[Cite as *State v. St. John*, 2019-Ohio-650.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 27988
	:	
v.	:	Trial Court Case No. 2017-CR-484
	:	
RYAN LUCAS ST. JOHN	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 22nd day of February, 2019.

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FROELICH, J.

{¶ 1} After a trial in the Montgomery County Court of Common Pleas, a jury found Ryan Lucas St. John guilty of felony murder (felonious assault), felonious assault, felony murder (endangering children), endangering children (abuse – serious physical harm), involuntary manslaughter (endangering children), and endangering children (parent – serious harm). The charges stemmed from the death of his girlfriend's two-year-old son. After merging several offenses, the trial court sentenced St. John for felony murder (felonious assault) and child endangering (parent – serious harm). The court imposed an aggregate term of 18 years to life in prison.

{¶ 2} St. John appeals from his convictions, claiming that (1) his convictions were based on insufficient evidence and against the manifest weight of the evidence, (2) the trial court erred in allowing certain testimony by the State's expert witness, (3) his trial counsel rendered ineffective assistance, (4) the trial court erred in giving an instruction on flight, (5) the prosecutor engaged in misconduct, and (6) cumulative error deprived him of a fair trial. For the following reasons, the trial court's judgment will be affirmed.

I. Facts and Procedural History

{¶ 3} The State's evidence at trial established the following facts.[1]

A. Brayden's Injuries and the Timing of those Injuries

{¶ 4} On February 13, 2017, Kelsie Martin's son, Brayden, was two years and 10 months old. At 12:54 p.m., Kelsie called 911, reporting that Brayden was not breathing

[1] Several witnesses were family members who interacted with the child during the days prior to the fatal assault. For clarity, we will refer to family members by their first names.

and was blue. At approximately 1:00 p.m., medics took Brayden by ambulance from his residence to Dayton Children's Hospital. Upon arrival, Brayden was unresponsive, not breathing on his own, and his pupils were fixed and dilated; he also had significant bruising on his forehead and the back of his head, with significant scalp swelling, he had bruises on his torso and back, and he had a burn mark on his ankle.[2] Brayden showed signs of significant brain damage.

{¶ 5} At 1:30 p.m., Brayden was taken for a CT scan, which revealed a "very significant" depressed (pushed in) skull fracture, a large area of subdural hemorrhage, and "massive" brain swelling (cerebral edema). The swelling was pushing Brayden's brain down towards the hole in the base of his skull, putting pressure on the brainstem. Brayden had a very poor prognosis. At approximately 2:10 p.m., in an effort to save Brayden's life, Dr. Kambiz Kamian, a pediatric neurosurgeon at Dayton Children's Hospital, performed surgery to relieve the intracranial pressure. Brayden survived the surgery, but his prognosis did not improve.

{¶ 6} At 8:00 a.m. on February 14, 2017, Dr. Lori Vavul-Roediger, a child-abuse pediatrician and then-Medical Director for the Department of Child Advocacy at Dayton Children's Hospital, examined Brayden. She was aware of Brayden's medical history as well as the CT scan, neurosurgical intervention, and laboratory tests that had been performed since his hospitalization. When she saw Brayden, he was comatose, nonresponsive to stimuli, had signs of "significant neurological abnormality," and was "close to death." Dr. Vavul-Roediger noted that Brayden had suffered from a viral

[2] The State presented evidence that the burn mark was unrelated to the trauma that caused Brayden's death and that it was caused by cigarette ash accidentally falling on Brayden's ankle while he was seated in a car seat.

infection (Acute Disseminated Encephalomyelitis-like inflammation) in October 2015 that affected his ability to walk, but stated that condition had resolved and was unrelated to his present head trauma. Subsequent to Dr. Vavul-Roediger's evaluation, two neurological tests were performed 12 hours apart; both demonstrated that Brayden had no brain function. Brayden's parents decided to remove his life support, and he died the same day.

{¶ 7} Dr. Vavul-Roediger and Dr. Robert Shott, the coroner who conducted Brayden's autopsy, testified at St. John's trial about the non-accidental nature of Brayden's injuries and the symptoms Brayden likely would have exhibited from the injuries.

{¶ 8} Dr. Shott concluded that Brayden died from multiple blunt force injuries. He observed bruising on the left side of Brayden's face and jaw; three bruises on Brayden's chest, one of which was a deep chest wall bruise consistent with knuckle marks; a bruise to the thymus gland; bruising and bleeding to a portion of the back wall of Brayden's stomach; bruises on Brayden's back; and a "large extensive irregular fracture" of Brayden's skull at the back of the head.

{¶ 9} Dr. Shott stated that the stomach injury would likely have caused a lot of pain, abdominal discomfort, and spitting or throwing up, but Brayden would have been awake and conscious. (Tr. at 155.) When asked about symptoms from the head injury, Dr. Schott responded:

> An injury like this could render somebody immediately unconscious. Potentially even rapidly -- basically dead within minutes to hours. There may be a lucid interval, they may be unconscious, and then come back

> awake for a period of time. As the brain swells, they may be in a stupor for a period of time. It's hard to say based on just looking at the injury what the exact reaction is going to be. If it -- if the child is not unconscious immediately, they may scream or cry out for a period of time. There's a lot of nerves in the scalp. It's going to hurt a lot.

(Tr. at 162.) Dr. Shott further indicated that a child could appear as if he or she were sleeping or dazed.

{¶ 10} Dr. Vavul-Roediger testified that Brayden would have been "immediately symptomatic" after his head injury. She stated, "There would have been no question that he was acutely and notably abnormal. He would not have been interactive. He would not have been talkative. He would not have been ambulating or walking. He would have been immediately observably ill to anybody in his presence following this head trauma." (Tr. at 739.) When asked if Brayden could have been crying, Dr. Vavul-Roediger answered, "I couldn't say with certainty that he couldn't perhaps have had some agonal moaning. But again, I think as the minutes would have progressed and his brain would have continued to swell, he would have quickly become, you know, probably incapable of making many noises and would have likely been unconscious." (Tr. at 739.)

{¶ 11} Both Dr. Vavul-Roediger and Dr. Shott testified that the skull fracture resulted from the application of "significant" force, and Dr. Shott described the fracture as a "massive devastating injury." Dr. Vavul-Roediger similarly testified that Brayden suffered "a significant impact or blow to the head," and she also described his skull fracture as a "massive, massive fracture." Both Dr. Vavul-Roediger and Dr. Shott indicated that this type of skull fracture would more typically be seen with a high-speed

motor vehicle accident or a fall from a very significant height/tall building (four or five stories). Dr. Shott also indicated that Brayden suffered "significant" blunt force to cause the back, chest, and abdominal injuries; Dr. Vavul-Roediger likewise stated that a "traumatic impact" was required to cause the bruising to Brayden's back.

{¶ 12} Dr. Kamian and Dr. Vavul-Roediger expressed opinions as to when the injuries occurred. Dr. Kamian testified that, based on the CT scan and his observations during the surgery, the trauma to Brayden occurred within 3 to 6 hours from the time of surgery, i.e., approximately between 8:10 a.m. and 11:10 am on February 13, 2017. He indicated that the precision in the estimates can vary and, thus, the trauma possibly could have occurred within 2 to 7 hours before surgery, but he indicated that it would not have occurred outside that time frame.

