[Cite as *State v. Cutts*, 2009-Ohio-3563.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

BOBBY LEE CUTTS, JR.

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2008CA00079

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 2007-CR-1098(A)

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 22, 2009

APPEARANCES:

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Wise, J.

{¶1} On August 23, 2007, the Stark County Grand Jury indicted Appellant, Bobby Lee Cutts, Jr., on seven counts involving the homicide of Jessie Marie Davis and her unborn child. The Indictment charged Appellant with one count of aggravated murder in the death of Davis, in violation of R.C. §2903.01(B), carrying two death penalty specifications ("Count One"); one count of aggravated murder for the unlawful termination of Jessie's pregnancy, in violation of R.C. §2903.01(B), carrying three death penalty specifications ("Count Two"); one count of aggravated murder of a viable, unborn child, in violation of R.C. §2903.01(C), with three death penalty specifications ("Count Three"); one count of aggravated burglary, in violation of R.C. §2911.11(A)(1) ("Count Four"); two counts of gross abuse of a corpse, in violation of R.C. §2927.01(B) ("Counts Five and Six"); and one count of child endangering, in violation of R.C. §2919.22(A) ("Count Seven"). Appellant appeared before the trial court on August 24, 2007, and entered a plea of not guilty to the Indictment.

{¶2} Prior to jury selection, the trial court granted Appellant's motion for special procedures to insulate the venire and the impaneled jury. Prospective jurors were mailed a petit juror summons, a cover letter, and a general questionnaire. The State and Appellant approved the content and mailing of these items. Potential jurors appeared on January 15, 16, and 17, 2008, to complete death penalty and pre-publicity questionnaires. Approximately two weeks later, the prospective jurors returned to court for a hearing regarding the answered questionnaires. The trial court ordered all general

questionnaires, as well as the death penalty and pre-publicity questionnaires, to be sealed.

{¶3} On February 4, 2008, the matter proceeded to jury trial.

{¶4} During her testimony, Patricia Porter, Jessie Davis's mother, testified that on June 13, 2007, Jessie dropped off her son, Blake, at Porter's home. She stated that her other daughter, Audrey Davis, would watch Blake until Porter returned from work. Porter was not present later that day when Jessie picked up Blake, but spoke with her daughter at approximately 9:00 p.m., during which time Jessie told Porter that Appellant would be picking Blake up that evening and that Blake would be with him the following day, June 14, 2007. Porter testified that she and Audrey made attempts to contact Jessie on her cell phone on June 14, 2007, but her phone went directly to voicemail. Porter said she made an additional attempt to contact Jessie later that evening but was unsuccessful. Porter assumed Jessie was asleep and that she would talk to her in the morning.

{¶5} Porter stated that she again tried to contact Jessie at approximately 6:00 a.m. the next day, June 15, 2007, but did not get an answer. When Jessie did not show up to drop off Blake at Porter's house at their usual time of 7:00 a.m., Porter and Audrey went to Jessie's residence. Porter entered Jessie's residence through the back sliding glass door which she had found unlocked. She stated that she entered the kitchen and began calling for Jessie. She testified that as she walked in, she saw the contents of Jessie's purse dumped onto the floor. Blake ran into the kitchen in a wet and soiled diaper. Porter recalled that she actually smelled the child before she saw him. Porter stated that she asked Blake where his mother was, to which he responded, "Mommy is

crying. Mommy broke the table. Mommy is in the rug." Porter stated that she ran upstairs, calling for Jessie. Once inside Jessie's bedroom, Porter found the mattress knocked partially off the bed, a table and lamp knocked over, and bleached patches on the floor. Porter also noticed the burgundy and gold comforter from Jessie's bed was missing. Porter ran frantically throughout the house searching for Jessie. When she did not find her daughter, Porter called 911. Porter recalled that she then told Audrey to telephone Appellant. A neighbor, who had heard Porter's screams, arrived and assisted with Blake. Police arrived at the scene, as did Appellant.

{¶6} Porter testified that Appellant telephoned her the following day, asking to speak with Blake, but Blake did not want to speak to him. Porter said she asked Appellant if he had done anything to Jessie, and that he responded with a "No". Porter said that she told Appellant she would support him until she had reason not to do so. Porter stated that Appellant then asked if Blake had seen "everything", and Porter replied, "Yes, I believe he did." (Feb. 4, 2008, T. at 96).

{¶7} Darin Baad, a deputy sheriff with the Stark County Sheriff's Office, testified that he was working the day shift on June 15, 2007, when he volunteered to respond to a call regarding a missing person and a possible burglary. Baad was the first officer to arrive at the scene. Baad stated that he spoke with Porter, who explained why she had called the police. The deputy entered the residence and proceeded upstairs to Jessie's bedroom. Inside the bedroom, Baad stated that he found the mattress shifted off the box spring, a lamp and a table knocked over, a bottle of bleach, and a large stain on the rug. The deputy testified that he continued through the rest of the house, noticing a

purse on the floor of the kitchen. While Baad was in the basement, Appellant entered the residence. Baad questioned Appellant as to his reason for being at Jessie's home. Appellant informed the deputy that he and Jessie had a child together and that he had been called by either Porter or Audrey. Together with Appellant, Baad inspected the garage and the trunk of Jessie's car. Baad then exited the residence. At that point, a number of other law enforcement officers had arrived and Baad shared the information he had obtained with them. The deputy testified that local hospitals had been contacted, but the hospitals had no information regarding Davis or any Jane Does. Deputy Baad stated that he examined Blake to determine if he needed any medical assistance, as he was concerned the child may have ingested the bleach. Although the deputy and other officers spoke with neighbors, they were unable to gather any additional information as to Jessie's whereabouts.

{¶8} Sergeant Eric Weisburn with the Stark County Sheriff's Office testified that he was the shift supervisor on June 15, 2007. Although he was on his way to court when he heard the initial dispatch, he decided to respond to the scene as the call suggested something out of the ordinary had occurred. En route, he contacted the dispatcher with instructions for any officer or deputy at the scene to clear the house. Sergeant Weisburn stated that upon arriving at the Davis residence, he conferred with the other officers and learned about Appellant's connection to Davis. Sergeant Weisburn stated upon reviewing the scene, he observed the purse spilled on the kitchen floor and the state of disarray in the bedroom. Sergeant Weisburn spoke with Appellant to ascertain any information he may have had about Jessie's whereabouts. While speaking with Appellant, Sergeant Weisburn observed that Appellant had a band-aid on

the pinky finger of his left hand. Appellant stated that he had cut himself while cleaning out a patio fireplace.

{¶9} After speaking with Appellant, Weisburn proceeded to speak with Blake. The sergeant asked the child if he knew where his mother was, to which Blake replied, "Mommy is at work." After some time, Blake stated, "Mommy is crying. Mommy is in the rug. Mommy broke the table." Sergeant Weisburn testified that these last statements were not given as answers to any questions he had posed to Blake, and that Blake repeated the statements several times. Blake also stated, "Daddy's mad." Sergeant Weisburn asked the child why his daddy was mad, but Blake just continued to repeat "Daddy's mad." Sergeant Weisburn stated that he then proceeded to collect and read Porter and Audrey's written statements and that prior to leaving the scene, he asked Appellant to return to the sheriff's office with him for further questioning. Weisburn stated that he wished to speak with Appellant in hopes of creating a better timeline of events.

{¶10} Appellant arrived at the sheriff's department at approximately 1:00 p.m. that day. Sgt. Weisburn stated that Appellant told him about the attempts he had made to reach Davis on her cell phone. He also informed the sergeant that the previous day, June 14, 2007, he picked up his friend, Myisha Ferrell, to babysit Blake, while he was at football practice. Appellant continued to deny any knowledge of Jessie's whereabouts. Following the interview at the sheriff's department, Sergeant Weisburn followed Appellant to his home. Appellant allowed the sergeant to inspect his home, including a shed and water well.

{¶11} Later that day, Sergeant Weisburn and Captain Shankle began to follow up with those individuals whose names Appellant had provided to them. Sergeant Weisburn stated that he spoke with Kelly Cutts, Appellant's wife, who verified the timeline Appellant had given to him. The officers were also able to verify Kelly Cutts' whereabouts during the same timeframe.

{¶12} The following day, June 16, 2007, Sergeant Weisburn contacted Myisha Ferrell to set up an interview. When the sergeant arrived at her home for said interview, he was informed that Ferrell had company and that he needed to return in thirty minutes to meet with her. Sergeant Weisburn stated that he returned to Ferrell's residence, but no one responded to his knock on the door. He attempted to call the residence, but did not get a response. Sometime later, a third attempt was made to speak with Ferrell; however, that attempt was also unsuccessful. Sgt. Weisburn contacted Appellant, who informed him that Ferrell was at his home and he was welcome to come there and speak with her. Sgt. Weisburn stated that he declined this offer and made arrangements to meet Ferrell later that evening. Larry Davidson, Appellant's cousin, drove Ferrell from Appellant's residence to her house. Davidson remained at Ferrell's house while Sergeant Weisburn spoke with her. Ferrell corroborated Appellant's version of the events.

{¶13} On June 18, 2007, the FBI contacted the Stark County Sheriff's Department and offered their services. The FBI and the Sheriff's Department worked together on any and all leads regarding Jessie's disappearance. The investigation team collected DNA samples from Jessie's family, Appellant, and Ferrell. During the week following Jessie's disappearance, the investigative team uncovered information which

conflicted with the information provided by Appellant. Appellant had told Sergeant Weisburn he left Champs Bar on the evening of June 13, 2007, and went directly home. However, it was subsequently discovered that Appellant visited Stephanie Hawthorne after he left the bar. Appellant had failed to mention Hawthorne during his previous conversations with law enforcement officials. Law enforcement officials also learned that the telephone call Appellant made to Jessie's cell phone at approximately 7:15 a.m. on June 14, 2007, was made from a location in Summit County, not from Appellant's residence as he had informed them.

{¶14} During the following week, Appellant pretended to assist in the search for Davis. However, on June 23, 2007, Appellant and Attorney Brad Iams, who was representing Appellant at the time, arrived at FBI offices and informed the investigation team that he would take them to the location of Jessie's body. After driving approximately two hours, Appellant was able to navigate the investigators to an area in the Hampton Hills Park in Summit County, Ohio. It was there that the investigators found Jessie's body located forty or fifty feet down an embankment. Thereafter, Appellant was placed under arrest.

{¶15} Myisha Ferrell, a friend of Appellant since middle school, testified that on the evening of June 13, 2007, she and three girlfriends went to bingo, to the home of the father of one of her friends, and to a sports bar, before returning to her home. When the women returned to Ferrell's residence, they stayed up all night, playing cards, drinking beer, and smoking marijuana. She stated that sometime after 6:00 a.m., on the morning of June 14, 2007, Appellant arrived at her home, which she found unusual because

Appellant always telephoned first before coming over. She testified that Appellant told her that he needed to talk to her and that he needed some help. Ferrell stated that she could tell something was wrong with Appellant and described his appearance as "dysfunctional", explaining that he just didn't look right. Ferrell noted that she had never seen Appellant look that way. She stated that she walked with Appellant to his truck, which was parked in an alley near her house. Ferrell acknowledged that she was high on marijuana, but understood what was happening. She stated that she got in the truck with Appellant and they proceeded to Interstate 77, where Appellant began to head north.

{¶16} Ferrell stated that as they drove, Appellant told her something was wrong and something bad had happened. Ferrell described Appellant as "nervous looking." Ferrell stated that she did not question Appellant but that after a period of silence, he went on to state that something was wrong with "the baby's mother." Ferrell knew Appellant was referring to his son Blake's mother. She testified that Appellant eventually informed her that Davis's body was in the back of his pick-up truck. Ferrell stated that she asked Appellant what had happened and that he responded with a gesture, raising his arm around his neck. Ferrell asked Appellant about Blake, and Appellant stated that Blake was at the house. Ferrell testified that she thought Appellant meant his house. She said that Appellant made a brief stop at a truck stop in order for Ferrell to use the restroom and that Appellant remained outside of the truck while he waited for her to return.

{¶17} She stated that once they were again on the road, they passed a sign which read "Cuyahoga Falls Parks," at which time Appellant stopped his truck in an

open field. Both Appellant and Ferrell exited the vehicle. In the bed of the truck, Ferrell observed a pair of feet. When asked by the prosecutor if there was anything preventing her from seeing more, Ferrell responded that she did not see and she "didn't want to see nothing else." Ferrell also stated that she noticed white trash bags in the bed of the truck, and that she could see a burgundy print through the bag. Ferrell then watched as Appellant removed Jessie's body from the truck and walked away. Appellant returned to his truck and the pair traveled back to Canton.

{¶18} Ferrell testified that during the return drive, Appellant stopped and deposited the trash bags into a dumpster. She stated that Appellant also stopped a second time at a gas station, washed his truck, and purchased bags of mulch which he placed in the bed of the truck. She recalled that Appellant also placed a call to Jessie's cell phone and left a message asking her why she had never dropped off Blake. Ferrell stated that Appellant then handed her a pink cell phone, which she knew did not belong to him, and Ferrell threw it out the window of the truck. She also recalled that Appellant placed another telephone call to an individual with whom he coached to tell him that he would be late for practice. She said that the two of them then proceeded to Appellant's house, where Appellant took a shower and dressed in wind pants and a t-shirt. Ferrell testified that Appellant asked her if she could see any marks on his chest, but stated that what she saw looked "vague." Ferrell recalled that Appellant had an injury on his pinky finger. When she asked him what had happened, Appellant told her "she" bit him. Ferrell stated that she knew he was referring to Davis. She stated that Appellant then gave her $100.00, and told her that he wished he could give her more. Ferrell testified that she remained at Appellant's residence while he went to football practice. She

stated that Appellant and his daughter returned to his house at approximately 1:00 p.m., and then he drove Ferrell home.

{¶19} Ferrell testified that the following day Appellant telephoned her and informed her that his baby's mom was missing. Ferrell stated that she thought Appellant was crazy. She stated that Larry Davidson arrived at her house sometime later that day and drove her to Appellant's house. She stated that Appellant instructed her to tell the police she was going to babysit Blake, but that Davis never dropped off the child. After Davidson drove Ferrell back to her house, someone from the sheriff's department arrived to speak with her. She stated that Davidson waited in her living room while she spoke with the sheriff's department in another room. Ferrell stated that afterwards, she returned to Appellant's house and remained there until she needed to leave to go to work on the midnight shift at a Denny's Restaurant. Ferrell was arrested on June 24, 2007.

