[Cite as *State v. Davis*, 2015-Ohio-889.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- SAMUEL DAVIS, JR. Defendant-Appellant	JUDGES: Hon. John W. Wise, P.J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 14 CA 34 O P I N I O N
CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Cae No. 13 CR 713
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 9, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Wise, P. J.

{¶1} Appellant Samuel Davis, Jr. appeals his conviction and sentence entered in the Richland County Court of Common Pleas on two counts of endangering children, one count of aggravated arson, and one count of criminal damaging, following a jury trial.

{¶2} Appellee is State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On October 14, 2013, Columbus Day, Appellant Samuel Davis was watching his daughters, Cheyanne and Alexia, for his ex-wife, Laurie, at her home at 886 Danwood Road, Mansfield, Ohio, while she went to work. (T. at 390, 393, 399). The couple divorced in 2010, but continued to have an on-again, off-again relationship. (T. at 393, 396-397). Laurie and the girls had just moved into the house a couple weeks prior. (T. at 399).

{¶4} Laurie stated that she had had minimal contact with Appellant since the move, mainly because he had been drinking more since he had been out of work, and his drinking had been a major contributing factor to the separation. (T. at 401-403). However, when Appellant contacted her at around 9:30 p.m. on October 13th and expressed that he wanted to come over and see the girls, Laurie allowed him to come over as long as he did not cause any problems. (T. at 411).

{¶5} Appellant did not come straight over, arriving instead nearly two hours later after the girls were already in bed. (T. at 412, 462). While Appellant did not appear to be intoxicated, it was clear that he had been drinking. (T. at 414-415). He also brought beer with him. *Id*. However, Laurie did not make him leave and the two of them

sat down, watched TV and talked for a couple hours. (T. at 413). The two of them discussed Appellant coming over in the morning to spend some time with the girls since they did not have school the next day. (T. at 415, 417, 470). Laurie stated that this would be a help to her because her mother, who normally watched the girls, had a doctor's appointment in the morning. (T. at 416). Appellant left at about 1:30 a.m. and Laurie went to bed because she had to work in the morning. (T. at 415, 417, 462).

{¶6} Appellant returned to Laurie's house around 5:30 a.m., waking her up. (T. at 418). She let him in and he laid down on the couch while she got ready for work. (T. at 418, 472). Once she left the bedroom, he went to her bedroom and got into her bed. (T. at 421-422, 472). Laurie left for work at 6:30 a.m., leaving Appellant asleep in her bed. (T. at 418, 422, 457).

{¶7} Cheyanne, who was thirteen years old, was awakened that morning by the shrill tone of the smoke detector. (T. at 175, 185). She stated that she did not think anything about it at first because she thought Appellant was there and that he had set off the smoke alarm on previous occasions with his attempts to cook something. (T. at 185-186, 228, 233, 244-246). When the smoke detector did not turn off, Cheyanne left her bedroom and walked down to the kitchen where she discovered that the electric stove top was on fire. (T. at 185-187). She described the flames as about two and a half feet high with what appeared to be some kind of clear plastic burning on the stove top. (T. at 188-189, 227, 244). All four burners were on and red hot and the knobs were starting to melt. (T. at 252). She stated that she saw Appellant sitting at the kitchen table with his back to the stove. (T. at 188, 207).

{¶8} Cheyanne stated that she asked her father why the stove was on fire and his reply was “Where is your mom?" (T. at 188-189, 225-226). He asked her this several times and she told him that she did not know where her mother was and continued to ask him why the stove was on fire. (T. at 189,225, 243). Finally he asked her "Why don't you call the police?" (T. at 190, 225, 243). Cheyanne told him that she did not have a phone. (T. at 90, 243). A house phone had not been set up yet and her cellular telephone had been broken before the move. (T. at 191, 253, 423-424, 454-455). Appellant did not offer her a phone or make any move to put out the fire while she was present. (T. at 191, 253).

{¶9} Cheyanne stated that she went back to her room and closed the door to pray for guidance about what to do next. Finally, she decided that she had to get herself and her sister out of the house so she gathered clothing for herself and her younger sister, Alexia. (T. at 192, 254). When Cheyanne exited her bedroom, the smoke was much thicker and darker, enough so that she thought her father would not be able to see her pass through the hall to her sister's room, which was next to the kitchen. (T. at 194). She explained that she did not want him to see her "[b]ecause of what he did, because he might not want us to tell anybody that he did that, because it was like out of the ordinary." (T. at 193). Cheyanne testified that she was also afraid that Appellant would not allow them to leave. (T. at 193).

