ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	ON APPEAL FROM THE STARK COUNTY COURT OF APPEALS,
Appellee	*	FIFTH APPELLATE DISTRICT
-vs-	*	14-2050
ALAN J. AESCHLIMANN	*	COURT OF APPEALS CASE NO. 2013 CA 00192
Appellant	*	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, ALAN J. AESCHLIMANN

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

The Court must grant review of this important legal question in order to provide guidance to the lower courts, the prosecutors, and the general public to ensure that the rule of law prevails even in the cases involving the most difficult crimes - the death of a child. "It is extremely 'difficult to be objective about the death of a child... Those responsible ought to be punished. Nevertheless, there must be proof as to who, if anyone, inflicted the injuries that resulted in death.'" *Oxendine v. State*, 528 A.2d 870 (Del. 1987) quoting *State v. Lynn*, 73 Wash.2d 117, 436 P.3d 463, 466 (1968) (en banc). Only by holding the State to the highest burdens of proof, production, and evidence can confidence in the criminal justice system be maintained. Because of the clear disparate treatment of the Fifth District and other appellate jurisdictions involving an identical issue, this Court must grant review.

Additionally, four (4) other Constitutional Propositions of Law are presented, all of which affect Appellants throughout the state:

1. In any case, let alone one which admittedly consists of weak evidence against the defendant, as well as equal or greater evidence that the offense was actually committed by another state suspect, should the Court permit the admission of other acts testimony that defendant is a violent cage fighter as harmless error.

2. Should the false testimony of a coroner regarding critical issues, be dismissed as harmless error when the prosecutor as well as the court of appeals concedes that the testimony is "inconsistent and contradictory."

3. When time of injury is critical to a determination of who was the caregiver at the time fatal injuries were inflicted, and the prosecution amends the pretrial Bill of Particulars, to expand that time, should a court deny Appellant the right to read, argue or refer to the Bill of Particulars.

4. Should Defendant be prohibited from introduction relevant evidence regarding the state's other suspect.

All these errors substantially affect Appellant's right to a fair trial under the Sixth Amendment to the Constitution, prejudiced this Appellant, as well as all who will follow, if this decision is allowed to stand.

STATEMENT OF THE FACTS AND CASE

Appellant agrees with the Statement of Facts and Case contained in the Opinion of the Court of Appeals attached hereto.

ARGUMENT

PROPOSITION OF LAW NUMBER I: PROOF THAT APPELLANT AND THE MOTHER OF AN INFANT CHILD WERE THE ONLY CAREGIVERS DURING A TIME PERIOD WHEN THE CHILD SUFFERED TRAUMATIC INJURIES RESULTING IN HIS DEATH, WITHOUT ANY EVIDENCE OF WHEN, HOW, OR BY WHOM THE INJURIES WERE INFLICTED, IS INSUFFICIENT CIRCUMSTANTIAL EVIDENCE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

INDISPUTABLE CONCLUSIONS FROM THE FACTUAL AGREEMENTS

The compatible testimony establishes beyond all doubt that during the critical dates of October 19 and October 20 Appellant was only home with a sleeping Bri'Sean and Hannah for a maximum period of 40 minutes. On the other hand, except for a 20 minutes visit by the Aeschlimann parents and a 40 minute trip to Walmart, Brittany was the sole adult and caregiver to an awaken Bri'Sean throughout the day of October 19 and the morning of October 20. ***Described another way, the prosecution's evidence conclusively established that Appellant had not even seen Bri'Sean for 33 consecutive hours***, i.e. between 1:45 p.m. on October 19 (when he left for work) until 10:30 a.m. on October 20 (when he returned from daycare) and his body was revealed by Brittany.

THE FORENSIC PATHOLOGICAL EVIDENCE

The three pathologists who testified in this case all agreed that Bri'Sean suffered from, and died as a result of, subdural hematomas and his death was a homicide. Dr. P.S. Murthy and Dr. Frank Miller for the state; and Dr. Jonathan Arden for the defense also agreed the "injuries were likely inflicted after 8:30 p.m., the last time Bri'Sean was observed to have appeared normal. But they could not say categorically because of the well documented principle of "lucid interval," (also known as lag period), i.e. is the proven principle that some people who suffer from a subdural hematoma do not show any "significant or neuro visible changes", i.e. symptoms for "minutes, hours, days, or longer" after the injurious event because it's the very nature of subdural hematomas that they bleed at different rates, makes it most difficult to determine the time of the injury. In this case, the mere fact that Bri'Sean may have appeared normal before 8:30 p.m. "does not exclude that he could have had that subdural hematoma already and he could have been in that lucid interval" and "he could have been injured as much as an hour or two before 8:30."

STATE V. MILEY

In *State v. Miley* (1996), 114 Ohio App.3d 738 (4th Dist.); cert. den. 77 Ohio St.3d 1548 the court considered facts strikingly identical to those presented herein. In that case, Miley lived with his 6 day old daughter Jessica as well as his girlfriend Detty and her 3 children. Jessica was hospitalized with labored breathing. Two to three days later the hospital staff discovered she had sustained multiple fractures and resulting hemorrhage. Four doctors "were unable to determine exactly when Jessica suffered these injuries" they uniformly opined that she was the victim of child abuse. When detectives determined that Miley and Detty "were the only ones who had

access to and cared for Jessica" Miley was indicted for, and convicted by a jury of Child Endangering. In reversing the conviction the Court observed:

> ***The state's circumstantial evidence does not prove that Miley was the one who abused Jessica beyond a reasonable doubt. The state's circumstantial evidence indicates that Miley and Detty were the ones with access to Jessica and that Jessica was abused. However, this does not prove beyond a reasonable doubt that Miley abused Jessica. Rather, it leads to the possibility that either Miley or Detty abused Jessica . . . a fifty percent possibility does not satisfy the standard of beyond a reasonable doubt. Miley, supra at p.744.***

The holding in *Miley* has been revisited many times and never been criticized or abandoned. Every case where Courts have affirmed a conviction in the face of an argument that the state's evidence was insufficient as a matter of law under *Miley*, the appellate courts distinguished the facts under consideration because the prosecution was able to establish the time the injuries were inflicted and that during that time the appellant was the only caregiver with access to the child. *State v. King*, 2011WL1771046 (Ohio App. 5 Dist.); *State v. Meadows*, 2001WL803822 (Oho App. 4 Dist.); *State v. Brooks*, 2001WL1117464 (Ohio App. 10 Dist.); *State v. Swain*, 2002WL146204 (Ohio App. 4 Dist.); *State v. Scott*, 2008WL115016 (Ohio App. 3 Dist.); *State v. Henderex*, 2010WL2489218 (Ohio App. 11 Dist.); *State v. Hall*, 2012WL4344078 (Ohio App. 11 Dist.); *State v. Haley*, 2013WL5372876 (Ohio App. 12 Dist.). That is not the case here. The medical evidence presented in this case is uniform in its inability to exclude Brittany Boitnott as the perpetrator just as it did not demonstrate assaultive behavior by Appellant.

This point is pointedly emphasized by the dramatic; unequivocal, and revealing conclusion of Dr. Murthy that the injuries could have been inflicted, and the child could have been unconscious, at the time Brittany put him to bed and Brittany placed Bri'Sean in bed before Appellant arrived home from work.

THE 5TH DISTRICT'S *MILEY* ARGUMENT

The Court of Appeals opinion does not criticize nor express disagreement with Miley. Instead, it ***states that Miley is distinguishable because in Miley, unlike here, the other caregiver (suspect) did not testify and in this case suspect Brittany did.*** That statement misses the point of *Miley*. Whether both suspects did, or did not testify is patently irrelevant. The question is whether there are two suspects, with equal evidence that either could have committed the offense. If the answer is yes, as here, the evidence is insufficient as a matter of law.

The 5th District then cited *States v. Samsill*, 4th Dist., Pickaway NO. 98CA17, 1998WL346680 (June 29, 1998) and *State v. Swain*, 4th Dist., Ross No. 01CA2591, 2002-Ohio-414 as being in support of their opinion that *Miley* is distinguishable from this case. In neither of these cases did the courts reject *Miley*. Nor did either cite the testimony of a second suspect to distinguish its opinions from *Miley*. The *Swain* court said *Miley* did not apply because "Evidence exists [the child] was abused and his injuries occurred on . . . the day appellant cared for [the child] and "Appellant was alone with the child for a substantial portion of the timeframe within which the injuries occurred." In *Samsill*, the court found a "fairly limited timeframe in which [the child] sustained her fatal injuries" and the defendant "was alone with [the child] a much larger portion of the timeframe . . ." T***he opposite is true in this case.***

The appellate courts attempt to distinguish *Miley* by reference to *Samsill* and *Swain* is simply unsupported by the language of those two decisions.

WEIGHT OF THE EVIDENCE

The appellate court opinion erroneously recites that "as an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses." (p.21) citing *Cross*

Truck v. Jeffries, 5th Dist. No. CA-5758, 1982WL2911 (Feb. 10, 1982). However, the same appellate district, in 2002, concluded the exact opposite:

> In considering a claim that a judgment is against the manifest weight of the evidence, the court of appeals sits as a thirteenth juror in weighing the credibility of witnesses and assessing the weight of the evidence (emphasis added). *State v. Black*, 2002WL1173626 (Ohio App. 5 Dist. 2002), headnote 5 citing *State v. Thompkins* (1997), 78 Ohio St.3d 380.

Thompkins is the well settled law of this state and clearly holds, that the appellate court reviews "the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses . . ." The lower court announced their application of a legal standard which is clearly inopposite to well-established law. See also *State v. Brown* (2006), 166 Ohio App.3d 32 (Ohio App. 5 Dist. 2006).

The lower court also recited that in reviewing the weight of the evidence they must view the evidence "in a light most favorable to the prosecution." (p.21). That is also inopposite to well-established law. See *State v. Henry* (2002), 151 Ohio App.3d 128, 143.

PROPOSITION OF LAW NUMBER II: THE TRIAL COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL BY PERMITTING EVIDENCE THAT HE HAD ENGAGED IN PROFESSIONAL MIXED MARITAL ARTS FIGHTING.