{¶ 13} Dr. Vavul-Roediger testified that Brayden's brain would have begun to swell as soon as it was injured, and that the swelling would have caused Brayden to become increasingly ill "within a few hours." She testified: "But once this head trauma was inflicted, within minutes, the injury is already taking form. You know, he's actively bleeding. He's hemorrhaging around his brain. The brain is severely injured. It is actively swelling. The brain is releasing all these chemicals, the cytokines. It's actively being injured as the child is, again, wherever he is in this environment. And he is actively becoming sicker and sicker and sicker as the minutes tick by. * * * This did not happen days before, 10 or 12 hours before. * * * This was a short period of time, and this child became rapidly, critically ill, and essentially, came to our ER by 1 p.m. dead[.] * * * I can tell you [his functions began to shut down] within hours." (Tr. at 760-761.)

B. Events Leading Up to Brayden's Admission to Hospital

{¶ 14} St. John and Kelsie began dating in 2015. At the time, Kelsie had a one-year-old son, Brayden, from a prior relationship. In November 2016, Kelsie and St. John had a child together. On December 3, 2016, the couple moved to a two-bedroom apartment in the Northlake Hills apartment complex; St. John's younger brother, Ian (aka Chance), stayed with them and slept in the living room.

{¶ 15} Several of St. John's family members also lived at Northlake Hills: St. John's mother, Melissa St. John ("Missy"), St. John's older brother, Zachary St. John ("Zack"), Zack's girlfriend, Janie Williams, and Zack and Janie's two children lived together in an apartment in a building across the parking lot from St. John and Kelsie's apartment. St. John's father, Bryan St. John, lived in another apartment building in the complex.

{¶ 16} Kelsie testified that Brayden would stay with his paternal grandmother or with St. John when she was at work. Kelsie also often left Brayden with one of her aunts, Cynthia McKinney ("Cindy"), or with her (Kelsie's) grandmother. Cindy testified that she tried to have Brayden over at her home every weekend, plus two or three times during the week. Kelsie testified that she and St. John would argue about Brayden, such as things Brayden did and Brayden's talking on the phone with his biological father.

{¶ 17} On Saturday, February 11, 2017, Kelsie's older brother, Tyler Hoerner, and Tyler's friend took Brayden to the mall. Tyler purchased Brayden a new pair of shoes. Afterward, Tyler took Brayden to Cindy's apartment so that Brayden could visit with Tyler's maternal grandmother, who was there. Tyler returned Brayden to Kelsie's residence around 6:00 p.m. Tyler and Cindy testified that Brayden was behaving normally while he was with them; Cindy stated that she did not notice any pain, injuries, or signs of illness. Kelsie testified that Brayden was behaving normally when he returned

home.

{¶ 18} On Sunday, February 12, Kelsie and Brayden stayed at home. Brayden video-chatted with Cindy over Kelsie's cell phone. At approximately 6:00 p.m. Kelsie gave Brayden a bath; Kelsie stated that she did not notice any bruises on Brayden's face or chest. Kelsie testified that Brayden had a slight runny nose and cough, but was not sick.[3]

{¶ 19} At approximately 6:30 p.m., Kelsie went to bingo with Missy and Janie. St. John stayed home with Brayden and his son. Kelsie returned home at approximately 10:30 p.m. There was some disagreement among Kelsie, Janie, Zack, and Chance as to who went to bingo, who remained at Kelsie's residence during bingo, and who was in the residence after bingo. However, there was general agreement that Zack, Janie, their children, and Chance each were in Kelsie's apartment at some point that evening. Kelsie testified that she argued with St. John after returning from bingo, because the house was messy and he was still playing video games. Kelsie testified that she took Brayden to her bedroom to watch television together before he fell asleep. Once he was sleeping, Kelsie transferred Brayden to his bed in the other bedroom.

{¶ 20} On the morning of Monday, February 13, Kelsie had a scheduled traffic court appearance due to driving with expired tags. She received a wake-up call from Missy shortly after 7:30 a.m. Kelsie looked in on Brayden, and he said that he needed to use the bathroom. Kelsie and Brayden both used the bathroom, and then Kelsie put Brayden in her bed next to St. John. Kelsie stated that Brayden whined about her

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[3] Brayden tested positive for Influenza A at the hospital, but his death was unrelated to his illness.

leaving, and St. John got up to play video games. Kelsie left her residence in her vehicle at approximately 8:00 a.m. At 8:05 a.m., St. John texted Kelsie, asking her to let him know when she arrived. St. John stayed home, alone, with Brayden and the infant. (Chance, who slept at the apartment, had left before 6:00 a.m. to go to work.)

{¶ 21} Once Kelsie was finished at the courthouse, she went to the license bureau to get new tags for her vehicle. At 8:51 a.m., Kelsie received a text from St. John asking her to "let me know when you're on the way back." At 9:14 a.m., St. John texted Kelsie that Brayden had thrown up. Kelsie texted back, "He wasn't sick or anything. How[?]" St. John responded at 9:15 a.m., "It was like spit not really throw up but we[']re going back [to] sleep." St. John texted or called Kelsie several more times, asking how long she was going to be, when she would be back, and whether she wanted to smoke marijuana and watch a movie when she returned. Kelsie testified that it was unusual for St. John to rush her. Kelsie paid at the BMV at 10:02 a.m., left the license bureau at approximately 10:15 a.m., and returned to her apartment at approximately 10:30 a.m.

{¶ 22} When Kelsie returned home, St. John was there with the two children. Kelsie peeked in on Brayden, who was in bed where she had left him, and he appeared to be sleeping. On cross-examination, Kelsie testified that she told a nurse that Brayden had looked at her and appeared to be daydreaming. (Tr. at 369.) Kelsie and St. John then watched a two-hour movie and smoked marijuana. After the movie, St. John suggested that he and Kelsie take a shower. Using her PlayStation controller by the bedroom door, Kelsie put on the movie *Finding Dory* in case Brayden woke up while she was in the shower. Brayden still appeared to be asleep.

{¶ 23} Shortly after showering, Kelsie realized it was close to 1:00 p.m. and

decided to wake up Brayden. She walked to the bed, took off Brayden's blanket, and noticed that he was blue in the face. Shocked, Kelsie picked up Brayden and ran into the living room. Kelsie told St. John to call 911. Instead, St. John attempted to call his mother and then called Zack. At 12:54 p.m., Kelsie called 911. Janie, Zack, Missy, and one of Kelsie's neighbors rushed to the apartment. Missy attempted CPR until medics arrived. Kelsie testified that St. John was screaming in the background, "Oh, my God. I'm about to go to prison" or something similar. Medics arrived and, at 1:04 p.m., took Brayden to Dayton Children's Hospital; Kelsie rode with them. Kelsie testified that St. John was still at the apartment when she got into the ambulance; St. John never came to the hospital.

C. Events After Brayden was Taken to Hospital

{¶ 24} Police officers responded to the residence as the ambulance was leaving. When Officer Timothy Polley arrived, Missy, Janie, Zack, and the baby were at Kelsie's apartment. He described the family as "distraught," "crying," and "yelling a little bit." (Tr. at 459.) St. John was not present. Janie could be heard saying, "Where is Luke [St. John]? Luke needs to come talk to them [the police] and tell them what happened." (Tr. at 463; Ex. 54.) Officers asked Missy, Janie, and Zack to try to contact St. John to see if he would come back to the apartment. Officer Polley remained at the apartment for approximately five hours; St. John did not return.

{¶ 25} Kelsie's twin sister, Chelsie, heard of Brayden's condition and came to Kelsie's apartment. After a brief confrontation with Janie, Chelsie went to Dayton Children's. Prior to Chelsie's arrival at the hospital, St. John had repeatedly texted and called Kelsie's cell phone, asking what was going on, asserting that he "didn't do this" to

Brayden, and asking Kelsie if she believed him.

