[Cite as *State v. Rafferty*, 2015-Ohio-1629.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 26724
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BROGAN W. RAFFERTY	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 12 01 0169

DECISION AND JOURNAL ENTRY

Dated: April 29, 2015

MOORE, Judge.

{¶1} Defendant, Brogan Rafferty, appeals from his conviction in the Summit County Court of Common Pleas. We affirm.

I.

{¶2} In August of 2011, Mr. Rafferty was sixteen years old. At that time, his friend Richard Beasley, a man in his fifties, devised a plan to rob and murder men who responded to a posting that Mr. Beasley created for a non-existent job as the caretaker of a 680-acre farm in Noble County, Ohio. Ralph Geiger, David Pauley, Scott Davis, and Timothy Kern were four of the men who responded to the posting. After luring these men to wooded locations, Mr. Beasley fatally shot and buried Mr. Geiger, Mr. Pauley, and Mr. Kern, and stole their possessions. Prior to the murder of Mr. Kern, Mr. Beasley had also lured Mr. Davis to a wooded area, where he attempted to shoot him in the head. However, the gun jammed, allowing time for Mr. Davis to escape. As he ran from Mr. Beasley, Mr. Beasley was able to shoot him once in the arm. After

hiding in the woods throughout the day, Mr. Davis made his way to a home where the residents called authorities for assistance.

{¶3} The officers investigating Mr. Davis' attack learned that Mr. Davis met Mr. Beasley after responding to the posting for the caretaker position. Thereafter, they learned that Mr. Pauley had been reported missing after responding to a similar advertisement. In the area where Mr. Davis had been attacked, police located the body of Mr. Pauley in a shallow grave.

{¶4} During the course of their investigation, the officers developed Mr. Beasley and Mr. Rafferty as suspects. On November 16, 2011, law enforcement officers went to Mr. Rafferty's high school and interviewed him. During this interview, the officers informed Mr. Rafferty that they were investigating a case regarding Mr. Beasley. Mr. Rafferty acknowledged that he and Mr. Beasley had breakfast with a man, whom the officers identified as Mr. Davis, at a restaurant in Marietta, Ohio, about one and a half weeks prior to the interview. Mr. Rafferty informed the officers that, after breakfast, they drove to Caldwell, Ohio, where Mr. Beasley and Mr. Davis had an altercation while they were driving on a country road. Mr. Beasley then told Mr. Rafferty to drop them off, which he did. Mr. Rafferty drove a short distance up the road, and he turned around and came back to where he had dropped the men off. When he came back, he saw Mr. Beasley walking. He picked him up, and Mr. Beasley informed Mr. Rafferty that Mr. Davis had to leave. Mr. Beasley and Mr. Rafferty then left the area. Mr. Rafferty confirmed that, about a week prior to meeting with Mr. Davis, Mr. Rafferty had traveled to this area with Mr. Beasley and eaten at a place called the Ashton. On that trip, they had just been driving around with no other purpose of being in that area. Mr. Rafferty also acknowledged that he and Mr. Beasley may have also met another man in Marietta, but he could not remember.

{¶5} During the interview at the school, officers seized Mr. Rafferty's car pursuant to the terms of a search warrant. After the school interview, the officers contacted the Noble County's Sheriff's Office to request an arrest warrant be issued for Mr. Rafferty.

{¶6} Later that day, the officers again interviewed Mr. Rafferty at his home with his parents present. During this interview, Mr. Rafferty's parents actively engaged in questioning Mr. Rafferty along with the officers. Mr. Rafferty maintained that the first time he went to Noble County with Mr. Beasley was two weeks to one month prior to the interview. During that trip, they had breakfast at a restaurant in Marietta with "the victim of the first attack." Over breakfast, Mr. Beasley discussed with a man (whom the officers noted was David Pauley) the details of a job working as a farmhand. After breakfast, they drove to Caldwell. Mr. Pauley left his truck and attached trailer at a gas station there, and then Mr. Pauley, Mr. Beasley, and Mr. Rafferty drove about ten minutes away up a gravel road. At some point, Mr. Beasley told Mr. Rafferty to pull over, because there was an area in the woods that they were going to use to access the farm property. Mr. Beasley and Mr. Pauley got out of the car, and Mr. Beasley directed Mr. Rafferty to continue down the road and then turn around on the next road, and then come back. When Mr. Rafferty drove back, Mr. Beasley was alone. Mr. Beasley told Mr. Rafferty that he and Mr. Pauley had found the property, that they had sealed all the details of the job, and that he and Mr. Rafferty could leave now. They drove back to the gas station where Mr. Pauley had left his truck and trailer, and Mr. Beasley got into Mr. Pauley's truck and drove it. Mr. Rafferty did not know why Mr. Beasley was taking his truck.

{¶7} During the interview at his home, Mr. Rafferty maintained that he was under the impression that some items from Mr. Pauley's trailer were junk that Mr. Pauley needed to get rid

of, including a tool chest, an ammo can, and a shot gun. Mr. Rafferty kept those items, which the officers found during their search of his bedroom.

{¶8} Mr. Rafferty further acknowledged that he went to Caldwell on a second occasion because Mr. Beasley informed him that Mr. Pauley had not worked out. This time, they met Mr. Davis for breakfast, and Mr. Davis and Mr. Beasley discussed the details of the job. They then all drove to Caldwell, and again, Mr. Beasley directed Mr. Davis to leave his truck and trailer at a gas station. The three then drove together to the same area where Mr. Rafferty had dropped off Mr. Beasley and Mr. Pauley. Just as before, he dropped off Mr. Beasley and Mr. Davis, and then kept driving until he reached a place where he could turn the car around. When he drove back to the location near where he had dropped the men off, Mr. Beasley was there, and he said that he had got Mr. Davis set up. Mr. Beasley and Mr. Rafferty then drove back to Akron.

{¶9} When questioned about whether Mr. Rafferty was aware of any pre-dug graves, he said he was not. However, he acknowledged that he had dug a hole in that area previously, which Mr. Beasley told him was for piping.

{¶10} After this second interview, the officers received the arrest warrant that they had requested earlier that day, and they placed Mr. Rafferty under arrest. The officers then transported Mr. Rafferty to a juvenile detention facility in Zanesville, Ohio.

{¶11} On November 23, 2011, Mr. Rafferty's public defender negotiated an agreement with the prosecutor and law enforcement officials, whereby Mr. Rafferty would provide a truthful account of the events and testify truthfully against Mr. Beasley. In exchange, the State agreed that he would only face charges for one count of complicity to murder and one count of complicity to attempted murder, he would not face additional charges for these or any other victims that he disclosed, and the federal government agreed not to prosecute Mr. Rafferty in

connection with these events. Mr. Rafferty agreed to these conditions, and, on the same day, Mr. Rafferty gave a recorded proffer.

{¶12} In Mr. Rafferty's proffer, Mr. Rafferty explained that he and Mr. Beasley had the type of friendship where they trusted and would do anything for each other. In August of 2011, Mr. Beasley was hiding from law enforcement due to legal problems unrelated to this case. During this time, Mr. Beasley contacted Mr. Rafferty and told him he needed a new identity so that he could obtain employment. Mr. Beasley created the farmhand job as a scheme to steal an applicant's identity. Mr. Beasley met Mr. Geiger, who looked similar to Mr. Beasley and who was interested in the job. In August 2011, Mr. Beasley, Mr. Rafferty, and Mr. Geiger drove to a motel in Caldwell, Ohio. The next morning, they drove to the purported farm property, at which point Mr. Beasley pulled a pistol from the car, which he proceeded to load, stating that there might be a problem with coyotes in that area. They then entered the woods, where Mr. Beasley looked for the entrance to the farm property. After some amount of time, the men turned around, at which point Mr. Geiger was in front of Mr. Beasley, and Mr. Beasley fatally shot Mr. Geiger in the back of his head. Mr. Beasley and Mr. Rafferty then drug Mr. Geiger's body further into the woods, where Mr. Rafferty dug a hole and buried Mr. Geiger's body. Mr. Rafferty explained to the interviewers where the body was buried.

{¶13} Mr. Rafferty then stated that, later that year, Mr. Beasley informed Mr. Rafferty that another man, David Pauley, was driving to meet him regarding the advertised caretaker job. In October 2011, Mr. Rafferty drove Mr. Beasley to the same wooded area in Caldwell where Mr. Beasley had murdered Mr. Geiger. Mr. Rafferty dug a hole in the woods. They then went to meet Mr. Pauley for breakfast. After they ate, Mr. Beasley instructed Mr. Pauley to leave his truck and trailer at a grocery store because he would not be able to maneuver it on the road to the

property. After they drove again to the wooded area, they all exited the vehicle, and Mr. Rafferty stayed behind as Mr. Beasley and Mr. Pauley walked up a hill. Mr. Rafferty heard Mr. Beasley shoot Mr. Pauley in the woods. Mr. Beasley then emerged from the woods, and Mr. Rafferty accompanied him back into the woods, where they drug Mr. Pauley's body to the hole they had previously dug and buried his body. Afterward, Mr. Rafferty and Mr. Beasley returned to the grocery store, where Mr. Beasley drove off with Mr. Pauley's truck and trailer, and Mr. Rafferty followed. They arrived at a house of two other men, and there they unpacked the truck. Mr. Beasley gave Mr. Rafferty a shotgun and several other items that he obtained from Mr. Pauley's possessions.

{¶14} Thereafter, another man, Scott Davis, responded to the caretaker advertisement. Mr. Rafferty explained that Mr. Beasley was excited because he anticipated that Mr. Davis would have a significant amount of property with him, for which Mr. Beasley could get a lot of money. Mr. Beasley and Mr. Rafferty again went to the wooded area in Caldwell and dug a hole. The next day, they met Mr. Davis for breakfast. After they ate, all three men went to a gas station, and then headed to Caldwell. When they reached the grocery store where Mr. Beasley had instructed Mr. Pauley to leave his truck, he again instructed Mr. Davis to leave his truck there. Mr. Rafferty then drove Mr. Beasley and Mr. Davis to the wooded area, and he let Mr. Beasley and Mr. Davis out of the car, while Mr. Rafferty drove further up the road to turn the car around. When Mr. Rafferty returned, Mr. Beasley informed him that Mr. Davis had escaped because something was wrong with the gun. He told Mr. Rafferty that, if he saw Mr. Davis walking on the road, to hit him with the car. However, they did not see Mr. Davis on the road, and Mr. Beasley said he must have gone into the woods. Mr. Beasley and Mr. Rafferty then left

that road, and Mr. Beasley disposed of his boots, gun, ammunition, computer and other items outside at other locations

{¶15} After the attempted murder of Mr. Davis, Mr. Beasley informed Mr. Rafferty that another man, Timothy Kern, had responded to the advertisement. Mr. Beasley and Mr. Rafferty dug a hole in a wooded area near an abandoned shopping complex. The next day, Mr. Beasley and Mr. Rafferty met Mr. Kern in the parking lot of a pizza shop in Canton, Ohio. Mr. Beasley informed Mr. Kern that he wanted to look for a watch that he had lost while squirrel hunting. The three men went into the area where Mr. Rafferty had dug the hole, and Mr. Rafferty and Mr. Beasley pretended to look for Mr. Beasley's watch. Mr. Beasley then shot Mr. Kern in the head several times, and Mr. Beasley and Mr. Rafferty buried Mr. Kern's body in the hole they had previously dug. Mr. Beasley gave Mr. Rafferty the gun used to kill Mr. Kern.