The Court of Appeals opinion unanimously concedes that the trial court erroneously admitted evidence of Appellant's "cage fighting," i.e. mixed martial arts training and background, over the repeated objections of defense counsels. The prosecution candidly filed a written argument setting for its purpose in the offering of this testimony.

> As the material issue in the case is not the cause of death, but rather the identity of the perpetrator, evidence of the defendant's extensive training, knowledge and experience in fighting is extremely probative and material.

Appellant argued the obvious, i.e. participation in a sport does not demonstrate that he was more likely to inflict injuries upon a child, nor does it help to identify the perpetrator. The

Court of Appeals agreed. I then explained their view of the prosecution's purpose for introducing such evidence.

> ***The only purpose of such testimony and arguments appears to have been to portray Aeschlimann as a person with violent propensities (p.29).***

In support thereof, the Court properly cited *State v. Johnson*, 71 Ohio St.3d 332, 340, 1994-Ohio-304 for the well-established principle that evidence of a character trait may not be used to prove that a person acted in conformity therewith on a particular occasion. With that proposition Appellant wholeheartedly agrees. If the evidence is not presented for any lawful purpose, but to portray the Defendant as violent, the state's purpose was to prejudice the Defendant.

But then the appellate court lost its way as well as the vote of the Honorable Patricia A. Delaney. If affirmed the conviction because, in its view, the erroneously admission was harmless beyond a reasonable doubt (p.35) with the following explanation:

> {¶96} In the case at bar, we find beyond a reasonable doubt, that the evidence of Aeschlimann's mixed martial arts background did not contribute to his conviction. Both Aeschlimann and Brittany testified at trial. The jury was able to personally observe the physical characteristics, size, relative strength and demeanor of each. Each expert testified, in essence, that no special strength or skill was needed to inflict the fatal blows. Aeschlimann testified that he uses strength and technique to restrain individuals in his job as a corrections officer at a maximum-security facility for juvenile offenders. Thus, evidence of his mixed martial arts training is cumulative to other evidence that was admitted concerning his strength and abilities. (p.35).

Logic, as well as the evidence presented at trial, clearly demonstrates that the reasons cited above are not supported by the record it credits for the conclusion.

<u>FIRST</u>: It is obviously true that the jury could observe suspect Brittany, as well as AJ Aeschlimann, as they rendered their testimony at trial. It is equally clear that the jury was likely capable of comparing their respective sizes and strengths, just as they could in the case of any male and female. ***But the Court fails to explain how a person's gender, size, or strength is***

Constitutionally relevant "evidence" for a jury determination of guilt or innocence especially when they already concluded that the evidence was introduced to demonstrate his violent propensities.

SECOND: The Court boldly and inaccurately states that each expert testified that no special strength or skill was needed to inflict the fatal blows. That is simply inaccurate. Dr. Murthy testified as follows:

> "Yeah, a petite person, like Chryssa (the prosecutor) or any other petite young women, do not have the physical power to inflict that type of injuries . . ."

Granted, he said the opposite on three (3) other occasions (Proposition of Law Number III), but he did eliminate "petite young women" which necessarily excludes strong young men. The only two suspects were a petite young woman and a strong young man. Add to this dimension a "cage fighter" and it's beyond comprehension that it could not have contributed to the verdict of guilty.

THIRD: For reason that are intellectually unclear, the Court observes that Appellant's occupation as a corrections officer occasionally requires the use of "strength and technique" to restrain individuals. Therefore, evidence of his mixed martial arts activities is simply cumulative and therefore – not prejudicial. But this same Court concluded that the cage fighting evidence was offered – not to show strength – but "to portray Aeschlimann as a person with violent propensities." The evidence of strength, occasionally utilized at work, was cumulative evidence of violent propensities which the appellate court described as error.

Appellant agrees that to find an error harmless beyond a reasonable doubt, *State v. Lytle* (1976), 48 Ohio St.2d 391, the state must provide "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California* (1967), 386 U.S. 18. If there is a "reasonable possibility that the evidence complained of might have

contributed to the conviction" the judgment is constitutionally infirm. *Lahy v. Connecticut* (1963), 375 U.S. 85.

In this case, the record cannot clear that bar. Besides the coroner's opinion cited above, the ***prosecutor asked Appellant whether he was healthy enough to "train and workout in MMA fighting"***; whether he had to be ***physically fit "in order to be a cage fighter"*** – During closing the prosecutor argued that ***"defendant's a fighter, he's aware of his power, his strength"*** and referring to Brittany asserted ***"It's not her who's used to using his strength in the way that he does in the ring or the case . . ."*** Finally, the coroner not only opined that a female couldn't have inflicted these injuries, but he referred to the ***"blunt force" trauma (agreed to by all) as the result of "bare knuckles" or "punches."*** He concluded his testimony by responding to a jury question that the blows were cushioned by some material ***"like a boxing glove . . . between the perpetrator's hand."*** These were not casual references. They were prejudicial imagery.

In *State v. Samsill*, 1998WL346680, the Court found that the verdict under consideration was not against the manifest weight of the evidence, but reversed because the state improperly introduced "other acts" testimony. Nonetheless, Appellant was prejudiced because there was not "overwhelming proof" of Appellant's guilt. See also *State v. Williams* (1988), 38 OhioSt.3d 346, 349; *State v. Johnson* (1994), 71 Ohio St.3d 332, 340.

As we have seen here, the evidence is contradictory, inconclusive and weak. Accordingly, the conviction is Constitutionally infirm under the fair trial provisions of the Sixth Amendment and must be reversed.

PROPOSITION OF LAW NUMBER III: THE CORONER RENDERED FALSE TRIAL TESTIMONY UNDER OATH, ON CRITICAL SUBJECTS, THAT WAS CONFLICTING AND IRRECONCILABLE, WHICH PREJUDICED APPELLANT AND DENIED HIM DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES.

Appellant argued before the Court of Appeals that the coroner rendered obviously false testimony concerning critical issues to be determined by the jury. The appellate decision concedes, albeit by reference to civil cases, that when false testimony is rendered, and the jury does not detect and disregard the false testimony, the Court of Appeals has a clear duty to grant a new trial on the weight of the evidence. Appellant cited *State v. Collins*, 2006WL3030981 (Ohio App. 8 Dist.) for the identical proposition. The appellate court rejected Appellant's argument with the following expression:

> ". . . although the testimony may at times have been inconsistent and contradictory, there is insufficient evidence for a determination that it was false." (p.25)

This appellate response lacks intellectual credibility because it ignores the obvious. First, it is false to say it "may" have been inconsistent and contradictory. It was. Second, it related to pivotal issues to be decided by the jury. Third, the statements were not, as stated by the Court of Appeals, responses to hypothetical questions.

FIRST – Dr. Murthy testified on direct examination by the prosecutor it is possible to cause a fatal subdural hematoma and not leave external skin injuries if the surface is covered by a pillow or towel to cushion the blow. On cross-examination he conceded that this testimony was simply an illustration but he "made no such findings in this case." Then on redirect he unequivocally stated that "in my opinion" the assailant used a pillow or a towel so the skin would be spared from easy detection. But he's not through yet.

On re-cross he once again concedes that there is no evidence "about a pillow or some sort of buffer" but thereafter responds to a jury question posed by the court that "I believe a pillow or

towel was used because if the child was struck with bare knuckles, then I would expect to find skin abrasions . . ." He also observed that the cushion could have been material like a "boxing glove." ***This concluding remark is a clear reference to Appellant's cage fighting background and could not have escaped the jury's notice.*** The two opinions are irreconcilable. One has to be false.

SECOND – During testimony on cross-examination the coroner, on three separate occasions, testified that "any normal healthy adult, pretty much of any size, shape, or, you know, capability" could have inflicted the injuries that caused Bri'Sean's death. But once again, in response to a jury question propounded by the Court, the coroner said the opposite:

> "Yeah, a petite person, like Chryssa (the prosecutor) or any other petite young woman, do not have the physical power to inflict that type of injuries . . ."

Not only are those two testimonial positions irreconcilable, but, if believed, the coroner had just eliminated Brittany Boitnott, the only other police suspect, even though he had testified to the opposite in identical questions posed by the defense. If the Court of Appeals did not attempt to explain how one of these statements, regarding a pivotal issue, could be anything but false.

CONCLUSION – The Court of Appeals did not, because it could not, reconcile the coroner's conflicting opinions on critical issues. Instead, it simply said that "Aeschlimann has failed to demonstrate that any of Dr. Murthy's testimony was false." That conclusion is itself false.

PROPOSITION OF LAW NUMBER IV: THE TRIAL COURT'S ORDER PROHIBITING APPELLANT'S COUNSEL FROM READING, ARGUING OR REFERRING TO THE BILL OF PARTICULARS DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Court of Appeals inexplicably interpreted Appellant's Assignment of Error below. The Assignment of Error clearly recited that the Court erred by prohibiting counsel "from reading, arguing or referring to the Bill of Particulars" which was a denial of his Sixth Amendment rights to a fair trial. Nonetheless, the appellate court says "we interpret Aeschlimann's fourth assignment of error" to mean that the court erred "in failing to provide adequate instructions concerning the purpose of a bill of particulars and the fact that [it] had been amended." (p.37). It then dismissed the assignment because counsel failed to object and failed to request a specific jury instruction (p.38). Accordingly, the appellate court never addressed Appellant's objection.

On March 12, 2013, five (5) months before the commencement of trial, the state filed a Bill of Particulars which, among other facts, specifically asserted that the injuries in this case were inflicted on "October 19, 2011 between 10:20 p.m. and midnight." During the trial the prosecution was permitted to amend the indictment to expand the timeframe during which the injuries were inflicted to include "the early morning hours of October 20,"

Counsel for the defense alerted the Court that it intended to present argument to the jury about the Bill of Particulars. In response thereto, the Court said:

> In this particular case I do not think that a reference or a reading of the Bill of Particulars is that crucial or significant to the case to render that appropriate. So I'm going to ask that all the attorneys and counsel refrain from those references for purposes of the remainder of testimony and argument.