{¶10} Cheyanne stated that when she got to Alexia's room, she locked the bedroom door. (T. at 194). Cheyanne woke Alexia and got her dressed and the two of them moved Alexia's dresser from in front of the sliding glass door that led to the patio.

(T. at 195). The two girls went to the neighbor's house and told her that their father had set the stove on fire. (T. at 196-198, 231).

{¶11} The neighbor, Janet Knecht, called the police. (T. at 259-261). Cheyanne called her mother at approximately 7:25 a.m., only forty-five minutes after Laurie left for work, and told her mother that Appellant was trying to burn the house down. (T. at 231-232, 261, 265, 419). Cheyanne never saw her father after she left him in the kitchen with the stove on fire. (T. at 196, 226, 254). Alexia did not see the Appellant at all that day. (T. at 271, 274).

{¶12} Mansfield police officers Eichinger and Swisher arrived on the scene within minutes of being dispatched. (T. at 289, 562). The initial call came in as a fire that was suspicious in nature, possibly a domestic. (T. at 289, 314-315, 561-562). When the officers arrived, smoke could be seen coming out of the vents. (T. at 290). Officer Eichinger approached the front door and found that it was not hot and was unlocked. (T. at 291). When she opened the door, the house was filled with smoke, with visibility down to three to four feet. (T. at 291). Officer Eichinger went around the back of the house to find another entrance. (T. at 292). The back door appeared to be locked, forcing her to return and enter through the front entrance. (T. at 292).

{¶13} Officer Eichinger stated that she made her way through the living room and into the kitchen. (T. at 292). Once in the kitchen, she saw that the stove was on fire, with all four burners glowing red. (T. at 95, 322). At that point the flames were only about a foot high. (T. at 293, 317, 326). She opened the back door to clear some of the smoke from the house. (T. at 293). Office Swisher, in the meantime, had entered the

front door and moved down the hall to check the bedrooms for occupants. (T. at 293, 563-564).

{¶14} When she opened the back door, Officer Eichinger saw a rake by the door and used it to remove the burning items from the stove, and doused the fire with water. (T. at 293). After extinguishing the fire, she grabbed one of knobs to turn off the stove burners and was burned. She then put on her leather gloves and turned off the burners, one of which stuck to her glove, melted from the intense heat of the fire. (T. at 294, 301-302, 323). Located in the debris from the fire was a pan which contained what initially appeared to be charcoal briquettes but were later discovered to be leftover dinner biscuits, a metal pepper container with the top melted off and a burnt biscuit stuck inside, and ashes apparently from burnt paper products. (T. at 298, 311, 318-319, 334, 342, 421, 434-436). On the kitchen table where Appellant had been sitting were two bottles of beer, a cigarette butt and a rolled up dollar bill that tested positive for cocaine. (T. at 300-301, 439, 537).

{¶15} After the fire, Laurie noticed several pot holders and dishtowels that had been on or near the stove at the time of the fire were missing. (T. at 409, 442, 460). Alexia was also missing library books that were last seen sitting on the counter next to the stove. (T. at 241-242,442-443, 459).

{¶16} The fire investigator, qualified as an expert without objection, testified that it was his opinion that "the subject fire originated in the kitchen within the dwelling on top of the kitchen range. The cause of the subject fire was the result of readily available combustibles being placed on top of the kitchen range, and all four stovetop electric burners being turned on by Mr. Sammy Davis." (T. at 369). Due to the nature of the

evidence the fire was ruled an incendiary fire. "Incendiary fire is a fire that was intentionally set on top of the range. I said that was with the evidence of what fuel we had on top of the range, with the four burners being reported by MPD that were all in the on position, and the range not being used for normally what a range is being used for. There appeared to be no food, nothing cooking on top of the stove. Further examination of this area and room or origin revealed that there were no accidental causes for the subject fire present." (T. at 366).

{¶17} The fire investigator and the Mansfield Fire Department assistant fire chief testified that the most house fire deaths are the result of smoke inhalation. (T. at 329, 354, 495). The person dies of either carbon monoxide poisoning or cyanide, poisoning caused by the chemicals given off by furniture and housing material as it burns. (T. at 329, 495). The investigator stated that this fire appeared to be getting close to the flash point had it not been extinguished by Officer Eichinger and that if a flash over would have occurred, it would have ignited everything in the room. (T. at 335-337, 338-339, 351).

