establish that a defendant’s sole motivation was to eliminate the person as a potential witness; it needed to show only that the defendant “was motivated in part by a desire to silence the witness.” *Hand*, 2006-Ohio-18, ¶ 90, citing *United States v. Dhinsa*, 243 F.3d 635, 654 (C.A.2, 2001). As such, the State was not at trial, and is not now on appeal required to

demonstrate that Appellant solely killed Allen with prior calculation and design to prevent her from testifying.

B. Forfeiture By Wrongdoing in Domestic Violence Cases

This point is further aided by the fact that the State demonstrated that there was an ongoing domestic violence on the part of Appellant towards Allen. In that situation, the *Giles* court itself specifically addressed the interplay of intent under the forfeiture by wrongdoing exception to domestic violence cases. In *Giles*, the Supreme Court has specifically addressed how the “forfeiture by wrongdoing” doctrine may be applied in the domestic violence context, stating:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, **the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.**

Giles, 554 U.S. 353, 377 (emphasis added).

In his concurrence, Justice Souter, with whom Justice Ginsburg joined, expounded upon the Court's rationale with respect to situations of domestic violence:

Examining the early cases and commentary, however, reveals two things that count in favor of the Court's understanding of forfeiture when the evidence shows domestic abuse. The first is the substantial indication that the Sixth Amendment was meant to require some degree of intent to thwart the judicial process before thinking it reasonable to hold the confrontation right forfeited; otherwise the right would in practical terms boil down to a measure of reliable hearsay, a view rejected in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). **The second is the absence from the early material of any reason to doubt that the element of intention would normally be satisfied by the intent inferred on the**

part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.

Id. at 380, (Souter, J., concurring) (emphasis added)

Taken together, these passages form the domestic violence exception. Under this exception, the State is required to present circumstantial evidence of domestic abuse sufficient enough to support an inference that the defendant intended to prevent the victim from seeking redress for, or protection from, such abuse through the courts. *See generally Crawford v. Com.*, 55 Va.App. 457, 474, 686 S.E.2d 557 (2009).

In the four years since *Giles* was decided, this Court has been joined by the courts of several other states in applying this reasoning to the use of “forfeiture by wrongdoing” evidence in domestic-violence related homicide cases. Specifically, in *Fry*, 125 Ohio St.3d 163, this Court affirmed the defendant’s convictions and death sentence arising out of the killing of his live-in girlfriend. *Id.* In doing so, this Court cited and followed *Giles*’ holding “that the forfeiture doctrine would apply in many domestic-violence cases where the victim’s statement was introduced after the victim was killed,” thus affirming the admission of statements made by the victim to a domestic-violence advocate. *Id.*, at 180. Thus, while the facts of *Fry* are not “on all fours” with the present case, the case clearly adopts the *Giles* holding and rationale that the forfeiture by wrongdoing doctrine will allow the admission of statements from a victim who has been subjected to domestic violence and is subsequently murdered.

Sister states have not only made the same recognition as this Court, but have also expressly recognized the domestic violence exception to the traditional forfeiture by wrongdoing doctrine. For

example, in *State v. McLaughlin*, the Supreme Court of Missouri, sitting en banc, affirmed the defendant's convictions for raping and murdering his ex-girlfriend, as well as his death sentence. *State v. McLaughlin*, 265 S.W.3d 257 (Mo. 2008) (en banc). The defendant challenged the admission of hearsay statements made by the victim, arguing that the "forfeiture by wrongdoing" exception did not apply "where the purpose of keeping the witness away was not related to the present [homicide] case." *Id.*, at 272. Quoting the *Giles* holding regarding domestic violence cases, the Court disagreed. *See id.* ("Under *Giles*, those parameters are not as circumscribed as defense counsel argues, at least in the context of cases involving domestic violence."). Instead, the Court relied in part on the pattern of domestic violence that predated the murder in holding the victim's hearsay evidence "comes squarely within the type of evidence *Giles* articulated as admissible under the forfeiture by wrongdoing doctrine." *See id.*, at 272-73, n.10 (citing as part of evidence supporting its holding "Ms. Guenther's statements prior to her death about defendant's stalking of her, threats to her, and abusive conduct were made during the time that she was attempting to break from the relationship . . .").

A year later, the issue was taken up in California. In *People v. Banos*, 178 Cal.App.4th 483, 100 Cal.Rptr.3d 476 (Cal.App. 2 Dist. 2009), the California appellate court upheld the defendant's conviction for murdering his ex-girlfriend with a hammer. The sole issue on appeal was defendant's objection to the admission of a series of statements made by the victim to the police during three prior incidents of domestic violence. *Id.* at 492. In light of the *Giles* holding, the Court upheld the admission of the statements, basing its decision on the pattern of assaultive conduct and statements aimed at persuading the victim not to report Banos' conduct to the police made ten months prior to the murder. *Id.* Just as this Court held in *Hand*, 107 Ohio St.3d 378, the California court held that the presence of other possible motives did not negate the inference of the intent to isolate and silence

the victim in order to make use of “forfeiture by wrongdoing” evidence. *Id.* Rather, the court noted nothing in a review of Supreme Court precedent “suggests that the defendant’s sole purpose in killing the victim must be to stop the victim from cooperating with authorities or testifying against the defendant. It strikes us as illogical and inconsistent with the equitable nature of the doctrine to hold that a defendant who otherwise would forfeit confrontation rights by his wrongdoing (intent to dissuade a witness) suddenly regains those confrontation rights if he can demonstrate another evil motive for his conduct.” *Id.*, at 493

But, the essence and most relevant part of the *Banos* holding was that the forfeiture of wrongdoing is “implicated not only when the defendant intends to prevent a witness from testifying in court but also when the defendant’s efforts were designed to dissuade the witness from cooperating with the police or other law enforcement authorities.” *Id.*, at 491. This holding was predicated on the exact wording of the *Giles* decision. The *Banos* court quoted the *Giles* decision that “*where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine.*” *Id.*, citing *Giles*, 128 S.Ct. at 2692–2693 (emphasis in original). The Court then correctly reasoned that “[t]he use of the disjunctive “or,” in our view, reflects the court’s intent to designate two alternative ways of satisfying the factual predicate for application of the forfeiture by wrongdoing doctrine: evidence that the defendant (1) intended to stop the witness from reporting abuse to the authorities; or (2) intended to stop the witness from testifying in a criminal proceeding.” *Id.*

Thereafter, in 2011, an Oregon Court of Appeals had the opportunity to address an argument

almost identical to Appellant's. *See State v. Supanchick*, 245 Or.App. 651, 263 P.3d 378 (2011). To this argument, the court stated "[w]e first reject defendant's contention that, in order for OEC 804(3)(g) to apply, his wrongful conduct had to be planned with the primary objective of preventing the declarant from testifying." *Id.*, at 658. In doing so, the Oregon court cited with approval the *Banos* decision and its language that it would be "illogical and inconsistent with the equitable nature of the doctrine to hold that a defendant who otherwise would forfeit confrontation rights by his wrongdoing (intent to dissuade a witness) suddenly retains those confrontation rights if he can demonstrate another evil motive for his conduct." *Id.*, at 658, citing *Banos*, 178 Cal.App.4th 483, 504, *cert. denied*, 560 U.S. —, 130 S.Ct. 3289, 176 L.Ed.2d 1195 (2010).

Thereafter, the court then continued, finding:

In addition, to the extent that defendant suggests that a defendant must somehow plan in advance his wrongful act with the intent to make the victim unavailable, we reject that contention as well. The Court in *Giles* explains at different points in the opinion that the wrongful conduct at issue must have been "designed to prevent the witness from testifying," 554 U.S. at 359, 128 S.Ct. 2678 (emphasis in original), and that the defendant must have "intended to prevent a witness from testifying," *id.* at 361, 128 S.Ct. 2678. Both of those terms refer interchangeably to the specific intent that the court must find in order for a victim's statements to be admissible under the forfeiture exception. That is, where the court finds that a crime "expressed the intent" to make the witness unavailable and thereby prevent the victim from "reporting [the defendant's conduct] to the authorities or cooperating with a criminal prosecution" against the defendant, the victim's prior statements will be admissible under the forfeiture doctrine. *Id.* at 377, 128 S.Ct. 2678.

Id. at 658.

Taken together, these cases help form and affirm the domestic violence exception to the forfeiture by wrongdoing exception. Under this exception, in a domestic violence case, the State is required to present circumstantial evidence of domestic abuse sufficient enough to support an inference that the defendant expressed the intent to prevent the victim from reporting the crime to

authorities, seeking redress for, or protection from, such abuse thought the courts, to utilize the forfeiture by wrongdoing exception. *See generally Crawford*, 55 Va.App. 457, *Banos*, 178 Cal.App.4th 483, *Supanchick*, 245 Or.App. 651, *McLaughlin*, 265 S.W.3d 257.

As such, in the case at bar, the State was required to present evidence that Appellant and Margaret were involved in a relationship that contained domestic violence, and that Appellant had expressed the intent to isolate Margaret and dissuade her from reporting abuse to the authorities, or seeking some form or redress. The State clearly demonstrated all of these essential facts.

At trial Ziala Danner testified that in 2008 she was at Margaret's home and overheard an argument in the garage between Margaret and Appellant where Margaret's screams turned into sobs while Appellant yelled. (Tr. 339,341-342, 344-345) Ziala believed that whatever was going on behind that door was a dangerous situation. (Tr. 346) Ziala then grabbed the phone, ran upstairs, and dialed 911. (Tr. 346) Once reporting the situation to the 911 operator, Ziala discussed not knowing whether Allen had been killed during the incident, and that she was too scared to go downstairs. (State's Exhibit #2) In detailing her fear, Ziala informed the emergency operator that she would have called earlier, but she thought Appellant would have hurt her too. (Id.) The ultimate result of this incident was that Allen's leg was broken. (Tr. 361)

In investigating the emergency call from Ziala, Officer Smith testified that when she talked with Allen about it, Allen told her that "they had had an argument. She would not disclose what that argument was about. She stated in no way did he harm her. She stated that if anything, she essentially provoked him, that she shoved him. In that conversation she stated that she had either tripped sideways or backwards over an item in the garage." (Tr. 382)

Terri White testified about another incident where she witnessed Appellant choking Allen

with his bare hands at the top of the stairs in her home. (Tr. 431-432) However, this was not the only incident that Terri witnessed. Rather, Terri recalled that while she was traveling in a car with Allen and Appellant, the two argued from Cincinnati to Fairfield, the argument continued into Allen's home, and at some point Allen called for Terri and told her to call the police on Appellant. (Tr. 434-435)

But, Terri was never able to call the police as Appellant took the phone from her and threw it onto the kitchen island. (Tr. 435-436) Appellant told Terri not to call the police. (Tr. 436) Shortly after this, Appellant grabbed Allen by the arm and at first would not let her go. (Tr. 436) Finally, Appellant let Allen go, and later apologized to Terri saying it wasn't anything. (Tr. 437) When Appellant did apologize, he did so while having a .40 caliber automatic gun with him. (Tr. 437)

Terri then described another domestic incident where she came home from a friend's home and heard items being thrown down and a lot of rumbling coming from Allen's bedroom. (Tr. 439) However, Terri testified that the police were not called because "I didn't call the police because my Aunt Missy told me not to. She said what goes on in her house, don't say nothing, and that's what I did." (Tr. 441) This rule, that the domestic violence inside the house stays inside the house, and is not to be mentioned to police or others, was told to Terri by Allen once she realized what was "going on" which meant that Appellant was abusive and controlling. (Tr. 441)

What is more, Terri also was aware of the incident where Allen broke her ankle, testifying that "I mean, like my Aunt Missy was in denial, so she was mad at Ziala because she called the police, and that's when Aunt Missy said nothing really went down. She says that everything was cool, and she was just angry because the police was involved and it happened that way. And she didn't want it to happen that way." (Tr. 443) Further, before a representative from Children's Services came out

to Allen's home to explore the incident with the broken ankle, Allen informed Terri not to discuss any of the other domestic violence incidents that have occurred in the home. (Tr. 445)

Thereafter, Detective David Ausdenmoore testified about what he discovered while searching the computer hard drive from Allen's home. Ausdenmoore found an affidavit written in the first person about an assaultive event. (Tr. 588, State's Exhibit 8) This affidavit was found in a file called "dot perp dot doc" in a document folder that was in the music folder with the user name Margaret (Allen). (Tr. 590) The document was created on September 13th, 2007 at 12:58:48 a.m. (Tr. 591) The affidavit covers events that occurred on the 12th of September that carry over into the 13th. (Tr. 592) State's Exhibit 8 details a domestic violence situation in which assaults, choking, and other forms of beatings occurred. There is a clear intent to "prosecute this matter to the highest and fullest extent." (State's Exhibit 8) The most logical interpretation of State's Exhibit 8 was that Allen had authored this affidavit about a domestic situation in which Appellant had assaulted her and her desire to prosecute the violence to the fullest extent of the law.

All of this evidence when taken in full, and when tied in with the testimony from the domestic violence expert, clearly demonstrate Appellant's domestic abuse of Allen. This evidence supported the finding that Appellant's crimes "expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine." *Giles*, 554 U.S. 353, 377. And the decision by the trial court was not an abuse of discretion as the evidence not only supported Appellant's intent, but was supported by testimony of earlier abuse, and threats and violence "intended to dissuade the victim from resorting to outside help" while he and Allen were in "a continuing relationship of this sort". *Id.* at 377, 380. Therefore, "it would make no sense to suggest

that the oppressing defendant”, Appellant, “miraculously abandoned the dynamics of abuse the instant before he killed his victim,” Allen, “say in a fit of anger.” *Id.*, at 380. Based upon the facts and evidence presented at trial, the trial court properly admitted this evidence pursuant to the forfeiture by wrongdoing exception. See, Evid.R. 804(B)(6).

Appellant also argues that the trial court used the correct standard for the admission of this evidence, but did not expressly use the right words to espouse the correct standard the first time it discussed the forfeiture by wrongdoing standard. (App. Brief p. 38-39) However, as is evinced by the record, the trial court noted the correct rule of evidence, the binding cases from this Court on the issue, and was briefed in full on this issue by the parties pre-trial. (Tr. 404, 609-620) As such, this argument is a non-issue as the trial court was provided with and utilized the correct rule and law to determine this issue.

And, as has been fully briefed, the evidence in the present case was properly admitted under the forfeiture by wrongdoing doctrine. As such, even assuming *arguendo* that the trial court initially omitted the purpose requirement, “[a]n appellate court may decide an issue on grounds different from those determined by the trial courts when the evidentiary basis upon which the appellate court decides the legal issue was addressed before the trial court and made a part of the record of the trial proceeding.” *Stone Excavating, Inc. v. Newmark Homes, Inc.*, 2d Dist. No. 20307, 2004-Ohio-4119, ¶ 14, citing *State v. Peagler*, 76 Ohio St.3d 496, 1996-Ohio-73, 668 N.E.2d 489; See also *State v. Boles*, 190 Ohio App.3d 431, 2010-Ohio-5503, 942 N.E.2d 417. Thus, as the legal issue was addressed before the trial court, and the evidence was proper, no error will lie.

Therefore, as the trial court made a proper determination pursuant to Evid.R. 804(B)(6) and the domestic violence exception, Appellant's fourth proposition of law should be denied.

Proposition of Law V:

A trial court neither abuses its discretion nor violates a defendant's rights by admitting relevant, probative evidence.

With his fifth proposition of law, Appellant challenges the admission of numerous items of evidence. The State addresses each in turn.

A. Appellant's Tattoos

Appellant argues that photographs depicting him with visible tattoos should not have been introduced. Appellant failed to object to the admission of tattoo evidence at trial, so he has thus waived all review save that for plain error. *See* Crim.R. 52(B).

Tattoos are generally admissible to identify a defendant. *See, e.g., United States v. Thomas*, 321 F.3d 627 (C.A.7 2003). Ohio courts have repeatedly approved of the admission of tattoo evidence for this purpose. *See State v. Smith*, 10th Dist. Nos. 08AP-736, 09AP-72, 2009-Ohio-2166 (defendant identified the tattoos on the robber's hands as the defendant's tattoos); *State v. Webster*, 1st Dist. Nos. C-070027, C- 070028, 2008-Ohio-1636 (tattoo stating "Bonafide Hustla" on defendant's forehead admissible to identify defendant); *State v. Morrison*, 10th Dist. Nos, 91AP-90, 91AP- 91, 1991 WL 325710 (victim's identification of rapist by demon-like tattoo on his chest considered credible).

In this case, the photographs of Appellant's tattoos were introduced, admitted, and remarked on in closing argument for the sole purposes of identification. The State's reference to the tattoos was brief, and was directly tied to identification: "[a]nd the tattoos, you know, there's some pictures of him on the cruise with the same tattoos just to verify that the guy that walked in and reacted that way to Toby Williamson is the same guy that was with Margaret on the cruise and living with her."

(Tr. 1975.) The tattoos were not used as improper propensity evidence, and the trial court did not abuse its discretion in admitting them into evidence.

B. The Testimony of Lemuel Johnson

At trial, Lemuel Johnson testified that he knew Appellant because he and Appellant both sold drugs in downtown Cincinnati from the late 1990's until the time of trial. (Tr. 1733-34.) Prior to being incarcerated, Mr. Johnson had attempted to intervene to settle a dispute between a friend, Ricardo "Little Rick" Williams, and Appellant. (Tr. 1734.) In doing so, Mr. Johnson agreed to sell drugs with Appellant. (Tr. 1738-39.) During the course of their conversations, Mr. Johnson told Appellant that Mr. Johnson's brother had been convicted of a crime. (Tr. 1739-40.) Appellant told Mr. Johnson that he knew of the witnesses in Mr. Johnson's brother's case, and that because Appellant needed money, he would "take care of witnesses" if Mr. Johnson so requested. (Tr. 1745-46.) When Mr. Johnson hesitated in accepting this proposition, Appellant started to "talked about some things that he did ... just to kind of get my confidence in him." (Tr. 1747.) Appellant argues that this testimony was improperly admitted.

The admission or exclusion of relevant evidence is, of course, reviewed for abuse of discretion. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 543 (1987), paragraph two of the syllabus. Under Evid.R. 404(B), evidence of other crimes, wrongs, or acts may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Here, Appellant's offer to kill witnesses that were set to testify against Mr. Johnson's brother was admissible as proof of *modus operandi*.

This Court has repeatedly made clear that *modus operandi* evidence is admissible because

“it provides a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator.” *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, ¶ 104, quoting *State v. Lowe*, 69 Ohio St.3d 527, 531, 634 N.E.2d 616 (1994). In this case, Mr. Johnson’s testimony provided Appellant’s fingerprint: he killed witnesses in order to silence them. Mr. Johnson’s testimony regarding both Appellant’s offer to kill witnesses against Mr. Johnson’s brother (Tr. 1745-46) and regarding Appellant’s boast that he had done so in the past (Tr. 1781) established the method by which Appellant commits murder. He finds an individual who is going to provide testimony in a criminal case and executes them.

In *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, this Court approved of the admission of testimony that the defendant had romantically solicited women other than his victim. In doing so, this Court reasoned:

Hammers and Ressler helped to establish appellant's opportunity, preparation, and plan to acquaint himself and be alone with Murray [the victim]. Appellant's phone calls to Hammers and Ressler showed that appellant developed an interest in his co-workers and asked them out. This pattern of behavior showed the likelihood that appellant also developed an interest in Murray. Thus, the jury could reasonably infer from the testimony of Hammers and Ressler that appellant had asked Murray for a ride after work.

Id. at ¶ 84.

In the instant case, Appellant’s pattern of behavior showed the likelihood that Appellant also killed Germaine Evans, the sole witness to the murder of Margaret Allen.

That Appellant’s prior offer to kill witnesses—and his admission, made in that hope of convincing Mr. Johnson to accept his offer, that he had done so in the past—arose in a context that “differ[ed] in some detail from the charged offenses does not affect the admissibility of the other-acts

evidence.” *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 115. Instead, such differences go to weight, not admissibility. *Id.* Moreover, such evidence should not have been excluded under Evid.R. 403. Even particularly prejudicial or inflammatory evidence is admissible if sufficiently probative. For instance, in *Hunter*, this Court approved of the admission of testimony that the defendant had previously abused his three-year-old victim. 2011-Ohio-6524, at ¶ 113-15.

Mr. Johnson’s testimony was properly admitted under Evid.R. 404(B), and to the extent his proposition of law argues otherwise, it should be overruled.

C. The Statements of Margaret Allen

In his fourth proposition of law, Appellant argues that the introduction of statements made by Margaret Allen should have been deemed inadmissible hearsay. The State has responded to those arguments in Section IV, *supra*. In his fifth proposition of law, Appellant argues that regardless of whether those statements were hearsay, some portions of them should have been excluded under Evid.R. 403 or 404. No objection was made to the statements on that basis at trial, so Appellant has waived all review save that for plain error. And the trial court committed no error, plain or otherwise, in the admission of those statements.

During trial, the State adduced testimony that Appellant had previously engaged in domestic violence against Margaret Allen. (Tr. 336-363; 424-446.) These incidents, as argued elsewhere, were relevant in that they tended to prove that Appellant intended to kill Ms. Allen. *See State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955. Witnesses also testified that Ms. Allen had told them that Appellant was a “killer” (Tr. 497-98) and a person who robbed drug dealers (Tr. 498-99). The statements were offered in furtherance of showing the previous acts of domestic

violence against Ms. Allen. Because the jury also learned that Ms. Allen had repeatedly denied that Appellant had physically harmed her (See, e.g., Tr. 363, 377), the State needed to proffer an explanation as to why that was so. The testimony of Ms. Luther did just that: it demonstrated that Ms. Allen would not have reported Appellant's crimes against her out of fear for what he might do. Sadly, Ms. Allen herself predicted what Appellant would do to her if Appellant ever became angry enough, telling Ms. Mam he would kill her if he learned another man sent her flowers. (Tr. 548.)

The trial court did not abuse its discretion or commit plain error in allowing testimony regarding the statements of Margaret Allen. To the extent Appellant suggests otherwise, his proposition of law should be overruled.

D. Testimony About McKelton As A Drug Dealer

For the first time on appeal, Appellant argues that three snippets of testimony regarding his activities as a drug dealer should not have been admitted. Because the trial court did not commit plain error in allowing the testimony, the State disagrees.

First, Appellant complains about the following testimony of Crystal Evans:

Q. Do you see at the top of [page] 19 where Detective Luke asks you, this is his business, we'll put his business calls here. And your response is, Yeah?

A. Yeah, I see it.

Q. Okay. What business was Calvin in on March 2nd, 2009?

A. March 2nd, 2009, he was—I guess he was probably selling drugs, doing whatever it was he was doing. I don't know what all he was doing, but that was his business line. So I don't know what all he was into.

(Tr. 1065-66.)

The statement was properly admitted to provide context to Ms. Evans' statement that

Appellant used a particular phone number. Moreover, Ms. Evans acknowledges that she didn't "know what all he was doing." (Tr. 1065.) And regardless of whether the statement admissible, Appellant has failed to demonstrate prejudice sufficient to establish plain error.

Appellant also now objects to part of Charles Bryant's testimony. Mr. Bryant testified that Appellant confessed to him that he killed Ms. Allen. (Tr. 989-90.) Following that testimony, the State asked Mr. Bryant how he knew Appellant. (Tr. 990.) Mr. Bryant acknowledged that he first met Appellant in the Hamilton County Justice Center. (Id.) The State asked for details about the conversation:

Q. Okay. did he [Appellant] ever indicate whether he meant to do it [kill Margaret Allen] or not?

A. Not really, that it just got out of hand.

Q. Do you know approximately when this conversation was? Do you have a--strike that. Let me ask you this. Do you know exactly when this conversation was?

A. No, I don't know exactly when it was.

Q. Do you know--do you have an estimate of when the conversation was?

A. About July, June or July. It was hot out. It was summertime.

Q. And is there a reason why he would talk to you in that way or confide in you?

A. Well, maybe we--we had dealings, and like it was a couple altercations, and we were together, and like some--like little-little altercation happen [sic], and I was there. I guess he seen I was there for him or something. And you know, I guess I confide in me as a friend or something.