{¶16} Mr. Rafferty further explained that Mr. Beasley did not threaten him directly, but after the murder of Mr. Geiger, Mr. Beasley would check in on him frequently, and he knew where his mother and sister lived.

{¶17} On November 25, 2011, law enforcement officers recovered the bodies of Mr. Geiger and Mr. Kern from the locations that Mr. Rafferty had provided in his proffer.

{¶18} On December 26, 2011, Mr. Rafferty's public defender presented Mr. Rafferty with a written agreement entitled "Defendant's Agreement[.]" Contained in that agreement was a provision that, if he did not comply with the terms of the agreement, Mr. Rafferty's November 23, 2011 proffer could be used against him in the State's case in chief. Mr. Rafferty ultimately signed the agreement. However, at a later court appearance, Mr. Rafferty indicated to his appointed counsel that he no longer wished to cooperate with the terms of the written agreement, and his appointed defense counsel relayed this to the prosecutor.

{¶19} Thereafter, Mr. Rafferty was charged with numerous other offenses stemming from these events. Mr. Rafferty obtained new defense counsel, who filed a motion to suppress statements he had made to law enforcement officers, including the two statements made on November 16, 2011, and the November 23, 2011 proffer.[1] The trial court denied the motion in regard to these statements, and the case proceeded to trial.

{¶20} At trial, during the State's case in chief, over the objection of defense counsel, the tape recording of Mr. Rafferty's November 16, 2011 statements and his November 23, 2011 proffer were played to the jury and admitted into evidence. As part of the defense, Mr. Rafferty testified that his involvement in the murders was coerced because of Mr. Beasley's threats toward him and his family. The defense requested instructions on the affirmative defenses of duress, self-defense, and defense of others, and the trial court denied these requests.

{¶21} The jury found Mr. Rafferty guilty on numerous charges, including the aggravated murders of Mr. Geiger, Mr. Pauley, and Mr. Kern and the attempted murder of Mr. Davis. The trial court sentenced him to life in prison without the possibility of parole. Mr. Rafferty timely appealed, and he now raises five assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE THE PROFFER AND PRETRIAL STATEMENTS OF [MR.] RAFFERTY INTO HIS TRIAL.

{¶22} In his first assignment of error, Mr. Rafferty contends that the trial court erred in admitting his pretrial statements and proffer. We disagree.

[1] Mr. Rafferty also moved to suppress a statement he made to law enforcement on November 17, 2011. The trial court initially denied the motion to suppress in regard to this statement, but later suppressed this statement prior to trial.

{¶23} In addition to being the subject of defense objections at trial when the state offered them as evidence, the statements and proffer had also been subjects of Mr. Rafferty's motion to suppress/motion in limine. While the stated assignment of error challenges the trial court's admission of the evidence, the point of alleged error occurred when the court ruled against Mr. Rafferty in response to his motion to suppress. In regard to motions to suppress:

> Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.

(Internal citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. *Accord State v. Hobbs*, 133 Ohio St.3d 43, 2012-Ohio-3886, ¶ 6 (*Burnside* applied).

{¶24} In its order ruling on the suppression motion, the trial court rendered the following findings of fact, which we accept as supported by competent, credible evidence. After Mr. Davis was shot and Mr. Pauley was reported as missing, law enforcement officers began investigating Mr. Rafferty and Mr. Beasley. On November 16, 2011, Detective Jason Mackie of the Noble County Sheriff's Office and Special Agent Drew McConaghy of the FBI visited Mr. Rafferty's school and interviewed him. The interview was captured on audiotape which was later admitted into evidence at trial. At that time, Mr. Rafferty was a sixteen-year-old junior in high school. The interview was held in a small office. The officers told Mr. Rafferty that he was not under arrest and that he was free to leave. Mr. Rafferty replied that he understood. The officers asked Mr. Rafferty if he was in any kind of special education classes, and he stated that he was not. The officers presented Mr. Rafferty with a short, uncomplicated form containing written *Miranda* warnings. Mr. Rafferty told the officers that he understood the *Miranda* rights,

and he signed a waiver of those rights. With respect to the interview, which lasted approximately twenty-two minutes, the trial court determined:

> [Mr. Rafferty] maintained his composure and did not appear to be tired, confused or out of sorts in any way during the interview. He had the presence of mind to have the officers clarify what he deemed to be overly broad questions before giving his answer. [Mr. Rafferty] displayed a certain savvy about the criminal justice system when he told the officers that he had not consented to their search of his car, and then conceded when he learned that they had obtained a search warrant. [Mr. Rafferty] expressed an understanding of the concept of self-incrimination, referring to it as "digging a hole." He displayed no outward distress after the interview and was seen "high-fiving" a fellow student in the hall.

{¶25} Further, the trial court noted that "[t]he police remained calm and maintained an even, often friendly tone throughout the interview. There was no physical deprivation or mistreatment, nor were any threats made." At the end of the interview, Mr. Rafferty stated, "I'll talk to you. I just want a lawyer present[.]" At that time, the officers concluded the interview.

{¶26} While Mr. Rafferty was at school that day, law enforcement officers were searching his home pursuant to the terms of a search warrant. After the search team left the home, Detective Mackey and Special Agent McConaghy returned to Mr. Rafferty's home. When they arrived, Mr. Rafferty's parents were present. The officers told his father that they had spoken with Mr. Rafferty at school, and he had invoked his right to counsel. Mr. Rafferty and his father then spoke privately, and then they indicated to the officers that Mr. Rafferty wanted to cooperate. Mr. Rafferty, the officers, and his parents went into the home and sat at the kitchen table. The officers again read Mr. Rafferty his *Miranda* rights, and Mr. Rafferty signed a waiver. The home interview lasted over one hour, and was recorded. The trial court noted:

> Again the officers were even-toned and calm throughout the interview. There were no threats. The officers allowed [Mr. Rafferty]'s parents to participate in the interview and allowed them to express their opinions. Although clearly distressed, [Mr. Rafferty]'s parents remained calm throughout the interview, as did [Mr. Rafferty]. He answered the questions clearly and never expressed any confusion. Neither [Mr. Rafferty] nor his parents asked for an attorney during the

> course of the interview, nor did they ask the officers to cease their questioning. Despite [Mr. Rafferty]'s contentions, this Court can find no coercive conduct on the part of the officers.

{¶27} At the end of the interview, other officers delivered an arrest warrant for Mr. Rafferty to the Rafferty residence, and Mr. Rafferty was placed under arrest.

{¶28} On November 18, 2011, Attorney Jack Blakeslee was appointed to represent Mr. Rafferty, and he met with Mr. Rafferty on November 21, 2011. Mr. Blakeslee spoke with Noble County Prosecutor Clifford Sickler and Detective Mackie. After some negotiations between Mr. Blakeslee and the prosecutor, the prosecutor made a time-sensitive offer, which required, in part, that Mr. Rafferty make a proffer regarding Mr. Beasley's crimes. The offer was time-sensitive because the investigation had led law enforcement officers to believe that other bodies may be buried in an area that was used for hunting. Hunting season was about to begin, and the officers were concerned that the crime scene could become contaminated. Mr. Blakeslee met with Mr. Rafferty again on November 23, 2011, and presented him the offer, which Mr. Rafferty agreed to accept. Later that evening, in the presence of Mr. Blakeslee, the assistant prosecutor, and law enforcement officers, Mr. Rafferty made the proffer.

{¶29} In December, Mr. Blakeslee went to the jail to have Mr. Rafferty sign a written agreement entitled "Defendant's Agreement[.]" The agreement included a provision that Mr. Rafferty's proffer could be used against him if he breached the agreement. Mr. Rafferty informed Mr. Blakeslee that he would not sign the agreement unless his father and his father's attorney reviewed it first. Mr. Blakeslee informed Mr. Rafferty that he was not going to wait for his father to read the agreement, and informed Mr. Rafferty, "I don't care what the f*** you do." Ultimately, Mr. Rafferty signed the agreement without his father's input, but he later informed

Mr. Blakeslee that he would not comply with the terms of the written agreement, and he never pleaded guilty to the two charges as had been agreed prior to his proffer.

{¶30} On appeal, Mr. Rafferty argues that (1) the November 16, 2011 statements should have been suppressed because Mr. Rafferty did not voluntarily waive his *Miranda* rights, and he should have had a lawyer present, (2) his November 16, 2011 statements resulted from coercive actions of police officers, (3) his November 23, 2011 proffer should have been suppressed because it resulted from coercion of his initially appointed public defender, who was acting as a state actor, (4) the proffer was inadmissible under Evid.R. 410, and (5) the plea agreement was voidable at Mr. Rafferty's discretion based upon contract principles. We will discuss these arguments separately.

Miranda Rights

{¶31} First we will review Mr. Rafferty's argument that he did not voluntarily waive his *Miranda* rights, and that he should have had counsel present during the November 16, 2011 interviews.[2] "The Fifth Amendment to the United States Constitution provides that no person 'shall be compelled in any criminal case to be a witness against himself.'" *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, ¶ 11. The Fifth Amendment applies to the states through the Fourteenth Amendment. *State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, ¶ 19. During a custodial interrogation, a suspect has the right to remain silent and to be represented by an

[2] Mr. Rafferty has not advanced a developed argument that, at the time he made his November 16th statements, he was entitled to counsel under statute pursuant to Ohio law or pursuant to the due process clause of the Fourteenth Amendment of the United States Constitution. *See In re M.W.*, 133 Ohio St.3d 309, 2012-Ohio-4538, and *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919. Instead, he seems only to argue that he had a right to counsel derivative of his Fifth Amendment rights. We limit our discussion accordingly.

attorney. *Miranda v. Arizona*, 384 U.S. 436, 469 (1966). "A suspect's right to an attorney during questioning * * * is derivative of his [or her] right to remain silent * * *[,]" under the Fifth Amendment. *Leach* at ¶ 13, quoting *Wainwright v. Greenfield*, 474 U.S. 284, 298-299 (1986) (Rehnquist, J., concurring). When a person is subject to a custodial interrogation, he must be informed of his rights to remain silent and to an attorney. *Miranda* at 469. "Juveniles are entitled both to protection against compulsory self-incrimination under the Fifth Amendment and to *Miranda* warnings where applicable." *In re K.W.*, 3d Dist. Marion No. 9-08-57, 2009-Ohio-3152, ¶ 12, quoting *State v. Thompson*, 7th Dist. Jefferson Nos. 98 JE 28, 98 JE 29, 2001-Ohio-3528, citing *In re Gault*, 387 U.S. 1, 54 (1967).