{¶ 26} After Chelsie arrived at the hospital, Chelsie took Kelsie's phone so that she (Chelsie) could contact family members; Chelsie never returned Kelsie's phone. Kelsie's phone records showed afternoon phone calls to Cindy, Tyler and others that Chelsie had made. St. John continued to text and call Kelsie while Chelsie had Kelsie's phone. Chelsie answered one of St. John's phone calls and asked him where he was and what he had done to Brayden; St. John denied that he had done anything.

{¶ 27} At 2:15 p.m., Chelsie, pretending to be Kelsie, texted to St. John, "This is about my son. Come talk to the cops, Luke." During another phone call from St. John, St. John asked if Brayden was okay or dead, said that Kelsie was a good mom and did not do anything, and asserted that he did not do it. Chelsie testified that she started texting St. John as Kelsie to try to find out what happened. In some texts, Chelsie (pretending to be Kelsie) claimed that she was probably going to prison in an effort to get St. John to "come forward." (Tr. at 542.)

{¶ 28} At one point, Chelsie handed the phone to her brother, Tyler, who spoke with St. John. When St. John stated that he did not do it, Tyler asked St. John, "If you didn't do anything, why are you running?"

{¶ 29} Dayton police officers continued to try to contact St. John. Officer Mitch Olmstead, who had spent 25 years assigned to the neighborhood in which the St. Johns lived, responded to Kelsie's apartment complex when additional officers were requested (after Chelsie's confrontation with Janie). Officer Olmstead testified that several of St. John's family members walked to his cruiser to ask about Brayden's condition. Missy handed Officer Olmstead her cell phone and indicated that St. John was on the line.

Olmstead told St. John that the police needed to hear his side of the story, and the officer offered to pick up St. John. St. John was sobbing, and he stated that he was scared, that he had not been in much trouble, and that he did not want to go to jail. Olmstead kept repeating that the police needed to talk to St. John. St. John told Olmstead that he would return to Kelsie's apartment in 20 minutes, but St. John did not come. Officer Olmstead later went to Zack's apartment in an attempt to locate St. John, but St. John was not there.

{¶ 30} At approximately 3:00 p.m., Detective Elizabeth Alley, who was assigned to the Child Advocacy Center, went to Kelsie's residence to transport Kelsie's and St. John's infant to the hospital to check on the child's welfare. Detective Alley walked through the residence and looked for anything that might have evidentiary value. She noticed a stain on the fitted sheet in the main bedroom; the sheet also appeared to have small particles of drywall on it. Officers also noted a hole in the drywall in Brayden's room and collected a sample of the drywall. Subsequent laboratory analysis indicated that the particles on the sheet did not match the drywall sample.

{¶ 31} Detectives Brad Daughtery and Tom Cope, members of a homicide taskforce, responded to the apartment complex and offered their assistance. They spoke with St. John's father, Bryan, and obtained a cell phone number for St. John. Both detectives repeatedly tried to contact St. John by phone, and Detective Cope reached St. John at approximately 4:50 p.m. St. John told the detectives that he had not done anything wrong, and the detectives asked St. John to come talk with them. St. John agreed to the meet the detectives at a grocery store near the apartment complex, but he did not show.

{¶ 32} At 5:30 p.m., Detective Alley took possession of Kelsie's phone. In the late afternoon, Detectives Hollie Bruss and James Harden interviewed Kelsie at the police station. She was returned to the hospital afterward.

{¶ 33} Officer Philip Watts came on duty at 4:00 p.m. on February 13, and he attempted to locate St. John. At 9:00 or 10:00 p.m., he spoke with Kelsie at Dayton Children's about St. John's possible whereabouts. Kelsie stated that St. John could possibly be at his brother's or father's residence, and she pointed out Zack's and Bryan's addresses on Google maps.

{¶ 34} Officer Watts went with Officer Bartlett to Zack's residence; a woman at that location initially told the officer that she did not know anyone by St. John's name. Officer Stewart spoke with Bryan about whether St. John was at his (Bryan's) apartment. Bryan told the officer that he had not seen his son, and he allowed officers to search his apartment. Officers Watts and Bartlett again tried to make contact with the residents of Zack's apartment. Janie told the officers that they were scaring the children. Bryan asked the officers for 10 minutes and said that he would come out with St. John. Bryan went inside Zack's apartment and came out with St. John approximately 10 to 15 minutes later.

{¶ 35} At approximately 2:15 p.m. on February 14, 2017, Officer Watts placed St. John in his cruiser and took St. John to the police station. (*See* State's Ex. 55.) On the way, St. John asked how his son was. Officer Watts responded that his son was currently in ICU with his mother. St. John stated that they were not talking about the same child; St. John asked about his infant son and said that "if he is with his mom then he is okay." St. John did not ask about Brayden's condition.

{¶ 36} Detective Bruss was alerted that St. John had been located and taken to the police station, and she returned to the station to interview him. After waiving his *Miranda* rights, St. John spoke with Bruss. St. John stated that Brayden woke up crying at 7:30 or 8:00 a.m., and Kelsie put Brayden in their bed. Brayden fell asleep. Kelsie left for traffic court, and St. John went into the living room, played a video game for a while, and watched television. St. John initially claimed that the children were asleep the entire time Kelsie was not home. When Kelsie came home from court, they watched two movies and took a shower. After the showering, Kelsie noticed it was close to 1:00 p.m., and St. John told Kelsie that she should wake up Brayden. When Kelsie checked on Brayden afterward, he wasn't breathing. (State's Ex. 93.)

{¶ 37} Detective Bruss testified that St. John's statements were significant, because they indicated that Brayden was healthy when Brayden awoke on February 13, 2017. The detective stated that St. John did not initially say anything about Brayden's spitting or throwing up that morning. When asked about the text message to Kelsie about Brayden's vomiting, St. John stated that Brayden had some spit, and St. John just wiped off Brayden's face and then Brayden went back to sleep. St. John later told the detective that he rubbed Brayden's head, which Brayden liked, and that Brayden said he was sleepy.

{¶ 38} On February 16, 2017, officers executed a search warrant at Zack's apartment, looking for electronic devices. Among other devices found around the apartment, they located a disassembled cell phone on top of a tall curio cabinet; the small SIM (memory) card for the device was located in a picture frame. The disassembled device belonged to St. John.

{¶ 39} On March 4, 2017, Dustin Middleton, an inmate in the same pod as St. John at the Montgomery County Jail, introduced himself to St. John during recreation. The two spoke about the offenses for which they were incarcerated. Middleton later asked jail personnel to speak with the detectives on St. John's case, and he submitted a written request form (a "kite").

{¶ 40} On March 20, 2017, Middleton met with Detectives Bruss and Alley, and he relayed to the detectives what St. John had said. According to Middleton, St. John said that at approximately 7:00 a.m. on the day in question, his (St. John's) girlfriend had to leave for court, and she put "the baby" in bed with him. St. John put on *Finding Nemo* or *Finding Dory* to try to calm down the child, but the child continued to cry. Middleton testified that St. John next stated that "the baby ended up spitting up or throwing up something and he [St. John] got aggravated because I guess they, him and his girlfriend[,] had argued prior to the event."

