[Cite as *State v. Crockett*, 2015-Ohio-2351.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 14AP-242 (C.P.C. No. 12CR-1185) and
v.	:	No. 14AP-248 (C.P.C. No. 13CR-1660)
Johnnie Crockett, III,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 11, 2015

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

James Sweeney Law, LLC, and *James S. Sweeney*, for appellant.

APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Johnnie Crockett, III, appeals the February 27, 2014 judgment of the Franklin County Court of Common Pleas convicting him of felony murder and two counts of endangering children. For the reasons that follow, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶ 2} On February 12, 2012, Whitehall Police Officer Jerry Dillon responded to a report that an eight-month-old child was not breathing. As he approached the reported location of the incident, a woman waved at him and then ran inside an apartment. Officer Dillon ran after the woman into the apartment, in which he found a man, later identified as appellant, kneeling over a child who was wearing only a diaper, had vomit coming out of the right side of his mouth, and appeared to be "lifeless." (Tr. 39.) Upon noticing that

the child was not breathing and did not have a pulse, Officer Dillon began performing chest compressions while simultaneously alerting medical personnel to the situation. A firefighter responded to Officer Dillon's report and told him to bring the child outside, as a medic was arriving on the scene. Officer Dillon ran outside and delivered the child to the medics.

{¶ 3} Whitehall Police Officer Anthony Fields also responded to the incident on February 12, 2012, arriving seconds after Officer Dillon. After Officer Dillon ran out of the house and delivered the child to the medics, Officer Fields remained at the apartment, where he spoke with the child's father, whom he identified as appellant. According to Officer Fields, appellant stated that the child's mother left the child in appellant's sole care while she left the apartment to go to the store. Appellant placed the child in a playpen and covered him with a blanket. Appellant later checked on the child, whereupon he noticed that the child was not breathing. Appellant took the child out of the playpen, removed the child's clothes, splashed water on the child's face, and began blowing in his mouth in an attempt to resuscitate him while he contacted the mother by phone. Appellant stated that the child had no prior health problems. Upon examining the apartment, Officer Fields noticed what appeared to be vomit in the bathroom sink.

{¶ 4} Doug Neighbarger, a paramedic and firefighter employed by the City of Whitehall Division of Fire, also responded to the report of a child having difficulty breathing on February 12, 2012. Within two minutes of being dispatched, he arrived at the scene, received the child, whom he identified as I.C., outside from a police officer, and proceeded to the hospital. En route to the hospital, Neighbarger and three other paramedics, who were in the back of the ambulance with I.C., began working to revive him. I.C. did not have a heartbeat and was not breathing but had no noticeable external injuries. Neighbarger noted that he had a dirty diaper and vomit on his face. The paramedics were able to restore I.C.'s heartbeat through CPR and delivered him to the emergency room at Nationwide Children's Hospital approximately 30 minutes after being dispatched.

{¶ 5} Dr. David Rogers, a pediatric ophthalmologist at Nationwide Children's Hospital, examined I.C. on February 12, 2012 around 7:30 p.m., and identified 15 to 20 retinal hemorrhages in the back of the left eye and 1 retinal hemorrhage in the back of the

right eye. Dr. Rogers testified that "retinal hemorrhages can happen in all kinds of situations and diseases" but that "their location * * * both within the retina and throughout the eye can be very diagnostic of what actually caused them." (Tr. 133-34.) He indicated that I.C.'s injuries were similar to those found in patients who had been in a fatal single impact motor vehicle accident or had fallen from a multiple story building but that the injuries were inconsistent with a short fall, such as from a bed or couch. Because the hemorrhages were located around the optic nerve and along the blood vessels, and there was no other sign of physical trauma to the eye, Dr. Rogers found that abusive head trauma was a potential cause of I.C.'s injury. Based upon I.C.'s history and the lack of other potential causes for the specific injury to I.C.'s eyes, Dr. Rogers concluded that the injury resulted from abusive head trauma.

{¶ 6} Dr. Rogers stated that "[t]here is absolutely no indication from this eye exam that I performed and which is documented photographically there is any possibility that this could be related to increased pressure in [I.C.'s] brain." (Tr. 141.) Dr. Rogers stated that the number, type, and location of the hemorrhages in I.C.'s eyes were inconsistent with an increase in intracranial pressure. Dr. Rogers sought further testing to determine whether I.C. had a bleeding disorder and noted that, if bleeding disorders were not found, then nonaccidental trauma should be considered as a potential cause of I.C.'s injuries. However, Dr. Rogers stated that the types of hemorrhages in I.C.'s eyes were not consistent with a bleeding disorder. Dr. Rogers also stated that he had seen retinal hemorrhages caused by CPR but that the hemorrhages found in I.C.'s eyes were inconsistent with those caused by CPR based upon studies of CPR performed by trained professionals and first responders in the community.