{¶20} The jury also heard testimony from Larry Davidson, Appellant's cousin. He recalled that he was at Appellant's house on June 16, 2007, during which time Appellant told him that Ferrell wanted to come over and asked Davidson to pick her up. A couple of friends were at Ferrell's house when Davidson arrived. After the friends departed, Davidson and Ferrell waited approximately half an hour for the sheriff's deputies. However, the deputies did not show up, so Davidson drove Ferrell to Appellant's house. At Appellant's house, Davidson, Ferrell, Appellant and his mother sat in the kitchen talking. Davidson and Ferrell stayed at Appellant's house for thirty to forty-five minutes and then returned to Ferrell's house in order for her to speak with the deputies. Davidson remained at Ferrell's house while she spoke with the deputies.

Thereafter, Davidson and Ferrell returned to Appellant's house. Davidson drove Ferrell to work later that evening.

{¶21} The State presented a number of other witnesses whose testimony created a timeline for Appellant's whereabouts between 6:00 p.m. on Wednesday, June 13, 2007, and 2:00 a.m. on Thursday, June 14, 2007. On Wednesday evening, Appellant played softball. The game started between 6:00 p.m. and 6:30 p.m. Following the game, he spoke with some friends and then proceeded to Champs Bar, arriving at approximately 8:15 p.m. to 8:30 p.m. Appellant had a couple of beers and socialized with friends, including Denise Haidet, with whom Appellant had previously had an affair. He exited the bar sometime around 12:30 a.m. At approximately 1:00 a.m., Appellant arrived at the home of Stephanie Hawthorne, another girlfriend. Appellant stayed with Hawthorne until 2:00 a.m. Hawthorne called Appellant's cell phone at 2:14 a.m. and spoke with him briefly.

{¶22} Kelly Schaub, fka Kelly Cutts, testified she and Appellant were married on July 28, 2001, and had one child, who was six at the time of trial. Schaub and Cutts separated for a period of approximately nine months between November or December, 2003, and September, 2004. Prior to reconciling in September, 2004, Appellant informed Schaub he had had a one-night stand and, as a result, the woman had become pregnant with his child. Schaub testified Cutts became obligated to pay child support, which she assumed to be approximately $240.00 every two weeks. The couple separated again in June or July, 2005, until October, 2005. Schaub moved out of the couples' residence permanently in February, 2007. Their divorce was final on December 31, 2007.

{¶23} Schaub recalled that Appellant telephoned her after his softball game on June 13, 2007. Appellant told Schaub that he was at Champs Bar having a drink. During the conversation, Appellant talked about their relationship, stating he had always wanted the relationship to work. Appellant also told Schaub he wished they could get back together. She further recalled that during a conversation on June 14, 2007, Appellant told her that Jessie was supposed to drop off Blake that morning, but that he had to have Ferrell watch the child because he forgot he had a football practice meeting that day. During her testimony, Schaub acknowledged she knew about Appellant's relationship with Davis. She testified that she learned Davis had become pregnant again in November, 2006, and had found out because Davis told her.

{¶24} On cross-examination, Schaub stated that she continued to have concerns about Appellant's relationship with Davis after the couple had reconciled. Schaub detailed an incident which occurred in November, 2005, recalling that as she was getting ready for work, she opened her makeup drawer and found a pair of underwear which did not belong to her. Schaub later learned from Davis that the underwear belonged to her. Schaub told Appellant about the conversation she had with Davis and stated that she did not believe Appellant's response to Davis with regard to the incident was forceful enough. Schaub says that shortly thereafter, she received a phone call from Davis and that during the call she told Davis that she and Appellant were happily married, and they were all living together with their daughter in their house. Schaub also recalled other telephone calls, initiated by Davis, during which Schaub repeatedly told Davis that she and Appellant were together and living as a family with their daughter. Schaub says that she told both Appellant and Davis numerous times that

Davis was not allowed in the home when she dropped off Blake. During the summer of 2006, Schaub said that she received another phone call from Davis telling her that she and Appellant had engaged in sexual relations on Schaub's new patio furniture. Schaub testified that she confronted Appellant about her conversations with Davis but that he simply shrugged off the incidents.

{¶25} Richard Mitchell, a close friend of Appellant, testified that approximately one month prior to the disappearance of Davis, Appellant told him he was "going to kill that bitch and throw her in the woods." Mitchell stated he did not think Appellant was serious when he made the statement. Mitchell could not recall the context in which the statement was made.

{¶26} Craig Polifrone, Jessie's obstetrician/gynecologist, testified that he examined Davis on June 4, 2007, and that she was thirty-five weeks, and six days along in her pregnancy at that time. He stated that he saw Davis again on June 11, 2007, and that there were no complications with the baby and all testing done showed normal results. Dr. Polifrone testified that at that stage in the pregnancy, the baby would have been viable if Davis had delivered it one or two days after he saw her. The doctor added the chance of a baby dying at that gestational age was extremely low.

{¶27} Dr. Lisa Kohler, the chief medical examiner for Summit County, testified that she was present at the Hampton Hills Metropark on June 23, 2007. She testified that photographs were taken, and the location and condition of the body were documented. She stated that Jessie's body and the comforter, in which she was wrapped, along with a number of small bones and fingernails found on the ground

underneath where the body had been positioned, were placed inside a body bag for transport to the coroner's office.

{¶28} Dr. Kohler testified that she performed an autopsy the following day. She explained that due to the advanced state of decomposition, she took x-rays to determine whether any projectiles or sharp objects remained in the body. Dr. Kohler stated that her external autopsy of Jessie's body revealed a very advanced state of decomposition, and the portion of her body which had been in contact with the ground was largely skeletonized. The remaining flesh on the body was dark, dried out, and leather-like. Dr. Kohler stated that she was able to observe the fetus inside Jessie's body during her external autopsy. The medical examiner went on to explain that she was able to get a good visualization of the skeletal remains of the baby. Dr. Kohler reiterated that Jessie's body was in an advanced stage of putrefaction with the drying out of the skin and the exposure of bones. She explained certain conditions affected the speed at which putrefaction occurs. Those conditions include a hot environment and exposure which would allow insects access to the body. As a result of her external autopsy, Dr. Kohler was unable to observe any external signs of recent injury. She further testified that dental records were used to positively identify the body as that of Davis.

{¶29} Dr. Kohler examined the bones to look for injuries. However, the medical examiners from her office were not able to recover all of the bones despite searching the scene a second time. Dr. Kohler called in forensic anthropologists to assist her in the examination of the bones. The examination did not identify any injuries to the bones which had been recovered. Toxicology tests were also performed on some of the remaining internal organ tissues, as no fluid remained in the body. The results of these

tests showed there were no detected drugs in the tissue. Dr. Kohler ruled the death as unspecified homicidal violence. Dr. Kohler explained:

{¶30} "What that indicates is the circumstances around her disappearance and her discovery and evidence obtained during the investigation indicate that Ms. Davis had come to harm at the hands of another individual.

{¶31} "Because of the stage of decomposition and putrefaction of the tissues, I could no longer identify what type of injury had resulted in her death, but the fact that she is found some great distance from her home wrapped in bedding and left out in the open field is evidence that that [sic] there was homicidal intent here. A natural death would not occur under those circumstances. Suicide would not be an issue in this situation. And based on circumstances an accident was also ruled out. Therefore, it would be a homicidal death. Unfortunately, I am unable to say exactly how the death occurred." (Feb. 8, 2008, T. at 1276).

{¶32} Dr. Kohler explained it is possible to asphyxiate a person using one's arm, either by placing the forearm against the front of the victim's neck, or placing the victim's neck in the crook of the arm and applying pressure on either side. Dr. Kohler stated that the condition of Jessie's body prevented a determination of whether she had been manually strangled. The condition of the body also impeded Dr. Kohler's ability to make any findings as to whether Davis had been stabbed or shot. Dr. Kohler found no trauma to the fetus, and opined the fetus died as a result of maternal death. Dr. Kohler added Davis was thirty-seven weeks pregnant and the fetus was viable on June 14, 2007.

{¶33} Upon conclusion of Dr. Kohler's testimony, the State rested its case. At that time, Appellant made an oral Crim.R. 29 Motion for Acquittal. After the parties argued their respective positions, the trial court overruled the motion.

{¶34} During the defense's case, Appellant testified on his own behalf. Appellant recalled that he met Davis at a nightclub in late February or early March, 2004, when Appellant was separated from his wife. He recalled that he and Davis had sexual relations that night and that sometime later in the year, he learned that she was pregnant with Blake, who was born on December 3, 2004.

{¶35} Appellant stated that he and his wife Kelly reconciled in early September, 2004. He stated that paternity for Blake was established in April, 2005, and that thereafter he began giving Davis child support and visiting Blake on a weekly basis. When asked about the incidents involving Davis and his wife, Appellant stated that he never confronted Davis because "there was nothing going on" between him and Davis at that time. Appellant acknowledged he and Davis became intimate again in 2005, after he and his wife separated again. He stated that in early November, 2006, he and Davis engaged in sexual relations at a time when Appellant and his wife "had some issues." Appellant subsequently learned that Davis was pregnant again after Davis contacted his wife and told her. Appellant testified that his wife moved out in February, 2007. Appellant continued to see Davis because of visitation with Blake, however, he claimed the two were not intimate.

{¶36} During his testimony, Appellant adamantly denied making the statement to Richard Mitchell that he should kill Davis and throw her body in the woods. Appellant also testified that while he and Mitchell were friendly, Mitchell was not his best friend.

{¶37} Appellant went on to testify that on June 10, 2007, he received a couple of text messages from Davis asking him if he was at work and telling him that she thought she might be in labor and might need him to watch Blake. Appellant stated that he told Davis he would take care of Blake while she went to the hospital. Appellant also recalled he and Davis discussed when he could watch Blake during the week of June 11, 2007. Appellant says he told Davis he could watch Blake on Thursday, his day off. Appellant stated that afterwards, he remembered that football practice was starting that week so he made arrangements with his friend, Myisha Ferrell, to watch Blake on that day. Appellant explained that Ferrell had asked him if she could borrow $100.00. Appellant says he offered to pay her $20.00 for watching Blake and loan her $80.00, which she would have to pay back.

{¶38} Appellant next testified to his actions on June 13, 2007. Appellant stated he had worked the previous night, with his shift ending at 8:00 a.m. on June 13, 2007. He then described what he did throughout the course of his day, prior to attending a softball game which started at 6:30 p.m. Appellant stated he spoke with Davis on his way to the softball game and informed her he planned on picking up Blake that evening around 10:00 p.m. He says that he and some other teammates stayed after their softball game was over and watched the second game of the evening. Appellant says he telephoned Davis and told her he was going to Champs Bar after the game and if he had anything to drink, he would not pick up Blake that evening, but would get him the next morning by 6:00 a.m. Appellant says he then proceeded to Champs Bar where he drank four or five beers and socialized with friends, including Denise Haidet, leaving at approximately 1:00 a.m. Appellant stated he then drove to Stephanie Hawthorne's

house, where he stayed until 2:00 a.m. before heading home. Appellant recalled that he spoke with Hawthorne on his cell phone on his way home.

{¶39} Appellant testified that he woke up at 5:20 a.m. on June 14, 2007, and drove to Jessie's house, arriving at approximately 5:45 a.m. Appellant stated he entered the home through the garage, which Davis would leave open when she was expecting him to come for Blake. Appellant says he knocked on the door, entered the house and called for Davis, who responded from upstairs. Appellant says he went upstairs, found Davis on the floor in her bedroom, and asked her what was wrong and if she was in labor. Appellant says Davis told him she was tired and nauseous. Appellant says he then asked her to get Blake ready and when Davis did not promptly get up, he again asked her to hurry up. Appellant stated that when she still did not respond quickly, he helped her get to her feet. Appellant admitted that he could tell Davis was trying to get her bearings once she was on her feet, but he still pushed her to hurry up as he wanted to get home and get more sleep. Appellant testified that Davis rebuked him, stating "If you weren't out last night with your friends all night, you wouldn't be rushing me now." (February 11, 2008, T. at 201). Appellant recalled he responded that what he did was not her concern, and he did not have to be there and could instead get Blake over the weekend. Appellant stated he then attempted to leave, but Davis stepped in front of him and grabbed his shirt. Appellant said he pulled away and tried to step around Davis, but she again moved in front of him. Appellant testified that Davis then grabbed him, telling him he could not leave because she needed to go to work. Appellant said he replied that he could leave if he could get her out of his way. Appellant stated he then pretended to stick his finger up his nose and put it in her face,

and that Jessie bit his finger. Appellant said he looked at his finger and told Davis he was "definitely leaving now, I don't care if you have to work or not." Id. at 205.

{¶40} Appellant testified he next stepped around Davis and she grabbed him and told him he could not leave. He stated that in an attempt to free himself from Jessie's grasp, he pulled his arm away and threw back his elbow, which struck Davis in the throat area. Appellant stated he was heading toward the door when he heard Davis fall, and he turned around and saw her lying on the floor. He testified that he went over to her and asked if she was all right, but she did not respond. Appellant says that he shook Jessie's shoulders and again asked her if she was all right but she remained unresponsive. Appellant testified that he unsuccessfully attempted CPR but was unable to find a pulse. Appellant went on to testify that he saw a bottle of bleach, and that he poured some into the cap and placed it under Jessie's nose in an attempt to revive her. Appellant explained that he knocked over the bleach bottle when he stood up. Appellant offered that he did not call 911 because he was unable to turn on Jessie's cell phone, which he located in its charger. Appellant acknowledged that he had his two cell phones in his truck but did not think about getting one from the vehicle to call 911. Appellant says he then collapsed, crying and fell back onto Jessie's bed, pushing the mattress off the box spring. Appellant claims he decided to leave without seeking help, because he knew he would never be able to explain what had occurred. He says that he checked on Blake and, finding him asleep, decided to leave him there while he went to get Ferrell to watch him. Appellant testified he then decided to take Jessie's body with him, placing her in the bed of his truck.