{¶32} The *Miranda* right to counsel attaches only when the individual is subject to a *custodial* interrogation. *State v. Biros*, 78 Ohio St.3d 426, 440 (1997); *State v. Mason*, 82 Ohio St.3d 144, 153 (1998). "Custody" for purposes of entitlement to *Miranda* rights exists only where there is a "'restraint on freedom of movement' of the degree associated with a formal arrest." *State v. Lerch*, 9th Dist. Summit No. 26684, 2013-Ohio-5305, ¶ 8, quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983), quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). "[A] police officer may continue to question a suspect in a noncustodial situation, even if the suspect has made a request for counsel, as long as the officer's persistence in questioning does not render statements made by the suspect involuntary." *State v. Fry*, 61 Ohio App.3d 689, 692 (9th Dist.1988).

{¶33} When subject to a custodial interrogation, a suspect may properly waive his *Miranda* rights if such a waiver is voluntary. *State v. Clark*, 38 Ohio St.3d 252, 261 (1988). "[T]he mere fact that a criminal defendant is a juvenile does not preclude that defendant from waiving constitutional rights[.]" *In re Taylor*, 9th Dist. Lorain No. 93CA005650, 1995 WL

134754, *2 (Mar. 29, 1995), citing *State v. Carder*, 9 Ohio St.2d 1, 9-10 (1966). We review the totality of the circumstances in determining whether a suspect has voluntarily waived his *Miranda* rights. *In re Taylor* at *2. "[T]he totality of the circumstances include[s] the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of the interrogation; the existence of physical deprivation or mistreatment; the existence of threat or inducement." *State v. Shepherd*, 9th Dist. Summit No. 15777, 1993 WL 36093, *1 (Feb. 17, 1993), quoting *State v. Edwards*, 49 Ohio St.2d 31 (1976), paragraph two of the syllabus, vacated in part on other grounds 438 U.S. 911 (1978). "The State bears the burden of proving a waiver of *Miranda* rights by a preponderance of the evidence." *State v. Barr*, 9th Dist. Summit No. 16822, 1995 WL 244156, * 3 (Apr. 26, 1995), citing *State v. Bobo*, 65 Ohio App.3d 685, 689 (8th Dist.1989).

{¶34} Here, although Mr. Rafferty has argued that he did not voluntarily waive his *Miranda* rights, he has advanced no argument on appeal that the November 16, 2011 interviews amounted to *custodial interrogations. See Biros*, 78 Ohio St.3d at 440. Nonetheless, assuming without deciding that Mr. Rafferty was subject to custodial interrogations on November 16, 2011, we conclude that he voluntarily waived his *Miranda* rights at the outset of each of the November 16, 2011 interviews. The State advanced evidence that, at the commencement of each interview, the officers read Mr. Rafferty his *Miranda* rights from a short, uncomplicated form, which Mr. Rafferty signed. Mr. Rafferty indicated that he understood the rights. We conclude that the State met its burden of demonstrating the voluntariness of the waivers.

{¶35} In his brief, as part of his argument that the officers acted coercively, Mr. Rafferty states that he was denied counsel after "he repeatedly requested an attorney[,]" and cites twenty-six pages of transcript. However, he advances no argument as to whether these alleged requests

were sufficient to re-invoke his *Miranda* right to counsel, and we decline to construct an argument on his behalf. *See* App.R. 16(A)(7) (appellant's brief to contain an argument with citations to authorities); *see also Davis v. United States*, 512 U.S. 452, 459 (1994), and *State v. Murphy*, 91 Ohio St.3d 516, 520 (2001) (to re-invoke the *Miranda* right to counsel, the request must be unambiguous and unequivocal.).

{¶36} Accordingly, to the extent that Mr. Rafferty argues that his November 16th statements should have been suppressed because he did not voluntarily waive his *Miranda* rights and that he should have had counsel present, we overrule his first assignment of error.

Voluntariness of November 16, 2011 Statements

{¶37} Mr. Rafferty further argues that his November 16, 2011 statements were coerced. Although a similar analysis is applied to whether a suspect voluntarily waived his *Miranda* rights and whether the suspect provided a voluntary statement, these are "analytically separate issues." *State v. Kennedy*, 2d Dist. Montgomery No. 25283, 2013-Ohio-4243, ¶ 22, quoting *State v. Strickland*, 2d Dist. Montgomery No. 25545, 2013-Ohio-2768, ¶ 10. "Even when *Miranda* warnings are not required, a confession may be involuntary and subject to exclusion if on the totality of the circumstances the defendant's will was overborne by the circumstances surrounding the giving of that confession." *State v. Jackson*, 2d Dist. Greene No. 02CA0001, 2002-Ohio-4680, ¶ 22. "[T]he Due Process Clause of the Fourteenth Amendment requires the exclusion of confessions that are involuntarily given by an accused." *State v. Antoline*, 9th Dist. Lorain No. 02CA008100, 2003-Ohio-1130, ¶ 21, citing *Dickerson v. United States*, 530 U.S. 428, 433 (2000), and *State v. Evans*, 144 Ohio App.3d 539, 560 (1st Dist.2001). "[T]he state carries the burden of proving the voluntariness of a confession by a preponderance of the evidence." *State v. Hill*, 64 Ohio St.3d 313, 318 (1992). The voluntariness of a statement is

reviewed under a totality-of-the-circumstances standard. *Clark*, 38 Ohio St.3d at 261. As in our review of the voluntariness of a suspect's waiver of *Miranda* rights, the totality of the circumstances regarding the voluntariness of a statement includes "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *Edwards*, 49 Ohio St.2d at paragraph two of the syllabus.

{¶38} However, "special caution" should be given to a review of a juvenile's pretrial statement. *In re Gault*, 387 U.S. at 45. Moreover, "[i]f counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.* at 55.

{¶39} Nonetheless, "the mere fact that a criminal defendant is a juvenile does not preclude that defendant from * * * making a voluntary confession." *In re Taylor*, 1995 WL 134754, at *2, citing *Carder*, 9 Ohio St.2d at 9-10. *In re Watson*, 47 Ohio St.3d 86, 89 (1989) (the "fact that a juvenile is subject to police interrogation does not change the nature of the constitutional rights afforded to him").

{¶40} Mr. Rafferty maintains that the officers' conduct when obtaining the November 16, 2011 statement from him at his high school was coercive because the officers displayed a "show of authority over the teachers and administrators[,]" no adult, aside from the officers, was present in the room during the interview, and the officers could have waited until Mr. Rafferty was at home to interview him. He further maintains that the actions of the officers at his home

were coercive because they displayed a show of authority over his parents, and they "whisk[ed]" him away from his parents.

{¶41} First, we note that Mr. Rafferty does not indicate in his appellate brief, through explanation or citation, to what he is referring as a "show of authority" over his teachers, administrators, and parents, and we cannot discern anything in the record demonstrating this show of authority, much less a show of authority that would rise to the level of coercion. *See* App.R. 16(A)(7) (appellant's brief to contain "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies"). Further, aside from the arrest of Mr. Rafferty *at the end* of the home interview, we cannot discern how officers "whisk[ed]" him away from his parents. Accordingly, we proceed to review the remainder of Mr. Rafferty's argument pertaining to purportedly coercive actions of the officers.

{¶42} Mr. Rafferty argues that his statements were coerced because no adult was present with him during the school interview, and no attorney was provided to him during either interview. However, we have already determined that, assuming without deciding that Mr. Rafferty was in custody during these interviews, he waived his *Miranda* right to an attorney, and he has not developed an argument that he re-invoked that right to counsel. Further, parental presence during a police interview is not a prerequisite to the admission of a juvenile's statement at trial. *In re Mabry*, 3d Dist. Logan No. 8-96-03, 1996 WL 668391, *4 (Nov. 2, 1996). Instead, it is a factor that may be considered in the totality of the circumstances. *Id.* Here, we consider the totality of the circumstances, taking the greatest care to assure that the admission was

voluntary, and "was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *See In re Gault*, 387 U.S. at 55.

{¶43} As set forth above, the State produced evidence that the officers explained to Mr. Rafferty his *Miranda* rights prior to each of the November 16, 2011 interviews. At the school, the officers specifically informed Mr. Rafferty that he was free to leave. At his home, Mr. Rafferty and his father initiated the interview. Mr. Rafferty's responses to the officers' questions during these interviews reflected that Mr. Rafferty was intelligent and understood his rights. As the trial court observed, Mr. Rafferty demonstrated savvy with regard to matters involving the criminal justice system. The officers made no threats, and maintained a calm tone during the interviews. The record does not reflect that the officers physically deprived or mistreated Mr. Rafferty in any way. *Edwards*, 49 Ohio St.2d 31, at paragraph two of the syllabus. Based upon the totality of these circumstances, the trial court did not err in concluding that the State met its burden in demonstrating that Mr. Rafferty's statements were voluntary. *See In re Gault* at 55.

{¶44} Therefore, to the extent that Mr. Rafferty argues that his November 16, 2011 statements should have been suppressed because the police officers coerced him into making these statements, his assignment of error is overruled.

Proffer – Coercion

{¶45} Mr. Rafferty next maintains that while he was in custody in Zanesville, Ohio, his public defender, Jack Blakeslee, acted as a "state actor" and coerced him into making his proffer. In support, Mr. Rafferty cites to *Polk County v. Dodson*, 454 U.S. 312 (1981).

{¶46} In *Polk Cty*. at 325, the United States Supreme Court held that a public defender is not a state actor when he performs "a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Here, Mr. Rafferty maintains that Mr. Blakeslee did not act in a

traditional lawyer role because he "pressured" Mr. Rafferty into accepting the plea agreement and making the proffer within forty-eight hours of meeting him. Further, at the suppression hearing, Mr. Blakeslee acknowledged that, in negotiating this agreement, he spoke with the prosecutor and detective for only about an hour and a half, and he reviewed no evidence in the case.

{¶47} However, these arguments appear to speak to whether Mr. Blakeslee was an effective attorney, not whether he engaged in a traditional lawyer function. The functions in which Mr. Blakeslee engaged which are at issue here were the negotiation of a plea agreement on behalf of his client and advice to his client to accept the agreement. Mr. Rafferty has pointed to no authority which holds that plea negotiation and client consultation would not be traditional functions of a defense lawyer, and we decline to develop an argument to this extent on his behalf. *See* App.R. 16(A)(7).

{¶48} Accordingly, to the extent that Mr. Rafferty argues that his proffer should have been suppressed because it was coerced through Mr. Blakeslee, who was at the time acting as a state actor, we overrule his first assignment of error.

Proffer – Evid.R. 410

{¶49} Mr. Rafferty further argues that his proffer was inadmissible under Evid.R. 410. Evid.R. 410(A)(5) provides that, with certain exceptions, "any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that do not result in a plea of guilty or that result in a plea of guilty later withdrawn" is not admissible. "[T]he courts have acknowledged that if a policy of plea bargaining 'is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful. Meaningful dialogue between the parties would, as a practical

matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence.'" *State v. Dunbar*, 8th Dist. Cuyahoga No. 89896, 2008-Ohio-2033, ¶ 29, quoting *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir.1976).

