

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 08CA0057

Appellee

v.

JAMES V. GRAY

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 08-CR-0086

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, James Gray, appeals from his convictions in the Wayne County Court of Common Pleas. This Court affirms.

I

{¶2} In February 2008, Gray was living with his girlfriend of four months, Staci Williams, her four-year-old daughter, Nicole, and her fifteen-month-old son, Kristin Emmanuel, who went by the name “Manny.” On the morning of February 25, 2008, Williams left her house and dropped Nicole off at school on her way to work, leaving Gray to care for Manny while she was gone. She returned home at approximately 10:00 a.m. to visit with Gray and Manny, then left again shortly before 12:00 p.m. to return to work. Manny appeared healthy, active, and otherwise fine when Williams left. At approximately 2:00 p.m. that afternoon, she received a call from Gray informing her that Manny had fallen down and hit his head, but simultaneously assuring her that he was alright and that she need not return home immediately. Following a

brief stop after work, Williams returned home at approximately 4:00 p.m. to find Manny lying on the floor next to Gray, with his eyes rolled back into his head. She immediately picked Manny up and began calling his name, but found him completely unresponsive. Gray and Williams rushed Manny to the nearest emergency room where he was examined and promptly taken by life flight to Akron Children's Hospital. Manny was placed on a ventilator upon his arrival as a result of severe head trauma and lack of oxygen to his brain. Manny was taken off life support three days later and died.

{¶3} On March 7, 2008, Gray was indicted on the following counts: murder in violation of R.C. 2903.02(B); felonious assault in violation of R.C. 2903.11(A)(1); endangering children in violation of R.C. 2919.22(B)(1); involuntary manslaughter in violation of R.C. 2903.04(A); and endangering children in violation of R.C. 2919.22(B)(3). Following a jury trial, the State dismissed the felonious assault count. Gray was found guilty of the four remaining counts. Upon sentencing, the court determined that the remaining counts were allied offenses of similar import and only sentenced Gray on the murder count. Gray was sentenced to prison for fifteen years to life. He now appeals from his convictions asserting several assignments of error, some of which we have rearranged and combined for ease of analysis.

II

Assignment of Error Number One

“THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO INTRODUCE GRUESOME AND INFLAMMATORY PHOTOGRAPHS IN EVIDENCE WHICH WERE CUMULATIVE IN NUMBER, TO THE EXTREME PREJUDICE OF JAMES GRAY AND WITHOUT CORRESPONDING PROBATIVE VALUE, WHICH, EXPECIALLY IN COMBINATION WITH OTHER ERRORS, VIOALTED MR. GRAY’S RIGHT TO A FAIR TRIAL UNDER R.C.2904.01(B), (sic) U.S. CONST. AMEND. XIV, AND OHIO CONST. ART.I, SEC.10.”

Assignment of Error Number Five

“THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ADMIT DEFENSE COUNSEL’S PROFFERED MEDICAL STUDY, OR BY REFUSING TO PERMIT THE STATE’S EXPERT TO REVIEW THE STUDY, WHILE ALLOWING THE STATE TO SWITCH ITS CHILD ABUSE EXPERTS SHORTLY BEFORE TRIAL WITH MINIMAL NOTICE TO THE DEFENSE, IN VIOLATION OF THE RIGHT TO A FAIR TRIAL UNDER R.C. 2901.04, US. CONST. AMEND. XIV, AND OHIO CONST. ART. I, SEC.10.”

{¶4} Because several of Gray’s alleged errors challenge the admissibility of the evidence upon which his convictions are based, we address those assignments of error first. In his first assignment of error, Gray argues that he was deprived of a fair trial because the court admitted multiple photographs of Manny’s injuries. Gray maintains that the photographs were gruesome, repetitive, and cumulative and that their prejudicial value outweighed their probative value such that they should have been inadmissible under Evid.R. 403. In his fifth assignment of error, Gray asserts that trial court erred when it denied the State’s witness the opportunity to review a study presented by the defense which evidenced an alternate theory as to the cause of Manny’s injuries. Gray alleges that the court’s ruling on this matter in turn denied Gray the opportunity to impeach the State’s witness and to “expose [the jury] to alternate theories [contained] in the report.” We disagree.