{¶41} Appellant says that when he arrived at Ferrell's house he told her that he needed her to come with him immediately. Appellant claims he intended to return to Jessie's house and have Ferrell watch Blake while he went to the police to explain the situation. Instead, he said that as the two were driving north on Interstate 77, he realized he was going to have a difficult time explaining why he moved Jessie's body. Appellant stated that he passed the exit for Jessie's house and continued to drive north. Appellant admitted that at approximately 7:10 a.m., he called Jessie's phone, but says he could not explain why he did so. Appellant said he exited the highway with the intention of returning to Jessie's house. Appellant recalled that he stopped at a rest area in order for Ferrell to use the restroom. Appellant recalled that he next traveled back onto the highway, but a state trooper passed them and he panicked and again exited the highway. He claims he then decided to travel back to Canton on back roads. Appellant testified he did not know where he was and drove around for at least a half an hour looking for a familiar landmark, eventually turning onto a dirt road into a park, where he made the decision to leave Jessie's body there.

{¶42} Appellant went on to testify that after leaving the park, he instructed Ferrell to throw Jessie's phone out the window because he could not get the phone to work and he did not need it. Appellant stated that Ferrell told him she needed cigarettes, so he stopped at a convenience store which had a carwash. Appellant explained that he decided to wash the car because his windshield wiper fluid would not work and there were bugs all over the windshield. Appellant recalled that prior to getting back on the highway, he deposited a garbage bag of trash, as well as a pillow from Jessie's bed into a dumpster.

{¶43} Appellant went on to explain that he continued with a normal daily routine, thinking the whole situation would go away. Appellant stated that he contacted the head football coach to tell him he would be late for practice, then stopped and picked up bags of mulch because he and his daughter had planned to mulch the flower beds at his house that day. Appellant says that he went back to his house, took a shower and continued with his schedule for the day. Appellant acknowledged he did not even think about Blake, as he just wanted the whole situation to go away. Appellant recalled that after football practice, he signed papers for a bank loan and then picked up his daughter. He returned to his house and picked up Ferrell to take her home. Appellant recalled that he stopped at Wal-Mart to buy his daughter a snow-cone maker and later that evening coached basketball.

{¶44} Appellant worked the 10:00 p.m. to 8:00 a.m. shift, and says that he planned to leave early to pick up Blake. He testified that he left the station at 7:45 a.m. on June 15, 2007, and was heading toward Jessie's house. He then received a call from Jessie's sister, telling him that Jessie was missing. Appellant says that he arrived at Jessie's house and was relieved to find Blake was safe. Although Appellant knew what had happened, he stated that he was unable to explain what occurred to the authorities because he feared they would not believe him. Appellant testified that it was sometime during the middle of the following week that he decided he had to end the charade because Jessie's family and his family had been through so much. On Saturday, June 23, 2007, Appellant and his attorney proceeded to the FBI office where Appellant disclosed the general location of Jessie's body. Appellant ultimately led authorities to that location.

{¶45} On cross-examination, the State elicited testimony from Appellant regarding his financial situation, including the increase in child support which would occur with the birth of Jessie's baby and from any obligation resulting from his divorce. Appellant admitted he applied for and received a loan, and that he paid approximately $2800 a month for various debts. The State also inquired of Appellant as to his actions on the morning of June 14, 2007. When asked why he did not get Blake ready instead of hurrying Davis, Appellant explained they had a routine and she was the one who would get Blake ready while he put the car seat in his truck. Appellant acknowledged after Davis fell, he did not retrieve his own cell phone out of his truck in order to call 911 when he was unable to turn on Jessie's phone. Appellant also conceded his attempts at CPR only lasted a few minutes. Appellant stated his actions following Jessie's death and the disposal of the body were an attempt to maintain a sense of normalcy in the hopes that what had happened actually had not happened. Appellant could not explain why he continued to conceal the whereabouts of Davis during the week following her disappearance.

{¶46} The defense rested its case following Appellant's testimony. Appellant renewed his Crim.R. 29 Motion for Acquittal and, during discussion of the jury instructions, requested the trial court instruct the jury on the lesser-included offense of involuntary manslaughter for counts one and two. The trial court denied this request.

{¶47} After hearing all the evidence and deliberations, the jury found Appellant not guilty of aggravated murder as alleged in Count 1 of the Indictment, but guilty of the lesser-included offense of murder. The jury also found Appellant guilty of the remaining charges and specifications. The trial court scheduled a separate mitigation phase of the

trial. At the conclusion of this hearing, the jury recommended Appellant be sentenced to life in prison with parole eligibility after serving thirty years for the two aggravated murder convictions relative to the death of Davis's unborn child. The trial court accepted the jury's recommendation for the two counts of aggravated murder but merged the offenses for purposes of sentencing. The trial court sentenced Appellant to an aggregate term of imprisonment of fifty-seven years to life.

{¶48} It is from this conviction and sentence Appellant appeals raising the following assignments of error:

{¶49} "I. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED CHARGE OF INVOLUNTARY MANSLAUGHTER.

{¶50} "II. THE TRIAL COURT ERRED IN ITS DENIAL OF DEFENDANT'S REQUEST FOR MISTRIAL AND ITS FAILURE TO FIND THAT THE JURY'S VERDICT WAS INCONSISTENT AS A MATTER OF LAW.

{¶51} "III. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR CHANGE OF VENUE.

{¶52} "IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL.

{¶53} "V. APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶54} "VI. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXPAND THE PROSPECTIVE JURY VENIRE THROUGH THE USE OF DRIVERS LICENSE RECORDS.

{¶55} "VII. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE WITH REGARD TO HEARSAY STATEMENTS MADE BY BLAKE.

{¶56} "VIII**.** THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISCLOSE GRAND JURY TESTIMONY.

{¶57} "IX. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE AS TO INTRODUCTION OF TESTIMONY THAT IS PREJUDICIAL PURSUANT TO EVIDENCE RULE 403.

{¶58} "X. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE CAPITAL SPECIFICATIONS OF THE INDICTMENT.

{¶59} "XI. THE TRIAL COURT COMMITTED A REVERSIBLE ERROR BY SENTENCING DEFENDANT TO MAXIMUM AND CONSECUTIVE SENTENCES ON ALL OF THE COUNTS AND BY FAILING TO MAKE A FINDING THAT THE CHARGES OF MURDER, AGGRAVATED MURDER AND AGGRAVATED BURGLARY ARE ALLIED OFFENSES WHICH SHOULD BE MERGED AND SERVED CONCURRENT TO EACH OTHER.

{¶60} "XII. THE TRIAL COURT ERRED IN REFUSING TO REMOVE PROSPECTIVE JURORS WHO PARTICIPATED IN THE SEARCH FOR THE VICTIM JESSIE DAVIS FOR CAUSE.

{¶61} "XIII. THE TRIAL WAS TAINTED BY SYSTEMATIC PREJUDICE AND PROSECUTORIAL MISCONDUCT."

I

{¶62} In the case sub judice, Appellant argues that it was error for the trial court to refuse to give a jury instruction on involuntary manslaughter. We disagree.

{¶63} Appellant was charged with three counts of Aggravated Murder: Count One for the death of Jessie Davis, pursuant to R.C. §2903.01(B), and two counts for the death of Jessie Davis's unborn child: Count Two for the unlawful termination of Jessie Davis's pregnancy pursuant to R.C. §2903.01(B), and, Count Three for the death of another who is under the age of thirteen pursuant to R.C. §2903.01(C).

{¶64} Appellant requested instructions on the lesser included offenses of murder and involuntary manslaughter based on counts one and two.

{¶65} R.C. 2903.04(B), Involuntary Manslaughter, provides:

{¶66} "No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree…"

{¶67} In this case, Appellant submits that the predicate misdemeanor offense was domestic violence under R.C. §2919.15(B), which states:

{¶68} "(B) No person shall recklessly cause serious physical harm to a family or household member."

{¶69} In order to warrant an instruction on domestic violence, Appellant would have had to present some evidence that he engaged in an argument with Jessie that resulted in him recklessly causing serious physical harm to a family member.

{¶70} The trial court gave an instruction on murder but refused to give the instruction on involuntary manslaughter.

{¶71} Involuntary manslaughter as set forth in R.C. §2903.04 is a lesser included offense of felony murder as set forth in R.C. §2903.01. *State v. Deem,* (1988) 40 Ohio St.3d 205, 533 N.E.2d 294. However, an instruction on a lesser included

offense needs to be provided "only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, 216, 533 N.E.2d 286.

{¶72} Trial courts have broad discretion in determining whether the evidence adduced at trial was sufficient to warrant a jury instruction. *State v. Morris,* Guernsey App. No. 03CA29, 2004-Ohio-6988, reversed on other grounds, 109 Ohio St.3d 313, 847 N.E.2d 1174, 2006-Ohio-2109; *State v. Mitts* (1998), 81 Ohio St.3d 223, 228, 690 N.E.2d 522. "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Sims,* Cuyahoga App. No. 85608, 2005-Ohio-5846, ¶ 12, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. A trial court does not abuse its discretion by not giving a jury instruction if the evidence is insufficient to warrant the requested instruction. *State v. Lessin* (l993), 67 Ohio St.3d 487, 494, 620 N.E.2d 72. An "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, (internal citations omitted.)

{¶73} When comparing aggravated murder and murder as charged in this case to involuntary manslaughter, it is the mental state of the accused that distinguishes one offense from the other. *State v. Brown* (Feb. 29, 1996), Cuyahoga App. No. 68761. The offenses of aggravated murder and murder require proof that the accused acted

purposely, or with specific intent to cause the death of another. See R.C. §2903.01; §2903.02; 2901.22(A). The culpable mental state of involuntary manslaughter is supplied by the underlying offense, in this case, "recklessly." See *State v. Campbell* (1991), 74 Ohio App.3d 352, 358-359, 598 N.E.2d 1244. Thus, an instruction on involuntary manslaughter should be given when, on the evidence presented, the jury could reasonably find against the State on the element of purpose, and find that the Appellant acted recklessly in taking the lives of Jessie Davis and her unborn child.

{¶74} The culpability level of recklessness is defined in R.C. §2901.22(C), which provides:

{¶75} "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶76} Based upon our review of the record, we find that the evidence presented at trial does not uphold the theory that Appellant acted recklessly in his actions. The basis for the involuntary manslaughter instruction was Appellant's claim that he did not intend to kill Jessie and her unborn child. The premise on which Appellant requested the involuntary manslaughter instruction was the underlying charge of domestic violence. There was no evidence that Appellant engaged in the act of domestic violence. The evidence presented at trial shows either that he acted purposely or accidentally, depending upon which story the jury believed. Appellant did testify that he did not intend to hurt anyone.

{¶77} At trial, when describing the events leading up to Jessie Davis's death, Appellant testified:

{¶78} "Q: And when you try to leave, tell the jury what occurs.

{¶79} "A: She stepped in front of me and she grabbed me and she said, You can't go anywhere. She goes, You have to watch Blake so I can go to work.

{¶80} "Q: Where does she grab you at?

{¶81} "A: She grabbed me by my shirt, like this.

{¶82} "Q: Okay. And what did you do in response to her grabbing you by the shirt at that time?

{¶83} "A: I pulled away from her and I said, you know, I don't.

{¶84} "Q: Did you try to step around her?

{¶85} "A: Yes.

{¶86} "Q: Were you able to?

{¶87} "A: No. She stepped in front of me again.

{¶88} "Q: Okay. What happened on the second time that she stepped in front of you?

{¶89} "A: I said, You know what, I'm trying to leave. I don't have to be here. You, you're taking your time and I can be sleeping. And –

{¶90} "Q: Did you feel like she was deliberately taking her time at this time based on her statement that she had made to you regarding having been out last night?

{¶91} "A: I don't know if she was deliberately taking her time, but she was very adamant that I couldn't leave because she needed to go to work.

{¶92} "Q: Okay. So the second time, ah, that she grabbed you, where does she grab you at, Bobby?

{¶93} "A: She actually grabbed my arm and – and pushed me back like, so I couldn't leave.

{¶94} "Q: Okay. And what did you do in response to that?

{¶95} "A: I said, Oh, well, I can leave and I can get you out of my way, and I pretended that I put my finger up my nose and I put it out in her face and she bit me. She bit my finger.

{¶96} "Q: How hard did she bite your finger?

{¶97} "A: She bit it pretty hard. She clamped down on my finger and I pulled it out of her mouth.

{¶98} "Q: And did that surprise you?

{¶99} "A: Yeah. I, I didn't expect for her to bite me. I thought she would move and I'd go by. I didn't expect her to bite me.

{¶100} "***

{¶101} "A: I stepped back and I looked at my finger and I was like, you know what, I'm definitely leaving now, I don't care if you have to go to work or not, and I went to step around her and she grabbed me and said I couldn't leave and I pulled my arms from her.

{¶102} "Q: Okay.

{¶103} "A: I, I pulled my arm and I threw my elbow back. And it connected.

{¶104} "Q: Bobby, were you making an effort to get Jessie off of you at that time?

{¶105} "A: I just, I just wanted to leave.

{¶106} "Q: Were you trying to get her arms off of you?

{¶107} "A: I just wanted – I swung, I swung my elbow just so she wouldn't grab anymore.

{¶108} "Q: And where did that elbow land?

{¶109} "A: Like in her throat area.

{¶110} "Q: In her throat area?

{¶111} "A: Yeah.

{¶112} "Q: What happened as a result of that?

{¶113} "A: She hit the ground.

{¶114} "Q: How hard did she fall?

{¶115} "A: She fell pretty hard. I didn't expect her to fall in the first place, but she fell pretty hard." (Feb. 11, 2008, T. at 202-206).

{¶116} Appellant stated that he "didn't mean to hurt her." (Id. at 218). When asked what was going through his head at that time, he stated that he was thinking, "This can't be happening. * * * I never tried to hurt anyone." (Id. at 221). He again stated that he "don't want anybody to be hurt. I didn't try to hurt anyone." (Id. at 223). He continued to repeat himself that he did not mean to cause harm to Jessie or Baby Chloe. When asked by his attorney on redirect if he ever tried "in any way" to cause harm to Jessie or the fetus, he responded, "I didn't try to cause harm to Jessie or

the fetus." He further stated that he did not intend to strike Jessie in the throat with his elbow. (Id. at 318).