{¶50} Mr. Rafferty contends that his proffer was made during plea negotiations which did not result in a plea of guilty, and thus, it was inadmissible pursuant to Evid.R. 410.

{¶51} The State does not refute that Mr. Rafferty's proffer was a statement made in the course of plea discussions which generally would be inadmissible under Evid.R. 410(A)(5). However, the State responds that Mr. Rafferty waived the inadmissibility provisions of Evid.R. 410 through the terms of the written agreement. The State cites to *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶ 55. There, the Ohio Supreme Court held that, where a suspect "specifically agree[s] that his proffer could be admitted into evidence against him in the event that he breache[s] the plea agreement, he * * * waive[s] any claim under Evid.R. 410(A)(5)." *Id.*

{¶52} At the time Mr. Rafferty gave the proffer, there was no indication that he agreed to waive the inadmissibility provisions of Evid.R. 410. *Compare United States v. Mezzanatto*, 513 U.S. 196, 198 (1995) (as a condition of the defendant being permitted to speak with the prosecutor, defendant agreed that any statements made during the meeting could be used to impeach his testimony at trial). However, the month after giving his proffer, Mr. Rafferty signed the Defendant's Agreement. Therein, Mr. Rafferty specifically agreed that the proffer could be used against him in event of his breach:

> [Mr. Rafferty] and the State agree that the proffer taken of [Mr. Rafferty] on November 23, 2011, will be admissible in a criminal trial in the State's case in chief against [Mr. Rafferty] in the event that [Mr. Rafferty] does not abide by the terms and conditions of this agreement set forth below[.]

{¶53} The parties do not dispute that Mr. Rafferty failed to abide by the terms and conditions set forth in the agreement. Therefore, the above provision would have waived the

protections of Evid.R. 410. However, Mr. Rafferty appears to summarily maintain that the provisions of the written agreement were never binding, by stating in his appellate brief: "The defense asserts that this agreement was not executed, even if in writing, until the court accepted [Mr. Rafferty's] plea on the record." This sentence is followed by no citation and no further development. We presume that Mr. Rafferty is alluding to a citation and short discussion that he provides two paragraphs earlier in his brief:

> Additionally, the signed plea agreement should also be considered statements made while[] engaging in plea negotiations. At the time that [Mr. Rafferty] signed the agreement, he had not formally entered a plea of guilty on the record. The defense and the prosecutor were still negotiating the provisions and terms of the agreement. The agreement was not fully executed until the defendant enters an actual plea of guilty. *See State v. Burchfield*, [] 118 Ohio App.3d 53 [(7th Dist.1997)] holding that parties seemingly reached a plea bargain during early phase of prosecution in Municipal Court, but it was not enforceable because it was not put into written form, signed by the parties, and because it was not stated on the record in open court as required by Crim.[R.] 11(F). Had these things been done, the agreement between the defendants and the city-designated special prosecutor would have been enforceable notwithstanding an intervening indictment obtained by the county prosecutor. *The entire written agreement is inadmissible* under Ohio Rule of Evidence 410 as statements made during plea negotiations.

(Emphasis added.)

{¶54} However, in this paragraph Mr. Rafferty is arguing that the written agreement was *inadmissible*. The written agreement was not admitted at Mr. Rafferty's trial. Therefore, the argument, as written, lacks merit. We will not develop an argument on Mr. Rafferty's behalf based upon speculation that Mr. Rafferty intended to develop an argument challenging the *enforceability* of the written agreement as opposed to challenging the *admissibility* of that agreement. *See* App.R. 16(A)(7) (appellant's brief to contain "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the

reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies").

{¶55} Accordingly, to the limited extent that Mr. Rafferty has summarily maintained that the provisions contained in a written plea agreement are not enforceable prior to a defendant entering his guilty plea, we conclude that he fails to fully develop and support this conclusion. *See* App.R. 16(A)(7). To this extent, his first assignment of error is overruled.

Evid.R. 410 Waiver – Knowing and Voluntary Waiver

{¶56} Further, Mr. Rafferty recognizes that a defendant can waive the provisions of Evid.R. 410. *See Bethel*, 2006-Ohio-4853, at ¶ 55, and *Mezzanatto*, 513 U.S. at 210. Then, without citation, he maintains that the State must prove that the waiver was voluntarily, intelligently, and knowingly made. Thereafter, he maintains that the waiver was neither discussed nor signed prior to Mr. Rafferty making the proffer and further statements. Accordingly, Mr. Rafferty seems to argue that, in order for an Evid.R. 410 waiver to be effective, the State must demonstrate that a waiver preceded the proffer.

{¶57} In support for his argument that the waiver must precede the proffer, Mr. Rafferty cites *Mezzanatto*. There, the defendant agreed to waive Evid.R. 410, insofar as he agreed, prior to making any statements, that any statements he made to the prosecutor could be used to impeach his testimony at trial. *Id.* at 198. However, this case does not hold that, as a matter of law, the waiver must precede the proffer for it to be knowingly, voluntarily, and intelligently waived. In fact, the Court held that "absent *some affirmative indication* that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable." (Emphasis added.) *Id.* at 210.

{¶58} Further, in *Bethel*, the defendant agreed to make a proffer, and the prosecution prepared a proffer letter "to clarify the ground rules for the proffer." *Id.* at ¶ 27. One condition of proceeding with plea discussions that was set forth in the letter included that, although the State agreed that no information provided by the defendant would be used against him in any criminal case, the State "reserved the right to make derivate use of [the defendant's] statement and to use it on cross-examination if his testimony was inconsistent with his proffer." *Id. After making his proffer*, the defendant entered into a plea agreement with the State in which he agreed "that the proffer taken of the defendant on August 30, 2001 will be admissible in a criminal trial against the defendant in the event that the defendant does not abide by the terms and conditions of this agreement set forth below." *Id.* at ¶ 33, 36. On appeal, the defendant maintained, in part, that he did not knowingly, voluntarily, and intelligently enter into the plea agreement. *See id.* at ¶ 65. The Ohio Supreme Court determined that a reviewing court must defer to the trial court's factual findings whether the defendant knowingly, voluntarily, and intelligently entered into the plea agreement, and found that, in that case, the court's findings supported that the defendant knowingly, voluntarily, and intelligently entered into the plea agreement. *Id.* at ¶ 69.

{¶59} Here, aside from the mere fact that the parties did not agree to waive the exclusionary provisions of Evid.R. 410 prior to the proffer, Mr. Rafferty has not developed an argument that his waiver was not knowingly, voluntarily, or intelligently made. *See* App.R. 16(A)(7). To the limited extent that Mr. Rafferty argues that he did not knowingly and intelligently enter into the Defendant's Agreement because the parties did not agree to completely waive the exclusionary provisions of Evid.R. 410 prior to the proffer, the same fact was true in *Bethel*, but the Ohio Supreme Court did not conclude that the intelligent, voluntary,

and knowing nature of the waiver turned upon this fact. Accordingly, to the limited extent Mr. Rafferty raises this argument, his first assignment of error is overruled.

Defendant's Agreement - Contract Law

{¶60} Mr. Rafferty further argues that the Defendant's Agreement was a written plea agreement governed by contract law principles.[3] He maintains that, under the infancy doctrine applicable to contract law, he can disaffirm his acceptance of the agreement, and he has chosen to do so. Therefore, he argues that the agreement, which includes the waiver of Evid.R. 410, was not enforceable against him.

{¶61} Generally, courts seek guidance from contract law in interpreting and enforcing agreements between the State and a defendant. *See State v. Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, ¶ 21. This is because, "[i]n the process of determining whether disputed plea agreements have been formed or performed, courts have necessarily drawn on the most relevant body of developed rules and principles of private law, those pertaining to the formation and interpretation of commercial contracts." *Id.*, quoting *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir.1986)

{¶62} R.C. 3109.01 provides that "[a]ll persons of the age of eighteen years or more, who are under no legal disability, are capable of contracting and are of full age for all purposes." Contracts entered into by those under the age of eighteen may be disaffirmed by the minor pursuant to the infancy doctrine:

> The rule with respect to the disaffirmance of an infant's contract is stated in *Mestetzko v. Elf Motor Co.*, 119 Ohio St. 575, [576, (1929),] [] third paragraph of the syllabus [] as follows:

[3] As the parties have characterized the "Defendant's Agreement" as a "plea agreement" in the context of the applicability of contract law principles, we will likewise refer to it as the "plea agreement" for purposes of our discussion.

> "Contracts of an infant except those authorized by law, those entered into in performance of a legal duty and for the purchase of necessities, are voidable at the election of the infant and may be disaffirmed by him at any time before or within a reasonable time after reaching his majority."

Weiand v. Akron, 13 Ohio App.2d 73, 75 (9th Dist.1968).

{¶63} Although both parties acknowledge that, generally, contract principles would apply to plea agreements, Mr. Rafferty has directed us to no authority which specifically applies the infancy doctrine to plea agreements, and our review of case law reveals no cases where the infancy doctrine has been applied to a plea agreement.

{¶64} Central to our discussion on this point, we note that plea agreements are essential to the criminal justice system:

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971).

{¶65} Although the enforcement and interpretation of plea agreements is generally guided by contract principles, "[b]ecause the defendant's constitutional rights are at stake in the plea process, the concerns underlying a plea agreement differ from and go beyond those of commercial contract law." *Dye*, 127 Ohio St.3d 357, 2010-Ohio-5728, at ¶ 21, citing *State v. Carpenter*, 68 Ohio St.3d 59, 61 (1993). This Court has held that "the mere fact that a criminal defendant is a juvenile does not preclude that defendant from waiving constitutional rights * * *." *In re Taylor*, 1995 WL 134754, at *2. Plea agreements are commonly used between prosecutors and juvenile defendants. *See, e.g., In re Wood*, 9th Dist. Medina No. 04CA0005-M,

2004-Ohio-6539, ¶ 1, 3 (sixteen-year-old defendant entered into plea agreement in juvenile court), *State v. Lang*, 8th Dist. Cuyahoga No. 92099, 2010-Ohio-433, ¶ 3-4 (sixteen-year-old defendant entered into plea agreement after being bound over to general division of common pleas court), *State v. Brookshire*, 2d Dist. Montgomery No. 25853, 2014-Ohio-1971, ¶ 3-4 (sixteen-year-old defendant entered into plea agreement after being bound over to general division of common pleas court), *In re K.S.J.*, 2d Dist. Montgomery No. 24387, 2011-Ohio-2064, ¶ 2, 78 (17-year-old entered into plea agreement in juvenile court), *In re Argo*, 5th Dist. Muskingum No. CT2003-055, 2004-Ohio-4938, ¶ 2, 7, 23 (sixteen-year-old defendant entered into plea agreement in juvenile court), *State v. J.T.S.*, 10th Dist. Franklin No. 14AP-516, 2015-Ohio-1103, ¶ 5-7 (sixteen-year-old defendant entered into agreement to transfer to general division of common pleas court and thereafter enter plea).

