[Cite as *State v. Lewis*, 2020-Ohio-5265.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108463
v.	:	
DEONTE LEWIS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: November 12, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-626899-B

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Anna M. Faraglia, Aqueelah A. Jordan, and Sean Kilbane, Assistant Prosecuting Attorneys, *for appellee.*

Mark A. Stanton, Cuyahoga County Public Defender, and Erika B. Cunliffe, Assistant Public Defender, *for appellant.*

EILEEN T. GALLAGHER, A.J.:

{¶ 1} Defendant-appellant, Deonte Lewis ("Lewis"), appeals his convictions and claims the following errors:

> 1. Deonte Lewis's convictions for aggravated murder, murder, felonious assault, permitting child abuse, and child endangering violate his right to due process as protected by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution.
>
> 2. Lewis's rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution were violated because his trial counsel failed to provide him with effective representation.
>
> 3. The failure to sever the cases against these two codefendants violated Deonte Lewis's right to a fair trial.

{¶ 2} We find some merit to the appeal, we affirm the trial court's judgment in part, reverse it in part, and remand the case to the trial court to vacate Lewis's child endangering convictions under R.C. 2919.22(B)(1) and (B)(2).

I. Facts and Procedural History

{¶ 3} Lewis was charged with one count of aggravated murder, one count of murder, one count of felonious assault, one count of permitting child abuse, three counts of child endangering, and one count of tampering with evidence in connection with the death of four-year-old A.D.[1] A.D.'s mother, Sierra Day ("Sierra"), was charged as a codefendant in the indictment. Lewis pleaded not guilty and asked the trial court to sever his case from Sierra's, arguing that a joint trial

[1] Juveniles are identified by their initials pursuant to this court's policy of non-disclosure of juvenile's identities.

would compromise his ability to confront and cross-examine witnesses and deprive him of a fair trial. The trial court denied the motion, and the cases were tried together.

{¶ 4} A.D. was born on September 2, 2013. Following A.D.'s birth, Sierra and A.D. lived with A.D.'s father, Mickhal Garrett ("Garrett"). Sierra and Garrett were not married, and they ended their relationship when A.D. was less than two years old. Sierra obtained custody of A.D., and Garrett paid child support.

{¶ 5} In January 2016, Sierra and A.D. moved to the Harbor Crest Apartments in Euclid, Ohio. (Tr. 777.) Garrett had custody of A.D. for visitation on weekends "almost every other week." (Tr. 778.) Garrett testified that during a visit in September 2017, he and his fiancée discovered bruises on A.D.'s chest and lower back. (Tr. 783-784.) Garrett asked A.D. about the bruises, and A.D. told him, "Mommy pushed me up the stairs." Garrett took photographs of the bruises, which were admitted into evidence, and reported the bruises to Cleveland police. (Tr. 784, 786.) Garrett also discovered that A.D. had a loose tooth that was starting to rot. (Tr. 785.) Garrett confronted Sierra about the bruises and the tooth, but Sierra was unable to provide an explanation for the injuries. (Tr. 789-790.) Thereafter, Sierra obtained a temporary protection order against Garrett to prevent him from visiting A.D. (Tr. 790-791.)

{¶ 6} Sierra's brother, Isaiah Day ("Isaiah"), and her sister, Erica Johnson ("Johnson"), testified that Sierra became romantically involved with Lewis in July 2017. Multiple witnesses testified they believed Lewis lived with Sierra because they

were together every day. (Tr. 565-566, 852, 885, 925, 938, 948.) Before Sierra started dating Lewis, A.D. regularly saw relatives on her maternal side of the family, and she acted like an ordinary child. (Tr. 930-931.) After Sierra became involved with Lewis, Sierra became estranged from her family and A.D. became withdrawn and stopped acting like a normal child. (Tr. 930-932, 945-949, 951.) Johnson testified that she also noticed that A.D. was becoming smaller. She explained:

> I thought maybe that just had something to do with her getting taller; you know, when toddlers grow, they slim out a little bit. She was getting littler and littler to the point you can see the extension of her stomach sticking out, so to speak.

(Tr. 932.)