{¶ 41} Middleton continued: "From there, he said the baby kept continuing to cry and that's when he grabbed the baby by the face and slammed the baby's head into the wall. And then grabbed the baby and shook the baby and told him to shut the f**k up and then tossed him on the ground. Well, he went out to smoke a cigarette prior to doing that." (Tr. at 624.) Middleton said that St. John told him that, when he (St. John) came back in, the child was not crying or moving, and St. John picked up the child and put him in bed. St. John told Middleton that his girlfriend returned home a few hours later, that she and St. John watched a movie and smoked marijuana, and that his girlfriend found the child unresponsive after the movie.

{¶ 42} On December 3, 2017, St. John made a telephone call from the

Montgomery County Jail and spoke with family members. During the phone call, St. John acknowledged to a brother that he had spoken with Middleton at the jail. (*See* State's Ex. 91.)

II. Sufficiency and Manifest Weight of the Evidence

{¶ 43} In his first assignment of error, St. John claims that his convictions were based on insufficient evidence and against the manifest weight of the evidence.

{¶ 44} "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997). A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." *Id*.

{¶ 45} In contrast, when reviewing an argument challenging the weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 46} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684 (Aug. 22, 1997). The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶ 14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin* at 175.

{¶ 47} In reviewing challenges based on the sufficiency and/or manifest weight of the evidence, we are required to consider all of the evidence admitted at trial, regardless of whether it was admitted erroneously. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284; *State v. Rosales*, 2d Dist. Montgomery No. 27117, 2018-Ohio-197, ¶ 16, citing *State v. Johnson*, 2015-Ohio-5491, 55 N.E.3d 648, ¶ 95 (2d Dist.).

A. Sufficiency and Manifest Weight of the Evidence: Felony Murder, Involuntary Manslaughter, Endangering Children (Serious Physical Harm)

{¶ 48} On appeal, St. John acknowledges that Brayden sustained serious injuries that led to his death, but he claims that the State failed to present sufficient evidence that he – St. John – inflicted those injuries. He asserts that the State's theory was that St. John was the only person who could have done it. St. John claims, however, that medical science could not be certain about when the injuries occurred, where they occurred, how they occurred, and who inflicted the injuries. He emphasizes that both he (St. John) and Kelsie were with Brayden between Sunday evening (February 12) and Monday afternoon (February 13), and he argues that the State's theory that he was the perpetrator was speculative.

{¶ 49} Construing the evidence in the light most favorable to the State, we find sufficient evidence that St. John inflicted the injuries to Brayden that led to his death. A defendant may be convicted based on direct evidence, circumstantial evidence, or both. *State v. Donley*, 2017-Ohio-562, 85 N.E.3d 324, ¶ 178 (2d Dist.). Circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 482 (1991), citing *State v. Nicely*, 39 Ohio St.3d 147, 529 N.E.2d 1236 (1988); *State v. Bennett*, 2d Dist. Montgomery No. 24576, 2012-Ohio-194, ¶ 11. In fact, in some cases, "circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence." *State v. Jackson*, 57 Ohio St.3d 29, 38, 565 N.E.2d 549 (1991).

{¶ 50} Here, the State presented evidence that Brayden was behaving normally on Sunday, February 12, 2017, and upon awaking on the morning of Monday, February 13, 2017. Kelsie testified that Brayden told her that he needed to use the bathroom, and that she and Brayden then used the bathroom. Kelsie placed Brayden in her bed; he whined that he did not want Kelsie to leave. There is no indication that Brayden was injured prior to Kelsie's leaving for the courthouse. St. John's statements to Detective Bruss also indicated that Brayden was fine when Kelsie left. The State's evidence established that St. John was alone with Brayden and his infant son until Kelsie returned at approximately 10:30 a.m.

{¶ 51} Based on the CT scan and his observations of fresh blood during surgery, Dr. Kamian concluded that Brayden's injuries would have been inflicted approximately three to six hours before the surgery, which began at approximately 2:10 p.m. Dr. Shott testified that the injury to Brayden's abdomen likely would have caused Brayden to have

abdominal pain and to vomit; St. John texted Kelsie at shortly after 9:00 a.m. that Brayden had spit or thrown up.

{¶ 52} Dr. Vavul-Roediger testified that Brayden would have become "immediately symptomatic" from the head injury. She indicated that Brayden would not have been behaving normally, interactive, talkative, and walking. The State's evidence indicated that Brayden could have been lucid for a period of time after the brain injury, but both Dr. Vavul-Roediger and Dr. Shott stated Brayden would have become unconscious from the brain swelling. St. John's statements to Detective Bruss indicated that Brayden expressed that he was sleepy and that he remained in bed. Kelsie testified that when she returned at approximately 10:15 a.m., she observed that Brayden appeared to be asleep, and he remained in the same position until she found him, unresponsive, shortly before 1:00 p.m.

{¶ 53} In short, although there was no direct evidence that St. John inflicted the injuries to Brayden, there was substantial circumstantial evidence that he committed the offenses. The State's evidence regarding Brayden's behavior on February 12-13, 2017, the nature of his injuries, the expected symptoms of the injuries, and the timing of the injuries established that Brayden's injuries occurred during the period of time when Kelsie was addressing her traffic court issues and when St. John was the only adult in the apartment with Brayden. St. John's actions in leaving the apartment as the police arrived and in avoiding contact with the police for the rest of that day could have indicated a consciousness of guilt on St. John's part. In addition, Middleton testified that St. John later confessed to slamming Brayden's head against the wall and throwing Brayden to the ground after Kelsie left for traffic court; Middleton provided specific details of what

allegedly had occurred in the apartment, details that were not released to the public by the police and were consistent with other evidence at trial. St. John acknowledged in a subsequent phone call to family members that he had spoken with Middleton. The State's evidence was sufficient to support the jury's guilty verdicts on two counts of felony murder, involuntary manslaughter, felonious assault, and endangering children (serious physical harm).

{¶ 54} St. John further claims that the jury's verdicts were against the manifest weight of the evidence. He argues that the State's lay witnesses, particularly Kelsie and Middleton, were biased and not credible, that the medical expert's opinion as to the time frame of the injuries was "not 100% certain – or within a reasonable degree of medical certainty," and that there was no physical evidence to support the State's theory of the case.

{¶ 55} At trial, defense counsel cross-examined Kelsie extensively regarding her prior statements to the police and to medical personnel, highlighting that many of her prior statements differed from her trial testimony. St. John emphasized, for example, that Kelsie failed to the tell the police that she and St. John had argued, that Kelsie told Detective Bruss that St. John "never put his hands on Brayden," that St. John "rarely even disciplined Brayden," and that she was the only one that had ever "smacked Brayden."

{¶ 56} Several of St. John's family members testified about Kelsie's behavior upon finding Brayden. Janie testified that Kelsie was kneeling at Brayden's feet, staring at Brayden, while she (Janie) attempted CPR. Janie noted that Kelsie did not immediately follow medics to the ambulance and that medics initially believed that she (Janie) was Brayden's mother; Janie and Zack testified that Kelsie grabbed her shoes and phone and

gave St. John a kiss before getting into the ambulance. Neither Missy nor Zack heard St. John say anything about going to prison.