{¶66} Due to the prevalence of plea agreements in the court system for both adult and juvenile cases, the fact that Mr. Rafferty was represented by counsel at the time of entering into the plea agreement, and our precedent that holds that a juvenile defendant can waive his constitutional rights, we are not inclined, without direct and persuasive authority on this point, to strictly apply the infancy doctrine to a plea agreement in this instance. This is especially so where the court, as here, has taken great care and special caution in regard to review of Mr. Rafferty's rights as a juvenile, as referenced above.

{¶67} Therefore, Mr. Rafferty's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE DEFENSE OF DURESS OR OTHER AFFIRMATIVE DEFENSES AND BY LIMITING THE DEFENSE'S EXPERT'S TESTIMONY ON THOSE ISSUES.

{¶68} In his second assignment of error, Mr. Rafferty argues that the trial court erred in denying his requests to instruct the jury on the affirmative defenses of self-defense, defense of others, and duress on all counts of the indictment, or, at a minimum, for all counts arising from acts alleged after the murder of Mr. Geiger. In support, Mr. Rafferty maintains that his testimony and that of his expert were sufficient to warrant these instructions. Further, Mr. Rafferty argues that the trial court erroneously limited his expert's testimony. We disagree.

{¶69} As the arguments presented in this assignment of error are premised upon the testimony of Mr. Rafferty and Dr. Eisenberg, we will first review their respective testimony. In order to facilitate our discussion, we will then separately, and out of order, discuss Mr. Rafferty's arguments that the trial court erred by failing to instruct the jury on certain affirmative defenses and in limiting Dr. Eisenberg's testimony.

Testimony of Mr. Rafferty

{¶70} At trial, Mr. Rafferty testified on his own behalf. He explained that he has two half-sisters, one older and one younger. When Mr. Rafferty was between five and seven years old, Mr. Beasley was released from prison. Mr. Rafferty's father was acquainted with Mr. Beasley, and Mr. Rafferty felt that he could trust Mr. Beasley because his father did. When Mr. Rafferty was between eight and ten years old, he started going to church with Mr. Beasley. Sometimes, Mr. Beasley would pick up Mr. Rafferty's younger sister to take to church with them. Mr. Rafferty viewed Mr. Beasley as a spiritual mentor and counselor. As their relationship evolved, Mr. Rafferty felt that he could go to Mr. Beasley for guidance on any issue.

{¶71} On August 8, 2011, Mr. Rafferty drove Mr. Beasley to southern Ohio because Mr. Beasley had indicated that they were going to get another man, Mr. Geiger, set up with a farm job. They picked up Mr. Geiger, and the men spent the night at a motel. The next day, they

drove along a country road in a wooded area in Caldwell, Ohio, trying to find the path to the farm property. At some point, Mr. Beasley directed Mr. Rafferty to stop, at which point the three men exited the car. Mr. Beasley said there was a coyote problem in the area, and he pulled out a pistol, which Mr. Rafferty had not known that Mr. Beasley had put in the car. The men then walked up a path in the woods until Mr. Beasley informed them that it was not the correct path, and they all turned around to head back toward the car. After they turned to walk back, Mr. Beasley shot Mr. Geiger in the back of his head with the pistol. Mr. Beasley then turned and pointed the gun at Mr. Rafferty and said words to the effect that were they going to go back to the car.

{¶72} After Mr. Beasley shot Mr. Geiger, Mr. Rafferty complied with Mr. Beasley's directions, because he did not know what could trigger Mr. Beasley. Thereafter, at Mr. Beasley's instruction, Mr. Rafferty dug a hole, in which they buried Mr. Geiger's body. Mr. Beasley and Mr. Rafferty returned to the car, and, after they got in, Mr. Beasley pointed a large kitchen knife at Mr. Rafferty and said, "And I know where your sister is, I know where mother is, don't tell this to anybody at all." It was clear to Mr. Rafferty that, if he told anyone about Mr. Beasley's murder of Mr. Geiger, Mr. Beasley would kill him and his family.

{¶73} On their return from Caldwell, they stopped at a gas station, and Mr. Beasley gave Mr. Rafferty something to throw away in the restroom. While in the restroom, Mr. Rafferty vomited. When Mr. Rafferty returned home, he was too concerned that Mr. Beasley would harm his mother or younger sister to be able tell his father or the police what had occurred. After the murder of Mr. Geiger, Mr. Beasley would call Mr. Rafferty about every other day, sometimes daily, to inquire as to where he was and what he was doing. Mr. Beasley also met with Mr. Rafferty several times a week.

{¶74} Mr. Rafferty also testified as to the murder of Mr. Pauley. After the murder of Mr. Geiger, Mr. Beasley called Mr. Rafferty and told him that they were going to meet with another man. Mr. Rafferty did not refuse because he thought that if he refused, Mr. Beasley would kill him. Prior to meeting with Mr. Pauley, Mr. Rafferty and Mr. Beasley went to the wooded area and dug a hole. Later, they met Mr. Pauley and drove him to the wooded area. When they arrived, Mr. Rafferty told Mr. Beasley that he had to use the restroom. Mr. Beasley and Mr. Pauley went into the woods without Mr. Rafferty, and Mr. Beasley murdered Mr. Pauley. After he murdered Mr. Pauley, Mr. Beasley again pulled out the knife and told Mr. Rafferty that he knew where his mother and sister lived, and, if he said anything, then "they [we]re dead." After burying Mr. Pauley, they then went back to retrieve Mr. Pauley's truck.

{¶75} Mr. Rafferty maintained that, throughout these murders, he was in a constant state of fear, and he believed he had no options but to follow Mr. Beasley's instructions. Mr. Rafferty contemplated suicide, but he believed that, if he committed suicide, then he would be unable to protect his family from Mr. Beasley.

{¶76} Mr. Rafferty further testified that the night before he and Mr. Beasley met with Mr. Davis, Mr. Rafferty dug a hole in the wooded area. However, he thought that Mr. Beasley was having him dig Mr. Rafferty's own grave. The next day, Mr. Rafferty and Mr. Beasley met Mr. Davis for breakfast. The men then drove to the wooded area, and Mr. Rafferty dropped off Mr. Davis and Mr. Beasley. He then drove down the road and turned the car around. When he came back to the area where he had dropped the men off, Mr. Beasley was on the road saying that Mr. Davis had escaped because the gun had malfunctioned. Mr. Beasley told Mr. Rafferty that he had seen Mr. Davis on the road, and that Mr. Rafferty was to run over Mr. Davis with the car, and Mr. Rafferty was horrified. However, they were unable to locate Mr. Davis

{¶77} In regard to Mr. Kern, the night prior to his murder, Mr. Beasley called Mr. Rafferty and told him to meet him, and Mr. Rafferty thought it was a possibility that Mr. Beasley was going to kill him that day. At Mr. Beasley's direction, Mr. Rafferty met with Mr. Beasley after buying a shovel. They went to an area near a mall in Akron, Ohio, where Mr. Beasley directed Mr. Rafferty to dig a hole. Again, Mr. Rafferty thought he may be digging his own grave. The next morning, he met Mr. Beasley, and they picked up Mr. Kern. At some point prior to picking up Mr. Kern, Mr. Beasley had mentioned that he anticipated getting some property from Mr. Kern. However, while Mr. Beasley and Mr. Kern were talking in the car, Mr. Rafferty realized that Mr. Kern had nothing of value with him. Mr. Beasley told Mr. Kern that he had lost his watch in the area by the mall, and that he wanted to look for it before driving to southern Ohio. The men went to the area by the mall, and Mr. Beasley shot Mr. Kern while Mr. Rafferty pretended to look for the watch. After the first shot, Mr. Rafferty believed that Mr. Kern was still alive, and Mr. Beasley shot him several more times. Afterward, Mr. Beasley handed Mr. Rafferty the gun and instructed him to hold onto it. Mr. Rafferty considered killing Mr. Beasley, but he did not want to be a murderer.

{¶78} During the months over which Mr. Beasley committed these murders, Mr. Rafferty never believed that he had the option of refusing Mr. Beasley. These months did not seem like a series of events, but instead "a constant state" of horror. Mr. Rafferty maintained that he never intended nor wanted any of these people to die, and was never part of any plan to lure them into going to these places. Although Mr. Rafferty thought about killing himself with a gun, and he had held it to his head, he believed that his compliance was the only thing standing between Mr. Beasley and his family.

{¶79} Mr. Rafferty explained that, when the police officers came to his school and said that Mr. Beasley had been arrested, Mr. Rafferty did not believe them. Mr. Rafferty maintained that, during his proffer, he did not say how scared he was, because the interviewers only wanted to know what happened, not why, and every time he tried to explain why he was involved, they cut him off or looked at him "like [he] was scum[.]" From the time that Mr. Beasley murdered Mr. Geiger in August through the point that he murdered Mr. Kern in October 2011, Mr. Rafferty did not feel he had any option but to do exactly what Mr. Beasley told him or to be killed. That fear never went away during this time, and he never felt that he could escape from the situation. The fear of death for himself and his family was "constant[,] immediate [and] always there."

Testimony of Dr. Eisenberg

{¶80} In addition to Mr. Rafferty's testimony, the defense presented the testimony of a clinical and forensic psychologist, Dr. James Eisenberg. Prior to Dr. Eisenberg's testimony, the State objected to Dr. Eisenberg testifying as an expert, maintaining that the doctor's report did not contain any information that was outside of the common knowledge of the jury. The trial court ruled that Dr. Eisenberg's testimony would be allowed for the limited purpose of explaining Mr. Rafferty's subjective belief, but the doctor could not render an opinion that Mr. Rafferty was under duress or was abused. The trial court explained that whether Mr. Rafferty acted under duress was a legal conclusion, and the determination that Mr. Rafferty was abused was not consistent with what the expert had already opined, as there was no mention of abuse in the expert's report. The court then allowed Mr. Rafferty's defense attorneys to proffer the expert's testimony as follows:

> [Defense counsel]: Well, your Honor, our expert would testify that a child witnessing violence at the hands of another adult is an act of abuse, and that

> during this four-month period [Mr. Rafferty] was abused by Mr. Beasley. Our expert would also testify that he believes without an evaluation of Mr. Beasley that he is a sociopath and would testify to that.
>
> [Defense counsel]: He would also testify that, other than witnessing the violent acts at the hands of Mr. Beasley being child abuse, that the fact that he was threatening him and threatening his family also constituted a form of child abuse.