{¶18} The damage to the home caused by the fire included smoke damage throughout the entire house. (T. at 362-363, 484,490, 493). The walls had to be washed down and repainted. (T. at 486, 493). The Formica behind the stove was burnt and had to be replaced. (T. at 484, 493). The cabinets above and around the stove were damaged but the model was no longer available and so they were cleaned and then covered with Formica. (T. at 484-485). The range hood above the stove was burned and the fan inside of it had been melted. (T. at 484). The whole unit had to be replaced. (T. at 487, 493). The knobs of the stove all melted and the microwave which was next to

the stove suffered significant exterior damage. (T. at 309, 323, 335, 373, 485). The total cost to repair the damage was determined to be $2,129.97. The owners completed all of the repairs themselves.

{¶19} Appellant testified that the night before the fire he had just received money from his student loans and decided to celebrate. He started drinking at about 10:30 a.m. on the day before the fire and drank most of the day. (T. at 584-584). He recalled that he arrived at Laurie's house at around 9:30 p.m. and the girls were getting ready for bed. (T. at 590). Appellant testified that after the girls went to bed, both he and Laurie started drinking and did some cocaine together which he had brought with him. (T. at 591-592). He testified that at one point during the evening, after they had run out of drugs and alcohol, Laurie drove them to the Circle K for beer and somewhere else to get some more drugs. (T. at 592). He stated that they did more cocaine and then ended up going into the bedroom and having sex. (T. at 592).Sometime between 1:30 a.m. and 2:30 a.m., Laurie said she could not stay up all night so he left and returned to his friend P.T.'s house and continued drinking. (T. at 592-593).

{¶20} Appellant stated that he returned to Laurie's house around 5:30 a.m., came in and laid down on the couch while Laurie got ready for work. (T. at 593-594). When she vacated the bedroom, he went back, undressed and got into her bed. (T. at 594). Sometime after Laurie left for work, Appellant recalled that he got up to use the bathroom, then went to the kitchen to make something to eat. (T. at 594-595).

{¶21} Appellant testified that he turned on all four burners on the stove and then went to the refrigerator to get out some food. (T. at 596, 608-609). Upon seeing beer in the refrigerator, Appellant decided to have a beer and a cigarette before he started

cooking. *Id.* Appellant claims that he finished his cigarette and his beer and either fell asleep or passed out at the table. (T. at 596, 609, 612). The next thing he knew, Cheyanne was waking him up, telling him that the stove was on fire. (T. at 596-597). Appellant testified that he told Cheyanne to call the police and go get help because he did not know what was going on. (T. at 597). After Cheyanne left the kitchen and he heard her go down the hall to her bedroom and close the door, he recalled having to will himself to physically get up and do something. (T. at 598, 613). He then claimed to take whatever he could find in the vicinity and use it to smother the flames on the stove. He did not recall what those items happened to be, whether they were books, towels, a pizza box, etc., but that he managed to smother the fire. (T. at 598, 600, 613-614, 623). Appellant did not sustain any burns. (T. at 624).

{¶22} Appellant stated that after the fire was extinguished, the smoke was too thick and he could not turn off the stove burners and that he left whatever remained of the items he used to smother the fire in the center of the stove. (T. at 598-600, 613-614, 19, 628). He stated that he yelled for Cheyanne to get her sister out of the house and he heard her go into Alexia's room and shut the door. (T. at 599, 616). Appellant stated that he then went to Laurie's room to retrieve his sweat pants and socks. (T. at 599, 614). After that, he went to the living room to fetch his shoes but he could not find his keys. (T. at 599, 617).

{¶23} Appellant alleged that when he went back to Laurie's room to look for his keys, he checked Alexia's room to make sure the girls had left. (T. at 600, 617). Then he shut all of the doors and went into the kitchen where he found his keys on the table. (T.

at 600). Appellant testified that at that point there was smoke coming from the stove but the fire was out. (T. at 600).

