IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
TUSCARAWAS COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	
v.	:	Case No. 2007 AP 07 0039
MARSHA MILLS,	:	
Defendant.	:	

APPELLATE BRIEF OF DEFENDANT-APPELLANT MARSHA MILLS

PAULA BROWN (0068251)
WILLIAM BLUTH (0014617)
RICHARD R. PARSONS (0082270)
KRAVITZ, BROWN & DORTCH, LLC
65 E. State Street, Suite 200
Columbus, Ohio 43215-5240
Tel: (614) 464-2000
Fax: (614) 464-2002
E-mail: pbrown@kravitzllc.com

COUNSEL FOR DEFENDANT-APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

ASSIGNMENT OF ERROR NO. 1

Whether the trial court denied the Appellant her right to due process of law when it restricted the testimony of the Appellant's experts and excluded the bases of their opinions, but allowed the State unwarranted leeway in presenting its experts' opinions clothed as non-expert testimony.

Whether the trial court erred when it disallowed the defense's experts from rebutting what the State's experts had testified to, and allowed the State to repeatedly cross-examine and discredit the Defendant's experts, knowing that the court would not allow them to support their opinions with the evidence of the bases of their opinions in violation of the Appellant's right to due process and the Ohio Evid. R. 705.

Whether the trial court erred when it denied Appellant's motion *in limine* to exclude the State's expert testimony without conducting a *Daubert*-style hearing in violation of *Valentine v. Conrad* (2006), 110 Ohio St. 3d 42, 44, 2006-Ohio-3561, ¶ 17, the Ohio rules of evidence, and the due process clauses of the Ohio and federal constitutions.

ASSIGNMENT OF ERROR NO. 2

Whether the court violated Appellant's federal and state constitutional rights and prejudiced the outcome of the trial when it admitted irrelevant, gruesome, repetitive, and unfairly prejudicial photographs of the decedent.

ASSIGNMENT OF ERROR NO. 3

Whether Appellant's convictions were against the manifest weight of the evidence because Appellant put on credible evidence which demonstrated reasonable doubt as to her guilt while the State relied on the unfairly prejudicial nature of its marginally probative evidence to obtain a conviction by inflaming the passions of the jury rather than appealing to their logic and common sense.

ASSIGNMENT OF ERROR NO. 4

Whether the court violated Rule 22 of the Ohio Rules of Criminal Procedure when it failed to record all of the trial court proceedings.

ASSIGNMENT OF ERROR NO. 5

Whether trial counsel’s performance was deficient and fell outside the range of professional competence when he failed to object to the introduction of irrelevant and highly prejudice evidence and in some cases went so far as to stipulate to such evidence, when he failed to request Crim. R. 16(b)(1)(g) material, and when he failed to test the State’s expert witnesses with the defense experts' opinions, among other deficiencies.

Whether these errors and omissions either singularly or cumulatively denied the Appellant a fair trial.

ASSIGNMENT OF ERROR NO. 6

Whether the Appellant was denied her right to a fair trial, due process and reliable determination of guilt when the prosecutor engaged in misconduct during summation by arguing facts not in evidence, interjecting his own personal beliefs, improperly vouching for the State's witnesses, and commenting on the Appellant's silence, among other improper comments.

Whether these errors and omissions either singularly or cumulatively denied the Appellant a fair trial.

ASSIGNMENT OF ERROR NO. 7

Whether the Court erred when it imposed multiple punishments for allied offenses of similar import.

STATEMENT OF CASE

On October 6, 2006, Marsha Mills ("Mills") was indicted on three counts of murder, R.C. § 2903.02(B), one count of felonious assault, R.C. § 2903.11(A)(1), and two counts of child endangering, R.C. § 2919.22(B)(1)(B)(3) in the death of Noah Shoup ("Shoup") on May 10, 2006. Mills had known Shoup's mother, Kristen, since she was a child, and Kristen was best friends with Marsha's daughter, Leslie. Mills has two grown children, Leslie and Brian, and several grandchildren.

Mills was tried by a Tuscarawas County jury beginning on May 30, 2007. On June 15, 2007, the jury returned guilty verdicts on two counts of murder, one count of Felonious Assault, and one count of child endangering. One count of murder and one count of child endangering were dismissed. On June 22, 2007, Mills was sentenced to a prison term of fifteen years to life. *See* Sentencing Entry, Ex. 1. A timely Notice of Appeal was filed on July 2, 2007.

STATEMENT OF FACTS

The primary issue at trial was whether Shoup's death was an accident. The detective who responded to the incident testified that after examining and measuring the stairs and talking with the Defendant, he determined that Shoup's death was a "freak accident." (Tr. 602.) Dr. John Plunkett, the Defendant's expert, testified that Shoup's injuries were consistent with a fall and that he was not abused. (Tr. 1258, 1292.) One of the physicians who examined Shoup testified that although children typically do not die from a three foot fall, nor from being shaken; "this is medicine you're talking about, nothing is completely impossible." (Tr. 639.) Moreover, Dr. Steiner, a State's witness, agreed that retinal hemorrhages and subdural hematomas, the symptoms used by the doctors who "diagnosed" abuse, are seen in short falls. (Tr. 726.)

The jury lost its way in finding that Shoup's death was not an accident due to the State's admission of terribly prejudicial, irrelevant and inadmissible autopsy photographs, the court's unwarranted restrictions on the Defendant's experts, its unwarranted leeway in permitting the State to present its theories through the guise of nonexpert testimony, and the failure of the treating pediatricians to stay current on the pathology of trauma to children.

The State showed 53 photographs of Shoup that were gruesome, irrelevant, terribly prejudicial and inadmissible and then suggested to the jury that all of the bruises, no matter how small or how minor, were caused by Mills. There were also 19 graphic photos that were admitted into evidence, and given to the jury that were not identified during the trial. The State repeatedly showed some of the most gruesome photographs, such as Shoup's tongue, which was removed and dissected. (Tr. 817.) It had nothing to do with his cause of death.

The photographs were not relevant to whether Shoup had been abused. As the State told the jury in closing argument, "**by the time Dr. Sterbenz finds him and documents it** that you'll be able to see, he's covered in bruises." (Tr. 1361 (emphasis added).) This is true, by the time photos were taken of Shoup, he did have bruises, but those photographs were not taken until after Shoup had received aggressive and invasive medical care in an effort to save his life. The photographs only showed what Shoup's body looked like after aggressive medical treatment, after he was pronounced dead, and after his organs had been donated. (Tr. 804.) Shoup was resuscitated at the house for 27 minutes. This involved a grown man pressing Shoup's chest 100 times a minute. (Tr. 533.) It also involved the unsuccessful attempt to place a cervical collar ("C-collar") on Shoup's neck. (Tr. 522-23.) A C-collar, however, was placed on his neck when he was transported by Lifeflight. Resuscitation efforts continued as he was transported via ambulance, he was intubated, and transported to Union Hospital. (Tr. 533, 543.) He was treated at Union Hospital, and once

stabilized, he was transferred to Akron Children's Hospital via Lifeflight. *See* Joint Exhibit B, Medical Records from Akron Children's Hospital.