{¶ 7} On February 14, 2012, Dr. Lisa Martin, a pediatric radiologist at Nationwide Children's Hospital, examined an MRI of I.C.'s cervical spine, which is the area from the bottom of the skull to the shoulders, and I.C.'s thoracic spine, which is located near the chest of the patient. Dr. Martin found abnormal fluid in the cervical spine, which indicated a ligament injury. Dr. Martin indicated that this injury resulted from "significant force," such as in a motor vehicle accident or a similar whiplash-inducing event, or in the event of a fall from a third-story window or a tall tree. She also found relatively acute or recent compression fractures in I.C.'s seventh and ninth thoracic

vertebrae, which are located approximately in the middle of the back. Dr. Martin stated that I.C.'s injuries could not have occurred while he was laying flat on his back, as would normally be the case if someone was performing CPR on him. Dr. Martin testified that I.C.'s injuries were consistent with either accidental or nonaccidental trauma but that she could not infer more based upon the radiological exam.

{¶ 8} On February 12, 2012, Dr. Brent Adler, a pediatric radiologist at Nationwide Children's Hospital, reviewed a portable chest x-ray of I.C. which was completed in the emergency department shortly after he arrived at the hospital. Based upon the initial chest x-ray, Dr. Adler was unable to find any problems with I.C.'s lungs and did not observe any fractures at the time. Next, Dr. Adler reviewed a lateral cervical spine film to ascertain whether the bones in the neck were properly aligned and found no abnormalities. Dr. Adler then reviewed a CT scan of I.C.'s head and found acute hemorrhages in the subdural area of the brain that had begun "within the last couple of days." (Tr. 269.) Dr. Adler stated that the kind of "relatively forceful bleeding" he observed in I.C.'s case reflected "some sort of trauma that caused tearing of the veins around the brain," resulting from events such as "car accidents, falls from great heights, nonaccidental trauma, or child abuse," or that it could happen if a person had a "propensity to bleeding." (Tr. 270-73.) Also, on February 12, 2012, Dr. Adler reviewed an abdominal CT scan performed on I.C. and found a three and one-half centimeter laceration of the liver and a pattern that suggested shock bowel. Dr. Adler stated that he had read about instances where liver lacerations resulted from CPR, but he had never seen it happen.

{¶ 9} On February 13, 2012, Dr. Adler conducted a skeletal survey on I.C. and found no fractures. On February 14, 2012, Dr. Adler reviewed the skeletal survey again and, based upon Dr. Martin's review of I.C.'s MRI, identified fractures of I.C.'s spine that he had initially not seen. Dr. Adler concluded that I.C.'s fractures were consistent with the bleeding he observed in I.C.'s brain and that such injuries could result from a large amount of force that flexed the body forward. On March 15, 2012, Dr. Adler reviewed another CT scan of I.C.'s head and observed extra fluid outside of the brain which indicated that the brain was shrinking as cells in the brain died. Dr. Adler indicated that the evolution of the injury to I.C.'s brain suggested that, "because the brain looked so

normal on the initial study, * * * the injury must have been shortly before the initial study" on February 12, 2012. (Tr. 328.)

{¶ 10} Dr. Nicholas Zumberge, a pediatric radiologist at Nationwide Children's hospital, performed the first MRI of I.C.'s brain on February 13, 2012, which showed swelling and cell death occurring in the brain. Based upon the increase in the amount of fluid around the periphery of the brain between the time of the initial head CT scan taken on February 12, 2012 and the MRI on February 13, 2012, Dr. Zumberge concluded that the injury likely occurred within hours or a day of the initial CT scan. Dr. Zumberge also stated that a hypoxic ischemic injury, namely an injury involving cell death resulting from a lack of oxygen, was not consistent with the subdural hemorrhages found in I.C.'s brain.

{¶ 11} Based upon I.C.'s medical history, Dr. Zumberge concluded that it was "difficult to explain or nearly impossible to explain" I.C.'s injuries, specifically "retinal hemorrhages, subdural hemorrhages, and diffuse brain injury," in any manner other than "child abuse or nonaccidental trauma or abusive head injury, whatever term is used." (Tr. 432.) Dr. Zumberge also pointed to the liver laceration, shocky appearance of the bowel, compression fractures of the seventh and ninth thoracic vertebrae, and edema in the ligaments of the upper neck as evidence raising a suspicion of child abuse. Dr. Zumberge conceded that, although "there's a chance that this wasn't abusive injury or a traumatic injury, * * * when it comes to the [injury to the] neck, I don't know what else this could be." (Tr. 438.) Dr. Zumberge asserted that I.C.'s injuries were "the result of significant trauma with a pattern that is very suggestive of abuse, and a trauma that is not compatible with trauma that would occur during aggressive or vigorous resuscitative effort." (Tr. 441.)

{¶ 12} Dr. Bhuvana Setty, a pediatric hematologist and oncologist at Nationwide Children's hospital, reviewed I.C.'s lab results and determined that he did not have an underlying bleeding disorder.