{¶24} Appellant then left the house but left the door unlocked for the police. (T. at 600). He did not see his daughters and did not look for them. (T. at 600, 617). Instead he got into his car and drove away because he did not want to talk to the police in his physical condition. (T. at 601, 671-618). Appellant drove to the home of his other girlfriend so that he could call Laurie. (T. at 601). Appellant called Laurie with the intention of telling her what happened but she immediately began asking him what he had done and then the detective took the phone and asked Appellant to come in and speak to them. (T. at 504-505, 602). Appellant told the detective he would come in, but then failed to do so (T. at 504-505). Appellant stated that he did not want to talk to the police until he sobered up. (T. at 602). He called Laurie a second time and was again asked by the police to come in and talk. Appellant again said he would but instead fell asleep on the couch. (T. at 602).

{¶25} The police waited for Appellant to come to the station for questioning. In the meantime, Appellant's girlfriend called in to inform the police that Appellant could be found at Landings Court in Ontario and how to gain entrance into the home. (T. at 507-508). After knocking on the door for two hours and attempting to make contact with Appellant, a search warrant for Appellant was requested and granted. (T. at 509-511). Once the warrant was granted, the tactical response team made entry into the house through the unlocked front door and arrested Appellant, who had allegedly been asleep on the couch a few feet from where the officers had been pounding for the past two hours. (T. at 511, 549-550).

{¶26} Once at the police station, Appellant accused the police of lying, told the police that he was never at the house and then invoked his right to remain silent. (T. at 516, 619-620).

{¶27} On November 7, 2013, Appellant was indicted on two counts of Endangering Children, in violation of R.C. §2919.22(A), felonies of the fourth degree, one count of Aggravated Arson, in violation of R.C. §2909.02(A)(1), a felony of the first degree, and one count of Criminal Damaging, in violation of R.C. §2909.06(A)(2), a misdemeanor of the first degree.

{¶28} Appellant entered pleas of "not guilty" at arraignment.

{¶29} On March 26, 2014, the State filed a motion to amend Counts One and Two to misdemeanors of the first degree, which was granted by the trial court on March 27, 2014.

{¶30} On March 27, 2014, a jury trial commenced in this matter. It continued into March 28, April 1st and 2nd.

{¶31} At trial, the jury heard testimony from Cheyanne Davis, Alexia Davis, Laurie Davis, Janet Knecht, Sgt. Eichinger, Asst. Fire Chief Mark Sieving, Fire Chief Harlan Barrick, Thelma and Joseph Stimens (Laurie Davis' landlord, the owners of the property), Det. Scheurer, Anthony Tambasco (forensic scientist), Det. Sigler and Appellant.

{¶32} During the cross examination of Det. Scheurer, Appellant elicited testimony that the detective had testified at preliminary hearing that during his interview, Appellant appeared to be coming down from some kind of drug. (T. at 516-517). In rebuttal, the State played a portion of the video recording of the interview so that the

jury could determine for itself if Appellant appeared to be intoxicated. (T. at 522-523). Appellant did not object.

{¶33} After Det. Scheurer was released, the State decided to recall him and have the rest of the video played and requested the same of the court. Again, Appellant did not object. (T. at 529-530). Det. Scheurer returned to the stand and the entire video was played for the jury. (T. at 543). After the interview was played, the trial court gave the following instruction:

> Folks, one of the Miranda rights, which you heard them talk about, giving someone their Miranda rights, one of those rights is they are informed that they are entitled to have an attorney if they want one. So when he was asking for an attorney he was doing what he is permitted to do pursuant to the Miranda case. It's a constitutional right he has. So there is nothing wrong with him asking for an attorney." (T. at 544).

{¶34} The State stipulated that the purpose of showing the video was to show the demeanor of Appellant during the interview. *Id.*

{¶35} When the State closed its case and submitted its exhibits for admission, Appellant objected to the video tape arguing that it had already been played to the jury. At that time, the trial court expressed its own concerns about emphasizing the fact that Appellant exercised his right to counsel and sustained the objection on that ground. (T. at 578).

{¶36} Appellant did not make a Crim.R. 29 motion at the end of the State's case.

{¶37} Appellant testified on his own behalf. During Appellant's cross-examination, Appellant explained to the jury his reasons for invoking his right to counsel during the interview:

> For one, I know that - I wasn't going to talk to no detective. I mean, just plain and simple.
>
> ***
>
> I know not to talk to a detective. I know I have the right to a lawyer. Because when you talk to a detective they build a case against you whether it's true or not. And a lawyer is supposed to be able to go in and give you legal counsel before you talk to a detective. (T. at 619).