There were no photographs taken of Shoup on admission to either hospital, because he had no bruises. (Tr. 535, 650.) The photographs were not taken until he was in the hospital over twenty-four hours, and pronounced brain dead. (Tr. 804, 1361.) In addition, he had been given Heparin to prevent his blood from clotting in anticipation of organ donation, and Heparin extenuates and may even cause bruises itself. (Tr. 1256-57.) Dr. Current, the State's expert, testified that it was possible to receive injuries through medical intervention. (Tr. 630.) Dr. Plunkett testified "you have got to remember that Noah, his coagulation system has gone haywire as a result of the lack of oxygen," (Tr. 1198), and the administration of Heparin combined with the compromised state of Shoup's blood clotting factors caused him to "bruise from any application of pressure," (Tr. 1257.) No one can say how many medical personnel cared for Shoup from the time the paramedics arrived until the time he was pronounced dead. No one deliberately caused bruising to Shoup, but he had to be moved, assessed and evaluated by the medical staff, and his coagulation system was compromised.

Photographs were shown to the jury of bruises that Dr. Sterbenz admitted predated the alleged incident or were caused during the harvesting of the organs, but these photographs were still shown to the jury. (Tr. 813.)[1] To show these photographs that had nothing to do with the injuries that the State alleged occurred on May 10th was inappropriate and highly prejudicial to the Defendant.

The State knew it could not determine when the bruising occurred, but it told the jury over and over that Shoup was beaten by Mills on May 10th. (Tr. 427, 1395.) And it told the jury in closing argument that this child did not have a bruise on him on the 9th which the State knew from its

[1] The State's expert admitted that "there's a bunch of bruises here at the back of the left leg have some discoloration which is consistent with a period of time that is exceeds May 10th, having incurred on May 10th, they're probably a day or two earlier from the May 10th and this bruise additionally here on the foreleg near the ankle is also an injury that has, by direct examination at the time of autopsy, discoloration that would place it greater than having occurred on May 10th and there is a bruise to Shoup's head which also is older than having occurred on May 10th." (Tr. 813).

own expert was not true. (Tr. 1361.) Also, the Mills' residence did not reveal any evidence that Shoup had been beaten, and the State looked. (Tr. 763–65.)

Shoup did not have any bruises when he was admitted to either Union Hospital, or to Akron Children's Hospital. (Tr. 650.) The State's witnesses who treated Shoup admitted that he did not have any bruises. (Tr. 650, 691.) There was no evidence that Shoup had retinal hemorrhages until he was admitted to Akron Children's Hospital, and the State admitted this in closing argument. (Tr. 1355.) His coagulation system was a "mess," he was anemic and was he subsequently given uncrossmatched blood. (Tr. 1198); *see also* Joint Ex. B. His blood work depicts the compromised state of his coagulation system. *See* Joint Exhibit B.

Not only was the Defendant prejudiced by the irrelevant and inadmissible photographs taken by Dr. Sterbenz, but the court permitted him, over objection by the defense, to testify to Play-doh molds he had taken of the edge of the steps at the Mills' home. (*See* Exhibit 2, Entry, May 30, 2007). The State admitted that Dr. Sterbenz was not qualified as an expert in accident reconstruction, but argued that no expertise was needed in the use of Play-doh since it is used by children all the time. (May 21, 2007, Pretrial Tr. 142). Dr. Sterbenz, however, was qualified as an expert in front of the jury, and if he was testifying as nothing more than lay witness, the jury needed to know this. If he was testifying as an expert, the testimony had to pass the test in Ohio Evid. R. 702. What the court did was to allow the State to circumvent the Ohio Rules of Evidence, which denied the Defendant the right to a fair trial.

The court wrongly limited the Defendant's expert testimony, when it excluded relevant and admissible evidence that Dr. Plunkett needed to present to the jury to explain the basis for his expert opinion. (*See* Exhibit 3, Entry, May 30, 2007.) Dr. Plunkett, a pathologist with nearly 30 years experience and who had done extensive, peer reviewed research over the past ten years on the

injuries suffered by children from short falls, brought photographs he had collected showing the injuries caused by C-collar on children. This evidence was vital because the bruises that appeared on Shoup's face were identical to those on the photos collected by Dr. Plunkett. The State claimed the injuries on Shoup's face were caused by a slap and Dr. Plunkett's photographs would have refuted this theory. Dr. Plunkett also had a video of a child falling a short distance and suffering a fatal head injury which explained his opinion why the injury suffered by Shoup was caused by a fall as related by Mills. Denying Dr. Plunkett the opportunity to show the video where a short fall caused a fatal injury undermined the credibility of Dr. Plunkett and the defense of Mills, and permitted the State to demean the Defendant's expert in front of the jury because the exhibits were not allowed to be introduced. The State referred to Mills as Dr. Plunkett's client and that the "bottom line is she paid you to be—here today." (Tr. 1280.) In addition, the court prevented the Defendant's expert from rebutting the testimony of the State's expert. (Tr. 1202.)

Shoup, who was twenty-six months old, and his brother, Evan, who was four years old, were being cared for by Mills on a part time basis. (Tr. 484.) Leslie Miller, Mills' daughter, and Kristen Shoup, Shoup's mother, had been friends since they were four years old. Kristen testified that Mills was like a mom to her. (Tr. 484.) It was Leslie that told Kristen that Mills was watching her children, and was interested in watching other children. (Tr. 483.) Kristen called Leslie in the hopes that Mills would watch her boys. (Tr. 483.)

On May 10, 2006, Mills was watching Shoup and his brother Evan. Mills' sister, Jerri Johnson, was at her house that morning to see Shoup and Evan, because Mills kept telling her she needed to come over and see "how darling the children were." (Tr. 1133.) When Jerri arrived at the door that morning, her sister had a "great smile on her face," and she attributed that to the fact that she had children there and that is what "gave her the greatest pleasure in her life." (Tr. 1134.) Jerri

was there when Kristen and Shoup arrived, and they sat there coloring and gluing the arts and crafts that Mills had prepared for the children. (Tr. 1134.) Jerri was at the house until about 11:15 a.m. and when she left the children were playing, and Mills was looking forward to the day. (Tr. 1135.) She is a "wonderful caretaker." (Tr. 1131.)

Mills loved children, and being around children "was the thing that made her glow the most." (Tr. 1129.) She would do arts and crafts with the children, and taught her young granddaughter to do sign language. (Tr. 1131.) Jerri described her sister as a "great mother," and as the mother she wished she could have been. (Tr. 1132.)

Mills' neighbor, Connie Miller, testified that she saw Mills at 12:45 p.m. on the day of Shoup's accident. She and Marsha spoke for some time and that Marsha was calm and happy. (Tr. 1043.) Marsha inquired about Connie's grandchildren, and Ms. Miller heard the children playing. (Tr. 1034-35.) Mills' life revolved around children.

As a member of the Child Conservation League she met with other parents to discuss nurturing and ways to make positive impacts on children's lives. (Tr. 1060.) She was actively involved in her church, providing meals and assisting with bible studies. (Tr. 1060.) When she was able to quit work and devote herself to taking care of children it "was a dream come true for her." (Tr. 1062.) Mills' son testified that he parents his children the way his mother parented him because "I feel like I've learned from the best." (Tr. 1063), and that his mother got through difficult times because of the love of her family, her friends, and God. (Tr. 1080.)

On May 10, 2006, Mills was taking the children to the backyard to play when Shoup fell. Marsha carried Shoup into the house, thought he was somewhat responsive, she called his father to tell him there had been an accident and Mr. Shoup called 911. (Tr. 593.) From the testimony provided by the State's witnesses, Mills was terribly distraught when the officers arrived. (Tr. 581,

584, 599.) They indicated she had been crying, seemed out of it, and Shoup's father testified she had been crying. (Tr. 462.) She was so upset that when she called Shoup's father, she told him that it was Evan that fell. (Tr. 459.) Everyone who arrived at the house kept asking her what happened, and she was upset and trying to keep the other children calm. (Tr. 584.) She repeatedly told the officers and medical staff that Shoup fell, and although she did a written statement as to what she thought she saw when Shoup was injured, she admitted to Detective Hootman that everything happened so fast that she was not sure what she saw. (Tr. 591.) Shoup's mother's testimony revealed that Shoup did have problems with steps, and that he did one step at a time, or he would "scoot" down the steps on his "butt." (Tr. 480, 504.)