Q. Did you have business with him?

A. Yes, I did.

Q. And when we talk about business, are we talking about dope dealing?

A. Yes.

Q. Why are you willing to tell the police about this? Why are you talking about this?

A. In all honesty, my lawyer, he kind of told me if I had any information with something, just come forward and I can help myself out some, and plus I been in the news so—

Q. I'm sorry, I missed that last part.

A. I been in the news, so I mean, it was more or less me helping myself or something.

Q. All right. Have you been promised anything specifically by anybody?

A. No.

(Tr. 991-93.)

Mr. Bryant's testimony regarding Appellant's drug dealing behavior was fleeting, at most. But it provided the jury the context to understand why Appellant would confess a murder to Mr. Bryant: the two had worked together in the past, dealing drugs. The evidence was admissible, and was not unduly prejudicial.

Appellant also claims that the trial court erred in permitting Andre Ridley to testify that after he killed Ms. Allen, Appellant gave Mr. Evans twenty ounces of crack cocaine worth tens of thousands of dollars. (Tr. 913-14.) No plain error was committed in introducing this evidence, either, as it clearly could have been construed by the jury as an inducement for Mr. Evans to remain silent about what he saw.

Finally, Appellant claims that "the jury was exposed to irrelevant testimony about [Appellant] enjoying a lavish lifestyle as a drug dealer." (Appellant's Brief at 56.) But this evidence was relevant, as it established the nature of the relationship between Appellant and Ms. Allen. Moreover, contrary to Appellant's implication, the State never argued or introduced testimony that

the money Appellant gave Ms. Allen or used to buy her gifts was the proceeds of drug trafficking. Accordingly, the trial court committed no plain error in admitting this evidence.

E. References to Rap Songs

In talking about Mr. Evans' account of the murder of Margaret Allen, Mr. Ridley testified:

He didn't say why [he threw drugs down near Ms. Allen's body], but I-I said, where he [Appellant] get that from, you know, throwing dope down by a body. He say, he already staged the scene. And he said, you know, he got—he said he got that shit off that biggie song. It's a rap song.

(Tr. 915.)

Appellant did not object to this testimony at trial. The testimony was relevant, as it demonstrated exactly how much detail Mr. Evans' description of Appellant's crime contained. Moreover, Appellant has not even attempted to explain how merely referencing a rap song prejudiced him at trial. Accordingly, he cannot show plain error.

F. J.C. Battles & Co.

At trial, the parties disputed the meaning and significance of a note Appellant sent to Crystal Evans from the Butler County jail. Detective Witherell testified that in the letter, Appellant proposed a plan to post the names of the State's witnesses on the wall of the "J.C. Battles Funeral Parlor." (Tr. 1544.) "I think the underlying message is—although it's subtle, but I think the message exists that we're going to put this witness list up at the funeral home, and that's meant for people to draw their own conclusions in terms of their safety." (T.p 1569.)

Detective Witherell's testimony was both relevant and highly probative, as it was evidence that Appellant meant to threaten witnesses against him. Appellant's threats towards a witness was

probative of consciousness of guilt, and thus admissible against him at trial. “Under Ohio law, evidence of threats or intimidation of witnesses reflects a consciousness of guilt and is admissible as an admission by conduct.” *State v. Parnell*, 10th Dist. No. 11AP-257, 2011-Ohio-6564, ¶ 33, quoting *State v. Exum*, 10th Dist. No. 05AP-894, 2007-Ohio-2648, ¶ 23. Appellant’s trial counsel extensively cross examined Detective Witherell regarding his assertion as to the letter and the significance of it. (Jury Trial Tr. at 1554-65.)

Detective Witherell properly testified that from his experience as a Cincinnati police officer, Appellant’s letter was an effort to describe a plan to intimidate witnesses. The trial court did not abuse its discretion in permitting this testimony.

G. “Generalized Testimony”

Appellant complains of instances of “generalized testimony.” As an initial matter, the legal proposition that Appellant advances—that all “generalized testimony” is prohibited—is dubious, at best.⁵ Appellant’s sole support for his argument is *United States v. Schwartz*, 790 F.2d 1059 (3d Cir. 1986). *Schwartz*, though, dealt with the admission of other-acts evidence under F.R.E. 404(B), and held that in that case, the “generalized testimony” regarding prior bad acts was inadmissible because, since it was not specific, it could only have been construed as propensity evidence. *Id.* at 1062. The evidence Appellant complains of in the instant case is not of the same nature.

Marcus Sneed testified he asked Appellant “about what happened with his girlfriend that was going on in the streets.” (Tr. 1598.) He also asked Appellant “bluntly again, was that the guy

⁵A Westlaw search reveals that this Court has only used the phrase “generalized testimony” once, and that was in regards to certain types of expert testimony, which it deemed to be admissible. *State v. Buell*, 22 Ohio St.3d 124, 129, 489 N.E.2d 795 (1986).

[Germaine Evans] that help you get rid of he body that everybody saying on the street.” (Tr. 1602.) These statements, to which Appellant did not object at trial, were not offered to prove that Appellant killed Ms. Allen and Germaine Evans because “everybody” said he had done so. Instead, the statements recited Ms. Sneed’s question to Appellant and provided context for the conversation. As such, they were admissible and not unduly prejudicial. No plain error was committed.

Detective Karaguleff was dispatched to investigate a deceased body that had been found in Inwood Park in Cincinnati. (Tr. 1300.) He found Germaine’s body, with an apparent gunshot wound to the head. (Tr. 1309.) While Detective Karaguleff was at the crime scene, Germaine’s family arrived. (Tr. 1316.) They told the detective that they believed Germaine had been killed by Appellant because Germaine had helped Appellant move Margaret’s body. (Tr. 1316.) These statements were admissible as excited utterances:

Q. And as the people in this group were, you said upset?

A. They were upset. Some were crying. They were emotional, yelling, screaming, wailing.

Q. Okay. And were these emotions you’re observing in reaction to the crime scene and what had happened to Mick up those steps.

A. Well, at the time Germaine was not identified.

Q. By you guys?

A. By us at all. They truly believed that the body up in the woods was Germaine’s body.

Q. These folks that just pulled up?

A. Yes. They had evidently gotten word that there was a body found up there and came up and were insistent. They were providing clothing descriptions, tattoo descriptions.

Q. Were they correct?

A. Yes.

Q. And were they communicating this information to you in that emotional, excited state?

A. Yes.

(Tr. 1315-16.)

Under Evid.R. 803(2), a hearsay statement is admissible if it relates to a “startling even or condition made while the declarant was under the stress of excitement caused by the event or condition.” As argued more extensively in Section XI, *infra*, these statements were properly admitted.

Crystal Evans testified that for two or three weeks following Germaine’s death, she lived with Sheena Land, the mother of Germaine’s child. (Tr. 1107.) She testified that she did so because she was afraid of Appellant. (Tr. 1107-08.) She made a fleeting reference to “rumors that he [Appellant] had something to do with my brother’s death.” (Tr. 1108.) No objection was made to this testimony at trial. And the testimony was relevant in that it explained why she forgot to provide information to police detectives during her initial interview with them. (*Id.*) The testimony does not constitute plain error.

In explaining why she contacted Crystal Evans in an effort to locate Germaine, Detective Luke testified that she had received information from an anonymous source that Germaine had been present when Appellant murdered Margaret Allen. (Tr. 1248-49.) The trial court gave a contemporaneous limiting instruction regarding this testimony, telling the jury:

Ladies and gentlemen, I’m going to permit it because it goes to this officer’s state of mind. You should not take her testimony at this point for the truth of the matter, only to show that she received this information at the meeting, and as a result of that, did something subsequent. So it’s not being offered for the truth of the matter. It is being offered for her state of mind.

(Tr. 1249.)

Thus, the testimony was admissible for this limited purpose. Contrary to Appellant's assertion, it was not unduly prejudicial under Evid.R. 403(A) (an argument that was not made before the trial court). Multiple witnesses testified at trial that Germaine was present when Appellant killed Margaret Allen. (Tr. 909, 1600, 1748.) Appellant also complains that Detective Luke "jumped to conclusions several times." He does not, however, offer any reason as to why her statements in this vein were inadmissible or how they unfairly prejudiced him.

Sheridan Evans testified regarding the Cincinnati Police Department:

I felt like—I felt like they were doing their job, but I also felt like homicide [detectives] is the fault of my son's death for the simple reason that when they called my daughter, Crystal Evans, and told her that they were looking for Germaine, and they—he could tie Calvin to that murder, to even do that was like throwing meat to a tiger when you know this man is a serial killer. And that's how I felt and that's how I still feel.

(Tr. 1836.)

No objection was made to this testimony. The testimony was offered to explain Sheridan's cooperation with the police in the investigation of the death of her son. This passing reference, unremarked upon and not sought by the State, does not constitute plain error.

H. McKelton "As A Misogynist"

Appellant's argument on this point is built on a faulty premise: that the State attempted to paint a picture of Appellant as an individual who hated women. The State never made any such argument, explicitly or implicitly. And the evidence that was introduced that Appellant now claims proves he is a misogynist was properly admitted.

Appellant takes issue with the admission of the testimony of Audrey Dumas. Ms. Dumas

was an extremely biased witness (in favor of Appellant), and the State was entitled to bring that out during its examination of her. The two were in an on-again, off-again relationship that seemed more on than off at the time of trial. Ms. Dumas regularly brought money to Appellant while he was incarcerated awaiting trial. (Tr. 1368.) Appellant was outraged when Ms. Dumas did not visit often enough. (Tr. 1455 & Ex. 77.) All of this evidence demonstrated that Ms. Dumas was in a relationship with Appellant that cast doubt on her credibility as a witness.

For the same reason—that the evidence makes Appellant appear misogynistic—Appellant also now objects (for the first time) to Mr. Bryant's testimony regarding Appellant's confession to the murder of Margaret Allen. Mr. Bryant testified:

Q. And at some point in time, did he start talking about his relationship with his female attorney?

A. Yes.

Q. Did he identify who he was talking about?

A. Not in the beginning, but as more time went on, he did.

Q. All right.

A. And I picked up.

Q. What did he tell you?

A. Well, when it went on to more of the conversation about not being trusted and unfaithfulness, first he asked me if I found out my girlfriend was unfaithful, what would I do to her. And probably—sometime I said I might spaz out or might choke her up or slap her or something like that. And he said, Yeah, I can—I can understand—understand where you going with that, you know what I mean. And that the—more or less that it was—I might have got out of hand with mine and maybe did some stupid stuff, but not in those words.

Q. All right. And did you know,—did you know Margaret Allen prior to this conversation?

A. Not on a personal level I didn't.

Q. And you said later on in the conversation she was identified. How did that conversation go?

A. Well, it was no secret that he was dealing with a female attorney. So at first he said it was a nickname like Mag or Marge or something like that. When he said it, I understood who he was talking about.

Q. All right. And what did he say about her?

A. That she was scandalous and running her mouth, and it was a whole lot foul words [sic].

Q. All right. Did he ever talk about her death?

A. Yes. Later on, that he choked her.

Q. All right. And prior to him telling you he choked her, what was he telling you happened?

A. That they basically got in an argument over her pregnancy. He didn't know if it was—well, I guess it was some point in time she must have told him she didn't know if she was pregnant by him or some other person. And I guess from the information or whatever, investigation that he found out it wasn't his, so they got into an argument and he choked her.

(Tr. 988-90.)

Mr. Bryant's testimony described the details of the conversation during which Appellant confessed to murder. His account of that confession provided motive: that Appellant was upset with Ms. Allen because he did not view her as trustworthy. The adverse statements were clearly directed towards Ms. Allen, not all women. And even if they were directed towards all women, Mr. Bryant's testimony does not constitute plain error.

For the proposition that the foregoing testimony requires reversal, Appellant seeks support in this Court's decision in *State v. Johnson*, 71 Ohio St.3d 332, 1994-Ohio-304, 643 N.E.2d 1098.

Johnson, contrary to Appellant's assertion, did not indicate that reversal was required because of a single reference to the defendant being a "son of a bitch." (Appellant's brief at 62.) Instead, the reversal was based on "several instances" of evidence of the defendant's bad character that "were in fact objected to at trial." *Johnson*, 71 Ohio St.3d at 340. That evidence included a detective testifying that during an interview, the defendant "continually referred to women as 'whores' or 'bitches.'" *Id.* No such evidence was presented in the instant case, nor was a contemporaneous objection made. Because Appellant has failed to demonstrate plain error, his challenge to the testimony of Ms. Dumas and Mr. Bryant should be overruled.

I. Audrey Dumas

Once again, Appellant claims that testimony, to which no objection was made to trial, should not have been admitted. Appellant contends that a series of questions and answers about Ms. Dumas's "role" with respect to Appellant was improper. (Appellant's Brief at 63-64.) The questions about her "role" were relevant and admissible for two reasons. First, truthful answers would have showed her bias and prejudice. If Ms. Dumas had testified, consistently with what the State believes to be true, that she "set guys at Vito's to then get robbed later by Appellant" (Tr. 1457), this would further demonstrate the extraordinarily close nature of her relationship to Appellant.

But moreover, during what Appellant calls "an irrelevant and prejudicial phone call" with Ms. Dumas, Appellant excoriates Ms. Dumas to "play [her] role" to the fullest. (Tr. 0457-58 & Ex. 77.) Her role could logically be inferred to be not just one of a source of financial support, but also to stand by Appellant, including providing him with a false alibi. The testimony was thus probative of Ms. Dumas's bias and Appellant's consciousness of guilt, and was properly admitted.

J. The Statement of and Letters to Crystal Evans

The transcript of Detective Luke's interview with Crystal Evans was admitted without objection from Appellant at trial. (Tr. 1871 & Ex. 56.) Now, though, Appellant claims that Detective's Luke's questions contained material that was irrelevant, prejudicial, or that they constituted other-acts evidence. (Appellant's Brief at 65.) The State disagrees.

The entire interview between Detective Luke and Crystal Evans was relevant in order to show the context of Crystal's statements to the police. Her answers to questions do not really make sense without the context of the questions that were being asked. Moreover, Detective Luke's questions to Crystal can hardly be considered outcome-determinative of the trial so as to show plain error.

Appellant's letters from jail to Crystal were also relevant and highly probative. Crystal was an important witness, but she was also a witness with a motive to lie for Appellant: she had been involved with him and he is the mother of their child. Those letters were probative of their relationship, and their admission did not constitute error, plain or otherwise.

K. Appellant's Other Objections

Appellant raises challenges to several other pieces of evidence to which no objection was made at trial. The State addresses each in turn.

Appellant claims that portions of Ms. Danner's 911 call the night Appellant broke Ms. Allen's ankle should not have been admitted. Appellant's hearsay objection is addressed in Section XI, *infra*. But the statement that Appellant had previously choked Ms. Allen with a phone cord was admissible for the same purpose as his other acts of domestic violence against her: to show intent

and a lack of mistake when he choked her and caused her death. *See, e.g., Hunter, supra.* Its admission, therefore, was not plain error.

Without objection, the contents of Appellant's bedroom were admitted into evidence. Included among those items was 'The Anarchist Cookbook.' (Tr. 1868 & Ex. 28.) The book was admitted, along with Appellant's other possessions, merely to prove that Appellant lived in Ms. Allen's house with Ms. Allen. No reference was made to the contents of the book, and Appellant makes no argument on appeal that any of the methods suggested in the book were implicated in the murder charges against Appellant. Any error in its admission is, therefore, harmless beyond a reasonable doubt; such error certainly would not fall into the category of plain error.

Next, Appellant challenges a single question asked on redirect examination of Mindie Nagel, Ms. Allen's physical therapist. During cross-examination, Appellant's trial counsel questioned Ms. Nagel about why Ms. Allen's statements about how her ankle had been broken were important. Ms. Nagel explained:

Like I said, it depends on how she fell. It's not so much what she tripped over that concerns me. It's the way in which she tripped over it.

If you trip over something and you fall medially, meaning the way you're standing right now, if you fell to your left, that makes a difference to me than if you fell to your right or if your foot got stuck in something and you fall forward. That makes a difference to me. Or if your foot gets stuck in something and you fall backwards makes a difference to me. Or if your foot gets stuck in something and you fall backwards makes a difference to me.

The soft tissue damage—we were aware that her ankle was broken. When you break your ankle, you don't just break your ankle. There are a lot of other things, a lot of other structures associated with your ankle. So when you hurt yourself, we want to think about what other structures could also be damaged. So we knew her bones were broken because the surgery had already been done, but I have to think about what way she fell so that I can figure out maybe what soft tissue structures may have been involved as well, because that would affect what exercises I might give her.

(Tr. 479-80.)

On redirect, the State asked whether her treatment plan would be different if Ms. Allen had told her that “her boyfriend broke her ankle by slamming a car door on it repeatedly.” (Tr. 481-82.) The question was in direct response to Appellant’s cross-examination, which was intended to suggest that Ms. Allen’s broken ankle was not the product of Appellant’s wrongdoing. The question and answer were proper, and no plain error was committed in permitting them.

Appellant claims that Mr. Bryant’s testimony that he and Appellant were riding in a car with no destination in mind was unfairly prejudicial. The State is at odds to find prejudice in that testimony. Appellant also contends that Mr. Bryant’s testimony that Appellant was drinking vodka while in the car was also prejudicial. Mr. Bryant never indicated who was driving the car, so even assuming Appellant believes a jury would conclude that a drunk driver is also a multiple murderer, the actual testimony does not support his argument. Accordingly, no plain error is present here.

Further, during Mr. Bryant’s testimony, Mr. Bryant briefly referenced that he first met Appellant at the Hamilton County Justice Center when Appellant was “in there for intimidation of a witness.” (Tr. 990.) Mr. Bryant later clarified his testimony to indicate that he did not know why Appellant was in jail:

Q. All right. When you mentioned the nature of the charges that he was there on, those charges of intimidation of a witness, did you have any conversations with him about that at that time?

A. About what?

Q. About intimidation of witnesses?

A. No. I just know he said they had me in here for intimidation of a witness or something.

Q. All right.

A. Intimidation of witness or contempt of court, something like that.
(Tr. 991.)

The preceding testimony shows that Mr. Bryant's testimony was not adduced as evidence of prior bad acts. Instead, it was only introduced to offer context as to the manner in which he and Appellant met. And Mr. Bryant made clear to the jury that he did not know the nature of the charge against Appellant at that time. Accordingly, Appellant has failed to show plain error in its admission.

Appellant also objects to testimony by Detective Gregory regarding Mr. Nix's statements that he had been the target of a shooting. Detective Gregory described for the jury the incident on September 26th, when Mr. Nix called him to report that someone had fired a gun at him. (Id.) At a birthday party, a mutual acquaintance of Mr. Nix and Appellant approached Mr. Nix and asked him about Appellant's trial. (Tr. 1813.) Mr. Nix denied any involvement in or knowledge of the trial. (Id.) Twenty minutes later, Mr. Nix walked outside and shots were fired at him from a car that drove past him. (Tr. 1813.) As a result, Detective Gregory arranged a hotel room for Mr. Nix. (Tr. 1815.) After a few days, Mr. Nix suddenly and unexpectedly disappeared from the hotel. (Id.) He was located the morning of Detective Gregory's testimony. (Id.)

The testimony was properly admitted for two purposes. First, as the trial court ruled, it was admissible to show Mr. Nix's state of mind. The jury had just seen Mr. Nix called to the stand and refuse to testify. (Tr. 1785.) The detective's testimony showed why that had happened. Secondly, the testimony was highly probative of Appellant's consciousness of guilt. *See Parnell, supra*. Thus, admission of Detective Gregory's testimony did not constitute plain error.

In a non-responsive answer to a question posed by the State, Detective Gregory revealed that Appellant's nickname is "C-Murderer." (Tr. 1805.) Appellant made no objection to this testimony. Appellant cites this Court's decision in *State v. Gillard*, 40 Ohio St.3d 226, 533 N.E.2d 272 (1988). In that case, although the State made far more use of a pejorative nickname than in the present case, this Court declined to find plain error:

Gillard's nickname was "Dirty John." In opening statement, the prosecution said that, by the time the case was over, the jury would "know exactly why that man is known as Dirty John." On cross-examination, the prosecution asked Gillard: "[T]he next thing that you did was to shoot an innocent sleeping woman * * * and put a bullet in her head, and that's why you're called Dirty John, isn't it?"

The court of appeals condemned these uses of the nickname as improper attempts to impugn Gillard's character. See Evid.R. 404(A)(1). While we agree it was improper, we observe that the defense did not object. The error is therefore waived unless it is plain error. Crim.R. 52(B). Weighing the evidence of guilt against the relative insignificance of the "Dirty John" nickname, it is not clear that, had the nickname not been improperly used, the outcome of the trial would have been different. See *State v. Long* (1978), 53 Ohio St.2d 91, 97, 7 O.O.3d 178, 181, 372 N.E.2d 804, 808.

Id., 40 Ohio St.3d at 230.

Just as in *Gillard*, Appellant failed to object at trial. Unlike *Gillard*, the nickname was only referenced once, and not by a prosecutor (and not during opening statements). Accordingly, this Court should follow *Gillard* and decline to find plain error.

Finally, Mr. Sneed was first asked about "Fat Boy" by Appellant's trial counsel on cross-examination. (Tr. 1616-17.) On redirect, the State confirmed Mr. Sneed's knowledge of "Fat Boy," and that this individual was apparently deceased. (Tr. 1640.) When the State asked Mr. Sneed about his conversations with Appellant about Fat Boy, Appellant objected and the trial court sustained the objection. (*Id.*) The trial court also told the jury to disregard Mr. Sneed's answer, which was given before the objection. (*Id.*) Juries are presumed to follow a court's instructions, including

instructions to disregard testimony. *State v. Eafford*, — Ohio St.3d —, 2012-Ohio-2224, ¶ 17; *State v. Zuern*, 32 Ohio St.3d 56, 61, 512 N.E.2d 585, 590 (1987). The trial court sustained Appellant’s objection; thus, no error is present.

L. Autopsy and Crime Scene Photographs

Appellant claims that the autopsy photographs of Ms. Allen should have been excluded under Evid.R. 403(A). Those photographs were admitted without objection at trial. (Tr. 1871-72.) Thus, again, Appellant can prevail only by showing plain error.

As this Court recently confirmed, in capital cases, “nonrepetitive photographs, even is gruesome, are admissible as long as the probative value of each photograph substantially outweighs the danger of material prejudice to the accused.” *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 138. In the present case, just as in *Lang*, each of the photographs supported the testimony of a witness and were not repetitive.⁶

Appellant’s argument is based on his assertion that he “never challenged the manner and cause of death.” (Appellant’s Brief at 67.) This may be true, but, Appellant contested the identity of the killer. The only eyewitness to the murder of Margaret Allen, Germaine Evans, was also murdered by Appellant. Thus, Appellant’s guilt was largely demonstrated by his repeated confessions that he had choked Ms. Allen. Accordingly, her manner of death was very much pertinent to the State’s case against Appellant. The introduction of the autopsy photographs did not

⁶Appellant implies that one of the jurors fainted upon the sight of the photographs. (Appellant’s Brief at 67.) This is untrue. The trial court described the incident in question, and indicated that the juror was “feeling uneasy.” (Tr. 1409, 1413.) Moreover, this juror had disclosed during voir dire that she “faints sometimes spontaneously over the sight of events.” (Tr. 255.) Appellant objected to excusing this witness for cause. (Id.)

constitute error, plain or otherwise.

M. Conclusion

Through this proposition of law, Appellant claims error in the admission of several pieces of evidence; with regards to most of them, no objection was raised at trial. The trial court did not abuse its discretion in admitting any of the evidence of which Appellant now claims. Thus, his fifth proposition of law should be overruled.

Proposition of Law VI:

A party may impeach its own witness with a prior inconsistent statement when that party demonstrates surprise and prejudice.

Gerald Wilson was incarcerated in the Hamilton County Justice Center at the time of trial. (Tr. 1648.) Although Mr. Wilson had previously told police that Appellant had confessed to the murders of both Margaret and Germaine in his presence, on the witness stand he claimed that he had fabricated the story at the request of a fellow inmate named Quincy Jones. (Tr. 1657-58 & Ex. 15.) Over Appellant's objection, Mr. Wilson's interview with the police was played before the jury. (Tr. 1654-55.) Appellant claims that the admission of the prior inconsistent statement was error.