{¶38} Appellant requested a jury instruction regarding voluntary intoxication with regard to how it might affect a one's physical ability to commit a crime. The trial court granted the request and gave the jury an instruction regarding the same.

{¶39} During closing arguments, Appellant was twice warned for misstating the law regarding the knowing element of the charge of arson, prompting the court to read the instruction again. (T. at 667-668).

{¶40} At the end of the first day of jury deliberations, the trial court was informed that the jury had come to an agreement on some of the counts but that there was at least one count upon which they had not yet reached a verdict. (T. at 686). The record is silent as to which count or counts the jury had decided on and which count or counts they were having difficulty with. The trial court sent the jury home to think about it overnight.

{¶41} The following morning the jury requested to see the video of Appellant's interview. The trial court gave the jury an extensive instruction before allowing the video to be played a second time:

> Folks, you sent out a request or question that you would like to see the video where Detective Scheurer questioned Samuel Davis. I did want to talk to you before I let you do that. If you remember, that is a piece of evidence for a limited purpose only. It has become an issue in this case whether he was intoxicated to the extent he was unable to perform the crime and there were other issues about the extent of his intoxication. This was admitted for the limited purpose of assessing the amount of his intoxication. This was at 4:00 in the afternoon when the event happened at seven in the morning. I do want to point out that it's important that the evidence not have a prejudicial effect on you. That the Supreme Court of the United States says the right to counsel in the Sixth Amendment includes the right to talk to an attorney before you submit to questioning. So a person refusing to submit to questioning before he talks to an attorney exercises that right. Mr. Davis does that in this case. I don't want you to use that against him. That's an exercise of his constitutional right. Don't stray past the purpose which is to assess the extent of his capacity as he's being questioned." (T. at 691-692).

{¶42} The video was then played for the jury a second time. After further deliberations, the jury found Appellant guilty of all counts in the indictment.

{¶43} On April 7, 2014, Appellant appeared before the court for sentencing. He was ordered to pay restitution in the amount of $2,129.97. The trial court sentenced Appellant to six (6) months in jail on each of the three misdemeanor counts and four (4) years in prison on the count of Aggravated Arson, all time running concurrently by operation of law.

{¶44} Appellant now appeals to this Court, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶45} "I. THE TRIAL COURT ABUSED ITS' [SIC] DISCRETION BY PERMITTING THE JURY DURING DELIBERATIONS TO WATCH A VIDEO OF A POLICE INTERROGATION AFTER EXCLUDING THE VIDEO FROM EVIDENCE BECAUSE IT DEPICTED DAVIS EXERCISING HIS RIGHT TO COUNSEL.

{¶46} "II. APPELLANT'S RIGHTS TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS WERE VIOLATED BECAUSE HIS ARSON CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶47} "III. APPELLANT'S ARSON CONVICTION IS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

{¶48} "IV. THE TRIAL COURT VIOLATED PRINCIPLES OF DOUBLE JEOPARDY AND R.C. 2941.25 BY IMPOSING SENTENCES FOR AGGRAVATED ARSON, CHILD ENDANGERING, AND CRIMINAL DAMAGING ALL ARISING FROM A SINGLE FIRE."

I.

{¶49} In his First Assignment of Error, Appellant argues that the trial court erred in allowing the jury to view the police interrogation video a second time during deliberations. We disagree.

{¶50} More specifically, Appellant argues that allowing the jury to re-view the videotape during deliberations was prejudicial and highly inflammatory to Appellant because he invoked his right to counsel in said videotape.

{¶51} Pursuant to Evid.R. 403(A), "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶52} During deliberations, the jury requested that it be allowed to re-view the videotape of Appellant's interrogation from the day of his arrest. The trial court allowed the tape to be viewed by the jury for the second time with the admonition that its purpose was solely to assess the level of Appellant's intoxication and that they were not to consider Appellant exercising his right to have to speak to an attorney.

{¶53} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage,* 31 Ohio St.3d 173, 180, 510 N.E.2d 353, 358 (1987). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142 (1983).