When the paramedics arrived, Shoup was in a life threatening situation, and cardiopulmonary resuscitation was begun. (Tr. 520.) The paramedics did CPR for 27 minutes, at 100 compressions a minute, and placed a bag over his face and mouth to ventilate him. He was not intubated at the house, because his head was too close to the headboard. (Tr. 526–28.) The paramedics testified that they assessed Shoup and that no bruises were noted on his body, except for a lump in the back of his head, and that they met resistance when trying to stabilize his neck. (Tr. 526.)

Dr. Plunkett testified that Shoup's death was an accident and that his injuries were consistent with a fall. (Tr. 1179, 1217, 1292.) Dr. Plunkett said the State's experts got it wrong; that the standard of forensic pathology today involves a reconstruction of the event, (Tr. 1281), that the diffused hemorrhages seen on Shoup's brain are exactly what you would expect to see in someone who has been on a ventilator for thirty hours, (Tr. 1272), that whiplash injuries are not consistent with acceleration-deceleration type injuries, (Tr. 1268), and that Dr. Steiner does not understand head injury mechanisms. (Tr. 1270). Dr. Plunkett testified "you can't make any statement about the

lethality of an individual fall. What you have to do is say if this happens and if the infant hits his or her head, what can happen or what is likely to happen." (Tr. 1230).

The State's theory was that Shoup was abused in the Mills' residence, but there was no evidence to support its theory. Officers arrived at the house while Shoup was being prepared for transport. (Tr. 576–77.) There was nothing that appeared out of order and the house what not in disarray. (Tr. 600.) The officers utilized a type of luminal testing, crime sight imager, that detects the presence of bodily fluids, such as blood, salvia, spit, biological substances, fingerprints and other marks. (Tr. 762-63.) The officers used this device in all of the rooms in the Mills' home. The officers tested the walls and furniture and found no evidence that Shoup had been abused. (Tr. 764-65.)

Mills' conviction was against the manifest weight of the evidence. Had the court not improperly restricted the testimony of the Defendant's expert, and not permitted the State's expert to testify to matters that were not proven scientifically reliable, Mills would have been acquitted. Two forensic pathologists testified and disagreed as to cause of death. Shoup's injuries were consistent with either a fall, or his head being hit against the floor. When the evidence is equipoised in a criminal case the defendant must be acquitted.

<u>FIRST ASSIGNMENT OF ERROR</u>: THE COURT ERRED WHEN IT PLACED UNWARRANTED RESTRICTIONS ON THE DEFENDANT'S EXPERT WITNESS AND ALLOWED THE STATE TO INTRODUCE EVIDENCE OF A SCIENTIFIC EXPERIMENT WITHOUT CONDUCTING THE REQUIRED PRETRIAL HEARING ON ADMISSIBILITY. (Tr. 141–43, 522-23, 1201–02, 1253, 1284, 1330, 1334, 1338.)

This case involved conflicting theories as to how Shoup died. The State charged that Shoup was savagely beaten by the Defendant. In support of this theory it was allowed to introduce 72 photographs taken of Shoup's body after he died and claimed that most of the discolorations shown on the photos were the result of abuse. It was also allowed to introduce evidence about Play-doh impressions made by the deputy coroner, over objection, without conducting a pretrial hearing as to

the validity of the deputy coroner's methods. The defense maintained that Shoup fell, struck his head on the steps at Defendant's home, that this accidental fall caused his death, and the bruising that occurred was the result of the fall, the extraordinary efforts to save his life, and the preparation for and harvesting of his organs following death.

The State's expert witnesses claimed that Shoup was slapped across the face, causing the severe bruise reflected in Exhibit 30, and that a fall causing death would have to result in a skull fracture. To counter this testimony, the defense produced Dr. John Plunkett, a pathologist with nearly 30 years experience who has spent the past 10 years studying the pathology of injuries to children. Prior to Dr. Plunkett's research, the conventional wisdom held that the injuries suffered by Shoup, retinal hemorrhages and subdural hematoma, could not be caused by a fall but only could occur as the result of severe shaking. Dr. Plunkett's research revealed many documented cases of these identical symptoms arising as the result of short falls, thereby debunking the conventional wisdom reflected in some of the pediatric testimony in this case. The biomechanical engineering testimony in this case also established that the injuries sustained by Shoup could not be caused by shaking, and both Dr. Plunkett and Dr. Sterbenz, the deputy coroner, agreed that the injuries suffered by Shoup could not have been caused by shaking alone.

In conducting his research Dr. Plunkett reviewed the records of the United States Consumer Product Safety Commission (CPSC), which had been collecting data on injuries suffered by children as the result of falls in order to determine whether regulations protecting children from such injuries were appropriate. The CPSC, as a result of this research, determined that playgrounds should be covered in energy absorbing surfaces, U.S. Consumer Product Safety Comm'n, Handbook for Public Playground Safety, Pub. No. 325, pp. 4–6, (available at http://www.cpsc.gov/cpscpub/pubs/325.pdf), changing the landscape of American playgrounds. In reviewing this data, Dr. Plunkett found many

documented cases where children fell on playgrounds and suffered retinal hemorrhages and subdural hematomas. One of the documented cases included a videotape made by a child's grandmother as the child fell, struck her head on concrete, and died. This video was relied on by Dr. Plunkett in reaching his conclusion that Shoup's injuries were caused by a fall and would have graphically shown the jury the plausibility of the defense theory of the case. It was error to exclude it.

This error was exacerbated when the State was allowed to undermine Dr. Plunkett's testimony by suggesting that he was claiming that Shoup was the only child ever to die from a fall down steps:

Q: [State]: Is Noah Shoup the first child that you know of in history to have died as a result of a fall down there [sic] steps?
A: [Dr. Plunkett]: Mr. Ernest, not by a long shot. If this had been videotaped and I have a videotape of a short distance fall … that is less . . . than this.

The State objected to the answer as non-responsive and the court struck the answer. (Tr. 1284.) After Dr. Plunkett denied the assertion contained in the State's question that he was claiming that Shoup was the first child to ever die from a short fall he should have been allowed to confirm his testimony by showing the jury the video of the child who died from a short fall. It was error to again exclude this testimony.

While Shoup was bruise free when the paramedics arrived on May 10, 2006, and bruise free when he was brought into the hospital on that day by the time of the autopsy on May 13, 2006, he had developed bruising on several parts of his body. Of particular controversy was a bruise that developed on the left side of Shoup's face. The State claimed it was caused by a slap to the face. The defense believed it was caused by the application of a C-collar. The paramedics who attended to Shoup testified that they attempted to fit him with a C-collar but could not get it to fit properly. (Tr. 522–23.) There was further evidence that Shoup was wearing a C-collar during the helicopter ride to Akron. (*See* Joint Ex. B). Dr. Plunkett, after examining the photographs of the facial bruise,

Exhibits 28–30, testified that in his opinion the bruise was caused by a C-collar and that he had seen similar bruise marks many times in the past. He offered several photographs of similar bruising caused by C-collars, but these photographs were improperly excluded by the trial court. *See* Def. Ex.13 A-D, 14. Had the jury been allowed to see how a C-collar could cause the same type of bruises depicted in State's Exhibit 30, the State's theory of abuse would have been effectively countered. Excluding these photographs and the videotape previously discussed allowed the State to challenge Dr. Plunkett by stating:

> And the **only real evidence** that you bring before the jury is anecdotal evidence of some photographs that you have seen, correct? You have no first hand knowledge?