{¶ 7} Several child-care workers who cared for A.D. at the Harbor Crest Day Care Center testified that A.D. was "energetic," "outgoing," and a "happy little girl" when they first met her in late 2016 and early 2017. (Tr. 644, 658.) One daycare worker, April Goode, described her as "verbal," meaning she could tell someone when she needed to go to the bathroom. Goode also stated that A.D. "interacted fine with other children." (Tr. 659.) However, A.D.'s behavior and demeanor changed over time. (Tr. 660.) Johnson testified that A.D. came to her daughter's birthday party on July 30, 2017, but A.D. did not interact with the other children. Johnson explained:

> It was a normal kid party. Everyone was having fun. We adults were, you know, watchin' the kids and they were playin' in the pool and chasing each other, just havin' fun, and [A.D] was just pretty much off to herself, not really interactin' with the other kids.

(Tr. 931.)

{¶ 8} Daycare workers at Harbor Crest Day Care Center noticed that A.D. often came to school with bruises and scratches. Tamira Finley testified that they started making observation reports every time they saw a new injury because they noticed that A.D had "too many bumps and bruises." (Tr. 649.) Whenever a child-care worker noticed a new bruise or scratch, she would question A.D. about it, and A.D. would invariably say that "Mommy did it," or "Mommy hit me, Mommy hurt me." (Tr. 647, 651, 662.)

{¶ 9} On May 15, 2017, A.D. came to the Harbor Crest Day Care Center with a scrape across her face. Michelle Marshall, one of the child-care workers, asked Sierra what happened to A.D. Sierra told Marshall that A.D. fell at the park. (Tr. 671.) After Sierra left the building, Marshall asked A.D. if she fell at the park, and A.D. replied, "Mommy pushed me." (Tr. 678.) Seeking clarification, Marshall asked A.D. if Mommy pushed her down the slide. A.D. explained, "Mommy pushed me down the steps." (Tr. 678.) Marshall recorded her observations in an internal observation report maintained at the daycare facility.

{¶ 10} Three days later, on May 18, 2017, A.D. complained to Marshall that her head hurt. Marshall examined her head and discovered blood blisters on her head and dried blood in her ear. As usual, Marshall inquired as to what happened, and A.D. replied: "Mommy hit me, Mommy hurt me." (Tr. 680.) Marshall and the daycare director called the police to report suspected child abuse. EMS transported A.D. to Euclid Hospital, and Marshall, who followed in her own car, joined A.D. at the hospital. The emergency room physician suggested A.D.'s head was bleeding

because her braids were too tight. (Tr. 688.) However, A.D. repeated over and over that her mother caused the injury. (Tr. 688.)

{¶ 11} As previously stated, Sierra and Lewis began dating in July 2017, and thereafter, Sierra's family saw less of A.D. According to Isaiah, Lewis was "possessive" of Sierra. Isaiah also believed that A.D. did not like Lewis. (Tr. 877, 878.) Isaiah testified that one day, in February 2018, he and Sierra were "hangin' out" at a friend's house for the evening. In the midst of conversation, Sierra mentioned that A.D. could not walk. Later that night, Lewis joined the party, and Isaiah noticed that he was nervous "[l]ike he did something." (Tr. 882-883.) Isaiah was concerned for A.D.'s safety and decided to go to Sierra's apartment to check on her.

{¶ 12} Isaiah testified that Lewis and Sierra were both present in the apartment when he came to check on A.D. under the pretext of a visit. (Tr.884-885.) He brought a bottle of Bacardi Silver and socialized for a while in the living room before asking about A.D. Thereafter, Isaiah found A.D. laying in her bed in her bedroom. Isaiah explained:

> So I go I open the door. I see [A.D.]. She layin' on the bed. And it dawn on me, like, she says she can't walk. She was just layin' down like this. Her nickname Na Na, I said, "Na-Na," she layin' like this, she turn her head like this, "Uncle Isaiah, Uncle Isaiah."
>
> I'm like "You cool, you cool?" She like, "Yeah, yeah."
>
> Everythin' just seemed pretty cool. I'm like, well, she can't walk, I'm figurin' her ankle hurts or somethin' like that.