{¶ 57} In addition, St. John presented testimony from Dr. Geoffrey Negin, a diagnostic radiologist and neuroradiologist, that, based on the CT scan alone, Brayden's injuries occurred no later than 12 to 24 hours before the CT scan, which began at approximately 1:30 p.m. Dr. Negin testified that the blood appeared very white on the scan, indicating that it was from an acute (within the past 24 hours) event. (Tr. at 1031.) Dr. Negin acknowledged that the injury could have occurred sooner, within 8 hours of the scan. However, he testified that nothing in the CT scan itself indicated that the injury occurred sooner than 8 hours before the scan. Dr. Negin further testified that the presence of fresh blood would not change his opinion regarding the time frame. (Tr. at 1034-1035.) He stated that subdural hematomas commonly bleed intermittently in the first 24 to 36 hours. (Tr. at 1033-1034.)

{¶ 58} Reviewing the entire trial, we cannot conclude that the jury lost its way when it found St. John guilty of two counts of felony murder, felonious assault, involuntary manslaughter, and endangering children (serious physical harm). In reaching its verdicts, the jury was free to believe all, part, or none of the testimony of each witness and to draw reasonable inferences from the evidence presented. *State v. Baker*, 2d Dist. Montgomery No. 25828, 2014-Ohio-3163, ¶ 28.

{¶ 59} St. John challenges the credibility of Kelsie and Middleton, in particular. Through cross-examination, St. John demonstrated that Kelsie provided inconsistent statements to medical personnel and the detectives about her relationship with St. John, St. John's relationship with Brayden, and what occurred on the morning of February 13,

2017. However, it was the province of the jury to evaluate Kelsie's credibility and to determine what version of events to believe.

{¶ 60} As to Middleton, Middleton provided detailed testimony about what occurred in the apartment while Kelsie was addressing her traffic-related matter. Middleton's version of the events was generally consistent with Brayden's injuries and symptoms and the timeline of events as provided by other witnesses. Moreover, the State presented evidence via a recorded jail telephone call by St. John that St. John admitted to telling Middleton details about the incident. We cannot conclude that the jury lost its way in apparently believing Middleton's testimony.

{¶ 61} The jury was presented competing evidence regarding the timing of Brayden's injuries. The State presented evidence from Dr. Kamian that the injury likely occurred between 8:10 a.m. and 11:10 a.m. on February 13, 2017; Dr. Vavul-Roediger did not provide a specific time frame, but likewise testified that the swelling would have caused Brayden's bodily functions to shut down "rapid[ly], within a few hours, clearly." Dr. Negin testified to a larger window of time based solely on the CT scan, indicating that the injuries could have occurred as early as the early-morning hours of February 12. The evidence reflected that St. John was alone with Brayden between 8:00 a.m. and 10:30 a.m.; Kelsie and Chance were present in the apartment at other times during the window provided by Dr. Negin. Again, it was the province of the jury, as the factfinder, to weigh this evidence and to determine what evidence to believe.

{¶ 62} Upon review of the trial as a whole, we cannot conclude that the jury "lost its way" in crediting the version of events presented by the State and in finding St. John guilty of felony murder, felonious assault, involuntary manslaughter, and endangering

children (serious physical harm).

B. Sufficiency and Manifest Weight: Endangering Children (Duty of Care)

{¶ 63} St. John further claims that the State failed to present sufficient evidence that he committed endangering children (serious physical harm), in violation of R.C. 2919.22(A). That statute provides: "(A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age * * *, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."

{¶ 64} To establish child endangering under R.C. 2919.22(A), the State must prove that the defendant acted recklessly. *State v. McGee*, 79 Ohio St.3d 193, 195, 680 N.E.2d 975 (1997); *State v. Hardy*, 2017-Ohio-7635, 97 N.E.3d 838, ¶ 57 (2d Dist.). "A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

{¶ 65} The Ohio Supreme Court has described acts constituting an offense under R.C. 2919.22(A), stating:

> It is not necessary to show an actual instance or pattern of physical abuse on the part of the accused in order to justify a conviction under R.C. 2919.22(A). Affirmative acts of torture, abuse, and excessive acts of corporal punishment or disciplinary measures are expressly covered under division (B) of the section. Division (A) is concerned with circumstances of neglect as is indicated by the Committee Comment to R.C. 2912.22. Manifestly, such neglect is characterized by acts of omission rather than

> acts of commission. *See, e.g., State v. Sammons* (1979), 58 Ohio St.2d 460, 391 N.E.2d 713. Accordingly, an inexcusable failure to act in discharge of one's duty to protect a child where such failure to act results in a substantial risk to the child's health or safety is an offense under R.C. 2919.22(A).

State v. Kamel, 12 Ohio St.3d 306, 308-309, 466 N.E.2d 860 (1984).

{¶ 66} Construing the evidence in the light most favorable to the State, St. John admitted to Middleton that he grabbed Brayden, slammed Brayden's head against a wall, shook Brayden, and threw him to ground. St. John told Middleton that he went outside to smoke a cigarette and returned to find Brayden on the floor, not moving or crying. St. John picked up Brayden and put him in bed, and Brayden's condition was not discovered until almost 1:00 p.m., several hours later. According to the State's medical witnesses, Brayden's injuries should have been immediately apparent and his condition became increasingly worse as the intracranial pressure increased. However, St. John took no steps to obtain medical treatment for Brayden either before Kelsie returned to the apartment or in the more than two hours between Kelsie's return and her discovery of Brayden's dire condition. The State's evidence was thus sufficient to demonstrate that St. John's failure to seek medical care for Brayden was reckless and created a substantial risk to Brayden's health. Moreover, upon review of the entire trial, we cannot conclude that the jury lost its way when it found St. John guilty of endangering children under R.C. 2919.22(A).

{¶ 67} St. John's first assignment of error is overruled.

III. Admission of Expert's Testimony

{¶ 68} In his second assignment of error, St. John claims that the trial court erred in allowing Dr. Kamian, the pediatric neurosurgeon, to state his opinion that the presence of fresh blood during the surgery reflected that the injury occurred between 3 to 6 hours before the surgery, not 8 to 10 hours before as he testified was reflected by the CT scan taken at the hospital. St. John argues that he was not informed of this reduced timeline prior to trial.

{¶ 69} At trial, Dr. Kamian testified that, based on the CT scan alone, the trauma to Brayden's head would have occurred not more than 8 to 10 hours prior to taking the scan. (Tr. at 794.) Dr. Kamian further testified that, during the surgery, he observed that "there was a still very fresh blood, which means blood did not have time to make a clot, so it was a hematoma of two densit[ies]: one was a clot which is formed already, the second one is an acute clot which was still bleeding." (Tr. at 793.) Dr. Kamian explained that the CT scan cannot differentiate between the fresh blood and the clotted blood. (Tr. at 793.)

{¶ 70} When the prosecutor asked Dr. Kamian if the presence of fresh blood would shorten the time frame, defense counsel objected. Counsel argued that, while Dr. Kamian's expert report indicated that the injury likely occurred 3 to 6 hours prior to surgery, the report did not mention that the 3-to-6-hour time frame was due to the presence of fresh blood. The trial court overruled the objection on the ground that counsel had Dr. Kamian's report indicating the relevant time frame, but failed to file a motion in limine regarding that opinion. (Tr. at 797.) The court concluded that counsel's objection was untimely. After the prosecutor completed her examination of Dr. Kamian, the trial court informed counsel that "for the reasons advanced by the State at the previous

sidebar, the basis for this ruling is also that regardless of the timeliness of any objection to this, the Court finds * * * that the report was sufficient to satisfy the Rule 16 requirements." (Tr. at 800.)