(Tr. 1253.) This argument was doubly pernicious. Throughout the trial, the State attempted to undermine Dr. Plunkett's expertise by claiming that he had not seen Shoup's body while Dr. Sterbenz had. (Tr. 1218.) Both Dr. Sterbenz and Dr. Plunkett agreed that pathologists routinely and regularly rely on autopsy photographs and laboratory reports in reviewing the conclusions reached by other pathologists. There is no other reasonable way to review an autopsy because of the disdain we have for disturbing an interred body and because of the changes that are likely to occur to a body after burial. Dr. Plunkett's review of the autopsy followed accepted medical practices, as acknowledged by the State's expert, (Tr. 1339), and it was error for the State to argue otherwise without any foundation.

Nor was Dr. Plunkett allowed to refute the testimony of Dr. Sterbenz, the deputy coroner who conducted the autopsy. Sterbenz testified at length as to his interpretation of the discolorations that were present when the autopsy was performed. When Dr. Plunkett was asked to review Dr. Sterbenz's opinions he was prevented from doing so. For example, Dr. Plunkett was asked to review State's Exhibit K18. He testified that he could not tell what was depicted in that photograph

because: "This is taken so close, I have no idea." (Tr. 1201.) When defense counsel tried to state Dr. Sterbenz's opinion of what Exhibit K 18 depicted he was not allowed to present his witness with the opposing expert's opinion in order to rebut it. (Tr. 1202.) This was clearly an appropriate way of contradicting the opposing expert and should have been allowed. To deny this line of questioning reinforced the State's expert and undermined the Defense's expert. It was fundamentally unfair.

Dr. Sterbenz, after the autopsy, went out to Mills' home with Play-doh. He pressed the Play-doh against her back steps with varying, unmeasured amounts of pressure and took photographs of the resulting impressions. Based on these photographs, he opined that Shoup was not injured in a fall on these steps. (Tr. 1338.) The defense repeatedly objected to this testimony. (*See* Def.'s Mot. to Exclude Playdough Casts and Testimony, May 11, 2007; Judgment Entry, May 30, 2007.) The State supported the photographs on the basis that every child knows what you can do with Play-doh. (May 21, 2007, Pretrial Tr. 141–42; Entry (Ex. 2).) The trial judge, without conducting a hearing on the reliability of the methods used in applying the Play-doh, ruled that the testimony was admissible under Evid. R. 701, Non-Expert Testimony, and could be used by Dr. Sterbenz as the basis for his expert opinion. (Entry, May 30, 2007 (Ex. 2).)

Ohio law mandates that the trial court conduct a hearing whenever the reliability of scientific evidence is reasonably questioned. *Valentine v. Conrad* (2006), 110 Ohio St. 3d 42, 2006 Ohio 3561. *See also Daubert v. Merrell Dow Pharm., Inc.*(1993), 509 U. S. 579. "Because even a qualified expert is capable of rendering a scientifically unreliable testimony, it is imperative for a trial court, as gatekeeper, to examine the principles and methodology that underlies the expert's opinion." *Valentine, supra.* Similarly, Ohio Evid. R. 702 requires a trial court to determine the scientific underpinning of proffered scientific testimony.

The trial court never inquired into the reliability of using Play-doh to create an accurate impression of concrete steps in order to determine whether the steps caused the bruises on Shoup's head. As Dr. Sterbenz admitted he could not determine the amount of force to apply to the Play-doh to accurately simulate the force of Shoup's body when it hit the steps, he applied varying amounts of pressure, (May 21, 2007, Pretrial Tr. 142–43), but still could not say that this was the force of the body against the steps. Nor could he say that the steps would cause the same impression on a body in the shape of a bruise as the impression made on the Play-doh at varying levels of pressure. At trial, Dr. Sterbenz compared the properties of Shoup's skin to the Play-doh without any scientific foundation and concluded that the steps could not cause the injuries found on Shoup's body. (Tr. 1330, 1334, 1338.) In essence Dr. Sterbenz was allowed to use a preschool material to make varying impressions, compare the Play-doh to human skin, opine that the impressions made in the Play-doh were different than the bruising found on Shoup, speculate that the bruises looked that they were caused by a ruler (no ruler was found in Mills home), and conclude that the bruises were not caused by a fall. A *Daubert* hearing was required before this testimony was admitted.

Finally, Dr. Steiner, a pediatrician was allowed to testify over objection, (Tr. 688), as to why people abuse children. Dr. Steiner was never qualified as an expert in such matters, had never interviewed abusers about this, and in fact denied any special expertise in this area as the basis for his opinion was some educational material he had read. (Tr. 688.) This educational material was never identified. His opinion was that children are abused because they misbehave in some way causing their caregivers to lose control as a result of the additional stress. The State tried to tie this "expert" opinion into the factors in Ms. Mills' life that were stressful. No evidence was presented from the people who saw her that day that Ms. Mills was upset on May 10, 2006. Nor was there any testimony that Shoup or any of the other children in her care had

misbehaved in any way on May 10, 2006. This testimony was inadmissible and should have been excluded. *State v. Williams* (1986), 23 Ohio St. 3d 16.

The Due Process Clause requires criminal prosecutions to comport with prevailing notions of fundamental fairness. *California v. Trombetta* (1984), 467 U. S. 479. As the United States Supreme Court has stated: "few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi* (1973), 410 U.S. 284. The Ohio Rules of Evidence provide for experts to explain to the jury the factual basis for their opinions. Evid. R. 705. It is prejudicial error to refuse to permit an expert witness to give the reasons for his opinion. *Fox v. Industrial Comm'n of Ohio* (1955), 162 Ohio St. 569. These evidentiary rulings denied Defendant a fair trial and require reversal of the conviction.

Defendant is also concerned that the trial court exhibited bias towards the Defendant which could have contributed to these erroneous rulings. At sentencing the trial judge made the following statement:

> I have prayed for Noah's family throughout this process and I was praying for the jury and **I was praying that justice would be the victor and I think that prayer was was answered.**

(Sentencing Tr. 12 (emphasis added).) From the Defendant's perspective it seems that the trial judge had decided early on that the Defendant was guilty and prayed that the jury would agree with her. If nothing else the appearance of fairness is lacking and the conviction must be reversed.

<u>SECOND ASSIGNMENT OF ERROR:</u> THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ADMITTED IRRELEVANT, GRUESOME, REPETITIVE AND SUBSTANTIALLY PREJUDICIAL PHOTOGRAPHS OF THE DECEASED CHILD IN VIOLATION OF MILLS' CONSTITUTIONAL RIGHTS. (Transcript pgs. 93–94, 97, 526, 650, 691, 765, 788, 794, 847, 1256–57, 1191, 1194, 1198.)

No photographs were taken of Shoup on admission to either hospital because, as all of the State's witnesses testified, **he wasn't bruised**. (Tr. 526, 650, 691.) This was not a child that came

into the emergency room with bruises from head to toe. This child had no bruises on admission to either hospital and had no retinal hemorrhages at Union Hospital. To allow the State to show photographs of how Shoup's body appeared after aggressive and invasive medical care, and further to impute these bruises, no matter how minor, to the alleged abuse by Mills, was improper and denied Mills the right to a fair trial. The photographs did not portray the actual condition of Shoup's body at the time he was admitted to the hospital. The jury was misled by the State in believing that the bruises seen on Shoup's body were caused by Mills, and if she caused those bruises she must have been the cause of his fatal head injury.