Under Evid.R. 607(A), the credibility of a witness may be impeached by any party, including the party who calls the witness. However, a party may not use a prior inconsistent statement to impeach its own witness unless the party can show surprise, and affirmative damage. Once a party demonstrates these two elements, it may impeach under Evid.R. 613.

The State establishes surprise if its witness's testimony is materially inconsistent with a prior oral or written statement and the State had no reason to believe that its witness would recant the original statement when called to testify. "Absent an express intention by the witness to the contrary, the state has the right to presume that its witness will testify in accordance with a prior statement." *State v. Stevens*, 12th Dist. No. CA2009-01-031, 2009-Ohio-6045, ¶ 19. Affirmative damage "is established when the witness testifies to facts which contradict, deny, or harm the party's trial position." *Ferguson Realtors v. Butts*, 37 Ohio App.3d 30 (12th Dist. 1987), paragraph two of the syllabus.

In this case, the State satisfied both elements of Evid.R. 607. The trial court specifically held that the State was surprised by Mr. Wilson's sudden departure from his prior statements. (Tr. 1666-

67.) Appellant has pointed to nothing in the record to contradict this finding. Moreover, Mr. Wilson's testimony damaged the State's case. Contrary to Appellant disingenuous assertion to the contrary, Mr. Wilson did not simply testify neutrally. Instead, he accused the police of fabricating evidence against Appellant:

Q. Do you remember telling the police that he indicated—Calvin indicated I'm going to choke her like I did Margaret and get away with it?

A. No.

Q. Did you say that to the police?

A. No.

Q. So you're saying that someone has falsified this transcript?

A. Yeah.

Q. Okay. Do you remember that at that point in time that Jello kind of spazzed out and told Calvin not to be talking in front of you?

A. No.

Q. You don't remember that?

A. No. *The truth is, it's a dirty cop in Hamilton County.* They getting all these people—

Q. But my question to you is—

A. I don't—I don't know—

Q. Do you understand my question?

A. I don't know none of that, man. *It's a dirty cop in Hamilton County.*

Q. Do you remember saying that?

A. *And they trying to get everybody to lie on this guy, and I ain't about to lie on him. I don't even know him. They want everybody to lie. They ain't even get a*

convictions to all these-I mean indictments on all these people in Hamilton County.

Q. Mr. Wilson, you're finished.

A. *I don't care, man. he ain't do nothing.*

* * *

Q. Would it refresh your memory to hear your own words out of your own mouth?

A. *I don't-man, it's a dirty cop.*

(Tr. 1652-54) (emphasis added).

Thus, Mr. Wilson's testimony damaged the State's case. Not only did he tell the jury that a "dirty cop" was trying to get witnesses to lie against Appellant, he also affirmatively stated that Appellant "ain't do nothing." The State thus satisfied its burden to impeach its own witness.

Appellant cites *State v. Ballew*, 76 Ohio St.3d 244, 1996-Ohio-81, 67 N.E.2d 369, for the proposition that a prior inconsistent statement may not itself be admitted as evidence. This is incorrect. *Ballew's* admonition against reading a witness's statement aloud to a jury was in reference to a statement used to refresh a witness's recollection under Evid.R. 612. Instead, Evid.R. 613(B) governs the admissibility of extrinsic evidence (such as a recording of the prior inconsistent statement). The rule has two foundational requirements: that the witness is given the opportunity to explain or deny the statement, and that the statement must be of consequence to the determination of the action other than the witness's credibility. Evid.R. 613(B)(1) & (2)(a).

Ohio courts routinely permit the admission of a witness's prior inconsistent statements for impeachment purposes. *See, e.g., State v. Hancock*, 1st Dist. No. C-030459, 2004-Ohio-1492; *State v. Fischer*, 8th Dist. No. 83098, 2004-Ohio-3123. Moreover, the State used the evidence only to impeach Mr. Wilson's testimony, and not as substantive evidence of Appellant's guilt. As the State

began to discuss the prior statement during closing arguments, the prosecutor reminded the jury, “Gerald was the dude that came in and sat down and look right at him and then goes, Nah, I don’t know him. I don’t know him. I don’t know anything. I didn’t say anything and then you hear the tape for five minutes, clear as a bell.” (Tr. 2003.) The State’s reference to the prior statement was to impeach Mr. Wilson’s sudden denials of Appellant’s guilty and his newly made claim that a “dirty cop” was convincing witnesses to fabricate testimony.

The trial court did not abuse its discretion in admitting Mr. Wilson’s prior inconsistent statement. The State showed both surprise and affirmative damage, and laid the proper foundation for the statement’s admission under Evid.R. 613. Accordingly, Appellant’s sixth proposition of law should be overruled.

Proposition of Law VII:

When a party demonstrates that a witness it calls is hostile, it may ask the witness leading questions under Evid. R. 611(C).

In proposition of law seven, Appellant argues that the trial court incorrectly allowed the State to ask leading questions to an adverse witness, Audrey Dumas, and that once allowed, too many leading questions were permitted. The State disagrees.

The decision to allow leading questions during the direct examination of a witness is within the trial court's discretion. *Ramage v. Cent. Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97, 1992-Ohio-109, 592 N.E.2d 828, paragraph six of the syllabus. "Generally, a party must show that a witness is either hostile or identified with the adverse party in order for the court to permit leading questions on direct examination. The ability of counsel to cross-examine its own witness by the use of leading questions is governed by Evid.R. 611(C)." *State v. Williams*, 8th Dist. No. 95748, 2011-Ohio-5385, ¶ 20. Specifically, Evid.R. 611(C) provides:

[I]leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. *When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.*" (emphasis added).

"An 'adverse witness' is one who identifies with the opposing party because of a relationship or a common interest in the outcome of the litigation." *State v. Irwin*, 184 Ohio App.3d 764, 2009-Ohio-5271, 922 N.E.2d 981, ¶ 81; *State v. Dolce*, 92 Ohio App.3d 687, 703, 637 N.E.2d 51 (1993). "Evidence of a long-term relationship between a witness and the defendant or another reason for a strong affinity between a witness and defendant may be a sufficient basis for a court to allow the state to ask leading questions of a witness on direct examination." *Williams*, 2011-Ohio-5385, ¶ 22, citing *Dolce*, 92 Ohio App.3d 687; *State v. Stearns*, 7 Ohio App.3d 11, 14, 454 N.E.2d 139

(1982). Cases that have approved of this type of leading questions on direct examination have found not only familial relationships to satisfy this requirement, but also pending relationships, and general friendships. *See State v. Darkenwald*, 8 Dist. No. 83440, 2004-Ohio-2693 (defendant's daughter); *State v. Fleming*, 12 Dist. No. CA2002-11-279, 2003-Ohio-7005 (defendant's nephew); *State v. Warren*, 67 Ohio App.3d 789, 588 N.E.2d 905 (1990) (defendant's fiancée); *Stearns*, 7 Ohio App.3d at 14 (two witnesses “were shown to have a strong affinity to the defendant”).

In the case at bar, the State was required to demonstrate that Dumas and Appellant had a long-term relationship or a strong affinity between the two, which formed the basis for the trial court to allow the State to ask leading questions on direct examination. The record demonstrates that this factual demonstration was satisfied.

First, Dumas testified that she was Appellant’s on again off again girlfriend for about 6 years from 2004-2010. (Tr. 1367-68) While their 6 year romantic relationship ended in 2010, she continued to have contact with Appellant, including both by phone and driving up from Cincinnati to Butler County to visit him while he was incarcerated during the present case. (Tr. 1370-71) Dumas also admitted that she sent Appellant a lot of money while he was incarcerated. (Tr. 1371) In fact, due to her and Appellant’s history, people know Dumas by the nickname of ‘fifty’ because during one of Appellant’s previous stints of incarceration, she would bring him \$50 every two weeks “like clockwork”. (Tr. 1368)

What is more, the communication between Dumas and Appellant included the frequent exchange of letters. (Tr. 1372) And, strikingly, Appellant had attempted communications with Dumas during the pendency of the trial. (Tr. 1372)

Additionally, Dumas was evasive in her answers about knowing that Appellant was dating

Allen directly after she and Appellant broke up in 2008. (Tr. 1369) Dumas was also evasive about what her cell phone numbers were during the 2009 time frame. (Tr. 1370) These attempts at being evasive were an obvious attempt to aid Appellant. The aforementioned clearly demonstrates that Dumas had a relationship and/or strong affinity for Appellant.

Based upon these facts, as testified to by Dumas, the trial court did not act unreasonably or arbitrarily in allowing the State to utilize Evid.R. 611(C) in questioning Dumas. Appellant's argument lacks merit.

Appellant also argues that while the State was allowed to utilize Evid.R. 611(C), the trial court abused its discretion in allowing the State overutilization of this rule. The State again disagrees.

“The ability of counsel to **cross-examine** its own witness by the use of leading questions is governed by Evid.R. 611(C).” *Williams*, 2011-Ohio-5385, ¶ 20 (emphasis added). “This rule gives the court discretion to allow counsel to proceed with leading questions. In effect, the direct examination becomes a cross-examination by leading questions * * * Again, the terms ‘cross-examination’ and ‘leading questions’ are used interchangeably without a clear distinction being drawn between the meaning of the terms.” *Darkenwald*, 2004-Ohio-2693, ¶ 16. As such, based upon the trial court's finding of Dumas as an adverse witness, the State was permitted to cross-examine her.

Guidance on the scope of cross-examination is also found in Evid.R. 611. Specifically, Evid.R. 611(B) states that “[c]ross-examination shall be permitted on **all** relevant matters and matters affecting credibility.” (emphasis added) The language “all relevant matters” has been found to include questions which could probe into and or demonstrate bias, prejudice, mistake in

identification, credibility, pecuniary interest in the litigation, motive to misrepresent facts and the nonexistence of a material fact even if the witness has given direct testimony that the fact exists. *See generally State v. Hannah*, 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978); *State v. Ferguson*, 5 Ohio St.3d 160, 450 N.E.2d 265 (1983); *State v. Warsame*, 10th Dist. No. 06AP-1254, 2007-Ohio-3656, ¶ 16; *State v. Clark*, 8th Dist. No. No. 95928, 2011-Ohio-4109; *State v. Minor*, 47 Ohio App.3d 22, 546 N.E.2d 1343 (1988).

Thus, cross-examination is available under Ohio law for **all matters pertinent to the case** that the party calling the witness would have been entitled or required to raise. *State v. Treesh*, 90 Ohio St.3d 460, 2001-Ohio-4, 739 N.E.2d 749. This is “[u]nlike federal Crim.R. 611, which generally limits cross-examination to matters raised during direct.” *Clark*, 2011-Ohio-4109, at ¶ 31. This is also unlike the only case cited by Appellant in this section of his brief, *United States v. Crockett*, 813 F.2d 1310 (4th Cir. 1987).

The *Crockett* case was decided under the federal law, which is more limiting to cross-examination. More importantly, however, the *Crockett* case involved a defendant wanting to call as a witness and cross-examine, a non-hostile non-adverse co-defendant. *Id.*, at 1313. Thus, the court’s determination that “favorable testimony from a cooperative codefendant may possess false credibility in the eyes of the jury if obtained on cross-examination” is very dissimilar to the present case. *Id.*

In the present case, all of the complained of questions, to an adverse witness, went to one of the legitimate areas of cross-examination that Ohio courts have recognized; bias, prejudice, mistake in identification, credibility, pecuniary interest in the litigation, motive to misrepresent facts and the nonexistence of a material fact even if the witness has given direct testimony that the fact exists. (Tr.

1459-60, credibility, bias, prejudice, and motive to lie; Tr. 1400-02, credibility, motive, and non-existence of material fact; Tr. 1402, credibility and motive to misrepresent; Tr. 1403-04, 1448-1449, credibility and bias; Tr. 1504-1505, credibility, bias, and prejudice; Tr. 1506, credibility, bias, and prejudice)

Appellant also attempts to argue that the inquiry about Dumas being some form of an arraigned alibi witness was improper. But, at least one Ohio court has permitted cross-examination concerning a potential alibi. *State v. Gest*, 108 Ohio App.3d 248, 670 N.E.2d 536 (8th Dist., 1995). The *Gest* court found that cross-examining a witness on whether she had planned to testify as an alibi witness for defendant "in another case" did not produce such issue confusion as to render testimony irrelevant. Even when the Appellant attempts to string together a tenuous theory that the State insinuated with its questions that Appellant was trying to bring Dumas to his attorney to get her coached, this would still be proper for cross-examination. *See Geders v. United States*, 425 U.S. 80, 89, 96 S.Ct. 1330, 1336, 47 L.Ed.2d 592, 600 (1976) (a prosecutor may cross-examine a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination).

Pursuant to all of the foregoing, Dumas was properly designated as an adverse witness, and the State's cross-examination was proper in all regards. Appellant's seventh proposition of law should be denied.

Proposition of Law VIII:

The State does not engage in prosecutorial misconduct by proffering admissible evidence and conducting cross-examination with good faith.

In proposition of law number eight, Appellant argues that the State committed acts of misconduct that deprived him of a fair trial. (Appellant's brief pages 85-91) The State disagrees.

A. Standard

The test for prosecutorial misconduct is whether the statements made by the State were improper, and if so, whether they prejudicially affected substantial rights of the accused. *State v. Smith*, 14 Ohio St.3d 13, 470 N.E.2d 883 (1984). When reviewing a claim of prosecutorial misconduct, an appellate court must review the context of the entire trial to determine if a prosecutor's remarks are prejudicial to the accused. *State v. Tumbleson*, 105 Ohio App.3d 693, 664 N.E.2d 1318 (1995). A conviction will not be reversed because of prosecutorial misconduct unless it so taints the proceedings that a defendant is deprived of a fair trial. *State v. Smith*, 87 Ohio St.3d 424, 442, 721 N.E.2d 93 (2000). As the United States Supreme Court has succinctly stated, "it is not enough to find that the comments were inappropriate or even universally condemned. * * * The relevant question is whether they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *See also State v. DePew*, 38 Ohio St.3d 275, 528 N.E.2d 542 (1988), *cert. denied*, 489 U.S. 1042 (1989).

A prosecutor's closing remarks are generally not considered prejudicial unless they are "so inflammatory as to render the jury's decision a product solely of passion and prejudice * * *." *State v. Williams*, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986); *See also DeChristoforo*, 416 U.S. at 643 (to be prejudicial, remarks must have "so infected the trial with unfairness as to make the resulting

conviction a denial of due process”). Moreover, instances of prosecutorial misconduct can be deemed harmless when they are isolated. *See State v. Lorraine*, 66 Ohio St.3d 414, 613 N.E.2d 212 (1993). A reviewing court must examine the final argument as a whole, not in isolated parts, and must examine the argument in relation to that of opposing counsel. *State v. Moritz*, 63 Ohio St.2d 150, 407 N.E.2d 1268 (1980).

B. Good Faith Basis

In the first argument section of this proposition of law, Appellant challenges two sequences of questions as being asked without a good faith basis. The State disagrees.

Generally, “a cross-examiner may ask a question if the examiner has a good-faith belief that a factual predicate for the question exists” *State v. Gillard*, 40 Ohio St.3d 226, 231, 533 N.E.2d 272 (1988). In adopting the “good-faith-basis” test, this Court stated the following:

The good-faith-basis test is the prevailing test in other jurisdictions. We now think it the better test as well, for “ * * * effective cross-examination often requires a tentative and probing approach to the witness' direct testimony, and this cannot always be done with hard proof in hand of every assumed fact.” We hold that a cross-examiner may ask a question if the examiner has a good-faith belief that a factual predicate for the question exists. Since the prosecutor’s good-faith basis for asking these questions was never challenged, we presume she had one * * * .
Id. at 231, 533 N.E.2d at 278 (citations omitted).

Therefore, “[w]here the good-faith basis for a question is not challenged at the trial level, it is presumed that a good-faith basis exists.” *State v. Henry*, 11th Dist. No. 2007-L-142, 2009-Ohio-1138, ¶ 115; *See Gillard, supra*, at 231, 533 N.E.2d 272. *See also State v. Davie*, 80 Ohio St.3d 311, 322, 686 N.E.2d 245 (1997). In the present case, that is exactly what transpired. All of the complained of questions, (Tr. 481-482, 1494-1499, 1506), were not objected to during the

trial.

Because there was no objection, the State was never required to indicate its good-faith basis for these questions, and thus, it would be impossible to argue this issue in any depth based upon the state of the record. This is why courts have stated that where “no objection was made by defense counsel. * * * we must presume that a good-faith basis for the questioning existed. *Gillard, supra*. We find no misconduct by the prosecutor and/or no unfair prejudice to appellant.” *Henry, 2009-Ohio-1138, ¶ 116*. Based upon the aforementioned, Appellant’s argument in the present case should be denied as no objection was made, and the complained of questions were fair and did not constitute misconduct.

C. Claimed Victim Impact Evidence

In this section, Appellant argues that the State committed misconduct by eliciting victim impact evidence. However, this claim must fail as even the alleged record citations do not demonstrate examples of victim impact evidence. *State v. Fautenberry, 72 Ohio St.3d 435, 439, 650 N.E.2d 878 (1995)* (victim impact evidence is that which elicits the effect that the victim’s death has had on family members). Rather, the alleged error, if they can be categorized as such, might more properly be framed as one of character evidence. Either way, no error occurred as there was either no error and thus the argument is waived, or the testimony served a legitimate purpose.

While the Appellant cites to a number of claimed errors in the record, only three of these were objected to (funeral references, police department incident, and description of Germaine Evans). As such, the State will address only these instances, as the others have been waived and should not be addressed by this Court. *State v. Allen, 73 Ohio St.3d 626, 633, 1995-Ohio-283, 653*

N.E.2d 675, (“Allen failed to object to the alleged character evidence and therefore waived this argument”).

I. Funeral

Appellant complains that the State elicited testimony from Charia Mam that Allen’s funeral was large and well attended, alleging that this was improper victim impact evidence. However, this testimony was not elicited for this purpose. Rather, when the context of this testimony is evaluated, another, proper purpose is clear. Specifically, Mam testified:

Q. Okay. Finally, were you at Missy’s funeral?

A. Yes.

Q. Was it a small funeral or large funeral?

A. It was a large funeral.

Q. About how many people would you say were there?

MR. HOWARD: Objection.

THE COURT: Overruled.

A. It was packed. I had a hard time finding a seat.

Q. (By Mr. Salyers) Was that funeral limited to just family or were there a lot of friends there as well?

A. A lot of friends.

Q. Was Calvin there?

A. No.

(Tr. 563-64) (emphasis added)

What is clear from this line of questioning was that the purpose was not to admit victim impact evidence; but rather to set the stage that while the funeral was packed, Appellant, Allen’s boyfriend, did not appear to pay his respects. This evidence was clearly put into the record for the jury to consider why Appellant would not have attended the funeral, and to potentially consider this as consciousness of guilt evidence. The clear inference was that Appellant, like the many others, would have attended and paid his respect if he did not have Allen’s murder weighing on him.

Therefore, because there was a proper purpose, no error can be found. *See generally State*

v. *Barton*, 12th Dist. No. CA2005-03-036, 2007-Ohio-1099, citing *State v. Williams*, 79 Ohio St.3d 1, 11, 1997-Ohio-407 (allowing polygraph evidence, which typically would not be admissible, because there was a proper evidentiary purpose); See *State v. Strowder*, 8th Dist. No. 85792, 2006-Ohio-442 (while a plea bargain or offer to plea is generally not admissible evidence, it may be admitted for the purpose of demonstrating a bias or motive); See also *State v. Gonzalez*, 151 Ohio App.3d 160, 2002-Ohio-4937.

2. *Run-in at the Police Station*

Appellant also complains that the State improperly elicited testimony concerning a chance meeting at the Fairfield police station between Appellant, Shaunda Luther, and Quisha. Again, an evaluation of this testimony, in context, demonstrates that the State elicited the testimony to demonstrate Appellant's guilty conscience.

In full context, the testimony informed the jury that:

A. We were upset. We had been crying. We had just recently found out that our friend was deceased the day before, so we were very upset.

Q. What happened when Calvin walked in?

A. We were surprised to see him walk in, and Quisha immediately jumps up, and she's beating on his chest, and she's asking him for explanations, and she's crying. She's hysterical.

Q. Was she asking him any questions?

A. She was asking him, Tell me what --

MR. HOWARD: Objection.

MR. PIPER: Excited utterance, your Honor.

THE COURT: It's not being offered for the truth of matter. It's not hearsay, so it's

under the exception. Overruled.

A. She's screaming at him, Tell me what happened. You owe me an explanation. You need to explain to me what happened. And she's saying the same thing over and over again while she's beating on his chest and grabbing him and trying to get him to talk to her.

Q. (by Mr. Piper) Did you hear him saying anything back?

A. He didn't say anything back, and he looked at her, and he was like -- he looked at me. He approached me and **tried to hug me** while I was sitting on a chair, and **he was like, I'm sorry**, and kept on walking back to Detective Williamson's, I guess, office or whatever.

(Tr. 505-506) (emphasis added)

This piece of testimony informed the jury that when Appellant saw the family of his murder victim this upset, he tried to hug them and even apologized. This clearly is consciousness of guilt evidence, and not improper victim impact evidence. See *Napper v. United States*, 22 A.3d 758, 772 (D.C., 2011) ("Appellant fled the scene moments after the shooting, and shortly thereafter, approached Brooks, hugged him, and apologized—conduct from which the jury could reasonably have inferred appellant's consciousness of guilt."), *Commonwealth v. Anderson*, 48 Mass.App.Ct. 508, 511 (2000) (defendant's rare display of support and affection toward the victim's mother in the aftermath of the crime demonstrated consciousness of guilt). The question objected to set the stage for this evidence and it was not error to allow this line of questioning.

3. *Germaine Evans*

Appellant's final claim of improper victim impact evidence was the descriptions of Germaine Evans, and what type of person he was. Specifically, when Andre Ridley was testifying, the following transpired:

Q. I've never met him. The ladies and gentlemen have never met him. How would

you describe Germaine Evans?

A. He was -- he was a good person, big heart.

MR. HOWARD: Objection.

THE COURT: Overruled.

A. Big heart, likeable, you know, he might -- you know, he did some things. He was young, you know, made some mistakes, but other than that, you know, he was a great friend to everybody and to his family.

(Tr. 904)

However, this Court has found that “[e]xcept perhaps where the evidence of the homicide is entirely circumstantial, it is not permissible for the state in the first instance, and before the character of deceased has been assailed, to offer primary evidence or evidence in chief of deceased’s good character or reputation as a quiet, peaceable, and law-abiding man.” *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968), citing 40 C.J.S. Homicide s 222, p. 1138 (emphasis added). The current case seems to fit this exception where the case against Appellant was mostly, if not entirely circumstantial, and so this brief reference should not be found as error.

Additionally, being a “great friend to everybody” would relate directly to the circumstances of this case where Evans might have made poor judgment in helping Appellant with Allen’s body as a friend, and then agreeing to again go with Appellant on the night he was executed. *See State v. Allen*, 73 Ohio St.3d 626, 1995-Ohio-283, 653 N.E.2d 675 (evidence about a victim is admissible when it relates directly to circumstances of crime and is not offered to elicit sympathy from jury.) Thus, the seven words that Appellant argues were inappropriate (“was a good person”, “big heart” and “likeable”) all either related to the circumstantial nature of the case, or related to the potential circumstances of the murders themselves.

4. Any Error

If this Court were to find error in these passing pieces of testimony, they should nevertheless, in light of the other significant evidence against Appellant, be found as not outcome determinative; and therefore, harmless.

D. Appellant Characterized As A Bad Person

This claim is truly not a prosecutorial misconduct claim; rather it has more to do with the admission of evidence. As such, all of the issues raised in this section, which are supported by no case law citations whatsoever, should be dismissed.