{¶5} A trial court possesses broad discretion with respect to the admission of evidence. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265. An appellate court will not disturb evidentiary rulings absent an abuse of discretion. *State v. Roberts*, 9th Dist. No. 21532, 2004-Ohio-962, at ¶14. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not

substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶6} “When considering the admissibility of photographic evidence under Evid.R. 403, the question is whether the probative value of the photographic evidence is substantially outweighed by the danger of unfair prejudice to the defendant.” *State v. Morales* (1987), 32 Ohio St.3d 252, 257. “[T]he mere fact that [a photograph] is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury.” *State v. Likosar*, 9th Dist. No. 03CA0063-M, 2004-Ohio-114, at ¶22, quoting *State v. Woodards* (1966), 6 Ohio St.2d 14, 25. “While it is true that the sheer number of photographs admitted may constitute error where they are needlessly cumulative *** the mere fact that there are numerous photos will not be considered reversible error unless the defendant is prejudiced thereby.” *State v. Davis* (Apr. 18, 1990), 9th Dist. No. 88CA004390, at *24, quoting *State v. DePew* (1988), 38 Ohio St.3d 275, 281.

{¶7} Specifically, Gray argues that the admission of photographic exhibits 4 – 13, 16, and 17, which were taken by police upon Manny’s arrival at the hospital, are cumulative and repetitive. In these exhibits, there are seven photographs of injuries to Manny’s face, head, and neck; three photographs of injuries to his buttocks; and two photographs of his feet. The record reveals that Gray filed a pre-trial motion in limine, but failed to contemporaneously object during the presentation of and testimony about the photographs. “[A] motion in limine does not preserve the record on appeal[;] *** [a]n appellate court need not review the propriety of such an order unless the claimed error is preserved by an objection *** when the issue is actually reached *** at trial.” (Emphasis omitted.) *State v. Grubb* (1986), 28 Ohio St.3d 199, 203, quoting Palmer, Ohio Rules of Evidence Manual (1984), at 446. The “failure to timely advise a trial

court of possible error, by objection or otherwise, results in a [forfeiture] of the issue for purposes of appeal.” *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121. See, also, *Ponder v. Kamienski*, 9th Dist. No. 23270, 2007-Ohio-5035, at ¶12-13. Gray’s only challenge to the use of these photographs occurred at the close of the trial, a day later, when the State moved to have its evidence admitted. By forfeiting the issue for appeal, Gray has confined our analysis to an assertion of plain error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23; Crim.R. 52(B). However, this Court will not undertake a plain error analysis sua sponte when the appellant has failed to assert such an argument in his brief. See *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶11 (noting that it is the appellant’s obligation to assert that plain error exists). Because Gray failed to assert plain error, we will not undertake such a review.

{¶8} Similarly, Gray asserts that the photographic exhibits 26 – 37, taken by the medical examiner during Manny’s autopsy, are gruesome and cumulative. Unlike the hospital photographs, these photographs were taken during the autopsy, days after Manny’s injuries were sustained and the other photographs were taken. The photographs depict measurements of the bruising to Manny’s head, face, ears, buttocks, and toes and include four photographs where the scalp is retracted from the skull to evidence internal injuries. Again, we note that the record reflects that Gray sought to exclude these photographs in his motion in limine, but later failed to contemporaneously object to the presentation of and testimony about the photographs when the issue was reached at trial. See *Grubb*, 28 Ohio St.3d at 203. As with the hospital photographs, Gray’s only objection to the use of or testimony about the autopsy photographs came at the close of trial. Accordingly, Gray has forfeited this issue for review on appeal. *Payne* at ¶23. Because

Gray has not argued plain error as to the admission of the autopsy photographs, we need not address it. Thus, Gray's first assignment is not well taken.

{¶9} Though the caption of Gray's fifth assignment of error alleges that the trial court "refus[ed] to admit defense counsel's proffered medical study" the trial transcript reveals that defense counsel never moved the court for its admission. Additionally, Gray's argument in support of that assignment centers not around the admission of the study, but around the fact that the State's witness, Dr. John Pope, had not read the medical study that Gray's counsel had sent to him prior to trial. Gray maintains that the trial court erred when it declined to permit Dr. Pope to review the medical study during trial, despite his willingness to do so. Gray asserts that, if Dr. Pope was given the chance to review the study, it could have been used "for impeachment purposes *** [and to] expose[] [the jury] to the alternate theories in the report, either through impeachment, or by being allowed to read the report." Gray further argues that the study is the "only medical evidence of any other theory that could have explained the injuries [to Manny]." Gray does not cite to any authority in support of his assertion that the State's witness has an obligation to review and testify to medical studies advanced by the defendant. Moreover, we note that "[i]n Ohio, medical literature may be used for impeachment purposes *if the expert witness to be impeached relied upon the literature.*" (Emphasis added.) *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 258. It is evident from the record that Dr. Pope was not familiar with the specific study advanced by Gray, nor did he rely on that study at any point in his testimony. Thus, it is not clear how Gray intended to impeach the witness on a matter upon which he had not relied. Accordingly, the trial court did not err in denying Dr. Pope the opportunity to review the medical study presented by the defense. *Thompson v. Capaldo*, 5th Dist. No. 08 CA 1, 2008-Ohio-6329, at ¶41-47 (concluding that the trial court did not err in