(Tr. 886.) Thereafter, Isaiah went to the kitchen and asked Sierra how A.D. was doing. Sierra told him that everything was fine, but indicated that A.D. was not eating much. *Id*.

{¶ 13} On March 11, 2018, Lewis called 911 to report that A.D. was "unresponsive." Nathan Lupah, a Euclid firefighter and paramedic who responded to the call, testified that Lewis opened the door to the apartment when he arrived. When Lupah entered the apartment, he found A.D. on the floor underneath an air conditioner that was running. (Tr. 402-403.) Lupah testified: "I remember thinking this is odd because it's cold outside" and noticed that the "wind was blowing on [A.D.]." (Tr. 438.) Robert Swope and Chris Wilson, of the Euclid Fire Department, also attended to A.D. at the scene. They noticed a strong smell of bleach upon entering the apartment, and Lieutenant Wilson discerned a smell of decomposition emanating from A.D.'s mouth while he was performing CPR. (Tr. 451, 508, 511.) The paramedics also noticed that A.D.'s jaw and body were stiff with rigor mortis. (Tr. 405.) According to Dr. Joseph Felo, a forensic pathologist in the Cuyahoga County Medical Examiner's Office, rigor mortis develops quickly and generally disappears within a day and half after death.

{¶ 14} Officer Nicholas Edington of the Euclid Police Department also responded to the 911 call. He testified that Lewis identified himself as A.D.'s stepfather. (Tr. 497.) Edington interviewed Sierra, who told him that A.D. stopped eating and became sick after the family went to Red Lobster the previous Thursday. (Tr. 499.) Sierra also told Edington that earlier that morning, A.D. fell off the toilet

and hit her head. (Tr. 499.) Sierra claimed she found A.D. on the ground unresponsive.

{¶ 15} EMS took A.D. to Euclid Hospital. Meanwhile, Euclid police obtained a search warrant to search Sierra's apartment. Lewis provided police with a key to the apartment. (Tr. 504.) Detective Phil Tschetter testified that he took photographs of A.D.'s bed because it had no sheets, no pillow, and no bedding, except a single fleece blanket. He also noticed that the mattress smelled strongly of urine. (Tr. 587.)

{¶ 16} Detective Jennifer Kroczak, the lead homicide detective, listened to a recording of Lewis's 911 call to police. When asked whether Detective Kroczak made any observations while listening to the call, she stated:

> I noticed that there was no excitement in the voices of the callers. Both the defendants had spoken during that call. There was no panic; it was very flat. It wasn't what I would expect for a medical emergency of a four-year-old having stopped breathing.

(Tr. 1002.) Heidi Hobart, the 911 dispatcher, authenticated the recording of the 911 call and testified that she had been on the phone with Lewis for three minutes and 53 seconds before he mentioned that the child was not breathing. (Tr. 388.)

{¶ 17} Detective Kroczak authenticated photographs of A.D.'s body that were taken at Euclid Hospital. She described A.D.'s body as "extremely emaciated" and "skeletal." She testified that there were obvious signs of trauma and abuse, including a deep dark bruise over an entire eye that was swollen shut. (Tr. 1000.) There was also a one-inch laceration above the eyelid. A.D. had burns on her lower extremities and bruises on her body.

{¶ 18} Kroczak reviewed videos and other evidence extracted from Lewis and Sierra's phones and found a video of Sierra and Lewis having sex at 3:28 p.m. on March 10, 2018, the day before A.D. was found dead. (Tr. 1014-1016.) Detective Kroczak also identified a surveillance video from a nearby Chipotle, showing Lewis and Sierra purchasing burrito bowls on March 10, 2018, at 6:34 p.m. Despite these videos, Kroczak concluded, based on the evidence in her investigation, that only Lewis and Sierra had access to A.D. at the end of her life. (Tr. 1010.)

{¶ 19} Dr. Felo performed the autopsy on A.D.'s body. Dr. Felo estimated that A.D. had been dead for a day and half at the time of the autopsy. Dr. Felo described A.D. as "severely malnourished" and weighing only 26 pounds. Her skin was loose because she had lost muscle and fat below the skin. Dr. Felo observed that A.D. had a bruise on the right side of her forehead that was approximately one week old, and a black eye that she sustained two days before her death. A.D. also had some abrasions on her left arm and back. Some skin had "sloughed off" her lower legs and feet, and she had bed sores on her lower legs. (Tr. 1064-1065, 1073.)