{¶ 13} On February 12, 2012, Detective Steve Brown of the Whitehall Police Department interviewed I.C.'s parents at Nationwide Children's Hospital. I.C.'s father, whom Detective Brown identified as appellant, stated that I.C. fell from a bed about three days before February 12, 2012. Detective Brown later examined the bed that appellant claimed I.C. fell from and found that the bed was 18 inches from the floor, which was

carpeted. According to Detective Brown, appellant claimed that I.C. was in good health with no apparent problems before the morning of February 12, 2012, when he stopped breathing. Appellant stated that he took I.C. out of bed that morning and that no one else had contact with I.C. until after he stopped breathing. After I.C. stopped breathing, appellant called I.C.'s mother, who was away from the home at a store. When she returned home from the store, I.C.'s mother called 911.

{¶ 14} Dr. Mary Ranee Leder, attending physician in the Child Advocacy Center at Nationwide Children's Hospital, whose duties included assessing children in response to reports of potential sexual assault or child abuse, was responsible for examining I.C.'s case in this capacity. After beginning an examination of I.C.'s case, she was able to obtain a timeline of I.C.'s condition through speaking with his parents. According to Dr. Leder, both parents affirmed that I.C. was well the night before being admitted to the hospital and that, when I.C. awoke at 11:00 a.m. on February 12, 2012, appellant removed him from bed and placed him on his abdomen in bed while appellant played video games. At that time, I.C.'s mother observed that he appeared well, and then she departed the home to go to a store. After some period of time, appellant checked on I.C., at which point he noticed that he was not breathing. Appellant stated that he splashed water on the child and attempted resuscitation by beating on the child's chest with a closed fist, which he demonstrated for Dr. Leder. When the child did not respond, appellant called I.C.'s mother, who left the store, arrived home, and then called 911 for help.

{¶ 15} Dr. Leder stated that I.C.'s injuries were inconsistent with a fall from a bed at a height of 18 inches onto a carpeted floor, as described by I.C.'s parents. Dr. Leder conducted a physical exam of I.C. and noted only minor external injuries. On February 13, 2012, Dr. Leder observed a subdural hemorrhage on the right side of I.C.'s brain and a three-centimeter liver laceration in her review of I.C.'s head CT scan, abdomen and pelvis CT scan, and skeletal survey, which she performed in conjunction with a pediatric radiologist. Dr. Leder stated that bleeding on the surface of the brain, like what she observed in I.C.'s case, could be caused by "repetitive acceleration/deceleration of the type seen with shaking, with or without impact," and that such shaking would be "vigorous shaking of the type where a reasonable caregiver observing it would say that this is an inappropriate way of handling an infant." (Tr. 623-24.) Dr. Leder stated that the ligament

injury in I.C.'s neck and the compression fractures in the seventh and ninth thoracic vertebrae could be caused by repetitive acceleration and deceleration or vigorous shaking. Dr. Leder also discussed the intra-retinal hemorrhages in I.C.'s eyes with Dr. Rogers, who concluded that, having ruled out an underlying bleeding disorder, I.C.'s intra-retinal hemorrhages were consistent with nonaccidental trauma.

{¶ 16} Based upon her review of I.C.'s condition, his history, and her discussions with other physicians, Dr. Leder concluded that "the subdural hemorrhages, the retinal hemorrhages, and the vertebral fractures were unexplained" and that "[t]here was no medical condition" or "accidental history that would be explaining [the] presence of these findings" and, therefore, "these findings were consistent with nonaccidental trauma." (Tr. 643.) Dr. Leder stated that the trauma and injury to the brain resulted in difficulties with breathing and the subsequent lack of oxygen to vital organs, rather than a lack of breathing causing the injuries. She stated that her findings allowed for "the possibility, however remote, that the liver laceration could have been caused by [appellant's] reported resuscitative efforts." (Tr. 621.)

{¶ 17} Dr. Charles J. Lee, a deputy coroner and forensic pathologist at the Licking County Coroner's Office, performed an autopsy on I.C. after he died on December 14, 2012 while at a nursing facility specifically for children. Prior to death, I.C. was in a coma with no voluntary movement for several months. Dr. Lee testified that I.C. was a normal weight and length for his age of 18 months at the time he died and that there were no apparent external injuries. Upon undertaking an internal examination, Dr. Lee found that I.C.'s feeding tube had become dislodged from his stomach and that fluid was leaking into his abdominal cavity. Dr. Lee testified that I.C. died as a result of irritation resulting from the fluid in his abdominal cavity and peritonitis, which he defined as "inflammation of the bowel as well as the irritation of the heart causing it to rapidly beat and then misbeat and beat irregularly and then not beat at all." (Tr. 703.) He concluded that I.C.'s cause of death was "complications of the peritonitis because of the fluid that was leaking into his belly secondary to him being in a chronic comatose state secondary to the head trauma" and that the manner of death was homicide.

{¶ 18} Dr. Lee testified that, although I.C. was otherwise in very good health, his brain was small compared to the size of his skull, and that it weighed about one-third of a

normal healthy brain for an average, healthy 18-month-old male. Because I.C.'s brain was about the size of a newborn's brain and much smaller than his skull, Dr. Lee concluded that I.C.'s brain regressed or shrank as a result of injury and death to the tissue. Dr. Lee found I.C.'s injuries to be consistent with abusive head trauma and a lack of oxygen from a significant global trauma affecting the entire brain at once. Dr. Lee found that there were no skull fractures present in I.C.'s case, but there was evidence of a subdural hemorrhage. Dr. Lee stated that bleeding in the brain was inconsistent with a sudden cessation of breathing unless there was trauma to the brain. Further, he stated that the injuries found in I.C.'s brain were inconsistent with sudden infant death syndrome ("SIDS") or short falls.