{¶117} Based on the foregoing, we find that the evidence did not establish that Appellant acted with heedless indifference to the consequences or that he perversely disregarded a known risk that his conduct was likely to cause a certain result or was likely to be of a certain nature. But this evidence, if accepted by the jury, would constitute a complete defense to the charges of aggravated murder and murder. That is, the jury was obligated to choose between Appellant's complete defense of lack of any intent to harm Jessie or her unborn child, (i.e. accident), and therefore acquittal, or the commission of the crimes of aggravated murder and murder. Although presentation of a complete defense does not automatically preclude a lesser-included-offense instruction, *State v. Wilkins*, 64 Ohio St.2d at 387-388, 415 N.E.2d 303, Appellant has presented no evidence that he was reckless in his actions. See, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791.

{¶118} A mere failure to perceive or avoid a risk, because of a lack of due care, does not constitute reckless conduct. *Columbus v. Akins* (Sept. 27, 1984), Franklin App. No. 83AP-977, 1984 WL 5923. Instead, one must recognize the risk of the conduct and proceed with a perverse disregard for that risk. *State v. Covington* (1995), 107 Ohio App.3d 203, 206, 668 N.E.2d 520; *State v. Whitaker* (1996), 111 Ohio App.3d 608, 613, 676 N.E.2d 1189 (noting that to be reckless, "one must act with full knowledge of the existing circumstances").

{¶119} In contrast to the actor who proceeds with knowledge of a risk, the failure of a person to perceive or avoid a risk that his conduct may cause a certain result

or may be of a certain nature is negligence. R.C. §2901.22(D). Recklessness requires more than ordinary negligent conduct. The difference between the terms "recklessly" and "negligently" is normally one of a kind, rather than of a degree. "Each actor creates a risk of harm. The reckless actor is *aware* of the risk and disregards it; the negligent actor is *not aware* of the risk but should have been aware of it." (Emphasis sic.) Wharton's Criminal Law (15th Ed.1993) 170, Section 27; see, also, *State v. Wall* (S.D.1992), 481 N.W.2d 259, 262.

{¶120} According to Appellant's version of events, he was simply trying to leave Jessie Davis's apartment and was trying to pull away from her and extricate himself from her grasp when her death occurred.

{¶121} The evidence as presented by Appellant, if believed by the jury, established that Appellant caused the deaths of Jessie Davis and her unborn child as the result of an unintentional act, an accident. Accident is defined as a "mere physical happening or event, out of the usual order of things and not reasonably anticipated as a natural or probable result of a lawful act." 4 Ohio Jury Instructions 75, Section 411.01(2). Moreover, "[a]n accidental result is one that occurs unintentionally and without any design or purpose to bring it about." Id.

{¶122} Where the theory of the defense is predicated on an accident, as was evident through the testimony of Appellant and through defense counsel's tenor throughout the trial, an instruction on involuntary manslaughter is inappropriate. Courts have repeatedly held that where a defendant presents a theory of accident, it is improper to instruct on lesser included offenses such as negligent homicide, (see e.g., *State v. James*, Stark App.No. 2005-CA-00076, 2006-Ohio-271, *State v. Gay* (Nov. 2,

1990), Portage App.No. 88-P-2043, citing *State v. Hill* (1987), 31 Ohio App.3d 65. See also *State v. Wiley* (Mar. 4, 2004), Franklin App.No. 03 AP-340; *State. v. Georgekopoulos* (Nov. 25, 1998), Summit App.No. 18797; *State v. Samuels* (Sept. 24, 1987), Cuyahoga App.No. 52527). Moreover, "the defense of accident is totally inconsistent with a request for a jury instruction with regard to involuntary manslaughter or negligent homicide in that each of these offenses possess the element of intent and/or criminal culpability." Appellant argues that the death of the victim did not involve the element of intent or criminal culpability.

{¶123} Appellant made the tactical decision to argue that he had no culpability for the deaths in this case. To later argue that Appellant was culpable for such deaths, but to a lesser extent, would have been wholly inconsistent with the defense theory.

{¶124} Moreover, evidence of the purposefulness of Appellant's actions was presented at trial. Appellant told his friend, Richard, who testified at trial, that he was going to "kill that bitch and throw her in the woods." Additionally, the coroner testified that a strike to the throat such as Appellant described would not cause asphyxiation and that constant pressure would need to be applied in order to cause death by asphyxiation. Specifically, the coroner stated that the person would have to apply continual pressure for a period of several minutes in order for the person to go unconscious first and then die. While the body was too decomposed for the doctor to determine a specific cause of death, the doctor noted that there were no fractures to the skull or ribs or any other trauma to the bones. Appellant also fled the scene and did not call 9-1-1. He then disposed of the body in the middle of a forested area where wild

animals were likely to ravage the body and then proceeded to lie to the police for days. Appellant only confessed once he knew that the officers placed him with Jessie's cell phone in the area where he disposed of her body.

{¶125} The nature of the evidence presented shows both purpose and consciousness of guilt in his actions following Jessie's murder. For Appellant to argue at trial that he did not mean to kill Jessie and her unborn child, and then to request an instruction that he engaged in an act of domestic violence would be disingenuous and inconsistent with the evidence presented. See *State v. Irwin*, Hocking App. Nos. 03CA13, 03CA14, 2004-Ohio-1129.

{¶126} For these reasons, we find that the trial court's decision to deny Appellant's request for an instruction on the lesser included offense of involuntary manslaughter was not unreasonable, arbitrary or unconscionable. Appellant's first assignment of error is overruled.

II

{¶127} In his second assignment of error, Appellant contends the jury's conviction for Appellant's murder of Davis is inconsistent with the convictions for Appellant's aggravated murder of Davis's unborn child, and that the trial court committed reversible error in denying a mistrial on that basis. We disagree.

{¶128} The standard of review for evaluating a trial court's decision to grant or deny a mistrial is abuse of discretion. *State v. Graewe*, Tuscarawas App.No. 2007 AP 10 0070, 2008-Ohio-5143, ¶ 46, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 510 N.E.2d 343. In order to find an abuse of 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* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Generally, "[i]nconsistency in a verdict does not arise out of inconsistent responses to different counts, but rather inconsistent responses to the same count." *State v. Gardner,* Montgomery App. No. 21027, 2006-Ohio-1130, ¶33, citing *State v. Adams* (1978), 53 Ohio St.2d 223; *State v. Lovejoy* (1997), 79 Ohio St.3d 440. Furthermore, an inconsistent verdict may very well be a result of leniency and compromise by the jurors, rather than being caused by jury confusion. *State v. Fraley*, Perry App.No. 03CA12, 2004-Ohio-4898, ¶ 15, citing *United States v. Powell* (1984), 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461. See, also, *State v. Ballard* , Cuyahoga App.No. 88279, 2007-Ohio-4017, ¶ 17.

{¶129} To reiterate, Count One of the indictment in the case sub judice charged the crime of the aggravated murder of Jessie Davis and alleged that Appellant purposely caused her death while committing or fleeing immediately thereafter the crime of aggravated burglary. (Feb. 12, 2008, T. at 171-172). In addition to the charge of aggravated murder, Count One also included two specifications which would serve to enhance the potential penalty for aggravated murder to include a death sentence. The jury found the Defendant not guilty of the crime of aggravated murder in the death of Jessie Davis, but guilty of murder, and thereby implicitly determined that he did not in fact purposely cause her death in the commission of an aggravated burglary. As instructed, the jury therefore did not consider the two death penalty specifications to Count One of the indictment.

{¶130} Counts Two and Three of the indictment charged Appellant with aggravated murder in purposefully causing the unlawful termination of Jessie Davis's

pregnancy and/or the death of her unborn child, while committing or fleeing immediately thereafter the offense of aggravated burglary, and with aggravated murder in purposely causing the death of another who is under thirteen years of age at the time of the commission of the offense. (Feb. 12, 2008, T. at 201-202, 229). The same two specifications as contained in Count One of the indictment were also attached and required the jury to make a finding as to their application by evidence beyond a reasonable doubt. (Id. at 215-219). In addition, a third specification was set forth requiring the jury to find that the viable unborn human child of Jessie Davis was a child under 13 years of age at the time of the commission of aggravated murder. (Id. at 220, 229).

{¶131} The jury, following instructions which included the lesser included offense of murder, returned its verdicts which, inter alia, found Appellant not guilty of the crime of aggravated murder as alleged in Count One of the indictment relative the death of Jessie Davis, but guilty of the lesser included offense of murder. Additionally, the jury found Appellant guilty of aggravated murder in both Counts Two and Three of the indictment, as well as all of the specifications, relative to the death of the unborn child. At the conclusion of the reading of the verdicts, defense counsel moved the trial court to declare a mistrial and argued that the verdicts as to Counts One, Two and Three were inconsistent as a matter of law and should be vacated. The trial court denied Appellant's motion for mistrial.

{¶132} Appellant presently directs us to the State's direct examination of Dr. Lisa Kohler, in support of his underlying proposition that there was no allegation of

separate animus or action in deliberately causing the death of the unborn child by independent acts:

{¶133} "Q: As part of the autopsy did you also have an opportunity to examine the fetal remains?

{¶134} "A: Yes, I did.

{¶135} "Q: Did you examine those bones for trauma?

{¶136} "A: Yes.

{¶137} "Q: Did you observe any trauma?

{¶138} "A: No, I did not.

{¶139} "Q: Based upon the autopsy, the training and education that you have had and your experience, do you have an opinion as to a reasonable degree of medical certainty as to the cause of death of the fetus in this case?

{¶140} "A: Yes, I do.

{¶141} "Q: Could you tell these folks what that is?

{¶142} "A: The fetus died a (sic) result of maternal death.

{¶143} "Q: So when Jessie died, the fetus died?

{¶144} "A: That's correct." (Trial T. at 1302-1303).

{¶145} The gist of Appellant's argument is that the jury's verdicts under the facts of this case were inconsistent where the jury found Appellant guilty of murder of Davis, which by definition lacked the finding of the underlying offense of aggravated burglary, and where the jury found him guilty of the purportedly simultaneous aggravated murder of the unborn child during the commission of an aggravated burglary.

{¶146} Aggravated burglary is defined as follows under R.C. 2911.11(A)(1): "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if *** [t]he offender inflicts, or attempts or threatens to inflict physical harm on another."

{¶147} Notwithstanding the additional evidence that the unborn child was viable and may have been able to survive her mother's death (Trial T. at 1242-1244, 1303-1304), along with Appellant's complete failure to take any measures to thereupon save the unborn infant, we find, upon review of the record, that the jurors may have properly inferred that Appellant's acts of physical harm to Davis, once inside the apartment, where his violent acts would have removed Davis's permission for him to be there, constituted aggravated burglary for purposes of the elevated charge of aggravated murder regarding the unborn child. Moreover, because the second aggravated murder conviction concerning the unborn child (Count Three) was separately premised on Appellant's act of purposely causing the death of another who is under thirteen years of age (R.C. 2903.01(C)), which conviction was merged for sentencing purposes, we find Appellant has failed to demonstrate prejudicial error upon appeal.

{¶148} Accordingly, we hold the trial court's denial of the motion for mistrial on the allegation of inconsistent verdicts was not arbitrary, unreasonable or unconscionable.

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

III

{¶150} In his third assignment of error, Appellant contends the trial court erred in denying his motion for a change of venue.

{¶151} Appellant explains, "After receipt and review of the juror questionnaires and the initial phase of the jury selection process, Defendant filed a motion seeking a change of venue due to detailed knowledge of the allegations amongst the vast majority of the venire." Appellant's Brief at 13-14. The trial court conducted a hearing on Appellant's motion on February 1, 2008, and subsequently denied the request.

{¶152} Both parties agree the standard of review to be applied is abuse of discretion. In order to find an abuse of discretion, we must find the trial court's decision constituted more than an error of law, that the ruling was unreasonable, arbitrary, or unconscionable. *State v. McKnight,* 107 Ohio St.3d 101, 2005-Ohio-6046.

{¶153} The State counters the examination of jurors during voir dire affords the best test to determine prejudice from pretrial publicity. We agree. Extensive exposure to pretrial publicity does not, in and of itself, preclude the seating of a fair and impartial jury. A jury venire is not required to be ignorant of the facts and issues of a particular case. Voir dire is the mechanism for determining whether a fair and impartial jury can be seated.

{¶154} The State adds the record does not support Appellant's argument a change of venue was mandated because Appellant "deliberately" chose not to include a transcript of the extensive voir dire which took place in this case. Upon questioning by this Court at oral argument, Appellant responded he complied with App.R. 9(B) by

serving notice on the State that he was not ordering the entire transcript of the voir dire and included a statement of the assignment of error he intended to present on appeal with regard to this issue. The State did not elect to seek supplementation of the record with the entire transcript of voir dire. Appellant concluded, therefore, the presumption of regularity under *Knapp v. Edwards Lab.* (1980), 61 Ohio St.2d. 197, 199, does not apply.

{¶155} Regardless, Appellant still has the affirmative duty to demonstrate in the record prejudicial error. As we previously stated, prior knowledge acquired through pretrial publicity does not equate to the inability to seat a fair and impartial jury. While such prejudice may have been evident from review of the entire voir dire process, the limited portion of the transcript Appellant chose to include in the appellate record does not affirmatively demonstrate prejudicial error. Appellant claims there was ". . . an overwhelming likelihood of prejudice . . ." Appellant's Brief at 15. Such speculation or conclusion is not a substitute for demonstration of error and prejudice in the record.

{¶156} Appellant's third assignment of error is overruled.

IV, V

{¶157} Appellant's fourth and fifth assignments of error have some overlap; therefore, we shall address said assignments of error together.

{¶158} In his fourth assignment of error, Appellant maintains the trial court erred in denying his Crim.R. 29 Motion for Acquittal with respect to the three counts of aggravated murder set forth in Counts One, Two, and Three of the Indictment.

{¶159} In his fifth assignment of error, Appellant challenges his convictions as against the manifest weight and sufficiency of the evidence.

Crim.R. 29 Motion for Acquittal

{¶160} Crim**.** R**.** 29(A) requires a trial court, upon motion of the defendant, to enter a judgment of acquittal of one or more offenses charged in an indictment if the evidence is insufficient to sustain a conviction of the offense or offenses. However, a trial court may not grant an acquittal by authority of Crim**.**R**.** 29(A) if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. On appeal of the denial of a Crim**.**R**.** 29(A) motion, the "relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Williams,* 74 Ohio St.3d 569, 576, 1996-Ohio-91, 660 N.E.2d 724, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶161} Appellant was indicted on three counts of aggravated murder, in violation of R.C. 2903.01(A), (B), and (C) which provides:

{¶162} "(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

{¶163} "(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

{¶164} "(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense."