First, Appellant claims that Detective Gregory should not have been allowed to state that he knew Appellant, that he knew Appellant's phone number, that he knew Appellant's voice, or some combination of the three. However, in order for the State to properly admit the evidence in this case, and demonstrate to the jury things Appellant, himself, might have stated on phone calls, all three pieces of evidence were necessary and admissible. *See* Evid.R. 901(A) & (B)(1)-(6), *State v. Spires*, 7th Dist. No. 04 NO 317, 2005-Ohio-4471, *State v. Lamb*, 12th Dist. No. CA2002-07-171, CA2002-08-192, 2003-Ohio-3870. There can be no error in the admission of this foundational evidence, and Appellant's claim must fail.

The second claim Appellant makes is that the State should not have been allowed to explore the fact that Appellant had multiple phone numbers and his means to pay for said phones. Specifically, Crystal Evans informed Detective Luke about Appellant's "business" phone number and how it was different from his personal phone number. Having two different phone numbers and how Appellant might have been able to use these phones in the course of committing his crimes and covering up his crimes was a proper line of questioning. It is not only extremely relevant but could

go directly towards demonstrating how Appellant avoided being caught. As such, asking a witness who identifies a phone number as a business phone, what type of business the person was in, is proper.

No misconduct should be found from a proper line of questioning about relevant facts. *See State v. Jenkins*, 4th Dist. No. 05CA7, 2006-Ohio-2546; *State v. Taylor*, 9th Dist. No. 01CA007945, 2002-Ohio-6992 (finding that the state's line of questioning was proper, and concluded that no error occurred). This is especially true when the phone number was active on the days of the crimes, and can aid the jury in the truth finding process. In fact, one witness testified that Appellant would switch out his sim card to the cell phone to make the phones like new (getting rid of old data) almost each week. (Tr. 1066-1067) No error lies in this line of questioning.

Finally, Appellant argues that the letter he authored, which included a reference to posting witness lists at Battles Co., funeral home should not have been admitted. Again, this argument appears to be more one of evidence admission as opposed to misconduct. But either way, the evidence was clearly relevant to the murdering of a victim/witness capital specification that Appellant was charged with.

Even if the letter said Buttler Co., (in reference to Butler County) it would still be reasonable for the State to elicit this evidence as it would be an attempt to intimidate potential witnesses no matter whether it was posted at a funeral home, or in the county where the trial was to take place. As such, there is nothing improper about this evidence.

Case law is clear that “[u]nder Ohio law, ‘evidence of threats or intimidation of witnesses reflects a consciousness of guilt and is admissible as admission by conduct.’” *State v. Exum*, 10th Dist. No. 05AP-894, 2007-Ohio-2648, ¶ 23, citing *State v. Soke*, 105 Ohio App.3d 226, 250 (1995),

and *State v. Richey*, 64 Ohio St.3d 353, 357 (1992). “Specific evidence of witness intimidation is admissible to show consciousness of guilt.” *State v. Grimes*, 1st Dist. No. C-030922, 2005-Ohio-203, ¶ 55, citing *State v. Richey*, 64 Ohio St.3d 353, 1992-Ohio-44, 595 N.E.2d 915; *See also* 4 OJI 405.25 (2006). What is more, “evidence of conduct designed to impede or prevent a witness from testifying is admissible to show consciousness of guilt.” *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 68 (internal citations omitted). This evidence can either be viewed as consciousness of guilt or admission by conduct.

Other states have also allowed this type of consciousness of guilt evidence. One such example is in Pennsylvania, where the courts have noted “[a]t the outset, we note that testimony regarding attempts by a defendant in a criminal prosecution to interfere with witnesses is admissible to show the defendant’s consciousness of guilt. *Commonwealth v. Lark*, 518 Pa. 290, 308-09, 543 A.2d 491, 500 (1988) (attempts to intimidate or influence witnesses admissible to show consciousness of guilt), citing *Commonwealth v. Goldblum*, 498 Pa. 455, 473, 447 A.2d 234, 243 (1982) and cases cited therein.” *Commonwealth v. Johnson*, 542 Pa. 384, 668 A.2d 97 (1995). (Emphasis added and Internal citations omitted)

Therefore, based upon the aforementioned authority, the evidence and testimony concerning Appellant’s attempts to either dissuade witnesses or intimidate them into not testifying was relevant evidence that demonstrated either his consciousness of guilt or an admission by conduct. No error should be found.

E. Unsworn Statement

Appellant argues, as he does in his sixth proposition of law, that the admission of Gerald

Wilson's unsworn statement was improper. But as argued in Section VI, *supra*, the State was both surprised and damaged by Wilson's suddenly inconsistent testimony. First, the State had no reason to believe that Wilson would not testify consistently with the statements he had previously made to the police. And second, Wilson did not just "neutrally" claim not to remember the facts about which he was called to testify. Instead, he concocted some sort of police-driven conspiracy to coerce witnesses to lie about Appellant's guilt. (Tr. 1652-54.) Thus, the State satisfied its burden under Evid.R. 607(A) and Evid.R. 613(B), and Wilson's prior inconsistent statement was properly admitted.

F. Characterization

Next, Appellant claims that the State mischaracterized several pieces of evidence. This is not so.

First, as noted in Section V, the State did not improperly use Appellant's tattoos as character evidence. And the State properly linked Appellant's "scandalous life" tattoo to the testimony of Charles Bryant, who recounted that Appellant had admitted killing Margaret Allen because she was "scandalous and running her mouth." (Tr. 988-90.) Appellant's use of the word "scandalous" on his own body and in his confession to Bryant was an important fact that confirmed the truth of Bryant's testimony. This was not substantive evidence, but proved that Bryant had properly identified Appellant as the individual who confessed to him.

The State also did not mischaracterize Wilson's departing statement to Appellant. It is unclear whether the transcript captured the exchange the State described during closing argument; the prosecutor merely described his recollection of what happened as Wilson left the room. The jury

had nearly the same vantage point as did counsel for the State. Thus, if the State's recollection was incorrect, the jury would have been aware of that.

Finally, the State did not mischaracterize the relationship between Audrey Dumas and Appellant or the "role" Dumas was expected to play. As argued in Sections V and VII, *supra*, the State adduced evidence indicating that Appellant had attempted to cajole Dumas into being his alibi witness, regardless of whether she actually knew his whereabouts on the night of Germaine Evans' death. Appellant has taken a different interpretation of the his recorded exhortations to Dumas. But that does not mean that the State's interpretation is without support in the record. Accordingly, Appellant's argument should be overruled.

G. Leading Questions

Appellant next claims that the State committed misconduct by asking leading questions. Based upon the state of the record, the State disagrees.

In *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio- 6266, 900 N.E.2d 565, ¶ 149, this Court found that a "leading question is 'one that suggests to the witness the answer desired by the examiner.' Under Evid.R. 611(C), '[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony.' However, the trial court has discretion to allow leading questions on direct examination." (Internal citations omitted) Thus, "Evid. R. 611(C) does not promulgate an absolute, per se prohibition against leading questions when examining one's own witness on direct examination; it says only that '[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony (emphasis added),' thus providing the trial court with a certain discretion." *State v. Rosskopf*, 1st

Dist. No.C-840778, 1985 WL 8904 (June 26, 1985). One such scenario where this Court has recognized the use of leading questions is permitted is where the State is directing the witness's attention to events or to matters on which testimony was already generated. *State v. D'Ambrosio*, 67 Ohio St.3d 185, 190, 1993-Ohio-170, 616 N.E.2d 909.

In the present case, while Appellant argues that there are supposedly egregious examples of leading questions, almost none of the record citations that he cites had an instance of an objection to a leading question. Therefore, these claims should all be considered waived for appellate purposes. (See, Tr. 1600, 1637-1342, 1646, 1779-1781, 1745, 1747) The only one of the examples put forth to this Court where there was an objection to leading questions was on page 1781, and these two objections were overruled. But, Appellant does not explain how these two questions prejudiced him. Rather, Appellant merely asserts that leading questions are per se not permitted on direct examination, which is an incorrect statement of the law. Appellant's argument should be overruled.

H. Witness Address

In his final argument for prosecutorial misconduct, Appellant argues that the prosecutor's failure to give the correct address of a non-disclosed witness violated his right to a fair trial. The State disagrees.

When supplying discovery on the non-disclosed witnesses, the State of Ohio disclosed Andre Ridley, but inadvertently gave an outdated address for Ridley. When the error was discovered, the State wholeheartedly acknowledged the error, but argued that there was no prejudice to the Appellant as he was aware of who the witness was and the defense investigator did not try to go to that address to find the witness, so no defense efforts were thwarted by this inadvertent mistake. (Tr. 1089)

In Ohio, Crim.R. 16(L)(1) allows the trial court in situations like this to utilize its discretion in maintaining proper discovery. Specifically, the rule states: “[t]he trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.” Ohio Crim.R. 16(L)(1)

In this present case, the trial court attempted to utilize Ohio Crim.R. 16(L)(1) when it offered a remedy to defense counsel:

THE COURT: Well, I’m still -- you know, obviously there’s been a violation, **inadvertent, but a violation**. And I’m still trying to figure out what I can do to help you remedy this situation. Would you like the witness to come back and sit down with your investigator so you can possibly recall him during your case in chief?

MR. HOWARD: No, your Honor.

(Tr. 1090) (emphasis added)

Thereafter, the trial court again offered: “[a]nd I am willing to bring that witness back. I’m willing to let that witness talk to your investigator and if there’s something there that that investigator believes should be brought to your attention, I will be willing to let that witness be called during your case this chief, even though you haven’t identified that witness or that witness as one of your witnesses. I mean, I think that’s the appropriate remedy. I’m willing to do that.” (Tr. 1092-1093) Again, defense counsel chose not to avail themselves to the remedy offered by the trial court.

What is more, a failure to provide the identity of a state witness is excusable if the failure was inadvertent or provision was impossible, but it is error if not justifiable. *State v. Edwards*, 49 Ohio

St.2d 31, 358 N.E.2d 1051 (1976), vacated as to death penalty, 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155 (1978). This general statement should apply to the case at bar where the failure was inadvertent, as found by the trial court, and defense counsel refused as unnecessary the trial court's offers to allow them time to interview and recall the witness. Therefore, while an inadvertent mistake occurred, there is no prejudicial error that can be found.

Proposition of Law IX:

A defendant's right to confrontation is not violated when his counsel is permitted to fully cross-examine the witnesses against him as to all relevant matters.

In his ninth proposition of law, Appellant claims a Constitutional violation in regards to limitations on his counsel's cross-examination of jail house informants. However, as defense counsel was permitted to cross-examine these witnesses on all relevant matters, this claim should be denied.

A. Limits On Cross-Examination

Cross-examination of a witness is a matter of right. *State v. Brinkley*, 105 Ohio St.3d 231, 247, 2005-Ohio-1507, 824 N.E.2d 959. This right is embodied in Ohio Evid.R. 611(B), which provides that "cross-examination shall be permitted on all relevant matters and matters affecting credibility." However, the "extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court." *Brinkley*, 105 Ohio St.3d 231, 247, citing *State v. Green*, 66 Ohio St.3d 141, 147, 609 N.E.2d 1253 (1993) quoting *Alford v. United States*, 282 U.S. 687, 691, 51 S.Ct. 218, 75 L.Ed. 624 (1931); accord *State v. Woodard*, 68 Ohio St.3d 70, 74, 623 N.E.2d 75 (1993) (upheld limits on cross-examination of co-accused). "Such exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion." *State v. Trimble*, 122 Ohio St. 3d 297, 2009-Ohio-2961, ¶ 266, 911 N.E.2d 242, citing *State v. Acre*, 6 Ohio St.3d 140, 145, 451 N.E.2d 802 (1983).

"Because the possible bias of a witness is always significant in assessing credibility, the trier of fact must be sufficiently informed of the underlying relationships, circumstances, and influences

operating on the witness ‘so that, in the light of his experience, he can determine whether a mutation in testimony could reasonably be expected as a probable human reaction.’” *State v. Gresham*, 8th Dist. No. 81250, 2003-Ohio-744, ¶ 9, quoting *State v. Williams*, 61 Ohio App.3d 594, 597, 573 N.E.2d 704 (1988) (quoting 3 Weinstein, Evidence (1988), Section 607[03], at 607-27). Therefore, courts have generally found that “a plea bargain may provide a motive to misrepresent the facts, and therefore is a proper subject of cross-examination.” *Id.*

However, courts have found that even when a plea agreement is reached, there are still limits to the extent of cross-examination. For example, “the specific extent of the benefit the plea bargain provided to the witness is not relevant to this purpose. The fact that the witnesses agreed to plead guilty to lesser charges and to testify against appellant is sufficient to demonstrate the witness’ potential motive to misrepresent the facts. A comparison of the potential penalties under the plea agreement versus the original charges does not add to this demonstration.” *Id.*, at ¶ 9; *See also State v. Franklin*, 7th Dist. No. 06-MA-79, 2008-Ohio-2264.

In another case, it was found that “[t]he trial court neither denied appellant his right to confront the witness nor abused its discretion in excluding the fact that the witness’ indictment and conviction were drug related. The nature of the charge was irrelevant to proving the witness’ bias. Bias was shown by the fact of the alleged deal with the state. Moreover, exclusion of the subject matter did not prejudice appellant.” *State v. Lumpkin*, 10th Dist. No. No. 91AP-567, 1992 WL 40555, (Feb. 25, 1992).

In the present case, the trial court’s decisions were in line with the aforementioned authority. Specifically, with regards to Charles Bryant, his direct examination included:

Q. Why are you willing to tell the police about this? Why are you talking about this?

A. In all honesty, my lawyer, he kind of told me if I had any information with something, just come forward and I can help myself out some, and plus I been in the news so --

Q. I'm sorry, I missed that last part.

A. I been in the news, so I mean, it was more or less me helping myself or something.

Q. All right. Have you been promised anything specifically by anybody?

A. No.

(Tr. 992-993)

Thereafter, on cross-examination, defense counsel was able to cross-examine him on all of the following: that Bryant was still incarcerated, that he discussed this case with the Cincinnati Police on multiple occasions, that he had a felonious assault conviction, that his case had been continued, that his attorney advised him that his testimony might help him out on his current case, and that he currently had felonious assault charges and other charges pending against him. (Tr. 993, 995-999)

However, Appellant argues that even with all of this testimony, the trial court abused its discretion by not allowing defense counsel to "question Bryant about possible consideration offered for his testimony or about how much time he was facing under his current indictment", citing page 998 from the transcript. (Appellant's Brief, p. 101) However, there was never a question as to the possible consideration Bryant was getting, and as such, the trial court did not abuse its discretion as it was never called upon to make a decision that would require it to utilize discretion. Further, how much time Bryant was facing is not relevant, and also, was never asked. Appellant also argues that the "trial court would not allow counsel to ask how many times his case had been set for trial." (Appellant's Brief at 101) But, Bryant did testify that his case had been continued four times, and

that he did not know when his case was first set for trial. (Tr. 999)

The trial court did sustain two objections during Bryant's testimony. One was in regard to how many times Bryant's case had been set for trial. This was not relevant, as Bryant had testified that his case had been continued four times, and the number of times it was set for trial added nothing to his testimony. (Tr. 997, 999) In fact, Bryant went as far as to explain the reasons he knew for the continuances. (Id.) Finally, the trial court excluded the specific fact that Bryant was charged with trafficking, but "the nature of the charge" is "irrelevant to proving the witness' bias." *State v. Lumpkin*, 1992 WL 40555. From these facts, the jury would clearly have known about the potential motives and bias Bryant would have had to lie. No error occurred.

Lemuel Johnson was not offered a plea. By the time he testified, he had already pled guilty, was awaiting sentencing, and stated that he is not hoping for something in exchange for his testimony. (Tr. 1753-1754, 1757) However, the trial court permitted defense counsel to cross-examine Johnson about all of the following: Johnson's previous charges, his current incarceration, his guilty plea and that he is awaiting sentencing, what his current charge is, that he has had discussions with the detectives about Appellant's case, that he never told anyone any information about this case until he was incarcerated, and if he was testifying to try to help out his brother whose murder case was on appeal. (Tr. 1752-1754, 1756-1757, 1765) Johnson elaborated on why he did not come forward sooner by explaining that "I presumed that everybody in Cincinnati knew [that Appellant killed Allen and Evans], and they just couldn't prove it. So me just coming and saying well, look, he said he did this, I didn't think that it would matter." (Tr. 1758)

The only topics that defense counsel was not allowed to broach with Johnson was how much cocaine was involved in his case, and questions that were already asked and answered. (Tr. 1754)

As the amount of cocaine squarely fits into the case law exceptions, and as a sustained objection to a question asked and answered indicates that defense counsel had already covered the question on cross-examination, no error occurred during Johnson's testimony. See *State v. Gresham*, 2003-Ohio-744, *State v. Franklin*, 2008-Ohio-2264.

Finally, with regards to Marcus Sneed, defense counsel was permitted to probe all of the following: that he was incarcerated, that he was appearing for court in shackles, the amount of time he has been under indictment for a drug conspiracy charge, that he has prior convictions, that he was not sure if he is facing a lengthy prison sentence, and that he had twice met with detectives on this case. (Tr. 1605-1607, 1613) But, Sneed was not testifying because he was offered a plea deal, rather, he was testifying because: "[f]or one, because enough is enough about, you know, senseless murders and robberies in the neighborhood. * * * And another, I just had this conscious on my mind for a long time that, you know, since it's been going on, I knew this." (Tr. 1603)

The trial court did sustain objections and utilize its discretion in excluding irrelevant testimony concerning Sneed's potential sentence under the federal guidelines, why his case was continued, and how many counts were in his indictment. (Tr. 1606, 1608, 1613) All of these items were properly excluded as not furthering any potential bias, and because they concerned the extent of a non-existent plea agreement, the potential sentence the witness faced, and the specific nature of the charges. See, *State v. Brinkley*, 105 Ohio St.3d 231 (no error in limiting cross-examination about a non-existent plea deal), *State v. Gresham*, 2003-Ohio-744, *State v. Franklin*, 2008-Ohio-2264, *State v. Lumpkin*, 1992 WL 40555.

As such, the trial court did not error in utilizing its discretion in limiting cross-examination questions to those that the evidence rules and case law permit, while properly excluding extraneous and irrelevant questions.

B. Confrontation Clause

Appellant also argues that notwithstanding the aforementioned law, his Confrontation rights were violated. But, as the Confrontation Clause is satisfied under essentially the same standards as have already been argued, no error lies.

Under the Confrontation Clause, “a defendant is not entitled to limitless cross-examination. ‘A limitation on cross examination does not violate the Confrontation Clause unless it limits relevant testimony and prejudices the defendant, and denies the jury sufficient information to appraise the biases and motivations of the witness.’” *United States v. Bridgeforth*, 441 F.3d 864, 868 (9th Cir. 2006), citing *United States v. Holler*, 411 F.3d 1061, 1066 (9th Cir. 2005), quoting *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999). Therefore, “the Confrontation Clause guarantees an opportunity for a thorough and effective cross-examination, though not one that is unbounded. *Fensterer*, 474 U.S. at 20, 106 S.Ct. 292; *United States v. Sasson*, 62 F.3d 874, 882 (7th Cir.1995). A trial court may impose reasonable limits on the scope of cross-examination, but the defendant’s rights under the Confrontation Clause may be violated if those limitations completely foreclose a defendant from exploring the witness’ bias or motive to testify. *See Van Arsdall*, 475 U.S. at 679, 106 S.Ct. 1431; *Sasson*, 62 F.3d at 883.” *United States v. Walker*, 673 F.3d 649, 657 (7th Cir.2012)

This general standard has been followed in Ohio. *See State v. Gonzales*, 151 Ohio App.3d 160, 177-178, 2002-Ohio-4937, 783 N.E.2d 903. In *Gonzales*, the court adopted and followed the

Seventh Circuit's reasoning that:

Thus, when deciding whether limitations of cross-examination are permissible, 'courts have striven to distinguish between the core values of the confrontation right and more peripheral concerns which remain within the ambit of trial judge's discretion.' " Limitations on cross-examination that deny a defendant "the opportunity to establish that the witnesses may have had a motive to lie" infringe on core Sixth Amendment rights, not merely the denial to counsel of the "opportunity to add extra detail to that motive." Accordingly, **"[o]nce this core function is satisfied by allowing cross-examination to expose a motive to lie, it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point home to the jury.** The trial court may preclude 'cumulative and confusing cross-examination into areas already sufficiently explored to permit the defense to argue personal bias and testimonial unreliability.' "

Id., citing *United States v. Nelson*, 39 F.3d 705, 708 (7th Cir. 1994), *United States v. Saunders*, 973 F.2d 1354, 1358 (7th Cir. 1992), quoting *United States v. Robinson*, 832 F.2d 366, 373 (7th Cir. 1987) (emphasis added).

In the present case, as has already been argued, defense counsel was allowed to explore the potential motives to lie and biases of Bryant, Johnson, and Sneed. If anything, what counsel was not allowed to do was go beyond the rules of evidence to "hammer it home" to the jury. This does not create a violation of the Ohio rules of evidence or the Confrontation Clause. *See State v. Gonzales*, 151 Ohio App.3d 160. Appellant's ninth proposition of law should be denied as the trial court did not abuse its discretion when it limited the extent of irrelevant cross-examination.

Proposition of Law X:

When a witness's prior statements to police evince an effort made, at a defendant's request, to falsely establish an alibi for the defendant, those statements are admissible at trial.

In his tenth proposition of law, Appellant claims that Crystal Evans's statements to the police were improperly admitted at trial. Because those statements demonstrate Appellant's prior planning to escape criminal liability for Germaine Evans's death, they were admissible and the trial court did not abuse its discretion in so finding.

As an initial matter, Appellant's characterization of the record is incorrect. Appellant claims that "[w]hen Evans took the stand at trial, the State did not ask her a single question about the night of her brother's death before questioning her about what she told detectives in her interview." (Appellant's Brief at 110.) This is simply untrue. The State began a lengthy examination of Ms. Evans regarding her activities on the evening of her brother's death with "[L]et me direct your attention to the night of February 27th, that Friday night. Do you remember which day I'm talking about?" (Tr. 1048.) The State questioned her about her activities that night for over nine pages of transcript testimony before referencing her interview with Detective Luke for the first time. (Tr. 1056.) Thus, Ms. Evans was, in fact, asked for her account of that evening before her statements to Detective Luke were introduced. And when the transcript of her interview was finally introduced, no objection was lodged by Appellant. (Tr. 1061.)

Appellant seems to take issue with the detail in which the State examined Ms. Evans about her testimony and the extent to which it was at odds with her statements to Detective Luke. (Appellant's Brief at 111-16.) But, of course, the questioning was detailed. Ms. Evans was purporting to provide an alibi for her brother's killer. The State was entitled to thoroughly examine her as to her movements, whereabouts, and activity on the night in question.

Moreover, Ms. Evans's subterfuge with homicide detectives was, in fact, substantive evidence against Appellant, and was properly used as such. Evidence was presented at trial that Appellant coached Ms. Evans regarding her alibi testimony. In a letter from the jail, Appellant told her:

I got some things that Rich [Appellant's counsel Richard Goldberg] dropped off to me (phone logs). From the phone logs, it looks like Mick died at 10:00. Babe, we were home asleep at 10. I got my phone logs, too. I have so many missed calls. Now, you know the only way I'm going to miss my calls is if I'm asleep. You of all people should know that I didn't do it. I was home with you. They have to charge me with Mick to open up the case with Margaret. It was no way they could charge me with Margaret, cause I didn't do it. But you got people saying I did that to Mick to cover up the case with Margaret. That's all they needed to tie them both together so they can charge me with both.

(Tr. 1148-49, Ex. 50.)

Additionally, after Ms. Evans had spoken with the police and set up an interview with an assistant prosecuting attorney, Appellant called her from jail complaining that Ms. Evans' decisions were the reason he was incarcerated. (Tr. 1154-58, Ex. 52.)

The evidence showed that Appellant solicited Ms. Evans in an effort to create an alibi during the time when Germaine Evans was killed. The jury and the trial court were entitled to rely on that evidence in convicting and sentencing Appellant. Thus, the trial court did not commit plain error in its admission of Ms. Evans' prior statements, and Appellant's tenth proposition of law should be overruled.

Proposition of Law XI:

Out-of-court statements that are either made by a declarant who appears at trial or that are non-testimonial in nature do not implicate a defendant's Confrontation rights.