{¶ 19} At trial, appellant called Dr. Thomas W. Young, a forensic pathologist in private practice, to testify. Dr. Young formerly served as a medical examiner for the state of Georgia, and then as the Chief Medical Examiner for the counties of Jackson, Platte, Clay, and Cass in the state of Missouri. Dr. Young reviewed I.C.'s records and testified that, when the flow of oxygen is restored to the brain after a period of deprivation, the brain will become swollen and that blood vessels will leak resulting in subdural hemorrhages. He also stated that swelling in the brain can increase pressure in the veins in the backs of the eyes, causing retinal hemorrhages. Dr. Young further stated that performing CPR on an infant can result in a liver laceration.

{¶ 20} Dr. Young stated that I.C.'s condition was consistent with a condition called an apparent life-threatening event, which he defined as an instance where a child suddenly stops breathing, similar to SIDS, but is resuscitated. Dr. Young disagreed that abusive trauma in the form of shaking could cause the types of injuries found in I.C.'s case, including ligament injury and vertebral fractures.

{¶ 21} On March 6, 2012, a Franklin County Grand Jury indicted appellant on one count of felonious assault in violation of R.C. 2903.11, a felony of the second degree, one count of endangering children in violation of R.C. 2919.22, a felony of the second degree, and one count of endangering children in violation of R.C. 2919.22, a felony of the third degree. On March 26, 2013, a Franklin County Grand Jury indicted appellant on one count of murder in violation of R.C. 2903.02. On July 1, 2013, the state filed a motion for joinder of the indictments into a single action for the purposes of trial.

{¶ 22} On February 4, 2014, a jury found appellant guilty of felony murder and the two counts of endangering children; the jury found appellant not guilty of the sole count of felonious assault. On February 27, 2014, the trial court sentenced appellant as follows: life imprisonment with the possibility of parole after 15 years, to be served concurrently with both a sentence of three years as to the felony two count of endangering children and a sentence of 18 months as to the felony three count of endangering children. Appellant timely appealed.

II. Assignments of Error

{¶ 23} Appellant appeals assigning the following four errors for our review:

> [I.] THE TRIAL COURT ERRED WHEN IT ENTERED A JUDGMENT AGAINST THE APPELLANT WHEN THE JUDGMENT WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [II.] THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE DEFENDANT'S MOTION FOR ACQUITTAL AS THE GUILTY VERDICTS AT THE TRIAL COURT WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE.
>
> [III.] THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER.
>
> [IV.] APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL TO A DEGREE THAT APPELLANT DID NOT RECEIVE A FAIR TRIAL

For ease of discussion, we consider appellant's assignments of error out of order.

III. Third Assignment of Error—Jury Instruction on Lesser-Included Offense

{¶ 24} In his third assignment of error, appellant asserts that the trial court erred by failing to instruct the jury on the lesser-included offense of involuntary manslaughter.

{¶ 25} "An offense is a lesser-included offense of another where: (1) the offense carries a lesser penalty; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove commission of the lesser offense." *State v. Hubbard*, 10th Dist. No. 11AP-945, 2013-Ohio-2735, ¶ 37, citing *State v. Deem*, 40 Ohio St.3d 205, 209 (1988).

{¶ 26} Appellant was charged with felony murder under R.C. 2903.02(B), which provides that "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree." Because appellant was acquitted of the felonious assault charge, his felony murder conviction was predicated on the felony two count of endangering children under R.C. 2919.22(B)(1), as felony murder requires a first or second-degree felony as the predicate offense. *See Hubbard* at ¶ 20. R.C. 2919.22 provides that it is a felony of the second degree to abuse a child under 18 years of age where such abuse results in serious physical harm to the child.

{¶ 27} R.C. 2903.04 defines the crime of involuntary manslaughter and provides that no person shall cause the death of another "as a proximate result of the offender's committing or attempting to commit a felony," or as the result of the offender committing or attempting to commit "a misdemeanor of any degree." R.C. 2903.04(A) and (B). Appellant asserts that the felony three count of endangering children could have served as the predicate felony for his involuntary manslaughter instruction since any felony or misdemeanor can be the predicate offense for involuntary mansalughter. *See Hubbard* at ¶ 20. R.C. 2919.22(A) provides that "[n]o 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." R.C. 2919.22(E)(2)(c) provides that a violation of R.C. 2919.22(A) that results in serious physical harm to the child involved is a felony of the third degree.