{¶ 20} An internal examination revealed that A.D. developed a subdural hematoma, or blood clot, in the brain following blunt trauma to the left side of her head. The brain injury caused pressure to build on A.D.'s brain, which caused her to have a stroke. (Tr. 1066.) Dr. Felo estimated that the stroke would have occurred somewhere between two weeks and three months before A.D.'s death. The injury also caused a lack of oxygen in the brain that caused the back part of the brain to die. The back part of the brain controls muscle coordination. (Tr. 1070.) Dr. Felo

explained that if A.D. could walk after the back part of her brain had died, her gait would have been clumsy and uncoordinated. (Tr. 1070.)

{¶ 21} According to Dr. Felo, A.D.'s body slowly withered away after the stroke because brain damage and starvation caused her organs to deteriorate. Her lungs were collapsed because they were not taking deep breaths. Her pancreas was digesting itself because she was not eating. Dr. Felo also found acute hemorrhagic gastrophy, i.e., the formation of stomach ulcers, caused by excessive stomach acid and no food.

{¶ 22} Dr. Felo opined that a lay person would have known that A.D. was dying because she was unable to walk for a period of time due to her injuries. (Tr. 1116.) Moreover, her gaunt face and emaciated body made it obvious that she was dying. (Tr. 1117.) Dr. Felo explained that A.D. gradually declined, having less and less appetite and becoming more and more lethargic over time. A.D.'s ability to use motor and cognitive skills also would have gradually diminished until the time of her death. (Tr. 1114.)

{¶ 23} The jury found Lewis guilty of one count of aggravated murder, one count of murder, one count of felonious assault, one count of permitting child abuse, three counts of child endangering, and one count of tampering with evidence. The court sentenced him to life in prison with eligibility for parole after 20 years. Lewis now appeals his convictions.

II. Law and Analysis

A. Sufficiency of the Evidence

{¶ 24} In the first assignment of error, Lewis argues his convictions violate due process because they are not supported by sufficient evidence.

{¶ 25} "[T]he test for sufficiency requires a determination of whether the prosecution met its burden of production at trial." *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 26} Lewis was found guilty of aggravated murder, in violation of R.C. 2903.01(C), which states, in relevant part, that "[n]o person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense."[2] Pursuant to R.C. 2901.22, a person acts "purposely"

> when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature.

R.C. 2901.22(A). "[A] person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts." *State v. Johnson*, 56 Ohio St.2d 35, 39, 381 N.E.2d 637 (1978). Purpose or intent can be established by circumstantial

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[2] Lewis erroneously argues that he was convicted of aggravated murder in violation of R.C. 2903.01(A), which requires proof that the defendant purposely caused the victim's death "with prior calculation and design." However, Lewis was charged with, and convicted of, violating R.C. 2903.01(C), which does not require proof of prior calculation and design.

evidence. *State v. Garner*, 74 Ohio St.3d 49, 60, 656 N.E.2d 623 (1995) (Intent can be determined from the surrounding facts and circumstances.).

{¶ 27} Lewis argues that because not a single witness testified that he ever touched A.D., and there was no evidence that he lived with Sierra and A.D., there is insufficient evidence to support his aggravated murder conviction. However, Isaiah testified that Lewis was living with Sierra. (Tr. 890.) Moreover, whether Lewis was officially living with Sierra is irrelevant to the issue of whether he purposely caused A.D.'s death. The evidence showed that Sierra and Lewis were always together. (Tr. 948.) On February 9, 2018, a little over month before A.D.'s death, police received a call for a disturbance between a man and woman in Day's apartment building. Police arrived on the scene and identified the man and woman as Lewis and Day. Officer Edington testified that, at that time, he observed Lewis in the hallway of the apartment holding a bag of clothes, shoes, and other belongings, which suggested that Lewis had been living in the apartment in Day. (Tr. 514-515.) Day and Lewis apparently reconciled because Lewis later identified himself as A.D.'s stepfather to first responders and to the 911 dispatcher when he called to report that A.D. was nonresponsive on March 11, 2018. According to Officer Edington, Lewis produced the key to the apartment when the police came with the search warrant. Therefore, there was sufficient evidence that Lewis had unfettered access to A.D.