Appellant claims that certain testimony at trial violated his right to confront the witnesses against him. Because all of these statements were properly admitted, the State disagrees.

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Constitution, Amend. VI. But the Sixth Amendment has never served to bar the admission of *all* out-of-court statements. Instead, the Confrontation Clause bars the admission only of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The key to a determination of whether an out-of-court statement is admissible is whether it is "testimonial," because "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. ... It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006).

When a statement whose admission would allegedly violate the Confrontation Clause involves encounters between police officers and witnesses, a court must look to the "primary purpose" of the interrogation or interview. *Michigan v. Bryant*, 131 S.Ct. 1143, 1160 (2011). "In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." *Id.*, quoting *Davis*, 547 U.S. at 827.

In the present case, none of the statements complained of by Appellant implicate the Confrontation Clause. Thus, his proposition of law should be overruled.

A. Detective Luke's and Detective Witherell's Testimony Regarding The Investigation

At trial, Detective Luke testified regarding her investigation of the murder of Margaret Allen and her eventual efforts to contact Germaine Evans. Initially, Detective Luke began to testify about what a "source of information" told her. (Tr. 1248.) Appellant objected, the objection was sustained, and the State posed a new question: "Let me ask it this way. At that meeting, did you get information about a new lead?" (Id.) Eventually, Detective Luke was asked what information she received about Mr. Evans. (Tr. 1249.) The trial court overruled an objection posed by Appellant, but immediately gave the jury a limiting instruction:

Ladies and gentlemen, I'm going to permit it because it goes to this officer's state of mind. You should not take her testimony at this point for the truth of the matter, only to show that she received this information at the meeting, and as a result of that, did something subsequent. So it's not being offered for the truth of the matter. It is being offered for her state of mind. Okay. Let's proceed with that admonition.

(Id.)

Detective Luke then testified that she had been told that Mr. Evans was present during the homicide and that he "either helped move the body or that he was present in the house when [Ms. Allen] was killed. (Id.)

Detective Witherell testified regarding his investigating the possibility that an individual named Donte Terry was involved in the murder of Margaret Allen. (Tr. 1513-26.) A report to the police had implicated Mr. Terry. (Tr. 1514.) However, the Detective explained that he eventually obtained a DNA sample from Mr. Terry and submitted it to the Miami Valley Regional Crime Lab.

(Tr. 1526.) Ultimately, the Detective did no further investigation of Mr. Terry. (Id.) Just as it did during the testimony of Detective Luke, the trial court admonished the jury that this testimony was being permitted for a limited purpose only:

The Court is going to permit this, but again, this type of thing, it only goes the officer's state of mind. And so again, out-of-court statements are not being offered for the truth of the matter here unless I tell you otherwise. They are simply going to this officer's state of mind, what he did, what was in his mind so that you have a context so you understand what he was doing, okay. Let's proceed with that.

(Tr. 1515.)

"It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed." *State v. Thomas*, 61 Ohio St.3d 223, 232, 400 N.E.2d 401, 408 (1980). In *Thomas*, this Court regarded an argument that testimony by law enforcement officials that "they had received information about a 'sports bookmaking' operation" was inadmissible hearsay as "devoid of merit." *Id.* Ohio courts regularly permit the testimony of the sort Appellant complains of here. *State v. Hicks*, 9th Dist. No. 24708, 2011-Ohio-2769, ¶ 41; *State v. Craft*, 12th Dist. No. CA2006-06-145, 2007-Ohio-4116, ¶ 57; *State v. Jordan*, 5th Dist. No. CT2003-0029, 2004-Ohio-0029, ¶ 34; *State v. Parker*, 2d Dist. No. 18926, 2002-Ohio-3920, ¶ 50.

The trial court did not abuse its discretion in permitting the two detectives to explain their rationale for the steps they took investigating the murders of Mr. Evans and Ms. Allen. Even if such an abuse were present, however, Appellant can show no prejudice as a result. Detective Luke's testimony was merely a vague version of what Mr. Ridley described with great specificity:

And when he [Germaine Evans] told me he was there, and he said Calvin, he said, I was there when Calvin killed that girl. I said, What Happened? He said, I was in another room, and he said, They was in there fighting. And then he said after a while, he came out the room. And when he came out the room, he seen Calvin

choking Margaret. And I saw, What you do? He said, I just stood there because I didn't know what to do.

And he said after that, when he was choking her and he said like—he didn't give me no time frame, he said Calvin just started smacking her, you know, saying wake up, Missy, wake up. Wake up. Wake up, Missy. And he said Calvin was crying like, Please, Missy, wake up. Wake up. Please wake up.

(Tr. 909.)

Detective Witherell's testimony regarding the elimination of Donte Terry as a suspect similarly carries no prejudice, as Appellant never advanced a theory that Mr. Terry was the actual perpetrator of Ms. Allen's murder. Thus, even if error occurred, it was harmless beyond a reasonable doubt.

B. The 911 Call Made By Ziala Danner

When Ziala Danner, Ms. Allen's niece, called 911 the night Ms. Allen's ankle was broken, she told the dispatcher that Appellant's "daughter warned me about him cause she said that he choked her mother with a phone cord. She told me to watch out for my aunt." (Tr. 349 & Ex. 2.) Ziala was thirteen years old at the time of the trial. (Tr. 336.) Appellant claims that the admission of this statement violated his right to confrontation.

As an initial matter, no serious argument can be made that Appellant's daughter's statements to a pre-teen Ziala could be construed as "testimonial" so as to fall within the ambit of the Sixth Amendment. The Supreme Court in *Davis*, *Crawford*, and *Bryant* has made clear that only testimonial statements create constitutional concerns. Appellant does not even attempt to argue that the statement that Ziala recounted, in her urgency to get help to her injured aunt, had been made in anticipation of litigation or a formal legal process.

The statement does not pose a hearsay problem, either. This is because at the conclusion of Ziala's testimony, the trial court gave the jury a limiting instruction, informing the jurors that the statement had been adduced for a limited purpose:

Ladies and gentlemen, very briefly before we start cross-examination, the Court admitted the 911 tape, and I just wanted to give you some cautionary instructions. The Court permitted it because it believed that it went to her state of mind at the time of the event. Certain things were said which were out-of-court statements which would traditionally be considered hearsay.

You should not consider the 911 tape for the truth of the matter. Anything said there only because it goes to her emotions and state of mind at the time it was said, okay. So with that cautionary instruction, let's proceed.

(Tr. 361-62.)

Thus, the trial court gave a very strong caution that the 911 call was admitted only so the jury would understand Ziala's state of mind at the time of Ms. Allen's ankle injury. They were specifically warned not to consider Appellant's daughter's statement for the truth of the matter that she had asserted. Thus, the trial court did not abuse its discretion in permitting the testimony.

C. "Statements" Made By Detective Luke and Witherell During Their Interview of Crystal Evans

Next, Appellant challenges the admission of several "statements" made by Detectives Luke and Witherell during the course of their interview of Crystal Evans. As previously noted, no objection was made to the introduction of this interview at trial (Tr. 1061), so Appellant has waived all review save that for plain error.

Although Appellant's brief does not make this clear, his challenge to this evidence is clearly not of a Constitutional nature. This is because Detectives Luke and Witherell both testified at trial, and *Crawford* and the Confrontation Clause are concerned only with the statement of declarants who

do not appear at trial. Thus, Appellant's sole argument is that the trial court committed plain error by not finding the statements to be hearsay.

The "statements" that Appellant refers to in his brief were all actually questions, designed to elicit a response from Crystal Evans. The Eighth District has addressed this issue:

[The witness's] statement about what Hall asked her is not hearsay; it is a question. By definition, a question cannot be offered for the truth of any matter because "a true question or inquiry is by its nature incapable of being proved either true or false," and therefore "it cannot be hearsay within the meaning of Evid.R. 801." *State v. Tucker*, 8th Dist. No. 83419, 2004-Ohio-5380, ¶ 46, quoting *State v. Lamar*, 95 Ohio St.3d 181, 196-97, 2002-Ohio-2128, 767 N.E.2d 166 (2002).

As this Court noted in *Lamar*, Evid.R. 801(A) defines a "statement" as an "oral or written assertion." 2002-Ohio-2128, at ¶ 61. (emphasis in *Lamar*). A review of the exchange between the detectives and Crystal Evans clearly reveals that they were not making assertions; they were making interrogatories and trying to get assertions from Ms. Evans. Accordingly, the trial court did not commit plain error in admitting the interview.

D. Detective Karaguleff's Testimony

During his testimony, Detective Karaguleff recounted what occurred when a group of people approached him at the site where Germaine Evans's body was discovered:

Q. And as the people in this group were, you said upset?

A. They were upset. Some were crying. They were emotional, yelling, screaming, wailing.

Q. Okay. And were these emotions you're observing in reaction to the crime scene and what had happened to Mick up those steps.

A. Well, at the time Germaine was not identified.

Q. By you guys?

A. By us at all. They truly believed that the body up in the woods was Germaine's body.

Q. These folks that just pulled up?

A. Yes. They had evidently gotten word that there was a body found up there and came up and were insistent. They were providing clothing descriptions, tattoo descriptions.

Q. Were they correct?

A. Yes.

Q. And were they communicating this information to you in that emotional, excited state?

A. Yes.

Q. Did they communicate any other information in that emotional, excited state in reaction to what had happened there?

A. They said he had last been seen Friday night around 9:30 at night.

Q. Okay.

A. They said that he—they believed that he was killed by his friend, Calvin McKelton.

Q. Did they use the term "his friend" or is that your term?

A. That's their term.

Q. Okay.

A. And they said it was because he helped move that lawyer's body.

Q. And this is before you and your partner, Detective Witherell, even know the identity of the body up the steps?

A. Correct. I did understand who Calvin McKelton was and what they meant by the lawyer's body though.

(Tr. 1315-17.)

Because these out-of-court statements were admissible as excited utterances under Evid.R. 803(2), the trial court did not commit plain error in allowing this testimony.

In *Bryant*, the Supreme Court explained its “primary purpose” analysis:

An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the “primary purpose of the interrogation.” The circumstances in which an encounter occurs—e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

131 S.Ct. at 1156.

Here, the objective circumstances demonstrate the non-testimonial nature of the statements made by the group of people yelling towards the detectives. They were understandably upset by the discovery of Germaine’s body, and in the excitement, communicating (unsolicited) information to the police about the circumstances of his death, which had just been confirmed to them.

The *Bryant* court explained why excited utterances fall outside of the Confrontation Clause’s prohibition on the admission of certain out-of-court statements:

This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” Fed. Rule Evid. 803(2); see also Mich. Rule Evid. 803(2) (2010), are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood. See *Idaho v. Wright*, 497 U.S. 805, 820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) (“The basis for the ‘excited utterance’ exception ... is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation ...”); 5 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 803.04[1] (J. McLaughlin ed., 2d ed.2010) (same); Advisory Committee's Notes on Fed. Rule Evid. 803(2), 28 U.S.C.App., p. 371 (same). An ongoing emergency has a similar

effect of focusing an individual's attention on responding to the emergency.

Id.

Similarly, in the present case, the body had just been discovered and had not even been identified by the police yet. Such circumstances yield no opportunity for the declarants to “form a falsehood.” Accordingly, the statements were admissible, and the trial court did not commit plain error in permitting Detective Karaguleff’s testimony.

E. Sheridan Evans’s Testimony

Appellant also claims that a small portion of Sheridan Evans’s testimony, in which she recounted that she asked Appellant, “[w]ell, Pooh said you did it. That’s why he left town that next morning after that same night. I told Calvin that.” (Tr. 1839.) In response, Appellant told her that he did not know who Pooh was. He also responded, “I don’t want to see nothing else happen to none of your kids.” (Tr. 1839-40.) Appellant did not object to this testimony at trial.

As discussed with reference to Detective Luke’s and Witherell’s questioning of Crystal Evans, questions are not assertions. Sheridan Evans testified that her reference to Pooh’s statement was part of a question to Appellant regarding whether he had murdered her son. Accordingly, the statement was not an assertion and was not hearsay. Thus, the admission of this testimony did not constitute plain error.

F. Marcus Sneed’s Testimony

Finally, Appellant takes issue with Marcus Sneed's testimony that he asked Appellant if it were true "what everybody was saying in the street about him killing his girlfriend." (Tr. 1599.) No objection was made to this testimony at trial. And as argued above, questions are not statements; they are thus not "assertions" and not hearsay offered to prove the truth of a matter "asserted." Accordingly, the trial court did not err in permitting Mr. Sneed's testimony in this regard.

Proposition of Law XII:

Under Ohio law, a defendant charged as a principal may be prosecuted as a complicitor, and a trial court need not provide a separate verdict form to the jury to determine whether the defendant has been convicted as a principal or a complicitor.

With his twelfth proposition of law, Appellant makes two arguments: first that the trial court erred in not providing a verdict form regarding complicity, and second, that the trial court erred in instructing the jury as to complicity.⁷ The State disagrees with each.

Ohio law expressly permits a complicitor to be prosecuted and punished as a principal offender. R.C. 2923.03(F). Nonetheless, Appellant claims that the trial court had an obligation to provide a separate verdict form for complicity to the jury to ensure unanimity. The Sixth District has rejected this argument. *State v. Alexander*, 6th Dist. No. Wd-02-047, 2003-Ohio-6969, ¶ 70.

Moreover, Appellant's complaint that "it is unclear whether the jury unanimously found Mckelton guilty of being the principal offender or of complicity" finds no support in Ohio law. In *State v. Lundgren*, the court held:

We turn now to the "non-principal offender" portion of the second prong of R.C. 2929.04(A)(7). As stated in our seventeenth assignment of error, in order to be found guilty as an accomplice of complicity pursuant to R.C. 2923.03, the defendant must first act with the same mental state required for the commission of the principal offense. In other words, one who is found guilty of complicity under R.C. 2923.03(F) may be punished as if he were a principal offender. Hence, even where the prosecution proceeds on a complicity to aggravated murder theory, a defendant's intent to kill must be proved. *Clark v. Jago* (C.A. 6, 1982), 676 F.2d 1099, 1104. Therefore, in the instant case, it mattered not whether the jury unanimously found that appellant was a non-principal offender (accomplice) under R.C. 2929.04(A)(7) because the state of mind required for complicity to commit aggravated murder - "purposely" and "with prior calculation and design" had already been proven.

⁷Appellant also makes a reference to the State failing to present a "cohesive theory of the case." (Appellant's Brief at 145.) Such an argument is really a challenge to the sufficiency of the evidence ("The flip flopping of the theory of the case by the State was at best confusing to the jury and at worst allowed the jury to convict despite doubts"), and is thus responded to in Section XIII, *infra*.

Lundgren, 11th Dist. Nos. 90-L-15-140, 91-L-036, 1993 WL 346444, *31.

This Court has also declined to require that a jury unanimously adopt a theory of a case. In *State v. Thompson*, 33 Ohio St.3d 1, 514 N.E.2d 407 (1987), this Court rejected the defendant's contention that a jury must be instructed that they must all agree with regards to which type of rape the defendant has committed in order to find him guilty. Instead, the Court reasoned that the fact "that some jurors might have found that appellant committed one, but not the other, type of rape in no way reduces the reliability of appellant's conviction, because a finding of either type of conduct is sufficient to establish the fact of rape in Ohio." *Id.* at 11.

This Court reached a similar conclusion in *State v. Johnson*, 46 Ohio St.3d 96, 545 N.E.2d 636 (1989). There, the defendant was charged with aggravated murder. The Court declined to require that a jury be unanimous as to whether the defendant had committed that offense while in the commission of aggravated robbery, attempted aggravated robbery, or while fleeing following one of those offenses. Instead, the Court held that unanimity as to a general verdict is all that is required under Ohio law.

This Court reiterated its analysis in *State v. Gardner*, 118 Ohio St.3d 420, 889 N.E.2d 995 (2008). Again rejecting a claimed violation of a defendant's right to jury unanimity,⁸ this Court held:

Although Crim.R. 31(A) requires juror unanimity on each element of the crime, jurors need not agree to a single way by which an element is satisfied. Applying the federal counterpart of Crim.R. 31(A), *Richardson [v. United States]* (1999), 526 U.S. 813, 119 S.Ct. 1707], stated that a "jury need not always decide unanimously which

⁸Interestingly, the *Gardner* court chose to "clarify" that neither the federal nor state constitution provides a guarantee of juror unanimity in a state criminal trial. *Gardner*, at ¶ 35; see also *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628 (1972) (holding that Sixth Amendment's right to juror unanimity is not incorporated against the states by the Fourteenth Amendment). Recently, the US Supreme Court declined to revisit its decision in *Apodaca*. *Herrera v. Oregon* 131 S.Ct. 904 (2011) (denial of certiorari).

of several possible sets of underlying brute facts make up a particular element, say which of several possible means the defendant used to commit an element of the crime.”

Id.

Thus, Ohio law does not require a jury to unanimously find whether a defendant is guilty as a principal or a complicitor.

Appellant also argues that the trial court erred in instructing the jury on complicity as to the murder of Germaine Evans. As Appellant notes, this Court rejected the same argument in *State v. Perryman*, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976). Appellant argues, however, that *Perryman* must be limited to those circumstances in which a defendant's case presents evidence that the defendant may have merely been a complicitor, rather than a principal.

Appellant cites no case that adopts such a limited reading of this Court's decision in *Perryman*. And with good reason: Ohio courts have routinely rejected this narrow construction of Ohio law on complicity. *See, e.g., State v. Howe*, 2d Dist. No. 13969, 1994 WL 527612; *State v. Cruz*, 11th Dist. No. 91-A-1580, 1991 WL 268746; *State v. Dotson*, 35 Ohio App.3d 135 (3d Dist. 1987).

Thus, *Perryman*, coupled with R.C. 2923.03(F), permit a defendant indicted as a principal to be tried and convicted as a complicitor. Appellant's eleventh proposition of law should be overruled.

Proposition of Law XIII:

Convictions supported by the statements of an eyewitness and the defendant's own confessions are supported by sufficient evidence and are not against the manifest weight of the evidence.

In proposition of law thirteen, Appellant challenges both the sufficiency and manifest weight of the evidence presented that supports the mens rea of purposely in his conviction for the aggravated murder of Germaine Evans. However, because witness testimony, motive, and consciousness of guilt evidence clearly supplied and exceeded the amount of evidence needed to prove purpose, the State disagrees.

A. Sufficiency Of The Evidence

This Court has held that “[t]he 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, 678 N.E.2d 541 (1997). In reviewing the record for sufficiency, “[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

When deciding a sufficiency of the evidence issue, the reviewing court will not substitute its evaluation of witness credibility for that of the trier of fact. *See State v. Benge*, 75 Ohio St.3d 136, 661 N.E.2d 1019 (1996). “The credibility of the evidence is not the focus of a Crim.R. 29(A) motion;

⁹ “[B]ecause 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.” *State v. Cummings*, 12th Dist. No. CA2006-09-224, 2007-Ohio-4970, at ¶13, quoting *State v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298, at ¶35.

rather, the motion focuses solely upon the legal sufficiency of the evidence.” *State v. Dunaway*, 12th Dist. No. CA96-08- 152, 1997 WL 71305, at *3, citing *State v. Harcourt*, 46 Ohio App.3d 52, 56, 546 N.E.2d 214 (1988).

Moreover, it is fundamental that “circumstantial evidence and direct evidence inherently possess the same probative value.” *Jenks*, paragraph one of the syllabus. Thus, the State can use either direct evidence or circumstantial evidence to prove the elements of any crime. *See State v. Nicely*, 39 Ohio St.3d 147, 151, 529 N.E.2d 1236 (1988) (“[c]ircumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable”). This Court has also rejected a claim that the evidence was insufficient because there were no eyewitnesses to a kidnapping-murder because it has “long held that circumstantial evidence is sufficient to sustain a conviction if that evidence would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 75, quoting *State v. Heinisch*, 50 Ohio St.3d 231, 238, 553 N.E.2d 1026 (1990).

B. Manifest Weight Of The Evidence

To determine whether a criminal conviction is against the manifest weight of the evidence, the court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d 380 (1997). This power should only be invoked in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *State v. Zentner*, 9th Dist. No. 02CA0040, 2003-Ohio-2352, citing *State v. Otten*, 33 Ohio App.3d 339, 340

(9th Dist. 1986). In using this power, the appellate court is acting as a 13th juror. However, this 13th juror is not omnipresent in that the appellate court cannot and does not hear testimony, observe body language, evaluate voice inflections, observe hand gestures, observe interplay between witness and examiner, and observe witnesses reactions in the courtroom. *Waterville v. Lombardo*, 6th Dist.No. L-02-1160, 2004-Ohio-475.

“[W]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the [trier of fact] believed the prosecution testimony.” *State v. Guzzo*, 12th Dist No. CA2003-09-232, 2004 -Ohio- 4979, ¶ 13, quoting *Zentner*, 2003-Ohio-2352, ¶ 21. Moreover, “[e]very reasonable presumption must be made in favor of the judgment and the findings of facts [of the trial court].” *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988). Furthermore, “if the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the trial court’s verdict and judgment.” *Id.*

C. Evidence Of Purpose/Cause

Under his sufficiency and manifest weight challenge, the only elements that Appellant alleges were not proven beyond a reasonable doubt was his purpose to commit the aggravated murder of Gernain Evans, and that he actually caused the death of Evans. As such, the State will solely focus on these two elements as no others have been raised.

The aggravated murder statute provides, in relevant part: “[n]o person shall purposely, and with prior calculation and design, cause the death of another * * *.” R.C. 2903.01(A). Purpose is defined under R.C. 2901.22(A) as “[a] person acts purposely when it is his specific intention to cause

a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.” In the case at bar, the State proved that Appellant purposely killed Germaine Evans to prevent him from working with authorities to aid them in solving the murder of Allen. The State did so through testimony, motive evidence, and consciousness of guilt evidence.

1. Testimony

During the trial the State presented the testimony of two witnesses who heard Appellant admit to purposely causing the death of Germaine Evans. The first admission from Appellant came through the testimony of Marcus Sneed, who had known Appellant “for a long time.” (Tr. 1596-97.) Sneed testified that not only did Appellant admit to killing Allen, but on another occasion, Appellant stated to him that:

Q. All right. After this conversation, did you hear of somebody being found in the Mt. Auburn Inwood Park area?

A. Yes.

Q. And after that, did you see Calvin McKelton again?

A. Yes.

Q. And did you have another conversation with him?

A. Yes, sir.

Q. And where was this conversation?

A. Same spot, Vito's.

Q. Okay. What was the conversation about?

A. I asked him bluntly again, was that the guy that help you get rid of the body that everybody saying on the street.

Q. All right.

A. His so-called friend.

Q. What did he say?

A. Yes, he had to. That was the only guy that could link him to the murder.

Q. All right, said he had to?

A. Yes.

Q. Why would he talk to you about these things?

A. Because I was the type older guy he felt he could talk to.

Q. Did he indicate how that guy could link him to the murder?

A. He said that he was a witness.

(Tr. 601-602)

After presenting the jury with this confession, the State also elicited the testimony of Lemuel Johnson. Johnson testified about a conversation he had with Appellant which focused on the phone conversation Appellant overheard Crystal have with the Cincinnati Police Detectives. Based upon overhearing that conversation, Appellant knew that the Cincinnati Police were actively looking to talk with Germaine about the Allen murder case. Possessing this information, Appellant stated to Johnson that:

He said basically that reaction was that he needed—he said he needed to, you know, to get—to get to Mick before the detective—before the detective did, because he knew because he had to kill Mick before—he knew that Mick was beginning to be a weak link, and he knew he had to get to him. Mick be the only person that can connect him to Missy murder.

(Tr. 1748.)

Johnson clarified that by "get to Mick" (Evans), Appellant meant that he had to kill Evans.

(Tr. 1748-1749) Thereafter, on cross-examination, Johnson recounted Appellant's "exact words":

Look, I did this, you know. I was over—I was over Mick's sister house, and when the officers, the detectives called and I knew that he was a weak link. I knew he was a weak link. So when they called and talked to him, they called and said they wanted to meet with him. They wanted to meet with Mick. I knew I had to go and meet with him first, because I knew I had to kill him because he was—they was going to—he was a weak link to Missy's murder. He was going to be able to connect me to Missy's murder.