{¶ 28} Here, there is no question that involuntary manslaughter is a lesser-included offense of felony murder. *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶ 79; *State v. Finley*, 1st Dist. No. C-061052, 2010-Ohio-5203, ¶ 29; *State v. Brundage*, 1st Dist. No. C-030632, 2004-Ohio-6436, ¶ 9 ("[I]nvoluntary manslaughter under both R.C. 2903.04(A) and (B) is a lesser-included offense of felony murder."). However, a court is required to give an instruction on a lesser-included offense only when " 'sufficient evidence is presented which would allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included * * * offense.' " (Emphasis sic.) *Hubbard* at ¶ 37, quoting *State v. Shane*, 63 Ohio St.3d 630, 632 (1992). *See also State v.*

Noor, 10th Dist. No. 13AP-165, 2014-Ohio-3397, ¶ 80. In other words, a trial court "must give an instruction on a lesser included offense if under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense." *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, ¶ 34. *See also State v. Wilkins*, 64 Ohio St.2d 382, 388 (1980). "In determining whether lesser-included-offense instructions are appropriate, 'the trial court must view the evidence in the light most favorable to the defendant.' " *Wine* at ¶ 21, quoting *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 37.

{¶ 29} "As is the case when reviewing a trial court's jury instructions generally, the proper standard of review for an appellate court in reviewing whether to give an instruction as to a lesser-included offense is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *Noor* at ¶ 81, citing *State v. Parnell*, 10th Dist. No. 11AP-257, 2011-Ohio-6564, ¶ 21-27. Abuse of discretion connotes more than an error of law or judgment; rather, it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 30} In this case, the appellant argued that a lesser-included-offense instruction was appropriate because "[t]here is F3 available to the jury already, F3 child endangering. So involuntary manslaughter could be predicated upon that F3. I would argue that the jury's been presented with a range of evidence. They will be determining the knowingly, recklessly element, and they could come to this decision." (Tr. 753-54.) In response, the state offered the following argument:

> [Assistant Prosecutor]: * * * There's been no evidence that indicates it should be given in this case. The defense's theory is that he is innocent, that he did not commit these crimes. That's not the kind of defense that warrants a lesser in this situation.
>
> The only witness that was offered by the defense testified to alternate causation aside from what the state's theory was.
>
> * * *
>
> The theory of the cause of death is from abuse. It's not from lack of attention. Now, that may have happened as well. But

> there isn't any evidence of that lack of attention of that violation of duty of care is the cause of death in this case.

(Tr. 754, 756.) The trial court overruled appellant's request for a lesser-included-offense instruction but warned the state to only argue that the cause of death was from abuse. Appellant renewed his objection to lack of the involuntary manslaughter instruction.

{¶ 31} Here, even viewing the evidence in a light most favorable to appellant, no reasonable jury could acquit appellant of felony murder but convict him of involuntary manslaughter. Although some evidence in the form of Dr. Young's testimony was offered at trial to support a finding that appellant did not commit child abuse, the jury clearly rejected such evidence in finding appellant committed abuse of a child in violation of R.C. 2919.22(B). Because the jury found appellant guilty of child abuse resulting in serious physical harm, it would be unreasonable for the jury to believe that the child's death resulted from the child endangering arising from a violation of a duty of care under R.C. 2919.22(A).

{¶ 32} Our conclusion is supported by both the content and quality of evidence in the record. The record contains an abundance of evidence supporting the conclusion that appellant's abuse caused I.C.'s injuries, which ultimately resulted in his death. Dr. Zumberge concluded that it was "difficult to explain or nearly impossible to explain" I.C.'s injuries, specifically "retinal hemorrhages, subdural hemorrhages, and diffuse brain injury," in any manner other than "child abuse or nonaccidental trauma or abusive head injury, whatever term is used." (Tr. 432.) Dr. Rogers agreed that, based on his examination of I.C.'s eyes and his associated medical history, the injuries resulted from abusive head trauma. Dr. Lee stated that his findings resulting from I.C.'s autopsy were consistent with abusive head trauma. Dr. Leder concluded that no medical condition or accidental history could explain the presence of I.C.'s injuries, and that his injuries were consistent with a finding of nonaccidental trauma. Thus, although the state's witnesses considered other possible explanations for I.C.'s injuries, they found no evidence to support any conclusion other than that the injuries resulted from child abuse. On the other hand, the record does not reflect, and appellant fails to point to, evidence demonstrating that appellant's failure to summon help was the cause of I.C.'s injuries, or, ultimately, of his death.

{¶ 33} Therefore, although appellant presented some evidence that would support the lesser-included-offense instruction, we find that such evidence was not sufficient to allow the jury to *reasonably* reject the greater offense and support the lesser-included offense. *See State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, ¶ 192, citing *State v. Shane*, 63 Ohio St.3d 630, 632 (1992) ("The lesser-included-offense instruction is not warranted every time 'some evidence' is presented to support the lesser offense.").