{¶81} Thereafter, Dr. Eisenberg provided the following testimony. He explained that the front area of the brain that makes decisions does not fully develop until the late teens or early twenties. Children make choices that are sometimes driven by inner drives, excitement or fear, whereas an adult can put aside those emotions and make an appropriate decision. Children may be susceptible to coercion from adults, especially when it is an individual they trust or feel powerless against. Dr. Eisenberg interviewed Mr. Rafferty at the request of the defense to determine if he was acting under the influence and force of another individual. The doctor also had interviewed people that Mr. Rafferty knew, and he looked over records involved in this case. The doctor concluded that Mr. Rafferty fit the profile of an individual who had been coerced as a result of traumatic incidents. The most important factor leading to this conclusion was the relationship between Mr. Rafferty and Mr. Beasley. The doctor opined that Mr. Rafferty viewed Mr. Beasley as a type of hero figure. The doctor believed that Mr. Beasley had an influence over Mr. Rafferty because he was the only adult in whom Mr. Rafferty confided and the only adult that he trusted. Dr. Eisenberg did not believe that Mr. Rafferty wanted to be a part of these murders. He believed that the murder of Mr. Geiger was a traumatic event for Mr. Rafferty, which caused him to shut down and become fearful and concerned for the safety of his sister and mother.

{¶82} Dr. Eisenberg further testified that, in his opinion, the most important element in this case was the relationship between Mr. Rafferty and Mr. Beasley. Mr. Rafferty believed that

Mr. Beasley was invulnerable, and he believed that Mr. Beasley had relationships within the court system, and, thus, it would not alleviate Mr. Rafferty's fear if Mr. Beasley were arrested. The doctor believed that the three months over which these murders occurred constituted one frightening experience, and Mr. Rafferty could not separate out one day from the next.

{¶83} In addition, the doctor explained that, when he saw Mr. Rafferty, he seemed remorseful for the events, but, because of his fear, he did not appear to have any concept that he could have stopped the events from occurring. Dr. Eisenberg explained that the more stress that an individual is under, the less likely he is to see all of the possibilities. The doctor determined that Mr. Rafferty acted out of fear, and that Mr. Rafferty felt in his mind that he had to participate in order to avoid his own death or the death of a member of his family. In Mr. Rafferty's mind, the threat of death to him and his family was imminent, and the doctor opined that this was a reasonable belief under the circumstances. The doctor explained that Mr. Rafferty did not exhibit any of the features that psychologists see in psychopaths.

Limitations on Dr. Eisenberg's Testimony

{¶84} As part of his second assignment of error, Mr. Rafferty maintains that the trial court erred in limiting Dr. Eisenberg's testimony, preventing him from testifying that Mr. Rafferty was abused.

{¶85} Crim.R. 16(K) states that:

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

{¶86} Pursuant to Crim.R. 16(L):

> (1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, *or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.*

(Emphasis added.)

{¶87} "Sanctions for a Crim.R. 16 discovery violation are within the discretion of the trial court[.]" *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, ¶ 20 (2013). An abuse of discretion connotes that the trial court "was unreasonable, arbitrary, or unconscionable" in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "The overall objective of the criminal rules 'is to remove the element of gamesmanship from a trial.'" *Darmond* at ¶ 19, quoting *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3 (1987). "The purpose of the discovery rules 'is to prevent surprise and the secreting of evidence favorable to one party.'" *Darmond* at ¶ 19, quoting *Lakewood* at 3.

{¶88} Here, in his merit brief, Mr. Rafferty sets forth an argument urging that the doctor's proffered testimony was relevant to his defenses. However, he does not address the failure of the report to contain any findings of abuse aside from the singular sentence as follows: "The word abuse was not in the doctor's report but it is obvious based on all recognized definitions of abuse that the activities described in the report could be classified as abuse." This sentence is followed by no further development on the issue of the doctor's report and no citation to any authority regarding the "definitions of abuse" that he references.

{¶89} We decline to construct on argument on Mr. Rafferty's behalf that the trial court abused its discretion in limiting the doctor's testimony based upon the contents of the doctor's

report. *See* App.R. 16(A)(7). Accordingly, to the extent that Mr. Rafferty argues that the trial court erred in limiting the doctor's testimony, his second assignment of error is overruled.

Jury Instructions – Affirmative Defenses

{¶90} Based upon the testimony of Mr. Rafferty and Dr. Eisenberg, the defense requested the trial court to instruct the jury on the affirmative defenses of duress, self-defense, and defense of others, and the trial court declined to give these instructions.

{¶91} "In order for the defendant to successfully raise an affirmative defense, evidence of a nature and quality sufficient to raise the issue must be introduced. Evidence is sufficient where a reasonable doubt of guilt has arisen based upon a claim of duress. If the evidence generates only a mere speculation or possible doubt, such evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted." *State v. Floyd*, 9th Dist. Summit No. 25880, 2012-Ohio-3551, ¶ 8, quoting *State v. Flinders*, 9th Dist. Summit No. 26024, 2012-Ohio-2882, ¶ 29, quoting *State v. Getsy*, 84 Ohio St.3d 180, 198-199 (1998). "This Court reviews a trial court's decision to give or decline to give a particular jury instruction for an abuse of discretion under the facts and circumstances of the case." *State v. Meadows*, 9th Dist. Summit No. 26549, 2013-Ohio-4271, ¶ 7, quoting *State v. Sanders*, 9th Dist. Summit No. 24654, 2009-Ohio-5537, ¶ 45.

{¶92} "In order to establish the defense of duress, one must establish the following: (1) a harm due to the pressure of a human force; (2) the harm sought to be avoided was greater than, or at least equal to that sought to be prevented by the law defining the offense charged; (3) the actor reasonably believed at the moment that his act was necessary and was designed to avoid the greater harm; (4) the actor was without fault in bringing about the situation; and (5) *the threatened harm was imminent, leaving no alternative by which to avoid the greater harm*."

(Emphasis added.) *Floyd* at ¶ 8, quoting *Flinders* at ¶ 30. In regard to the "threatened harm[,]" *Floyd* at ¶ 8, quoting *Flinders* at ¶ 30, the evidence must show that the danger was "immediate" and that it was continuous "during the entire time that the act was being committed." *State v. Turner*, 9th Dist. Summit No. 18618, 1998 WL 225049, *2 (May 6, 1998), citing *State v. Good*, 110 Ohio App. 415, 419 (10th Dist.1960). "It must be a force threatening great bodily harm that remains constant in controlling the will of the unwilling participant while the act is being performed and from which he cannot withdraw in safety." *Turner* at *2, quoting *Good* at 419.

{¶93} "[T]he defense of * * * duress is strictly and extremely limited in application and will probably be effective in very rare occasions." *Floyd* at ¶ 8, quoting *State v. Cross*, 58 Ohio St.2d 482, 488 (1979). In addition, "duress is not a defense to aggravated murder." *State v. Penix*, 9th Dist. Summit No. 23699, 2008-Ohio-1051, ¶ 41, citing *Shepherd*, 1993 WL 36093, at *2.

{¶94} The trial court concluded, in regard to the aggravated murder charges which were based upon prior calculation and design, as a matter of law, the duress instruction was not warranted. *See Penix* at ¶ 41. *See also State v. McCray*, 103 Ohio App.3d 109, 118-19, (9th Dist.1995) ("Even the affirmative defense of duress cannot justify the taking of an innocent life.").

{¶95} Further, in regard to the incidents regarding Mr. Geiger, the trial court concluded that Mr. Rafferty's testimony indicated that he did not know the true purpose of traveling to southern Ohio, and he did not know about the plan to murder Mr. Geiger or the plan for Mr. Beasley to steal Mr. Geiger's identity. *See McCray* at 118 ("Clearly, psychological trauma which is experienced only after a murder has been committed would not offer a defense, justification or excuse to a defendant's participation in that murder.").

{¶96} In addition, the trial court concluded that the evidence did not demonstrate that Mr. Beasley's alleged threats to Mr. Rafferty were of an imminent nature, would compel a state of constant control over Mr. Rafferty's will, or would not allow for the opportunity for Mr. Rafferty to safely withdraw. *Turner*, 1998 WL 225049, at *2. Instead, the evidence established that Mr. Rafferty went home, went to school, and saw his family and friends during the times in between the murders. Further, during the times when Mr. Rafferty and Mr. Beasley traveled to southern Ohio, there were occasions when Mr. Rafferty was separated from Mr. Beasley and in control of a vehicle, so that the control was not constant and escape was possible. *See Good*, 110 Ohio App. at 420 (where "the acts which constituted the crimes for which the defendant was indicted took place over a period of more than two weeks during which time the defendant was, for the most part, completely free from any possible domination" by the other person, evidence was insufficient to charge the jury on duress).

{¶97} Despite these gaps in time when the trial court concluded that Mr. Rafferty's testimony indicated that he could have safely withdrawn, the threats were not imminent, and Mr. Beasley's control over him was not constant, Mr. Rafferty argues that he was subject to "psychological duress." In support, he cites case law pertaining to overcoming a victim's will through fear or duress in the context of proving the element of force where an individual is charged with a sex offense. *See State v. Rucker*, 1st Dist. Hamilton No. C-110082, 2012-Ohio-185, ¶ 1, 18, *State v. Dye*, 82 Ohio St.3d 323, 327 (1998), and *State v. Martin*, 77 Ohio App. 553, 554 (9th Dist.1946). None of these cases involved the affirmative defense of duress, and none of these cases address the inapplicability of the defense of duress to aggravated murder based upon prior calculation and design.

{¶98} The sole case that Mr. Rafferty cites in which he argues that "[p]sychological duress [was] addressed in the context of affirmative defenses" is *State v. Nemeth*, 82 Ohio St.3d 202 (1998). However, *Nemeth* involved the affirmative defense of self-defense, which requires an "honest belief" of the imminence of danger. *Id.* at 207. However, a subjective belief, alone, pertaining to the imminence of danger is not sufficient to raise the defense of duress. *State v. Lawson*, 2d Dist. Montgomery No. 22155, 2008-Ohio-1311, ¶ 19. Instead, such a belief must be objectively reasonable. *Id.* Here, we cannot conclude that the trial court abused its discretion in concluding that, although the evidence may have been sufficient to demonstrate that Mr. Rafferty subjectively believed that Mr. Beasley's threats toward him and his family were imminent, there was insufficient evidence to establish that this belief was subjectively reasonable. Further, *Nemeth* involved whether expert testimony on the issue of "battered child syndrome" was relevant to cases of parricide, and it is of little assistance in our discussion of whether jury instructions on affirmative defenses were warranted here. *See Nemeth* at 205.

{¶99} The defense also requested instructions on self-defense and defense of others. In regard to the issue of self-defense "the defendant must show (1) that he was not at fault in creating the situation giving rise to the affray; (2) that he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of force; and (3) that he did not violate any duty to retreat or avoid the danger." *State v. Campbell*, 9th Dist. Lorain No. 97CA006973, 1999 WL 492595, *5 (July 14, 1999), citing *State v. Williford* , 49 Ohio St.3d 247, 249 (1990). In regard to the issue of defense of others, the intervenor "stands in the shoes of the person whom he is aiding[.]" *Campbell* at *5, quoting *State v. Wenger*, 58 Ohio St.2d 336, 340 (1979).