{¶165} Appellant asserts he was entitled to judgments of acquittal on the three aggravated murder charges as the State failed to present any evidence to establish the mens rea of purposeful. We disagree. Based upon the evidence produced during the State's case-in-chief as set forth in our Statement of the Facts and Case, supra, we find there was more than sufficient evidence to support the trial court's decision to overrule Appellant's Crim.R. 29 Motion for Acquittal.

Standard of Review – Sufficiency and Manifest Weight of the Evidence

{¶166} In *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, superseded by constitutional amendment on other grounds in *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at para. two of the syllabus.

{¶167} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised

only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541 superseded by constitutional amendment on other grounds as stated by *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, para. one of the syllabus.

Counts One and Two

{¶168} Given our disposition of Appellant's first assignment of error, we find Counts One and Two were supported by substantial, competent and credible evidence as outlined in our Statement of the Facts and Case, supra; therefore, we find rational jurors would have found Counts One and Two proven beyond a reasonable doubt, and the convictions were not against the sufficiency of the evidence. Furthermore, upon review, we conclude the verdicts were not against the manifest weight of the evidence.

Count Three

{¶169} Appellant was found guilty of aggravated murder, in violation of R.C. 2901.01(C), as alleged in Count Three of the Indictment.

{¶170} R.C. 2901.01(C) provides:

{¶171} "(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense."

{¶172} Appellant contends an unborn fetus does not constitute a person "under thirteen years of age"; therefore, his conviction in Count Three is against the manifest weight and the sufficiency of the evidence. We disagree.

{¶173} R.C. 2901.01(B)(1) defines "person" as follows:

{¶174} "(B)(1)(a) Subject to division (B)(2) of this section, as used in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense, "person" includes all of the following:

{¶175} "(i) An individual, corporation, business trust, estate, trust, partnership, and association;

{¶176} "(ii) An unborn human who is viable."

{¶177} Dr. Polifrone, Davis's obstetrician, and Dr. Kohler, the Summit County Medical Examiner, both testified the unborn child was viable and she would have survived had she been born on or about June 14, 2007. Because Davis's fetus was capable of independently surviving her mother at the time of Davis's death, we find Chloe, by statutory definition, was a person under thirteen years of age. Accordingly, we find Appellant's conviction on Count Three was neither against the manifest weight nor the sufficiency of the evidence.

Count Four – Aggravated Burglary

{¶178} Appellant was convicted of aggravated burglary, in violation of R.C. 2911.11(A)(1), which provides:

{¶179} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is

present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶180} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another. * * *"

{¶181} Appellant argues he did not trespass in Davis's home. Although Appellant may have had consent to enter Davis's home to pick up Blake, once he committed an act of violence against Davis, the consent was revoked and Appellant became a trespasser. Where a defendant commits an offense against a person in the person's private dwelling, the defendant forfeits any privilege, becomes a trespasser and can be culpable for aggravated burglary. See, e.g., *State v. Steffen* (1987), 31 Ohio St.3d 111, 115. The jury's conviction on Count Four was not against the manifest weight or the sufficiency of the evidence.

{¶182} Based upon the foregoing, we overrule Appellant's fourth and fifth assignments of error.

VI

{¶183} In his sixth assignment of error, Appellant submits the trial court erred in denying his motion to expand the prospective jury venire through driver's license registrations. Appellant asserts drawing the venire solely from registered voters deprived him of his Sixth Amendment right to a jury drawn from "a fair cross section of the community". See, generally, *State v. Fulton*, (1991), 57 Ohio St.3d 120, para. two of the syllabus.

{¶184} The Sixth Amendment to the United States Constitution does not require that petit juries "mirror the community and reflect the various distinctive groups in the population." *Taylor v. Louisiana* (1975), 419 U.S. 522, 538, 95 S.Ct. 692, 42 L.Ed.2d 690. However, the method employed for selecting the groups from which juries are drawn "must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id.

{¶185} In *Duren v. Missouri* (1979), 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579, the United States Supreme Court set forth the prerequisites a defendant must satisfy in order to establish a prima facie violation of *Taylor's* fair cross-section requirement:

{¶186} "[T]he defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation is due to systematic exclusion of the group in the jury-selection process." Id. at 364, 95 S.Ct. at 668.

{¶187} For purposes of fair, cross-section analysis, African-Americans are a distinctive group. *State v. Jones* (2001), 91 Ohio St.3d 335, 340, 744 N.E.2d 1163. However, with respect to the second prong of the *Duren* test, Appellant has failed to prove African-Americans in Stark County are unfairly represented in venires relative to their numbers in the community. Appellant has also failed to satisfy the third prong of *Duren,* as he has not presented any evidence of systematic exclusion of African-Americans. Appellant simply argues, without more, voter registration rolls result in the systematic exclusion of African-Americans.

{¶188} As Appellant has failed to satisfy the second and third prong of the *Duran* test, we find no error in the trial court's denial of Appellant's motion to expand the prospective jury venire. See, e.g., *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126 at ¶103-106. (Calling of venire solely from voter registration list as opposed to list of licensed drivers did not violate defendant's right to fair and impartial jury.)

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

VII

{¶190} In his seventh assignment of error, Appellant contends the trial court erred and abused its discretion in denying his motion in limine relative to out-of-court statements made by two-year-old Blake to Sergeant Weisburn of the Stark County Sheriff's Department. We disagree.

{¶191} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. 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* (1983), 5 Ohio St.3d 217. The grant or denial of a motion in limine is an interlocutory and preliminary order. See *State v. Grubb* (1986), 28 Ohio St.3d 199, 200-201. The failure to proffer or object at trial does not preserve the issue for appellate review. Id. at 203. In order to preserve the matter for appeal, the parties must renew their motions or objections at the appropriate time during trial. *Forbus v. Davis* (Sept. 25, 2000), Stark App.No. 1999-CA-0382, citing *State v. Brown* (1988), 38 Ohio St.3d 305, paragraph three of the syllabus.

{¶192} In the case sub judice, after a hearing on appellant's motion in limine, the trial court found Blake's statements were admissible under the excited utterance exception to the hearsay rule. The trial court further found, in regard to the issue of right to confrontation under the Sixth Amendment, that the statements were admissible because they were part of the ongoing emergency investigation being conducted by the police at the time. Appellant presently not only does not identify where in the record he objected to this testimony at trial, but also fails to assert he even objected at trial. As such, we find Appellant has waived this argument. However, even if we had determined the alleged error was preserved for our review, we would overrule it on the merits, as discussed below.

Hearsay Issue

{¶193} Evid.R. 803(2), an exception to the hearsay rule, provides: "Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The Ohio Supreme Court, in *State v. Duncan* (1978), 53 Ohio St.2d 215, 373 N.E.2d 1234, emphasized that " * * * an appellate court should allow a wide discretion in the trial court to determine whether in fact a declarant was at the time of an offered statement still under the influence of an exciting event." Id. at 219, 373 N.E.2d 1234. Furthermore, "[w]hen the statements are those of * * * a child of tender years, the lapse of time between the event and the declaration has been expended [sic], thus recognizing the reality that 'a child victim of a crime may be under stress caused by the events for a longer period of time than adults.' " *State v. Reed* (May 31, 1991), Lake App. No. 89-L-14-130, quoting *State v. Kunsman* (Mar. 30, 1984), Lake App. No. 9-252, at 6.

{¶194} Appellant herein asserts the passage of more than twenty-four hours from the time of the incident to the time of the conversation with Sergeant Weisburn demonstrates Blake's statements were not made while still under the stress or excitement of the event. However, we hold that where Blake was only two years old at the time and had been left alone for an extended period of time after the trauma-filled events surrounding his mother's disappearance, the record supports the trial court's conclusion that Blake's out-of-court statements to the officer qualified as excited utterances.

Confrontation Clause Issue

{¶195} Appellant further contends his Sixth Amendment right to confrontation was violated as a result of the admission of Blake's statements, although Appellant again does not identify where in the record he presented this argument to the trial court. The Confrontation Clause of the Sixth Amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the United States Supreme Court held that testimonial statements of a witness who does not appear at trial may not be admitted or used against a criminal defendant unless the declarant is unavailable to testify, and the defendant has had a prior opportunity for cross-examination.

{¶196} In *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, the Ohio Supreme Court established the "primary purpose" test for the issue now before us: "To determine whether a child declarant's statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test: 'Statements

are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' (*Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 224, followed.)" Id. at paragraph one of the syllabus.

{¶197} Upon review, we find the trial court did not abuse its discretion in determining the statements were admissible as part of an ongoing emergency investigation which satisfied the "primary purpose" test of *Siler*. Appellant's suggestion that an "immediate emergency" was lacking because of the passage of over twenty-four hours ignores the fact that Davis's whereabouts and condition were still unknown to law enforcement officials at the time of Blake's statements to Sergeant Weisburn. We conclude Blake's statements were non-testimonial in nature; therefore, they were not admitted in violation of Appellant's right to confrontation. *Crawford*, supra.

{¶198} Finally, Appellant asserts error in the trial court's admission of similar statements Blake made to his grandmother. Appellant again fails to reference where in the record the alleged error occurred or whether he objected to it. We find any such statements would merely be cumulative to the statements Blake made to Sergeant Weisburn, which we have already found to have been properly admitted.

{¶199} Accordingly, Appellant's seventh assignment of error is overruled.

VIII

{¶200} In his eighth assignment of error, Appellant asserts the trial court erred in denying his motion to disclose grand jury testimony.

{¶201} Ohio Crim.R. 6(E) provides:

{¶202} "Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

{¶203} Grand jury testimony is secret by nature, and will remain such, absent a showing by the defendant of a particularized need which outweighs the need for secrecy. *State v. Greer* (1981), 66 Ohio St.2d 139. A particularized need exists when the circumstances show a probability the accused will be denied a fair trial without the grand jury testimony. *State v. Davis* (1988), 38 Ohio St.3d 361. A trial court has discretion to decide when a particularized need exists, and thus will not be reversed absent an abuse of discretion. *State v. Greer,* supra.

{¶204} Appellant argues a particularized need existed for two reasons. First, the State failed to provide Appellant with admissions he made to witnesses and/or to his co-defendant, Myisha Ferrell, when the State's case-in-chief was premised solely upon those alleged admissions. Second, the State allegedly failed to produce any evidence of a burglary upon which one of the death specifications was based.

{¶205} A review of the record reveals the State complied with the requirements of Crim.R. 16 and provided Appellant with the names of the witnesses it intended to call at trial as well as the exculpatory statements he made to Myisha Ferrell. Additionally, a review of the Bill of Particulars and the State's responses to Appellant's motions to dismiss reveal Appellant was put on notice of the case law the State intended to rely upon to establish the revocation of privilege to support the aggravated burglary charge. Accordingly, we find the trial court did not abuse its discretion in denying Appellant's request for the disclosure of grand jury testimony.

{¶206} Appellant's eighth assignment of error is overruled.

IX

{¶207} In his ninth assignment of error, Appellant argues the trial court erred in denying his motion in limine as to the introduction of testimony of four witnesses as such was prejudicial pursuant to Evid.R. 403.

{¶208} A motion in limine is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of an evidentiary issue. *State v. Grubb* (1986), 28 Ohio St.3d 199, 200-201. The established rule in Ohio is the grant or denial of a motion in limine is not a ruling on the evidence. Id. The ruling is preliminary and thereby requires the parties to raise specific evidentiary objections at trial in order to permit the trial court to consider the admissibility of the evidence in its actual context. Id. "At trial it is incumbent upon a defendant, who has been temporarily restricted from introducing evidence by virtue of a motion in limine, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." Id. at 203. Failure to proffer the evidence waives the right to appeal the granting of the motion. Id.

{¶209} The record herein reveals Appellant did, in fact, object at trial to the testimony he sought to have excluded in his motion in limine. As such, the matter is properly before this Court for review.

{¶210} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173. Therefore, we will not disturb a trial court's evidentiary ruling unless we find said ruling to be an abuse of

discretion; i.e. unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶211} Evid.R. 403(A) provides:

{¶212} "(A) Exclusion mandatory

{¶213} "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶214} Specifically, Appellant asserts the State presented the testimony of Jill Butler, Stephanie Hawthorne and Jennifer Sprout for the sole purpose of impeaching his character. The testimony of these women showed Appellant engaged in numerous sexual relationships while he was either still married to or separated from his wife. Appellant also sought to exclude the testimony of Todd Porter, a reporter for The Repository, a local newspaper, who conducted an interview with Appellant during the week following Davis's disappearance. Appellant avers the State presented this testimony for the sole purpose of impeaching his character through untruthful statements made shortly after the offense, as well as his failure to disclose any involvement therein.

{¶215} We find the trial court did not abuse its discretion in admitting the testimony of Stephanie Hawthorne. When Appellant initially spoke with law enforcement officials on June 15, 2007, he indicated he left Champs Bar on the evening of June 13, 2007, and proceeded directly to his home. However, it was later learned Appellant left Champs Bar and arrived at Hawthorne's home at 1:00 a.m. on June 14, 2007, and stayed with her until 2:00 a.m. Hawthorne spoke to Appellant at 2:12 a.m.,

after he had left her residence. Hawthorne also testified she was pregnant with Appellant's child and had terminated the pregnancy on June 13, 2007. We find the probative value of Hawthorne's testimony was not outweighed by any unfair prejudice, as it established Appellant's whereabouts a few hours prior to Davis's death and it directly challenged his credibility as to the events surrounding Davis's death.