{¶ 34} Appellant asserts that, contrary to the state's arguments both at the trial level and on appeal, the Supreme Court of Ohio in *Wine* found that a defendant's trial strategy was irrelevant to the determination of whether or not a lesser-included-offense instruction was appropriate. In *Wine*, the Supreme Court considered "whether a defendant who presents an 'all or nothing' defense in a criminal trial has the right to prevent a trial court from giving lesser-included-offense jury instructions." *Id.* at ¶ 1. The Supreme Court held that "[t]he trial court, after reviewing the evidence, determines whether an instruction on lesser included offenses is appropriate" and that "[t]he trial court must give an instruction on a lesser included offense if under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense." *Id.* at ¶ 34. While appellant is correct that the Supreme Court also stated that "[t]his court has therefore left no doubt that it is the quality of the evidence offered, not the strategy of the defendant, that determines whether a lesser-included-offense charge should be given to a jury," this does not alter our conclusion that no reasonable jury could acquit appellant of felony murder but convict him of involuntary manslaughter. *Id.* at ¶ 26. Regardless of whether or not the trial court considered the state's argument regarding appellant's trial strategy in making its determination, the trial court correctly determined that a lesser-included-offense instruction was not warranted in this instance.

{¶ 35} Thus, under the facts and circumstances of the case at hand, we cannot find that the trial court abused its discretion by refusing to provide the requested jury instruction. *Noor* at ¶ 81. Accordingly, we overrule appellant's third assignment of error.

IV. First Assignment of Error—Manifest Weight

{¶ 36} In his first assignment of error, appellant asserts that his convictions are not supported by the manifest weight of the evidence.

{¶ 37} "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 38, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25. See also *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id.*, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). " 'The court, reviewing 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). This authority " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *Martin* at 175.

{¶ 38} In support of his assertion that his convictions were against the manifest weight of the evidence, appellant contends that the state failed to prove how the injuries were caused because no one observed appellant causing any harm to I.C., appellant was only home alone with I.C. for a short period of time, and that appellant never admitted abuse. Although appellant is correct that the record contains no direct evidence of child abuse, appellant fails to appreciate that his convictions can be sustained based upon circumstantial evidence. *See State v. Jewett*, 10th Dist. No. 11AP-1028, 2013-Ohio-1246, ¶ 34, quoting *State v. Fausnaugh*, 10th Dist. No. 11AP-842, 2012-Ohio-4414, ¶ 26, quoting *State v. Franklin*, 62 Ohio St.3d 118, 124 (1991) (" 'Under Ohio law * * * circumstantial evidence can have the same probative value as direct evidence, and "[a] conviction can be sustained based on circumstantial evidence alone." ' "); *State v. Hillman*, 10th Dist. No. 14AP-252, 2014-Ohio-5760, ¶ 44.

{¶ 39} Here, as discussed above, the state's witnesses provided circumstantial evidence to support the conclusion that I.C.'s injuries were the result of child abuse. Appellant contends that Dr. Young's testimony provided another plausible explanation for

I.C.'s injuries. Although Dr. Young did advance another explanation for the injuries, the state's witnesses presented evidence that disputed the accuracy of Dr. Young's explanation. Dr. Martin stated that I.C.'s injuries would not have occurred while he was laying flat on his back while someone performed CPR on him. Dr. Leder stated that I.C.'s injuries were inconsistent with a fall from a bed 18 inches above a carpeted floor. Dr. Zumberge stated that a hypoxic ischemic injury, in which organs are deprived of oxygen as suggested by Dr. Young, was not consistent with the subdural hemorrhages found in I.C.'s brain. Dr. Leder also stated that I.C.'s injuries were not consistent in any way with an episode wherein he stopped breathing and then started breathing again.

{¶ 40} Although appellant contends that he was left alone with I.C. for a only short period of time, Dr. Adler stated that the evolution of I.C.'s injuries suggested that "the injury must have been shortly before the initial study" on February 12, 2012. (Tr. 328.) Dr. Zumberge concurred that the injury likely occurred within hours or a day of the initial CT scan based on the increased fluid around the brain between the time of initial head CT scan on February 12, 2012 and the MRI on February 13, 2012. Appellant offers no support in the record for his contention that his short time with I.C. would have rendered it impossible for him to commit abuse.

{¶ 41} Finally, appellant contends that he did not violate a duty of care based upon the facts that he "was not a trained medical professional, that he attempted to get help by calling [I.C.'s] mother who was nearby, that he attempted CPR on I.C. after 911 was called, and that it was clearly established to be a panicked situation." (Appellant's Brief, 9.) However, appellant provides no support in the record for his contention that he did not violate a duty of care by never dialing 911 to summon help but, instead, waiting until I.C.'s mother returned home, at which time she summoned help by calling 911.

{¶ 42} Thus, considering the credibility of the witnesses and the evidence presented at trial, nothing suggests that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387. Accordingly, we overrule appellant's first assignment of error.

V. Second Assignment of Error—Sufficiency of the Evidence

{¶ 43} In his second assignment of error, appellant asserts that the evidence insufficiently supported his convictions.

{¶ 44} Sufficiency of evidence is a "legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict." *Cassell* at ¶ 36, citing *Thompkins* at 386. When judging the sufficiency of the evidence to support a criminal conviction, an appellate court must decide if, "after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Where the evidence, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt," it is sufficient to sustain a conviction. *Id.* at 273.