The trial court denied defense reference to the Bill of Particulars even though it acknowledged that the jury had already asked what is a "Bill of Particulars", and "I wouldn't be

a bit surprised if we get that as a jury question", there would be no mention of the Bill of Particulars in the jury instruction. In *State v. DeRighter* (1945), 145 Ohio St. 552, 555, the Supreme Court considered a defense objection to the prosecuting attorney's reading of the Bill of Particulars to the jury during opening statement.

> Just how this could have been prejudicial or even improper is not apparent, inasmuch as the statutory function of a bill of particulars is to set up specifically the nature of the offense charged – the very thing a jury is required to know in order to render an intelligent verdict.

See also *State v. Houlihan*, 1978WL217306 (Ohio App. 5 Dist.), wherein the Court held that "we are reluctant to adopt a "per se rule" for in some cases it may be necessary to refer to the Bill of Particulars to state the case fairly for the defense."

In *State v. Runnion*, 2004WL2376461 (Ohio App. 11 Dist.), the Court held that the Notice of Alibi is admissible, for the purposes of impeachment, as an admission of a party-opponent pursuant to Evid.R.801(D)(2). See also *State v. Kelly*, 2002WL31528695 (Ohio App. 1 Dist.), wherein the Court cited *State v. Haynes* (Mar. 9, 1988), 9th Dist. No. 13258, for the same proposition. A Bill of Particulars, drafted by the prosecuting attorney can hardly be anything less than the admission of a party opponent.

The Court's decision denying defense counsel the right to comment upon the prosecution's formal declaration of uncertainty as revealed by the Amended Bill of Particulars, especially when it relates to the most important issue in the case, i.e. the time the fatal injuries were inflicted, denied Appellant his Sixth Amendment rights to a fair trial.

PROPOSITION OF LAW NUMBER V: THE TRIAL COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL BY PROHIBITING THE DEFENSE FROM THE PRESENTMENT OF RELEVANT EVIDENCE REGARDING AN ALTERNATIVE SUSPECT.

Upon cross-examination, Appellant's counsel asked Brittany Boitnott whether she was "upset about anything" on the date that Bri'Sean was presumably injured which she answered in the negative. Counsel then inquired whether she recalled a conversation with AJ's mother about being upset during their brief visit at 8:00 p.m. of that evening and the prosecution objected.

A conference was held at the bench outside the hearing of the jury. The prosecutor argued that although Brittany had been convicted of OVI and was scheduled to attend the 3 day Driver Intervention Program (DIP) the next evening and had discussed that fact with Jody Aeschlimann she was not upset "she was sad.". The Court correctly observed that the defense told the jury during opening statement that Brittany, not Appellant, was the offender and the requested questioning may relate to "her state of mind.", a point with which the defense agreed. The Court ruled that the witness could not be asked whether the OVI and DIP was the reason she was upset nor could they ask whether she drove that night while her license was under suspension even though the Court accepted that it was "conduct that's out of the ordinary for her and it reinforces that she wasn't acting herself that day.". The defense objected (R.158-159) and the parties recited a stipulation for the record. Thereafter, ***the defense was restricted to a generic and unrevealing questioning that Brittany was upset about going somewhere the next day that she didn't want to.*** Even the jury asked where Brittany was going; why she was upset; did Brittany have a license to drive? The court also refused to permit its questions.

The Court of Appeals dismissed Appellant's claimed error because the questioning of Brittany about an OVI conviction, her attendance the next day at a Driver Intervention Program (DIP), and her driving to Walmart on a suspended license were all in violation of Evid.R.609(A)

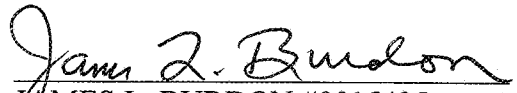
prohibiting evidence of prior misdemeanor convictions. ***But the evidence was not offered simply to attack her credibility. It was also offered to explain the personal pressures she was experiencing during the critical hours preceding Bri'Sean's death which would help a jury understand her assaultive behavior.*** Additionally, Evid.R.608(B) permits evidence to attack the credibility of a witness for truthfulness. Given her denial that she spoke to Mrs. Aeschlimann about being upset, and her further claim that she had driven AJ's car before that evening, the defense should have been permitted to cross-examine.

It's clear that the admission or exclusion of relevant evidence rests within the sound discretion of the Court. *State v. Sage* (1987), 31 Ohio St.3d 173. In this case the Court should have allowed the cross-examination to establish her out of character conduct which is a material consideration for a jury when the witness is the only suspect. See *State v. Martin*, 2003WL22888006 (Ohio App. 12 Dist. 2003) wherein the Court approved under Evid.R.609(A)(2) because the case "boiled down to the credibility of two people."

CONCLUSION

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

Respectfully submitted,



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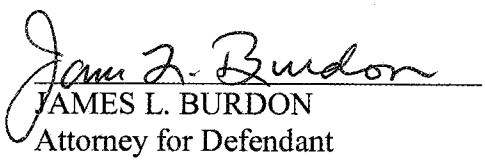
PROOF OF SERVICE

I hereby certify that a copy of the foregoing was mailed by regular U.S. Mail this 25th day of November, 2014, to John Ferrero, Stark County Prosecutor, by Ronald Mark Caldwell, Assistant, 110 Central Plaza South, Suite 510, Canton, Ohio 44702.



JAMES L. BURDON
Attorney for Defendant

APPENDIX

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2013CA00192
ALAN J. AESCHILMANN	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2013-CR-0287

Heath

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

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CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

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By: Deputy
Date 10-6-14

Gwin, P.J.

{¶1} Appellant Alan J. Aeschlimann ["Aeschlimann"] appeals his convictions on one count of felony murder and one count of child endangering for the death of two-year-old Bri'Sean T. Gamble on October 19, 2011.

Facts and Procedural History

A. The Parties

{¶2} Aeschlimann, also known as "A.J." was a 28-year-old divorced father and sole custodian of his 4-year-old daughter Hannah. He withdrew from Kent State University to begin employment with the Ohio Department of Youth Services at the Indian River Correctional Facility where he had served for 5 years as a corrections officer. Brittany Boitnott was a 24-year-old single parent of 2 1/2 year old Bri'Sean Gamble. A romance developed between Brittany and Aeschlimann in May of 2011 and in September of that same year Brittany and Bri'Sean moved into the residence occupied by Aeschlimann and Hannah. In August of 2013, at the time of the trial, Aeschlimann was married and residing with his wife Amanda Aeschlimann.

B. The Home

{¶3} Aeschlimann's home was small with a living room, kitchen, and three bedrooms, one of which was vacant because Aeschlimann's ex-wife had removed all the furnishings. Bri'Sean and Hannah slept in separate bedrooms at the end of the hall and across the hall from one another. Because they had no bedroom furniture of their own, Aeschlimann and Brittany slept on the living room couch together. Aeschlimann slept with his back to the backrest of the couch and Brittany with her back to Aeschlimann stomach, heads going the same direction.

C. Wednesday, October 19, 2011

{¶4} During the period that Aeschlimann, Brittany and the two children lived together, their daily routines were consistent and predictable. Brittany was unemployed and stayed home with the two children except on those days Hannah attended preschool or visited her paternal grandparents. Hannah attended Oak Park Preschool three to four times per week.

{¶5} Wednesday, October 19, 2011 was no different. Aeschlimann awoke at approximately 7:30 a.m., as did Brittany. They ate breakfast together and Aeschlimann left for his usual work shift at 1:45 p.m. to 10:00 p.m. Hannah did not attend preschool that day. Brittany, Bri'Sean and Hannah stayed home all day. The only visitors were Aeschlimann parents who stopped by with groceries a little after 8:00 p.m. staying for approximately 20 minutes. According to Jody Aeschlimann, Hannah's grandmother, she noticed nothing unusual about the children but did observe that Brittany appeared upset.

{¶6} Brittany testified that she fed Bri'Sean, and gave him a bath around 9:15 p.m. She then put Bri'Sean to bed at between 10:00 and 10:15 p.m., which was his normal bedtime. She further testified that Aeschlimann was not yet home from work when she put Bri'Sean to bed and that was normal.

{¶7} Aeschlimann's memory of those events was consistent. He recalls leaving work at 10:00 p.m. and arriving home approximately 10 minutes later. An excited Hannah greeted him and, although he could see Brittany in the back of the hall, he did not see Bri'Sean at all. He further observed that Bri'Sean was usually already in bed when he returned from work.

{¶8} Shortly after Aeschlimann's arrival home, and as he played with Hannah in the living room, Brittany left in Aeschlimann's car to go to Wal-Mart. The car was actually owned by Aeschlimann's parents, and Brittany was not insured to drive it. Aeschlimann testified that she had never driven his car before. Brittany testified that she had driven this car in the past. Aeschlimann testified Brittany had called him at work several times that day; however, she did not ask him to stop at Wal-Mart on his way home even though it was located across the street from his place of employment. Brittany testified that she left for Wal-Mart at "10:15, 10:20" -- "probably a little later" and "at the latest 10:20-10:25" returning home a little before 11:00 p.m.

{¶9} While Brittany was at Wal-Mart, Aeschlimann remained home with Hannah while Bri'Sean remained in his bedroom. Brittany and Aeschlimann each testified that Bri'Sean had "good sleeping habits". When Brittany returned Hannah was still awake. Hannah stayed awake until approximately 11:00 p.m. for two reasons. First, to give her time to interact with her father and second, because Aeschlimann's custody agreement included the right of her non-custodial mother to make a nightly phone call. In fact, her mother made her nightly call at approximately 10:20 p.m. and Aeschlimann monitored the content of the conversations.

{¶10} At 11:00 p.m., Brittany returned from Wal-Mart. Aeschlimann put Hannah to bed between 11:00 and 11:30 p.m. Aeschlimann and Brittany went to sleep on the couch and awakened together the next morning. Brittany concedes that no one got up during the night and Detective Von Spiegel concluded that no one had contact with Bri'Sean throughout the night.