{¶ 28} There is also evidence that Lewis knew A.D. was unable to walk and had stopped eating. Yet he did nothing to help her. Rather, he made concerted efforts with Sierra to conceal A.D.'s plight. Isaiah testified that A.D. had lost the

ability to walk by the time he visited her on an unspecified date in February 2018. Lewis and Sierra spoke with police at the apartment on February 21, 2018, when Sierra reported the theft of a laptop computer, but Lewis never told police there was an injured child in the apartment. When Lewis called 911 to report that A.D. was unresponsive, he neglected to tell the dispatcher that she had stopped breathing until he had been on the phone for almost four minutes. Lewis's failure to report the truth of A.D.'s demise to the dispatcher demonstrates a specific intent to conceal the harm that was done to her before her death. Lewis further concealed the harm done to A.D. when he falsely told police that she became ill after dining at a Red Lobster a few days before she died. By purposely concealing A.D.'s condition from people who would have helped her, Lewis purposely let her die. He, therefore, collaborated with Sierra in purposely causing her death. And because it is undisputed that A.D. was under 13 years of age at the time of her death, there was sufficient evidence to support Lewis's aggravated murder conviction under R.C. 2903.01(C).

{¶ 29} Lewis was convicted of felony murder pursuant to R.C. 2903.02(B), which states, in relevant part, that "[n]o person shall cause the death of another as a proximate result of the offender's committing * * * an offense of violence that is a felony of the first or second degree * * * ." Lewis was charged with one count of felonious assault in violation of R.C. 2903.11(A)(1), three counts of child endangering in violation of R.C. 2919.22(B)(1), 2919.22(B)(2), and 2919.22(A), and one count of permitting child abuse in violation of R.C. 2919.22(A). The felonious assault charge is a second-degree felony offense of violence; permitting child abuse

is a first-degree felony offense of violence; and the child-endangering charges under R.C. 2919.22(B)(2) and 2919.22(B)(1) are second-degree felony offenses of violence. Therefore, in order to convict Lewis of felony murder, the state only had to prove that Lewis committed one count of felonious assault, one count of permitting child abuse and/or at least one second-degree felony child endangering charge.

{¶ 30} Lewis was convicted of permitting child abuse in violation of R.C. 2903.15(A), which states, in relevant part:

> No parent, guardian, custodian, or person having custody of a child under eighteen years of age * * * shall cause serious physical harm to the child, or the death of the child, as a proximate result of permitting the child to be abused, to be tortured, to be administered corporal punishment or other physical disciplinary measure, or to be physically restrained in a cruel manner or for a prolonged period.

{¶ 31} Lewis argues there is insufficient evidence to support his permitting child abuse conviction because he was not a parent, guardian, custodian, or person having custody of the child. Lewis further contends that he did not live in Sierra's apartment, as evidenced by the fact that his name was not on Sierra's lease and by the fact that he wrote his parents' address instead of Sierra's address on his written statement to police. However, this court has held that a defendant has custody and control of a child if the record demonstrates a relationship sufficient to give rise to a duty of care, protection, and support. *See State v Masterson*, 8th Dist. Cuyahoga No. 88102, 2007-Ohio-1145. In *Masterson*, we held that the defendant was a "person having custody of the child" because he lived with the mother and acted as though he were the child's father. *Id*. at ¶ 23.

{¶ 32} Isaiah and Johnson testified that Lewis and Sierra lived together and were always together. There was also evidence that Lewis regularly dropped Sierra and A.D. off in the mornings at the daycare center where A.D. was enrolled and Sierra was employed. Moreover, Lewis identified himself as A.D.'s stepfather to the 911 dispatcher and to Euclid first responders. Therefore, Lewis had a relationship with A.D. that gave rise to a duty of care, protection, and support.