The jury was given 72 photographs of Shoup that were taken after he received over twenty-four hours of intensive and invasive medical therapy. No photographs were taken of Shoup until he was pronounced brain dead.[2] The only thing the photos documented was that Shoup was bruised after receiving medical therapy; they should not have been admitted. The jury was inundated with gruesome, repetitive, cumulative, and irrelevant photographs that do not show how Shoup looked after his accident.

The defense provided uncontradicted evidence that Shoup's coagulation system was compromised, his blood clotting system was not working properly, and any amount of pressure applied to his body would cause a bruise, (Tr. 1256-57), including the application of the C-collar that caused bruising to his face. (Tr. 1194.) He was given Heparin prior any of the photographs being taken, which caused his body to be more susceptible to bruising, (Tr. 1191, 1198), and the medical records reflect that Shoup was given uncrossmatched blood and his platelet count was severely compromised therefore his blood was not properly clotting. *See* Joint Exhibit B.

[2] Sixty-seven photos were taken during or after organ procurement, and fifty-three photos were repeatedly shown to the jury through the use of a color Power Point Presentation.

The photographs were repeatedly shown to the jury throughout the testimony and during the State's closing argument. The photographs depicted Shoup's scalp retracted and pulled over his face, his eyes removed and dissected, his removed spinal cord, (which was improperly compared to that of another unidentified child), (Tr. 830) and his tongue removed and dissected. *See* State's Exhibits K-1 through K-53, and C-1 through C-19.[3] The State knew how horrific these photographs were, especially the photograph that showed Shoup's removed and dissected tongue, as the State encouraged the jury to look at this photograph during deliberations. (Tr. 1359.) That photo had nothing to do with what caused Shoup's death. These photographs functioned only to inflame the jury and evoke sympathy to the prejudice of Mills' defense.

This issue is one of fairness with respect to these photographs.[4] It is unfair to admit evidence for the sole purpose of eliciting an emotional response. When evidence is admitted for the purpose of appealing to the sympathies of the jury or to convey a sense of horror, it engenders an instinct to punish, without the determination of innocence or guilt, and should be excluded. We have found no cases where as many as 72 graphic photos were repeatedly shown to a jury. The only photographs that may have been relevant were those claiming to show where Shoup struck his head, for those were the only ones dealing with the cause of death. The problem with the photos showing bruising on Shoup's scalp is that no attempt was made by the State to match the location of the bruising in the photos with the bruising observed by the paramedics when they arrived on the scene.

Other states have held that trial courts must be vigilant in exercising their discretion in the use of gruesome photos. The Arkansas Supreme Court held that the State cannot be permitted to introduce every piece of admissible evidence if the cumulative effect of such evidence is

[3] The 72 photographs admitted at trial are attached to our appendix. Please review them to see just how damaging these photographs were, and how they denied Mills' the right to a fair trial.
[4] We are aware that defense counsel failed to object to these photographs, *see* Assignment of Error No. 5, but believe the trial court had an obligation to see that the Defendant received a fair trial.

inflammatory and unnecessary." *Berry v. State* (Ark. 1986), 290 Ark. 223. In its ruling the Court made the following observation:

> Other states have been . . . liberal in the admission of similar photographs where they were relevant to proof of the state's case. Like we do now, many have found it necessary, however, to stem the resulting influx of inflammatory pictures where the claims of relevance were increasingly tenuous in light of the prejudicial nature of the photographs.

Id. at 450. In *People v. Burns* (1952), 109 Cal. App.2d 524, the court found the trial court abused its discretion in admitting photos which only served to inflame the jury, noting the "line was crossed in this case." In Arizona, a manslaughter conviction of a seventeen-month-old child was reversed. *State v. Beers* (1968), 8 Ariz. App. 534. The court found reversible error in the admission of the pictures of the nude, bruised body of the deceased, without sufficient evidence to connect the bruises to the death of the child. *Id.* at 540. Not unlike the present matter, the court found that photos were unnecessary and likely gave the wrong impression that the defendant caused the bruises and that the bruises were the cause of death which was not supported by the evidence. *Id.* at 539.

Where medical testimony adequately describes the degree or extent of an injury, gruesome and graphic photos should not be admitted. *State v. Duncan* (Tenn. 1985), 698 S.W.2d 63, 69. In *State v. Roberson* (Tenn. Crim. App.), 1995 WL 765009, the court found that photographs of the cranial bone of the victim should have been excluded and "we are unable to say that the undue prejudicial effect of this gruesome photograph did not affect the jury's findings of guilt." In the present case, the photos were unnecessary because the State had expert testimony of the alleged injuries to Shoup, and a diagram depicting the injuries. (Tr. 847.)

In *State v. Warner* (Ohio App. 11th Dist. 2007), 2007-Ohio-3016, the Court of Appeals found that certain gruesome photographs should not be shown to the jury:

> **The fact that the scalp has been reflected does not, per se, preclude the admission of the photographs. However, we conclude these particular pictures**

> **are gruesome. [Her] facial features are not visible because her scalp is covering them. These photographs did have minimal probative value, as they corroborated [the expert's] testimony regarding the bruising underneath [her] scalp. However, the gruesome nature of these pictures was prejudicial. The probative value of these photographs was substantially outweighed by the danger of unfair prejudice.**

Id. at ¶ 89 (emphasis added).

Although the court failed to reverse on plain error, unlike the present case there were only three photographs of the deceased's retracted scalp shown, there was no evidence that the photographs were repeatedly shown to the jury, and the case did not involve the death of a child. The court also found that the admission of the photographs did not affect the outcome of the trial. In the present case, without the admission of the 72 grotesque photographs, the jury would not have convicted Mills. The *Warner* Court held that the "better practice in relation to these photographs . . . would be to have the witness explain what was discovered during the autopsy by way of precise and candid descriptive testimony. This approach will avoid the possible danger of unfair prejudice, while still portraying the details of the autopsy examination to the jury." *Id.*

The Ohio Supreme Court held in *State v. Morales* (1987), 32 Ohio St.3d 252, that a "trial court may reject an otherwise admissible photograph which, because of its inflammatory nature creates a danger of prejudicial impact that substantially outweighs the probative value of the photograph as evidence." The court in *State v. Van Sickle* (1993), 90 Ohio App. 3d 301, held that the videotape admitted by the State was greatly prejudicial: "the disgusting, sickening and gruesome details and close-up views of the burned body depicted in the videotape are not relevant to the aggravated murder charge." *Id.* at 306. Likewise, in *Clark v. Com.* (Ky 1991), 833 S.W.2d 793, the court held inadmissible a videotape of a decomposed body.

The inherent prejudice in admitting 72 colored photos of a bruised, bloodied and nude two-year old is apparent. The photos were not probative at all, and the majority of the photos

were not admitted to establish cause of the death. If the photos did provide a determination of cause of death, they still should not have been admitted, given that the State's experts could describe what was documented in the photographs without showing them to the jury. Autopsy photos should be closely scrutinized for their unduly prejudicial effect; that was not done in this case, and the State may not use gruesome photographs "to appeal to the jurors' emotions and to prejudice them against the defendant." *State v. Thompson* (1987), 33 Ohio St. 3d 1, 15. Each gruesome photo must have a probative value that outweighs its prejudicial effect. *State v. Morales*, *supra*.