D. Bri'Sean's Body is Discovered

{¶11} The next morning Aeschlimann and Brittany awakened and resumed their predictable routines. Aeschlimann took Hannah to preschool at 9:00 a.m., where they both met and spoke with her teacher Samantha Carr. Ms. Carr testified that neither demonstrated unusual conduct. Aeschlimann returned home at 10:00 a.m. Bri'Sean had not awakened by the time Aeschlimann returned which was beyond his normal arising time of 9:30 a.m. Brittany entered his bedroom at 10:30 a.m. and found his lifeless body. A frantic and emotional 9-1-1 call was played for the jury.

E. EMS Arrives.

{¶12} EMS technicians arrived along with a Deputy from the Stark County Sheriff's Office. En route dispatch informed the technicians that a two-year old child might be in cardiac arrest and a possible choking. Upon arrival, Brittany came running from the house, followed by Aeschlimann. Brittany had Bri'Sean in her arms and was crying hysterically.

{¶13} EMS firefighter/paramedic Jennifer Mohler testified that the child was pulse less and apenic. (1T. at 62). He had rigor mortis or "stiffening of his jaw, his shoulder, his knees." (1T. at 63). According to Mohler, this meant that the child had been gone too long and resuscitation was futile. The medical personnel at the scene could find no "lividity" or pooling of the blood that occurs after death.

{¶14} When Mohler informed Aeschlimann that the child was gone, she testified, "he dropped to his knees and put his hands on his head." (1T. at 66).

{¶15} While photographing the child's body at the direction of the deputy sheriff, Mohler observed what she believed could be a small bruise on the child's rib cage. (1T. at 68)

F. The Autopsy

{¶16} Stark County Coroner P.S. Murthy, M.D. testifed that he conducted an autopsy upon the body of Bri'Sean Gamble on October 21, 2011. (2T. at 428).

{¶17} During his external examination of the body, Dr. Murthy noted a one-half inch contusion or bruise in the left chest area, a contusion under the chin of less than half an inch and extremely small contusions at each eyebrow. (2T. at 446-447). No evidence of injury was noted on the surface of the skin in the area of the back of the head, front of the head and the scalp. (2T. at 452).

{¶18} During his internal examination of the body, Dr. Murthy observed a tiny contusion in the left chest area extending to the lung. (2T. at 449-451). Dr. Murthy observed more than two "maybe ten, twelve, thirteen in that range, multiple, prominent, subgaleal contusions." (2T. at 452; State's Exhibits 8G; 8H; 8I; 8N and 8J). The subgaleal contusions were "on the top of the head, right side, left side and the back." (2T. at 459-460). Dr. Murthy further observed "the massive accumulation of acute subdural hemorrhage." (2T. at 464). Dr. Murthy concluded that the primary cause of death was blunt impacts to the head. (Id.)

{¶19} Dr. Murthy also found bronchopneumonia in the lungs. (2T. at 472). Dr. Murthy testifed concerning this finding,

> Well, to me, it indicates he sustained multiple, forceful blunt impacts injuries to the head. Again, to the best of my judgment and knowledge,

> two or three forceful impacts on the head, the kid is unconscious, he's lying there and then the brain gets swollen, the brain is injured and the respiratory system gets labored, he gets snoring, shallow respirations and the celia does not move the secretions, so he's a beautiful candidate to develop bronchopneumonia. So injury on top of injury—a chain of events starts.

2T. at 473-474.

{¶20} Dr. Murthy testified that the child suffered multiple impacts, "maybe nine, ten, twelve, thirteen, I don't know. But two or three impacts itself would be sufficient to make a little child unconscious." (2T. at 475)

{¶21} Dr. Murthy concluded that Bri'Sean died as a result of multiple massive blunt impact injuries to his head and the back of his neck. (2T. at 477). Concerning the time of death, Dr. Murthy opined,

> Q. Can you tell how long it would have taken this child to die after becoming unconscious and then, as you said, becoming a candidate for that bronchopneumonia?
>
> A. To the best of my judgment and experience, the sequence would be something like this, three or four blunt impact injuries of this magnitude, the child would be unconscious, then the brain gets injured, starts getting swollen, and the accumulation of blood in the subdural space is a very strong thing you find in fatal head injuries. And then the subarachnoid hemorrhage. Subarachnoid hemorrhage is also an irritant and sometimes the medulla oblongata, where the heart and the brain

> centers – brain functions, cardio-respiratory centers are located, when they're bathed in blood they get into spasm so the -- the chain of events take place and then he becomes a candidate for pneumonia so -- and then he will probably die of pneumonia three, four hours after injury, and then three or four hours later he dies, approximately.

2T. at 480.

G. The Homicide Investigation

{¶22} Deputy Rick Stauffer of the Stark County Sherriff's Department responded to the 9-1-1 call at Aeschlimann's home on October 20, 2011. (1T. at 236). He attempted to obtain written statements from Aeschlimann and Brittany. Deputy Stauffer noted and photographed the small bruise on Bri'Sean's chest. (1T. at 246-247; State's Exhibit 4D).

{¶23} The following day, Deputy Stauffer was informed by an investigator from the coroner's office that Bri'Sean's death was ruled a homicide. Deputy Stauffer notified Detective John Von Spiegel. The pair met with the coroner's investigator and reviewed the physical findings.

{¶24} Detective Von Spiegel contacted Aeschlimann. He did not inform Aeschlimann about the results of the autopsy. Instead, Detective Von Spiegel told Aeschlimann he just had some follow-up questions. (2T. at 334). Detective Von Spiegel asked Aeschlimann to bring Brittany and Hannah to the station. Aeschlimann then took Hanna to his parents who were dining at a local restaurant. Aeschlimann subsequently informed Detective Von Spiegel that Hanna was not home, she was out to dinner with his parents. Detective Von Spiegel contacted Aeschlimann's parents, Jody and Alan,

who brought Hannah to the Sherriff's office around 8:30 p.m. Brittany's mother, Leslie Hoover, arrived around the same time.

{¶25} Detective Von Spiegel contacted C.J. Taylor of the Child Advocacy Center to conduct a "forensic interview" of Hannah at the police station. Ms. Taylor met Hannah in the lobby area when she arrived. Ms. Taylor described Hannah as "very bubbly, cheery, appeared to be above her developmental age." (1T. at 206). Hannah asked Ms. Taylor when it was going to be her time to talk. Brittany's mother told Ms. Taylor that she was shocked that Hanna had to be brought there at the time to go over things. (1T. at 308). Ms. Taylor conceded that it is "very rare" that such interviews are conducted outside their offices and never before in her 14 years and 1500 interviews had she been asked to do so in a police station because it is not the best environment. (1T. at 211-212). Aeschlimann and his parents both objected to the interview unless one of them was present. The interview did not take place at that time.

{¶26} Aeschlimann and Brittany were placed in separate interview rooms. Detective Von Spiegel testifed that Aeschlimann emptied his pockets of his keys, cell phone and wallet even though Detective Von Spiegel had not told him too. Aeschlimann testifed that one of the deputies told him to leave them. (3T. at 881-882). He further testified that he has never carried a wallet. Brittany's mother testifed that in response to his mother's question about why he was giving her his things, Aeschlimann responded, "Well, just in case something happens. I don't anticipate anything happening, but just in case." (1T. at 309). Aeschlimann testified that he said, "Can you hold on to these until I'm done." (3T. at 882). Aeschlimann further testified that Leslie Hoover was mistaken about what she had heard. (Id.)

{¶27} Detective Von Spiegel testifed that Aeschlimann admitted that he had spanked Bri'Sean on the butt on three occasions in the past. (2T. at 343-344). Aeschlimann testified that he told the Detective he had "patted" his butt. (3T. at 883-884).

{¶28} When Aeschlimann and Brittany were alone in their separate interview rooms, Brittany asked Aeschlimann "just tell me what happened. (1T. at 138; 2T. at 350). Aeschlimann responded that Brittany should tell them she does not want to talk anymore and that they will talk when they get home. (1T. at 138; 2T at 350).

{¶29} Aeschlimann told Detective Von Spiegel about Brittany's trip to Wal-Mart on October 19, 2011. When confronted, Brittany admitted the trip to Wal-Mart and produced a receipt. Surveillance photographs from Wal-Mart showed Brittany arriving at Wal-Mart at 10:35 p.m. and leaving the parking lot at 10:50 p.m. (1T. at 277-279).

{¶30} No admissions were obtained during the police interviews of Brittany or Aeschlimann. Aeschlimann was not permitted to have any contact with Hannah. Hannah left with her grandparents.

{¶31} With Aeschlimann's permission Chelsea Eberling, a forensic interviewer, interviewed Hannah two days later. (2T. at 599). The interview took place at the home of her grandparents. Aeschlimann was not present when the interview was conducted. The interview lasted four to five minutes because Hannah became distracted and did not want to talk. (2T. at 619). Hannah disclosed nothing traumatic during the interview.

{¶32} In March 2013, the Stark County Grand Jury returned an indictment that charged Aeschlimann with the charges of felony murder and child endangering for the death of two-year-old Bri'Sean T. Gamble on October 19, 2011.

{¶33} Deputy Stauffer and Detective Von Spiegel, the only two investigators assigned to this case, admit that during the interim of October 19, 2011 and Aeschlimann's arrest some 17 months later, they developed no witnesses to the inflicted injuries; nor witnesses to Bri'Sean's death; there were no admission or confessions to the alleged assault; no relevant physical evidence; nor did they even request forensic examinations other than the autopsy. In fact, other than the interviews of Brittany and Aeschlimann whom they declared to be the only two suspects, the only subsequent investigation include speaking to personnel at Wal-Mart; Brittany's ex-boyfriend Sean Gamble; and common associates of each. None were called as witnesses. After October 31, 2011, neither investigator did anything further related to this investigation, and "gathered no new evidence about this case." (2T. at 398). Both officers testified that during the 17 month idle time between October 31, 2011 and the indictment, Brittany's relatives were very active and public in attempts to see Aeschlimann charged including phone calls to Detective Von Spiegel, the prosecutor and others; letters to the editor; and a petition drive. (2T. at 388-389).