{¶ 71} Crim.R. 16(K) provides:

> An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

{¶ 72} The trial court has discretion to regulate discovery in a manner consistent with Crim.R. 16. Crim.R. 16(L); *State v. Mobley*, 2d Dist. Montgomery No. 26858, 2016-Ohio-4579, ¶ 23. If it comes to the court's attention that a party has not complied with Crim.R. 16 or the court's discovery order, the trial court may "order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances." Crim.R. 16(L)(1).

{¶ 73} At trial, defense counsel acknowledged that he had received a copy of Dr. Kamian's report. Indeed, on December 5, 2017, defense counsel filed a motion in limine related to Dr. Kamian's anticipated testimony. The motion stated that counsel had received an email that day (December 5), indicating that Dr. Kamian would be giving the

following opinions:

> 1) He observed Brayden to have suffered a severe skull fracture and a severe subdural hematoma.
>
> 2) Brayden's skull fracture and subdural hematoma in this case were both acute, likely caused within 3-6 hours prior to presentation to neurosurgery.
>
> 3) The location of the skull fracture, across the occiput, would have required significant trauma as the occiput is the strongest bone in the skull.
>
> 4) The skull fracture could not have been caused by a fall.
>
> 5) The skull fracture that he observed back in 2015 played no role in the fracture seen in 2017.
>
> 6) The viral infection Brayden suffered in 2015 played no role in the injuries seen in 2017.

Defense counsel stated that the doctor's second opinion related to the timing of Brayden's injuries was "very concerning because it, for the first time in the case, puts a time frame on the victim's injury. Testimony as to the timing of the injury is important because it could place the time of the injury during a period when the Defendant was alone with the victim and eliminates another perpetrator. The Defendant would have asked for an expert to challenge this opinion had he timely kn[own] of this opinion."

{¶ 74} On December 7, 2017, St. John sought a continuance of the trial date (December 11), stating that additional time was "necessary to obtain an expert to review the victim's medical records and the recently disclosed opinion's [sic] of the State's witness Dr. Kamian." St. John indicated that the State had been advised of his request and it had no objection.

{¶ 75} In response to St. John's motions, the State informed the trial court that Dr. Kamian had clarified the time window during a pretrial conference with prosecutors on December 5, 2017, and that, in an abundance of caution, the prosecutors had forwarded that information to defense counsel. The State emphasized that Dr. Kamian had consistently indicated that Brayden's injuries were "acute." The State asked the trial court to overrule the motion in limine, but indicated that it did not object to a continuance of the trial date so that defense counsel could review the updated information.

{¶ 76} On December 12, 2017, the trial court continued the then-scheduled December 11, 2017 trial date. St. John's trial ultimately began on April 2, 2018.

{¶ 77} The record reflects that, although Dr. Kamian did not initially mention the 3-to-6-hour window in his initial report, St. John's counsel was timely notified of Dr. Kamian's opinion for purposes of trial. All of Brayden's medical records from his February 13, 2017 admission to Dayton Children's Hospital had been provided to defense counsel; those records included a summary of the surgical procedure that Dr. Kamian performed. (*See* Court's Ex. IV.) Defense counsel also received a summary prepared by Dr. Kamian of his findings. The summary indicated that his "intra-operative note is describing all of my findings in detail." The intra-operative note described multiple areas of "subgaleal bleeding and also intradermal bleeding all over the frontal scalp." The summary further noted that the CT scan reflected "an Acute Subdural hematoma on the left side with significant midline shift. This was an acute subdural hematoma and c*annot be older than few hours from the time of impact*." (Emphasis added.)

{¶ 78} We find no abuse of discretion in the trial court's conclusion that Dr. Kamian's expert opinions were adequately disclosed to defense counsel prior to trial.

Defense counsel was aware, several months prior to trial, that Dr. Kamian would opine that Brayden's injuries were inflicted 3 to 6 hours prior to surgery. Defense counsel was notified via Dr. Kamian's post-operative report of Dr. Kamian's observations during the surgery, including the presence of multiple areas of bleeding, and that the subdural hematoma on the left side could not be older than a few hours from the time of impact. The trial court thus did not abuse its discretion in permitting Dr. Kamian to testify to the 3-to-6-hour time frame at trial.

{¶ 79} St. John's second assignment of error is overruled.

III. Ineffective Assistance of Counsel

{¶ 80} In his third assignment of error, St. John claims that his trial counsel rendered ineffective assistance in three respects. First, St. Johns claims that his trial counsel should have objected to testimony by Kelsie's siblings that they told St. John to "turn himself in." Second, St. John claims that counsel should have offered additional evidence about Brayden's medical history, which might have indicated that Brayden incurred the skull fracture through no fault of anyone. Third, St. John claims that his attorney should have played the entire jail conversation between St. John and his brother, when the State played only an excerpt for the jury.

{¶ 81} To establish ineffective assistance of counsel, a defendant must demonstrate both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the outcome of the case would have been different. *See Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989).

{¶ 82} Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland* at 688. A defendant is entitled to "reasonable competence" from his or her attorney, not "perfect advocacy." *See Maryland v. Kulbicki*, 136 S.Ct. 2, 5 (2015), citing *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. *State v. Cook*, 65 Ohio St.3d 516, 524-525, 605 N.E.2d 70 (1992); *State v. Fields*, 2017-Ohio-400, 84 N.E.3d 193, ¶ 38 (2d Dist.).

A. Testimony by Chelsie and Tyler

{¶ 83} First, we cannot conclude that trial counsel provided ineffective assistance when he failed to object to testimony by Chelsie and Tyler that they told St. John to turn himself in. Numerous other witnesses, including several police officers, testified that they attempted to contact St. John and to convince him to talk to the police, but that St. John avoided the police until the early morning hours of February 14, 2017. Chelsie and Tyler's testimony regarding similar statements to St. John were generally cumulative evidence of St. John's unwillingness to talk to the police. Upon review of the evidence as a whole, there is no reasonable probability that these statements by Chelsie and Tyler affected the outcome of St. John's trial. In addition, in testifying about their communication with St. John, both Chelsie and Tyler testified that St. John denied any wrongdoing, which was beneficial to St. John.

B. Additional Medical History

{¶ 84} Second, trial counsel did not act deficiently when he failed to offer evidence

that Brayden had suffered a prior skull fracture in November 2015.

{¶ 85} On November 13, 2017, defense counsel filed a motion in limine, asking the court to prohibit the introduction of evidence of an incident concerning Brayden in November 2015. Counsel argued that the incident was not admissible under Evid.R. 404(B) and should be excluded under Evid.R. 403, because any probative value was substantially outweighed by a danger of unfair prejudice. The motion provided the following facts regarding the incident.

> On November 19, 2015, Brayden [ ], the victim in this case, was taken to Children's Hospital with bruising. He was examined and found have a subacute skull fracture along with bruising to his face and neck. The doctor stated that his injuries were consistent with abuse. Brayden's mother was interviewed and told the police she found Brayden behind his playpen when she woke up that morning. It was then that she notice[d] the bruises on his face and neck. She and the Defendant had slept in the same room with Brayden that previous night. The Defendant was arrested and questioned by detectives. He told them he had got up with Brayden in the middle of the night, changed his diaper and fed him. When Brayden fell asleep, the Defendant put him back in his playpen. He also saw him out of the playpen the next morning when he awoke. The Defendant denied hurting Brayden. The interview of the Defendant with the detectives cannot be located. * * * The Defendant was never charged for injuring Brayden.

{¶ 86} In the motion in limine, St. John's counsel noted that the State might argue

that the November 2015 incident was proof of the identity of the perpetrator or of evidence of a scheme, plan, or system of St. John's causing harm to Brayden. Counsel argued against these possible arguments, noting that the prior skull fracture was subacute, meaning that it was already healing, that it was unknown when the prior fracture occurred, and it was never proven that St. John had caused Brayden's prior injury.