{¶54} It is well-established that juries are presumed to follow and obey the limiting instructions given them by the trial court. *State v. DeMastry,* 155 Ohio App.3d 110, 127, 799 N.E.2d 229, 2003–Ohio–5588, ¶84, citing *State v. Franklin* (1991), 62

Ohio St.3d 118, 127, 580 N.E.2d 1; *Zafiro v. United States* 506 U.S. 534, 540, 113 S.Ct. 933, 122 L.Ed.2d 317(1993). “A presumption always exists that the jury has followed the instructions given to it by the trial court.” *Pang v. Minch* (1990), 53 Ohio St.3d 186, 187, 559 N.E.2d 1313, at paragraph four of the syllabus, rehearing denied, 54 Ohio St.3d 716, 562 N.E.2d 163.

{¶55} Appellant himself brought the issue of his intoxication to the attention of the jury, arguing that he was too intoxicated to have been able to commit the crimes for which he was charged. It was in response to these arguments that a portion of the videotape was first played and then the entire tape was played, all without objection by Appellant.

{¶56} Due to the fact that Appellant did ask for an attorney during the interview, the trial court gave the jury a cautionary instruction

{¶57} Here, Appellant has not cited any evidence in the record that the jury failed to follow the trial court's instruction not to consider his exercise of his right to counsel.

{¶58} Further, upon review, given the strength of all of the other trial testimony, we find Appellant has failed to demonstrate an abuse of discretion in regard to the evidentiary decisions of the trial court.

{¶59} Appellant’s First Assignment of Error is overruled.

II., III.

{¶60} In Second and Third Assignments of Error, Appellant argues that his conviction for arson was against the manifest weight and sufficiency of the evidence. We disagree.

{¶61} In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶62} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: "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 ." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. *See also*, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶63} In the case *sub judice*, appellant was convicted of Aggravated Arson, under R.C. §2909.02, which states:

> (A) No person, by means of fire or explosion, shall knowingly do any of the following:
>
> (1) Create a substantial risk of serious physical harm to any person other than the offender;
>
> ***

{¶64} The issue before the jury was whether Appellant knowingly caused a substantial risk of serious harm to his daughters by causing the fire.

{¶65} At trial, the jury heard testimony from Cheyanne that she woke to the smoke detector alarm and found Appellant sitting in the kitchen with his back to the stove which was on fire, which was red hot, with flames approximately two foot tall. (T. at 188-207).

{¶66} Appellant himself admitted that he turned on all four burners on the stove but then decided to have a beer and a cigarette, fell asleep or passed out and woke to the stove being on fire. (T. at 596, 598, 608-609). While Appellant testified that he was intoxicated, "[v]oluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense." Further, The fire investigator stated that the fire was intentionally set and that the investigation revealed that the fire was set/stoked mainly with paper and cloth, highly flammable materials. (T. at 366, 369). While Appellant testified that he used books and papers found in the vicinity "on the side of the stove" to "smother" the fire, such actions could just as easily be seen as fueling the fire. (T. at 598, 600)

{¶67} Appellant also testified that he left the house, with the stove burners still turned on, and the house full of smoke, without confirming that his daughters were safely outside the house. (T. at 600, 617).

{¶68} Based on the testimony as presented at trial, we find sufficient evidence to support Appellant's conviction for aggravated arson and further find that the jury verdict was not against manifest weight of the evidence.

{¶69} Appellant's Second and Third Assignments of Error are overruled.

IV.

{¶70} In his Fourth Assignment of Error, Appellant argues that the trial court erred in not finding that arson, child endangering and criminal damaging were allied offenses. We disagree.

{¶71} Specifically, Appellant argues that all of the counts arose from the same single act of starting the fire and therefore should have been merged.

{¶72} R.C. §2941.25 states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶73} Historically, Ohio courts have struggled to interpret the language of R.C. 2941.25. *State v. Huhn,* 5th Dist. Perry No. 13 CR 0057, 2014–Ohio–5559, ¶ 11, citing *State v. Rogers,* 2013–Ohio–3235, 994 N.E.2d 499 (8th Dist.) at ¶ 9. For a number of years, the law in Ohio concerning R.C. 2941.25 was based on *State v. Rance,* 85 Ohio St.3d 632, 636, 710 N.E.2d 699, 1999–Ohio–291, wherein the Ohio Supreme Court had held that offenses are of similar import if the offenses "correspond to such a degree that

the commission of one crime will result in the commission of the other." *Id.* The *Rance* court further held that courts should compare the statutory elements in the abstract. *Id.* at 637.