During voir dire several individuals indicated that they would be unable to be fair if they had to see gruesome and graphic photographs. One of those individuals became a juror in this case, Ms. Rubino. During voir dire she told the court she would be unable to render a fair verdict if presented with such photographs. Specifically:

> MS. RUBINO: I don't know about doing the exhibits. I get real emotional about things.
> THE COURT: You have some concerns about doing photographs—
> MS. RUBINO: Yes, I do.
> THE COURT: —or maybe some of the more graphic materials?
> MS. RUBINO: Au-hau, yes.
> THE COURT: … Mrs. Rubino, I don't think that's going to be easy for anybody.
> MS. RUBINO: I'm sure.
> THE COURT: And you know, I'm a mother too, and . . . we're probably all going to be affected to some degree. Our concern would be that you would maybe be overly sympathetic to one side or the other and not be able to set that aside and clearly look at this case from an impartial standpoint.
> MS. RUBINO: Au-hau.
> THE COURT: Do you have any thoughts about that?
> MS. RUBINO: I don't know how I feel about that. I think it might be difficult for me to be real fair. I don't know, I hate to say that. * * *
> MR. ERNEST: Is it because you're concerned about having to see exhibits and such?
> MS. RUBINO: Yes. The entire subject is upsetting and I know to everyone but very upsetting to me.

(Tr. 93–94, 97.) This juror's passions and sympathies, as well as the judge's, were already set alight by even the prospect of viewing graphic photos of Shoup's dissected body parts. The court was aware that the photos would have a devastating impact and it was her obligation to assure a fair trial and the only way to do that was to exclude or to limit the photos to those that were absolutely essential to presenting the State's theories of the case. The 72 photos of a removed and dissected tongue, removed and dissected eyes, retracted scalp, and extracted spinal cord were not necessary to prove the State's case. A conviction based solely on inflamed passions, rather than proof of guilt shall not stand. *Williams*, 23 Ohio St. 3d at 16; *see also State v. White* (Ohio App. 4th Dist.), No. 03CA2926, 2004-Ohio-6005, ¶ 51. The jury decided this case on an improper basis—an emotional one. Mills' conviction must be overturned.

<u>THIRD ASSIGNMENT OF ERROR:</u> THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND DEFENDANT'S CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE. (Sentencing entry, Tr. 523, 600, 602, 630, 639, 682, 693, 718, 720, 726, 762–65, 780, 799, 813, 830, 854, 858, 878, 1036, 1052, 1166–71, 1177, 1179, 1184–85, 1194–96, 1198, 1217, 1238, 1241, 1257–58, 1277, 1281–82, 1292, 1313, 1344.)

Dr. Plunkett has performed extensive research related to short fall injuries and deaths in children. He has been a forensic pathologist for nearly thirty years, has done over three thousand autopsies, and has spent the last ten years researching infant injury using rigorous scientific criteria. (Tr. 1166, 1194) Dr. Plunkett testified that Shoup's death was an accident, and that forensic pathologists cannot just simply document that a bruise is present—"you have to determine what caused it." (Tr. 1238, 1282.) The bruises that were found on Shoup's body were caused by resuscitation and therapeutic intervention; "they weren't there when the paramedics got there, they weren't there at Union and they weren't there when he was first admitted to Akron Children's. They developed during the hospitalization. They are exactly the type of bruises that you see develop during therapy." (Tr. 1258.) The bruising seen on Shoup's body was not only caused by medical

intervention, but was also caused by the fact that his blood clotting system was not working properly. "[Y]ou have got to remember that Noah, his coagulation system has gone haywire as a result of the lack of oxygen." (Tr. 1198.) Shoup was administered Heparin prior to the organ donation and prior to the photographs being taken, and it prevents blood clotting and extenuates and may even cause bruises itself. (Tr. 1198.) The Heparin combined with the compromised state of Shoup's blood clotting factors caused him to "bruise from any application of pressure." (Tr. 1257); Joint Exhibit B. Dr. Plunkett testified that Shoup's death was accidental and his injuries were consistent with a fall, and that the State's experts were wrong when they alleged that Shoup was abused. (Tr. 1179, 1217, 1218, 1292.) There were no photos taken of Shoup until he was pronounced brain dead. These are exactly the type of bruises that develop during hospitalization and during therapy. (Tr. 1258.)

Regarding specific bruises, Dr. Plunkett testified that the bruise on the left side of Shoup's face, which was not documented on admission to either hospital nor photographed until after Shoup was pronounced brain dead, was caused by a cervical collar ("C-collar") placed on Shoup to stabilize his head, not a slap. (Tr. 1194.) Dr. Plunkett had seen this type of bruise before and had at least a half dozen photographs depicting this type of bruise.[5] (Tr. 1194.) The C-collar typically covers the exact area of bruising depicted on the left side of Shoup's face. (Tr. 1195.) If the C-collar does not fit properly, it is more likely to cause a bruise. (Tr. 1195.) The paramedics admitted that the C-collar did not fit well and was subsequently removed. (Tr. 523.) Shoup, however, was again wearing the C-collar when he was transported on LifeFlight and when at the hospital. *See* Joint Ex. B. C-collar bruising is not a novel idea; the medical community is familiar with this. (Tr. 1196.)

[5] These photographs formed the basis of Dr. Plunkett's opinion, and it was error for the court to exclude them prior to trial. *See* Assignment of Error One; Def.'s Ex. 13 A-D, 14 proffered photos.

Indeed, one of the State's own experts testified that injuries can occur from medical intervention. (Tr. 630.)

Dr. Sterbenz, the State's expert, agreed that not all of the bruising shown to the jury occurred on the date of alleged incident. There were bruises on Shoup that predated the May 10th accident, including an old bruise on the top of his head and a "bunch of bruises" on the back of his left leg. (Tr. 813.) He said there was bleeding between Shoup's ribs that could have occurred when his organs were harvested, and thereby acknowledged that some of the bruises were irrelevant to determining Shoup's cause of death. (Tr. 799.) These irrelevant bruise photos were repeatedly shown to the jury, in an effort to inflame the jurors' passions. The photos do not represent credible evidence that Mills caused Shoup's death.

The State put on additional improper testimony from Shoup's treating physicians about cause of death. The treating physicians had absolutely no training in forensic pathology and were therefore not competent to testify as to cause of death. Treating physicians testify as to cause of injury in the absence of autopsy, while the definitive method to determine cause of death is by conducting an autopsy. (Tr. 780.) The treating physicians should not have been allowed to testify to cause of death because they testify to probability of what pathology caused death, not actuality. The treating physicians' testimony as to cause of death should have been excluded.

The defense put on credible evidence that Shoup's injuries were caused by a short fall, not child abuse, which at a minimum established a reasonable doubt as to whether Mills caused Shoup's death. Dr. Plunkett testified that peer reviewed articles show that science in this area is evolving and changing as experts attempt to bridge the gap between the biomedical community and the medical community. (Tr. 1171.) The only way to evaluate Shoup's injuries is to carry out a biomechanical reconstruction, "[t]here's no other way to do it." (Tr. 1177.) Plunkett has written a number of

articles on infant head injury evaluation, including a peer reviewed article entitled *Fatal Pediatric Head Injury Caused by Short Fall Deaths.* (Tr. 1166-68.) Based on his research, Dr. Plunkett wrote an article, published in the Journal of Pediatrics, detailing the need to look at the biomechanics of what happens when a child falls, and that a child can fall a short distance and die from those injuries. (Tr. 1168.)