refusing to allow the defendant to impeach the plaintiff's expert physician by introducing a learned treatise with which the physician was not familiar).

{¶10} The balance of Gray's argument reveals that his intention to examine Dr. Pope about the medical study was also driven, in part, by a desire to provide the jury with a different set of medical circumstances which could have explained Manny's injuries and subsequent death. In both the transcript of the proceeding below and in Gray's brief to this Court, Gray plainly admits he sought to examine Dr. Pope on the medical study because the study represented an alternative theory as to what caused Manny's brain injuries and the timeframe within which those injuries occurred. Stated differently, Gray wanted the study in evidence to help prove the truth of the matter asserted, that is, his assertion that there is medical evidence which supports a conclusion that children can suffer from bleeding and hemorrhages in the brain as a reaction to having been vaccinated, as is suggested in the study. Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Thus, to the extent Gray was attempting to introduce the study to prove an alternative theory that could explain Manny's death, it was hearsay evidence and the trial court did not err in precluding him from doing so. Gray's arguments to the contrary are without merit.

{¶11} Based on the foregoing, Gray's first and fifth assignments of error are not well taken. Accordingly, they are overruled.

Assignment of Error Number Two

"PLAIN ERROR OCCURRED TO THE PREJUDICE OF JAMES GRAY WHEN THE PROSECUTOR MADE IMPROPER CLOSING REMARKS DURING CLOSING ARGUMENT, LEADING TO CUMULATIVE ERRORS IN VIOLATION OF THE RIGHT TO A FAIR TRIAL GRANTED BY R.C. 2901.04, US. CONST. AMEND. XIV, AND OHIO CONST. ART. I, SEC.10."

Assignment of Error Number Three

“IT WAS PLAIN ERROR TO PERMIT THE JURY TO VIEW THE POLICE INTERVIEW WITH JAMES GRAY, WITHOUT REDACTING THE POLICE OPINIONS AS TO MR. GRAY’S GUILT OR INNOCENCE, AS TO THE IMPORT OF EXPECTED MEDICAL TESTIMONY, AND AS TO MR. GRAY’S LACK OF VERACITY IN RESPONDING TO THE QUESTIONS, CREATING FURTHER CUMULATIVE ERROR IN VIOLATION OF MR. GRAY’S RIGHT TO A FAIR TRIAL UNDER R.C. 2901.04, US. CONST. AMEND. XIV, AND OHIO CONST. ART. I, SEC.10.”

{¶12} In his second assignment of error, Gray asserts that the prosecutor made improper statements about him during his closing argument and that those statements constituted plain error. Similarly, in his third assignment of error, Gray asserts that it was plain error for the trial court to permit the jury to view an unredacted video of the police questioning him because the police: (1) repeatedly told Gray they did not believe his version of events; (2) lied to Gray about what the medical testimony against him would reveal; and (3) urged Gray to confess that he lost control of his temper when he was with Manny and that he felt that he was being taken advantage of by Manny’s mother for having to babysit him. Gray argues that the cumulative effect of the video denied Gray the right to a fair trial. We disagree.

{¶13} Pursuant to Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” The Supreme Court has repeatedly admonished that this exception to the general rule is to be invoked reluctantly. “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. In order for this Court to apply Crim.R. 52(B), it must be clear that the outcome of the trial would have been different but for the alleged error. See *State v. Wharton*, 9th Dist. No. 23300, 2007-Ohio-1817, at ¶18.

{¶14} We have previously stated that:

“[When] deciding whether a prosecutor’s conduct rises to the level of prosecutorial misconduct, a reviewing court must also determine if the remarks were improper, and, if so, whether they actually prejudiced the substantial rights of the defendant. [An] appellant must demonstrate that there is a reasonable probability, that, but for the prosecutor’s misconduct, the result of the proceeding would have been different.” *Wharton* at ¶16, quoting *State v. Overholt*, 9th Dist. No. 02CA0108-M, 2003-Ohio-3500, at ¶47.