{¶ 33} Moreover, there were obvious signs of trauma and abuse on A.D.'s body at the time of her death, including a deep dark bruise over an entire eye that was swollen shut, a one-inch laceration above the eyelid, burns on her lower extremities, and bruises on her body. There was also evidence that she was unable to walk or eat in the weeks immediately preceding her death. Yet Lewis did not nothing to stop the abuse. Therefore, there was sufficient evidence that Lewis permitted child abuse.

{¶ 34} Permitting child abuse that results in the death of the child in violation of R.C. 2903.15(A) is a first-degree felony offense of violence. R.C. 2903.15(C). Thus, because there was sufficient evidence to prove that Lewis permitted child abuse that resulted in A.D.'s death, there was also sufficient evidence to support his felony murder conviction under R.C. 2903.02(B).

{¶ 35} Lewis was convicted of felonious assault in violation of R.C. 2903.11(A)(1), which states, in relevant part, that "[n]o person shall knowingly * * * cause serious physical harm to another * * *." R.C. 2901.22(B) defines "knowingly" as follows:

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

Lewis argues there is insufficient evidence that he committed felonious assault because there is no evidence that he ever struck A.D. or caused any of her injuries. This is true. However, as previously stated, there was also evidence that Lewis knew A.D. sustained a serious injury that eventually impaired her ability to walk. He also knew she was severely malnourished. At least two witnesses testified that Lewis was living with Sierra and A.D. in Sierra's apartment, and other witnesses testified that they observed Lewis's presence at the apartment in the weeks preceding A.D.'s death. Dr. Felo testified that A.D.'s gaunt face and emaciated body made it obvious that she was dying. Thus, although there is no direct evidence that Lewis caused any of A.D.'s physical injuries, there was evidence that Lewis contributed to her death by hiding her from authorities, who could have saved her life. He, therefore, knowingly caused her serious physical harm.

{¶ 36} Lewis was convicted of three counts of child endangering, in violation of R.C. 2919.22(B)(1), 2919.22(B)(2), and 2919.22(A). R.C. 2919.22 addresses "child neglect and abuse." R.C. 2919.22(A) provides, in relevant part:

> No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen

> years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. * * *

{¶ 37} To support a conviction for child endangering under R.C. 2919.22(A), there must be sufficient evidence that the defendant (1) recklessly (2) created a substantial risk to the health or safety of one or more children (3) by violating a duty of care, protection or support. *Cleveland Hts. v. Cohen*, 2015-Ohio-1636, 31 N.E.3d 695, ¶ 25 (8th Dist.).

{¶ 38} R.C. 2901.22(C) defines the term "recklessly" as follows:

> (C) A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

{¶ 39} Lewis reiterates that he owed no duty of care or protection to A.D. because he was not her biological father and was neither her guardian, custodian, nor person having custody or control over her. However, we have already concluded that because he lived with A.D. and acted as her father, he was a person having custody or control over A.D. Furthermore, the evidence shows that despite his relationship with A.D., Lewis either caused, or allowed Sierra to cause, her serious physical injuries. Moreover, Lewis failed to call the police to stop the abuse and neglected to obtain medical treatment for A.D.'s injuries. The neglect of A.D.'s injuries ultimately caused her death. Therefore, there was sufficient evidence to support Lewis's child-endangering conviction under R.C. 2929.12(A).

{¶ 40} Lewis was also convicted of child endangering under R.C. 2919.22(B)(1) and 2919.22(B)(2). Unlike R.C. 2919.22(A), which defines an offense of neglect as a "violation of a duty of care, protection, or support which results in a substantial risk to his health or safety," R.C. 2919.22(B)(1) and (B)(2) deal "with actual physical abuse of a child, whether through physical cruelty or through improper discipline or restraint." Committee comment to R.C. 2919.22; *see also State v. Esper*, 8th Dist. Cuyahoga No. 105069, 2017-Ohio-7069, ¶ 13.