{¶ 87} The trial court apparently granted the motion in limine, as no evidence of the 2015 incident was presented at trial.

{¶ 88} On appeal, St. John claims that the outcome of his trial would have been different had the jury been told about Brayden's complete medical history and the fact that no one was charged for the prior skull fracture. St. John states that Brayden's medical history showed that he was underweight and had lost weight and height between 2015 and 2017, that Brayden always had some injuries and was "clumsy," and that he was still having occupational therapy for walking and coordination problems stemming from his prior viral infection. St. John claims that "just like in 2015, it is more than likely that with this additional medical evidence, the jury could have believed that [Brayden] could have suffered a second skull fracture with no fault on anyone, just like before."

{¶ 89} Defense counsel did not act deficiently when he failed to offer evidence of the 2015 incident, for several reasons. First, although no one was charged for Brayden's November 2015 injuries, Brayden's medical records clearly indicated a medical conclusion that the November 2015 skull fracture and additional injuries resulted from physical abuse. Had defense counsel attempted to introduce evidence of the 2015 skull fracture and to present it as an accidental injury, the State might have sought to introduce evidence that the November 2015 injury was also from physical abuse and that St. John

was suspected of causing that prior skull fracture. Dr. Kamian's summary of the November 19, 2015 CT scan noted that there were signs of healing in the fracture line at that time and that it was "impossible to say the exact time of trauma but fracture usually shows the healing about 2-3 weeks after the trauma." The State could have argued that no one was charged in November 2015 simply because the exact timing of the injury could not be ascertained. Evidence of a pattern of physical abuse to Brayden would have been more prejudicial than helpful to St. John's current case.

{¶ 90} Second, there was no evidence at trial to support St. John's contention that Brayden suffered an accidental injury on February 13, 2017. Dr. Shott and Dr. Vavul-Roediger testified that the skull fracture resulted from the application of "significant" force and described the fracture as "massive." Both Dr. Vavul-Roediger and Dr. Shott indicated that the skull fracture would more typically be seen with a high-speed motor vehicle accident or a fall from a very significant height/tall building (four or five stories). Dr. Vavul-Roediger concluded that Brayden "had a severe brain trauma and that this was the result of inflicted head trauma and physical maltreatment," i.e. physical abuse. (Tr. at 740.) Dr. Negin, St. John's medical expert, agreed that Brayden's injuries were indicative of inflicted, as opposed to accidental, trauma. (Tr. at 1043.) He stated that Brayden's injuries were "due to direct blunt force trauma of the head being slammed against something and causing the skull to break." (Tr. at 1044.)

{¶ 91} Third, the record indicates that Brayden's death was unrelated to his prior head injury. Brayden's medical records indicated that the 2015 skull fracture had completely healed by February 2017. Dr. Kamian's supplemental report from December 2017 indicated his opinion that "[t]he skull fracture that he observed back in 2015 played

no role in the fracture seen in 2017." Accordingly, the record suggests that defense counsel could not have reasonably argued that Brayden's prior skull fracture was relevant to Brayden's February 2017 injuries.

{¶ 92} Trial counsel's strategy at trial was to demonstrate that Brayden's injuries could have occurred while both St. John and Kelsie were alone with Brayden and that it was Kelsie who actually harmed her child. This trial strategy was reasonable, and counsel did not act deficiently in electing not to assert that Brayden incurred accidental injuries in February 2017.

C. Failure to Play Entire Phone Call

{¶ 93} St. John further argues that his trial counsel acted deficiently when he failed to play an entire telephone conversation between St. John and family members that occurred in December 2017, while St. John was jailed pending trial.

{¶ 94} During Detective Bruss's testimony, the State played a portion of a recorded telephone call that St. John made from the Montgomery County Jail to family members on December 3, 2017. In the excerpt of the call that was played for the jury, St. John told his brother that Middleton "knows a lot of details, that's because I f***ing told him, like a ret**d. That was my fault." (State's Ex. 91 at 14:25-14:33.) St. John argues that his counsel should have played the entire conversation for the jury "so that it would be known to the jury that [St. John] never admitted guilt, but only admitted to speaking with Middleton and only told him about the evidence in the case."

{¶ 95} St. John's entire phone call with family members is approximately 21 minutes long. (State's Ex. 91.) The initial portion of St. John's phone call seems to be with his mother, and they discuss the custody of St. John's child and St. John's pending

case. Approximately 9 minutes into the call, St. John began to speak with one of his brothers. They also talked about different witnesses' statements and the strength of St. John's case.

{¶ 96} After hearing the entire telephone call, we conclude defense counsel did not perform deficiently in failing to play the entire recording. The vast majority of the conversation concerned St. John's and his family's opinions about specific witnesses and the case as a whole, none of which was relevant or admissible.

{¶ 97} During the phone call, St. John did not expressly admit to confessing to Middleton, and he claims that Middleton told "lies" to the police. Defense counsel elicited this information during his cross-examination of Detective Bruss. He asked:

> Q: * * * Isn't it true in that phone call Luke [St. John] disputes some of the things that Mr. Middleton says about the accuracy where the injury occurred and that type – and that fact?
>
> A: I – I believe so.
>
> * * *
>
> Q: Detective, isn't it true that in regards to that telephone conversation and – and Mr. Middleton's testimony that he gave that all Luke [St. John] does is – is admit that he talked to Dustin Middleton?
>
> A: He admits talking to Dustin Middleton, yes.
>
> Q: Right, but that's it as far as the – that's all he does is just say, I – yeah, I talked to him, was my bad, whatever, correct?
>
> A: Yes.

(Tr. at 861, 862-863.) Defense counsel acted reasonably in clarifying St. John's

statements during the telephone call in this manner.

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

IV. Jury Instruction on Flight

{¶ 99} In his fourth assignment of error, St. John claims that the trial court erred in providing a jury instruction on flight.

{¶ 100} At the outset, St. John did not object to the court's jury instructions. (*See* Tr. at 1144, indicating that the parties agreed to the written jury instructions.) Accordingly, St. John has forfeited all but plain error with respect to the jury instructions. In order to constitute plain error, the error must be an obvious defect in the trial proceedings, and the error must have affected St. John's substantial rights. *State v. Norris*, 2d Dist. Montgomery No. 26147, 2015-Ohio-624, ¶ 22; Crim.R. 52(B). Plain error should be noticed "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus; *State v. Singleton*, 2d Dist. Montgomery No. 26889, 2016-Ohio-5443, ¶ 45.

{¶ 101} "When reviewing the trial court's jury instructions, the proper standard of review is whether the trial court's decision to give or exclude a particular jury instruction was an abuse of discretion under the facts and circumstances of the case." (Citation omitted.) *State v. Fair*, 2d Dist. Montgomery No. 24388, 2011-Ohio-4454, ¶ 65. "A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary." (Citation omitted.) *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

{¶ 102} "A trial court's decision to instruct the jury on flight is not an abuse of

discretion if the record contains sufficient evidence to support the charge." (Citations omitted.) *State v. Grissom*, 2d Dist. Montgomery No. 25750, 2014-Ohio-857, ¶ 31. "Flight means some escape or affirmative attempt to avoid apprehension. It can take the form of fleeing from the police or eyewitnesses to changing or disguising one's physical characteristics after the fact." *Id*., quoting *State v. Wesley*, 8th Dist. Cuyahoga No. 80684, 2002-Ohio-4429, ¶ 19. Evidence of flight is admissible as tending to show consciousness of guilt. *E.g., id.*; *State v. Wood*, 2d Dist. Clark No. 2010 CA 42, 2011-Ohio-2314, ¶ 30. However, "[e]vidence of flight to support an inference of guilt should generally be limited to situations when the activities associated with flight occur at a time and place near the criminal activity for which the defendant is on trial." *State v. Frock*, 2d Dist. Clark No. 2004 CA 76, 2006-Ohio-1254, ¶ 57.