{¶216} Jill Butler and Jennifer Sprout both testified they were involved in sexual relationships with Appellant. Butler called Appellant on his cell phone at approximately 10:30 p.m. on June 13, 2007. Butler also called Appellant on June 15, 2007, after hearing on the news a pregnant woman was missing and her boyfriend was a Canton Police Officer. Butler called Appellant "out of curiosity" to see if he knew who the officer was. Appellant was asleep when Butler called. She apologized for waking him and stated she would talk to him later. Jennifer Sprout testified she and Appellant were together the weekend before Davis's disappearance. Sprout spoke to Appellant after the news story broke. During the conversation, Appellant told Sprout he could not believe Davis was missing. Although the testimony of Butler and Sprout was only marginally relevant and we recognize the potential prejudice to the Appellant from disclosure of additional sexual relationships, we find the trial court did not abuse its discretion in allowing such testimony as Appellant's tendency to engage in adulterous sexual relationships had already been established and any further testimony was merely cumulative.

{¶217} Todd Porter, a reporter from the Canton Repository Newspaper, testified regarding the interview he conducted with Appellant during the week following his disappearance. Richard Mitchell, Appellant's friend at the time, contacted Porter to give

Appellant an opportunity to tell his side of the story. Prior to the interview, Appellant spoke with his attorney and reviewed the questions Porter intended to ask him. Appellant denied any knowledge about the disappearance of Davis and told Porter he hoped she would be found alive. We find Porter's testimony was relevant as to Appellant's behavior following Davis's disappearance. We find the trial court did not abuse its discretion in admitting the testimony.

{¶218} Appellant's ninth assignment of error is overruled.

X

{¶219} In his tenth assignment of error, Appellant argues the trial court erred by failing to dismiss the capital specifications of the Indictment because such specifications had no foundation in law or fact.[1] Specifically, Appellant challenges the capital specification alleging he caused the death of two or more persons in the course of conduct, one being the death of a child under the age of 13. Appellant also takes issue with the sufficiency of the allegations for a capital specification due to the commission of an aggravated burglary.

{¶220} Following the mitigation phase of the trial, the jury did not recommend the death penalty. Because capital punishment has ceased to be an issue in this case, we find the arguments raised herein to be moot.[2]

{¶221} Accordingly, we overrule Appellant's tenth assignment of error.

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[1] Again, Appellant failed to reference where in the record he made this argument to the trial court.

[2] Furthermore, we found in our discussion of Appellant's fourth and fifth assignments of error, supra, the jury's verdict as to the aggravated burglary count was not based upon insufficient evidence and was not against the manifest weight of the evidence.

XI

{¶222} In his eleventh assignment of error, Appellant claims the trial court erred by sentencing him to maximum, consecutive sentences on all the counts and failing to find the charges of murder, aggravated murder and aggravated burglary to be allied offenses which should be merged and served concurrent to each other.[3]

Sentencing Issues

{¶223} In support of his initial argument, Appellant relies in part on R.C. 2929.14(C), which states as follows: "Except as provided in division (D)(7), (D)(8), (G), or (L) of this section, in section 2919.25 of the Revised Code, or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section." Appellant similarly asserts the trial court gave no consideration to the jury's findings and rejected their recommendation when sentencing Appellant to an aggregate term of 57 years to life in prison. Appellant also contends the trial court violated the United States Supreme Court's holding in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, by considering numerous "factors" neither submitted nor proved to the jury. Appellant's Brief at 37.

[3] We note appellant's statement of the assignment of error itself does not specifically identify by number which aggravated murder counts of the Indictment he claims to be allied offenses. By process of elimination, we find the reference to the murder charge necessarily involves Count One. We presume reference to the aggravated murder charge involves Count Two.

{¶224} However, Appellant's reliance on R.C. 2929.14(C) is unfounded. That subsection was severed from R.C. 2929.14 in *State v. Foster* (2006), 109 Ohio St.3d 1. In *Foster*, the Supreme Court held, inter alia: "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at syllabus para. 7. An abuse of discretion implies the court's attitude is "unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 157. The fact the trial court's aggregate sentence exceeded the jury's recommendation is not determinative.[4] Based upon our review, we do not find the trial court abused its discretion in rendering maximum and consecutive sentences.

Allied Offense Issues

{¶225} In *State v. Rance,* 85 Ohio St.3d 632, 710 N.E.2d 699, 1999-Ohio-291, the Ohio Supreme Court held that offenses are of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. The *Rance* court further held that courts should compare the statutory elements in the abstract. Id. at 636.

{¶226} In further clarifying *Rance*, the Court, in *State v. Cabrales,* 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, syllabus, instructed as follows:

{¶227} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the

[4] Appellant notes the jury found him not guilty of the most serious offense of aggravated murder as to Davis and recommended a sentence of 30 years in prison rather than life without parole. The jurors were not asked to make recommendations relative to the aggravated burglary count, the two counts of abuse of a corpse, or the child endangering count. Furthermore, the jury's recommendation did not include consideration of whether the sentences were to run concurrently or consecutively.

abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." According to *Cabrales*, the sentencing court, if it has initially determined that two crimes are allied offenses of similar import, then proceeds to the second part of the two-tiered test and determines whether the two crimes were committed separately or with a separate animus. *Id.* at 57, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶228} The Eighth Appellate District has described the *Cabrales* clarification as a "holistic" or "pragmatic" approach, given the Ohio Supreme Court's concern that *Rance* had abandoned common sense and logic in favor of strict textual comparison. *State v. Williams,* Cuyahoga No. 89726, 2008-Ohio-5286, ¶ 31, citing *State v. Sutton,* Cuyahoga App. No. 90172, 2008-Ohio-3677. This court has referred to the *Cabrales* test as a "common sense approach." *State v. Varney,* Perry App. No. 08-CA-3, 2009-Ohio-207, ¶ 23.

{¶229} The Ohio Supreme Court revisited the issue of allied offenses of similar import in *State v. Brown,* 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569. The Court first found that aggravated assault in violation of R.C. 2903.12(A)(1) and (A)(2) are not allied offenses of similar import when comparing the elements under *Cabrales,* but did not end the analysis there. The Court went on to note that the tests for allied offenses of similar import are rules of statutory construction designed to determine legislative intent. *Id.* at 454. The Court concluded that while the two-tiered test for

determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the intent of the legislature is clear from the language of the statute. Id. In the past, the Court had looked to the societal interests protected by the relevant statutes in determining whether two offenses constitute allied offenses. Id., citing *State v. Mitchell* (1983), 6 Ohio St.3d 416. The Court concluded in *Brown* that the subdivisions of the aggravated assault statute set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest of preventing physical harm to persons, and were therefore allied offenses. Id. at 455.

{¶230} Most recently, the Ohio Supreme Court addressed this issue in *State v. Winn,* 121 Ohio St.3d 413, 2009-Ohio-1059. In *Winn,* the Court considered whether kidnapping and aggravated robbery are allied offenses of similar import. In ultimately finding such offenses to be of similar import under the *Cabrales* test, the Ohio Supreme Court in *Winn* did not consider the societal interests underlying the statutes to determine legislative intent, and determined legislative intent solely by applying R.C. 2941.25. The *Winn* court stated that, in Ohio, we discern legislative intent on this issue by applying R.C. 2941.25, as the statute is a "clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses." Id. at ¶ 6. We noted in *Varney,* supra, that the Ohio Supreme Court in *Brown* expanded the first step of the allied offense analysis by adding the additional factor of societal interests protected by the statutes. *Varney,* at ¶ 16, citing *State v. Boldin,* Geauga App. No. 2007-G-2808, 2008-Ohio-6408. In light of the Supreme Court's analysis in *Winn,* societal interest may be a tool to be used in some circumstances in determining if the

intent of the legislature is clear from the criminal statutes being compared. See *State v. Mills*, Tuscarawas App.No. 2007AP070039, 2009-Ohio-1849, ¶ 212.

Comparison of Murder to Aggravated Burglary

{¶231} We herein first address the question of whether the conviction for the murder of Davis is an allied offense of similar import to the aggravated burglary conviction.

{¶232} Ohio's murder statute, R.C. 2903.02(A), states: "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy."

{¶233} Aggravated burglary, under R.C. 2911.11(A)(1), states: "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if *** [t]he offender inflicts, or attempts or threatens to inflict physical harm on another."

{¶234} Under the first *Cabrales* step, in comparing the elements of murder with aggravated burglary in the abstract, we find the commission of one offense will not necessarily result in the commission of the other. We therefore hold murder is not an allied offense of similar import to aggravated burglary as charged in this case.

Comparison of Aggravated Murder to Aggravated Burglary

{¶235} We next address the question of whether the conviction for the aggravated murder of Davis's unborn child is an allied offense of similar import to the aggravated burglary conviction.

{¶236} R.C. 2903.01(B), aggravated murder, states in relevant part as follows: "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit *** aggravated burglary ***."

{¶237} As stated previously, aggravated burglary, under R.C. 2911.11(A)(1), states: "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if *** [t]he offender inflicts, or attempts or threatens to inflict physical harm on another."

{¶238} Appellant thus was convicted of aggravated murder based on a predicate offense, as well as the predicate offense itself. Under the first *Cabrales* step, in comparing the elements of aggravated murder with aggravated burglary (R.C. 2911.11(A)(1)), in the abstract, we find the offenses are sufficiently similar that the commission of one offense will result in the commission of the other. Nonetheless, applying *Brown* and *Winn*, and taking the common sense approach indicated in *Varney*, we conclude that the aggravated murder statute as charged is meant to protect persons

from death during an aggravated burglary, while the aggravated burglary statute is meant to protect the integrity of occupied residences and buildings.

{¶239} We therefore hold the trial court did not err in rendering consecutive sentences for aggravated murder vis-a-vis aggravated burglary, as they are not crimes of similar import. Moreover, similar to our conclusion in Appellant's second assigned error, supra, because the second aggravated murder conviction concerning the unborn child (Count Three), which the court merged for sentencing purposes, was premised on appellant's act of purposely causing the death of another who is under thirteen years of age (R.C. 2903.01(C)), which conviction would not involve the predicate aggravated burglary offense, we find Appellant has failed to demonstrate prejudicial error upon appeal.

Comparison of Aggravated Murder to Murder

{¶240} We thus reach the remaining question of whether the convictions of the murder of Davis and the aggravated murder of her unborn child are allied offenses of similar import.

{¶241} Generally, where a defendant commits a crime against two victims, each offense is necessarily committed with a separate animus. See, e.g., *State v. Scheutzman,* Athens App.No. 07CA22, 2008-Ohio-6096, ¶ 12; *State v. Luce* (Dec. 12, 1980), Lucas App.No. L-79-317, 1980 WL 351657. We recognize in the case sub judice that the death of the unborn child resulted from maternal death. However, as we discussed in Appellant's second assigned error, the evidence demonstrated Appellant's complete failure to take any measures to save the unborn child following the fatal injuries to Davis. Therefore, separate animus existed between the murder offense

(Davis) and the aggravated murder offense (the unborn child), and we find no reversible error in the trial court's decision not to merge said offenses for sentencing purposes.

{¶242} Appellant's eleventh assignment of error is therefore overruled.

XII

{¶243} In his twelfth assignment of error, Appellant maintains the trial court erred by refusing to remove for cause from the venire those prospective jurors who had participated in the search for Davis.

{¶244} As part of the voir dire process, the prospective jurors were given written questionnaires; one of which concerned whether the individual or any members of his/her family had participated in the search. Appellant submits the purpose of this question was to eliminate any potential juror who had already formed any emotional attachment to the victims or the case itself. Appellant sought removal for cause of those jurors who gave a positive response to the question. The trial court denied removal for cause.

{¶245} One of the challenged prospective jurors was eventually seated on the jury after Appellant had exercised all of his preemptory challenges. Appellant concludes, " . . . it is difficult to imagine a more potentially prejudicial circumstance could arise" and to allow the juror in question to serve "* * * is a blatant miscarriage of justice and demonstrates an unconscionable act on the part of the Trial Court that is an overwhelming abuse of discretion." Appellant's Brief at 38.

{¶246} This Court has concerns about the propriety of allowing any individual who either participated or had an immediate family member participate in the search for Davis. We believe the better practice would have been to excuse any such prospective

juror for cause to avoid any possibility of partiality or bias on the part of the jury. However, we agree with the State that participation in the search, standing alone, is insufficient to affirmatively demonstrate the juror in question could not be fair and impartial. As set forth in our discussion of Appellant's third assignment of error, the failure to transcribe the entire voir dire makes an affirmative demonstration of prejudicial error difficult, if not impossible. We find no such demonstration here.

{¶247} Appellant's twelfth assignment of error is overruled.

XIII

{¶248} In his final assignment of error, Appellant maintains his trial was tainted by systematic prejudice and prosecutorial misconduct. Without reference to any specific place in the record, Appellant broadly states, "A mere review of the docket and the multiple motions filed by the Defendant which were all denied reveals a patent question of prejudice. In addition, the subsequent events during the trial itself further illustrate such bias and prejudice." Appellant's Brief at 39. We summarily reject Appellant's broad claims for failure to comply with App. R.16.

{¶249} Appellant does later set forth several examples to support his claim of systematic prejudice and prosecutorial misconduct. The first example is the trial court's allowing an individual, who had previously participated in the search for Davis, to serve as a juror. We addressed this issue in our discussion of Appellant's twelfth assignment of error, supra, and found no affirmative demonstration of prejudicial error.

{¶250} Appellant's next example is the trial court's permitting the State, over his objection, to refer to the unborn fetus by the name, "Baby Chloe," throughout the trial, and in the jury instructions, which repeatedly made reference to the unborn child by

name. Appellant asserts this was an attempt by the State to establish sympathetic ties to the victim and bias the jury. Appellant cites no legal authority in support of this argument. We find no error in such practice.

{¶251} Appellant's third example of systematic prejudice was the fact "any objections made by the defense were denied out of hand without any legal basis on support." Appellant's Brief at 39. This generalized assertion without specific reference to the record merits no further discussion by this Court.

{¶252} Appellant also points to the State's eliciting a hypothetical opinion from the medical examiner as to the cause of Davis's death and utilizing "graphic and disturbing photographs" in support.[5]

{¶253} Appellant has not separately assigned as error admission of the medical examiner's opinion nor admission of Exhibit 59. Accordingly, we will not presume such constituted error. We find Appellant's suggestion the same demonstrates systematic prejudice tantamount to prosecutorial misconduct is without merit.

{¶254} Finally, Appellant asserts all of his claims of error denied him a fair trial. Having found no merit as to all of his assigned errors, we reject Appellant's cumulative error argument.

[5] We note in this instance Appellant does make reference to the record where the alleged error occurred.

{¶255} Appellant's thirteenth assignment of error is overruled.