Here, Gray alleges that the prosecutor’s comments during closing arguments were improper because they characterized the defense as “fearing evidence” and having “lied” or acted “dishonestly” when his counsel asserted during closing argument that the State introduced photographic evidence specifically to elicit anger and emotion from the jury.

{¶15} The transcript reveals that the trial court instructed the jury at the start of the case that “[y]ou have to rely on what you get from the witness stand in making your decision [of guilt or innocence].” Furthermore, the trial court again instructed the jury at the commencement of closing arguments that, “[a]t this time, *** the attorneys will have a chance to make a closing statement. It’s not evidence but [it is] to help you in evaluating the evidence.” Thus, the jury was instructed on more than one occasion as to what constituted admissible evidence in this case and was specifically informed that closing arguments did not. Thus, we presume the jury adhered to those instructions and did not consider the prosecutor’s statements as evidence. *Wharton* at ¶19; see, also, *State v. Turner* (July 19, 1995), 9th Dist. No. 17010, at *5. Additionally, when read in the context of both parties’ closing arguments, it is apparent that the prosecutor’s comments were not improper, and instead, were solely an attempt to refute the defense’s assertion that the State introduced photographic evidence merely to conjure up anger and emotion toward Gray and obtain a conviction based on those feelings, not the facts or evidence that the photographs conveyed. Compare *State v. Smith* (1984) 14 Ohio St.3d 13, 15

(concluding that unsubstantiated assertions by the prosecution that the defense's evidence was "lies," "garbage," "garbage lies," "[a] smoke screen," and "a well conceived and well rehearsed lie" constituted plain error). Moreover, Gray has failed to present any evidence that, but for the prosecutor's statements, the outcome of his trial would have been different. *Wharton* at ¶16. Thus, we are not persuaded by Gray's assertions it was plain error to permit the prosecutor's statements during closing argument.

{¶16} Gray also asserts that he was denied a fair trial when the trial court permitted the jury to review the unredacted video of his police interview because the statements made by the police in the video were "like an instruction manual to the jury on the police[']s theory of guilt." Specifically, in the recorded interview the police inform Gray that they do not believe his version of events and they encourage him to confess that he lost control of his temper while watching Manny and, as a result, repeatedly struck or shook him. Additionally, police informed Gray that physicians would be testifying that Manny died as a result of physical abuse and being hit repeatedly in the back of the head. Gray argues that the cumulative effect of the video denied him the right to a fair trial. Gray relies on a Sixth Circuit case, *Cooper v. Sowders* (1988), 837 F.2d 284, as authority for this Court to conclude the admission of the unredacted videotape constitutes plain error. In *Cooper*, the Sixth Circuit granted the petitioner's writ of habeas corpus based on its belief that multiple errors, "when considered cumulatively, *** produced a trial setting that was fundamentally unfair." *Cooper*, 837 F.2d at 288. There, the trial court permitted the arresting officer to give opinion-based testimony as to the guilt or innocence of the defendant, then referred to the officer as an "expert" on whether to arrest someone as a suspect. *Id.* at 286-87. The Sixth Circuit concluded that the testimony and court's comments during trial, combined with the fact that it was a "close case[.]" that "much of th[e] evidence was

questionable[.]” and that the State “waited two years after the evidence *** was *** compiled before it elected to prosecute[.]” resulted in cumulative errors that denied the defendant the right to a fair trial. *Id.* at 288.

{¶17} Our review of the video recording does not reveal a similar type of prejudicial error. Both officers who questioned Gray in the recording testified at trial and were subject to cross examination as to the statements they made to him during the interview. Moreover, the police officer who conducted the majority of the interview admitted at trial that he had lied to Gray about certain statements made by the physicians treating Manny in an unsuccessful attempt to elicit a confession from him. We note, however, that both Dr. Pope and the medical examiner, Dr. Lisa Kohler, testified at trial that Manny was, in fact, injured as a result of being struck or shook, as police told Gray during their questioning. Furthermore, despite the officer’s urging Gray to confess to the crimes, Gray maintained an unwavering commitment to his innocence throughout the interview, which the jury was also able to review. Furthermore, Gray proffers no evidence in support of any claim that the outcome of his trial would have been different if the video were redacted. Therefore, we cannot conclude that the inclusion of the officers’ unredacted statements during their interview prejudiced Gray, or constituted the “exceptional circumstance” of plain error. *Long*, 53 Ohio St.2d at paragraph three of the syllabus.