(Tr. 1777-78.)

Based upon this testimony, the jury could clearly find that Appellant purposely caused the death of Evans to prevent him from working with the police to help connect, charge, and convict Appellant with the murder of Allen. Thus, both purpose and cause were proven.

Additionally, Gerald Wilson also testified as to an admission by the Appellant. During Wilson's testimony, his recorded statement was played for the jury pursuant to Evid.R. 607(A). In the statement, Wilson describes a night in which he was in the backseat of a vehicle in which Appellant was also a passenger. (State's Exhibit 15) During the car ride, Appellant discussed choking out a female like he did Allen, which he claims he got away with. (Id.) The driver of the vehicle, "Jello", told Appellant not to discuss these things in front of Wilson. (Id.) Appellant's response was that Wilson was cool, and if he said anything he would end up like Mick did. (Id.) Appellant and Jello laughed about this statement. (Id.) Clearly, this statement was another admission by Appellant that if Wilson became a snitch, like Mick was about to be, he would end up dead like Mick. Again, these words directly from Appellant's mouth are admissions that he purposely caused the death of Mick/Evans. This testimony coupled with Sneed's and Johnson's clearly proves Appellant's guilt as to the aggravated murder charge.

Rather than accept all this testimony, Appellant wants this Court to reverse the jury's decision based upon his perception of the credibility of Sneed and Johnson, because they were "jail house informants." (Appellant's Brief, p. 151) The fact that a witness is a "jail house informant", does not per se make their testimony incredible. *See State v. Riddle*, 7th Dist. Nos. 99 CA 147, 99 CA 178, 99 CA 204, 2001-Ohio-3484. Quite to the contrary, the law in Ohio is clear that determinations of credibility and weight of the testimony remains within the province of the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

This same legal reasoning holds true with informants, jail house informants, and snitches. *See generally State v. Smith*, 193 Ohio App.3d 201, 2011-Ohio-997, 951 N.E.2d 469; *State v. Coleman*, 10th Dist. No. 10AP-265, 2011-Ohio-1889, (court considered a claim that a conviction was against the manifest weight of the evidence in part based on challenges to the credibility of "jailhouse informants" and noted that "it was within the province of the jury to believe or disbelieve [the jailhouse informant's] testimony," including statements that amounted to a confession of guilt.); *State v. Bliss*, 10th Dist. No. 04AP-216, 2005-Ohio-3987, ¶ 26 (concluding that the jury was free to assess the witnesses' credibility where the details of witnesses' plea agreement were revealed); *State v. McClendon*, 10th Dist. No. 11AP-354, 2011-Ohio-6235 (rejecting claim that testimony was "extremely unreliable" because witness was a "snitch"). *See also People v. Hovey*, 44 Cal.3d 543, 749 P.2d 776 (Cal.,1988) (California's case law is clear that "cellmate testimony is not inherently unreliable").

What is more, "[a] cold record cannot divulge subtle body language that may indicate to a

jury whether the witness is or is not credible.” *State v. Kapsouris*, 7th Dist. No. No. 02 CA 230, 2004-Ohio-5119, ¶ 62. Thus, this Court should affirm the jury’s first hand determination that Appellant purposely caused the death of Germaine Evans.

Additionally, the testimony of Sneed and Johnson gains support from the statements made to Detective Gregory by Michael Nix. Specifically, Nix stated on the night of February 27, 2009, Appellant, Germaine, Brian Adams, and Lamar “Mouse” Simmons were present at Mr. Nix’s home. (Tr. 1805.) All four left together in a white panel van. (Tr. 1806.) Mr. Nix never saw Mr. Evans again. (Tr. 1807.) This testimony indicates that Appellant was more than likely one of the last people to see Evans alive, and lends support and credibility to the testimony of both Sneed and Johnson. Thus, both purpose and cause were proven.

2. *Motive*

Appellant clearly had a motive to purposely cause the death of Mr. Evans. Evans was the sole witness to Appellant’s murder of Ms. Allen, and as such, was all that was standing between Appellant’s freedom and a 15-Life sentence.

Specifically, Mr. Evans had detailed to Andre Ridley that he had been present with Appellant during and after the homicide of Allen. (Tr. 908-915) Mr. Evans even described to Ridley how Appellant killed Ms. Allen, what they did to hide the body, how Appellant staged the crime scene, and how Appellant left Allen’s body. (Id) This testimony again supports that of Sneed and Johnson that Appellant’s motive to kill Mr. Evans was that he was the only link to Appellant’s murderous actions against Ms. Allen.

Motive to commit the crime one is found guilty of can be utilized in satisfying a manifest

weight challenge on appeal. *See State v. Adams*, 9th Dist. No. 07-CA-0086, 2008-Ohio-4939, ¶ 66 (“Besides the eyewitness identification, testimony at trial established that Defendant had motive to commit the crimes.”); *State v. Wright*, 4th Dist. No. 07CA2952, 2008-Ohio-208. Therefore, in the present case, direct testimony and motive evidence exceeds that necessary to sustain Appellant’s aggravated murder conviction.

3. *Consciousness Of Guilt*

Appellant’s guilt of purposely causing the death of Evans was also proven by a plethora of consciousness of guilt evidence. Consciousness of guilt evidence can be considered as evidence of guilt itself. *See generally State v. Taylor*, 78 Ohio St.3d 15, 27, 1997-Ohio-243, 676 N.E.2d 82, quoting *State v. Eaton*, 19 Ohio St.2d 145, 249 N.E.2d 897 (1969), paragraph six of the syllabus. In the present case, Appellant’s communications with Crystal Evans established that he was trying to communicate in code, establish her as a false alibi, use her to post witness list to dissuade people from testifying against him so that they can “draw their own conclusions in terms of their safety.” (Tr. 1530-1532, 1535, 1538-1539, 1544-1546, 1569.)

What is more, within a couple of days of Michael Nix’s name and witness statement being released, he was at a birthday party where he was approached and asked about Appellant’s trial. (Tr. 1810-1811, 1813.) Twenty minutes after denying involvement in Appellant’s case, Nix walked outside and became the target of a drive by shooting. (Tr. 1813.)

Finally, after Mr. Evans’ death, Appellant had an occasion to speak with Sheridan Evans. (Tr. 1839.) While Appellant denied killing her son, he warned her “I don’t want to see nothing else

happen to none of your kids.” (Tr. 1839-40.) Sheridan interpreted this as a threat towards her family. (Tr. 1840.)

When the direct testimony of Sneed, Johnson, Wilson, and Nix, the motive evidence, and the consciousness of guilt evidence is properly weighed, it becomes clear that the jury did not create a manifest miscarriage of justice. Thus, Appellant was properly found guilty of having purposely caused the death of Mr. Evans. His proposition of law should be denied.

Proposition of Law XIV:

A trial court does not abuse its discretion in permitting the testimony of an expert witness who satisfies the requirements of Ohio law.

In Appellant's fourteenth proposition of law, he argues that the trial court acted unconscionably when it admitted expert testimony to aid the trier of fact in the truth finding process. As the trial court's decision followed binding case law, Ohio statutes, Ohio Evidence Rules, law from sister Ohio appellate courts, and sister states, no error can be found.

In Ohio, expert testimony is admissible if it will assist the trier of fact in the search for the truth. *State v. Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970 (1990). "In order to establish that expert testimony will assist the trier of fact, it must generally be established that the subject of the testimony is outside the experience, knowledge or comprehension of the trier of fact." *State v. Dyson*, 2d Dist. No. 2000CA2, 2000 WL 1597952, citing *State v. Daws*, 104 Ohio App.3d 448, 462 (1994); *State v. Coulter*, 75 Ohio App.3d 219, 228 (1992). However, if such knowledge is within the experience, knowledge or comprehension of the jury or trier-of-fact, expert testimony is inadmissible. *Koss*, *supra*.

Any question concerning the admission or exclusion of expert testimony is within the trial court's discretion, and the court's decision will not be reversed absent an abuse of that discretion. *State v. Jones*, 90 Ohio St.3d 403, 414, 2000-Ohio-187, 739 N.E.2d 300. A trial court abuses its discretion only when the court's decision is arbitrary, unconscionable, or unreasonable. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989).

In Ohio, a trial court's decision on whether to permit a witness to testify as an expert is further founded in Evid.R. 702. The rule states in pertinent part:

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.

Evid.R. 702.

A. Binding Authority

With the general rules and standards well established, the trial court was also guided by binding decisions from this Court and the Twelfth District Court of Appeals to guide its discretion. "In *State v. Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970 (1990), this court first recognized the admissibility of expert testimony regarding battered-woman syndrome." *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, ¶ 29. In allowing the admission of expert testimony regarding the battered-woman syndrome, this Court recognized that "testimony on battered-woman syndrome would assist the trier of fact in finding the truth" and pursuant to Evid.R. 702, such testimony would provide "specialized knowledge" that would "assist the trier of fact to understand evidence or to determine a fact in issue." *Haines*, 112 Ohio St.3d at 398-399, citing *Koss*, 49 Ohio St.3d at 216.

This Court specifically found guidance from the following passage in *Koss*:

Expert testimony regarding the battered woman syndrome can be admitted to help the jury not only to understand the battered woman syndrome but also to determine whether the defendant had reasonable grounds for an honest belief that she was in imminent danger when considering the issue of self-defense. 'Expert testimony on the battered woman syndrome would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any "common sense" conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier.

Popular misconceptions about battered women would be put to rest, including the beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage. See Walker, *The Battered Woman*, 19-31 (1979).⁷ *State v. Hodges* (1986), 239 Kan. 63, 68-69, 716 P.2d 563, 567. See, also, *Smith v. State* [1981], 247 Ga. [612] 618-619, 277 S.E.2d [678]; *Hawthorne [v. State]* (Fla.App.1982), 408 So.2d 801; [*People v.*] *Torres* [1985], 128 Misc.2d [129] 133-134, 488 N.Y.S.2d [358].

Haines, 112 Ohio St.3d at 399, citing *Koss*, 49 Ohio St.3d at 216.

This Court found that this type of testimony would not be aimed at reinforcing what a jury may already know; but rather, “[i]t is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors’ logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge.” *Haines*, 112 Ohio St.3d at 399, citing *Koss*, 49 Ohio St.3d at 217, quoting *State v. Kelly*, 97 N.J. 178, 206, 478 A.2d 364 (1984). All of the findings in *Koss* were further supported when, the same year *Koss* was decided, the Ohio general assembly codified R.C. 2901.06, which recognizes the value of battered-woman-syndrome testimony. See, *Haines*, 112 Ohio St.3d at 400.

B. Domestic Violence

Seven years after *Koss*, the Twelfth District Court of Appeals, binding authority on the trial court, decided *State v. Kraus*, 12th Dist. No. CA2006-10-114, 2007-Ohio-6027. In *Kraus*, the court found that expert testimony on the issue of domestic violence was proper. In coming to this decision, the court analyzed other courts in Ohio which had also approved of this type of expert testimony. One case that was examined was *State v. Dyson*, 2d Dist. No. 2000CA2, 2000 WL 1597952 (Oct. 27, 2000).

The *Kraus* court noted that in *Dyson*:

the state called an expert on domestic violence who testified about ‘the cycle of behavior in violent relationships, the issues of power and control in those relationships, and the frequency with which victims recant their stories of abuse due to the control that the perpetrator has over them and their own feelings of being responsible for the abuse.’ *Id.* The *Dyson* court upheld the trial court's decision to admit the expert's testimony, rejecting the defendant's arguments that the expert was not qualified to testify as an expert, and that the matters on which she was testifying were not beyond the ken of the jury. *Id.* See, also, *State v. Thomas*, Montgomery App. No. 19435, 2003-Ohio-5746, at ¶ 29 (expert testimony regarding the behavioral characteristics of victims of abuse is admissible).

Kraus, 2007-Ohio-6027, ¶ 40.

The *Kraus* court also found instructive that in domestic violence cases, “[t]he average person may not be aware of the dynamics of power, control, and dependency in an abusive relationship. The average person may also be confused or have misconceptions about why a victim of domestic violence would choose to stay with the abuser or to defend the abuser in court.” *Id.*, at ¶ 47, citing *Dyson*, 2000 WL 1597952, citing *Koss*, 49 Ohio St.3d at 216. These misconceptions are properly clarified by expert testimony which can address the fact that “the average person may be aware of the existence of domestic violence, it does not follow that the average person would ‘have a detailed understanding of the inner-workings of an abusive relationship, notwithstanding some awareness of domestic violence in our society.’” *Thomas*, 2003-Ohio-5746, ¶ 26, citing *Dyson*, *supra*.

This position has also been accepted in other states across the country. See *State v. Cababag*, 9 Haw.App. 496, 850 P.2d 716, 721-23, *cert. denied*, 74 Haw. 652, 853 P.2d 542 (1993) (finding that based on training and experience, expert properly testified about characteristics exhibited by victims of domestic violence); *Commonwealth v. Goetzendanner*, 42 Mass.App.Ct. 637, 679 N.E.2d 240, 243-46, *review denied*, 425 Mass. 1105, 682 N.E.2d 1362 (1997) (ruling that expert testimony about domestic violence and battered woman’s syndrome was proper); *Isaacs v. State*, 659 N.E.2d

1036, 1040-41 (Ind.1995), *cert. denied*, 519 U.S. 879, 117 S.Ct. 205, 136 L.Ed.2d 140 (1996) (ruling that expert testimony about battered woman's syndrome was admissible in murder prosecution as possible explanation of victim's behavior even though expert had not heard testimony or ever spoken to defendant, victim, or any other witnesses).

This position is bolstered by this Court's finding in *Haines*, that "[p]rior to 1990, 'appellate courts in only a handful of jurisdictions had considered whether prosecutors may use expert testimony on battering and its effects in a domestic violence prosecution,' but since that time, the courts in an overwhelming majority of jurisdictions that have considered the issue have held that such evidence is admissible under the proper circumstances." *Haines*, at 400-401. As such, it appears that expert testimony on domestic violence is clearly permitted in Ohio, as well as across the United States. Therefore, the trial court did not abuse its discretion in allowing the State to call an expert on the topic of domestic violence.

C. Limitations

While a domestic violence expert is permitted to testify pursuant to Evid.R. 702, there are limitations to this evidence. This Court has defined the limitations placed upon a domestic violence expert's testimony to include that "the expert cannot opine that complainant was a battered woman, may not testify that defendant was a batterer or that he is guilty of the crime, and cannot comment on whether complainant was being truthful." *Haines*, 112 Ohio St.3d at 404, quoting *People v. Christel*, 449 Mich. 578, 537 N.W.2d 194 (1995). If these limitations are followed, any concerns about unfair prejudice, under Evid.R. 403(A), should be dispelled. *Id.*

This Court went on to explain that “experts who are called to testify in domestic violence prosecutions must limit their testimony to the general characteristics of a victim suffering from the battered woman syndrome.” *Haines*, 112 Ohio St.3d at 404. What is more, the expert “may also answer hypothetical questions,” but should be careful not to “offer an opinion relative to the alleged victim in the case.” *Id.*

D. Present Case

In the case at bar, the State presented the expert testimony of Margene Robinson.¹⁰ The State presented this testimony to help explain to the jury why a person would stay in a violent relationship.

As to her qualifications to be an expert, Margene Robinson retired as a lieutenant in the Dayton (Ohio) Police Department in 2001. (Tr. 645.) Prior to her retirement, she served the department for twenty-five years. (Id.) For the three years prior to her retirement, she was the chief of the department’s domestic violence unit, which handled around 10,000 cases during that time. (Tr. 646.) She testified to her extensive experience training police officers, probation and parole officers, medical and social work students, and prosecutors and judge about the dynamics of domestic violence. (Tr. 647.) She has also taught at the Ohio Peace Officer Training Academy on the topic of domestic violence. (Tr. 648.) Based upon her training, education and experience, she was qualified by the trial court as an expert.

Ms. Robinson, after being qualified as an expert in the dynamics of domestic violence by the trial court, testified regarding the “cycle of violence” present in domestic violence cases. (Tr. 653)

¹⁰ This was the same expert on domestic violence that was approved in *State v. Thomas*, 2d Dist. No. 19435, 2003-Ohio-5746.

The first phase is the “tension building phase,” in which tension builds in the home over an economic or domestic issue. (Tr. 656-57.) The second phase, or “battering phase,” usually includes some sort of abuse—verbal, sexual, or physical—against the victim. (Tr. 658.) In the third phase, the “honeymoon phase,” the abuser may become remorseful, and may give gifts and make promises to change. (Tr. 659.) Often, this lures the victim into a false sense of security. (Id.) Ms. Robinson testified that domestic violence victims often fail to disclose to others the abuse they are suffering. (Tr. 665-66.) Victims will also often deny or minimize the abuse, feeling that the abuse is their own fault. (Tr. 657.) This minimization is also often the result of fear of reprisal by the perpetrator. (Tr. 658.)

All of the aforementioned is proper testimony as to domestic violence and the cycle of abuse of domestic violence that has been approved by cases throughout Ohio. See, *Kraus*, 2007-Ohio-6027, *State v. Thomas*, 2003-Ohio-5746, *State v. Koss*, 49 Ohio St.3d 213, *State v. Haines*, 112 Ohio St.3d 393. The State next elicited answers from Robinson to a series of generalized hypothetical. This is where Appellant bases most of his arguments and where his misunderstanding of the case law is apparent.

Case law mandates that the State can ask the experts “hypothetical questions,” but must be careful not to have the expert “offer an opinion relative to the alleged victim in the case.” *Haines*, 112 Ohio St.3d at 404, citing Hawes, *Removing the Roadblocks to Successful Domestic Violence Prosecutions: Prosecutorial Use of Expert Testimony on the Battered Woman Syndrome in Ohio*, 53 Clev.St.L.Rev. 133, 158 (2005). Appellant twists this passage in a way that would forestall the State from asking any questions about the dynamics of domestic violence with regards to socioeconomic status, community status, job status, and potential harm to victims. If this were the

case, it is hard to fathom what relevant hypothetical questions could be asked of the expert. Rather, the limitations in *Haines* are a direct prohibition on the expert giving victim specific answers.

In the present case, while not specifically referencing Allen or any of Allen's words, the State had to clarify misperceptions such as that written in Appellant's brief, that there is a "stereotypical victim of domestic violence." (Appellant's Brief, p. 158) It is just this type of confusion that makes the hypothetical questions about socioeconomic status, community status, job status, and potential harm to victims so beneficial as to educate the jury and clarify misperceptions. This is what an expert witness is supposed to do. See, *Kraus*, at ¶ 47, citing *Dyson*, 2000 WL 1597952, citing *Koss*, 49 Ohio St.3d at 216 ("The average person may also be confused or have misconceptions about why a victim of domestic violence would choose to stay with the abuser or to defend the abuser in court.") In fact, Robinson testified that "[d]omestic violence cuts across all lines of our society. It doesn't matter what class you're in, what age you are, what your sexual orientation is. It cuts across all socioeconomic lines, not just people who are poor and uneducated." (Tr. 662)

The hypothetical questions that were asked included multiple professions, injuries, and socioeconomic statuses. For example, the expert was not asked how domestic violence would effect a lawyer who had suffered a broken ankle, and who made 'x' amount of money. Rather, the State asked about medical, legal, and law enforcement professions; broken bones, stabs, or gunshot wounds; college educated, post grad educated, professional, working people; and low income as opposed to those who had financial resources. (Tr. 662, 663, 668-672) All of these hypothetical questions were generalized enough not to single out Allen, or to specifically single out her exact situation. These are the exact type of questions that are permitted under *Haines*. 112 Ohio St.3d 393.

Further, while Appellant claims error, he also concedes that “the expert did not explicitly say Allen was a battered women, she said everything but.” (Appellant’s Brief, p. 159) This is exactly what a good direct examination of an expert on this topic would do, and is within the bounds of *Haines*. This argument essentially breaks down into Appellant arguing error from good prosecutorial work and a proper exercise of discretion by the trial court.

The exercise of proper discretion by the trial court included the court sustaining multiple objections and instructing how questions could or should be phrased. (Tr. 659, 674, 675) Therefore, as the State stayed within the bounds of *Haines*, and the trial court properly utilized its discretion, no error can be found with either the admission of this expert testimony or the finding that the testimony complied with Evid R. 403(A). *See, Haines*, 112 Ohio St.3d at 404, quoting *People v. Christel*, 449 Mich. 578, 537 N.W.2d 194 (1995) (if these limitations are followed, any concerns about unfair prejudice, under Evid.R. 403(A), should be dispelled).

This Court should overrule Appellant’s fourteenth proposition of law.

Proposition of Law XV:

Trial counsel does not render ineffective assistance of counsel by failing to make objections or motions that would have been unsuccessful.

As this Court has recently held, reversal of a conviction “for ineffective assistance requires that the defendant show, first, that counsel’s performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.” *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 36. Moreover, both this Court and the United States Supreme Court have rejected Appellant’s claim that counsel’s standards of performance are to be measured against the American Bar Association’s Guidelines for the Appointment of Counsel in Death Penalty Cases. *Id.* at ¶ 39; *Bobby v. Van Hook*, — U.S. —, 130 S.Ct. 13 (2009). Moreover, even where deficient performance is established, Appellant must satisfy a high standard for prejudice. To warrant reversal, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

A. Counsel’s Preparation to Defend

First, Appellant again argues against the application of Crim.R. 16 to permit the State to certify the nondisclosure of witnesses under certain, enumerated circumstances. But Appellant does not offer any indication of how trial counsel was objectively unreasonable in light of Crim.R. 16. Thus, this argument should be overruled.

B. Counsel's "Failures" to Object to State's "Misconduct"

In this section, Appellant raises several instances in which he believes trial counsel should have objected. However, the State has responded to each of these alleged plain errors in other sections of its brief. (Sections VIII (prosecutorial misconduct) and VI (Gerald Wilson's prior, inconsistent statement)) Simply put, there was no misconduct by the State, and Mr. Wilson's statement was properly admitted. Thus, Appellant cannot demonstrate ineffective assistance by his trial attorney's failure to object to non-objectionable events during the trial.

C. Crystal Evans' Testimony and Statement

In Section X, the State explained at length why Crystal Evans' statement was admissible at trial and properly used by the State. Moreover, in Section VII, the State demonstrated that it properly asked Evans leading questions. Again, no prejudice inures from trial counsel's failure to object to admissible evidence and proper trial procedure. Thus, this argument should be rejected.

D. "Hearsay"

In Section XI, the State has discussed Appellant's arguments that certain testimony violated his right to confrontation. Because the statements at issue were nontestimonial or otherwise not hearsay, trial counsel did not err in failing to object.

E. Limiting Instructions

Appellant argues that a "limiting instruction" should have been given with regards to the statements of Crystal Evans and Gerald Wilson, but offers no indication of what that instruction

should have been. On that basis alone, his argument should be overruled. Moreover, no limiting instruction was required for Ms. Evans's statement. With respect to Mr. Wilson's statement, which was clearly used to impeach his testimony that a "dirty cop" asked him to lie, Appellant does not even suggest that the lack of a limiting instruction undermines the confidence in the verdict. Thus, his argument fails.

F. "Irrelevant, Prejudicial, and Inadmissible Evidence"

In this section, Appellant presents a bullet-point list of allegedly inadmissible evidence that was admitted by the trial court. The State has addressed each piece of evidence in other sections of its brief. Because the admission of each of these pieces of evidence was proper, trial counsel did not err in failing to object to them.

G. The Statements of Margaret Allen

Appellant's argument in this regard is truly bizarre. While acknowledging that Appellant's trial counsel objected and preserved the record, he argues that trial counsel apparently did not object strenuously enough, leaving the trial court judge "uninformed." (Appellant's Brief at 169.) This is not a cognizable ineffective assistance claim. Moreover, the trial court, despite Appellant's insulting insinuation to the contrary, was very informed with respect to the forfeiture by wrongdoing doctrine. As the Judge Sage told trial counsel outside the presence of the jury, "I'm very familiar with the forfeiture by wrongdoing doctrine because I was part of the Rules Commission that dealt with it at the Supreme Court." (Tr. 612.) Appellant's argument should be rejected.