{¶256} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By: Wise, J.

Delaney, J. concurs separately.

Hoffman, P. J., concurs in part and dissents in part.

/S/ JOHN W. WISE_____

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JWW/d 65

Delaney, J., concurring separately

{¶257} I concur with the majority in the disposition of all of Appellant's assignments of error. However, I submit a different analysis in regards to the disposition of assignment of error eleven. I disagree with the majority's finding in ¶238, in regards to Davis's unborn child, that the offenses of aggravated murder and aggravated burglary are sufficiently similar that the commission of one offense will result in the commission of the other. The Ohio Supreme Court has held that aggravated murder and aggravated burglary are not allied offenses of similar import. *State v. Reynolds*, 80 Ohio St.3d 670, 681, 1998-Ohio-171, 687 N.E. 1358, 1371 (citations omitted); see also *State v. Harris*, __ Ohio St.3d__, 2009-Ohio-3323, at ¶¶12-13 (reaffirming that offenses are first viewed in the abstract under an allied offenses analysis). Also, as noted by the majority in ¶241, the aggravated murder offense was committed with a separate animus.

{¶258} Accordingly, I would affirm that portion of assignment of error eleven on those grounds.

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JUDGE PATRICIA A. DELANEY

Hoffman, P.J., concurring in part and dissenting in part

{¶259} I concur in the majority's analysis and disposition of Appellant's Assignments of Error III, IV, V, VI, VII, VIII, IX, X, XII and XIII.

{¶260} I also concur in the majority's analysis and disposition of Appellant's argument concerning maximum and consecutive sentences as set forth in Appellant's Assignment of Error XI. I further concur in the ultimate disposition of Appellant's allied offenses of similar import argument as set forth in Assignment of Error XI, but do so for a different reason.[6]

{¶261} I also concur in the majority's decision to overrule Appellant's Assignment of Error II. However, I would do so without reaching the merits of the issue at this time given my proposed disposition of Appellant's Assignment of Error I.[7]

{¶262} That leaves for my consideration Appellant's Assignment of Error No. I. I respectfully dissent from my colleagues' opinion. Prior to presenting my legal analysis of the issue presented therein, I offer the following preface to my opinion.

PREFACE

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[6] Based upon my analysis of Appellant's Assignment of Error I, I find any discussion of Appellant's argument concerning allied offenses of similar import premature. Accordingly, I join in the majority's decision to overrule it because I would find it to be moot. However, I am not yet persuaded by the majority's analysis of this issue and express no opinion as to my agreement or disagreement with it.

[7] I am well aware of Ohio Supreme Court precedent that no error arises from inconsistent verdicts between multiple counts in an indictment. The Ohio Supreme Court held, in *State v. Conway* (2006), 108 Ohio St.3d 214, 2006-Ohio-791, consistency between the verdicts on multiple counts of an indictment is unnecessary because the counts of an indictment are not interdependent. Id. at 218. Although I believe the scenario presented in this case (the death of an unborn child proximately caused by the death of the mother) raises an interesting question as to whether an exception to that rule should be considered (i.e., the same conduct results in multiple counts so causally intertwined they should be deemed interdependent), my consideration of this issue is rendered moot by my proposed disposition of Appellant's Assignment of Error I.

{¶263} A defendant is not entitled to a perfect trial . . . one free from all error. But a defendant is entitled to a fair trial . . . one free from prejudicial error. Bobby Cutts deserves no more, but is entitled to no less.

{¶264} A former colleague, Judge Norman Putman, once observed in all his years as a county prosecutor, common pleas court judge and appellate court judge, he had never participated in a trial nor reviewed on appeal a case that was perfectly tried. My experience to date has been the same. This case provides no exception.

{¶265} The rules governing appellate practice and the standards of review this Court employs have been developed over centuries. The goal has been, and remains, to establish a framework providing consistent application of constitutional protections, legal precedent, rules of court and statutory enactments to all who are accused, both those justly accused and those falsely accused. Those same principles apply whether a defendant is appealing a shoplifting conviction or an aggravated murder conviction.

{¶266} Bobby Cutts was presumed innocent by the law until a jury of his peers found him guilty. A large segment of the public did not share that presumption. Nevertheless, having been found guilty by a jury, Bobby Cutts is no longer entitled to that presumption of innocence. But, the right to appeal does not belong only to the innocent who were wrongly convicted, but also to the guilty whose conviction was tainted by prejudicial error.

{¶267} I have never been involved with a case which has generated as much publicity, public interest and sharply defined opinions as the case now before this panel. There appears to have been a rush to judgment by many in our community, and indeed across much of this country, as to Bobby Cutts' guilt long before the first piece of

evidence was presented in court. This is not unexpected given the extensive media coverage, the fact a police officer was the defendant, the attendant human emotions generated by the death of an expectant mother and her unborn child, and the extensive, protracted search for Jessie Davis. But justice does not and should not rush to judgment. Though justice ought not to be unnecessarily delayed, the oft-quoted adage "justice delayed is justice denied" is, at times, inapposite to ensuring justice is served.

{¶268} I confess being somewhat dismayed by public reaction after The Repository featured an article in the Sunday edition about the upcoming oral argument. In the article, the names and pictures of this panel's members were displayed, something I can never recall having been done before.[8] While attending worship service that Sunday morning, I was engaged on two separate occasions by others quick to share their opinion the appeal was meritless and the death penalty should have been given.

{¶269} The next day as I drove to work, I was distraught to hear a local radio talk show host rant about what a waste of taxpayer money it was to even allow Bobby Cutts an appeal and, if it were up to him, Bobby Cutts should be put to death – not by lethal injection, but the "old fashioned way", using the gas chamber or electric chair. Audience building? Perhaps. Honest belief? I suspect so.

{¶270} The host's views were shared by many callers. It seems no one cared much for, nor rose to defend, the decision of those twelve jurors who spent weeks listening to the testimony of a multitude of witnesses, arguments of counsel, and

[8] The composition of all appellate panels is announced well in advance of the day of oral argument and available to the public on this Court's website and on record with the Clerk of the Court of Appeals.

instructions of law by the judge and were charged with the weighty duty to decide Bobby Cutts' guilt and ultimate fate. To second guess their decision without having "walked in their shoes" does them a severe disservice.

{¶271} I was further discouraged by both the volume and tenor of readers' comments to The Repository's Sunday article and subsequent article following the attorneys' oral argument in this Court. The vast majority of those commenting opined Bobby Cutts should not be allowed an appeal, one labeling it "frivolous crap", and many advocating the only way Bobby Cutts should be granted a new trial is if the death penalty is put back on the table.[9]

{¶272} Let me be quick to point out, the Constitution prohibits double jeopardy. The death penalty cannot be put back on the table. And I find the legal arguments raised in Bobby Cutts's appeal are both complex and challenging. They are not "frivolous crap!"

{¶273} Judges are not insensitive to public sentiment nor shielded from such expressions of public outcry. We live and work in this community. We are elected by the voters in this district to serve. For the most part, we are respected because of the positions we hold, and hopefully for the quality of our work.

{¶274} As an appellate court judge, I have authored thousands of opinions and participated in many thousands more. Those unfamiliar with the work of this Court might be surprised by the volume and vast array of types of cases this Court routinely

[9] My dismay, distraught and discouragement were relieved in part, by the thoughtful response attributed to Patty Porter regarding the prospect of a new trial. She responded she doesn't know what's best for everyone and only hopes something good comes out of this for all.

hears.[10] But often a judge is remembered only for one significant decision and his or her career is then defined by that decision. Perhaps the Bobby Cutts case will prove to be my legacy; albeit, an infamous one.

{¶275} God has blessed me with two children and graciously spared me the loss of a child or grandchild. I am saddened by the tragic loss of life this case presents and sympathize with the families of all involved. But, when I put on the robe as judge, I must not let my feelings, my emotions, much less public opinion, influence my review and application of the law. I am mindful of the admonition: ". . . do not pervert justice by siding with the crowd."[11]

{¶276} I anticipate my dissent will be met with disfavor by many in the general public and, although this Court's decision will be widely reported, few will read our actual words. I anticipate the attorneys for both sides will take issue with all or parts of my colleagues' and my legal analysis and an attempt to appeal to the Ohio Supreme Court is likely. I do not discourage nor shy from such further review by a higher court. To the contrary, if I or this Court have misapplied any law, improperly analyzed the record, or misinterpreted any legal precedent, I invite further review and welcome correction. However, at this time it is my task to decide this appeal, just as it was Judge Charles Brown's to preside over the trial.[12]

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[10] Other than lawyers and judges, few read our opinions and for the most part, we work in anonymity from the public's view.

[11] The Holy Bible, Exodus 23:2, New International Version, Copyright 1973, 1978, 1984.

[12] I trust the public to understand, although I may find error in this case, I credit Judge Brown's overall handling of this very difficult trial as an example of judicial professionalism.

{¶277} Justice . . . a concept not always easily defined . . . as is often said of beauty, sometimes lies in the eye of the beholder. But the oath of office I have sworn charges me with the responsibility to administer justice without respect to persons, faithfully and impartially, to the best of my ability and understanding. Such responsibility feels, at times, burdensome. Yet, it is one I willingly chose to accept when I sought and assumed the bench.

ASSIGNMENT OF ERROR I

{¶278} Herein, Appellant challenges the trial court's decision not to instruct the jury on the lesser-included offense of involuntary manslaughter.

{¶279} The Ohio Supreme Court has adopted a two-pronged test to determine whether a jury instruction on a lesser-included offense is warranted. In *State v. Thomas* (1988), 40 Ohio St.3d 213, the Ohio Supreme Court held first the trial court must determine whether the offense in the requested instruction is a lesser-included offense of the charged crime by comparing their statutory elements. In doing so, the *Thomas* Court held involuntary manslaughter is a lesser-included offense of aggravated murder. The State of Ohio does not contest this prong has been satisfied.

{¶280} The second prong of the *Thomas* test requires an examination of the facts to determine whether there exists sufficient evidence to allow the jury to reasonably acquit on the greater offense and find the defendant guilty on a lesser-included or inferior degree offense. In considering whether the jury could reasonably conclude the defendant is guilty of the lesser offense, the persuasiveness of the evidence regarding the lesser offense is irrelevant and such evidence is to be construed in the light most

favorable to the defendant. *State v. Conway* (2006), 108 Ohio St.3d 214, 2006-Ohio-791; *State v. Campbell* (1991), 74 Ohio Ap. 3d 352, 358.

{¶281} Whether the trial court judge or, for that matter, this Court finds the evidence offered in support of giving the lesser-included offense instruction credible does not matter. Because a defendant has a right to a trial by a jury of his or her peers, the issue is whether the jury could reasonably reject the greater offense, yet conclude the evidence supports a conviction for the lesser offense when the evidence is considered in the light most favorable to the defendant.

{¶282} My conclusion as to whether the second prong of the *Thomas* test has been satisfied depends upon my resolution of whether the evidence could reasonably support the jury finding Appellant committed the crime "recklessly" as opposed to "purposely." The crimes of aggravated murder and involuntary manslaughter are distinguishable by 1) the requisite degree of *mens rea* the defendant possessed when committing the crime, and 2) the underlying predicate offense, i.e., death occurring during the commission of certain felonies or during the commission of a misdemeanor. I find the evidence reasonably could support the conclusion Davis's death occurred during the commission of misdemeanor domestic violence rather than aggravated burglary.[13, 14]

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[13] The focus of the argument in both parties' briefs concerns the requisite culpable mental state of Appellant. There is little discussion of the felony-misdemeanor distinction.

[14] The majority states Appellant would have had to present some evidence that he engaged in an argument with Jessie that resulted in his recklessly causing serious physical harm to a family member. Majority Opinion at ¶69. While the existence of an argument is not an element of the offense, I find the testimony quoted in the majority opinion clearly shows Appellant and Jessie were arguing.

{¶283} The *mens rea* necessary for commission of the aggravated murder count relating to the death of Davis (Count One) as charged under R.C. 2903.01(B) is "purposely".[15] "Purposely" is defined in R.C. 2901.22(A) as follows:

{¶284} "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

{¶285} The *mens rea* necessary for commission of the lesser-included offense of involuntary manslaughter under R.C. 2903.04(B) is "recklessly".[16] "Recklessly" is defined in R.C. 2901.22(C) as follows:

{¶286} "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶287} Appellant argues based upon his testimony concerning the circumstances surrounding his striking Davis in an effort to break free of her grasp in order to leave the residence and his self-professed lack of intent to cause her death – when considered in the light most favorable to him – could reasonably support the jury's concluding he did not purposely cause the death of Davis, but rather recklessly did so. I agree. I believe

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[15] The trial court did instruct on the lesser-included offense of murder as to Counts One and Two, instructing the requisite culpable mental state for murder was "purposely".

[16] Because R.C. 2901.22(B) fails to specify any degree of culpability and does not plainly indicate a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense pursuant to R.C. 2901.21(B).

throwing his elbow back at neck level knowing Jessie was in the immediate vicinity could be considered reckless conduct . . . when Appellant's version of the facts is considered in the light most favorable to him.[17] While I believe there was more than sufficient evidence presented to support the jury's finding Appellant acted purposely,[18] I find there was sufficient evidence presented to warrant an instruction on the lesser-included offense of involuntary manslaughter. However, my analysis does not end there.

{¶288} The State counters because Appellant proffered the complete affirmative defense of accident – one which if believed by the jury would result in a verdict of not guilty to both aggravated murder or involuntary manslaughter - he is not entitled to an instruction on the lesser-included offense of involuntary manslaughter. The State of Ohio argues, "Cutts' own testimony at trial claimed that he swung his elbow in an effort to get away from Davis, and that he did not intend to strike the pregnant woman in the throat, causing her apparent immediate death. Cutts did not testified [sic] that he recklessly struck Davis, but instead that he never intended to strike her." Appellee's Brief at 19, no citation to record included. The State concludes, "Thus, the evidence at trial did not support the requested instruction for involuntary manslaughter." Id. The State maintains because Cutts's own trial testimony establishes he accidently struck the fatal blow, the second prong of the *Thomas* test is not met.