H. The Defense Case.

{¶34} The three pathologists who testified in this case all agreed that Bri'Sean suffered from, and died as a result of, subdural hematomas and his death was a homicide. Dr. P.S. Murthy (2T. at 464; 515) and Dr. Frank Miller (3T. at 965) for the state; and Dr. Jonathan Arden (2T. at 646) for the defense.

{¶35} Dr. Murthy would only say that the "injuries must have taken place after 8:30 p.m.," the last time Bri'Sean was observed to have appeared normal. (2T. at 542-543). Dr. Miller did not render an opinion regarding the time of injury explaining that the

observations of an "independent person" may have been helpful. However, he could not rely upon Brittany Boitnott, who was home with Bri'Sean, because he knew her to be a suspect (3T. at 972-973). Dr. Arden could only say that it is more likely that Bri'Sean was injured after 8:30 p.m. "but even that cannot be stated categorically." (2T. at 697).

{¶36} The defense introduced evidence of the principle of "lucid interval" after which an injury has been inflicted yet the subject does not appear to show symptoms of injury.

{¶37} Dr. Murthy agreed that he was aware of the principle and had read the studies on the subject by Dr. Jan Leestma in a publication entitled Forensic Neuropathology (2T. at 525). He also agreed, and stated, that a lucid interval is the proven principle that some people who suffer from a subdural hematoma do not show any "significant or neuro visible changes", i.e. symptoms. (2T. at 525-526). However, in the case at bar, Dr. Murthy unequivocally testified that the injuries to Bri'Sean were such that he would not have been able to function normally after the infliction.

{¶38} Dr. Miller opined that, he was familiar with the studies of Dr. Leestma and the principle of lucid interval and although he would not expect it, there is no way to "conclusively" determine whether Bri'Sean experienced a lucid interval. (3T. at 968-969; 971).

{¶39} Dr. Arden explained that the very nature of subdural hematomas, in that they bleed at different rates, makes it most difficult to determine the time of the injury (2T. at 650). He testified that he agrees with Dr. Leestma that subdural hematomas, especially in children, frequently have a lucid interval and the studies reflect conclusions derived from the studies of serious injuries to deaths in children (2T. at 656-657). In this

case, the mere fact that Bri'Sean may have appeared normal before 8:30 p.m. "does not exclude that he could have had that subdural hematoma already and he could have been in that lucid interval" and "be could have been injured as much as an hour or two before 8:30." (2T. at 657; 684). However, Dr. Arden noted,

> I think it's more likely that he's injured after 8:30, but he could have been injured any time between 8:30 and sometime in the early morning hours. Could have happened at any time in that - - the injury could have happened any time in that time frame, and actually death could have happened pretty much almost any time in that time frame as well given the variabilities [sic.] for accumulation of subdural hemorrhage and given the rigor mortis when found the next morning.

2T. at 685.

{¶40} The following exchange occurred during Dr. Arden's testimony,

> Q. Is it any more reasonable to say that these injuries were inflicted between 10:20 and 11:00 [while Brittany was at Wal-Mart] than to say that the injuries were inflicted between 8:30 and 10:00? [When Brittany was alone with both children]?
>
> A. No, it's not more reasonable at all. There's nothing medical that allows you to say it was more likely the 10:20 to midnight versus the 8:30 to 10:20. There's nothing you can do medically, that you can base an opinion on medically, that says it more likely happened in one time frame than the other.

Q. And both Dr. Murthy and Dr. Miller have said it could have occurred any time after 8:30?

A. Yes, sir.

2T. at 269.

I. Verdict and Sentence

{¶41} The jury first indicated that it had become deadlocked and was unable to reach a verdict. After the trial court rendered a "Howard charge[1]," the jury returned with a unanimous verdict of guilty of both counts charged in the indictment.

{¶42} On September 4, 2013, Aeschlimann was sentenced on Count 1 to a term of 15 years to life. The Court did not impose a sentence on Count 2 in light of the allied offense provisions of R.C. 2941.25.

Assignments of Error

{¶43} Aeschlimann raises five assignments of error,

{¶44} "I. PROOF THAT APPELLANT AND THE MOTHER OF AN INFANT CHILD WERE THE ONLY CAREGIVERS DURING A TIME PERIOD WHEN THE CHILD SUFFERED TRAUMATIC INJURIES RESULTING IN HIS DEATH, WITHOUT ANY EVIDENCE OF WHEN, HOW, OR BY WHOM THE INJURIES WERE INFLICTED, IS INSUFFICIENT CIRCUMSTANTIAL EVIDENCE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

{¶45} "II. THE CORONER RENDERED TRIAL TESTIMONY UNDER OATH, ON CRITICAL SUBJECTS, THAT WAS CONFLICTING AND IRRECONCILABLE, WHICH

[1] In *State v. Howard,* 42 Ohio St.3d 18, 537 N.E.2d 188(1989), the Ohio Supreme Court approved a supplemental charge to be given to juries that have become deadlocked on the question of conviction or acquittal.

PREJUDICED APPELLANT AND DENIED HIM DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES.

{¶46} "III. THE TRIAL COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL BY PERMITTING EVIDENCE THAT HE HAD ENGAGED IN PROFESSIONAL MIXED MARTIAL ARTS FIGHTING."

{¶47} "IV. THE TRIAL COURT'S ORDER PROHIBITING APPELLANT'S COUNSEL, FROM READING, ARGUING OR REFERRING TO THE BILL OF PARTICULARS IN ARGUMENT DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL UNDER THE CONSTITUTION OF THE UNITED STATES.

{¶48} "V. THE TRIAL COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL BY PROHIBITING THE DEFENSE FROM THE PRESENTMENT OF RELEVANT EVIDENCE REGARDING AN ALTERNATIVE SUSPECT."

I.

{¶49} Aeschlimann's first assignment of error challenges the sufficiency of the evidence. Subsumed within his argument, Aeschlimann contends his convictions are against the manifest weight of the evidence produced by the state at trial. [Appellant's Brief at 13].

{¶50} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt." Id.; see also *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶68.

{¶51} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio–355. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis sic.) Id. at 387, 678 N.E.2d 541, quoting Black's Law Dictionary (6th Ed. 1990) at 1594.

{¶52} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the fact finder's resolution of the conflicting testimony. Id. at 387, 678 N.E.2d 541, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that "'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.'" *State v. Thompkins*, supra, 78 Ohio St.3d at 387, quoting *State v.*

Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721(1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id.

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
>
> * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶53} There is no dispute in the case at bar that a Bri'Sean died because of blunt force trauma to his head and neck. Aeschlimann's main argument is that there was insufficient evidence to identify him as the assailant in the death of the child.

{¶54} The gravamen of Aeschlimann argument is that the time frame for Bri'Sean's injuries included two time periods when the two adults were separately alone with the child. Aeschlimann argues that the evidence did not prove beyond a reasonable doubt that he inflicted Bri'Sean's fatal injuries when he was alone with the boy, as opposed to Brittany inflicting the injuries when she was alone with her son.

{¶55} Aeschlimann relies upon *State v. Miley*, 114 Ohio App.3d 738, 684 N.E.2d 102 (4th Dist.1996). In *Miley*, the state presented evidence that the defendant's infant daughter had been intentionally abused, and that the defendant and the child's mother were the only individuals with access to the child. However, there was no direct evidence that either the defendant or the mother had abused the child. Furthermore, the state could not establish a specific time period during which the child was abused.

{¶56} The trial court in *Miley* denied the defendant's Crim.R. 29 motion for acquittal. The jury found the defendant guilty of child endangering, in violation of R.C. 2919.22(A). The Fourth District Court of Appeals reversed, finding that the evidence was insufficient to support the conviction. The circumstantial evidence merely supported a fifty-percent possibility that either the defendant or the child's mother committed the abuse. Furthermore, the evidence did not establish that the defendant should have been aware that the child had been abused. Thus, the Court found that reasonable minds could only conclude that the state had not proven the material elements of child endangerment beyond a reasonable doubt. Id. at 745, 684 N.E.2d at 107.

{¶57} We find *Miley* to be distinguishable. In *Miley,* the other caregiver, the child's mother, did not testify during trial. In the case at bar, the only other person present during the period when the injuries occurred was the child's mother, Brittany. She testified that she did not inflict the fatal blows upon her son. Aeschlimann also testified in his own defense. Thus, the jury was able to hear and see the only persons who could have committed the crime.

{¶58} Indeed, the Fourth District Court of Appeals itself distinguished *Miley* on this basis in *State v. Sampsill*, 4th Dist. Pickaway No. 97CA17, 1998WL346680(June 29, 1998), wherein the court stated,

> The only other person present during the time-frame [when the child was injured] was Vanchure. He testified that he did not injure Brittany and the jury was free to believe his testimony. Further, appellant was alone with Brittany for a much larger portion of the time-frame than Vanchure.

See also, State v. Swain, 4th Dist. Ross No. 01CA2591, 2002-Ohio-414.("Although some evidence exists that appellant was not the sole caretaker during the period of time when the abuse occurred, once again the jury was free to reject appellant's other evidence...").

{¶59} If the state relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E. 2d 492(1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith, 80 Ohio St.3d 89, 684 N.E.2d 668(1997).* "Circumstantial evidence and direct evidence inherently possess the same probative value [.]" *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, "[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." *Jenks*, 61 Ohio St.3d at 272,

574 N.E. 2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293(1990), citing *Hurt v. Charles J. Rogers Transp. Co*, 164 Ohio St. 329, 331, 130 N.E.2d 820(1955). Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott,* 51 Ohio St.3d at 168, 555 N.E.2d 293, citing *Hurt,* 164 Ohio St. at 331, 130 N.E.2d 820.

{¶60} The jury heard evidence from the grandparents that the child was functioning normally as late as 8:30 p.m. The jury further was presented evidence that due to the severity of the blows inflicted upon him, Bri'Sean would most likely have been rendered unconscious. All three experts agreed that it was more likely that the injuries were inflicted after 8:30 p.m.