{¶ 41} In distinguishing the neglect form of child endangering set forth in R.C. 2919.22(A) from the abuse form of the offense set forth in R.C. 2919.22(B)(1) and (2), the Ohio Supreme Court explained that "neglect is characterized by acts of omission rather than acts of commission" and abuse is characterized by "[a]ffirmative acts of torture, abuse, and excessive acts of corporal punishment or disciplinary measures." *State v. Kamel*, 12 Ohio St.3d 306, 309, 466 N.E.2d 860 (1984), *see also State v. Sammons*, 58 Ohio St.2d 460, 391 N.E.2d 713 (1979) (an affirmative act of abuse is a required element for a conviction under R.C. 2919.22(B); whereas subsection (A) involves acts of omission).

{¶ 42} R.C. 2919.22(B) provides, in relevant part:

> No person shall do any of the following to a child under eighteen years of age * * * :
>
> (1) Abuse the child;
>
> (2) Torture or cruelly abuse the child;

"Torture" has been defined as "'the infliction of severe pain or suffering (of body or mind).'" *State v. Laney*, 6th Dist. Williams No. WM-18-004, 2019-Ohio-2648, ¶ 31, quoting *State v. Nivert*, 9th Dist. Summit Nos. 16806, 16843, 1995 Ohio App. LEXIS 4666, *5 (Oct. 18, 1995), citing *XI Oxford English Dictionary*, 169-170 (2d Ed.1933). "Abuse" has been defined as "'ill-use, maltreat; to injure, wrong or hurt.'" *Id*., quoting *Nivert* at *6, citing *I Oxford English Dictionary* at 44-45.

{¶ 43} Lewis argues there was no evidence that he committed any act to abuse, torture, or discipline A.D. Although there is overwhelming evidence that Lewis was present while A.D. was being tortured and abused, there is no evidence that he caused committed any affirmative acts of torture or abuse or that he affirmatively caused any of A.D.'s physical injuries. We, therefore, agree the record lacks sufficient evidence to sustain his child endangering conviction under R.C. 2919.22(B)(1) and (B)(2).

{¶ 44} Finally, Lewis was convicted of tampering with evidence in violation of R.C. 2921.12(A)(1). Lewis does not challenge the sufficiency of the evidence supporting this conviction. We, therefore, find no reason to find it unsupported.

{¶ 45} The first assignment of error is sustained in part and overruled in part.

II. Ineffective Assistance of Counsel

{¶ 46} In the second assignment of error, Lewis argues his constitutional right to the effective assistance of counsel was violated because his trial counsel failed to provide effective representation. He contends his trial lawyers were

ineffective because they mishandled evidence of prior acts of abuse under Evid.R. 404(B), failed to request a jury instruction on reckless homicide, failed to object to prosecutorial misconduct during closing argument, failed to object to hearsay evidence, and promised to produce certain evidence during opening statements and then failed to present the evidence during trial.

{¶ 47} To establish ineffective assistance of counsel, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonable representation and that he or she was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice is established when the defendant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

1. Prior Acts Evidence

{¶ 48} Lewis argues his trial lawyers were ineffective because they failed to object to evidence that Sierra had abused A.D. numerous times in the past. Indeed, seven witnesses described Sierra's prior acts of abuse, and three daycare workers authenticated "Child Observation Forms" they made to document the abuse they observed while A.D. was in their care. The documentary evidence contained descriptions of black eyes, a split lip, and various bruises on A.D.'s body.

{¶ 49} However, the evidence of prior abuse referred to specific incidents that occurred before Sierra and Lewis were romantically involved. Sierra and Lewis started dating in July 2017, and the "Child Observation Forms" described abuse that

occurred in 2015, 2016, and the first half of 2017, before Sierra and Lewis started dating. Although A.D.'s father, Mickhal Garrett, testified that he observed bruises on A.D.'s chest and back in September 2017, it was clear that A.D. told authorities that Sierra, not Lewis, caused those bruises. Therefore, it was clear that the prior acts evidence pertained solely to Sierra, and Lewis cannot show that he was unfairly prejudiced by its admission into evidence.

2. Reckless Homicide Instruction

{¶ 50} Lewis argues his trial counsel was ineffective because they failed to request a jury instruction on the lesser-included offense of reckless homicide.

{¶ 51} However, there is a presumption in Ohio that the failure to request an instruction on a lesser-included offense constitutes a reasonable "all or nothing" trial strategy. *State v. Jackson*, 6th Dist. Sandusky No. S-15-020, 2016-Ohio-3278, ¶ 20; *see also State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980).