{¶100} In his merit brief, Mr. Rafferty maintains that he was coerced to "use force" against others to save his life and the lives of his family members. Although the force was used against innocent victims, he maintains that "[a] self-defense instruction does not require that the force be used against the perpetrator. The requirements only require the use of 'force' in general." We conclude that Mr. Rafferty's argument on this point lacks merit, as, by his own testimony, he did not personally use any "force" against the victims. Instead, he was convicted through a theory of complicity. *See* R.C. 2923.03. The principal offender here, Mr. Beasley, used the requisite force against the victims. Through no evidence was it ever suggested that Mr. Beasley was "not at fault" in creating the situations. *See Campbell* at *5, citing *Williford* at 249. For purposes of the self defense analysis in this context, Mr. Rafferty stands in the shoes of Mr. Beasley, the principal offender. *See Campbell* at *5; *see also State v. Moody*, 10th Dist. Franklin No. 98AP-1371, 2001 WL 242547, *9-10 (aider and abettor entitled to a self-defense instruction where evidence is sufficient to warrant the conclusion that principal acted in self-defense). Therefore, neither a self-defense nor a defense of others instruction was warranted from the evidence presented at trial.

{¶101} Accordingly, based upon the foregoing, we cannot say that the trial court abused its discretion in concluding that the evidence adduced at trial was insufficient to warrant instructions on the affirmative defenses of self-defense and defense of others. Thus, to the extent that he argues that the trial court erred in failing to give these instructions, we overrule Mr. Rafferty's second assignment of error.

{¶102} Therefore, Mr. Rafferty's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE COURT ERRED BY ALLOWING PREJUDICIAL AND IRRELEVANT EVIDENCE, INCLUDING BUT NOT LIMITED TO INTERNET SEARCHES ON THE RAFFERTY FAMILY COMPUTER.

{¶103} In his third assignment of error, Mr. Rafferty argues that the trial court erred in admitting, during the State's rebuttal case, evidence of certain searches performed on his family's computer. We disagree.

{¶104} The trial court has broad discretion in the admission or exclusion of relevant evidence. *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore*, 5 Ohio St.3d at 219.

{¶105} During the defense's case, along with the testimony of Mr. Rafferty and Dr. Eisenberg, as set forth in our discussion of Mr. Rafferty's second assignment of error, the defense called numerous witnesses that commented on Mr. Rafferty's character prior to the time period surrounding the murders and as to his mental state during the time of the murders. One such individual, James Hill, testified that he used to date Mr. Rafferty's mother when Mr. Rafferty was younger, and he had kept in touch with Mr. Rafferty. Mr. Hill explained that Mr. Rafferty would sometimes act up in such ways as not cleaning his room, but "other than that he was a good boy." He maintained that, about a year and a half prior to trial, Mr. Rafferty lost a lot of weight and became withdrawn.

{¶106} Marc Craig testified that he belongs to the church that Mr. Rafferty attended, and he had conversations with Mr. Rafferty from 2009 through 2011. In 2009, Mr. Craig provided Mr. Rafferty a "plan of salvation, and he listened attentively * * * which he did in all of [their] conversations." In addition to being a "good listener[,]" Mr. Craig noted that Mr. Rafferty was a

quiet, serious, and polite person. The last time he spoke with Mr. Rafferty was very briefly in October of 2011. At that time, it seemed as if something was bothering Mr. Rafferty.

{¶107} Susan Deitrick testified that she was the fifth and sixth grade school counselor at the school that Mr. Rafferty attended when he was ten to eleven years old. She believed Mr. Rafferty to be a very depressed boy, but he was also a "perfect little gentleman." She recalled that he kept to himself and was fairly quiet, however, he did what he was supposed to do. Her opinion of him was that "he could not cry, he could not express emotions. It was there, and it was eating him up, but he couldn't – he didn't dare let his guard down."

{¶108} Kerri Moore testified that her son had been best friends with Mr. Rafferty since the seventh grade. She noticed a change in Mr. Rafferty's personality in October of 2011. She maintained that he seemed a little short and distant, and not the "typical fun, silly kid" that he had been previously. Ms. Moore's son testified that Mr. Rafferty was his best friend and was "the nicest guy" he had ever known. Mr. Rafferty would always ask how he was doing, and he was very respectful, responsible, and kind. However, in early October of 2011, he noticed a change in Mr. Rafferty's behavior. Instead of being "his normal joking self," he seemed more agitated and short in their conversations.

{¶109} Mr. Rafferty's father also testified on Mr. Rafferty's behalf. He explained that he and Mr. Rafferty's mother divorced in 1998 because she developed a drug addiction. Mr. Rafferty lived with him after the divorce, and he taught Mr. Rafferty to be responsible from an early age. Mr. Rafferty's father knew Mr. Beasley. When Mr. Rafferty was between five and seven years old, Mr. Beasley was released from prison. Mr. Rafferty's father permitted Mr. Beasley to come over on Sundays for dinner. Mr. Beasley was very religious. Mr. Rafferty and his father trusted Mr. Beasley, and Mr. Beasley started bringing Mr. Rafferty to church every

Sunday. Mr. Rafferty's father characterized Mr. Rafferty as "a good kid[,]" who was "kind of quiet[,]" and liked to laugh. His father explained that he received compliments about Mr. Rafferty being polite and humble. At the end of summer or early fall of 2011, he noticed that Mr. Rafferty had changed, and he seemed to spend more time in his room listening to his iPod, and he forgot about his chores.

{¶110} On rebuttal, the State recalled, over the objection of defense counsel, Mr. Allan Buxton, a computer forensic specialist assigned to the cybercrimes unit of the Ohio BCI. Mr. Buxton testified as to searches performed on the Raffertys' computer under the user names "Guest" and "Brogan." According to Mr. Buxton's testimony and his reports, which were entered into evidence, on August 21, 2011, October 10, 2011, October 11, 2011, October 20, 2011, October 25, 2011, and November 3, 2011, there were several searches under these user names conducted regarding the television show *The Sopranos*, certain individuals associated with organized crime, and the IRA. These searches occurred on search engines, YouTube, Amazon.com, and Wikepedia.org. The exhibits indicate that the August 21, 2011 searches were conducted under the user name "Guest[,]" while the remaining searches were conducted under the user name "Brogan[.]"

{¶111} Mr. Rafferty argues that the trial court erred in admitting the evidence of the internet searches because it was irrelevant under Evid.R. 401, and its probative value was outweighed by the danger of unfair prejudice under Evid.R. 404 because of the danger of the jury inferring bad character traits in Mr. Rafferty from this evidence.

{¶112} Evid.R. 402 limits the admission of evidence to relevant evidence. Evid.R. 401 defines "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact

that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶113} Evid.R. 403 provides:

> (A) Exclusion mandatory
>
> Although 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.
>
> (B) Exclusion discretionary
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

{¶114} "Evid.R. 403 speaks in terms of unfair prejudice. Logically, all evidence presented by a prosecutor is prejudicial, but not all evidence unfairly prejudices a defendant." *State v. Ellis*, 9th Dist. Summit No. 27013, 2014-Ohio-4186, ¶ 26, quoting *State v. Wright*, 48 Ohio St.3d 5, 8 (1990). "The Ohio Supreme Court has stated that 'relevant evidence, challenged as being outweighed by its prejudicial effects, should be viewed in a light most favorable to the proponent of the evidence, maximizing its probative value and minimizing any prejudicial effect to one opposing admission.'" *Ellis* at ¶ 26, quoting *State v. Frazier*, 73 Ohio St.3d 323, 333 (1995).

{¶115} Evid.R. 404(A)(1) provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions: * * * [e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible * * *." "[T]he Supreme Court of Ohio has held that when a defendant offers evidence regarding his good character, the introduction opens the door for the prosecution to inquire about a defendant's bad character." *State v. Mills*, 9th Dist. Medina Nos. 02CA0037-M, 02CA0038-M, 2002-Ohio-

7323, ¶ 54, citing *State v. McGlaughlin*, 9th Dist. Summit No. 19019, 1998 WL 801930, *2 (Nov. 18, 1998), citing *Wright*, 48 Ohio St.3d at 5, 8.

{¶116} Here, Mr. Rafferty called numerous witnesses who testified as to his nice, humble, silly character. Further, these witnesses, Mr. Rafferty, his father, and Dr. Eisenberg, all testified as to Mr. Rafferty's behavior and mental state during the time of the murders. Given this evidence introduced by the defense, we cannot say that the trial court abused its discretion in determining that the computer searches of sites involving the activities of mobsters, organized crime and the violent organizations were relevant to rebut the character evidence and to speak to Mr. Rafferty's mindset during the time period at issue. *See* Evid.R. 401 and 404(A). In addition, we cannot say that the trial court abused its discretion in determining that the probative value of the searches outweighed the danger of unfair prejudice. *See* Evid.R. 403.

{¶117} Accordingly, Mr. Rafferty's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> THE COURT'S SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR A JUVENILE IS UNCONSTITUTIONAL AND CONTRARY TO LAW.

{¶118} In his fourth assignment of error, Mr. Rafferty argues that his life sentence without the possibility of parole was unconstitutional and contrary to law. We disagree.

{¶119} R.C. 2929.03 provides:

> (A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:
>
> (1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:
>
> (a) Life imprisonment without parole;

> (b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;
>
> (c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
>
> (d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;
>
> (e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

{¶120} The United States Supreme Court has held that a *mandatory* life-without-parole sentence for juvenile offenders is cruel and unusual punishment in *Miller v. Alabama*, ––– U.S. –––, 132 S.Ct. 2455, 2460 (2012). However, R.C. 2923.03 does not require a mandatory sentence of life without parole. Instead, it "allows the trial court to exercise its discretion when sentencing for aggravated murder by imposing life imprisonment without parole or with parole eligibility after 20, 25, or 30 years." *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, ¶ 5.

{¶121} Recently, in *Long*, the Ohio State Supreme Court held that "[a] court, in exercising its discretion under R.C. 2929.03(A), must separately consider the youth of a juvenile offender as a mitigating factor before imposing a sentence of life without parole." *Id.* at paragraph one of the syllabus. Further, "[t]he record must reflect that the court specifically considered the juvenile offender's youth as a mitigating factor at sentencing when a prison term of life without parole is imposed." *Id.* at paragraph two of the syllabus. In *Long*, "[b]ecause the trial court did not separately mention that Long was a juvenile when he committed the offense, [the Court could not] be sure how the trial court applied this factor." *Id.* at ¶ 27. On this basis,

the Court reversed Mr. Long's sentence and remanded the matter to the trial court for resentencing. *Id.* at ¶ 28.