{¶61} The jury heard Brittany's explanation concerning the events that occurred after the grandparents had left. Brittany testified that she fed her son and gave him a bath around 9:15 p.m. She put him to bed around 10:00 to 10:15 p.m. Bri'Sean patted his pillow indicating that he wanted Brittany to lay with him. She did for a short time.

{¶62} The jury heard Aeschlimann's explanation as well. He testified that he did not interact with the child after he came home from work. The jury was aware that Aeschlimann was alone in the home with the children while Brittany went to Wal-Mart.

{¶63} Evidence was presented which if believed inferred that when asked by Detective Von Spiegel to bring Hanna with him, Aeschlimann instead deliberately took his daughter to his parents. The jury was presented with evidence that Aeschlimann refused to allow the authorities to interview Hannah that night in spite of the precautions that were taken to make her feel comfortable. The jury further heard evidence that when

asked by Brittany what had happened, Aeschlimann responded that she should stop talking to the police and he would discuss it when they got home.

{¶64} The jury heard the parties' evidence and counsels' arguments and was free to reject Aeschlimann's claims of innocence.

{¶65} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Aeschlimann committed the crimes. We hold, therefore, that the state met its burden of production regarding each element of the crimes and, accordingly, there was sufficient evidence to support Aeschlimann's convictions.

{¶66} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries*, 5th Dist. No. CA–5758, 1982 WL 2911(Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578(1978). The Ohio Supreme Court has emphasized: "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012-Ohio-2179, *quoting Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is

well established that the trial court is in the best position to determine the credibility of witnesses. See, e.g., *In re Brown*, 9th Dist. No. 21004, 2002–Ohio–3405, ¶ 9, citing *State v. DeHass*, 10 Ohio St .2d 230, 227 N.E.2d 212(1967).

{¶67} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.'" *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶68} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶69} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or

sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, supra;

{¶70} We find that the jury neither lost his way nor created a miscarriage of justice in convicting Aeschlimann of the charges.

{¶71} Based upon the foregoing and the entire record in this matter, we find Aeschlimann's convictions were not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the state's witnesses and the defendant's witnesses. This court will not disturb the jury's finding so long as competent evidence was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of Aeschlimann's guilt.

{¶72} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of each crime beyond a reasonable doubt.

{¶73} Aeschlimann's first assignment of error is overruled.

II.

{¶74} In his second assignment of error, Aeschlimann argues that he was denied due process trial because the testimony of Dr. Murthy was conflicting in several respects. Aeschlimann first points to Dr. Murthy's testimony that he believed that a pillow or a towel had been used to cushion the blows delivered to Bri'Sean. Aeschlimann characterizes this testimony as false. Secondly, the coroner rendered testimony on cross-examination, on three separate occasions, that "any normal healthy adult, pretty much of any size, shape, or, you, know capability" could have inflicted the injuries that caused Bri'Sean's death. However, in response to the question of a juror, propounded by the Court, the coroner said the opposite. Aeschlimann cites *Ward-Collins v. Sugar,* 8th Dist. Cuyahoga No. 87546, 2006-Ohio-5589, 2006 WL 3030981 for the proposition that the Court of Appeals has a clear duty to grant a new trial on the weight of the evidence where it appears probable that a verdict is based upon false testimony.

{¶75} In *Tanzi v. New York Central RR. Co.*, 155 Ohio St. 149, 153, 98 N.E.2d 39, 42(1951), the Ohio Supreme Court stated the following rule for granting new trials where the movant claims that false testimony was given:

> A witness is required to take an oath before giving his testimony and is subject to prosecution for perjury if he gives false testimony. Furthermore, juries have the duty to detect and disregard false testimony. Finally, in the event that a jury does not detect and disregard false testimony, the trial court and the Court of Appeals [both have] a clear duty

> to grant a new trial on the weight of the evidence where it appears probable that a verdict is based upon false testimony.

{¶76} In *Markan v. Sawchyn*, 36 Ohio App.3d 136, 138, 521 N.E.2d 824(8th Dist. 1987), the Court observed,

> In this case, defendant claims the record indicates that a key witness's testimony consisted of false statements. In reviewing the record, we conclude to the contrary. Although the testimony may at times have been inconsistent and contradictory, there is insufficient basis for a determination that it was false. If apparent contradictions by witnesses justified new trials, courts would be besieged with motions for new trials because such evidence is found in almost every trial.

Accord, Silver v. Jewish Home of Cincinnati, 190 Ohio App.3d 549, 2010-Ohio-5314, 943 N.E.2d 577(12th Dist.), ¶33. In this case, although the testimony may at times have been inconsistent and contradictory, there is insufficient basis for a determination that it was false. The statements were Dr. Murthy's opinions based upon hypothetical questions. They were subject to cross-examination and argument of counsel. Any inconsistency in Dr. Murthy's testimony goes to the weight, not the admissibility of the testimony. In other words, '[t]he jury is the sole judge of the weight of the evidence and the credibility of witnesses. It may believe or disbelieve any witness or accept part of what a witness says and reject the rest.' " *McKay Machine Co. v. Rodman*, 11 Ohio St.2d 77, 82, 228 N.E.2d 304(1967).

{¶77} Aeschlimann has failed to demonstrate that any of Dr. Murthy's testimony was false.

{¶78} Aeschlimann's second assignment of error is overruled.

III.

{¶79} In his third assignment of error, Aeschlimann contends that evidence admitted at trial that he had engaged in professional mixed martial arts fighting denied him due process and a fair trial because it was used as impermissible character evidence.

{¶80} In advance of trial, Aeschlimann's counsel filed a Motion in Limine notifying the Court of its objection to the admission of other acts and character evidence. Specifically, evidence that Aeschlimann was a professional mixed martial arts fighter. (See, T. August 2, 2013 at 14-25). The state responded:

> As the material issue in the case is not the cause of death, but rather the identity of the perpetrator, evidence of the defendant's extensive training, knowledge and experience in fighting is extremely probative and material.

{¶81} At trial, the state asked Brittany Boitnott where she had met defendant, she responded, "When I did ring card girl for Fight Fest," and defendant objected. (1T at 91). The court allowed the testimony but reserved ruling on the publication of a photograph of defendant in his fighting apparel. The prosecution then asked if he was "involved as a fighter." Again, defense objections were overruled (1T. at 94). Boitnott then testified that he was involved in that kind of fighting throughout the time she knew him and he was definitely less muscular now. She then identified his photograph but it was not displayed to the jury.

{¶82} During cross-examination of Aeschlimann, the prosecutor returned to the subject of Aeschlimann's professional fighting by asking whether he was healthy enough to "train and workout in MMA fighting," and later, whether he had to be physically fit "in order to be a cage fighter." (3T. at 886).

{¶83} During closing argument the character references continued as the prosecutor said, "This defendants a fighter, he's aware of his power, his strength." (4T. at 1013). The argument continued as the prosecutor compared Aeschlimann to Brittany Boitnott by asserting, "It's not her who's used to using his strength in the way that he does in the ring or the cage." (4T. at 1019).

{¶84} Evid.R. 404(B) is in accord with R.C. 2945.59 in that it precludes the admission of evidence of other crimes, wrongs, or acts offered to prove the character of an accused in order to show that the accused acted in conformity therewith, but it does not preclude admission of that evidence for other purposes. *State v. Williams,* 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, syllabus. The Court in *Williams* noted,

> The General Assembly, however, has codified certain exceptions to the common law regarding the admission of evidence of other acts of wrongdoing. Those exceptions are contained in R.C. 2945.59:
>
> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous

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

This court likewise has promulgated Evid.R. 404(B), which states:

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

134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶15.

{¶85} The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. See *State v. Curry* (1975), 43 Ohio St.2d 66, 68, 330 N.E.2d 720(1975). This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, as is certainly true in this case. *State v. Schaim,* 65 Ohio St.3d 51, 60, 1992-Ohio-31, 600 N.E.2d 661,669.

{¶86} Other acts may prove identity by establishing a *modus operandi* applicable to the crime with which a defendant is charged. "Other acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B)." *State v. Jamison*, 49 Ohio St.3d 182, 552 N.E.2d 180(1990), syllabus. "'Other acts' may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was

used in the commission of the charged offense." *State v. Smith*, 49 Ohio St.3d 137, 141, 551 N.E.2d 190(1990); *State v. Lowe, supra*, 69 Ohio St.3d at 531, 1994-Ohio-345, 634 N.E.2d at 629.

{¶87} "Pattern" evidence refers to other acts evidence that is admissible when the defendant's scheme, plan, or system in doing an act is relevant at trial. Evidence of a defendant's scheme, plan, or system in doing an act can be relevant for two reasons: (1) the other acts are part of one criminal transaction such that they are inextricably related to the charged crime, and (2) a common scheme or plan tends to prove the identity of the perpetrator. *State v. Curry* (1975), 43 Ohio St.2d 66, 72-73, 330 N.E.2d 720(1975).

{¶88} In the case at bar, without any evidence directly implicating Aeschlimann's mixed martial arts background in the death of Bri'Sean we fail to see how evidence of Aeschlimann's mixed martial arts training or background was a matter genuinely in issue. Put differently, we fail to see how such evidence was circumstantially connected to the manner or cause of Bri'Sean's death. The record in this case presents no basis to conclude that Aeschlimann's fighting background was in any sense intrinsic to the death of the child. As we have noted, there is no evidence connecting the amount or type of force necessary to inflict the injuries to any expertise or training in the mixed martial arts. Rather, the experts agreed that any adult could have inflicted the fatal blows. The only purpose of such testimony and argument appears to have been to portray Aeschlimann as a person with violent propensities. *State v. Johnson*, 71 Ohio St.3d 332, 340, 1994-Ohio-304, 643 N.E.2d 1098. *Accord, State v. Burson*, 38 Ohio St.2d

157, 159-160, 311 N.E.2d 526(1974); State *v. Griffin,* 142 Ohio App.3d 65, 75-76, 753 N.E.2d 967(1st Dist. 2001).