{¶ 45} In support of his assertion that his convictions for the two counts of child endangering and one count of murder were based upon insufficient evidence, appellant reiterates his contentions that "the State's evidence against Appellant failed to address the important question of how Appellant could have caused the injuries" to I.C. and that "there were two plausible explanations" for I.C.'s injuries. (Appellant's Brief, 12.) Again, although the state did not present a direct explanation for appellant's injuries, the state offered circumstantial evidence to support the explanation that appellant abused I.C. thereby causing his injuries. Appellant fails to provide support with citation to pertinent legal authority or to the record for his contention that the evidence failed to support any element of the crimes for which he was convicted. As appellant merely rehashes the same argument he made in support of his contention that his convictions were against the manifest weight of the evidence and, further, fails to provide any support for his argument, we decline to consider it further. *White v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 12AP-927, 2013-Ohio-4208, ¶ 11; *Lundeen v. State Med. Bd. of Ohio*, 10th Dist. No. 12AP-629, 2013-Ohio-112, ¶ 16.[1]

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[1] Although appellant did not argue the same, we feel compelled to address the theory that I.C.'s death resulted from improper medical care instead of appellant's actions or failure to act. Even though I.C.'s peritonitis resulted from treatment administered by medical personnel, this is not sufficient to break the chain of causation. " 'It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts.' " *State v. Carter*, 64 Ohio St.3d 218, 226 (1992), quoting *State v. Johnson*, 56 Ohio St.2d 35, 39 (1978). "Generally, 'one who inflicts injury upon another is criminally responsible for that person's death, regardless of whether different or more skillful medical treatment may have saved his life.' " *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, ¶ 45, quoting *Johnson* at 40. "[M]edical treatment for homicide victims is not an intervening cause" but, rather, "[o]nly gross negligence or willful maltreatment will relieve the defendant from liability. Simple negligence is not enough." *Hanna* at ¶ 45 (citations omitted). "The injuries inflicted by the defendant need not be the sole cause of death, as long as they constitute a substantial factor in the death." *State v. Beaver*, 119 Ohio App.3d 385, 394 (11th Dist.1997) (finding that,

{¶ 46} Accordingly, we overrule appellant's second assignment of error.

VI. Fourth Assignment of Error—Ineffective Assistance of Counsel

{¶ 47} In his fourth assignment of error, appellant asserts that he received ineffective assistance of counsel because his trial counsel failed to object to questions posed by the state that were allegedly irrelevant.

{¶ 48} A convicted defendant alleging ineffective assistance of counsel must demonstrate that: (1) defense counsel's performance was so deficient that he or she was not functioning as the counsel guaranteed under the Sixth Amendment to the United States Constitution; and (2) defense counsel's errors prejudiced defendant, depriving him or her of a trial whose result is reliable. *State v. Campbell,* 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶ 24, citing *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus, *cert. denied*, 497 U.S. 1011 (1990).

{¶ 49} "Judicial scrutiny of counsel's performance must be highly deferential * * * [and] [a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689; *Bradley* at 141. In Ohio, a properly licensed attorney is presumed competent. *State v. Davis*, 10th Dist. No. 13AP-98, 2014-Ohio-90, ¶ 20, citing *Vaughn v. Maxwell,* 2 Ohio St.2d 299, 301 (1965). Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie,* 81 Ohio St.3d 673, 675 (1998). " 'To show that a defendant has been prejudiced by counsel's deficient performance, the

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even if infection listed as one of four immediate causes of victim's death was the result of negligence of attending surgeons, it was not sufficient by itself to break the chain of direct causation). *See also State v. Wilson*, 10th Dist. No. 03AP-592, 2004-Ohio-2838, ¶ 15-41 (finding that jury could have rationally concluded that victim's death was the direct and proximate result of defendant's actions where death in part resulted from prescribed drugs in her system nine months after defendant set her on fire).

Here, the state presented evidence that I.C.'s death was the natural and foreseeable result of appellant's actions. Dr. Lee stated that the "cause of death was complications of the peritonitis because of the fluid that was leaking into his belly secondary to him being in a chronic comatose state secondary to the head trauma." (Tr. 731.) Specifically, Dr. Lee testified that I.C. "would not have had the problems with his bowel and that fluid draining into his abdominal cavity if he didn't have that tube to feed him. The only reason he has a tube to feed him is because he can't chew or swallow himself. The only reason he can't chew and swallow himself is because of the head injury in the first place." (Tr. 732-33.) Even if I.C.'s death resulted in part from negligence of medical personnel administering treatment, this alone is not sufficient to break the chain of causation since nothing in the record reflects that I.C.'s death resulted from gross negligence or willful maltreatment. *Hanna* at ¶ 45. Thus, although I.C.'s death did not immediately follow from appellant's actions or inactions, there was sufficient evidence presented upon which the jury could rationally have concluded that appellant's actions were the direct and proximate cause of I.C.'s death. *Id.*; *Wilson* at ¶ 40; *Beaver* at 394.

defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.' " *State v. Griffin*, 10th Dist. No. 10AP-902, 2011-Ohio-4250, ¶ 42, quoting *Bradley* at paragraph three of syllabus.