{¶122} The present case is distinguishable from *Long* in that, here, the record demonstrates that the trial court considered Mr. Rafferty's youth as a mitigating factor, stating:

> The law requires that I consider that as a teen you may have been more vulnerable or susceptible to outside influences, so it is only in that limited context that I will make any reference at all to Richard Beasley.
>
> In determining your sentence, I have considered and do take into account your age, the fact that you have absolutely no prior record before getting into this situation. I know that you came from a broken home, raised by a single parent. Sadly many children are.
>
> The fact that you were getting yourself off to kindergarten to me is heartbreaking. But the facts surrounding your mother's addictions, some things that came up, you know, regarding possible issues with your father, heartbreaking.
>
> You got dealt a lousy hand in life, but none of that is an excuse for murder. The one thing that I have noticed is that you are so intelligent, you could have been so much more, you should have been so much more.
>
> I do not discount the fact that Richard Beasley played a significant role in your life. He is about thirty-five years older than you. He came into your life when you were a very young boy. He clearly filled a need for you.
>
> Because you were so young and because of the length of time he was in your life, you would have been more susceptible to being influenced by him, whatever that influence may have been.
>
> What I do not accept and what the jury clearly rejected is the notion that you had no way out. The evidence showed that you had people in your life to whom you could have turned to and in whom you could have confided. Instead of doing so, you embraced the evil. You studied it. You continued with it.
>
> The law tells me that because of your age, I am supposed to take into consideration the reckless nature of youth and the impetuousness of youth. But there was nothing reckless or impetuous about what happened. It was cold, calculated, methodical execution of three human beings and nearly a fourth.
>
> It didn't happen over one day or even one weekend from which you could not escape. It stretched over a three-month period.

> I am also supposed to determine whether you should have the opportunity for a parole hearing. They didn't give me a crystal ball with this black robe. I cannot predict what the future is for you in your heart, if (sic.) your mind, chances of rehabilitation. All I can do is look at the evidence I heard before me.
>
> And what I heard and the predictors I gleaned from the evidence is the number of deaths that were involved here, the method and manner of those deaths. Those factors weigh heavily against you, as did the fact that you had the opportunity to stop the deaths.
>
> Perhaps, finally, I recall in your interview, the words about Tim Kern. You were clearly disturbed by his death, but I remember you saying that his was so unnecessary, he only had five bucks on him, what was left of the twenty that he borrowed from his son. And I know that those probably are the poorly chosen words of a teenager, but it gives me some insight into what was going on because I couldn't help but wonder: Does that mean the other deaths were necessary? Or would twenty bucks have made Tim's death necessary or two hundred or a better car? I don't know.
>
> I do know in light of all the factors that I have placed on the record, and in weighing those factors, the only sentence that this Court deems proportionate for the crimes that you have committed is life in prison without the possibility of parole.
>
> Because of your cooperation, and assistance, albeit self-serving, you did cooperate early on, and because of the mitigating factors that this Court has stated on the record, including your youth and lack of record, the Court will run the sentences in this case concurrent and not consecutive, but for the firearm specifications, which are mandated to be consecutive.
>
> * * *

{¶123} On appeal, Mr. Rafferty urges that the trial court was required to consider certain specific factors pertaining to youth, including:

> (a) "the character and record of the individual offender [and] the circumstances of the offense," *Miller*, 567 U.S. at ——, 132 S.Ct. at 2467 (quotation marks omitted);
>
> (b) "the background and mental and emotional development of a youthful defendant," *id.*;
>
> (c) a juvenile's "chronological age and its hallmark features-among them, immaturity, impetuosity, and failure to appreciate the risks and consequences," *id.*, 567 U.S. at ——, 132 S.Ct. at 2468;

> (d) "the family and home environment that surrounds" the juvenile, "no matter how brutal or dysfunctional," *id.*;
>
> (e) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected" the juvenile, *id.*;
>
> (f) whether the juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," e.g., the juvenile's relative inability to deal with police and prosecutors or to assist his own attorney, *id.*; and
>
> (g) the juvenile's potential for rehabilitation, *id.*

Bear Cloud v. State, 2013 WY 18, ¶ 42 (2013).

{¶124} These factors were extracted from the *Miller* decision by the Wyoming Supreme Court in *Bear* at ¶ 42-45 as a non-exhaustive list of factors pertaining to youth that a trial court should consider in sentencing a juvenile offender to a life-without-parole sentence. However, in *Long*, the Ohio Supreme Court held, "Although the Wyoming factors may prove helpful to courts as they select appropriate sentences for juveniles, we note that Ohio statutes do not require such findings. In imposing a prison sentence, the sentencing court has discretion to state its own reasons in choosing a sentence within a statutory range unless a mandatory prison term must be imposed." *Id.* at ¶ 15; *see also id.* at ¶ 27.

{¶125} Because the record is clear that the trial court separately considered Mr. Rafferty's youth as a mitigating factor during sentencing, and the trial court was not required to make findings on the Wyoming factors, we cannot agree that Mr. Rafferty's sentence was contrary to law.

{¶126} Accordingly, Mr. Rafferty's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

> [MR. RAFFERTY'S] FIRST ATTORNEY WAS INEFFECTIVE FOR INDUCING [HIM] TO PROFFER WITHOUT COMPETENCE AND DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING EVIDENCE ON MITIGATING FACTORS IN SENTENCING.

{¶127} In his fifth assignment of error, Mr. Rafferty argues that he received ineffective assistance of trial counsel from Mr. Blakeslee in inducing Mr. Rafferty to give his proffer, and that he received ineffective assistance of counsel from his subsequent trial counsel in failing to present evidence on mitigating factors at sentencing. We disagree.

{¶128} This Court must analyze claims of ineffective assistance of counsel under a standard of objective reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 142 (1989). Under this standard, a defendant must show (1) deficiency in the performance of counsel "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" and (2) that the errors made by counsel were "so serious as to deprive the defendant of a fair trial[.]" *Strickland* at 687. A defendant must demonstrate prejudice by showing that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* at 694. In applying this test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 689. This Court need not address both prongs of *Strickland* where an appellant fails to prove either prong. *See State v. Ray*, 9th Dist. Summit No. 22459, 2005-Ohio-4941, ¶ 10

{¶129} In regard to his argument pertaining to Mr. Blakeslee, Mr. Rafferty maintains that he was deficient by hurrying Mr. Rafferty into making a proffer without adequately investigating the case. In support, Mr. Rafferty directs us to Mr. Blakeslee's actions "[a]s described above[.]"

Mr. Rafferty then summarily maintains that Mr. Blakeslee was "incompetent and effectively functioned as a state actor when he handle[d] the beginning of [Mr. Rafferty's] case. Attorney Blakeslee hurried [Mr. Rafferty] into a proffer without adequate investigation of the case, etc." [4] Thus, the reference to Mr. Blakeslee's actions "[a]s described above," appears to be a reference to the facts and argument set forth in Mr. Rafferty's first assignment of error, in which he maintains that Mr. Blakeslee was performing as a state actor.

{¶130} The Rules of Appellate Procedure clearly state that we "may disregard an assignment of error presented for review if the party raising it fails * * * to argue the assignment separately in the brief, as required under App.R. 16(A)." App.R. 12(A)(2). Mr. Rafferty's reference to his previous argument, without adequately delineating the facts in the record on which he relies in support of his fifth assignment of error, fails to satisfy this requirement. However, even were we to overlook this procedural issue, Mr. Rafferty claims that Mr. Blakeslee was ineffective in inducing him to make the proffer, and he was prejudiced by the proffer being used at trial. However, the parties appear to agree that the proffer was protected under Evid.R. 410 until Mr. Rafferty signed the written plea agreement, waiving the exclusionary provisions of Evid.R. 410. Mr. Rafferty has not developed an argument that Mr. Blakeslee was ineffective in advising Mr. Rafferty to sign the written plea agreement, and we decline to create an argument on his behalf. *See* App.R. 16(A)(7). Further, Mr. Rafferty improperly references issues outside of the record in his prejudice argument, when he next maintains in his merit brief that the "jurors

[4] Mr. Rafferty also briefly notes that Mr. Blakeslee failed to conduct the proffer simultaneously with a plea on the record. We cannot discern the import of this comment in the context of the effectiveness of counsel, and we decline to speculate as to its significance. *See* App.R. 16(A)(7).

stated to the media that the[y] primarily considered the proffer when determining that [Mr. Rafferty] was guilty." This reference *dehors* the record is not proper on direct appeal, where our review is restricted to the record. *See* App.R. 9 and App.R. 12(A)(1)(b). Accordingly, we conclude that Mr. Rafferty has not set forth a proper argument in his fifth assignment of error as to Mr. Blakeslee's ineffectiveness.

{¶131} In regard to defense counsel's failure to present evidence on mitigating factors at sentencing, we first note that appointed appellate counsel who filed the brief in this matter served as one of Mr. Rafferty's defense attorneys at trial and sentencing. We note that the district courts are split on whether an appellant may raise a claim of ineffective assistance of counsel on direct appeal where appellate counsel represented the appellant at trial. *State v. Tinch*, 84 Ohio App.3d 111, 126 (12th Dist.1992); *State v. Leahy*, 6th Dist. Fulton No. F-00-011, 2000 WL 1867296, *4 (Dec. 22, 2000); *State v. Jones*, 11th Dist. Ashtabula No. 96-A-0009, 1996 WL 761230, *2 (Nov. 29, 1996); and *State v. Beitzel*, 5th Dist. Tuscarawas No. 93AP050036, 1994 WL 313737, *4 (June 14, 1994). *But see State v. Harris*, 7th Dist. Belmont No. 00BA26, 2002-Ohio-2411, ¶ 20-29 (discussing split in the districts as to whether appellate court will consider counsel's argument as to his own ineffectiveness, and concluding that it could consider such an argument), citing *State v. Meredith*, 4th Dist. Lawrence No. 99 CA 2, 2000 WL 821619, *3 (June 22, 2000), fn. 2 (concluding appellant failed to demonstrate ineffective assistance of counsel and declining to take a position as to whether appellate counsel could argue his own ineffectiveness on direct appeal where the matter could be resolved on other grounds); *State v. Jones*, 10th Dist. Franklin No. 89AP-424, 1995 WL 765152, *2 (Dec. 26, 1995) (reviewing court may consider argument of ineffective assistance of counsel on direct appeal advanced by appellate counsel who also served as trial counsel); and *State v. Taylor*, 2d Dist. Montgomery No. 15119, 1996 WL 417098,

*7 (July 26, 1996) ("Although counsel cannot be expected to argue his own trial ineffectiveness where he or she does so in a forthright manner, this court is not precluded on direct appeal from addressing that issue.").

{¶132} However, neither party has raised or briefed the issue here of whether appellant's counsel is precluded from arguing her own ineffectiveness, and we need not decide this issue under the facts of this case. This is so because we cannot discern the alleged prejudice from the record before us. *See Meredith*, 2000 WL 821619, *3, fn. 2 (declining to decide whether counsel is precluded from arguing his own ineffectiveness where the matter can be resolved on other grounds). Mr. Rafferty maintains that counsel was ineffective in failing to present evidence pertaining to mitigating factors at sentencing, including: "psychological testimony, background testimony, or scientific evidence[,]" and in failing to request a pre-sentence investigation. However, because none of this evidence is contained in the record, Mr. Rafferty cannot establish prejudice on direct appeal, where our review is confined to the record. *See* App.R. 9(A)(1) and App.R. 12(A)(1)(b).

{¶133} Accordingly, Mr. Rafferty's fifth assignment of error is overruled.

III.

{¶134} Mr. Rafferty's assignments of error are overruled. The judgment of the Summit 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 Summit, 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(C). 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.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

JILL R. FLAGG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.