Dr. Plunkett testified Shoup had retinal hemorrhaging from an increase in intracranial pressure and not from acceleration-deceleration forces. (Tr. 1184.) He stated the force needed to cause retinal hemorrhage by acceleration would equal "something in the one point two million feet per second squared . . ." (Tr. 1185.) He further testified that State's experts including Dr. Steiner, (Tr. 1277, 1281), were wrong when they stated that retinal hemorrhages only result from abuse: "I think they are unfamiliar with the actual studies that have been done to determine to examine the causes of retinal hemorrhage and I think they're unfamiliar with the forces required to cause injury." (Tr. 1185.) Dr. Steiner agreed that retinal hemorrhages can be seen in non-abusive situations. (Tr. 682.) Dr. Plunkett's expert opinion finds ample support in Shoup's medical records. Shoup had no retinal hemorrhaging at Union County. (Tr. 1355.) This proves that Shoup's retinal hemorrhaging was caused by intracranial pressure not rotational acceleration-deceleration forces.

While Dr. Steiner testified on direct that Shoup suffered from acceleration-deceleration injuries, he admitted that Shoup did not have the classic signs and symptoms associated with those injuries. He did not have any rib fractures which are seen in sixty per cent of the children who had acceleration-deceleration injuries, he had no fractures of his growth plates, an injury which has been documented in forty per cent of all the acceleration-deceleration cases, and there was no noted damage to the muscles in his arms. (Tr. 718,720.)

The State's experts repeatedly changed their opinions as to what caused Shoup's death. Prior to trial, Dr. Steiner stated that Shoup's death was caused by shaking, while Dr. Sterbenz stated it was caused by blunt force trauma. Once the trial began, Dr. Steiner adopted Dr. Sterbenz's opinion that blunt force trauma contributed to Shoup's death, while Dr. Sterbenz stated that Shoup was shaken while his head was striking a firm surface. (Tr. 693; State's Exhibit L.)

In the end, two forensic pathologists, Drs. Plunkett and Sterbenz, testified and disagreed as to cause of death, but **both admitted that each other's theory was plausible**. Dr. Plunkett testified that Shoup's primary injury was the posterior neck injury. (Tr. 1241). Dr. Sterbenz testified that the bruising noted on the back of Shoup's neck could have been indicative of some type of impact against the surface resulting in an over stretching whiplash injury, and admitted he could not say for certain what happened because he was not there. (Tr. 830.) It should be noted that a bump on the back of the head was the only injury observed by the paramedics. Dr. Sterbenz also admitted that the there could have been only one impact to the back of Shoup's head, (Tr. 1313), and he admitted that Shoup did not die from being violently shaken. (Tr. 858.) This fact alone establishes a reasonable doubt as to whether Mills caused Shoup's death.

Mills' conviction is against the manifest weight of the evidence. The lead detective called the incident what it is, an accident. The State's own witness admitted the injuries that Shoup sustained, retinal hemorrhages and subdural hematoma, can occur from a **short fall.** (Tr. 726 (emphasis added).) Other State witnesses admitted that injuries occur during medical intervention, (Tr.630), that it is possible to have retinal hemorrhages in accidental head trauma, (Tr. 723), that rotational type injuries are seen in accident cases, (Tr. 682), and unexpected things happen to patients. (Tr. 630.)

The defense proved Shoup's injuries were consistent with a fall and that he was not abused. The State's theory was that Mills physically abused Shoup and hit his head against a firm surface in her home. (Tr. 854.) The difficulty with the State's case is that there was no physical evidence that Mills violently attacked Shoup. (Tr.764-65.) The police promptly responded to the home, interviewed Mills, and concluded this was a "freak accident." (Tr.602.) The police searched the home and found nothing out of order. (Tr. 600.) They looked for any kind of bodily fluids and found no blood, hair or tears. (Tr. 762-63.) None of the neighbors who were home reported any screaming or crying. (Tr. 1036, 1052.)

A weight of the evidence claim challenges the amount of credible evidence offered in support of an issue. *State v. Thompkins*, 78 Ohio St. 3d 380, 387. When a weight of the evidence issue is raised, the "appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of conflicting testimony." *Id.* at 387; *see also State v. Wilson* (2007), 113 Ohio St.3d 382, 387; *State v. Mattison* (1985), 23 Ohio App. 3d 10.

The medical evidence was consistent with a fall, or Shoup's head hitting some kind of surface. When evidence is equipoised in a criminal case, the defendant must be acquitted. When all of the other evidence and errors are viewed in totality, it is clear Mills would have been acquitted if she had received a fair trial.[6]

<u>FOURTH ASSIGNMENT OF ERROR</u>: THE COURT ERRED WHEN IT FAILED TO RECORD ALL OF THE PROCEEDINGS IN THE CASE. (Tr.638-9, 692-93, 760-61.)

[6] The State also failed to present sufficient evidence to prove all of the offenses beyond a reasonable doubt. Therefore, Mills' conviction violates Due Process. *Tibbs v. Florida* (1982), 457 U.S. 31; *Jackson v. Virginia* (1979), 443 U.S. 307. In its case-in-chief, the State never demonstrated that Mills caused Shoup's death. Notwithstanding this fact, the trial court denied counsel's movement for a judgment of acquittal at the conclusion of the government's case, and at the close of evidence. (Tr. 878, 1344.) The court therefore erred when it failed to grant Defense's Rule 29 motion.

Rule 22 of the Ohio Rules of Criminal Procedure provides: "In serious offense cases **all** proceedings **shall** be recorded." Yet in this murder case, nearly all of the colloquy between counsel and the court was not recorded. The transcript of proceedings repeatedly shows that counsel would make an objection and the court would direct the lawyers to chambers where presumably the objections were discussed. (*See e.g.* Tr. 638, 639, 692, 693, 760, 761) None of these discussions were recorded, nor is it clear that the Defendant was present for these discussions. Months later, no one can remember what was said during numerous in-chambers discussions.

Failing to record the proceedings puts the Defendant in a particularly vulnerable position for it is up to her to establish error below. If significant parts of the proceedings are not recorded, it makes her task impossible. She is forced to guess as to the positions taken by her counsel during these conferences and must speculate in part as to whether her interests were adequately and constitutionally protected. Rule 22 is mandatory. This was a serious case. All of the proceedings should have been recorded. Defendant was denied her right to a complete transcript of proceedings and the convictions must be reversed. *State v. Said* (1994), 71 Ohio St.3d. 473.

FIFTH ASSIGNMENT OF ERROR: APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO NUMEROUS ERRORS AND OMISSIONS WHICH PREJUDICED APPELLANT'S TRIAL. (Tr. 347, 387, Pretrial Tr., February 1, 2007, p. 3.)

Defense counsel made the following errors and Defendant's conviction must be reversed:

1. Counsel failed to object to the gruesome, irrelevant, prejudicial photos of Shoup,[7] and counsel stipulated to 19 photographs about which there was no testimony, but were marked as exhibits and given to the jury. (Tr.875; Ex. C1-19)

2. Counsel failed to object to prosecutor's improper closing argument. *See infra*.

3. Counsel failed to object to hearsay when the State's witnesses testified as to what they believed Mills told them regarding Shoup's accident.

[7] As none of the sidebar or in chamber conferences were recorded it is impossible to tell if defense counsel's failure to object to any of the evidentiary issues raised was caused by a court ruling made in chambers and off the record.

4. Counsel ineffectively cross-examined the State's expert witnesses by not confronting them with the defense's experts' conclusions.

5. Counsel failed to request Crim. R. 16(b)(1)(g) material.

6. Counsel permitted the State's experts who non-pathologist to testify to cause of death without objection.

To prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687.[8] But for counsel's unprofessional errors, the result of the trial would have been different.