{¶ 50} Appellant contends that his trial counsel should have objected more quickly when the state began to question Dr. Young regarding his prior testimony in other cases in Franklin County involving child abuse. Appellant also contends that trial counsel should have objected when the state inquired of Dr. Young whether various medical organizations accepted shaken baby syndrome as a valid diagnosis. Although appellant contends that his counsel's failure to object led to the introduction of irrelevant information, we cannot find that the record in this case demonstrates that counsel's performance fell below an objective standard of reasonableness. *See State v. Jeffers*, 10th Dist. No. 10AP-1112, 2011-Ohio-3555, ¶ 19, quoting *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 103, citing *State v. Holloway*, 38 Ohio St.3d 239, 244 (1988), citing *State v. Gumm*, 73 Ohio St.3d 413, 428 (1995) (" '[T]he failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel.' "). Further, appellant's trial counsel could have been pursuing a legitimate trial strategy by refraining from objecting to the state's allegedly irrelevant line of questioning. *State v. Fisk*, 9th Dist. No. C.A. 21196, 2003-Ohio-3149, ¶ 9, quoting *State v. Phillips*, 74 Ohio St.3d 72, 85 (1995) ("It is well settled that an attorney's decisions not to file a motion to suppress or not object at certain times during trial are 'debatable trial tactics [that] generally do not constitute a deprivation of effective counsel.' "); *State v. Leonard*, 4th Dist. No. CA92-12 (May 21, 1993); *State v. Sykes*, 10th Dist. No. 04AP-381, 2005-Ohio-1813, ¶ 7. Finally, appellant fails to provide citation to any relevant authority demonstrating that the failure to object to allegedly irrelevant inquiries under these circumstances renders counsel's performance ineffective.

{¶ 51} Accordingly, we overrule appellant's fourth assignment of error.

VII. Disposition

{¶ 52} Having overruled appellant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, J., concurs.
TYACK, J., concurs in part; dissents in part.

TYACK, J., concurring in part and dissenting in part.

{¶1} I respectfully dissent in part.

{¶2} The injuries to this child were truly horrific. However, the child died as a result of the inadequate medical care given months after the initial injuries. The child's feeding tube became dislodged from his stomach and leaked fluid into his abdominal cavity. The dislodged feeding tube caused peritonitis. The peritonitis caused the child's death.

{¶3} The jury which heard the case did not find that Johnnie Crockett, III knowingly caused serious physical harm to the child. The jury found Crockett not guilty of felonious assault. Instead, the jury found that Crockett was guilty of endangering the child in violation of R.C. 2919.22. This finding could well have been based in part on the fact that Crockett did not immediately seek medical help when he claimed he found the child not breathing. Instead, he called his wife, who came home from shopping before medical assistance was sought. She was the one who called for help.

{¶4} Although the evidence supported the child endangering convictions including the finding he recklessly abused the child, the evidence did not establish that the injuries the child suffered in February 2012 were a proximate cause of the death of the child in December 2012. The proximate cause of death of the child was the inadequate medical care the child received many months later and the inadequate monitoring of the child's medical condition months later. The fact the child was not receiving nutrition for an unknown period of time undoubtedly had several negative effects on the child. The fact the fluid which should have been nourishing the child was being dumped into the child's abdomen and causing inflammation of that area is the fact as to the actual cause of the death which occurred approximately ten months after the child was found not breathing.

{¶5} The autopsy report on the child indicates that the gastric feeding tube in the child had perforated the peritoneal wall. The tube's tip was adjacent to the perforation but exposed to the peritoneal cavity. As noted earlier, the damage to the peritoneum was what caused the child's death. The earlier treatment of the child at Nationwide Children's

Hospital did not reveal any harm to the peritoneum. All the harm to the peritoneum occurred at the facility which cared for the child after the child's discharge from Nationwide Children's Hospital.

{¶6} I also note that the trial court judge told the jury:

> Cause is an act or failure to act which in the natural and continuous sequence directly produces the injury, and without which it would not have occurred. Cause occurs when the injury is the natural and foreseeable result of the act or failure to act.
>
> A death is the "proximate result" of an act or failure to act when it is produced directly by the act or failure to act in a natural and continuous sequence and would not have occurred without the act or failure to act. "Result" occurs when the death is naturally and foreseeably caused by the act or failure to act.

(Feb. 3, 2014 Jury Instructions, 5.)

{¶7} The injury which caused the death of this child was the result of the improper medical care and treatment of the child ten months after Crockett and his wife contacted authorities. Such care was not a foreseeable result of any act or failure to act of Johnnie Crockett, III.

{¶8} Therefore, I do not view the evidence as establishing that Crockett's actions or inactions proximately caused the damage to the child's peritoneum and therefore did not cause the death of the child. I would sustain the second assignment of error in part. Sustaining the second assignment of error moots the first and third assignments of error.

{¶9} I see no basis for finding that Crockett's defense counsel at trial rendered ineffective assistance of counsel. I agree with the majority's finding as to the fourth assignment of error.

{¶10} Because the majority does not sustain the second assignment of error in part, I respectfully dissent in part.