H. Voir Dire of a Juror

Appellant claims that in response to an incident in the courtroom, his trial counsel should have accepted the trial court's offer to voir dire the jury. (Tr. 1410-12.) With respect to pre-trial voir dire, this Court has held that "counsel is in the best position to determine whether any potential juror should be questioned and to what extent." *State v. Mundt*, 115 Ohio St.3d 22, 30, 2007-Ohio-4836, 873 N.E.2d 828. The same should hold true of a mid-trial voir dire opportunity. Trial counsel observed the incident and the jurors' response, and was in the best position to determine whether the jury should be questioned, or whether doing so would merely draw more attention to the situation and perhaps prejudice the defendant. The Second District has rejected the argument that trial counsel is per se ineffective for failing to voir dire a juror or jurors during trial. *State v. Williams*, 2d Dist. No. 22126, 2008-Ohio-2069.

What is more, Appellant is entirely unable to show any prejudice as a result of the decision not to voir dire the jury. Without such prejudice, his *Strickland* claim cannot prevail, and his argument should be overruled.

I. Joinder

Appellant next challenges his counsel's decision not to file a motion to sever. However, as the domestic violence and felonious assault charges stem from the same patten of activity, and form the patten of abuse against Ms. Allen, the State disagrees.

Criminal Rule 8(A) permits two or more offenses to be joined in the same indictment if such offenses "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common

scheme or plan, or are part of a course of criminal conduct.” The law favors joining multiple offenses in a single trial under Criminal Rule 8(A) “to conserve judicial resources, reduce the chance of incongruous results in successive trials and diminish inconvenience of witnesses.” *State v. Lott*, 51 Ohio St.3d 160, 162, 555 N.E.2d 293 (1990); *State v. Johnson*, 88 Ohio St.3d 95, 109, 2000-Ohio-276, 723 N.E.2d 1054.

A defendant may move to sever offenses that are joined under Crim.R. 14 if he can “establish prejudice to his rights.” *State v. Mills*, 62 Ohio St.3d 357, 362, 582 N.E.2d 972 (1992); *Johnson*, 88 Ohio St.3d at 109. The State may counter an accused’s claim of prejudice from joinder of multiple offenses in one of two ways, namely, the “other acts” test, or the “joinder” test. *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991). The “other acts” test requires the State to show that evidence of one offense would have been admissible at the trial of another offense under the other acts portion of Evid.R. 404(B). *Id.* The “joinder” test merely requires the State to show that “the evidence of each of the crimes is simple and direct.” *Id.* Evidence is “simple and direct” if “a jury is capable of segregating the proof required for each offense,” i.e., where “[t]he evidence makes it unlikely that the jury would confuse the two offenses,” *Mills*, 62 Ohio St.3d at 362. The accused is not prejudiced by joinder when there is simple and direct evidence for each crime, regardless of whether evidence of the other crimes is admissible under Evid.R. 404(B); thus, if the State can meet the joinder test, it need not meet the stricter requirements of the other acts test. *Franklin*, at 122.

Applying these two tests, it is clear that Appellant was not prejudiced by joinder as the State was capable of meeting both the “other acts” test, as well as the “joinder” test.

In this case, Ms. Allen’s murder could not be viewed in isolation without reference to the domestic-violence and felonious assault charges. *See State v. Fry*, 125 Ohio St.3d 163,

2010-Ohio-1017, 926 N.E.2d 1239. The previous incidents would clearly have been proper Evid.R.404(B) evidence as they would demonstrate Appellant's motive, intent, knowledge, identity, and the absence of mistake or accident. The Appellant clearly had abused and assaulted Ms. Allen previously, and did so to control her. This was his clear behavioral pattern, and per expert testimony, the cycle of domestic violence was present in the relationship between Ms. Allen and Appellant. The previous domestic violence and felonious assault would clearly have been admissible as 404(B) evidence during any trial against Appellant for Ms. Allen's murder. Therefore, it cannot be stated that his counsel were ineffective.

What is more, the evidence of the previous domestic violence and felonious assault were simple and direct. The complained of counts occurred at distinct times, had distinct injuries to Ms. Allen, and involved distinct testimony. There was no confusion by the jury as to these injuries and the murder of Ms. Allen or Mr. Evans. It is inconceivable that these crimes do not satisfy the simple and direct test. The domestic violence and felonious assault counts were such that the jury was "capable of segregating the proof required for each offense," and it was "unlikely that the jury would confuse the two offenses,." *Mills*, 62 Ohio St.3d at 362.

Therefore, as the actions that gave rise to the domestic violence and felonious assault counts satisfies both the "other acts" and "joinder" tests, trial defense counsel were not ineffective for failing to raise what would have amounted to a frivolous motion.

J. "Further Evidence of Ineffectiveness"

Finally, Appellant argues that his trial counsel should have done something (though he does not specify what, precisely) prior to the dismissal of a juror during sentencing deliberations. (Appellant's Brief at 174.) Appellant speculates, without support in the record, that the juror was actually a "holdout and was therefore struggling with the other jurors." (Appellant's Brief at 175.)

Appellant's speculation is just that: speculation. The record does not support an inference that the dismissed juror was a holdout. Instead, the truth is likely what the juror told the court: that her mother was having surgery the following day in Virginia, and that she could no longer "think of anything else," thus rendering her unfit to participate in deliberations. (Tr. 160, 164.) Appellant cannot show that if this juror had remained, the outcome of the sentencing phase of his trial likely would have been different. Accordingly, trial counsel did not render ineffective assistance of counsel, and Appellant's fifteenth proposition of law should be overruled.

Proposition of Law XVI:

Where trial counsel performs objectively reasonably, the defendant's right to counsel is upheld.

In his sixteenth proposition of law Appellant argues that his "right to effective counsel was violated by the cumulative effect of errors and omissions by this trial counsel in the sentencing phase of his capital trial." (Appellant's Brief, p. 177) However, as counsel performed effectively, no error, much less cumulative error occurred, and this proposition of law should be denied.

In *State v. Bradley*, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373 (1989), this Court stated that "when considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsels ineffectiveness." This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The *Strickland* Court found that "[w]hen a convicted defendant complains of the ineffectiveness of counsels assistance, the defendant must show that counsels representation fell below an objective standard of reasonableness." *Strickland*, at 687-688. The court next observed that there are "countless ways to provide effective assistance in any given case." *Id.* at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsels conduct falls within the wide range of reasonable professional assistance." *Id.* Reviewing courts will therefore give much deference to defense counsel's performance. Consequently, an attorney's performance will not be deemed ineffective unless and until their

performance is proved to have fallen below an objective standard of reasonable representation and, prejudice arises from counsel's performance. See *Bradley*, 42 Ohio St.3d 136. Moreover, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, supra, 466 U.S. at 690.

Even assuming that counsel rendered an ineffective performance, this finding alone does not warrant reversal of a conviction. The *Strickland* Court noted that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365 (1981)." *Strickland*, at 691. Therefore, to warrant reversal, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bradley*, 42 Ohio St.3d at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, at 694, See also *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980) (debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel).

The United States Supreme Court gave additional guidance to other courts in the following passage:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” See *Michel v. Louisiana*, supra, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 343 (1983). *Strickland*, 466 U.S., at 689-690.

Therefore, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. A failure to make an adequate showing on either the “performance” or “prejudice” prongs of the Strickland standard will doom the defendant’s ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687, 697.

It must also be noted that while Appellant desires to rely upon the ABA guidelines for appointment of counsel in capital cases, the United States Supreme Court and this Court has found that the ABA guidelines are “only guides” to what reasonableness means, not its definition. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 39, 960 N.E.2d 955, citing *Bobby v. Van Hook*, — U.S. —, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009).

A. Overall Mitigation Presentation

Appellant argues under this subsection that his counsel’s presentation at the mitigation hearing was “bare bones and not cohesive.” (Appellant’s Brief at 179.) He premises this argument on the fact that only three witnesses were called. However, Appellant never truly explains this argument. It is hard to understand whether he thinks more witnesses should have been called,

whether he did not like the answers to the questions that the witnesses gave, or how the calling of three familial/personal witnesses was not cohesive. But, no matter what this argument is truly saying, it is clear that trial counsel were effective.

The presentation of mitigating evidence is a matter of trial strategy. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 189, citing *State v. Keith*, 79 Ohio St.3d 514, 530, 1997-Ohio-367, 684 N.E.2d 47. Moreover, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Bryan*, at ¶ 189, citing *Wiggins v. Smith*, 539 U.S. at 521, quoting *Strickland*, 466 U.S. at 690-691. Therefore, when “counsel has presented a meaningful concept of mitigation, the existence of alternative or additional mitigation theories does not establish ineffective assistance.” *State v. Combs*, 100 Ohio App.3d 90, 105, 652 N.E.2d 205 (1994).

Based upon the foregoing, this Court has found that counsel can be effective when they call a single witness whose testimony only spans four pages of transcript. *See State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104. Therefore, any argument premised on there being only three witnesses called on Appellant’s behalf is unpersuasive. There is no per se number of witnesses that must be called.

Furthermore, this Court has found that a clear strategy exists in mitigation when counsel argues for a life sentence based upon the defendant being raised in an abusive home, suffering problems while growing up that hindered their development, and having a low intelligence. *See State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31. In the present case, counsel’s strategy was to argue for a life sentence based upon Appellant being raised without a father, being raised by a drug abusing mother who would prostitute herself, that the neighborhood he grew up in

was rough and crime ridden (including that his brother was murdered), that he was a product of this environment, and that he was a loving father. This presentation was cohesive and included testimony from his mother, his daughter, and the mother of his child.

Finally, Appellant also gave an unsworn statement which echoed this theme: “but I come before you all today to give you some insight into my world. I didn’t have the same opportunities you all had. There were many issues and obstacles I had to overcome in my life. Just to be able to be in front of you today is a blessing.” (Mitigation Hearing Tr. 67) Thus, it is clear that the mitigation theme was to portray Appellant as a product of a bad environment who was brought into a lifestyle and should not be held fully accountable as he did not have an opportunity to get out of this world. Merely because this strategy did not work, or might, in hindsight have not been the best; does not make counsel ineffective. *See State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980) (when counsel chooses a strategy that proves unsuccessful, the fact that there was another and better strategy available does not amount to ineffective assistance).

B. Mitigation Team

In the second prong of this proposition of law, Appellant argues, without support in the record, that his counsel were ineffective for not hiring more experts. Appellant premises this argument on the guidelines as put forth by the ABA. Again, it must be reiterated that the United States Supreme Court has held that the ABA guidelines are “only guides” to what reasonableness means, not its definition. *Hunter*, 2011-Ohio-6524, ¶ 39, citing *Van Hook*, 130 S.Ct. 13.

What is more, this Court has already rejected the argument that the failure to hire a mitigation specialist/expert constitutes ineffective assistance of counsel. *See State v. McGuire*, 80 Ohio St.3d

390, 399, 1997-Ohio-335, 686 N.E.2d 1112 (“First, he claims ‘inadequate preparation and presentation of mitigation evidence,’ because counsel should have hired a ‘mitigation specialist’ to gather mitigating evidence. However, he cites no authority that this is a requirement of effective assistance, and we hold that it is not.”); *see also State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 130.

Additionally, Appellant cannot demonstrate prejudice under this argument. The only way to demonstrate prejudice is to put forth what one of these “experts” would have said. This is impossible during the direct appeal process as it would require facts from outside the record. *See State v. Keith*, 79 Ohio St.3d 514, 536-537, 1997-Ohio-367, 684 N.E.2d 47. In *Keith*, this Court noted that “[t]o do so would require that there was mitigating evidence counsel failed to present and that there is a reasonable probability that the evidence would have swayed the jury to impose a life sentence. Establishing that would require proof outside the record, such as affidavits demonstrating a lack of effort to contact witnesses or the availability of additional mitigating evidence. Such a claim is not appropriately considered on a direct appeal.” *Id.*

Further, while counsel did not hire certain experts, the record appears to indicate that they did explore the hiring of these experts, and that they extensively utilized a private investigator. First, during a hearing in October counsel indicated that they had explored the potential hiring and aid that would be given by additional experts:

THE COURT: Okay. And I want to make sure that the record is very clear at this point, that back in February eight months ago, this Court authorized money for mitigation experts, forensic experts, investigators and mental health experts. And you’ve had that money available and I assume that if you felt it was necessary, that you have pursued all that with the Court; is that correct?

MR. HOWARD: That’s correct.

THE COURT: Not with the Court, but with your client.

MR. HOWARD: Yes, sir.

THE COURT: And I want to make sure that at this point, there is nothing out there that could have been done that wasn't done, so that that would delay this hearing.

MR. HOWARD: As far as mitigation, no, your Honor.

THE COURT: Okay. I don't want to know what that mitigation is today. I just want to make sure that you had an opportunity to explore mitigation experts, mental health experts, investigators and everything that is necessary to present mitigation in this case.

MR. HOWARD: Yes.

(October 15, 2010 Hearing Tr. 16-17)

Secondly, the record supports that two death penalty certified counsel, with a third counsel also participating for a time, chose to utilize an investigator (Quest Associates of Ohio) as opposed to a "mitigation specialist". The trial court allowed for \$8,162.16 to this investigator, who when combined with three attorneys, was more than able to satisfy the requirements of competent counsel with the aid of a specialist. (See, Entry dated Dec. 3, 2010 and Motion for Additional Funds, dated Dec. 1, 2010)

Thus, the record supports the fact that defense counsel had the funds and opportunity to explore various experts, but strategically chose to invest heavily in a private investigator. No error can be found in this decision as "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Bryan*, 2004-Ohio-971, ¶ 189, quoting *Wiggins*, 539 U.S. 510, 521.

D. Closing Argument

Appellant also claims that his counsel's closing argument was "devoid of advocacy", rendering his assistance ineffective. (Appellant's Brief, p. 182) The claim truly boils down to the fact that Appellant now takes issues with the strategic way his counsel argued the case. However, it must again be stated that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Bryan*, 2004-Ohio-971, ¶ 189, quoting *Wiggins*, 539 U.S. 510, 521.

First, Appellant takes issue with the fact that counsel acknowledged that Appellant's crimes and specifications were extremely severe. This admission is a sound strategy which attempted to build a level of trust and rapport with the jury. What is more, offering to take the options of 25 to life and 30 to life off the table, demonstrates a clear willingness to accept responsibility, a very commonly used factor in mitigation. Both of these tactics, trust building and acceptance of responsibility, are common place tactics in closing arguments of capital murder cases, and cannot be found to constitute ineffective assistance.

Secondly, many of the complained of comments by defense counsel went to the centralized theme: that Appellant was a product of his bad environment and that this should be the factor that tips the scales away from a death verdict. Counsel played this theme well, and had to portray Appellant as a person who had bought into the street life. Otherwise, this tactic was sure to fail. For example, how can one argue to a jury that they are the product of impoverished crime ridden streets, while at the same time claiming to be an angel on the inside? Instead, counsel had to call Appellant a bad man, who lived a scandalous life, and who hustled drugs. (Tr. 112-113, 125, 126) The jury knew these things to be true as they had only days before found Appellant guilty of two murders and

numerous other crimes. A defense strategy that did not acknowledge Appellant's past, and the crimes he was just convicted of, would have surely failed and possibly even insulted the jury.

As such, while it ultimately proved unsuccessful in tipping the scales, counsel's decision was a strategic and well reasoned one. The fact that the decision was unsuccessful does not indicate that counsel was ineffective. This is especially true because it is hard to fathom a strategy that would have worked, in light of the tons of weight that Appellant created on the side of the aggravating circumstances in this case.

Based upon all of the foregoing, Appellant received effective assistance of counsel during the mitigation stage of his trial and the sixteenth proposition of law should be denied.

Proposition of Law XVII:

The State does not engage in prosecutorial misconduct by making arguments to the jury regarding the aggravating circumstance and the lack of mitigating circumstances.

In proposition of law fourteen, Appellant argues that the State committed acts of misconduct that deprived him of a fair sentencing phase. The State disagrees.

A. Standard

The test for prosecutorial misconduct is whether the statements made by the State were improper, and if so, whether they prejudicially affected substantial rights of the accused. *State v. Smith*, 14 Ohio St.3d 13, 470 N.E.2d 883 (1984). When reviewing a claim of prosecutorial misconduct, an appellate court must review the context of the entire trial to determine if a prosecutor's remarks are prejudicial to the accused. *State v. Tumbleson*, 105 Ohio App.3d 693, 664 N.E.2d 1318 (1995). A conviction will not be reversed because of prosecutorial misconduct unless it so taints the proceedings that a defendant is deprived of a fair trial. *State v. Smith*, 87 Ohio St.3d 424, 442, 721 N.E.2d 93 (2000). As the United States Supreme Court has succinctly stated, "it is not enough to find that the comments were inappropriate or even universally condemned. * * * The relevant question is whether they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); See, also, *State v. DePew*, 38 Ohio St.3d 275, 528 N.E.2d 542 (1988), *cert. denied* (1989), 489 U.S. 1042.

A prosecutor's closing remarks are generally not considered prejudicial unless they are "so inflammatory as to render the jury's decision a product solely of passion and prejudice * * *." *State v. Williams*, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986); *see also DeChristoforo*, 416 U.S. at 643

(to be prejudicial, remarks must have “so infected the trial with unfairness as to make the resulting conviction a denial of due process”). Moreover, instances of prosecutorial misconduct can be deemed harmless when they are isolated. See *State v. Lorraine*, 66 Ohio St.3d 414, 613 N.E.2d 212 (1993). A reviewing court must examine the final argument as a whole, not in isolated parts, and must examine the argument in relation to that of opposing counsel. *State v. Moritz*, 63 Ohio St.2d 150, 407 N.E.2d 1268 (1980).

Prosecutors are entitled to latitude in arguing what the evidence has shown and what the jury may infer from the evidence. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, citing *State v. Tibbetts*, 92 Ohio St.3d 146, 2001-Ohio-132, 749 N.E.2d 226. In addition, prosecutors may properly argue all reasonable inferences from the evidence admitted at trial. *State v. Stephens*, 24 Ohio St.2d 76, 263 N.E.2d 773 (1970). “Prosecutors can urge the merits of their cause and legitimately argue that defense mitigation evidence is worthy of little or no weight.” *State v. Wilson*, 74 Ohio St.3d 381, 399, 659 N.E.2d 292 (1996).

In the penalty phase of a capital murder trial, the State is permitted to introduce and comment upon at least six specific items, and all matters contained inside of them. See *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995), syllabus. Specifically, the state may introduce and comment upon “(1) any evidence raised at trial that is relevant to the aggravating circumstances specified in the indictment of which the defendant was found guilty, (2) any other testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified in the indictment of which the defendant was found guilty, (3) evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant, (4) the presentence investigation report, where one is requested by the defendant, and (5) the mental examination report, where one is

requested by the defendant”, and (6) “Further, counsel for the state may comment upon the defendant’s unsworn statement, if any.” *Id.*

In beginning to evaluate Appellant’s claims in the present case, it should first be parsed out which alleged instances of misconduct were specifically objected to. Aside from the readmission of the autopsy photographs, Appellant failed to object to any of the claimed instances of misconduct in this proposition of law. Thus, almost all of his arguments are waived, absent plain error. See, *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 198. Crim.R. 52(B) states that “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Therefore, “there are three limitations on a reviewing court’s decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. *** Second, the error must be plain. To be ‘plain’ within the meaning of Crim.R. 52(B), an error must be an ‘obvious’ defect in the trial proceedings. *** Third, the error must have affected ‘substantial rights.’” *State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722, 950 N.E.2d 931, ¶ 13. For an error to affect a substantial right, the error must have affected the outcome of the case. *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240.

B. Unsworn Statement

Appellant first claims that although not object to, the State should not have commented on his unsworn statement. Generally, R.C. 2929.03(D)(1) grants the defendant in a capital case the right to make an unsworn statement at the penalty phase of his trial. This Court has held that, “[t]o permit the prosecutor to extensively comment on the fact that the defendant’s statement is unsworn affects Fifth Amendment rights and negates the defendant’s statutory prerogative.” *State v. Skatzes*, 2d Dist.

No. 15848, 2003-Ohio-516, *aff'd*, 104 Ohio St.3d 195, 819 N.E.2d 215, 2004-Ohio-6391, citing *State v. DePew*, 38 Ohio St.3d 275, 285, (1988) *cert. denied* (1989), 489 U.S. 1042, 109 S.Ct. 1099. When an unsworn statement is given, “[t]he prosecutor is permitted to comment that the defendant’s statement was not made under oath or affirmation, but such comment must be limited to reminding the jury that, in contrast to the testimony of all other witnesses, the defendant’s statement was not made under oath.” *Depew*, at paragraph two of the syllabus.

In the present case, the prosecution did cross this line in a couple of passing phrases during its initial closing argument. (M.p. 98-99) The small offending phrases were “[y]ou heard Calvin McKelton tell you, let me talk to you about why we’re here. And you never heard him say Missy’s name. You never heard him talk about Germaine Evans’ death.” (M.p. 98) And “you never heard Calvin McKelton say a single word about it. He told you, Calvin did, about going out for Moosewood to the body of his friend Tey and paying respects and putting his hand on his back, went out to Moosewood. He never went out to Inwood to see his friend Germaine, to pay his respects.” (M.p. 99) A total of five, non-objected to sentences, limited to reminding the jury what Appellant did not say.

These five sentences are not enough to be plain error based upon this Court’s previous rulings. In a previous decision from this Court, it was determined that an error by a prosecutor in commenting not only on an appellant’s silence on particular issues, but also on issues of credibility, and lack of cross-examination of an unsworn statement “was harmless beyond a reasonable doubt.” *State v. Lorraine*, 66 Ohio St.3d 414, 419, 613 N.E.2d 212 (1993), *See also State v. Mack*, 8th Dist. No. 62366, 1993 WL 497052, *27 (Dec. 2, 1993), *aff'd* 73 Ohio St.3d 502, 1995-Ohio-273, 653 N.E.2d 329 (finding prosecutor’s remarks that appellant did not offer any explanation in his unsworn

statement as to why he was found in the company of others who also possessed weapons involved in the fatal shooting, harmless and not warranting reversal).

Thus, if this Court has found that committing the same error, plus two additional errors in regards to an unsworn statement “was harmless beyond a reasonable doubt”, the State asserts that any error in the present case is also harmless beyond a reasonable doubt. *Id.*

C. Margaret Allen & Germaine Evans

Appellant next argues that the State should not have been allowed to discuss Margaret Allen during its closing arguments in the sentencing phase. This argument is premised upon Appellant’s misunderstanding that he was capitally convicted “in connection with the death of Germaine Evans, not Margaret Allen.” (Appellant’s Brief at 188) However, the correct statement is that Appellant was convicted of aggravated murder with the capital specification being that his act of murdering Evans was done to prevent Evans from testifying about his other murder of Ms. Allen and the gross abuse of Allen’s corpse. See, R.C. 2929.04(A)(8). The crimes become inextricably linked under R.C. 2929.04(A)(8), and thus no error occurred.

R.C. 2929.04(A)(8) states in relevant part: “[t]he victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim’s testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim’s testimony in any criminal proceeding.” As it relates to the present case, the specification was based upon Evans having witnessed Appellant

murder Ms. Allen, and then Evans himself being murdered to prevent his testimony against Appellant, in a separate murder case with Allen as the victim. Therefore, it is beyond cavil, that the State was permitted to discuss both murders, pursuant to the plain language of R.C. 2929.04(A)(8).

As part of this specification, the State is free to discuss that a person was a witness to an offense, what offense they witnessed, and must demonstrate that the victim of the aggravated murder was not killed “during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness.” The final part of the specification makes it incumbent upon the State to discuss the time frame of the previous offense and the ending point of the current offense. As such, it was within the specification to discuss not only the offense to which Germaine Evans had witnesses, but also that Evans was not killed immediately after Allen.

Additionally, the State is also able to discuss the nature and circumstances of the offense. This again would open the door to the natural link, caused by Appellant, of the two murders. This is demonstrated by the fact that Appellant concocted the entire plan to murder Evans after overhearing the police talking to Evans’ sister about the Margaret Allen case. No matter the spin Appellant attempts to put into this argument, the two murders combined encompass the R.C. 2929.04(A)(8) specification. Without Ms. Allen’s murder, the conviction for killing Evans does not contain this specification, as the Allen murder is the predicate for the victim/witness specification.