{¶ 103} At the State's request, the trial court gave the following instruction on flight:

> Testimony has been admitted indicating that the Defendant fled the scene. You are instructed that the Defendant's conduct alone does not raise a presumption of guilt, but may tend to indicate the Defendant's consciousness or awareness of guilt. If you find that the facts do not support that the Defendant fled the scene or if you find that some other motive prompted the Defendant's conduct or if you are unable to decide what the Defendant's motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the Defendant fled the scene and if you decide that the Defendant was motivated by a consciousness or awareness of guilt, then you may but are not required to consider that evidence in deciding whether the Defendant is

guilty of the crimes charged. You alone will determine what weight, if any, to give this evidence.

(Tr. at 1114; Court's Ex. V; *see also* 2 Ohio Jury Instruction 409.13.)

{¶ 104} St. John argues that the flight instruction was inappropriate, because he could not explain at trial why he was scared to talk to the police without raising an uncharged prior accusation that he had physically abused Brayden.

{¶ 105} We find no error, let alone plain error, in the trial court's decision to provide a flight instruction. There was substantial evidence that St. John was present in his apartment when Brayden was found to be unresponsive and not breathing, that he remained in the apartment until Brayden was taken by medics to the hospital, and that he left the apartment – while the others stayed – as police officers responded to the apartment. In addition, multiple law enforcement officers and family members testified that they attempted to contact St. John or actually spoke with St. John in an effort to convince St. John to speak with the police. St. John twice failed to show when he had arranged to meet with officers at different locations. St. John was found at Zack's apartment approximately 13 hours after Brayden was taken to the hospital; St. John was escorted out of Zack's apartment and to the police by his father. The jury could have reasonably concluded that St. John's actions in leaving the apartment and avoiding the police constituted flight.

{¶ 106} Moreover, we have commented that an instruction on flight is "all but innocuous." *State v. White*, 2015-Ohio-3512, 37 N.E.3d 1271, ¶ 51 (2d Dist.). We reasoned: "[The flight instruction] explains the limited use of the flight evidence and clearly says that the jury may consider [the defendant's] flight only if it finds that he was

'motivated by a consciousness or awareness of guilt.' And even if the jury finds that this motivated him, the instruction says that it still is not required to consider the flight evidence. We do not believe that giving the jury this particular instruction could have affected the outcome of the trial." *Id*.

{¶ 107} St. John's fourth assignment of error is overruled.

V. Prosecutorial Misconduct

{¶ 108} In his fifth assignment of error, St. John claims that the prosecutors engaged in misconduct by asking for an instruction on flight, by presenting testimony of a jailhouse informant, by "not play[ing] fair" with the medical expert testimony regarding when the injury occurred, and by failing to point out that Brayden had a prior head injury.

{¶ 109} The test for prosecutorial misconduct is whether the prosecutor's conduct was improper and, if so, whether that conduct prejudicially affected substantial rights of the accused. *State v. Martin*, 2d Dist. Montgomery No. 22744, 2009-Ohio-5303, ¶ 15. A prosecutor's conduct during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Williams*, 2d Dist. Montgomery No. 24548, 2012-Ohio-4179, ¶ 51, citing *State v. Apanovitch*, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987). The focus of the inquiry is on the fairness of the trial, not on the culpability of the prosecutor. *State v. Bey*, 85 Ohio St.3d 487, 496, 709 N.E.2d 484 (1999).

{¶ 110} Where it is clear beyond a reasonable doubt that the trier of fact would have found the defendant guilty, even absent the alleged misconduct, the defendant has not been prejudiced, and his conviction will not be reversed. *See State v. Underwood*, 2d Dist. Montgomery No. 24186, 2011-Ohio-5418, ¶ 21. We review allegations of prosecutorial misconduct in the context of the entire trial. *State v. Stevenson*, 2d Dist.

Greene No. 2007-CA-51, 2008-Ohio-2900, ¶ 42, citing *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

{¶ 111} First, we conclude that the prosecutors did not engage in misconduct when they requested an instruction on flight. As discussed above, the evidence at trial supported an inference that, after Brayden was taken to the hospital, St. John fled from the apartment to avoid the police. St. John may have had a motivation other than consciousness of guilt for leaving the apartment and not wanting to talk with the police. Nevertheless, because the evidence at trial reasonably raised an inference that St. John's actions were based on consciousness of guilty, the prosecutors did not act improperly in requesting a jury instruction on flight.

{¶ 112} Second, we find nothing improper in the prosecutor's calling Middleton, a jailhouse informant, to testify at trial. The record does not indicate that the prosecutors knowingly or recklessly offered untruthful testimony by Middleton. Middleton testified in detail about what allegedly occurred on the morning of February 13, 2017, while Kelsie was at traffic court and the Bureau of Motor Vehicles. His testimony included details regarding the incident that had not been released to the public, and his testimony was generally consistent with other witnesses' testimony. By way of example, Middleton testified that St. John indicated that he put on *Finding Dory* or *Finding Nemo* for Brayden; Kelsie testified that she showed of those movies for Brayden and that those were Brayden's favorite movies; Brayden's bedroom was decorated in a *Finding Nemo* theme. Significantly, St. John admitted to his brother that he (St. John) had spoken with Middleton about the incident and that Middleton "knows a lot of details, that's because I f***ing told him, like a ret**d. That was my fault."

{¶ 113} Third, the record does not support St. John's contention that the prosecutors engaged in misconduct with respect to Dr. Kamian's medical opinion about the timing of Brayden's injury. As discussed above, St. John had received a report from the prosecution in December 2017, indicating Dr. Kamian's opinion that Brayden's injuries occurred between 3 and 6 hours before his surgery. Moreover, as discussed above, we agree with the trial court that Dr. Kamian's summary of medical findings, which was provided to defense counsel, adequately placed St. John on notice of the basis for his opinion that Brayden's injuries were caused within that time frame.

{¶ 114} Finally, we find no prosecutorial misconduct in the prosecutor's decision not to inform the jury that Brayden had previously suffered a head injury. To the contrary, the absence of evidence regarding Brayden's prior skull fracture appears to have been beneficial, rather than prejudicial, to St. John's case.

{¶ 115} St. John's fifth assignment of error is overruled.

VI. Cumulative Error

{¶ 116} In his sixth assignment of error, St. John claims that the cumulative effect of all errors at trial deprived him of a fair trial.

{¶ 117} The cumulative error doctrine provides that a conviction may be reversed "where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial[,] even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995); *see State v. Moody*, 2d Dist. Montgomery No. 26926, 2016-Ohio-8366, ¶ 129. Because St. John has not demonstrated that multiple errors occurred, the cumulative error doctrine does not apply.

{¶ 118} St. John's sixth assignment of error is overruled.

VII. Conclusion

{¶ 119} The trial court's judgment will be affirmed.

. . . . . .

DONOVAN, J. and TUCKER, J., concur.

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