SIXTH ASSIGNMENT OF ERROR: THE PROSECUTION PREJUDICED THE OUTCOME OF THE CASE THROUGH IMPROPER CLOSING ARGUMENT. (Tr. 1355, 1356, 1365, 1366, 1368, 1389, 1390, 1392, 1394)

A closing argument can infect the trial with unfairness where it implicates specific trial rights of the accused. *Caldwell v. Mississippi* (1985), 472 U.S. 320, 340; *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 1979).[9] It is reversible error to allude to matters not supported by the evidence, to express a personal belief or to make improper suggestions or insinuations. *Smith*, 14 Ohio St.3d at 14 (citing *Berger v. United States* (1935), 295 U.S. 78, 88.); *State v. Liberatore* (1982), 69 Ohio St.2d 583; *State v. Keenan* (1993), 66 Ohio St.3d 402, 406. It is improper for a prosecutor to comment on the credibility of a witness or to express a personal belief that a particular witness is lying. *Hodge v. Hurley* (6th Cir. 2005), 426 F.3d 368, 378.

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[8] First, a defendant must show that counsel's performance was deficient by demonstrating that defense counsel's acts or omissions were not the result of reasonable judgment. "Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law . . . ." *Beasley v. United States* (6th Cir. 1974), 491 F.2d 687, 696. Second, a defendant must show prejudice—that, but for counsel's unprofessional errors, the defendant would have had a reasonable probability of a favorable result. *Strickland*, 466 U.S. at 692. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. One of the basic duties of the defendant's counsel is "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. . . ." *Id.* at 688.

[9] Reversal is required where the prosecution's closing argument "remarks were improper and . . . [where] they prejudicially affected substantial rights of the defendant." *State v. Smith* (1984), 14 Ohio St.3d 13, 15. Further, "it is not enough that there be sufficient other evidence to sustain a conviction in order to excuse the prosecution's improper remarks. Instead, it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found the defendant guilty." *Id.*

The prosecution commented on Mills' and Dr. Plunkett's credibility telling the jury that Dr. Plunkett just "travels around and gives expert testimony," (Tr. 1355); he "gets paid, he flies and he comes down here and says this is the way it is" (Tr. 1392); "[he] gets paid fifty-five hundred dollars and comes down here." (Tr. 1389.) The prosecution repeatedly told the jury to discount Dr. Plunkett's testimony because he does not see patients, when the prosecution knew that forensic pathologists are not in a position to see and treat patients. (Tr. 1390, 1355, 1356.) The prosecution vouched for its own witnesses; "if any of your children were hurt, that's where they would go. It's the best place with the best people. And Dr. Steiner is one of those best people . . . ." (Tr. 1390.)

The prosecutor stated, "[y]ou will come to same conclusion that I have in this case," you "need to make the right decision," this woman's guilty." (Tr. 1365-68, 1396)[10] During voir dire, the prosecutor told Ms. Rubino,[11] "I would expected someone to be open to both side of the case **u]nless they've been through our files** here so I took that to mean that you are coming into this with an open mind . . . ?" (Voir dire Tr. 96–97.) This comment is clearly impermissible.

The prosecution commented on the **defendant's silence** by stating that: "[y]ou've not heard one fact in this case from anybody to include her seven versions that says this child went to the edge of the steps and fell off backwards." (Tr. 1389.) "It is axiomatic that a defendant in a criminal trial need not testify or produce any evidence, and that a prosecutor may not comment on the absence of such." *United States v. Drake,* 885 F.2d 323, 323 (6th Cir.1989), *cert. denied,* 493 U.S. 1033, (1990). These comments were "'manifestly intended' to reflect on the accused's silence [and were] of such a character that the jury would 'naturally and necessarily' construe them as such." *United States v. Bond* (6th Cir. 1994), 22 F.3d at 669; *State v. Twyford* (2002), 94 Ohio St. 3d 340, 355–56.

[10] These comments "convey[ed] the impression that evidence not presented to the jury, but known to the prosecutor, support[ed] the charges against the defendant[,] thus jeopardize[ing] the defendant's right to be tried solely on the basis of the evidence presented to the jury." *Young*, 470 U.S. at 18.

[11] See Assignment of Error Two in reference to juror Rubino.

The prosecution misrepresented the evidence, stating that Shoup did not have any bruises on him when he was dropped off at the Mills' home: "He didn't have any bruises on him." (Tr. 1347.) Yet, Dr. Sterbenz testified that there were bruises that predated May 10th. (Tr.813.)

The prosecution played upon the jurors' emotions when it emphasized and again presented to the jury the autopsy photographs of Noah's dissected tongue. (Tr. 1359–60.) The prosecutor told the jury Shoup was talking to them and to "[L]isten to this child and make the proper decision." (Tr. 1393-95.) Such comments are incredibly inflammatory and "[e]xcessively emotional." *Keenan*, 66 Ohio St.3d at 409.

The evidence of guilt in this case was thin at best.[12] It is in no way "clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found the defendant guilty." *Smith*, 14 Ohio St.3d at 15. Mills' rights to due process and a fair trial under the Ohio and United States Constitutions were denied, and her conviction must be reversed.

SEVENTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN IMPOSING MULTIPLE PUNISHMENTS FOR ALLIED OFFENSES OF SIMILAR IMPORT CONTRARY TO R.C. § 2941.25 AND THE DOUBLE JEOPARDY CLAUSE OF THE OHIO AND UNITED STATES CONSTITUTIONS. (Sentencing Entry.)

Mills was convicted of two separate counts of murder, in violation of R.C. § 2903.02(B), for causing the death of Shoup while committing a felony. The felonies alleged were child endangering (R.C. § 2919.22(B)(1)) and felonious assault (R.C. § 2903.11(A)(1)). The court imposed a separate concurrent sentence for each conviction. (Sentencing Entry 1,3.)

The federal and state constitutions prohibit cumulative punishments for the same offense. *State v. Rance* (1999), 85 Ohio St.3d 632, 1999-Ohio-291; *Blockburger v. United States* (1932), 284 U.S. 299. To determine whether offenses are allied, courts must look at the elements of the offenses in the abstract. If the elements correspond to such a degree that commission of one crime will result

[12] As explained in the Third Assignment of Error there was either insufficient evidence to convict Mills or her conviction was against the manifest weight of the evidence.

in the commission of the other, multiple punishments are prohibited unless the court finds the defendant committed each act with a separate animus. *Id.*at 638-9.

Mills was twice **sentenced** for the same crime, R.C. § 2903.02(B). R.C. § 2903.02(B) is an allied offense of itself. Only one animus for the alleged murder was possible because there was only one decedent. Under *Rance* and *Blockburger*, two sentences for murder are impermissible. The court also separately sentenced Mills for child endangering, but that conduct was the same as the conduct which formed the basis for the underlying felony in one of the murder counts. To convict for murder, the State had to prove child endangering. Once the State proved this as to the murder count, the State had also proved child endangering. The child endangering count was therefore a lesser included offense of the murder. The same analysis applies to the second murder and the felonious assault counts. *See, e.g., State v. Brown* (Ohio App. 10th Dist. 1982), 7 Ohio App. 3d 113.

It was a violation of R.C. § 2941.25 and the double jeopardy clause to sentence Mills separately on the felonious assault and child endanger convictions. One trial court in this district has previously recognized that felonious assault and child endangering merge. *See State v. Stein* (Ohio App. 5th Dist.), 2007-Ohio-1153, ¶ 6. In sum, it was only permissible for the trial court to sentence Mills to a term of imprisonment for either one of the murder convictions, the child endangering conviction, **or** the felonious assault conviction. This matter should therefore be remanded to the trial court for resentencing on one of the convictions, but not all.

CONCLUSION

For the foregoing reasons, Mills' convictions must be reversed.

Respectfully submitted,

Paula Brown (0068251) William Bluth (0014617) Richard R. Parsons (0082270)