What is more, precedent from this Court supports the State’s position. In *State v. Filiaggi*, 86 Ohio St.3d 230, 714 N.E.2d 867 (1999), this Court used all of the background information of Filiaggi’s ex-wife and the crimes and complaints that she was going to file as support and proof that went directly to the aggravated circumstance in R.C. 2929.04(A)(8). In *State v. Frazier*, 73 Ohio

St.3d 323, 338-339, 652 N.E.2d 1000, 1013-1014, (1995), this Court held that evidence that the accused previously raped the murder victim was “inextricably linked” to the murder when the victim was killed to silence her as a rape witness.

This Court later followed the *Frazier* decision and found that “the trial court properly admitted evidence of Coleman’s drug sales to Stevens. The admission of the underlying facts regarding the three separate drug sales tended to prove the essential elements of the specification. R.C. 2929.04(A)(8) requires that the state prove motive, and evidence was introduced to demonstrate that Stevens was the key witness against appellant and that her murder would hinder the state’s case against him by preventing her testimony, which explained appellant’s motive and deep obsession with killing Stevens. Thus, the drug sales are not considered “other acts” evidence limited by Evid.R. 404(B); rather, they were introduced to prove the R.C. 2929.04(A)(8) death-penalty specification.” *State v. Coleman*, 85 Ohio St.3d 129, 140, 707 N.E.2d 476 (1999). The *Coleman* decision went on to note that the previously witnessed drug crimes and the murder of the witness “were not ‘wholly independent’ crimes; hence, the state could reasonably prove not only that Stevens was a witness, but also precisely what crimes she witnessed and that she was a key witness.” *Id.*, at 141 (Emphasis added).

This case law clearly established that the State is permitted to discuss the nature and details of the crimes that were witnessed which caused a defendant to decide to execute the witness to prevent their testimony. This is similar to the R.C. 2929.04(A)(5) (previous murder conviction) specification of which this Court has held “because the prior murder conviction is an aggravating circumstance, the prosecutor is permitted to discuss the elements of it, including the name of the

victim.” *State v. Evans*, 63 Ohio St.3d 231, 239, 586 N.E.2d 1042 (1992) (emphasis added), followed by *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215.

As such, the R.C. 2929.04(A)(8) specification is not a status specification that the jury must consider in a factual vacuum concerning the offense to which the aggravated murder victim witnessed. *See State v. Hill*, 75 Ohio St.3d 195, 661 N.E.2d 1068 (1996) (Court stated: “We will not interpret Ohio’s capital sentencing statute to require a jury to make its recommendation between life and death in a factual vacuum.”) To make it such would in essence, turn the R.C. 2929.04(A)(8) specification into a meaningless specification where the jury would could not consider what offense was witnessed and how the offense was committed. This cannot be, and has been held by this Court to not be the proper reading of R.C. 2929.04(A)(8). Therefore, no misconduct occurred by the State discussing Evans witnessing Appellant murder Ms. Allen.

D. Autopsy Photographs

Next, Appellant argues that the State committed misconduct by asking the trial court for the readmission of autopsy photographs. It is hard to see this as a case of prosecutorial misconduct, and would appear to be more properly framed, albeit equally as ultimately unsuccessful, as an alleged trial court error in admission. However, under either theory, the photographs were relevant to the aggravating circumstance Appellant was found guilty of committing, and therefore, were properly admitted.

R.C. 2929.03(D)(1) provides that the prosecutor at the penalty stage of a capital proceeding may introduce “any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing.” *See State v. DePew*, 38 Ohio St.3d 275, 528 N.E.2d 542,

paragraph one of the syllabus. Appellant was found guilty of R.C. 2929.04(A)(8). This allowed the State to admit evidence concerning the offense which Evans witnessed Appellant commit. These offenses were the murder and gross abuse of a corpse¹¹ of Margaret Allen. The autopsy pictures in question were clearly relevant to this aggravating circumstance and were properly admitted without any misconduct on the part of the State.

In *State v. Lang*, 129 Ohio St.3d 512, 546, 2011-Ohio-4215, 954 N.E.2d 596, this Court considered a similar argument when a trial court admitted at the sentencing phase “photograph of the victims as they were found in the Durango, and the coroner’s photographs and autopsy reports.”

After citing R.C. 2929.03(D)(1), it was held that “the trial court did not abuse its discretion in readmitting this evidence because these items bore some relevance to the nature and circumstances surrounding the [R.C. 2929.04(A)] specifications.” *Id.* This is directly in line with this Court’s general statement concerning the sentencing phase that:

As we explicitly recognized in *Wogenstahl*, “R.C. 2929.03(D)(1) requires that the trial court and jury ‘hear’ testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing.” (Emphasis sic.) *Id.* at 353, 662 N.E.2d 311. Accord *State v. Stojetz* (1999), 84 Ohio St.3d 452, 464, 705 N.E.2d 329. In *State v. Hill* (1996), 75 Ohio St.3d 195, 661 N.E.2d 1068, we explicitly made this point: “We will not interpret Ohio’s capital sentencing statute to require a jury to make its recommendation between life and death in a factual vacuum. * * * We will not sanction a procedure by which counsel for a criminal defendant is provided full opportunity to vigorously argue the full range of mitigating evidence * * * while his adversary, the prosecutor, is precluded from vigorously arguing the entire scope of facts surrounding the act of murder of which the defendant has been convicted. * * * In short, a capital defendant in Ohio is not statutorily or constitutionally entitled to protection during the

¹¹ Appellant’s argument that based upon when Allen’s body was found and its decomposing state, Evans did not witness this is defeated by the fact that in unceremoniously dumping Allen’s body, Evens also witnessed Appellant commit the crime of Gross Abuse of A Corpse.

sentencing process from the facts he himself created in committing the crime.”
(Emphasis added.) *Id.* at 201, 661 N.E.2d 1068.
State v. Newton, 108 Ohio St.3d 13, 2006-Ohio-81, 840 N.E.2d 593, ¶ 47.

Therefore, the trial court did not abuse its discretion, and the State did not commit misconduct by requesting the readmission of the autopsy photographs as they bore direct relevance to the nature and circumstances surrounding the R.C. 2929.04(A)(8) specification.

E. Childhood References

Appellant argues that the prosecutor should not have been allowed to discuss his childhood during the State’s rebuttal closing argument. However, the prosecutor did this after hearing Appellant’s counsel attempt to use his affluent childhood as a juxtaposition to Appellant’s more difficult childhood, as some type of reason that would explain or mitigate Appellant’s actions. In evaluating misconduct during closing argument, this Court has found that when reviewing a closing argument for misconduct, the court must examine the final argument as a whole, not in isolated parts, and must examine the argument *in relation to that of opposing counsel*. See, e.g., *State v. Moritz* (1980), 63 Ohio St.2d 150, 157-158, 407 N.E.2d 1268; see also *State v. Loza*, 71 Ohio St.3d 61, 641 N.E.2d 108 (1994).

Clearly, during closing arguments, trial counsel for Appellant first discussed his childhood when he stated “I was raised in an upper middle were class environment. My father was a doctor and my mom was housewife. I was expected to do things. I was expected to go to college. I was expected after to college to go on and get some sort of post college education, which I did, as were my sisters,

who have done the same thing. One is a doctor and one has a master's degree." (Mitigation Hearing Tr. 122)

This was in direct juxtaposition to the theme of Appellant's mitigation that he grew up in a rough neighborhood and that his economic status was a factor that should be considered. The prosecutor merely responded to these arguments. While the prosecutor's reference to his childhood in another case might be inappropriate, when considered in light of defense counsel's argument, it became proper in the case at bar. As such, no error occurred.

F. Proper Weighing

In Appellant's final argument in this proposition, he quotes and then misconstrues a brief section of the State's closing argument. According to his misconception, he argues that the State improperly invited the jury to put everything surrounding the crime on the aggravating circumstances side of the scales. The State disagrees.

In the passage quoted, the State informs the jury that Germaine's death is the weight that goes on the scale. While not artful, this appears to be an appropriate argument as the aggravated circumstance was that Germaine Evans was killed to prevent him from being witness in what would have been Appellant's murder trial for the death of Ms. Allen. Thus, the statement "[I]like Missy, Germaine's body lay out in the open waiting to be found by people not involved. That is why you're here. That is the weigh that goes on the side of that specification" while not perfect, is a correct statement.

Further, in *State v. Gumm*, 73 Ohio St.3d 413, 422, 653 N.E.2d 253 (1995), the case cited by Appellant, this Court found that "the inaccurate description of 'nature and circumstances'

evidence as ‘aggravating circumstances’ during argument does not constitute plain error. We find beyond a reasonable doubt that the outcome of the jury’s sentencing recommendation would not have been different in the absence of this argument, particularly as the jury was correctly instructed as to what the statutory aggravating circumstances were for weighing purposes.” Therefore, as the statement is a correct statement of the specification, as no objection was made, and as the jury was correctly instructed on what constitutes an aggravating circumstance, there is no error, plain or otherwise, in the present case. Appellant’s proposition of law should be denied.

Proposition of Law XVIII:

During the sentencing phase of a capital trial, a trial court properly instructs a jury to consider “only that evidence admitted in the trial phase that is relevant to the aggravating circumstance and to any of the mitigating factors,” as well as all evidence admitted during the sentencing phase.

Appellant claims that the trial court’s instruction to the jury during the sentencing phase of the trial “resulted in the jury being left to determine what trial phase evidence was relevant to the sentencing deliberations,” and that as a result, this Court “should have no confidence that the jury understood the legal irrelevance of trial phase testimony that was permitted to be considered.” (Appellant’s Brief at 193.) Appellant’s argument, which was not raised before the trial court, incorrectly summarizes the trial court’s instructions to the jury and, moreover, and has been rejected by this court.

Prior to the jury’s sentencing deliberations, the trial court instructed the jury, in part:

Some of the evidence and testimony that you considered in the trial phase of this case may not be considered in this sentencing phase. ***For purposes of this proceeding, only that evidence admitted in the trial phase that is relevant to the aggravating circumstance and to any of the mitigating factors is to be considered by you.*** You will also consider all of the evidence admitted during this sentencing phase.

(Mitigation Hearing Tr. 141) (emphasis added).

The trial court continued by informing the jury:

I ***will place in your possession the exhibits * * **** The foreperson will retain possession of the exhibits * * *and return them to the courtroom when you have reached a verdict. ***These are the only exhibits you may consider.***

(Mitigation Hearing Tr. 145) (emphasis added).

Thus, contrary to Appellant’s argument, the trial court instructed the jury as to which of the trial phase evidence could be considered in its sentencing deliberations.

This Court has recently considered and rejected the precise argument advanced by Appellant in the instant case:

During penalty-phase instructions, the trial court advised the jury:

“Some of the evidence and testimony that you considered in the trial phase of this case may not be considered in this sentencing phase. We went through the exhibits. I’ve culled out only certain exhibits that will be with you in the jury room.

“For purposes of this proceeding, only that evidence admitted in the trial phase that is relevant to the aggravating circumstances and to any of the mitigating factors is to be considered by you. You will also consider all of the evidence admitted during the sentencing phase.”

Lang argues that the instructions improperly allowed the jury to determine which guilt-phase evidence was relevant to the aggravating circumstances during the penalty phase. However, defense counsel failed to object to this instruction and waived all but plain error. *Underwood*, 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus. Neither plain error nor any other error occurred.

It is the trial court's responsibility to determine what guilt-phase evidence is relevant in the penalty phase. See *State v. Getsy* (1998), 84 Ohio St.3d 180, 201, 702 N.E.2d 866. Here, the trial court's instructions on relevancy limited the jury's consideration of the guilt-phase evidence and testimony to the two aggravating circumstances and the mitigating factors. The trial court's instructions also made it clear that the jury would see only those guilt-phase exhibits that the trial judge admitted and deemed relevant. Viewing the penalty-phase instructions as a whole, we conclude that the trial court adequately guided the jury as to the evidence to consider in the penalty phase.

State v. Lang, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶¶ 247-51.

Thus, this Court has approved of an instruction that was, in both form and function, virtually identical to the one given to the jury in this case. Accordingly, Appellant is unable to establish error of any kind—much less plain error—and his eighteenth proposition of law should be overruled.

Proposition of Law XIX:

A trial court's adverse rulings are not evidence of bias or prejudice.

Appellant claims, with no support from Ohio law, that the trial court's "errors" are evidence of bias. As the State has argued throughout, Appellant's other assignments of error are without merit, as the trial court's decision did not constitute error. In a capital case in which the death penalty was imposed, this Court rejected outright the argument that "the judge's unfavorable rulings prove bias." *State v. Sanders*, 92 Ohio St.3d 245, 278, 2001-Ohio-189, 750 N.E.2d 90, 128. Ohio courts have never accepted arguments that equate adverse rulings with bias. Accordingly, Appellant's nineteenth proposition of law should be overruled.

Proposition of Law XX:

Ohio's death penalty is constitutional.

Appellant raises several constitutional and international law-based challenges to the death penalty. These have previously been rejected by this Court, and should be rejected in the instant case as well.

A. Not Arbitrary

Appellant argues that Ohio's death penalty scheme is arbitrary and that it is administered in a racially discriminatory manner. (Appellant's Brief at 205-06.) This Court was previously faced with this argument, which it rejected. *See State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, at ¶ 139; *State v. Jenkins*, 15 Ohio St.3d 164, 168-169, 473 N.E.2d 264 (1984); *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, ¶ 103; *State v. Steffen*, 31 Ohio St.3d 111, 124-125, 509 N.E.2d 383 (1987).

B. Reliable Sentencing Procedures

Appellant argues that Ohio's death-penalty scheme is unconstitutional because of unreliable sentencing procedures. (Appellant's Brief at 206-07.) This Court has previously rejected this argument and thus, should continue to follow its precedents and reject Appellant's argument. *See State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, ¶87; *State v. Esparza*, 39 Ohio St.3d 8, 12-13, 529 N.E.2d 192 (1988), *cert. denied*, 490 U.S. 1012, 109 S.Ct. 1657 (1989); *State v. Stumpf*, 32 Ohio St.3d 95, 104, 512 N.E.2d 598 (1987); *State v. Jenkins*, 15 Ohio St.3d 164, 172-173.

C. No Burden

Appellant argues that Ohio's death-penalty scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. (Appellant's Brief at 208.) Appellant's argument is without merit and has previously been rejected by this Court. *Ferguson*, 2006-Ohio-1502, ¶ 89; *State v. Buell*, 22 Ohio St.3d 124, 138, 489 N.E.2d 795 (1986).

D. R.C. 2929.03(D)(1) Is Constitutional

Appellant argues that Ohio's capital statutes are unconstitutional because they require submission of the presentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. (Appellant's Brief at 208-09.) This Court has previously rejected Appellant's argument in *State v. Buell*, 22 Ohio St.3d 124. In *Buell*, this Court held that pursuant to R.C. 2929.03(D)(1), "the defendant decides whether to expose himself to the risk of potentially incriminating presentence investigations, including mental examinations. There is no constitutional infirmity in providing the defendant with such an option." *Id.*, at 138; *see also State v. Esparza*, 39 Ohio St.3d 8, 10. As such, this Court should overrule Appellant's argument.

E. R.C. 2929.03(D)(1) and 2929.04(A) Are Constitutional

Appellant argues that the reference to "nature and circumstances of the aggravating factors" in R.C. 2929.03(D)(1) permits a trial court to consider the nature and circumstances of the offense as an aggravating factor. (Appellant's Brief at 209.) This Court has previously rejected this argument. *See Ferguson*, 2006-Ohio-1502, ¶ 92; *State v. Newton*, 108 Ohio St.3d 13, 2006-Ohio-81,

¶ 105; *State v. McNeil*, 83 Ohio St.3d 438, 453, 700 N.E.2d 596 (1998). As such, this Court should also overrule Appellant's argument.

Appellant argues that R.C. 2929.04(A) fails to narrow the class of individuals eligible for the death penalty. (Appellant's Brief at 209.) This Court was faced with a similar argument in *State v. Jenkins*, which it rejected. In *Jenkins*, this Court upheld the death sentence of Jenkins, who was convicted of felony murder pursuant to R.C. 2903.01(B) and sentenced in accordance with R.C. 2929.04(A)(7). *Jenkins*, 15 Ohio St.3d 164. In affirming the conviction, this Court stated that "any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option." *Id.*, at 178.

More recently, in *State v. Fry*, this Court again rejected this argument and indicated that "the United States Supreme Court has previously rejected similar arguments. *See Lowenfield v. Phelps* (1988), 484 U.S. 231, 108 S.Ct. 546, 98 L.E.2d 568; *see also State v. Bryant*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 55 ("The narrowing requirement may occur at either the guilt phase or the sentencing phase of a capital trial but need not occur at both")." *Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 184. As such, this Court should also overrule Appellant's argument.

F. Proportionality and Appropriateness Review Constitutional

Appellant argues that the "appropriateness analysis" and "comparison method" pursuant to R.C. 2929.05(A) is "constitutionally infirm." (Appellant's Brief at 209-11) This Court has previously rejected Appellant's argument. In *State v. Steffen* this Court held "[t]he proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing

court in which the death penalty has been imposed.” *Steffen*, 31 Ohio St.3d 111, paragraph one of the syllabus. This Court has continued to uphold the constitutionality of R.C. 2929.05(A). *See Short*, 2011-Ohio-3641, ¶ 140; *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 381; *State v. Lamar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 23. As such, this Court should also overrule Appellant’s argument.

G. Ohio’s Death Penalty Scheme Does Not Violate International Law

Appellant argues that Ohio’s death penalty scheme violates international law. (Appellant’s Brief at 211-17.) The State disagrees.

First, contrary to Appellant’s argument and as previously addressed *infra* in subsections A through F, Ohio’s death penalty statutory scheme does not allow for arbitrary and unequal treatment in punishment; the procedures are reliable; provides for individualized sentencing; does not burden a defendant’s right to jury trial; the requirement to mandatory submission of reports and evaluations does not preclude the effective assistance of counsel; and does not allow arbitrary selection of certain defendant’s who may be automatically eligible for death. Thus, Ohio’s death penalty statutory scheme is constitutional and is not cruel and unusual punishment.

Second, Ohio’s death penalty statutory scheme does not violate international law. Recently, the Twelfth District Court of Appeals in *State v. Davis* held:

The Sixth Circuit has explained that international law agreements and treaties to which the United States belong (such as the International Covenant and Charter of the Organization of American States) do not prohibit the death penalty. *Buell v. Mitchell* (C.A.6, 2001) 274 F.3d 337. ‘Moreover, the United States has approved each agreement with reservations that preserve the power of each of the several states and of the United States, under the Constitution.’ *Id.* at 371. The effect of this

reservation is that United States courts are not bound by international law on the issue of capital punishment where the death penalty is upheld as constitutional. In *State v. Williams*, we discussed the application and effect of international law on death penalty issues, and quoted the Fifth Circuit for the proposition that ‘[h]ow these issues are to be determined is settled under American Constitutional law. Not a single argument is advanced directed to proving that the United States in these international agreements agreed to provide additional factors for decision or to modify the decisional factors required by the United States Constitution as interpreted by the Supreme Court.’ Butler App. Nos. CA91-04-060, CA92-06-110, [1992 WL 317025], 19, citing *Celesteine v. Butler* (C.A.5, 1987), 823 F.2d 74, 79-80, certiorari denied (1987), 483 U.S. 1036, 108 S.Ct. 6.

The *Buell* Court specifically noted that in relation to the International Covenant’s Article VII, ‘the United States agreed to abide by this prohibition only to the extent that the Fifth Eighth, and Fourteenth Amendments ban cruel and unusual punishment.’ 274 F.3d 371. As we have previously determined that the years Davis has spent on death row do not constitute cruel and unusual punishment, his challenge under the guise of international law must also fail.”
Davis, 12th Dist. No. CA2009-10-263, 2011-Ohio-787, ¶¶ 124-126.

In addition, while the United States is a party to the International Covenant on Civil and Political Rights (“ICCPR”), the U.S. government and its constituent states are not necessarily required to enforce the provisions of the treaty as binding federal law. During the United States’ ratification process of the ICCPR, the U.S. specifically stated that the treaty would not be self-executing and that its provisions cannot be enforced in U.S. courts absent enabling legislation. *Commonwealth v. Judge*, 916 A.2d 511, 523 (Penn. 2007), citing generally 138 Cong. Rec. S4781, S4783; *see also* Restatement (Third) of the Foreign Relations Law of the United States Sec. 111 (1987). To date, Congress has not enacted any such law with regard to the ICCPR. *See Sosa v. Alvarez-Machian*, 542 U.S. 692 (2004).

Similarly, the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) subject to multiple reservations, and declared specifically that the treaty is not self-executing. 140 Cong. Rec. S. 7634-02. While this Court has

not apparently ruled on an ICERD-based challenge to the death penalty statute, Appellant's argument should be rejected along similar lines to those raised under the ICCPR. Moreover, Appellant has failed to demonstrate the truth of his premise that Ohio's death penalty is racially discriminatory.

Furthermore, this Court has consistently rejected claims where customary international law is used as a defense against an otherwise constitutional action as recently as July 28, 2011 in *Short*, 2001-Ohio-3641, ¶¶ 137-138. See, *Fry*, 2010-Ohio-1017, ¶ 216; *Davis*, 2008-Ohio-2, ¶ 383; *Ferguson*, 2006-Ohio-1502, ¶ 85; *State v. Bey*, 85 Ohio St.3d 487, 502, 709 N.E.2d 484 (1999).

As such, this Court should follow its precedents and reject Appellant's arguments. Therefore, Appellant's convictions and sentences should be upheld.

Proposition of Law XXI:

The doctrine of cumulative error is not applicable where a defendant fails to persuasively establish that there were multiple instances of harmless error during the course of the trial which, viewed singularly, may not constitute cause for reversal, but cumulatively rise to the level of prejudicial error and deprived the defendant of a fair trial.

In his twenty-first and final proposition of law, Appellant contends that he was denied a fair trial and sentencing due to the cumulative effect of errors that occurred during this case. However, as no persuasive showing of cumulative error has been demonstrated, the State disagrees. *See State v. Sanders*, 92 Ohio St.3d 245, 279, 2001-Ohio-189, 750 N.E.2d 90.

The doctrine of cumulative error may be applied in a proper case. *See State v. DeMarco*, 31 Ohio St.3d 191, 196-197, 509 N.E.2d 1256 (1987), paragraph two of the syllabus (“[a]lthough violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial”).

However, the doctrine is not applicable to the instant case, where Appellant received a fair trial; and errors committed during trial, if any, were harmless or nonprejudicial, cumulatively as well as individually. *See State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955; *see also State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 185, 818 N.E.2d 229, citing *State v. Goff*, 82 Ohio St.3d 123, 140, 1998-Ohio-369, 694 N.E.2d 91. Where any errors committed during trial were harmless or nonprejudicial, “[s]uch errors cannot become prejudicial by sheer weight of numbers.” *State v. Hill*, 75 Ohio St.3d 195, 212, 1996-Ohio-222, 661 N.E.2d 1068, citing *State v. Davis*, 62 Ohio St.3d 326, 348, 581 N.E.2d 1362 (1991); *see also State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, ¶ 102, 805 N.E.2d 1042; *State v. Fears*, 86 Ohio St.3d 329, 348, 1999-Ohio-111, 715 N.E.2d 136.

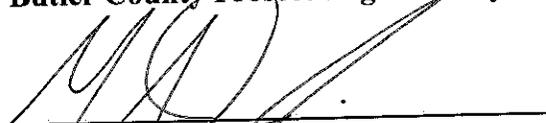
In other words, any error was either harmless or curable by this Court's independent review. See, e.g., *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶ 48, 796 N.E.2d 506, citing *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, 656 N.E.2d 623. This Court should overrule Appellant's final proposition of law.

CONCLUSION

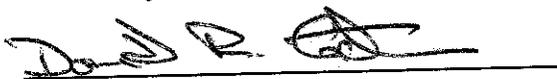
For the foregoing reasons, Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that a copy of the foregoing was served upon the following by ordinary U.S. mail this 5th day of June, 2012:

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