{¶89} In *State v. Hirsch,* 129 Ohio App.3d 294, 309, 717 N.E.2d 789(1st Dist. 1998), the Court observed,

> More troublesome is Hirsch's contention that the trial court admitted evidence that Hirsch had a violent military background, that he collected and carried weapons, that he had behaved violently, that he lived in a desolate "compound," and that he had the nicknames "Rambo" and "Psycho Johnny." Much of this evidence was other-acts evidence presented solely for the purpose of painting Hirsch as a violent individual, and it was clearly inadmissible under Evid.R. 404(B). *See State v. Gillard* (1988), 40 Ohio St.3d 226, 230, 533 N.E.2d 272, 277, *certiorari denied* (1989), 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 608; *State v. Davis* (1989), 64 Ohio App.3d 334, 339–340, 581 N.E.2d 604, 607–608; *State v. Jones* (Dec. 29, 1995), Hamilton App. No. C–950005, unreported, 1995 WL 763604. Some of it was not technically other-acts evidence, but it had little relevance other than to portray Hirsch as a violent individual. *See Soke, supra*, 105 Ohio App.3d at 249, 663 N.E.2d at 1001; *Jones, supra.* Consequently, the trial court erred in admitting this evidence.

{¶90} Despite finding that the trial court erroneously admitted the other-acts evidence in the case at bar, we must determine if the error was harmless. Pursuant to Crim.R. 52(A), "any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." *See also State v. McKnight*, 107 Ohio St.3d

101, 2005–Ohio–6046, 837 N.E.2d 315, ¶88 (applying non-constitutional harmless-error analysis to erroneous admission of other acts evidence). To find an error harmless, an appellate court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *State v. Lytle*, 48 Ohio St.2d 391, 403, 358 N.E.2d 623 (1976).

{¶91} In determining whether an error in the admission of evidence is "harmless", we agree with the Supreme Court of Montana that at least three different approaches appear in United States Supreme Court cases: (1) Focusing on the erroneously admitted evidence or other constitutional error to determine whether it might have contributed to the conviction *e. g., Fahy v. Connecticut* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171(1963); (2) excluding the constitutional infirmity where overwhelming evidence supports the conviction *e. g., Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1(1972); (3) determining whether the tainted evidence is merely cumulative or duplicates properly admitted evidence *e. g., Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284(1969). *See, State v. McKenzie*, 186 Mont. 481, 533, 186 P.2d 428(1980). These three differing approaches have been noted in Ohio. *See, State v. Rahman,* 23 Ohio St.2d 146, 151, 492 N.E.2d 401(1986)("Upon a thorough review of the record, we simply cannot state in good conscience that the error in the admission of this privileged testimony was either harmless beyond a reasonable doubt, did not have an impact on the jury, or did not contribute to appellant's conviction in any meaningful degree." (Footnote omitted)).

{¶92} In *Fahy v. Connecticut*, the United States Supreme Court held that the erroneous admission of unconstitutionally obtained evidence required reversal, noting that the Supreme Court was "not concerned ... with whether there was sufficient

evidence on which the [defendant] could have been convicted" absent the erroneously admitted evidence, but rather whether there was a "reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. 85, 86–87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

{¶93} In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Court rejected the view that all federal constitutional errors in the course of a criminal trial require reversal. The Court held that the Fifth Amendment violation of prosecutorial comment upon the defendant's failure to testify would not require reversal of the conviction if the State could show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id., at 24, 87 S.Ct. at 828.

{¶94} In *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the Court further explained the harmless error analysis as set forth in *Chapman,*

> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. *See Chapman, supra*, 386 U.S., at 24, 87 S.Ct. at 828 (analyzing effect of error on "verdict obtained"). Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." *Yates v. Evatt*, 500 U.S. 391, 404, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to

> the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Sullivan at 279, 113 S.Ct. 2078, 124 L.Ed.2d 182.

{¶95} As one Court has explained,

> Thus we, as a reviewing court, do not pretend that the constitutional error did not occur and then evaluate how overwhelming the evidence would have been to a hypothetical jury, or even to the jury charged with fairly deciding this case. We do not hypothetically extract the error from the trial which the jury heard; we must, however, consider and weigh the *effect* of the error on the actual jury.
>
> After evaluating the effect of the error in this case, if we find "[u]nder these circumstances" that it is completely impossible for us to say the prosecution has demonstrated, beyond a reasonable doubt, that the trial prosecutor's questioning and comments, and the trial judge's error, did not contribute to Mr. Marshall's conviction, then we cannot find the error harmless. *See Chapman v. California*, *supra* at 26, 87 S.Ct. 824. And if the error is not harmless, then Mr. Marshall is entitled "to a trial free from the pressure of unconstitutional inferences." Id. But if we can find beyond a reasonable doubt that this jury's verdict is surely unattributable to the constitutional error, then the error is harmless and the trial was fair. (Citations omitted).

State v. Marshall, 2012-0650, 120 So.3d 922, 929(La.App. 4 Cir. 7/31/13). In *State v. Rahman,* the Ohio Supreme Court recognized this principal,

> We are also mindful that our role upon review of this case is not to sit as the supreme trier of fact, but rather to assess the impact of this erroneously admitted testimony on the jury. In writing about the court's function on federal appellate review, Justice John Paul Stevens' observation is particularly appropriate:
>
> "'[I]t is not the appellate court's function to determine guilt or innocence * * *. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out * * *. [T]he question is, not were [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.' " *United States v. Hasting* (1983), 461 U.S. 499, 516, 103 S.Ct. 1974, 1984, 76 L.Ed.2d 96, Stevens, J. concurring (*quoting Kotteakos v. United States* [1946], 328 U.S. 750, 763-764, 66 S.Ct. 1239, 1247-1248, 90 L.Ed. 1557).

State v. Rahman, 23 Ohio St.3d 146, n. 4, 492 N.E.2d 401. This standard of review has been applied by the Ohio Supreme Court,

> Thus, under Section 2945.83 of the Revised Code it would seem that since there is substantial evidence to support the guilty verdict even after the tainted evidence is cast aside, we should affirm. However, under

> *Fahy v. State of Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), and *Chapman v. State of California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (decided February 20, 1967), we are refused that course of action. In *Fahy*, the court said that when constitutionally inadmissible evidence has been admitted, a reversal is required where 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' (Emphasis added.) *In Chapman,* the court made it clear that the *Fahy* rule applied to federal constitutional errors in spite of a state harmless-error statute to the contrary.

State v. Cowans, 10 Ohio St.2d 97,104-105, 227 N.E.2d 201(1967).

{¶96} In the case at bar, we find beyond a reasonable doubt, that the evidence of Aeschlimann's mixed martial arts background did not contribute to his conviction. Both Aeschlimann and Brittany testified at trial. The jury was able to personally observe the physical characteristics, size, relative strength and demeanor of each. Each expert testified, in essence, that no special strength or skill was need to inflict the fatal blows. Aeschlimann testifed that he uses strength and technique to restrain individuals in his job as a corrections officer at a maximum-security facility for juvenile offenders[2]. Thus, evidence of his mixed martial arts training is cumulative to other evidence that was admitted concerning his strength and abilities.

{¶97} Based upon the entire record before us, we conclude that any error in the admission of the mixed martial arts testimony was harmless beyond a reasonable doubt.

---

[2] Although Aeschlimann initially objected to this testimony at trial, he does not assign as error the introduction of this testimony in this appeal. (3T. at 888).

{¶98} Aeschlimann's third assignment of error is overruled.

IV.

{¶99} In his fourth assignment of error, Aeschlimann maintains the trial court's order prohibiting appellant's counsel from reading, arguing or referring to the bill of particulars in argument denied appellant his constitutional rights to a fair trial.

{¶100} The content of a Bill of Particulars filed in this case and served upon the defense on March 12, 2013 recited,

> On or about October 19, 2011 between 10:20 p.m. and midnight... defendant did recklessly abuse and cause serious physical harm to Bri'Sean Gamble... by inflicting massive blunt force injuries to his head and posterior neck, which proximately resulted in the child's death. . .

{¶101} The trial court sustained the state's motion to amend the bill of particulars to extend the timeframe during which the injuries were alleged to have been inflicted to include "the early morning hours of October the 20." (3T. 728; 935-941).

{¶102} Aeschlimann contends that the prosecution's claims regarding the time of injury as first articulated in the Bill of Particulars and then as amended were relevant to the understanding of the jury regarding the state's expressed uncertainty. Aeschlimann then argues,

> The jury had heard references to the Bill of Particulars during the defense examination of Dr. Arden (R.674, 678). The Court conceded the jury had asked questions regarding what a Bill of Particulars is (R.940) and acknowledged that she didn't "think the jury knows what a Bill of Particulars is." *Yet the Court denied instruction thereon in violation of the*

> *Court's duty to provide relevant instruction that are necessary for the jury to weigh the evidence and to discharge its duty as the fact finder. State v. Steele,* 2011WL5119107 (Ohio App. 1st Dist.), citing *State v. Cornon* (1990), 50 Ohio St.3d 206, paragraph two of the syllabus. (Emphasis added).

Appellant's Brief at 23.

{¶103} This appears to be a different claim than the claim set forth in the fourth assignment of error. Accordingly, we interpret Aeschlimann's fourth assignment of error in the following manner: The trial court erred in failing to provide the jury adequate instructions concerning the purpose of a bill of particulars and the fact that the bill of particulars in the case at bar had been amended. (3T. at 731).

{¶104} The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens*, 90 Ohio App.3d 338, 629 N.E.2d 462 (3rd Dist.1993). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140(1983). Jury instructions must be reviewed as a whole. *State v. Coleman*, 37 Ohio St.3d 286, 525 N.E.2d 792(1988).

{¶105} Crim.R. 30(A) governs instructions and states as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The

> court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court need not reduce its instructions to writing.
>
> On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

{¶106} Aeschlimann did not file a written request for specific jury instructions, and did not object to the trial court's jury instructions. The trial court specifically asked trial counsel "Does counsel desire anything further at this time?" (4T. at 1109). Both counsel answered in the negative. (Id.).