{¶74} However, in 2010 the Ohio Supreme Court decided *State v. Johnson,* 128 Ohio St.3d 153, 2010–Ohio–6314, 942 N.E.2d 1061, which specifically overruled the 1999 *Rance* decision. The Court held: "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id.* at the syllabus.

{¶75} In *State v. Williams,* the Ohio Supreme Court held that an appellate court reviews a trial court's R.C. §2941.25 decision de novo. 134 Ohio St.3d 482, 2012–Ohio–5699, 983 N.E.2d 1245 at ¶ 1.

{¶76} The Ohio Supreme Court has further instructed us that we are required to "review the entire record, including arguments and information presented at the sentencing hearing, to determine whether the offenses were committed separately or with a separate animus." *State v. Washington,* 137 Ohio St.3d 427, 2013–Ohio–4982, 999 N.E.2d 661, syllabus.

{¶77} Appellant bears the burden of establishing his entitlement to merger at sentencing. *State v. Mughni,* 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). The Ohio Supreme Court anticipates the issue of merger will be fully litigated at sentencing, with neither party limited to theories argued at trial. *Washington, supra*, 2013–Ohio–427 at ¶ 20–21.

{¶78} Upon review of the record, we find Appellant failed to raise the issue of merger of allied offenses at the trial level. However, the Ohio Supreme Court held that

the requirement to merge allied offenses is mandatory, occurs at sentencing, is reviewable on appeal even pursuant to a Crim.R. 11 jointly agreed-upon sentence, and may be reviewed for plain error even when no allied offense objection is raised at trial. *State v. Underwood, 124 Ohio St.3d 365, 2010–Ohio–1, 922 N.E.2d 923, ¶ 31, citing State v. Yarbrough, 104 Ohio St.3d 1, 2004–Ohio–6087, 817 N.E.2d 845, ¶ 96–102.*

{¶79} In the instant case, our analysis begins with the elements and corresponding allegations. Appellant herein was convicted of the following offenses:

R.C. §2909.02, Aggravated Arson

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

(1) Create a substantial risk of serious physical harm to any person other than the offender;

***

R.C. §2909.06, Criminal Damaging or Endangering

(A) No person shall cause, or create a substantial risk of physical harm to any property of another without the other person's consent:

(1) Knowingly, by any means;

(2) Recklessly, by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance.

R.C. §2919.22, Endangering Children

(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 or a mentally or physically handicapped child under twenty-one 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. ***

{¶80} Upon review of the sentencing hearing transcript, we find that no discussion was had at the hearing about whether the convictions for aggravated arson, criminal damaging and endangering children were allied offenses of similar import.

{¶81} If the offenses can be committed by the same conduct, then "the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " *Johnson* at ¶ 49, quoting *State v. Brown,* 119 Ohio St.3d 447, 2008–Ohio–4569, ¶ 50. If the answer to both questions is in the affirmative, then the offenses are allied offenses of similar import and will be merged. *Taylor* at ¶ 38; *Johnson* at ¶ 50. However, if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. *Johnson* at ¶ 51.

{¶82} Appellant argues that the criminal damaging charge resulted from the fire which is the basis of the arson charge. Appellant further argues that the arson was aggravated because the fire created a substantial risk of serious harm to his daughters, which is the same factual basis for the child endangering charges.

{¶83} Appellee argues that Appellant committed the act of criminal damaging when Appellant turned on all four of the stove's burners on high. Appellee argues that such act created a substantial risk of harm to Laurie Davis' personal property, even if all that was at risk for being damaged was the stove itself.

{¶84} Appellee further argues that once the fire started, Appellant's inaction or failure to put out the fire or failure to ensure that such fire extinguished, was arson which was aggravated by the fact that he created a risk of serious physical harm to his daughters who were present in the house, asleep in their beds.

{¶85} Finally, the State argues that Appellant committed the crime of endangering children when he failed to makes sure that each of his daughters had escaped from the house and were safe. Appellant left the house and the children, who had been left in his care while their mother as at work.

{¶86} Upon review, we agree that a separate animus existed for each of the offenses, and that the trial court did not commit plain error in concluding that the charges in this case were not subject to merger.

{¶87} Appellant's Fourth Assignment of Error is overruled.

{¶88} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

By: Wise, P. J.

Delaney, J., and

Baldwin, J., concur.

JWW/d 0224