{¶18} For the reasons previously stated, Gray’s second and third assignments of error are without merit. Accordingly, they are overruled.

Assignment of Error Number Four

“TRIAL COUNSEL WAS INEFFECTIVE FOR NOT ASKING FOR A REDACTION OF THE DVD, STATE’S EXHIBIT 19, IN VIOLATION OF R.C. 2901.09, US. CONST. AMEND. VI AND XIV, AND OHIO CONST. ART. I, SEC.10.”

{¶19} In his fourth assignment of error, Gray asserts that he was denied the effective assistance of counsel because his counsel permitted the jury to view the unredacted video of him being questioned by police. Much like his challenge to the admission of the video itself, Gray alleges that the tape was prejudicial to his defense and that if police attempted to testify during trial as to their theory of his guilt, counsel would have “undoubtedly” objected to such testimony. Thus, he asserts his counsel was ineffective for not having redacted the video to eliminate such prejudice as it was not “part of a sound defense strategy.” We disagree.

{¶20} To prevail on a claim of ineffective assistance of counsel, Appellant must meet the two-prong test established in *Strickland v. Washington* (1984), 466 U.S. 668, 687.

“First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687.

The defendant has the burden of proof and must overcome the strong presumption that counsel’s performance was adequate or that counsel’s action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. “Ultimately, the reviewing court must decide whether, in light of all the circumstances, the challenged act or omission fell outside the wide range of professionally competent assistance.” *State v. DeNardis* (Dec. 29, 1993), 9th Dist. No. 2245, at *2, citing *Strickland*, 466 U.S. at 689. Furthermore, an attorney properly licensed in Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174.

{¶21} In demonstrating prejudice, the 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. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

Further, an appellate court need not analyze both prongs of the *Strickland* test if it finds that Appellant failed to prove either. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶22} Having previously concluded that Gray was not prejudiced by the police statements made in the unredacted video, he has likewise failed to make a showing the second prong of the *Strickland* test. *Strickland*, 466 U.S. at 687. Accordingly, we need not address his ineffective assistance claim any further. *Ray* at ¶10. Gray’s fourth assignment of error lacks merit.

Assignment of Error Number Six

“THE VERDICT AND FINDING OF GUILTY OF MURDER LACKED SUFFICIENT EVIDENCE TO SURVIVE THE RULE 29 MOTION, OR WAS OTHERWISE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND THE VERDICTS WERE INCONSISTENT.”

{¶23} In his sixth assignment of error, Gray argues that there was insufficient evidence to support his convictions and that his convictions are against the manifest weight of the evidence. He maintains that his convictions for second- and third-degree child endangering are inconsistent with the evidence because the evidence did not reveal any “factual distinction between non-serious and serious or fatal injuries” which he argues was required if he was convicted of both felony endangering offenses. He further asserts that there was a lack of evidence from which to distinguish between “serious and fatal injuries” versus “non-serious and non-fatal” injuries, which “is the precise distinction between the two sections of [R.C. 2919.22] of which [he] was found guilty[.]” Accordingly, he avers that there was a lack of evidence to convict him of second-degree endangering children which served as the statutory predicate to his murder conviction. We disagree.

{¶24} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000),

9th Dist. No. 19600, at *1. “While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.” *Id.*, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *Id.* at paragraph two of the syllabus; see, also, *Thompkins*, 78 Ohio St.3d at 386.

In *State v. Roberts*, this Court explained:

“[S]ufficiency is required to take a case to the jury[.] *** Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.” (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at *2.

Accordingly, we address Gray’s challenge to the weight of the evidence first, as it is dispositive of his claim of sufficiency.

{¶25} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

“[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the

evidence, the appellate court sits as the “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.* Therefore, this Court’s “discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶26} Gray was convicted of one count of murder in violation of R.C. 2903.02(B). R.C. 2903.02(B) sets forth the elements for murder with a predicate offense and considers it a crime to “cause the death of another as a proximate result of the offender’s committing an offense of violence that is a felony of the first or second degree[.]” An “offense of violence” as used in that section includes a violation of R.C. 2919.22(B)(1)-(4). R.C. 2901.01(A)(9)(a). Gray challenges his conviction for second-degree endangering children under R.C. 2919.22(B)(1), asserting that there was a lack of evidence to support his conviction for that offense, which serves as the predicate offense to his murder conviction.

{¶27} R.C. 2919.22(B)(1) provides that “[n]o person shall *** [a]buse [a] child” if the child is under eighteen years of age. Pursuant to 2919.22(E)(1)(d), if a violation of 2919.22(B)(1) results in serious physical harm to the child, the offense is a felony of the second degree. Initially, we note that, despite Gray’s assertion that “the precise distinction” between second- and third-degree endangering children is the difference between “serious and fatal injuries” versus “non-serious and non-fatal injuries,” our review of the statutes reveals no such defining line. Thus, we decline his invitation to read such a categorization into the statute and address his challenge to weight of the evidence advanced to support his conviction.

{¶28} At trial, Williams, Manny’s mother, testified that Manny had spent the weekend with his father and was dropped off at her mother’s on Sunday, where she and Gray arrived later

that evening to pick him up. After going out for dinner, she, Gray, and both her children returned to her house for the night. Williams testified that Manny was an “active little boy” who seemed fine that night; she did not notice any scrapes or bruises on him when she got him ready for bed around 9:00 p.m. When Manny awoke the next morning, Williams changed his diaper, got him cereal, and then left at approximately 7:50 a.m. to drop her daughter off at school and head to work as a home health aide. Gray remained at home with Manny for the day.

{¶29} Williams returned to the house at approximately 10:00 a.m., at which point she played with Manny, changed his diaper, and fed him lunch before leaving again at noon for her afternoon appointments. Manny appeared fine when Williams left him to return to work. Williams testified that she received a call at approximately 2:00 p.m. from Gray stating that while he and Manny were playing, Manny fell against a metal sweeper and the wall and hit his head. Williams asked how Manny was and Gray informed her he was fine. Williams finished her appointment at approximately 3:15 p.m., at which point she called Gray to see if he and Manny wanted to go with her to handle some insurance paperwork. Gray indicated he and Manny were sleeping, so Williams went by herself and returned home at approximately 4:00 p.m.

{¶30} According to Williams, when she entered the house, Manny and Gray were lying on the living room floor. When she approached Manny, she noticed “his eyes were rolling back in his head” and that he had on different clothes than when she had left the house at noon. Williams then picked Manny up, called his name several times, and asked Gray what was wrong with him, to which he did not respond. Williams told Gray something was wrong with Manny, that they needed to get him to the hospital, and asked him to grab Manny’s coat. Williams testified that Manny was “completely lethargic” and that when she asked Gray to help her put

Manny's arm into the coat "[h]e picked up Manny's hand and he dropped it. He couldn't even touch him." Williams testified Gray was pacing back and forth while she was getting a blanket to cover Manny and told her "everybody's going to think I did something to your son."

{¶31} Williams testified that Gray drove her and Manny to Dunlap Memorial Hospital in Orrville which was minutes away. Emergency personnel there tended to Manny immediately and informed Williams that he would need to be taken to Akron Children's Hospital by way of a life flight. While Williams was waiting to see Manny, Gray waited with her and "constantly paced *** and sat for maybe five seconds." Williams went with Manny in the helicopter while Gray drove her car to the hospital in Akron.

{¶32} Upon arriving at Akron Children's Hospital, Williams spoke with a social worker who informed her Manny's injuries were the result of abuse. While at Akron Children's Hospital and waiting to be let in to see her son in the pediatric intensive care unit, Williams asked Gray, who was waiting in the hallway, to come into the waiting room with her. He declined, and told her everyone "keep[s] looking at me like I did something to your son." He told Williams he was leaving but would come back if anything happened to Manny. He left in Williams' car and later called her at the hospital at which point he informed her "he might as well leave now."

{¶33} Upon cross examination, Williams testified that it was not uncommon for Manny to fall, hit things, or sustain bruises, but that he had never had any serious injuries from such activities. She admitted he was wearing slippers when she left him and that they made the kitchen floor slippery. She testified that she had never seen Gray hit Manny in the past, that Manny had some diaper rash when he returned from the weekend at his father's, and that he was currently on medication for an ear infection. She further admitted that she was alone with

Manny in the house for portions of the morning when she returned home for a few hours from work while Gray was outside.

{¶34} Officer Joshua Hunt, the officer who investigated the circumstances surrounding Manny's death, testified that upon his arrival at Akron Children's Hospital on the evening of February 25, 2008, a social worker informed him that Manny was on a ventilator and appeared to be victim of abuse. Officer Hunt then photographed Manny's injuries and interviewed Williams. Gray had left the hospital by that point, but police later located Williams' car at Gray's sister's apartment in Orrville. At approximately 4:30 a.m., Officer Hunt proceeded to that location, awoke Gray, and requested Gray accompany him to the police station for questioning, which he did.

{¶35} In the recorded interview, Officer Hunt questioned Gray as to the events that occurred while he cared for Manny the day before. Gray initially indicated that Manny fell into the wall and onto the kitchen floor, but indicated that, after crying for a few minutes, Manny was otherwise fine and continued playing. Officer Hunt challenged Gray's version of events, but Gray maintained he was being truthful. Once Officer Hunt informed Gray that the physicians at the hospital had indicated that Manny's injuries were inconsistent with falling, Gray added that Manny had also fallen down the steps to the basement. Initially, Gray denied ever hitting Manny, but later admitted he struck him once or twice with an open hand. He denied throughout the interview ever hitting Manny with a remote control. Gray similarly denied that Manny was ever sick that day, but upon being informed by Officer Hunt that the police already had found Manny's clothes and other blankets in the basement with vomit on them when they searched the house, Gray stated that when he woke up from napping with Manny, he realized Manny had

thrown up at some point while they were sleeping, so he changed Manny's clothes and threw the soiled clothes and blankets into the basement.

{¶36} Upon cross examination at trial, Officer Hunt admitted that he lied to Gray at various points during the questioning. He also stated that when Gray attempted to divert the blame for Manny's injuries to Williams, Officer Hunt redirected the conversation back to Gray's conduct that day because he had already learned from Williams that Manny was fine when she last saw him. Officer Hunt testified that he thought Gray's account of what occurred the afternoon he was with Manny was inconsistent with the information he had obtained from the hospital and Williams.

{¶37} Officer Michael Bishop testified that he initiated the search of Williams' house and returned to the police station to join Officer Hunt who was in the process of questioning Gray. Officer Bishop informed Gray that his search of the residence had produced evidence of soiled baby wipes which he suspected contained blood. Upon questioning Gray about the wipes, Gray stated that Manny had cut his lip during one of his falls. Officer Bishop testified that he did not believe Gray's version of events, but did admit that he later learned the wipes did not contain blood, but instead were used to clean up Manny's vomit.

{¶38} Officer William Stitt testified that he and three other police officers went to Williams' house with Gray early in the morning of February 26, 2008, after interviewing him at the police station. While there, police found an adult shirt on the chair with body fluid on it, which the parties stipulated at trial was Gray's shirt and contained a stain of Manny's blood. Gray also showed police the metal sweeper, wall, and kitchen floor where, according to Gray, Manny had hit his head the day before. Upon cross examination, Officer Stitt admitted that

police did not swab any of those surfaces for DNA evidence or take the metal sweeper from the residence for further investigation.

{¶39} Dr. Robert Hutson, Manny’s physician, testified that Manny was a “healthy patient” whom he had treated since he was two weeks old and had most recently seen two to three weeks before his death. Dr. Hutson stated that he had never seen any injuries or other signs of physical abuse over the course of time he was Manny’s physician. Dr. Hutson opined that Manny had been sick with illnesses such as a cold, fever, rash, and ear and eye infections, but that he never had any serious or life-threatening illness or injuries.

{¶40} Dr. Pope, the pediatrician who treated Manny in the intensive care unit at Akron Children’s Hospital, testified that Manny had bruising on the top of both his feet, lower abdomen, buttocks and mid to lower back. He also had small abrasions and bruising to the back and front of his head, ears, and both sides of his face. Dr. Pope corroborated his testimony with pictures taken of Manny when he was in the hospital. He further stated that Manny’s “most significant injuries were to his brain *** [which included] blood inside [] his head and around his brain *** [and] the he had suffered some period of time where his brain wasn’t getting enough oxygen.” Dr. Pope concluded that Manny’s injuries were inflicted and were the result of abuse. Upon examining Manny on the evening he was admitted, Dr. Pope determined that Manny’s trauma occurred “some time that day[,] most likely later that day.” Dr. Pope testified that, upon sustaining that type of trauma, Manny “would have been out of it *** [and] unresponsive” and that there was no reasonable likelihood that he could have been running around and playing afterward because the neurological effects would have been immediate.

{¶41} Upon cross examination, Dr. Pope testified that Manny had a severe, but “diffuse injury to his brain.” He further clarified that Manny had a subdural hematoma, or bleeding

around the brain, as well, which can be sustained by a significant amount of force to the head or by shaking the head back and forth. Dr. Pope testified, however, that Manny's subdural hematoma did not create "enough blood to push on the brain *** [such that] the blood itself was causing the injury to the brain."

{¶42} Dr. Lisa Kohler, the chief medical examiner for Summit County who conducted Manny's autopsy, testified to several external injuries, including: bruising on Manny's eyelids, nose, forehead, cheeks, midchest, and cuts to his ear. Additionally, he had a cut and "bruises within the folds of his buttocks." Dr. Kohler stated that these bruises were "deep down in the soft tissue" and were consistent with trauma that would have occurred while Manny's feet were being held upright exposing the folds of his buttocks, as is done when changing a diaper. She further opined that the bruising was not representative of "just smacking a child on the buttocks[.]" nor would it be related to diaper rash. Manny also had significant bruising on the tops and bottoms of his feet and in between his toes. Dr. Kohler testified that, while "typical toddler type bruises" are on the front of the shins, the extensive bruising to Manny's feet and toes indicated that his "toes may have been squeezed forcefully together or *** struck[.]" She maintained that such bruising would not occur if Manny had fallen or if someone had merely stepped on his feet. Additionally, examination of Manny's scalp revealed a "small cluster of bruises" on the top and front of his scalp. On the rear of the scalp "there was an area *** [that showed] kind of a patterned contusion[.]" with evenly spaced red marks and small oval bruises contained to a rectangular area. She stated that, upon comparing the patterned marks on his scalp to the DVD remote control that police had recovered from Williams' house, it was possible that those marks "may have been inflicted by [Williams'] remote control[.]" although she was not absolutely certain.

{¶43} Upon internal examination, Dr. Kohler determined that Manny had subdural bleeding, brain swelling, optic nerve sheath bleeding, hemorrhaging of the membranes surrounding the skull and brain, and a spinal cord injury. Autopsy photographs with Manny's scalp retracted revealed "a big area of bruising *** on [the back of] the skull" as well as "multiple areas of bruising" on the top to rear portion of his skull, which corresponded to the external bruising injuries to Manny's head. Dr. Kohler concluded that Manny's "head was impacted against or by some object and there [were] multiple sites of impact []. There [was] a possibility that there was a shaking injury [] as well." Specifically, she stated that Manny's subdural hemorrhages, retinal hemorrhages, brain swelling and spinal cord injuries were consistent with shaking injuries. Dr. Kohler determined Manny's cause of death to be blunt force trauma to the head inflicted by another person, but noted that "there are also injuries [] that suggest there may have been a shaking component as well." She testified that it was not possible for Manny to sustain such injuries from falling into the wall, a metal sweeper, or even down several steps and that he would have been unable to walk or play after such injuries because their effects would have been immediate.

{¶44} Upon cross examination, Dr. Kohler admitted that "[t]he dating of bruising is very imprecise" and that it was impossible to tell on what day or at what time the bruising occurred, but noted that, in terms of Manny's bruises, "everything appeared to be [] fresh[.]" She further clarified that it was impossible to tell whether a man or woman inflicted the injuries. She maintained that the bruises on various parts of Manny's body were not the cause of his death, rather, the head injuries were, and confirmed that Manny could not have inflicted such injuries upon himself, even by falling onto an object.

{¶45} Upon viewing the evidence adduced at trial, we cannot conclude that Gray's conviction for second-degree endangering children was against the manifest weight of the evidence. Williams testified that when she left Manny in Gray's care at noon that day, he was walking around and playing. She further testified that when she returned home four hours later, he was completely unresponsive. Manny's family physician testified that Manny was generally healthy and had never exhibited signs of abuse. Two different physicians testified that Manny's injuries could not have been self inflicted, that is, the result of any fall, but rather, were the result of a blunt force or shaking trauma to his brain. Additionally, the physicians consistently testified that Manny would not have been able to run around or play after sustaining such injuries. Moreover, two officers testified that Gray augmented his story of that afternoon's events as they revealed to him what evidence they had found at the house and what they were told by hospital personnel about Manny's condition.

{¶46} Based on the foregoing evidence, we conclude that the jury did not lose its way in convicting Gray of second-degree endangering children. Accordingly, we conclude that the trial court did not err in convicting Gray of second-degree endangering children, which serves as the predicate offense to his murder conviction. Because we have determined that Gray's conviction was not against the weight of the evidence, we similarly dispose of his challenge to the sufficiency of the evidence. See *Roberts*, supra, at *2. Accordingly, Gray's sixth assignment of error lacks merit.

III

{¶47} Gray's six assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.