{¶107} Based upon Aeschlimann's failure to proffer instructions or object to the instructions and bring the issue to the trial court's attention for consideration, we must address this assignment under the plain error doctrine pursuant to the Crim.R. 52(B).

{¶108} As the United States Supreme Court observed in *Puckett v. United States*, 526 U.S. 129, 129 S.Ct. 1423, 173 L.Ed.2d 266, (2009),

> If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; "anyone familiar with the work of courts understands that errors are a constant in

> the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal."

556 U.S. at 134. (Citation omitted).

> [A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

United States v. Marcus, 560 U.S. 258, 130 S.Ct. 2159, 2164,176 L.Ed.2d 1012 (Internal quotation marks and citations omitted). The Ohio Supreme Court pertinently addressed when structural error analysis should be used in *State v. Perry,*

> We emphasize that both this court and the United States Supreme Court have cautioned against applying a structural-error analysis where, as here, the case would be otherwise governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court. See *Hill*, 92 Ohio St.3d at 199, 749 N.E.2d 274; *Johnson*, 520 U.S. at 466, 117 S.Ct. 1544, 137 L.Ed.2d 718. This caution is born of sound policy. For to hold that an error is structural even when the defendant does not bring the error to the attention of the trial court would be to encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction

> would be automatically reversed. We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court-where, in many cases, such errors can be easily corrected.

101 Ohio St.3d 118, 802 N.E.2d 643, 2004-Ohio-297, ¶23. Thus, the defendant bears the burden of demonstrating that a plain error affected his substantial rights and, in addition that the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508(1993); *State v. Perry,* 101 Ohio St.3d at 120, 802 N.E.2d 643. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240(2002); *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804(1978), paragraph three of the syllabus; *Perry,* supra, at 118, 802 N.E.2d at 646.

{¶109} In the case at bar, the jury was instructed, in pertinent part,

> The offenses charged are alleged to have taken place on or about the 19th day of October 2011. It is not necessary that the State prove that the offenses were committed on the exact day as charged in the indictment. It is sufficient to prove that the offenses took place on a date reasonably near the date claimed.

4T. at 1000. This is a correct statement of law. *See*, *State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781(1985); *State v. Adams*, 5th Dist. Licking No. 02-CA-00043, 2002-Ohio-5953, ¶8.

{¶110} The trial court further instructed the jury in relevant part,

> Before you can find the Defendant Guility of this charge [murder], you must find beyond a reasonable doubt that on or about the 19th day of October, 2011, and in Stark County Ohio, the Defendant recklessly cause the death of Bri'Sean T. Gamble...

4T. at 1001. Ordinarily, precise times and dates are not essential elements of offenses. Thus, the failure to provide dates and times in an indictment will not alone provide a basis for dismissal of the charges. A certain degree of exactitude of averments, where they relate to matters other than elements of the offense, is not *per se* impermissible or necessarily fatal to a prosecution. *State v. Sellards*, 17 Ohio St.3d 169, 171(1985).

{¶111} We note that the purpose of a bill of particulars is "to elucidate or particularize the conduct of the accused alleged to constitute the charged offense." *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E. 2d 781, 784(1985). It also acts to "inform an accused of the exact nature of the charges against him so that he can prepare his defense thereto." *State v. Fowler*, 174 Ohio St. 362, 364, 189 N.E.2d 133, 134(1963). Consistent with this purpose, Crim.R. 7(D) allows amendment of a bill of particulars "before, during, or after a trial," provided that "no change is made in the name or identity of the crime charged." See, also, *State v. Brown*, 99 Ohio App.3d 604, 610, 651 N.E.2d 470, 474(1994). Aeschlimann does not argue that the trial court erred by permitting the state to amend the bill of particulars.

{¶112} Accordingly, we find no error as the trial court properly instructed the jury in accordance with the law. Further, we find Aeschlimann did in fact argue to the jury the uncertainty concerning the time the injuries were inflicted. (4T. 1067-1071; 1075-1076).

Thus, any error in the trial court's exclusion of evidence or argument concerning the Bill of Particulars was harmless beyond a reasonable doubt.

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

V.

{¶114} Aeschlimann's fifth assignment of error challenges the trial court's ruling that allegedly prevented him from introducing evidence of an alternative suspect for Bri'Sean's death. We note that this assignment of error appears overbroad. The only other potential suspect was the child's mother Brittany Boitnott. Aeschlimann does not contend that he was prohibited from introducing evidence of a third party. Rather, Aeschlimann wanted to introduce evidence that Brittany had been convicted of driving while under the influence, and was going to Wal-Mart in order to obtain personal items for her upcoming three-day attendance at the Driver Intervention Program. Aeschlimann also wanted to present evidence that Brittany was therefore driving while under suspension when she went to Wal-Mart. The trial court precluded this evidence.

{¶115} "It is axiomatic that a determination as to the admissibility of evidence is a matter within the sound discretion of the trial court. See *Calderon v. Sharkey*, 70 Ohio St.2d 218, 24 O.O.3d 322, 436 N.E.2d 1008(1982). The issue of whether testimony is relevant or irrelevant, confusing or misleading is best decided by the trial judge who is in a significantly better position to analyze the impact of the evidence on the jury." *State v. Taylor*, 39 Ohio St.3d 162, 164, 529 N.E.2d 1382(1988).

{¶116} The relevant fact that Brittany was going somewhere that she did not relish going was introduced at trial. The addition of the fact that she was to attend a driver intervention program is irrelevant because it does not have the tendency to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid.R. 101. In addition, Evid.R. 609(A) does not provide for using a witness's prior misdemeanor OVI conviction (punishable by imprisonment for a period of less than one year) for impeachment purposes. To permit evidenced of the witness's attendance at a driver's intervention program would circumvent Evid.R. 609 in the case at bar.

{¶117} The trial court did permit evidence about whether Brittany was upset. (1T. at 153; 188-189). Aeschlimann further was permitted to introduce evidence that Brittany discussed being upset with Aeschlimann's mother. (3T. at 752). Therefore, any error in the trial court's exclusion of the specific evidence Aeschlimann sought to admit was harmless beyond a reasonable doubt.

{¶118} We find that the trial court did not abuse its discretion by excluding reference to the driver intervention program.

{¶119} Aeschlimann next argues that he should have been permitted to introduce evidence that Brittany had driven to Wal-Mart in violation of her driver license suspension. This information was irrelevant because it does not have the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid.R. 101. In addition, the introduction of this evidence may have been a two-edged sword. The fact that her license was under suspension may have benefitted the state. The state could have argued that Brittany did not volunteer that she had gone to Wal-Mart when questioned by the police because she was afraid she would be charged with driving under suspension.

{¶120} We accordingly find that the trial court did not abuse its discretion by excluding reference to the driver license suspension.

{¶121} Aeschlimann's fifth assignment of error is overruled.

{¶122} For the forgoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By Gwin, P.J., and

Farmer, J., concur

Delaney, J., dissents

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

WSG:clw 0902

Delaney, J., dissenting.

{¶123} I respectfully dissent from the majority's conclusion in ¶ 97 that the admission of the mixed martial arts ("MMA") testimony was harmless beyond a reasonable doubt.

{¶124} In the instant matter, the state argued the fatal head injuries suffered by Bri'Sean were more likely caused by Aeschilmann because he was a larger, more physically fit person than Brittany, he engaged in MMA fighting and worked as a corrections officer.

{¶125} MMA is a full contact combat sport that uses striking and grappling techniques in a ring or fenced area, commonly called a "cage". At the pre-trial stage the state argued "the Defendant's knowledge and expertise and training and fighting with his hands is clearly relevant, probative evidence in this case because it makes the fact more likely that he is the perpetrator of the offense. It shows his familiarity with placement of blows in the back of the head or in areas - - specific areas of the body. It is plain and simple Your Honor, highly probative evidence that is circumstantial evidence that the jury can use in this case and should have the ability to use." (Hearing Transcript, p. 19-20).

{¶126} At trial, however, the experts agreed that any adult could have inflicted the fatal blows, as noted by the majority. The state never developed in the record how Aeschilmann's training in this sport was relevant to Bri'Sean's injuries. In closing argument, the state portrayed Aeschilmann as the "fighter" and corrections officer who was aware of his power and strength "in the ring or the cage" and in his job working with "violent youth".

{¶127} I disagree with the majority's conclusion the evidence of Aeschilmann's mixed martial arts involvement was cumulative and harmless. The trial record reflects the state specifically relied upon this evidence in attempting to convince the jury Aeschilmann was capable of inflicting the deadly trauma.

{¶128} Recently, courts have addressed evidentiary issues involving a defendant's knowledge and training in MMA. In *State v. Boscarino*, 2nd Dist. Montgomery No. 25580, 2014-Ohio-1858, the court found the defendant's status as a licensed MMA fighter was relevant to his awareness that his punches could inflict serious physical harm. The court cited to cases from other jurisdictions finding MMA or boxing training can be probative of the defendant's awareness his actions or culpable mental state in causing injury. I would agree with this holding in cases when it is undisputed the defendant inflicted injury but the defendant's state of mind remains disputed.

{¶129} However, the state agrees on appeal this case was about time, not manner, of death. Under the circumstances herein, I would conclude that the evidence was not offered for a legitimate purpose, and had limited probative value which is outweighed by the danger of unfair prejudice. There were only two possible perpetrators, Aeschilmann and Brittany. Thus, the credibility of the witnesses was key to the case. Aeschilmann's participation and training in MMA tempts the jury to find he is not credible based on his participation in a violent sport, rather than the actual facts and circumstances of the case.

{¶130} For these reasons, I would sustain the third assignment of error, reverse the judgment of the trial court and remand the matter for a new trial.

HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ALAN J. AESCHILMANN	:	
Defendant-Appellant	:	CASE NO. 2013CA00192

14 OCT -6 PM 2:39
NANCY S. HERSHOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY