Supreme Court of Ohio Clerk of Court - Filed December 12, 2019 - Case No. 2019-0980

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	**CASE NO. 2019-0980**
Plaintiff-Appellee,	)	
vs.	)	On Appeal from the Ohio Court of Appeals, Eighth Appellate District Case No. 107494
URSULA OWENS,	)	
Defendant-Appellant,	)	

MERIT BRIEF OF APPELLANT URSULA OWENS

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STATEMENT OF THE CASE

Defendant-Appellant Ursula Owens ("Owens") was arrested on March 19, 2017, and subsequently indicted on April 3, 2017, for the March 2017 death of the five-year old daughter of Owens' fiancée/co-defendant, Tequila Crump, and other crimes alleged to be related. This included an incident on October 16/17, 2016, which allegedly resulted in the same five-year old victim suffering severe burn injuries to her hands from scalding water.

The State alleged that the victim died as a result of injuries sustained when, on the morning of March 17, 2017, she was subjected to a felonious assault by defendants at the home they all shared, which allegedly resulted in the infliction of a severe brain injury. The little girl was declared brain dead that evening at the hospital and died the next day. (T. 1642.) The defendants denied any abuse or assault and claimed the victim suffered a seizure that morning, due to an undiagnosed condition, and that her death was natural.

As a result of the events of March 17, the State chose to also pursue charges regarding burn injuries the victim had sustained from scalding water in her bathroom several months earlier, on October 16/17, 2016, and which necessitated hospitalization and surgery.

These two separate events resulted in a fifteen-count indictment against Owens and Crump. Counts 1 and 2 charged Owens and Crump with counts of aggravated murder in violation of, respectively, R.C. 2903.01(A) and/or 2903.01(C), in that defendants allegedly committed the victim's murder with prior calculation and design and/or that the victim of the alleged purposeful murder was under 13. They were also charged, in Count 3, with murder in alleged violation of R.C. 2903.02(B) ("Felony Murder"), in that defendants allegedly committed the murder as a proximate result of committing or attempting an offense of violence that is a felony of the first or second degree, to wit, felonious assault.

Owens and Crump were also charged with felonious assault against the victim on March 17, 2017 (Count 4). There were also charges relating to the alleged incident in October 2016, during which the victim sustained burn injuries to her hands from scalding water; however, that October 2016 incident was not alleged to have caused the victim's death. There were also several charges of endangering a child as to both dates. (Indictment, filed April 3, 2017.)

A. Trial Court Proceedings

Owens entered a plea of not guilty on April 6, 2017. Because she is indigent, trial counsel were appointed to represent her: a private attorney and the county public defender's office.

On April 6, 2018, Owens filed a motion for separate trials, but she withdrew that motion on April 12, 2018. Trial commenced on May 29 against both defendants.

Starting on June 1, the State presented the testimony of twenty (20) witnesses. This included five (5) witnesses who testified *only* about events allegedly pertaining to the hand burns sustained by the child in October 2016, and which had nothing to do with the child's death in March 2017. As to the March 17 incident, there were only two alleged witnesses — young teens R.M. and R.O. — who supposedly had knowledge of seeing or hearing the alleged assault of the victim on March 17.

The deputy medical examiner, Elizabeth Mooney, D.O., testified about the autopsy she conducted on the victim on March 22, 2017. The State's final witness was Det. Jody Remington, the investigating detective with the Cleveland Police Department, whose testimony included her recounting of statements made to her by defendant Owens.

The State also introduced a number of exhibits, including many photographs. The exhibits also included, over defendants' objections, voluminous records of the victim's medical care at MetroHealth for the hand burns (State Exh. 93) and of her medical care at Rainbow on March 17 before she was pronounced brain dead and died the next day (State Exh. 95). (T. 1654-71.)

After the completion of the State's case, the defendants each moved for a directed verdict of acquittal on all counts. (T. 1671-1701.) The trial court denied both motions. (T. 1697, 1701.)

Defendant Owens then presented the testimony of one witness, an expert in forensic pathology, Thomas W. Young, M.D. He testified that the victim's cause of death was complications of sinovenous thrombosis (blood clotting in the brain), which resulted in multiple seizures all day long on March 17, impairing her breathing, and that the manner of death was natural. (T. 1711-61.)

The defense then rested and renewed the Rule 29 motions. (T. 1805-06.)

The State had one rebuttal witness, Thomas Gilson, M.D., the county medical examiner. Defendant Owens then made another Rule 29 motion as to all counts concerning the alleged events of October 16/17, 2016. (T. 1843-46.) It was again denied. (T. 1851.)

In the discussion with the court before the jury instructions, the defense asked for an instruction on reckless homicide, under R.C. § 2903.041, as a lesser-included offense. (T. 1802-05.) Over the State's objection, the court said it would provide that lesser-included offense instruction. (T. 1805.) Later, the court did indeed provide instructions on reckless homicide, but *only* as to each of Counts 1 and 2 which charged aggravated murder. (T. 1865-72.) However, the court did *not* provide the instruction on reckless homicide as a lesser-included offense to the charge of felony murder in Count 3, and, as a result, reckless homicide was not an option on Count 3's verdict form. (T. 1872-74; 1973-91.)

The State, in its closing argument, vehemently insisted that recklessness has no place in describing the homicidal acts of the two defendants:

> Now, aggravated murder is also going to have the term "purposely" which is defined for you in there, and you're going to have to show that there was a specific intent of Tequila and Ursula. Well, take a look at their words, take a look at their actions. I'm sick of it, and the end result is a barrage of hits and thumps and throws. There's absolutely one thing that does not belong in the realm of the physical abuse

> regarding the death of this girl, and that is recklessness. There's going to be another charge, a lesser included offense in there that's going to say that the death was caused recklessly. Nothing about what we heard in here over the past two days was nearly reckless, nothing. It's not mere recklessness when you slam her after already deciding that, you know what, I can't take it anymore.
>
> This homicide was a murder. It wasn't merely a reckless homicide.
>
> . . . .
>
> So when you go back there with your instructions, please keep clear in your minds that it wasn't mere recklessness that killed her. Oh, no. It was much more. It was purposeful.

(T. 1918-20.)

The jury received the case that evening, June 7, and reached its verdict on Tuesday afternoon, June 12. *Squarely rejecting the State's argument about the inapplicability of recklessness*, the jury acquitted Owens of aggravated murder in Counts 1 and 2, and found her guilty of the lesser-included offense of reckless homicide on both those counts. But, with reckless homicide *not* being provided to them as an option on Count 3, the jury found Owens guilty of felony murder with felonious assault of the victim on March 17 as the sole predicate, and guilty of that offense of felonious assault in Count 4. Owens was also found guilty of endangering a child on all such counts pertaining to March 17, and two of the counts pertaining to October 17, 2016. Owens was acquitted of both counts of felonious assault — Counts 10 and 11 — pertaining to October 17, and of two of the counts of endangering a child, Counts 13 and 14, pertaining to that date. (T. 1973-82.)

The verdict was similar for Crump, with the two differences being Crump was acquitted of felony murder in Count 3 and acquitted of felonious assault in Count 4 (both regarding March 17), whereas Owens had been found guilty of those counts. (T. 1983-91.)

The sentencing occurred on July 10, 2018 for both women. (T. 1995.) As to Owens, the State elected to proceed on Count 3, the felony murder charge, which carries a penalty of 15 year

to life. The court sentenced Owens to 15 years to life on Count 3, and to two years, six years, and two years (for a total of ten years) on the other non-merged counts of her conviction, with those sentences to be run consecutive to each other, for a total term of incarceration for Owens of **25 years to life**. (T. 2021-23.) The court also imposed post-release control for five years.[1] (T. 2023-23.)

B. Appellate Court Proceedings

In her direct appeal, Owens raised eight assigned errors, including as relevant here Assignment of Error No. 4:

> The trial court erred when it failed to provide a jury instruction, for the murder charge in Count 3, to allow for the jury's consideration on that Count of the lesser-included offense of reckless homicide, in violation of Owens' rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 9, 10, and 16 of the Ohio Constitution.

Owens also raised, in her Assignment of Error No. 6, that Owens' trial counsel rendered deficient performance to the extent they failed to request, and/or failed to object to the trial court's omission of, a jury instruction for the charge of felony murder in Count 3 (R.C. § 2903.02(B)) which would have allowed for the jury's consideration of the lesser-included offense of reckless homicide on that count too.

The court of appeals affirmed in an opinion dated June 6, 2019. State v. Owens, 2019-Ohio-2221 (8th Dist. App. 2019). With respect Owens' assigned error concerning the trial court's failure to provide an instruction on reckless homicide as a lesser-included offense of felony murder under R.C. 2903.02(B), the appellate court rejected Owens' arguments by concluding, as a threshold matter, that, under this Court's recent precedent, "reckless homicide can no longer be

[1] The court sentenced Crump to a total sentence of 13 years on her offenses of conviction, also on a consecutive basis. (T. 2026-27.)

considered a lesser included offense of felony murder under R.C. 2903.02(B)." State v. Owens, 2019-Ohio-2221 at ¶ 26. In so ruling, the lower appellate court became the first appellate court in Ohio to hold that reckless homicide is no longer a lesser-included offense to felony murder.

Based on that same analysis, the appellate court rejected Owens' claim that her trial counsel had been ineffective in not ensuring that the trial court included, and/or in not objecting to the trial court's omission of, the reckless homicide instruction as a lesser-included offense to the charge of felony murder in Count 3. State v. Owens, 2019-Ohio-2221 at ¶ 30 ("[R]eckless homicide is not a lesser included offense of felony murder under R.C. 2903.02(B) according to Nolan, 141 Ohio St. 3d 454 . . . . Thus, Owens's trial counsel's performance was not deficient.").

On July 19, 2019, Owens filed a timely notice of appeal and MISJ in this Court.

On October 1, 2019, this Court accepted discretionary jurisdiction over Proposition of Law No. 1 as raised in Owens' MISJ in this Court, as follows:

> Reckless homicide is a lesser-included offense of Felony Murder. A criminal defendant who has been charged with Felony Murder is denied due process, the right to trial by jury, and a fair trial when the jury is not provided with an instruction on reckless homicide, as a lesser-included offense of Felony Murder, under facts and circumstances which warrant that instruction, in violation of the defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 9, 10, and 16 of the Ohio Constitution.

(See 10/01/2019 Case Announcements, 2019-Ohio-4003.)

The record was filed on October 14, 2019. Owens' merit brief is now timely filed.

STATEMENT OF THE FACTS

The jury determined by its verdict that the tragic death of the young victim in this case, as based on the evidence presented at trial, was at most a reckless homicide, and was neither a purposeful nor intentional homicide. The facts bear that out.

A. Background Facts.

Ursula Owens was 37/38 years old at the time of the alleged events. She had no prior criminal history. (T. 1643.) Tequila Crump was 26/27 years old; the deceased child victim, T.M., was Crump's only child. Owens and Crump had been dating and living together since 2016 and they were referred to as each other's fiancée.

T.M. was born in September 2011. She was born prematurely and was small for her age. Her mother, Crump, has a history of seizure disorder and was epileptic during her pregnancy. (T. 749-50, 880-81.) Crump evidently became pregnant with T.M. while homeless in North Carolina. (T. 1354.) During her pregnancy, she met a Lynchburg, Virginia woman, Shabrina McCloud, on an internet dating site and moved in with McCloud in Virginia. Crump had the baby in Lynchburg and lived there with McCloud, on and off with some periods of separation, until T.M. was 4 to 5 years old. McCloud testified that she shared legal custody of T.M. with Crump while Crump was in Virginia. (T. 746-47.) McCloud testified the child was well taken care of in Virginia. (T. 734-38, 1354-55.)

According to McCloud, Crump met Owens on the internet in 2016. Shortly afterwards, Crump travelled to Cleveland, Ohio for three weeks to stay with Owens, leaving T.M. behind with McCloud. Later in 2016, Crump took T.M. with her to Cleveland; they were supposed to return to Virginia in July, but they never did. (T. 745-48, 765-66.)

Relatively new to Ohio in 2016, Crump and T.M. did not sign-up with relevant social service providers, and T.M. was not enrolled in school. (T. 868-69; State Exh. 93.) Crump did not

have identification and was unable to access T.M.'s school records from Virginia.

In Cleveland, Crump and Owens lived in economically-deprived conditions. At first, they stayed on East 141st Street with Jamika Vance, a cousin of Owens, who had six of her own children already living with her. (T. 929, 958-60, 1375-79; State Exh. 93.) When living with Jamika Vance, T.M. slept in a closet in the bedroom shared by Crump and Owens. (T. 1381-85.)

Beginning in or about December 2016, the women went to live with Yamika Brock, a friend of Owens' from high school, in Cleveland. (T. 1201-20.) T.M. lived there too, and sometimes so did R.O., who is Owens' 15-16-year-old son. The house was in very poor condition. (State Exhs. 4 to 61.) T.M.'s bedroom was on the second floor. Across the hall was the bedroom that R.O. would sleep in when he stayed with his mother Ursula. (He lived most days during the week with his other mother, Sierra Giles, who had been in a relationship with Ursula Owens during 2006-12.) (T. 956-63, 1366-68, 1381-88.) The bedroom shared by Crump and Owens at Brock's house was also on the second floor, and it evidently had a door that went into T.M.'s room. (T. 1222-33, 1606.)

T.M. did not have a bed in her bedroom, and so she slept on the floor. (T. 1301-02, 1306, 1387-88.) But, "she had a TV, a DVD player, and there was this big dresser with a mirror. And she had covers and toys." (T. 1386.) R.O. testified that T.M. would sometimes wet her pants, and, when she did so, she would get in trouble. (T. 1387-88.)

He described the discipline Owens would administer to T.M. in those and other situations. He said Owens would push or punch T.M. down. And if T.M. did not respond when asked why she was doing something, Owens would "push her right back down" and "would like continue to hit her." (T. 1379.) When R.O. saw these incidents, he testified he would sometimes try to intervene, but he often did not do so because he said he was told not to and he did not want to get in trouble. (T. 1376-80.)

B. The Events of March 16-17, 2017.

On the evening of Thursday March 16, R.O. and his friend, R.M., were spending the night at Brock's house. R.O. testified that when he arrived at the house T.M. was getting in trouble and was crying. She was scrubbing up pee stains on the floor in her bedroom and was using bleach. Eventually she blacked out and fell to the floor. Crump came in and carried her into the bathroom and threw water on her face. This revived T.M. and she was able to go downstairs to play, but she complained to R.O. about having a headache. (T. 1390-93, 1432-36.)

Once R.O.'s friend, R.M., arrived, the two teens played video games in the living room, and they let T.M. play too. She went to bed before them. The boys stayed up until after midnight playing the video games, and then went to bed in R.O.'s room across the hall from T.M.'s room. (T. 1297-1311, 1392-99.)

Both R.O. and R.M. testified that they were awoken early the next morning, March 17, by loud noises coming from T.M.'s room. R.O. testified he heard his mom yelling at T.M. and T.M. was crying. He said the doors were open and he could see into T.M.'s room:

> Q. Okay. What's the next thing that happened?
>
> A. Well, my mom, she's -- my mom and Tequila started arguing in they room, and my mom was saying, like, I can't take this no more. Because, somehow, a fan got plugged up in [T.M.'s] room.
>
> Q. Okay. And so what happened?
>
> A. Well, it was thought that [T.M.] had plugged up the fan, so that's when Tequila went in the room and started yelling at [T.M.] and popped her like four or five times on the arm.
>
> Q. Okay. Now, what do you mean "popped"?
>
> A. Like -- like -- like little -- like little pops to the arm, like right here. And then...
>
> Q. And then what happened?

A. And then that's when my mom came in there and was like, That's not how you do it. And then that's when she started hitting -- she started hitting [T.M.].

Q. And how did she hit [T.M.]?

A. She like punched her and picked her up and, like, threw her around and picked her up and threw her.

(T. 1401-02.)

R.O. testified that his mom hit T.M. on the arm and stomach and punched her in the head and stepped on her back. (T. 1403-04.) He explained that the two "thuds" he and R.M. heard were his mother throwing T.M. against the wall and into the dresser. He saw T.M. hit her head near the mirror on the dresser. He said he witnessed his mother doing this. (T. 1405-09.) He said he just stood there while it was happening and did not intervene or call 9-1-1 because "I knew I would get in trouble." He said he was told not to call the cops. (T. 1408, 1440-41.)

R.O. testified that, after T.M. was thrown against the dresser, she blacked out. He continued: "And then that's when Tequila was like, Babe, babe, stop. She's not moving. Her arms locking up. That's when Tequila rushed [T.M.] to the tub and tried to throw water on her face again like the previous day." (T. 1409.) But she did not wake up, even after they moved her to the bed in Crump and Owens' room. (T. 1409-11.) R.O. said that he even tried some CPR maneuvers on T.M. as she was laying on the bed, with no success. (T. 1411-14.)

For his part, R.M. likewise testified about being awoken very early in the morning by the sounds of T.M. crying and screaming and of people yelling. (T. 1312, 1337-38.) He said he then heard two loud thuds coming from T.M.'s room, one against the floor and one against the wall. (T. 1312-13, 1344-45.) He remained in R.O.'s room but, with both doors open, he said he could see into T.M.'s room. He did not see what caused the thuds, but he said R.O. saw that. (T. 1337-18.) R.M. testified that, from his vantage, he could see T.M. on the ground and Owens standing over

her and yelling. (T. 1316.) T.M. was in what R.M. described as a locked position on the floor, when she was picked up by Crump and taken from the room.

Originally, R.O.'s statement about whether he could see what caused the thuds was the same as R.M.'s. Indeed, very soon after these events, R.O. told CPD's Detective Diaz, on March 24, *that he did not see what caused the thuds*. (T. 1429-32.) His recollection was the opposite by the time of trial. R.O. also denied to Det. Diaz that he could see Owens hitting T.M., telling the detective he did not have his glasses on that morning. (T. 1436-37.) R.O.'s statement on that issue was also very different by the time of trial. CPD Det. Jody Remington testified on cross that R.O.'s new version of what he claimed to see that morning, as he testified to at trial, *was the first time she had heard that version*. (T. 1651-52.)

Nonetheless, both R.O. and R.M. testified that, around noon—and thus not long after they supposedly saw or heard the noises from T.M.'s room and saw her taken to the bed unable to respond, and with R.O's CPR moves being unsuccessful—they walked to McDonald's, around the corner, for a Snap Wrap, McFlurry, and other treats. There, they goofed around and R.O. posted pictures of himself on Instagram. (T. 1320-21, 1325-28, 1339-43, 1414-16, 1441-43.) R.O. testified he did not call police or 9-1-1 from McDonald's because he did not want to "risk getting hit" when he got home. (T. 1441.) When they got back to the house, R.O. and R.M. played games most of the day, hoping for the best for T.M. (T. 1417-18, 1444-46.)

Neither Owens nor Crump testified at trial, but they had each made statements to Det. Remington during interviews on March 23 about what had happened on the morning of March 17 (T. 1618), and Det. Remington testified about those statements.

Crump told Remington that T.M. had to be disciplined on the morning of March 17 because T.M. had touched the fan and had wet her pants, but Crump said that she only pushed T.M. away from her because she did not want to hurt T.M. (T. 1618, 1623). When Crump later checked on

her daughter, at 11:00 a.m. or so, Crump said T.M. was having a seizure. (T. 1621-22.) This is when Crump says she put T.M. in Crump's bed, with the thought that she would need sleep for 6-7 hours to recover from the seizure. (T. 1622.)

Remington testified that Ursula Owens told her that at about 8 o'clock in the morning on March 17, T.M. wanted to get up and play, but, when Owens told her she couldn't because it was too early, T.M. had a temper tantrum and was throwing her head back. (T. 1625.) Later at around 11:00 a.m. that morning, after Owens had made breakfast, Owens said she checked on T.M. in her room and saw that she had not eaten her breakfast and had moved the fan. Remington testified that Owens said she then "whooped" T.M.: "She said she took off her slipper and she hit [T.M.] three or four times on her butt with her flip-flop." And then Owens "mushed her on her head and told [T.M.] to go play," by which Owens meant she pushed T.M. away by her face. (T. 1626-27, 1646.) According to Remington, Owens said she did not believe her "mush" or "push" was enough to make T.M. fall down. (T. 1627.) Owens told Remington that when she was leaving the bedroom, T.M. had fallen to the ground and was having the same kind of seizure she had the day before. (T. 1628.) Owens described the push to Remington:

> A. I asked her if -- after [T.M.] was pushed to the ground, was she a little out of it? And Ursula Owens shakes her head and tells me "Yes." She tells me that after [T.M.] hit the floor, she began having a seizure. I asked if [T.M.] fell to the floor striking her head, and after striking her head, she began to have a seizure. Owens again shakes her head and tells us "Yes."

(T. 1631; see also T. 1645-46.)

The women made a number of web searches that day, March 17, that corroborated their belief that T.M. was suffering with a seizure which the two women were expecting would resolve itself with sleep, as in the past. (T. 1615-17.) For example, at 10:48 a.m., a search was performed at epilepsy.com for "Five-year-old with first-time seizure, dash, strange symptoms six days later."

(T. 1615-16, 1639; State Exhs. 133, 133-A.) And between 7:31 and 7:33 p.m., Google searches were performed for "How long can a seizure last?", and "How long can sleep last after a seizure?", and "Recovery after a seizure", and "What to expect after a seizure." (T. 1616-17, 1639-40; State Exhs. 133, 133-A.)

C. The 9-1-1 Calls and T.M.'s Hospitalization and Death.

By the observation of R.O., the victim continued to have what appeared to be seizures throughout the day. (T. 1445-47.) After many hours had passed, and T.M. had still not woken up, and indeed her heart was starting to slow, Crump called 9-1-1, with the first call at 10:06 p.m. (T. 1096-97, 1106, 1418-19, 1611-12, 1614, 1640-42; State Exhs. 78-80.)

A fire truck responded first and reported to the en-route EMS crew that "there's a five-year-old female having agonal respirations and they're assisting ventilations at this time." (T. 1105.) The EMS crew arrived at 10:23 p.m. (T. 1106.) The little girl had a weak pulse. (T. 1108-09.) EMS crewman Sam Wilson testified: "we realized that this was a critical situation, so we quickly grabbed the child and took her to the squad." (T. 1110.) In the ambulance, they suctioned vomit from her airway and assisted with ventilation and allowed for intubation. (T. 1111-14.) The crew noted that T.M.'s pupils were fixed and dilated. Her scores on the tests used by EMS to measure responsiveness and oxygenation were poor. EMS noted the possibility of "brain bleed/herniation." (T. 1120-22, State Exh. 94.)

EMS's Wilson testified that Crump told him the patient "had a seizure around 12 p.m. and had been sleeping ever since." (T. 1120-22.)[2] The EMS report continued: "Mom states the patient does not have a history of seizures and [she] has been checking on her breathing with a stethoscope

[2] This is similar to what Crump later told the UH pediatric social worker Kim Foley. (T. 1133 ("She told me that around 11 or 12, 11 a.m. or 12 p.m. that day, [T.M.] had had a seizure. Mom told me that she allowed her to -- and I have it in quotes – 'sleep it off.'").)

ever since. Mom states that she herself has seizures and that she sleeps a lot after them." (T. 1120-22, State Exh. 94; see also T. 1125-26.)

The ambulance arrived at UH's Rainbow hospital at 10:34 p.m. (T. 1115, 1124.) Dr. Stormorken, the experienced pediatric critical care doctor on duty that night in the PICU (pediatric intensive care unit), testified that T.M. presented with severe life-threatening injuries as demonstrated on the CT scan of her head that UH's ER made upon her arrival. (T. 1149.) "That basically means that she had a severe brain injury that was not likely to be survivable." (T. 1149; see also T. 1175.) Dr. Stormorken described, in some detail, the course of treatment they immediately embarked upon for T.M.'s injury. (T. 1152-53.)

Dr. Stormorken also met with Crump that night to explain the plan of care and deliver the sad and dire prognosis: "I told the mother that the patient had a life-threatening hemorrhage within the brain and significant brain injuries as a consequence, which neither the neurosurgeon, the trauma surgeon or myself believed were going to be survivable." (T. 1159.) The doctor also obtained from Crump a history of T.M.'s medical care. Crump told her there were no significant medical issues with her daughter. (T. 1156-57.) Crump described T.M. as being in good health until the day of hospitalization. Dr. Stormorken relayed to the jury her conversation with Crump about T.M.'s history during the previous 24 hours:

> On the night of the 16th, so the night before, [T.M.] went to bed at 10:30. The mom woke up at 8:00, went into the patient's room to make sure she could get up to go to the bathroom so that she wouldn't wet the bed.
>
> The girl hadn't gotten out of bed, but when the mother approached the bed, she opened her eyes, looked at her mother and said, "Good morning, mother. I love you."
>
> The patient then got out of bed, went to the bathroom and urinated, per the mother. The patient then had a breakfast of chicken nuggets and ketchup. The patient went into her own room and was playing with her books and toys.

> At about 11 a.m., the mother could see through the bedroom door opening into the child's room and noted that the child was laying on the floor with her arms and legs jerking. By the time she got to the room and started to try to stop the jerking, the patient had stopped on her own. That's what we call a brief self-limited seizure. The mother guesstimates no more than three to five minutes. The patient was noted to have her eyes open and looking at mom and seeming to respond, but there were no spontaneous sounds, no verbalization, no making any purposeful movements.
>
> The mother noted the patient to become more sleepy. She slept until 3 or 4 and then she woke up again. The patient at that time had her eyes open but, again, didn't verbalize and didn't make any purposeful movements.
>
> The patient went to sleep again until about 10 p.m. when the mother indicated the breathing was more labored, so she called EMS. The mother and her fiancée had Googled seizures and followed the advice, which was to allow the patient to continue to sleep after the seizures.

(T. 1157-59.)

According to the doctor, Crump told her of only the one limited seizure of 3 to 5 minutes in duration, happening on March 17. (T. 1178-79.) On cross-examination, the defense referenced another note in the medical chart which recited that the mother described six additional seizure episodes that day. (T. 1176-81.)

Dr. Stormorken testified that a self-limited seizure, such as described to her by Crump, does not cause "a profound life-threatening subdural hemorrhage with mass effect" such as they saw in T.M.'s case. (T. 1160.) The doctor described the injury as "an enormous bleed that is squishing this kid's brain and essentially not making their -- you know, not allowing their heart or their lungs to work right." (T. 1165.) Dr. Stormorken said that UH's lab and blood work "confirm[ed] that the hemorrhage on [T.M.'s] CT scan happened acutely, not chronically. In other words, she didn't bleed several days ago. She bled several hours ago." (T. 1161.)

Dr. Stormorken's shift ended at 8:00 a.m. on March 18. When she transferred T.M.'s care to the subsequent PICU doctor on March 18, the prognosis was that T.M. would not survive. (T. 1171.) T.M. died later that day. (T. 1179-80, 1642.)

D. The Conflicting Expert Opinions on the Cause of T.M.'s Death.

The deputy medical examiner, Dr. Mooney, opined that T.M. died from multiple blunt force injuries including subdural hemorrhage and hemorrhage around the brain. She testified that the cause of death was blunt force injuries, and the manner of death was homicide. (T. 1506-08, 1538; State Exh. 96.)

Dr. Mooney identified the subdural hemorrhage in the brain. She also found evidence of hemorrhage and/or bruising in other parts of the body, which she attributed to blunt force injuries: "I also found hemorrhage in her eyes and the retina of her eyes, as well as in the nerves surrounding the eyes that come from the back of the eyes. There was also hemorrhage within the ears. I also found hemorrhage in the cervical spinal cord, underneath there. Additionally, there was bruises to the lungs. There were also bruises to the soft tissues or subcutaneous tissues underneath the skin of [T.M.'s] back and one of her arms." (T. 1507.) The doctor testified that all these injuries, along with bleeding to the brain, allowed her to conclude the cause was blunt force trauma. (T. 1585.)

She testified that any hemorrhage is indicative of impact and trauma which sheers vessels. (T. 1525-26.) The subdural hemorrhage to the brain, which she found on opening T.M.'s skull, was itself indicative to her of inflicted blunt force trauma. (T. 1561-62.) Because trauma to the brain, like all trauma involves the sheering of vessels, a forensic pathologist, in a case of traumatic brain hemorrhage, is sometimes able to see an indication of the sheering if clotting has occurred, such as during a hospital stay. Dr. Mooney found evidence of such a "thrombosed vein" in T.M.'s autopsy, and she explained the severance of that vein was caused by a force large enough to sever the vessel. (T. 1527-30, 1561-62; State Exhs. 126, 128.)

On cross examination, the defense urged that the clot could itself have caused a seizure, if it had been present when the patient was alive. Dr. Mooney replied that she did not believe the clot happened then, but she agreed that a clot can cause a seizure. (T. 1573-75.)

Dr. Mooney's autopsy also noted some "remote injuries," meaning the injuries had been inflicted in the past, not recently. (T. 1507-08, 1527-29, 1533-35, 1576-77.) In addition to T.M.'s hand burns, the doctor found remote rib fractures, of posterior right ribs 8 through 12, and of her left clavicle bone. (T. 1507-08, 1517-19, 1533-34, 1576-77.) She explained: "Posterior rib fractures are indicative of inflicted trauma, especially in pediatric populations. It takes a significant amount of force to fracture a posterior rib, and it's inflicted trauma." (T. 1518.)

The defense expert pathologist, Dr. Young, disagreed about the cause of the observed clotting — and, specifically, the State's suggestion that trauma caused the clotting — and about the cause of death. He suggested the medical providers all assumed child abuse, even though the only evidence of any current external injury was on the deceased's foot, but otherwise there were no visible outer injuries and none to the head. (T. 1723-24.) He disagreed with any conclusion of blunt force trauma causing a head injury because there was no evidence of scrapes, tears, fractures, bruises, or lacerations to the head, all of which he would expect to see with blunt force trauma. (T. 1798-99.)

Dr. Young described the delivery of blood to and around the brain, including the "bridging veins" that take blood flow to the dural sinuses in the brain. (T. 1728-30.) Here, the medical examiner Dr. Mooney had observed a clot in one of the bridging veins. But that was a red flag to Dr. Young because, he testified, it is speculative to assume that severance of a bridging vein — and thus trauma — caused that clot, as Dr. Mooney had assumed. Indeed, as Dr. Young explained, severance in this instance, due to the location of bridging veins, is often caused by opening a skull for autopsy, and that, he told the jury, is what he believes happened here. (T. 1730-34, 1760-61, 1770.)

Dr. Young also did not agree that the severance led to the clotting. (T. 1769.) Instead, he opined that T.M. had a rare condition called sinovenous thrombosis which caused clotting, and

that condition, in turn, was why she so often experienced the seizures the defendants described. (T. 1731-32, 1734-36, 1746-48, 1768, 1780.) Sinovenous thrombosis is also sometimes referred to in medical literature as "cerebral [or cortical] venous sinus thrombosis" or "CVST." (T. 1734, 1768.) Dr. Young noted that Hillary Clinton has this condition, and it can be treated with anticoagulants if caught in a timely way, usually by an MRI, as it was with Clinton. (T. 1734-35, 1776-79, 1797.) But he said a CT scan will not detect the condition, and so Rainbow did not notice it with T.M. (T. 1735, 1786, 1797.) In his review of the autopsy slides, Dr. Young noticed *not only* the one clotted bridging vein, but he saw clotting in *another sinus* that was quite a distance away. (T. 1742-47; Defense Exhs. EE, GG.) To him that meant T.M.'s CVST was much more serious than Clinton's. (T. 1743, 1775-79.)

The doctor testified that the CVST-related clotting in the brain, as he observed with T.M., can cause a seizure, and then multiple seizures which can themselves deprive the brain of oxygen as the patient struggles to breathe, thereby impairing coagulation and leading to increased bleeding and further damage to the brain, in a downward spiral. (T. 1736-39, 1747-49, 1787-88.) There would also be associated bleeding in the eyes, as was observed here. (T. 1740.) The breakdown in coagulation can also lead to the body being more easily bruised, thereby, for example, making the bruising on T.M.'s back, as observed in the autopsy, an expected observation that did not require a conclusion of child abuse. (T. 1755-56, 1783-88.)

Dr. Young saw evidence of such multiple seizures in T.M.'s history, corroborating his conclusion of CVST. (T. 1749-50.) There was mention in the record of a seizure when T.M. was 2 or 3 years old. (T. 1749.) And the family described a history of multiple seizures as they related to the hospital. (T. 1780, 1796-97; State Exh. 95 (page 290).) The mother also suffered from epilepsy and had had seizures. (T. 880-81, 1006.)

Dr. Young concluded that, if he were the medical examiner filling out the death certificate in this case, he would fill it out as follows: "Cause of death, complications of sinovenous thrombosis. Manner of death, natural." (T. 1760; see also 1790-91.)

In rebuttal, the State presented the testimony of Dr. Thomas Gilson. He testified that the most common cause of subdural hemorrhage is trauma and the most common mechanism of that trauma is tearing of the bridging vein. (T. 1821.) Dr. Gilson also testified that, contrary to what Dr. Young had said, subdural hemorrhages can occur with the absence of skull fractures or bruising. (T. 1821-22.) Dr. Gilson said he had only seen CVST twice in twenty-four years because he claimed it is not a common condition. (T. 1837-38.) Furthermore, Dr. Gilson stated that it is not common to have a subdural hemorrhage accompany that kind of sinus thrombosis. (T. 1838.)

E. The Burns Sustained by T.M. on October 16-17, 2016 and the County's Review of That Matter.

Although it had nothing to do with T.M.'s death, the State insisted on pursuing claims concerning the scalding injuries T.M. sustained on October 16-17, 2016. At that time, Owens and Crump were living with Jamika Vance on East 141st Street. (T. 1607-08.) T.M. was admitted that day to Metro with scalding burns to her hands. She was diagnosed with second-degree burns of her left hand and forearm, which the doctors believed would heal, and third-degree burns of the fingers of her right hand, her wrist, and forearm. (T. 781-84, 891-95; State Exhs. 62-77.) They performed surgery on October 22, and she was released to her mother on October 29. (T. 789-93.)

One of the principal treating doctors, Dr. Anjay Khandelwal, did not recall any interaction with T.M.'s family during the hospital stay. (T. 889, 899.) The other principal treating doctor, Dr. Charles Yowler, likewise did not testify of any interaction by him with the family. (T. 776-80.) Dr. Yowler testified that he would have reviewed the medical record of T.M.'s burn care when he

took over the case on October 20, including her surgery, after Dr. Khandelwal was unavailable for the rest of that week. (T. 778-81; State Exh. 93.)

The record confirms a consistent explanation by the family for the injuries as being caused when T.M. went into the bathroom on Sunday night (October 16) by herself and turned on the hot water, when her hands became entangled in a rag that was also in the hot water. Owens came in and turned the water off. The next morning October 17, the women noticed the blistering and brought the girl to the hospital. (T. 863-66, 871-74.) There had been no hot water at their house for a while, and Crump believed T.M. did not realize how hot it would be with the hot water now working. (T. 873; see also T. 975-77, 1007, 1620.)

This explanation was also consistent with T.M.'s own statements about how she suffered the injuries, including statements she made when she was alone with medical providers and the moms were not present: "Q. And when the child was asked what occurred, the child was consistent with the fact that she was in the bathroom by herself when she sustained these burns; isn't that right? A. That's what's in the record, yes." (T. 800-01; see also T. 807.)

Because a child had sustained serious injuries that can be suspicious for non-accidental trauma or neglect, Metro made a referral of the matter to Cuyahoga County Children and Family Services ("the County"). (T. 790-92, 841-43, 877-78.) The referral was also made to ensure that the Crump and her child received the available public services they had not been receiving. (T. 883-85.) However, no one at Metro contacted any law enforcement agency about the burns (T. 831, 883-84), and Metro discharged the child to Crump and Owens on October 29. (T. 792-93; State Exh. 93.) Among the follow-up issues Metro noted was the need to review the safety of Crump's house concerning water temperature, but that was never done. (T. 869, 883.)

As part of the referral to the County, the Metro pediatric social worker, Kathy Mahoney, said she asked Dr. Yowler of his impressions. (T. 871.) As a result, the doctor wrote in the medical

record: "The etiology of this burn is unclear. While it certainly may have happened as described by the mother, we are concerned at the depth of the burn, since it would seem that the child would have removed her hand from the hot water, slash, towel before she was burned this deeply." (T. 795; State Exh. 93.)

On cross-examination, Dr. Yowler acknowledged that, to be more accurate, his note should have stated that the description of how the injury happened was the description not only given by the mother, but by the child too. (T. 802-03.) He also agreed that the injury may have happened as the mother described: "Q. And, as you sit here in this courtroom today, it may have certainly happened as mom described? Just yes or no. A. Yes." (T. 803.)

On referral from Metro, the County investigated the incident. But, after completing its investigation, the County closed the file in October because the agency concluded any suspicions of neglect or abuse were "unsubstantiated." (T. 967-80, 985-96.) Unsubstantiated means "there wasn't any proof to prove that there was any abuse or neglect." (T. 968; see also T. 988.)

It was apparent that T.M. had a very high tolerance for pain. The Metro nurse testified that when they removed her bandages — ordinarily a very painful ordeal with burn patients — T.M. didn't even flinch. (T. 821-22, 824-25.)

LEGAL ARGUMENT

Proposition of Law No. 1. The trial court erred when it failed to provide a jury instruction, for the murder charge in Count 3, to allow for the jury's consideration on that Count of the lesser-included offense of reckless homicide, in violation of Owens' rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 9, 10, and 16 of the Ohio Constitution.

The jury unanimously determined that T.M.'s death was recklessly caused by Owens. They did so in rejecting the State's charges in Counts 1 and 2 that Owens had acted with prior calculation and design and/or purposely to cause the child's death. (T. 1973-74.) Owens was found not guilty of aggravated murder as charged by the State in both of those counts, and she would have been found not guilty of so-called "murder-A" too, if that count had been charged, because the jury determined that the element of a purposeful killing was not proven.[3] See R.C. § 2903.02(A); T. 1973-74. As determined by the jury, Owens recklessly caused T.M.'s death by her conduct; and this conclusion was reached despite the State's vehement argument in closing argument that the jury should reject any allegation of recklessness with respect to T.M.'s death. (T. 1918-20.)

During the on-the-record discussions with the court before the jury instructions, the defense asked for an instruction on reckless homicide as a lesser-included offense.[4] (T. 1802-05.) Over the State's objection, the trial court said it would provide that lesser-included offense instruction. (T. 1805.) Later, the trial court did indeed provide instructions on reckless homicide, but *only* as to each of Counts 1 and 2 which charged aggravated murder. (T. 1865-72.) However, the court did *not* provide the instruction on reckless homicide as a lesser-included offense to the charge of felony

[3] Because the victim was under the age of 13, the State was able to charge as "aggravated murder" an offense that would have been "murder-A" had the victim been over 13. In all respects other than the age of the victim, the elements are the same. Compare R.C. § 2903.01(C) with R.C. § 2903.02(A).

[4] Reckless homicide is a felony of the third degree (R.C. § 2903.041), and any prison term shall be no more than thirty-six months. See R.C. § 2929.14(A)(3)(b).

murder in Count 3, and, as a result, reckless homicide was not an option on Count 3's verdict form. (T. 1872-74.)

This failure was obvious error, and, if plain error review is required — due to the failure of Owens' trial counsel to object to that error and/or to the apparent oversight in the jury instruction for Count 3 — it is plain error too and/or is the result of Owens' trial counsel's constitutionally deficient performance which prejudiced Owens. Strickland v. Washington, 466 U.S. 668 (1984).

The lower appellate court rejected all these arguments by concluding, as a threshold matter, that under this Court's recent precedent "reckless homicide can no longer be considered a lesser included offense of felony murder under R.C. 2903.02(B)." State v. Owens, 2019-Ohio-2221 at ¶ 26. The lower appellate court is mistaken.

A. Reckless Homicide is a Lesser-Included Offense of Felony Murder.

It has long been established in Ohio that reckless homicide is a lesser-included offense to a charge of felony murder under R.C. 2903.02(B), so-called "murder-B" or "Felony Murder."[5] See, e.g., State v. Berry, 2004-Ohio-5485, ¶ 48 (8th Dist. App. Oct. 14, 2014); State v. Alston, 2006-Ohio-4152, ¶ 48 (9th Dist. App. 2006). The State appears to concede the point, writing in its response to Owens' MISJ: "Reckless homicide is a lesser-included offense to a charge of felony murder. State v. Willis, 8th Dist. Cuyahoga No. 99735, 2014-Ohio-114 (2014)." (State Opp. To MISJ at 4).

This conclusion follows from this Court's three-part test for lesser-included offenses under State v. Deem, 40 Ohio St. 3d 205, 209 (1988), as the test was modified by State v. Evans, 122 Ohio St. 3d 381, 383, 387, 2009 Ohio 2974, ¶¶ 6, 25 (2009), because:

[5] Section 2903.02(B) provides: "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

(1) Reckless homicide is a felony of the third degree, which carries a lesser penalty than Felony Murder.

(2) A person cannot cause the death of another under R.C. 2903.02(B) without also causing the death of another under R.C. 2903.041.

(3) The mens rea/causation element of Felony Murder is clearly different than the mens rea of reckless homicide. Reckless homicide requires "a heedless indifference to the consequences" and a "disregard" of a known risk, whereas Felony Murder requires a "knowing" mens rea and an underlying felony that results in the death of the victim.

See, e.g., Alston, 2006-Ohio-4152 at ¶ 48 (applying Deem).[6]

This conclusion in Alston that reckless homicide is a lesser-included offense of Felony Murder was endorsed in, if not specifically adopted by, this Court in State v. Trimble, 122 Ohio St. 3d 297, 324, 2009-Ohio-2961, ¶¶ 190-91 (2009). There, the Court held that "[a]pplication of the Deem test shows that reckless homicide is a lesser included offense of aggravated felony murder" under R.C. 2903.01(B), and the Court then cited Alston's conclusion with approval as to Felony Murder too under R.C. 2903.02(B). Id. at 324, 2009-Ohio-2961 at ¶ 191 (citing with approval Alston, 2006-Ohio-4152 at ¶ 48).

The recognition of reckless homicide as a lesser-included offense of both aggravated felony murder (requiring a *purposeful* mens rea) and felony murder (requiring a *knowing* mens rea) is consistent with Ohio's hierarchy of culpable mental states for homicide crimes: purposeful with prior calculation and design, purposeful, knowing, reckless, negligent. "When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices

[6] The Court modified the Deem test in Evans to remove the word "ever" from the test's second element, which, before Evans, provided: "the greater offense cannot, as statutorily defined, *ever* be committed without the lesser offense, as statutorily defined, also being committed." Evans, 122 Ohio St. 3d at 383, 2009 Ohio 2974 at ¶ 10 (quoting Deem, at par. 3 of the syllabus).

to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element." R.C. § 2901.22(E). Inversely, then, purpose includes knowledge, knowledge includes recklessness, and recklessness includes negligence. Trimble recognizes and enforces this hierarchy of culpable mental states, and maintains its integrity insofar as applicable to Ohio's law of homicide. Trimble, 122 Ohio St. 3d at 324, 2009-Ohio-2961 at ¶ 190 ("In purposely causing the death of another, one has to first become reckless in causing the death of another.").

This Court has not overruled or waivered from Trimble in this respect, nor should it do so given the importance of maintaining the integrity of Ohio's established hierarchy of culpable mental states for homicide offenses. Ohio's lower appellate courts thus continue to recognize, applying Deem, that reckless homicide is a lesser-included offense of Felony Murder, because, of course, recklessness is subsumed within knowingly: knowledge includes recklessness. See, e.g., State v. Rickard, 2019-Ohio-298, ¶ 47 (6th Dist. App. 2019) ("Both involuntary manslaughter and reckless homicide are lesser included offenses of felony murder." (citing Trimble)); State v. Waters, 2019-Ohio-1813, ¶ 12 (6th Dist. App. 2019) (same); State v. Williams, 2016-Ohio-7345, ¶ 19 (9th Dist. App. 2016); State v. Willis, 2014-Ohio-114, ¶ 49 (8th Dist. App. 2014); State v. Miller, 2013-Ohio-5621, ¶¶ 26-27 (2nd Dist. App. 2013); State v. Collins, 2011-Ohio-3241, ¶ 40 (8th Dist. App. 2011). See also State v. Turner, 2019-Ohio-144, ¶¶ 66-67 (2nd Dist. App. 2019) (Hall, J., concurring in part & dissenting in part) ("Because the jury found Duncan guilty of felony murder, of necessity it also would find him guilty of reckless homicide, which is also a lesser included offense of felony murder. [T]he 'knowledge' mental state required for the Duncan jury's felony murder verdict included and subsumed the recklessness required for the death caused by

recklessness, i.e. the reckless homicide.") (discussing State v. Duncan, 2006-Ohio-5009 (8th Dist. App. 2006)).

B. The Lower Appellate Court's Analysis to the Contrary Below is in Disregard of Trimble and is Superficial and Incorrect.

In becoming the first appellate court in the State to now conclude that reckless homicide "can no longer be considered a lesser included offense of felony murder under R.C. 2903.02(B)," Owens, 2019-Ohio-2221 at ¶ 26, the panel below has ruled in direct contradiction to Trimble and these many other cases and has misconstrued the mens rea applicable to Felony Murder. If the lower court's decision is allowed to stand, it will upend the integrity of Ohio's established hierarchy of culpable mental states for homicide offenses. The lower appellate court's decision is incorrect and should be reversed.

In the first place, this Court in Trimble has already addressed the issue, and that decision at least must be viewed as endorsing, if not adopting, the conclusion in Alston that reckless homicide is a lesser-included offense of Felony Murder under the Deem test. Trimble, 122 Ohio St. 3d at 324, 2009-Ohio-2961 at ¶ 190. The lower appellate court, however, did not cite Trimble at all on this issue, nor did it explain why that higher court decision has been disregarded. Indeed, one of the three cases from this Court on which the lower appellate court relied — as assertedly representing the "latest pronouncements" of this Court, and which have supposedly "overruled by implication" the cases holding that reckless homicide is a lesser-included offense of Felony Murder — actually *predates* 2009's Trimble decision by some 7 years. Owens, 2019-Ohio-2221 at ¶ 23 (citing State v. Miller, 96 Ohio St. 3d 384, 2002-Ohio-4931 (2002)). Miller cannot be viewed as implicitly overruling a rule endorsed in Trimble, when Miller was decided long before Trimble.

Second, and equally important, the lower appellate court has misconstrued this Court's teaching, and the longstanding legal theory, on the mens rea applicable to Felony Murder, and thus

has misapplied the Deem test to reckless homicide and Felony Murder. The lower appellate court determined that Felony Murder, as analyzed by this Court at least beginning with Miller in 2002, does not actually have a "culpable mental state," but, instead, is in the nature of a "strict liability" offense. Thus, in applying the second and third elements of Deem to reckless homicide and Felony Murder, the lower appellate court concluded that the greater offense of Felony Murder can be committed without also committing the lesser offense of reckless homicide. That is because, although reckless homicide requires a culpable mental state of recklessness, the lower court said there is no "level of culpability" needed for Felony Murder. In the lower appellate court's view, "the reckless homicide statute actually imposes a greater mental state with respect to causing the death of the victim than does R.C. 2903.02(B)," because "felony murder can be statutorily committed without any intent to cause the death of the victim." Owens at ¶¶ 23-25.

That analysis is superficial and wrong. For all purposes relevant to mens rea and the Deem test, Felony Murder has a culpable mental state of *knowingly causing death* when felonious assault is the underlying predicate. It is a less culpable mental state than the mental states of *purposeful with prior calculation and design* (as required for Aggravated Murder) and *purposeful* (as required for Murder (A)), but it is a more culpable mental state than *recklessness*, and more too than *negligent*. That culpable mental state of "knowingly" causing death applies to Felony Murder through the fiction of imputed or transferred intent, the historic fiction which has always existed with "felony murder" whether by statute or common law. The "knowledge" needed to commit the underlying felony is transferred from *that* offense to the *homicide actually committed*, so as to make that homicide a killing committed with the culpable mental state necessary to make it a *murder*, and thus punishable as among the most serious of offenses in Ohio law, permitting a mandatory sentence of 15 year to life in prison. See R.C. § 2929.02(B)(1) ("Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be

imprisoned for an indefinite term of fifteen years to life."). Nothing this Court has said in the three cases cited by the lower appellate court requires a contrary conclusion or suggests otherwise as to the jury-instruction issue in Owens' case.[7]

Indeed, this Court in Nolan explicitly acknowledged the doctrine of imputed/transferred intent as applicable to Felony Murder, citing with approval the statement of that principle by New York's highest court:

> The basic tenet of felony murder liability is that the mens rea of the underlying felony is imputed to the participant responsible for the killing. By operation of that legal fiction, the transferred intent allows the law to characterize a homicide, though unintended and not in the common design of the felons, as an intentional killing.

Nolan, 141 Ohio St. 3d at 456, 2014-Ohio-4800 at ¶ 9 (citing and quoting People v. Hernandez, 82 N.Y.2d 309, 317, 624 N.E.2d 661 (1993)). Case law throughout the country contains similar expressions of that well-recognized doctrine of imputed/transferred intent which inheres in the offense of felony murder. See, e.g., Farmer v. State, 201 Tenn. 107, 115, 296 S.W.2d 879, 883 (Tenn. 1956) ("the premeditated intent to commit a felony or other criminal acts is, by implication of law, transferred from that offense to the homicide actually committed, so as to make the latter offense a killing with malice aforethought constituting murder in the first degree."); Commonwealth v. Gunter, 427 Mass. 259, 271, 692 N.E.2d 515, 525 (1998) ("The effect of the felony-murder rule is to substitute the intent to commit the underlying felony for the malice aforethought required for murder. Thus the rule is one of 'constructive malice.'"); State v. O'Blasney, 297 N.W.2d 797, 798 (S.D. 1980) ("'The purpose of the felony-murder rule is to relieve the state of the burden of proving premeditation or malice. . . . By proof of the perpetration of a separate felony, general malicious intent is transferred from that crime to the homicide, thus

[7] Those three cases are: State v. Nolan, 141 Ohio St. 3d 454, 2014-Ohio-4800 (2014); State v. Fry, 125 Ohio St. 3d 163, 2010-Ohio-1017 (2010); State v. Miller, 96 Ohio St. 3d 384, 2002-Ohio-4931 (2002).

elevating the homicide to the crime of murder.'") (quoting Richard Bonnifield, Felony-Murder Rule: An Assault Resulting in Homicide May be Used to Invoke the Felony-Murder Rule, 13 Gonz. L. Rev. 268, 271 (1977)). See also Nelson E. Roth and Scott E. Sundby, The Felony-Murder Rule: A Doctrine at Constitutional Crossroads, 70 Cornell L. Rev. 446, 453 (1985) ("The felony-murder rule may be conceptualized as a theory of 'transferred or constructive intent.' This theory posits that the intent to commit the felony is 'transferred' to the act of killing in order to find culpability for the homicide. The rule thus serves 'the purpose of . . . reliev[ing] the state of the burden of proving premeditation or malice.'").

Under the doctrine of imputed/transferred intent, the mens rea for Felony Murder in Ohio is "knowingly" causing death, when felonious assault is the underlying felony, because that is the applicable mens rea for felonious assault and that mens rea is imputed, via this historic legal fiction, to any alleged proximately caused murder. In State v. Miller, another case relied upon by the lower court, this Court itself acknowledged that "knowingly" is the applicable mens rea for Felony Murder where felonious assault is the sole predicate, stating: "The defendant contends that since felony murder has a lesser mens rea standard (knowingly) than murder (purposely), and since the two crimes carry the same punishment, prosecutors will now seek murder convictions under the felony murder statute based on felonious assault. However, prosecutors can still charge in the alternative and generally seek an indictment most aligned with the facts of the case." Miller, 96 Ohio St. 3d at 390, 2002-Ohio-4931 at ¶ 34. The Court there also noted, when addressing that the lower appellate court in that case had "critically misconstrued" the "standard of mens rea necessary to commit felony murder," that the mens rea for the offense comes from the underlying felony, felonious assault, which the Court said "is defined as ***knowingly*** causing, or attempting to cause, physical harm to another by means of a deadly weapon. A person acts ***knowingly, regardless of purpose***, when he is aware that his conduct will probably cause a certain result or will probably be

of a certain nature." Miller, 96 Ohio St. 3d at 390, 2002-Ohio-4931 at ¶ 31. The italics, noted in bold in the preceding sentence, are the Court's italics, from its opinion. Significantly, the Court did ***not*** say that Felony Murder lacks a mens rea and did ***not*** say that the offense is a strict liability offense. To the contrary, in discussing the mens rea for Felony Murder, the Court unambiguously said it was "knowingly" and it placed that word in italics for emphasis.

The third and final of this Court's cases that was relied upon below — State v. Fry — is to the same effect, also recognizing that the mens rea for Felony Murder is that of the underlying felony, which, where that felony is felonious assault, is knowingly causing death: "[A] person commits felony murder pursuant to R.C. 2903.02(B) by proximately causing another's death ***while possessing the mens rea element set forth in the underlying felony offense***. In other words, the predicate offense contains the mens rea element for felony murder." State v. Fry, 125 Ohio St. 3d at 169, 2010-Ohio-1017 at ¶ 43 (emphasis supplied) (citing with approval State v. Sandoval, 2008 Ohio 4402, ¶ 21 (9th Dist. App. 2008)). See also Sandoval, 2008 Ohio 4402 at ¶¶ 21-23 ("***[T]he predicate offense contains the mens rea element of the felony murder***. . . . [A] reasonable person viewing the indictment [for Felony Murder] would understand all of the essential elements of Count One and that a conviction for felony murder could only stand upon a finding that Sandoval ***knowingly caused*** Conti's death through his commission of the predicate offense of felonious assault. . . . While it would not have been error for the State to also include the mens rea of 'knowingly' in Count One, the omission of the same did not make the indictment defective.") (emphasis supplied); State v. Rickard, 2019-Ohio-298 at ¶ 48; Alston, 2006-Ohio-4152 at ¶ 48 ("***[F]elony murder requires a 'knowing' mens rea*** **and** an underlying felony that results in the death of the victim.") (emphasis supplied); State v. Dubose, 2008-Ohio-4983, ¶ 17 (1st Dist. App. 2008) ("[F]elony murder is one of the few crimes in Ohio that has no mens rea element directly

attached to it. ***The mens rea element is found in the predicate offense*** and does not arise from the catchall culpable mental state of recklessly found in R.C. 2901.21(B).") (emphasis supplied).

The recognition of a mens rea of "knowingly" causing death for purposes of Felony Murder is also "consistent with a basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called 'a vicious will.' 4 W. Blackstone, Commentaries on the Laws of England 21 (1769)." Rehaif v. United States, 139 S. Ct. 2191, 2196 (2019). The Court in Rehaif further noted:

> As this Court has explained, the understanding that an injury is criminal only if inflicted knowingly "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Morissette [v. United States, 342 U.S. 246, 250 (1952)]. Scienter requirements advance this basic principle of criminal law by helping to "separate those who understand the wrongful nature of their act from those who do not." X-Citement Video, 513 U. S., at 72-73, n. 3, 115 S. Ct. 464, 130 L. Ed. 372.
>
> The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion. We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question. And we have interpreted statutes to include a scienter requirement even where "the most grammatical reading of the statute" does not support one. [United States v.] X-Citement Video, [Inc., 513 U. S. 64, 70 (1994)].

Rehaif v. United States, 139 S. Ct. at 2196 (some citations omitted). Likewise, as noted in Morissette, even where a criminal statute did not expressly include an intent requirement, "[c]ourts with little hesitation or division, found an implication of the requirement as to the offenses that were taken over from the common law." Morissette, 342 U.S. at 252. "It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must not only be a wrongful act, but a criminal intention." Id. at 274 (quoting People v. Flack, 125 N. Y. 324, 334, 26 N. E. 267, 270 (1891)).

The lower appellate court is thus mistaken in concluding that this Court's descriptions of Felony Murder — as not specifically including a "culpable mental state" for the murder and/or as

being in the nature of a "strict liability" offense — have "overruled by implication" the many Ohio appellate decisions, not to mention Trimble, which recognize that reckless homicide is a lesser-included offense of Felony Murder. By operation of the doctrine of imputation, "knowingly" causing death remains the applicable mens rea of Felony Murder for all purposes relevant to analyzing the Deem issue. Any contrary decision would upend the integrity of Ohio's established hierarchy of culpable mental states for homicide offenses and would further weaken the already-dubious constitutional footing on which the offense of felony murder rests in Ohio.[8]

Reckless homicide is now and remains a lesser-included offense of Felony Murder in Ohio, in satisfaction of all three elements of the Deem test. The lower appellate court erred in holding otherwise.

C. The Recognition of Reckless Homicide as a Lesser-Included Offense of Felony Murder is Essential to an Ohio Defendant's Rights to Due Process and to Have the Jury's Verdict Accurately Reflect that Defendant's Culpability and Moral Responsibility for the Homicide at Issue, as Required by the Fifth, Eighth, and Fourteenth Amendments and Ohio's Counterparts.

The importance for this Court to continue to recognize reckless homicide as a lesser-included offense of Felony Murder is underscored by the absence, in Ohio, of the merger doctrine and/or other rules which ameliorate the harshness of felony murder rules and statutes. At the very least, continued recognition is essential to a criminally accused's rights to due process and to have

[8] Owens raised one such issue below as her Fifth Assignment of Error, wherein she urged that her conviction for felony murder under R.C. § 2903.02(B), with felonious assault of the murder victim as the sole predicate, is unconstitutional because it violates the independent-felony/merger doctrine. "The merger doctrine, first conceived in the nineteenth century, bars the application of the felony-murder doctrine whenever the underlying felony is an integral element of the homicide. In other words, to support the charge of felony murder, the underlying felony must be independent of the homicide." State v. Jones, 451 Md. 680, 694, 155 A.3d 492, 500 (2017) (citing cases). Owens also sought review of this same issue in her MISJ to this Court, but the Court declined review of the issue, with three Justices dissenting. See 10/01/2019 Case Announcements, 2019-Ohio-4003.

the jury's verdict accurately reflect that defendant's culpability and moral responsibility for the homicide at issue, as required by the Fifth, Sixth, Eighth, and Fourteenth Amendments and Ohio's counterparts. See U.S. Const., Amends. V, VI, VIII, XIV; Ohio Const., Article I, Sections 5, 9, 10, and 16.

It is a fundamental requirement of due process that the State must prove beyond a reasonable doubt every fact necessary to constitute the crime with which an accused is charged. In re Winship, 397 U.S. 358, 364 (1970); Sandstrom v. Montana, 442 U.S. 510 (1979). In Sandstrom the trial court had instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Id. at 512. The Sandstrom Court found the instruction flawed because it shifted the burden of proving intent. Id. at 524. Because felony murder is justified under a theory of "transferred intent," some commentators and judges have suggested that the transferred intent theory of the felony murder rule is subject to serious challenge under Sandstrom. See, e.g., State v. Harrison, 914 N.W.2d 178, 217 (Iowa 2018) (Appel, J., dissenting); State v. Ortega, 112 N.M. 554, 560-62, 817 P.2d 1196, 1202-04 (1991); Roth and Sundby, supra, 70 Cornell L. Rev. at 469.

It is likewise a requirement of due process, and a bedrock principle of criminal law, that imposition of serious criminal sanctions ought to reflect culpability and moral responsibility. Morissette, 342 U.S. at 252, 274; Rehaif v. United States, 139 S. Ct. at 2196. The law, in that sense, recognizes a distinction, for example, between a reckless actor and one who acts with intent to kill:

> The difference lies in the nature of the choice each has made. The reckless actor has not chosen to bring about the killing in the way the intentional actor has. The person who chooses to act recklessly and is indifferent to the possibility of fatal consequences often deserves serious punishment. But because that person has not chosen to kill, his or her moral and criminal culpability is of a different degree than that of one who killed or intended to kill.

Tison v. Arizona, 481 U.S. 137, 170-71 (1987) (Brennan, J., dissenting, with Marshall, Blackmun, Stevens, JJ.).

A gravely serious constitutional problem with felony murder is that, unless its scope is strictly confined by relevant legal doctrines, it can violate these constitutional protections, including by permitting an offender to be subject to the law's most severe punishments for murder *without* any proof that the offender had a purpose or intention to kill. Due to the fictions employed with felony murder, killings which are accidental, or negligent, or which result from recklessness, can be punished as severely as intentional, purposeful, or knowing murders, subjecting the offender to imprisonment for life. This makes felony murder one of the most controversial doctrines in the field of criminal law. See, e.g., State v. Heemstra, 721 N.W.2d 549, 554 (Iowa 2006).

To avoid such harsh, and constitutionally dubious results, many states which still recognize felony murder have sharply cabined the offense in a variety of ways. See Tomkovicz, The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law, 51 Wash. & Lee L. Rev. 1429, 1467 (1994). One of those ways is the merger doctrine. That doctrine "precludes certain particularly dangerous felonies — the archetype is assault with a deadly weapon — from qualifying [as the underlying felony]." Id. It requires that "the underlying felony be independent of the killing." State v. Dixon, 2002 Ohio App. LEXIS 472, *12 (2nd Dist. App. 2002).

Chief Judge Cardozo, writing in 1927 for the unanimous Court of Appeals of New York, provided the most famous explanation of the merger doctrine and its purpose:

> Homicide is murder in the first degree when perpetrated with a deliberate and premeditated design to kill, or, without such a design, while engaged in the commission of a felony. To make the quality of intent indifferent, it is not enough to show that the homicide was felonious, or that there was a felonious assault which culminated in homicide. Such a holding would mean that every homicide, not

> justifiable or excusable, would occur in the commission of a felony, with the result that intent to kill and deliberation and premeditation would never be essential. **The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as, e.g., robbery or larceny or burglary or rape.**

People v. Moran, 246 N.Y. 100, 102, 158 N.E. 35, 36 (1927) (emphasis supplied).

"In those jurisdictions which have applied the independent-felony or merger rule, a felonious assault that is an integral element of the homicide cannot be the predicate felony to support the felony murder." State v. Mays, 2012-Ohio-838, ¶ 8 (2nd Dist. App. 2002). "'Most jurisdictions apparently follow some form of the 'merger' doctrine.'" Id. ¶ 10 (quoting Tomkovicz, 51 Wash. & Lee L. Rev. at 1467). See also People v. Morgan, 197 Ill. 2d 404, 446-48, 758 N.E.2d 813, 837-39 (Ill. 2001); State v. Jones, 451 Md. at 701-02, 155 A.3d at 504; People v. Ireland, 70 Cal. 2d 522, 538-40, 450 P.2d 580, 589-90 (Cal. 1969) (restricting the scope of the felony-murder rule by holding it inapplicable to felonies that are an integral part of the homicide); People v. Smith, 35 Cal. 3d 798, 806-08, 678 P.2d 886, 890-92 (Cal. 1984); Commonwealth v. Fredette, 480 Mass. 75, 76, 101 N.E.3d 277, 280-81 (Mass. 2018) ("the merger doctrine limits the application of the felony-murder rule by requiring the Commonwealth to prove that the defendant committed or attempted . . . a felony that is independent of the conduct necessary to cause the victim's death"). Under the merger rule, the predicate felony underlying a charge of felony murder must be a collateral felony which is independent of the lethal act; otherwise the underlying felony offense, such as felonious assault of the victim, will be found to have merged into the homicide.

The Illinois Supreme Court applied the merger doctrine in People v. Pelt, 207 Ill. 2d 434, 800 N.E.2d 1193 (2003), a case very similar to Owens' case, where an underlying felony of aggravated battery of a child was the sole predicate for Rayshun Pelt, Sr.'s conviction of felony murder of a child, his infant son, Rayshun Pelt, Jr. As in Owens' case, Pelt too was found not guilty of an intentional murder. Id. at 436, 800 N.E.2d at 1194. The analysis of Illinois's highest court in

reversing Pelt's conviction for felony murder, while sustaining his conviction for the underlying felony of aggravated battery, is greatly illustrative of how courts impose and enforce legal doctrines, such as merger, to ensure felony murder is not abused in emotional cases:

> Our task here is to discern from defendant's conduct whether defendant's aggravated battery was an act that was inherent in, and arose out of, the killing of the infant. Like [People v.] Morgan, [758 N.E.2d 813, 836-48 (Ill. 2001)], the cause and effect relationship between the aggravated battery and the killing is muddled. Defendant's statement indicated that he was upset when the infant would not stop crying, and that he tried to throw him to the bed. He stated that he apparently threw him too far "because he hit the dresser." The act of throwing the infant forms the basis of defendant's aggravated battery conviction, but it is also the same act underlying the killing. Therefore, as in Morgan, it is difficult to conclude that the predicate felony underlying the charge of felony murder involved conduct with a felonious purpose other than the conduct which killed the infant.
>
> We also note that the present matter illustrates our apprehension that to permit such a felony-murder charge of this nature would "'eliminate the need for the State to prove an intentional or knowing killing in most murder cases.'" Morgan, 197 Ill. 2d at 447, quoting Morgan, 307 Ill. App. 3d at 712. The prosecution attempted to establish a knowing killing by defendant. The jury rejected this charge and instead found defendant guilty of aggravated battery of the infant. Our holding ensures that defendant will not be punished as a murderer where the State failed in proving to the jury that a knowing murder occurred. Accordingly, we hold that the acts charged here cannot serve as the predicate felony to the charge of felony murder.

People v. Pelt, 207 Ill. 2d at 442, 800 N.E.2d at 1197. See also People v. Smith, 35 Cal. 3d 798, 806-07, 678 P.2d 886, 891 (1984) (also involving the death of a child, allegedly due to the defendant-mother's child abuse, and applying merger rule to vacate conviction for felony murder).

Ohio has, to this point, declined to cabin the constitutional deficiencies presented by the offense of Felony Murder with the adoption of the merger doctrine and/or a like rule requiring that the underlying felony must be independent of the homicide and of the assault merged therein. That fact about *Ohio's* felony murder law only underscores how important it is for this Court to apply Deem and Ohio's rules of lesser-included offenses such that, at a minimum, the Court maintains the integrity of Ohio's established hierarchy of culpable mental states for homicide offenses. That hierarchy recognizes Felony Murder as requiring the culpable mental state of a "knowingly"

caused death, and further recognizes that, if the subject homicide was, instead, recklessly caused, *that* offense — reckless homicide — is a lesser-included offense of Felony Murder, undeserving of Ohio's much harsher punishment for Felony Murder under R.C. 2903.02(B).

Failure to maintain that integrity, as with the lower court's decision, would deny Owens her constitutional rights to due process and to have the jury's verdict accurately reflect her culpability and moral responsibility for the homicide at issue, as required by the Fifth, Sixth, Eighth, and Fourteenth Amendments and Ohio's counterparts.

This case exemplifies that constitutional problem. The jury rejected the State's claims in Counts 1 and 2 that Owens had acted with prior calculation and design and/or purposely to cause the victim's death, finding instead that Owens had recklessly caused the death and was thus guilty only of reckless homicide. Yet, because the Ohio courts have not adopted the merger doctrine, and because the trial court in Owens' case failed to provide the lesser-included offense instruction of reckless homicide in Count 3, Owens was still found guilty of murder, and sentenced to 15 years to life in prison on that offense, without proof of any intent or purpose to kill, and with no opportunity for the jury's verdict to accurately reflect its assessment of Owens' culpability and moral responsibility for the death of T.M, i.e., a reckless homicide, nothing more.

D. The Reckless Homicide Instruction was Required on the Facts of Owens' Case.

An instruction on a lesser-included offense is required if the evidence presented at trial would reasonably support both an acquittal of the crime charged and a conviction upon the lesser offenses. State v. Trimble, 122 Ohio St. 3d 297, 2009-Ohio-2961 (2009); State v. Carter, 89 Ohio St. 3d 593, 600, 2000-Ohio-172 (2000). The trial court's duty to provide the instruction exists irrespective of whether a party objects to the instruction or it is contrary to a party's trial strategy. State v. Wine, 140 Ohio St. 3d 409, 416-18, 2014-Ohio-3948, ¶¶ 26-33 (2014). The trial court is

to view the evidence in the light most favorable to the defendant when determining if an instruction on lesser offenses is warranted. Trimble, 122 Ohio St. 3d at 325, 2009-Ohio-2961 at ¶ 192. In examining errors in a jury instruction, a reviewing court must consider the jury charge as a whole and "must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights." Kokitka v. Ford Motor Co., 73 Ohio St. 3d 89, 93, 1995-Ohio-84 (1995). It is a violation of due process, and of an accused's right to present a defense, to fail to instruct the jury on the accused's theory of the case. See, e.g., California v. Trombetta, 467 U.S. 479, 485 (1984); Barker v. Yukins, 199 F.3d 867, 875-76 (6th Cir. 1999).

The lower appellate court never proceeded to address whether the evidence supported the instruction — or to address the related issues of whether the trial court committed reversible error and/or plain error in failing to provide the instruction and/or whether Owens' trial counsel were ineffective in not ensuring the instruction was provided on all three homicide counts — because of the court's threshold legal determination that reckless homicide is no longer a lesser-included offense of Felony Murder. State v. Owens, 2019-Ohio-2221 at ¶¶ 26, 30. Because that threshold determination is incorrect, the issue of whether the instruction was supported by the trial evidence in Owens' case must be addressed.

The evidence here plainly supported reckless homicide as opposed to the more serious offense of Felony Murder in Count 3. Indeed, reckless homicide is precisely what the jury concluded, after extensive deliberations over multiple days, as the proper homicide offense for Owens in T.M.'s sad and tragic death. The jury found Owens guilty of that offense, and not the State's grossly overcharged offenses of "aggravated murder," on Counts 1 and 2. If the jury had been given the opportunity to do so, and had the required jury instruction been provided for Count 3 too, the jury would have acted consistently and found Owens guilty of reckless homicide on that count as well, not murder. Purposeful, knowing, reckless — *that* is the hierarchy. Owens was found

to have recklessly caused the death of T.M. That homicide, while tragic, is thus not a purposeful killing and is not a knowing killing.

Owens denied committing anything other than a push or "mush" to T.M. that morning. T.M. had no signs of any cuts, bruises, abrasions, or other outwardly visible injuries to her head or face (or of any other recent injuries), such as would be expected, Dr. Young testified, if T.M. had been subjected that morning to violently assaultive conduct of enough force to cause internal brain bleeds or the sheering of vessels in her brain. Reasonable medical experts sharply disagreed at trial, and testified for hours, on whether T.M.'s death was caused by, on the one hand, an assaultive act inflicting blunt force trauma which sheered a vessel in her brain leading to subdural hematoma and death, or, on the other hand, multiple seizures brought on by a relatively rare but undiscovered clotting condition, totally unrelated to any alleged abuse and fully consistent with her prior seizures.

Neither one of the defendants was wealthy or sophisticated, and they were both struggling in poverty, getting by wherever they could find a place to stay. But their Google searches that morning of March 17 are exculpatory, plainly suggesting how confused they both were by T.M.'s condition and her inexplicable, to them, failure to respond, evidence which corroborated the authenticity of their belief — whether accurate or not — that T.M.'s condition was the result of seizures. It is true, of course, that R.O. testified at trial that his mother did, indeed, assault the little girl that morning, causing the loud noises that woke up himself and R.M., and that he saw Owens do those things. But even if the jury believed that an *assault* occurred as testified, they did not have to also conclude the *death* was knowingly, as opposed to recklessly, caused. What's more the jury could have reasonably rejected all or most of R.O.'s testimony, and would have been well within its rights doing so, including because R.O.'s story at trial was 100% different from what he told Det. Diaz on March 17, his story at trial was not heard by Det. Remington until that very day, and

his alleged professed concern for his "sister's" health on March 17 was questionable — including because he went to McDonald's with R.M. after T.M. was placed in the bed, he made postings to Instagram while he was there, and he then spent the rest of that day playing video games, never once calling 9-1-1. R.O. was a 16-year-old high school student, not a young child. (T. 1367.)

The State has suggested that any failure to provide the lesser-included offense instruction was harmless error because, the State argues, the evidence at trial allegedly supports the greater offense of Felony Murder under a "manifest weight" standard. But that too is wrong. Owens maintains the evidence does not support her conviction for Felony Murder on manifest weight review. But, even if it did, harmless error analysis is not appropriate when the subject error is the failure to give a lesser-included offense instruction. Beck v. Alabama, 447 U.S. 625, 627 (1980). That analysis would subsume the rule and denies the criminal defendant a *jury* determination of guilt/innocence. See, e.g., Stevenson v. United States, 162 U.S. 313, 320 (1896) ("Is it not clearly a question of fact for a jury to determine just what the mental condition of plaintiff in error was in regard to malice?").

Indeed, the entitlement to a lesser-included offense instruction exists *not* because the *only* possible outcome on the subject record is an acquittal on the greater offense, but because the evidence could *reasonably support* such an acquittal *and* a conviction on the lesser offense. Trimble; Carter. Thus, the fact that the evidence could also support a conviction on the greater offense is not dispositive. Owens was entitled to an instruction that would allow *the jury* to make the appropriate determination of which crime Owens committed, if any. In fact, Ohio courts have reversed guilty verdicts in noncapital cases if the trial court failed to give a lesser-included offense instruction that was supported by the evidence, finding reversible error even though the defendant was convicted of the more serious offense, with no discussion of whether the weight or sufficiency of the evidence supported conviction of the more serious offense. See, e.g., State v. Solomon, 66

Ohio St. 2d 214, 222 (1981); State v. Cochran, 2003-Ohio-3980, P15 (2nd Dist. App. 2003); State v. Elwell, 2007-Ohio-3122, ¶¶ 55-57 (9th Dist. App. 2007) (Dickinson, J., concurring in part and dissenting in part).

Owens was entitled to a jury determination of whether the victim's death was caused recklessly or knowingly by the alleged assaultive act underlying the alleged Felony Murder. The trial court's failure to provide that instruction, and Owens' counsel's deficient performance in failing to ensure that instruction was provided, denied Owens her rights to a jury determination on that critical issue and her rights to due process, to a fair trial, and to the effective assistance of counsel.

This case is a tragedy. But it is at worst a case of reckless homicide, not aggravated murder and not Felony Murder. The jury concluded as much by its verdict on Counts 1 and 2, and it would have found consistently on Count 3 as well — and reached a verdict of reckless homicide and not Felony Murder — had it been properly instructed on that lesser-included offense for Count 3. The court's failure to provide that instruction on Count 3 was obvious and prejudicial error, and it is plain error too if that standard must be met. See Ohio Crim. R. 52(B); State v. Thomas, 152 Ohio St. 3d 15, 21-22, 2017-Ohio-8011, ¶¶ 32-34 (2017).

CONCLUSION

Pursuant to the preceding Proposition of Law, Ursula Owens respectfully requests that this Honorable Court reverse the decision of the Eighth Appellate District, and order that Owens' conviction and sentence for Felony Murder be vacated and/or that that matter be remanded for a new trial on Counts 3 and 4. Alternatively, the decision of the Eighth Appellate District should be reversed and the case remanded to that court to address Owens' assigned errors in that court with the understanding that reckless homicide is a lesser-included offense of Felony Murder.

Respectfully submitted,

/s/ Timothy F. Sweeney

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLANT URSULA OWENS was served by regular U.S. Mail, first-class postage pre-paid on Michael O'Malley, Cuyahoga County Prosecutor, and Jennifer M. Meyer and Anna Faraglia, Assistant Prosecuting Attorneys, Cuyahoga County Prosecutor's Office, 1200 Ontario Street, 8th Floor, Cleveland, Ohio 44113, this 12th day of December 2019, and also by email to jmeyer@prosecutor.cuyahogacounty.us this same date.

/s/ Timothy F. Sweeney

Timothy F. Sweeney
Attorney for Ursula Owens

APPENDIX

CONTENTS

JUN 06 2019

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 107494

v. :

URSULA OWENS, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 6, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-615579-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anna M. Faraglia and Owen M. Patton, Assistant Prosecuting Attorneys, *for appellee.*

Timothy F. Sweeney, *for appellant.*

SEAN C. GALLAGHER, J.:

{¶ 1} Ursula Owens appeals her convictions for felony murder, with the predicate offense being felonious assault, and three counts of endangering children. Owens is serving an aggregate term of imprisonment of 25 years to life. The convictions are affirmed.

{¶ 2} Owens was engaged to, and cohabitating with, codefendant Tequila Crump.[1] Crump was the birth mother of the victim, who was approximately five years old at the time of her death. Previously, Crump was romantically involved with a woman in North Carolina. The couple had lived together for a short period of time. During that time, the other woman took responsibility for the victim and was ultimately granted legal custody of the child, but she was committed to providing Crump with the opportunity to stay in the victim's life. Sometime after that, Crump relocated to Cleveland and became engaged to Owens. The victim accompanied Crump, although the victim's legal guardian believed that Crump was not intending to permanently move to the Cleveland area. Crump and the victim moved in with Owens. There are two separate incidents giving rise to the convictions.

{¶ 3} In October 2016, the victim was admitted to the hospital for third-degree, deep tissue burns on her hand and wrist. Crump and Owens claim the child had been scalded with a hot water-soaked towel while washing her hands through a malfunctioning hot-water heater. It was claimed that the hot-water heater was not generally working, so the victim was unaware of the potential danger. Crump and Owens maintain that the victim somehow wrapped her wrist in the hot water-soaked towel causing the third-degree burns. Owens and Crump waited a full day before taking the child to the hospital. Although indicating that Owens and Crump's story was plausible, an investigation with children services was opened because the child

[1] Crump was convicted for crimes relating to the events herein and separately appeals in 8th Dist. Cuyahoga No. 107460.

needed multiple surgeries and skin grafts because of the severity of the burns. These facts led to the conviction against Owens for two counts of child endangerment, based on the injury itself and the failure to seek timely medical attention after the injury occurred.

{¶ 4} On March 17, 2017, the child was again admitted to the hospital, but she died as a result of a traumatic brain injury the morning following her admission. Owens's biological son ("son") was staying with Owens the night of March 16 through the following day. The son's friend was staying as well. On the morning of March 17, the boys woke to screaming and yelling coming from the victim's bedroom, which was directly across from the boys' room. The son testified to being able to see into the victim's room, although his disclosure did not occur immediately. At trial, the son testified to seeing Crump "pop" the victim four or five times on her arm. The son visibly demonstrated in court what the word "pop" meant, but the description is not evident from the written record. According to the boys, Owens told Crump "that's not how you do it." According to the son, Owens then punched the victim, picked her up, and threw her into the wall and then a dresser. Both boys testified to hearing two loud "thumps." The son explained that the two thumps were the victim hitting the wall and the dresser. By that time, the son's friend went to the door of their room and saw the victim on the ground with Owens standing over the victim, yelling. Crump was standing behind Owens, with Crump telling Owens something to the effect of "that's enough." The victim was not moving or making any noises. The son's friend asked the son if the victim had been "body slammed"

as the source of the two loud thumps. Crump took the victim to her bedroom, placed the victim in Crump's bed, and tried to wake the victim. The boys left the house at that point to get food at a nearby McDonald's. Owens admitted to police officers that she pushed the victim, who then fell, but claimed the punishments were not that severe.

{¶ 5} Crump and Owens waited over 12 hours to take the victim to the hospital, after conducting an online search about seizures in young children. The couple claimed that the victim was having seizures throughout the morning and the afternoon and they read online that the best course of treatment was to allow the victim to sleep. After the victim's pulse became noticeably weak, Crump finally called for emergency services late in the evening. When the victim was first admitted to the hospital, Crump told the physician that the victim had one short seizure in the morning and no medical history of seizures.

{¶ 6} The treating physician testified that the victim presented with a traumatic brain injury that in her experience could not be caused by a seizure. By the time the victim was admitted to the hospital, there were no viable treatment options — the injury and swelling in the brain tissue was too severe. The coroner determined that the death was caused by acute trauma, in part indicated by the existence of a severed blood vessel in the brain. Owens presented an expert in her defense, who claimed that the severed blood vessel was caused by the autopsy itself. The defense expert, Thomas William Young, M.D., claimed that the traumatic brain injury was caused by seizures the victim was experiencing the day she was admitted

to the hospital. According to Dr. Young, the victim's seizures caused a blood clot to form that cut the flow of blood to the victim's brain and that caused the child's death. Dr. Young was unable to explain the cause of the seizures. Upon taking the victim to the hospital, Crump told the treating physicians that the child had no history of seizures and that the child experienced one short seizure in the morning. After the victim died from her injuries, someone told an unknown member of the medical staff that the victim had been experiencing seizures repeatedly throughout the day.

{¶ 7} With respect to the March incident, Owens was convicted of felony murder under R.C. 2903.02(B), with the predicate offense being felonious assault, and child endangering for failing to seek immediate medical attention.

{¶ 8} In the first assignment of error, Owens claims that error occurred in failing to sever the counts pertaining to the separate abuse. Owens claims that permitting the jury to consider the October and March allegations in one setting prejudiced her right to a fair trial.

{¶ 9} Crim.R. 8(A) provides that "two or more offenses may be charged in the same indictment" if the offenses "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Joinder is generally permitted to "conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to the witnesses." *State v. Schaim*, 65 Ohio St.3d 51, 58, 1992-Ohio-31, 600 N.E.2d 661, citing *State v. Torres*, 66 Ohio St.2d 340, 343,

421 N.E.2d 1288 (1981). If offenses are properly joined under Crim.R. 8(A), the charges may be severed under Crim.R. 14 if the joinder will prejudice the moving party's rights. *Id.* In order to demonstrate prejudice, a defendant must affirmatively show that the evidence of the other crimes would not be admissible in the other trial if the counts were severed, and if the evidence would not be separately admitted, that the evidence of each crime is not simple and direct. *Schaim* at ¶ 42.

{¶ 10} Owens focuses on whether the evidence of the October burning incident would have been admissible under Evid.R. 404(B) in a separate trial on the March assault incident that led to the victim's death. We need not address this argument because even if we accepted her claim, solely for the sake of this discussion, the evidence for each incident was separate and direct. According to Owens, the state's purpose behind joining the two incidents in one indictment was to present the jury with highly prejudicial and inflammatory evidence to invite the jury to speculate that the March 2017 incident was assault and abuse.

{¶ 11} In *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 300, the Ohio Supreme Court addressed a similar argument, albeit one made in the context of an ineffective assistance of counsel claim for failing to seek severance of joined offenses. In *McKelton*, the defendant was charged with felonious assault and domestic violence for a May 2008 incident that resulted in the victim's broken ankle. *Id.* Two other counts charged the defendant with felonious assault and domestic violence that resulted in the victim's death and occurred in July 2008. *Id.* Both incidents were separate, but were related in that they

demonstrated a pattern of conduct of the same type of abuse the defendant committed against the victim. *Id.* Further, each incident was demonstrated with separate evidence that was not "rendered more complex or confusing" by joining the multiple counts together for one trial. *Id.*, citing *State v. Miller*, 105 Ohio App.3d 679, 692, 664 N.E.2d 1309 (4th Dist.1995).

{¶ 12} *McKelton* is instructive. In this case, the evidence demonstrating each instance of alleged abuse is demonstrated by separate and distinct evidence, and the evidence does not render the evidence of either offense more complex or confusing. Further, the jury acquitted Owens of the felonious assault charges associated with the October hot-water incident. Owens was only convicted of child endangering. This demonstrates the jury was capable of separately deliberating on the charged offenses without imputing criminal liability based on Owens being found guilty of murder for her later conduct. There is no error in the court's refusal to sever the trial, and the first assignment of error is overruled.

{¶ 13} In the second assignment of error, Owens claims the child endangering convictions for the hot-water incident are based on insufficient evidence "and/or" against the weight of the evidence based on the same arguments presented in the first assigned error. According to Owens, the "burn doctor" conceded that Owens and Crump's story of how the victim was injured was "plausible" and children services was not able to substantiate the abuse claim.

{¶ 14} Although Owens correctly identifies evidence that arguably weighs in her favor, she does so at the expense of the remainder of the evidence that proved

the child endangerment charges beyond a reasonable doubt. A claim that a jury verdict is against the weight of the evidence involves a separate and distinct test that is much broader than the test for sufficiency. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 193. In light of the fact that Owens has not presented separate arguments in support of the claim that the conviction is based on insufficient evidence without consideration of the credibility or the weight of the state's evidence, we will solely address the arguments under the weight-of-the-evidence standard as presented. App.R. 16(A)(7); *State v. Cassano*, 8th Dist. Cuyahoga No. 97228, 2012-Ohio-4047, ¶ 2.

{¶ 15} When reviewing a claim challenging the manifest weight of the evidence, the court, reviewing the entire record, must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. Generally, determinations of credibility and weight of the testimony are reserved for the trier of fact. *State v. Lipkins*, 2017-Ohio-4085, 92 N.E.3d 82, ¶ 36 (10th Dist.), citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶ 16} Under R.C. 2919.22(A), "no person, who is the parent * * * or person in loco parentis of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or

support." Under division (B)(1) of that statute, "no person shall * * * abuse the child" and if it is determined that the abuse results in serious physical harm, as the jury found in this case, the (B)(1) offense is a felony of the third degree. Owens does not contest her status as a person in loco parentis of the child victim. Further, there is ample evidence that the delay in providing the victim with immediate medical attention violated the parents' duty of care or protection. The evidence also demonstrated that the burns were deep tissue burns that would not have resulted from momentary contact with scalding water, but instead were intentionally inflicted upon the child. That conviction rests on circumstantial evidence, evidence of the same evidentiary quality as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). That there is some evidence upon which an acquittal could have rested is considered, but is not dispositive. Tellingly, Owens does not cite the relevant statutory sections or the standards of review underlying her arguments. App.R. 16(A)(7). The second assignment of error is overruled.

{¶ 17} In the third assignment of error, Owens claims that the evidence of the victim's older or remote injuries as noted by the coroner and the treating physician through the signs of healing, was inadmissible under Evid.R. 404(B). Those remote injuries occurred before or are unrelated to the October 2016 events. Neither Owens nor Crump were charged for crimes related to the remote injuries found by the treating physician and coroner. There is no evidence, or even an argument, that Owens caused the remote injuries.

{¶ 18} Evid.R. 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The starting premise is that the state is introducing evidence of an act committed by the defendant to prove the defendant's propensity to commit the crime at issue. *State v. Stull*, 9th Dist. Summit No. 26146, 2012-Ohio-3444, ¶ 8 (evidence of a codefendant's other acts does not implicate Evid.R. 404(B) in the defendant's trial). In this case, there are no allegations or arguments that Owens caused the pre-October 2016 injuries discovered by the treating physician and the coroner. As Owens repeatedly emphasizes, there is no evidence even connecting those injuries to Owens. Although the state used those remote injuries to demonstrate that the child was generally subjected to abuse throughout her stay in Cleveland, the state never claimed those remote injuries were specifically caused by Owens. Evid.R. 404(B) is not implicated because the evidence was not introduced to prove Owens's character. *State v. Bulger*, 8th Dist. Cuyahoga No. 106516, 2018-Ohio-5346, ¶ 29, citing *State v. Wilson*, 8th Dist. Cuyahoga No. 104333, 2017-Ohio-2980, ¶ 44. Owens has not presented any other argument to support the claim that the evidence was inadmissible. App.R. 16(A)(7). The third assignment of error is overruled.

{¶ 19} In the fourth assignment of error, Owens claims the trial court erred by not instructing the jury on reckless homicide as a lesser included offense to the felony murder count, charged under R.C. 2903.02(B). That argument is overruled.

{¶ 20} Owens is correct that reckless homicide was generally considered a lesser included offense of felony murder under R.C. 2903.02(B). *See, e.g., State v. Berry*, 8th Dist. Cuyahoga No. 83756, 2004-Ohio-5485, ¶ 48. In reaching this conclusion, it had been concluded that one cannot cause the death of another under R.C. 2903.02(B) without doing so recklessly. *See State v. Alston*, 9th Dist. Lorain No. 05CA008769, 2006-Ohio-4152, ¶ 48. The notion stems from the belief that R.C. 2903.02(B) was "silent as to an offender's mental state in the commission of 'causing of death of another'" and therefore the culpable mental state was "recklessness." *State v. Jones*, 8th Dist. Cuyahoga No. 80737, 2002-Ohio-6045, ¶ 77. According to that rationale, however, felony murder under R.C. 2903.02(B) would always be reckless homicide since they would share the same level of the offender's intent to cause the death of another under the interpretation in *Jones*. That interpretation of the "lesser included offense" analysis would have reckless homicide always swallow the offense of felony murder. Courts cannot interpret statutes in such a way as to render other provisions meaningless or inoperative. *State v. Polus*, 145 Ohio St.3d 266, 2016-Ohio-655, 48 N.E.3d 553, ¶ 12. This analysis also has been overruled by implication.

{¶ 21} Felony murder under R.C. 2903.02(B) is considered a strict liability offense because it does not include a culpable mental state for causing another's death. *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016, ¶ 9; *State v. Day*, 8th Dist. Cuyahoga No. 83138, 2004-Ohio-1449, ¶ 50, *compare Alston* at ¶ 48 (felony murder under R.C. 2903.02(B) requires a "knowing" mens rea);

Jones (felony murder under R.C. 2903.02(B) requires a "reckless" mens rea). Felony murder is dependent solely on the death of the victim that is proximately caused by the commission or attempted commission of the predicate offense. *Nolan*. Under R.C. 2903.02(B), the General Assembly criminalized a result — that no person shall cause the death of another as a proximate result of committing a first- or second-degree felony offense of violence. There is no mens rea component. *State v. Hill*, 2018-Ohio-1401, 110 N.E.3d 823, ¶ 10 (8th Dist.) (discussing involuntary manslaughter, which is the equivalent to felony murder except for the degree of the predicate offense), citing *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 43 (felony murder under R.C. 2903.02(B) contains no mens rea component). A defendant may be found guilty of felony murder under R.C. 23903.02(B) without having any intent to cause the victim's death. *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, 775 N.E.2d 498, ¶ 31-33.

{¶ 22} An offense is considered to be a lesser included offense of another if (1) the "lesser" offense carries a lesser penalty than the greater one; (2) as statutorily defined, *the greater offense cannot ever be committed without the lesser offense also being committed*; and (3) some element of the greater offense is not required to prove the commission of the lesser offense. (Emphasis added.) *State v. Deem*, 40 Ohio St.3d 205, 209, 533 N.E.2d 294 (1988). The test is stated in the conjunctive.

{¶ 23} Applying that test to felony murder under R.C. 2903.02(B) and reckless homicide under R.C. 2903.041(A), the "greater offense" of felony murder *can* be committed without the lesser offense having also been committed as both are

statutorily defined. In *Nolan* at ¶ 9, the Ohio Supreme Court held that "the felony-murder statute [R.C. 2903.02(B)] imposes what is in essence strict liability. Though intent to commit the predicate felony is required, intent to kill [or cause the death of another] is not." *Id.*, citing *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, 775 N.E.2d 498, ¶ 31-33; *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 43; *People v. Hernandez*, 82 N.Y.2d 309, 317, 604 N.Y.S.2d 524, 624 N.E.2d 661 (1993). Under the Ohio Supreme Court's latest pronouncement, if a death is caused as a result of the offender's committing or attempting to commit any offense of violence that is a felony of the first or second degree, that offender has committed felony murder *regardless of any intent to actually cause the death of the victim.* *Id.*; R.C. 2903.02(B).

{¶ 24} In contrast, in order to be convicted of reckless homicide, the death of the victim has to be recklessly caused by the offender. R.C. 2903.041(A). The state must prove that the offender had some level of intent to cause the victim's death in support of that conviction. Reckless homicide requires, at the minimum, "a heedless indifference to the consequences" and a "disregard" of a known risk in causing the death of the victim.

{¶ 25} That level of culpability is not necessary to proving felony murder under R.C. 2903.02(B). *Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, 775 N.E.2d 498, at ¶ 31-33; *Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, at ¶ 43; *Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016, at ¶ 9. The reckless homicide statute actually imposes a greater mental state with respect to causing the

death of the victim than does R.C. 2903.02(B). For the purposes of whether reckless homicide is a lesser included offense of felony murder under R.C. 2903.02(B), an offender can indeed commit felony murder without having committed a reckless homicide because felony murder can be statutorily committed without any intent to cause the death of the victim. As the Ohio Supreme Court explained, for example, "[i]f defendant knowingly caused physical harm to his wife by firing the gun at her through a holster at close range, he is guilty of felonious assault. The fact that she died from her injuries makes him guilty of felony murder, regardless of his purpose." *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, 775 N.E.2d 498, ¶ 33. Thus, even if the offender's action does not rise to the level of recklessly intending to cause the death of another, the offender can be guilty of felony murder under R.C. 2902.03(B), a strict liability offense.

{¶ 26} And, although it is conceivable that a reckless homicide could factually be found within the commission of felony murder, the standard under *Deem* focuses on the statutory definitions, not the factual possibilities. Under *Deem*, as interpreted through the lens of *Nolan*, reckless homicide can no longer be considered a lesser included offense of felony murder under R.C. 2903.02(B). The case law, concluding that reckless homicide is statutorily committed within every commission of a felony murder under R.C. 2903.02(B), has been overruled by implication. *See Nolan*. Our adherence to the case law as cited by Owens would necessarily force us to contradict the holdings in *Miller*, *Fry*, and *Nolan*. We cannot rule as Owens suggests, nor does our decision create a conflict with the outdated

case law. The continued validity of the prior decisions must be considered in light of the holdings in *Miller*, *Fry*, and *Nolan*. Those cases are controlling authority, and unless the Ohio Supreme Court overrules its analysis therein, those cases remain controlling. The fourth assignment of error is overruled.

{¶ 27} In the fifth assignment of error, Owens claims that R.C. 2903.02(B) violates the independent-felony/merger doctrine. This argument is not novel. Generally, it is argued that a conviction for felony murder, with a charge of felonious assault as the predicate offense, violates the federal and state constitutions if Ohio were to adopt the so-called independent-felony/merger doctrine. *State v. Franks*, 8th Dist. Cuyahoga No. 103682, 2016-Ohio-5241, ¶ 15. The doctrine recognizes that an offender should be convicted of felony murder only if the collateral, or predicate, felony offense was independent of the lethal act. Ohio appellate courts, including panels from this district, have rejected this argument. *Id.*, citing *State v. Robinson*, 8th Dist. Cuyahoga No. 99290, 2013-Ohio-4375, ¶ 107, *appeal not allowed*, 138 Ohio St.3d 1449, 2014-Ohio-1182, 5 N.E.3d 667, and *State v. Mays*, 2d Dist. Montgomery No. 24168, 2012-Ohio-838, ¶ 8; *State v. Pickett*, 1st Dist. Hamilton No. C-000424, 2001-Ohio-4022, *appeal not allowed*, 94 Ohio St.3d 1508, 764 N.E.2d 1037 (2002); *State v. Hayden*, 11th Dist. Lake No. 99-L-037, 2000 Ohio App. LEXIS 3198 (July 14, 2000), *appeal not allowed*, 91 Ohio St.3d 1522, 747 N.E.2d 249 (2001). We continue to adhere to the case law rejecting the independent-felony/merger doctrine in Ohio. The fifth assignment of error is overruled.

{¶ 28} In the sixth assignment of error, Owens claims she was denied her Sixth Amendment right to effective assistance of trial counsel because her attorney (1) failed to renew the motion to sever at the close of the state's case; (2) failed to object to the improper admission of the remote injuries the victim suffered under Evid.R. 403(B); and (3) failed to request or object to the trial court's omission of a jury instruction for the reckless homicide as a lesser included offense to the felony murder as charged under R.C. 2903.02(B).

{¶ 29} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial — which is defined as a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 98, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 689. In Ohio, the defendant has the burden of demonstrating both prongs of the test. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 223.

{¶ 30} We need not dwell on Owens's arguments. We have addressed all three issues on the merits and rejected each claim of reversible error. There is no error in the failure to sever the trials; the evidence of the victim's remote injuries was not improperly admitted under Evid.R. 404(B); and reckless homicide is not a lesser included offense of felony murder under R.C. 2903.02(B) according to *Nolan*,

141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016. Thus, Owens's trial counsel's performance was not deficient. The sixth assignment of error is overruled.

{¶ 31} In the seventh assignment of error, Owens claims her convictions "on Counts 1-2, 3, 4, and 5-9, for reckless homicide, murder, felonious assault, and endangering a child, all as to March 17, are based on insufficient evidence and/or are against the manifest weight of the evidence." According to Owens, there is no proof, much less that beyond a reasonable doubt, that Owens committed a felonious assault that proximately caused the victim's death because there were no visible injuries suggestive of an assault or abuse committed on the fateful day. Owens claims the son's testimony about seeing his mother body slam the victim into the wall and dresser was fabricated because he delayed his disclosure.

{¶ 32} Even without the son's eyewitness testimony, it is undisputed that Owens was in the room with Crump when the son's friend heard the crying and two loud thumps. The son's friend testified to hearing Owens tell Crump "that's not how you do it" after Crump "popped" the victim in the arm a few times and before the two loud thumps were audible. He also heard Crump tell Owens, "that's enough" after he heard two loud "thumps" that he believed were caused by the victim being body slammed based on his observations. It is undisputed that the victim was unresponsive immediately after the thumps were heard. The treating physician testified to the severity of the traumatic brain injury that she explained to have been caused by acute trauma and not by a seizure. Coupled with the coroner's conclusion as to the cause of death, there is sufficient evidence of Owens having committed a

felonious assault on the child that resulted in the victim's death. The seventh assignment of error is overruled.

{¶ 33} And finally, in the eighth assignment of error, Owens claims that the child endangering counts, as they pertained to the same date, are allied offenses of similar import. The only multiplicity with respect to the child endangering counts pertains to the events in October, the day on which the victim's hand sustained third-degree, deep tissue burns from the hot-water incident. The offenses relating to the physical abuse of the victim in March, the assault that led to the victim's death, were merged into the felony murder count and did not result in final convictions. The only surviving conviction for child endangering from the March incident was based on the failure to provide the victim with medical care following the physical abuse. As a result, the conviction for violating R.C. 2919.22(A) with respect to the March assault did not merge with Courts 1-8 dealing with the assault, as will be discussed in detail below. With respect to the October abuse, Owens was convicted of child endangering for failing to provide the child immediate medical attention and for physical abuse of the child under R.C. 2919.22(A) and (B). These crimes do not merge.

{¶ 34} Owens cites several cases in which the trial court merged child endangering offenses under R.C. 2919.22(A) with offenses under R.C. 2919.22(B). *See, e.g., State v. Bracy*, 9th Dist. Summit No. 28745, 2018-Ohio-2542, ¶ 2; *State v. Thompson*, 2017-Ohio-9044, 101 N.E.3d 632, ¶ 56 (7th Dist.); *State v. Henderson*,

7th Dist. Mahoning No. 15 MA 0137, 2018-Ohio-2816, ¶ 8. Notably absent from each of the cited cases is any analysis. These cases are unpersuasive.

{¶ 35} Under R.C. 2941.25, multiple sentences may be imposed if the conduct constituting the offenses is of dissimilar import, or if the conduct demonstrates that the crimes were committed separately or with a separate animus. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraph three of the syllabus. Two or more offenses are of dissimilar import if the conduct constituting the offenses involves separate victims or if the resulting harm of the two offenses is separate and identifiable. *Id.* at paragraph two of the syllabus.

{¶ 36} In this case, Owens was convicted of child endangering under R.C. 2919.22(A) and (B) for physically abusing the victim and failing to provide timely medical care for the child after the child sustained severe, deep tissue burns from the hot water. "The Ohio Supreme Court has similarly distinguished between the two types of child endangering by explaining that division (B) deals with affirmative acts of physical abuse whereas division (A) is concerned with circumstances of neglect[,]" an act of omission. *State v. Esper*, 8th Dist. Cuyahoga No. 105069, 2017-Ohio-7069, ¶ 13, citing *State v. Kamel*, 12 Ohio St.3d 306, 309, 466 N.E.2d 860 (1984), and *State v. Sammons*, 58 Ohio St.2d 460, 391 N.E.2d 713 (1979). In *Esper*, it was concluded that "[s]ubsection (A) defines the offense of neglect as the 'violation of a duty of care, protection, or support which results in a substantial risk to his health or safety.'" *Id.* "Subsection (B) of R.C. 2919.22, on the other hand, 'deals with

actual physical abuse of a child, whether through physical cruelty or through improper discipline or restraint.'" *Id.*

{¶ 37} Under *Ruff*, the two violations are based on separate conduct — affirmative abuse and the neglect, an act of omission. *See State v. Porosky*, 8th Dist. Cuyahoga No. 94705, 2011-Ohio-330, ¶ 11 (the affirmative act of abuse is separate from the act of omission in failing to get the child medical care). Each results in a separate identifiable harm or was committed with separate conduct. Either way, Owens's eighth and final assignment of error is overruled.

{¶ 38} The convictions are affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

URSULA OWENS
Defendant

Case No: CR-17-615579-A

Judge: KELLY ANN GALLAGHER

INDICT: 2903.01 AGGRAVATED MURDER
2903.01 AGGRAVATED MURDER
2903.02 MURDER
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT IN COURT. COUNSEL FRANK CAVALLO, JOSHUA BARNHIZER AND JOHN LUSKIN PRESENT.
COURT REPORTER PRESENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF RECKLESS HOMICIDE 2903.041 - UN THE LESSER INCLUDED OFFENSE UNDER COUNT(S) 1 OF THE INDICTMENT.
THE JURY RETURNS A VERDICT OF NOT GUILTY OF AGGRAVATED MURDER 2903.01 C AS CHARGED IN COUNT(S) 2 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF RECKLESS HOMICIDE 2903.041 - UN THE LESSER INCLUDED OFFENSE UNDER COUNT(S) 2 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF MURDER 2903.02 B UN AS CHARGED IN COUNT(S) 3 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(1) F2 AS CHARGED IN COUNT(S) 4 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF ENDANGERING CHILDREN 2919.22 B(1) F2 AS CHARGED IN COUNT(S) 5, 12 OF THE INDICTMENT.
FURTHER FINDING: STATE PROVED THE VIOLATION DID RESULT IN SERIOUS PHYSICAL HARM TO THE VICTIM.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF ENDANGERING CHILDREN 2919.22 B(2) F2 AS CHARGED IN COUNT(S) 6 OF THE INDICTMENT.
FURTHER FINDING: STATE PROVED THE VIOLATION DID RESULT IN SERIOUS PHYSICAL HARM TO THE VICTIM.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF ENDANGERING CHILDREN 2919.22 B(3) F2 AS CHARGED IN COUNT(S) 7 OF THE INDICTMENT.
FURTHER FINDING: STATE PROVED THE VIOLATION DID RESULT IN SERIOUS PHYSICAL HARM TO THE VICTIM.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF ENDANGERING CHILDREN 2919.22 B(4) F2 AS CHARGED IN COUNT(S) 8 OF THE INDICTMENT.
FURTHER FINDING: STATE PROVED THE VIOLATION DID RESULT IN SERIOUS PHYSICAL HARM TO THE VICTIM.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF ENDANGERING CHILDREN 2919.22 A F3 AS CHARGED IN COUNT(S) 9, 15 OF THE INDICTMENT.
FURTHER FINDING: STATE PROVED THE VIOLATION DID RESULT IN SERIOUS PHYSICAL HARM TO THE VICTIM.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF NOT GUILTY OF FELONIOUS ASSAULT 2903.11 A(1) F2 AS CHARGED IN COUNT(S) 10 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF NOT GUILTY OF FELONIOUS ASSAULT 2903.11 A(2) F2 AS CHARGED IN COUNT(S) 11 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF NOT GUILTY OF ENDANGERING CHILDREN 2919.22 B(2) F2 AS CHARGED IN COUNT(S) 13 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF NOT GUILTY OF ENDANGERING CHILDREN 2919.22 B(3) F2 AS CHARGED IN COUNT(S) 14 OF THE INDICTMENT.
DEFENDANT ADDRESSES THE COURT, PROSECUTOR ANNA FARAGLIA ADDRESSES THE COURT.
THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.

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THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.
THE COURT IMPOSES A PRISON SENTENCE AT THE OHIO REFORMATORY FOR WOMEN OF 25 YEARS TO LIFE.
BY AGREEMENT OF THE PARTIES, COUNTS 1 THROUGH 8 MERGE FOR THE PURPOSE OF SENTENCING, STATE ELECTS DEFENDANT TO BE SENTENCED ON COUNT 3. DEFENDANT IS SENTENCED TO 15 YEARS TO LIFE ON COUNT 3; 2 YEARS OF INCARCERATION ON COUNT 9, 6 YEARS OF INCARCERATION ON COUNT 12; AND 2 YEARS OF INCARCERATION ON COUNT 15. COUNTS 3, 9, 12 AND 15 ARE TO RUN CONSECUTIVE TO EACH OTHER, FOR A TOTAL TERM OF INCARCERATION OF 25 TO LIFE.
THE COURT IMPOSES PRISON TERMS CONSECUTIVELY FINDING THAT CONSECUTIVE SERVICE IS NECESSARY TO PROTECT THE PUBLIC FROM FUTURE CRIME OR TO PUNISH DEFENDANT; THAT THE CONSECUTIVE SENTENCES ARE NOT DISPROPORTIONATE TO THE SERIOUSNESS OF DEFENDANT'S CONDUCT AND TO THE DANGER DEFENDANT POSES TO THE PUBLIC; AND THAT, AT LEAST TWO OF THE MULTIPLE OFFENSES WERE COMMITTED IN THIS CASE AS PART OF ONE OR MORE COURSES OF CONDUCT, AND THE HARM CAUSED BY SAID MULTIPLE OFFENSES WAS SO GREAT OR UNUSUAL THAT NO SINGLE PRISON TERM FOR ANY OF THE OFFENSES COMMITTED AS PART OF ANY OF THE COURSES OF CONDUCT ADEQUATELY REFLECTS THE SERIOUSNESS OF DEFENDANT'S CONDUCT.
DEFENDANT TO RECEIVE JAIL TIME CREDIT FOR 476 DAY(S), TO DATE.
DEFENDANT DECLARED INDIGENT.
COSTS WAIVED
DEFENDANT ADVISED OF APPEAL RIGHTS.
DEFENDANT INDIGENT, COURT APPOINTS TIMOTHY F SWEENEY AS APPELLATE COUNSEL.
TRANSCRIPT AT STATE'S EXPENSE.
ALL MOTIONS NOT SPECIFICALLY RULED ON PRIOR TO THE FILING OF THIS JUDGMENT ENTRY ARE DENIED AS MOOT.
DEFENDANT REMANDED.
SHERIFF ORDERED TO TRANSPORT DEFENDANT URSULA OWENS, DOB: 08/02/1979, GENDER: FEMALE, RACE: BLACK.

07/10/2018
CPKXG 07/12/2018 15:40:17

Kelly A Gallagher

Judge Signature 07/12/2018

SENT
07/10/2018

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07/12/2018 15:59:41
NAILAH K. BYRD, CLERK

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

History

134 v H 511 (Eff 1-1-74); 146 v S 239 (Eff 9-6-96); 147 v H 5. Eff 6-30-98.

Ohio Rev. Code Ann. § 2903.02 (Page, Lexis Advance through file 18)

§ 2903.041 Reckless homicide.

(A) No person shall recklessly cause the death of another or the unlawful termination of another's pregnancy.

(B) Whoever violates this section is guilty of reckless homicide, a felony of the third degree.

History

148 v H 37. Eff 9-29-99.

Ohio Rev. Code Ann. § 2903.041 (Page, Lexis Advance through file 18)

U.S. Const., Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const., Amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., Amend. XIV

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Oh. Const. Art. I, § 5

§ 5 Trial by jury; reform in civil jury system.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

History

As amended September 3, 1912.

Oh. Const. Art. I, § 9

§ 9 Bail; cruel and unusual punishments.

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.
The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the state of Ohio.

History

As amended January 1, 1998.

Oh. Const. Art. I, § 10

§ 10 Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

History

As amended September 3, 1912.

Oh. Const. Art. I, § 16

§ 16 Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

History

As amended September 3, 1912.