{¶289} From my review of Appellant's opening statement, I find no mention of the affirmative defense of accident. The same holds true for Appellant's closing argument

[17] This should not be interpreted as meaning I believe it was this act that caused Jessie's death or that I find Appellant's testimony credible.
[18] See, Discussion of Appellant's Assignment of Error V, supra.

to the jury. Of particular note is the fact Appellant did not request an instruction on accident nor did the trial court instruct the jury on accident.

{¶290} I recognize there are some complete defenses that, by their nature, are inconsistent with acquittal of the greater charge and a finding of guilt on a lesser-included offense.[19] For example, an alibi defense is a complete denial of the commission of the charged offense which would also preclude conviction on a lesser-included offense instruction. Likewise, a defense based upon misidentification as the perpetrator of the charged offense would be inconsistent with a conviction on any lesser-included offense.

{¶291} However, in the case sub judice, Appellant admits committing the physical act which caused Davis's death. That admission distinguishes this case from those types of complete defenses noted above. Whether Davis's and Chloe's deaths were ultimately determined by the jury to be accidentally caused (a complete defense resulting in not guilty verdict(s)); purposely caused (resulting in an aggravated murder or murder conviction(s)); or recklessly caused (resulting in involuntary manslaughter conviction(s)), I find all three conclusions are permissible and possible based upon the evidence presented.

{¶292} The State fervently maintains the evidence showed Appellant either purposely caused Davis's death, or accidently caused Davis's death; and the evidence

[19] Even in some such cases, lesser-included offense instructions may be appropriate where elements other than the actual physical commission of the criminal act are disputed. For example, even where a complete defense of self-defense is presented in a felonious assault charge, a lesser-included offense instruction may still be warranted concerning whether the requisite degree of physical harm has been established.

could not support a conclusion he acted recklessly. Appellee's Brief at 21. Unlike the majority, I respectfully disagree.

{¶293} Even if I were to assume Appellant offered a complete defense of accident,[20] I do not believe accident and recklessness are necessarily so inapposite as to find a claim of accident forecloses a finding of recklessness. The fact Appellant swung his elbow in Davis's direction in an attempt to escape her grasp, knowing she was in close proximity, and striking her in the neck could be considered by a reasonable jury to have been an accident or to have been reckless. Neither inference is necessarily inconsistent with Appellant's statement he did not intend to kill Davis. Accordingly, I find it was error not to instruct on the lesser-included offense of involuntary manslaughter.

{¶294} Again, my inquiry does not end there. I must next determine whether the failure to so instruct the jury constituted harmless or prejudicial error. That is, did the error affect a substantial right of Appellant to a fair trial? See, Crim.R. 52 (A). If there is a reasonable possibility the jury may have acquitted on the charged offense yet convicted on the lesser-included offense, the failure to instruct on the lesser-included offense affects a substantial right; therefore, is not harmless. *State v. Brown* (1992), 65 Ohio St.3d. 483. For the reasons that follow, I find a reasonable possibility does exist.

{¶295} The only direct testimony presented regarding how the deaths occurred is from Appellant himself. Most, if not all, of the other evidence of intent is circumstantial

[20] From my review of the record I am not persuaded Appellant clearly did so, at least to the exclusion of the possibility he recklessly caused Davis's and Chloe's deaths.

evidence.[21] Although the circumstantial evidence places Appellant's credibility clearly at issue, his *mens rea* remained very much in dispute.

{¶296} Much is made in the State's Brief of Appellant's statement to Myisha Ferrell "something bad happened." While I recognize the statement may infer a consciousness of guilt and criminal intent, the statement itself would not be out of the norm even if Davis's and Chloe's deaths were accidentally or recklessly caused.

{¶297} Still more problematic is establishing the cause of death to be something other than what Appellant claims. There is no expert medical testimony from Dr. Kohler, the medical examiner, after autopsy to definitely determine how Davis's death occurred.[22]

{¶298} I find the Ohio Supreme Court's discussion of lesser-included offenses in *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, particularly instructive.[23] In C*onway,* the Supreme Court specifically declared the presentation of a complete defense does not automatically preclude a lesser-included offense instruction. Id. at 240.

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[21] I understand circumstantial evidence is not inferior to direct evidence and the circumstantial evidence in the case sub judice does support the jury's determination Appellant acted purposefully.

[22] I recognize Appellant's delay in leading the authorities to the body, and the state of decomposition resulting therefrom, is circumstantial evidence from which the jury could infer a purposeful act.

[23] The majority briefly cites to *Conway* for the proposition Appellant presented no evidence his actions were reckless. Majority Opinion at ¶117. No further discussion of *Conway* is offered by the majority. I note all the cases cited by the majority in their analysis of this assignment of error were decided before *Conway*. I find the issue in *Conway* to be the same as the case sub judice and an understanding and application of *Conway* crucial to my decision.

{¶299} As in this case, the trial court in *Conway* instructed on the charged offense of aggravated murder and the lesser-included offense of murder, but refused to instruct on the lesser-included offense of involuntary manslaughter. The Ohio Supreme Court found the trial court did not error in refusing to do so because the evidence did not support an instruction on involuntary manslaughter. The *Conway* Court found the defendant's testimony he pulled the trigger as fast as he could and fired eight shots at two victims, the fact the defendant hit each victim four times, and the fact the final shots were fired at defenseless victims at close range contradicted the defendant's testimony he did not have purpose to kill. Id. That evidence would not allow a jury to reasonably acquit on aggravated murder (purpose to kill) yet convict on involuntary manslaughter (recklessly cause death). Appellant's testimony in this case stands in marked contrast to the defendant's testimony in *Conway*. Unlike Conway, there was no such clear and direct evidence of purpose to kill in this case.

{¶300} In *Conway*, the Ohio Supreme Court went further to declare even if it was error not to instruct on involuntary manslaughter, it would be harmless error because the rejection of the option to convict on the lesser-included offense of murder showed the jury would also have rejected the still lesser offense of involuntary manslaughter. Id. The same cannot be said to have occurred in this case because the jury did invoke the option to convict Appellant on the lesser-included offense of murder in Count One.

{¶301} Accordingly, I conclude the failure to instruct the jury on the requested lesser-included offense of involuntary manslaughter was prejudicial error. It was for the jury to consider whether Appellant acted purposely or recklessly.

{¶302} The question now becomes which count(s) in the Indictment does my conclusion affect.

{¶303} Appellant argues " . . . the jury could have determined that the death of Jessie Davis was recklessly caused while in the commission of a misdemeanor offense, namely domestic violence." Appellant's Brief at 5.[24] Appellant's Brief does not separately make a similar argument concerning Chloe's death. Later, Appellant again claims, "The sole evidence presented by the State of Ohio as to the circumstances leading to the death of Jessie Davis was offered in the testimony of Co-Defendant Myisha Ferrell." Appellant's Brief at 7. Again, no mention is specifically made as to Chloe's death.

{¶304} In its Brief, the State asserts the jury instruction request went only to Davis's death, and not to the subsequent death of Chloe. Appellee's Brief at 19.[25] However, I note in the concluding sentence of this portion of his argument, Appellant does urge the reversal of the convictions [plural]. Thus, I must determine whether the request for instruction on involuntary manslaughter went to all three aggravated murder counts or only the one involving the death of Jessie Davis in Count One.[26]

{¶305} The trial court and counsel for both parties had the following discussion relative to Appellant's request for an instruction on involuntary manslaughter:

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[24] Contrary to App. R.16(A), Appellant fails to reference where in the record this argument was presented to the trial court. Appellant repeats this failure throughout his Brief.

[25] I find it surprising Appellant did not choose to file a Reply Brief in this case.

[26] Appellant does argue " . . . there was one single act that resulted in all of the offenses outlined in Counts One, Two and Three . . ." in his argument of his second assignment of error. Appellant's Brief at 12.

{¶306} "The Court: Counsel for the defendant, do you request an instruction on involuntary manslaughter?

{¶307} "Ms. Ranke: Yes, Your Honor, we believe that pursuant to Ohio Revised Code 2903.04 the jury could also consider the evidence, ah, and find Mr. Cutts guilty of the lesser included offense of murder, which would be involuntary manslaughter, with the argument that the defendant did cause the death of the victim in this case, Jessie Davis, while in the commission or while a proximate result of committing or attempting to commit the crime of domestic violence, a misdemeanor. * * *

{¶308} "* * * this goes to the idea the death was caused in a reckless act.

{¶309} "Again, the use of an elbow, the use of force, ah, can be deemed excessive, can be deemed recklessly causing serious physical harm and in actuality, under voluntary manslaughter, causing the death of another while in a reckless state.

{¶310} "We believe that is one of the alternatives the jury could find based upon the evidence again produced by the State of Ohio through the testimony of Myisha Ferrell, as well as through the testimony of Mr. Cutts, himself; * * *

{¶311} "The Court: Thank you.

{¶312} "State of Ohio?

{¶313} "Ms. Hartnett: Your Honor, we would object to that instruction for several reasons.

{¶314} "Ah, first of all, contrary to defense counsel's assertions, I don't recall any testimony produced on behalf of the State of Ohio that would support that particular theory.

{¶315} "The Court has to be convinced that there is sufficient credible evidence, ah, that there would be, ah, the evidence, ah, that there would be, ah, the evidence of this misdemeanor offense and I don't think that, that there is any credible evidence that supports that theory of a misdemeanor occurring.

{¶316} "* * *

{¶317} "In the event that the Court were to consider instructing on, ah, the misdemeanor offense, that same evidence could certainly support the offense of felonious assault and thereby a section be murder because death did result.

{¶318} "* * * I think what the evidence supported that was produced by the defendant, if believed, is accident and he said that repeatedly, that that's what it was and, ah, I think that if any other instruction were to be considered, it wouldn't be the involuntary manslaughter, * * *

{¶319} "Ms. Ranke: * * * the issue of the credibility of the evidence goes to the state's own witness, once again, Myisha Ferrell.

{¶320} "Myisha Ferrell, as I indicated earlier, testified, ah, that Mr. Cutts acknowledged, ah, an argument, an altercation, something bad happening. That can be construed as the commission of an offense in causing her death.

{¶321} "In addition, he identified her as being his son's mom.

{¶322} "She [Myisha Ferrell] testified, again, the state's own witness, that it was Blake's mother, she knew that, that all goes to the relationship, which is a requisite element of domestic violence.

{¶323} "The difference between a murder and the crime of involuntary manslaughter, obviously, goes to the idea of the intent and although the evidence can

be construed as an accident, it also can be construed, because of the nature of the force, whether or not it was appropriate under the circumstances, can be construed as reckless, which would then go to the idea of involuntary manslaughter.

{¶324} "* * * this was also brought out by Mr. Cutts' testimony, who did acknowledge the use of his elbow, the use of force, that led to the events causing her death. Ah, a struggle with regard to the scratches, that's all the evidence, produced by both the state and further corroborated by the testimony elicited on the defense's case.

{¶325} "* * *

{¶326} "The evidence in its totality can only support reckless, which would be a misdemeanor and that should be the crime, underlying crime set forth in an involuntary instruction, which we are requesting.

{¶327} "The Court: Thank you very much.

{¶328} "Applying the appropriate standard, the Court is not going to instruct on involuntary manslaughter. The court does not find that it's warranted by the evidence.

{¶329} "And the Court notes the objection of counsel for the defendant to the Court's ruling."

{¶330} February 12, 2008 Tr. at 33-39.

{¶331} Because the death of Chloe resulted from the same act, albeit indirectly, which proximately caused the death of Davis, I find the lesser-included offense instruction would apply equally to both counts of aggravated murder alleging Davis's and Chloe's deaths occurred during the commission of an aggravated burglary. (Counts One and Two of the Indictment). However, I do not believe the same analysis necessarily applies with respect to the charge of aggravated murder of Chloe based

upon causing the death of a person under age thirteen (Count Three of the Indictment). This charge is not dependent upon death occurring during the commission of aggravated burglary nor during the commission of the misdemeanor of domestic violence as were advanced by Appellant to support his request for the involuntary manslaughter instruction. Appellant does not separately argue in his Brief why an involuntary manslaughter instruction would be applicable concerning this count nor does he identify where in the record a request or argument was presented relative to this count.[27] A different analysis is necessary to determine the applicability of an involuntary manslaughter instruction with regard to Count Three. The jurors may have based their verdict with respect to Count Three upon an omission to act theory separate and apart from Appellant striking Davis with his elbow.

{¶332} However, as noted supra, such analysis is not necessary. During earlier discussions regarding the jury instructions, the trial court determined an instruction on the lesser-included offense of murder for Counts One and Two was warranted. Prior to closing arguments, the trial court and the parties reviewed corrections to the proposed instructions. The trial court then stated, "Now, what I have left open then is whether the Court is going to give an instruction on voluntary manslaughter or the Court is going to give an instruction on involuntary manslaughter and whether count three has a lesser included." February 12, 2008 Tr. at 29. The parties argued their respective positions. After denying Appellant's requests for instructions on the lesser-included offenses of voluntary manslaughter and involuntary manslaughter as to counts One and Two, the trial court noted:

[27] The trial court merged Count Three with Count Two for sentencing only and proceeded to sentence Appellant on Count Two.

{¶333} "The Court: That leaves the final issue of, ah, does count three need a lesser included offense.

{¶334} "State of Ohio?

{¶335} "Ms. Hartnett: If I could just have a second, Your Honor.

{¶336} "We would not request that, Your Honor.

{¶337} "The Court: Counsel for the defendant?

{¶338} "* * *

{¶339} "Ms. Ranke: Judge, we do not believe that there needs to be the lesser included of murder with regard to Count Three, * * *

{¶340} "The Court: Can I just say then you all are in agreement?

{¶341} "Ms. Hartnett: Yes, sir.

{¶342} "The Court: Is that right?

{¶343} "Ms. Ranke: That's right."

{¶344} Id. at 39-40.

{¶345} Based upon the foregoing, I find Appellant specifically declined an instruction on a lesser-included offense with respect to Count Three. Accordingly, I find no error in failing to instruct on the lesser-included offense of involuntary manslaughter as it relates to Appellant's conviction by the jury of Aggravated Murder in Count Three.

{¶346} I would sustain Appellant's first assignment of error as to Counts One and Two, but overrule it as to Count Three.

/s/ WILLIAM B. HOFFMAN_____
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BOBBY LEE CUTTS, JR.	:	
Defendant-Appellant	:	Case No. 2008CA00079

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

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ PATRICIA A. DELANEY_____

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