{¶ 52} By not requesting an instruction on a lesser-included offense, the hope is that the jury will acquit the defendant if the evidence does not support all the elements of the offense charged. *See, e.g., State v. Vogt*, 4th Dist. Washington No. 17CA17, 2018-Ohio-4457, ¶ 119 (It would have been inconsistent to argue for complete acquittal while at the same time arguing for the lesser-included offense.); *State v. Viers*, 7th Dist. Jefferson No. 01JE19, 2003-Ohio-3483, ¶ 47 (Trial courts tend to overrule [ineffective assistance] arguments based upon reviewing court's deference to the all-or-nothing trial strategy.); *State v. Griffie*, 74 Ohio St.3d 332, 333, 658 N.E.2d 764 (1996)("Failure to request instructions on lesser-included

offenses is a matter of trial strategy and does not establish ineffective assistance of counsel.").

{¶ 53} Lewis argues that because there was no evidence that he purposely caused any harm to A.D., his trial lawyers should have requested a jury instruction on the lesser-included offense of reckless homicide. This argument fails to overcome the presumption that his counsel made a tactical decision to seek an acquittal rather than a conviction on a lesser-included offense. We, therefore, cannot say that counsel's performance was deficient simply because they decided not to request a lesser-included offense instruction.

3. Prosecutorial Misconduct

{¶ 54} Lewis argues his trial counsel was ineffective because they failed to object when the prosecutor repeatedly stated that both Sierra and Lewis caused A.D.'s fatal injuries when there was no evidence that Lewis caused any physical injury.

{¶ 55} The test for prosecutorial misconduct in closing argument is "'whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.'" *State v. Hessler*, 90 Ohio St.3d 108, 125, 734 N.E.2d 1237 (2000), quoting *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). "To demonstrate prejudice in this context, 'a defendant must show that the improper remarks or questions were so prejudicial that the outcome of the trial would clearly have been otherwise had they not occurred.'" *State v. Obermiller*, 147

Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 105, quoting *State v. Collier*, 8th Dist. Cuyahoga No. 78960, 2001 Ohio App. LEXIS 4663 (Oct. 18, 2001).

{¶ 56} Lewis contends the prosecutor unfairly attributed Sierra's acts of child abuse to him when there was no evidence that he ever struck or beat A.D. However, as previously stated, evidence of Sierra's prior acts of abuse pertained solely to her and made no reference to Lewis. Indeed, the evidence clearly showed that Lewis was not involved in A.D.'s life until July 2017, and the prior acts evidence concerned incidents that occurred before that time. Nevertheless, Lewis objects to the following excerpt from the state's closing argument:

> The only person that wasn't happy in that equation was [A.D.]. Because there came a point in time, ladies and gentlemen, that regardless of who struck her or where the blow came from, this child suffered a blow. And I submit to you they are equally culpable for that blow. One is not more responsible than the other. Once she suffered that blow, that child started to deteriorate right in front of their eyes. As human beings, we nurture people that are ill. We spend hours at hospice centers watching people die because we love them. We don't let them be alone.
>
> But these two, they don't have a heart or a soul for what they did to this child. Torture and cruelly abuse. And she has the audacity to say find them not guilty? Are you kidding me?
>
> Not so much as a glass of water? She couldn't talk. She couldn't tell you what she was going through. The only thing she knew was lying in a bed, soaked with urine. That's what she knew. And those were the end of her days. Lying in a bed soaked with urine.

(Tr. 1249-1250.) Even if Lewis did not directly cause A.D.'s injuries, the evidence showed that he permitted the abuse and concealed the harm to A.D., thereby preventing her from receiving any medical treatment that might have saved her life

or alleviated her suffering. Therefore, there was nothing inappropriate about the prosecutor's observation that Lewis contributed to A.D's suffering and death.

{¶ 57} Lewis also argues the prosecutor committed misconduct by asserting there was no evidence that he lived anywhere but with Sierra. Lewis objects to the following statements:

> By the way, where is there evidence that he was staying at his mom or dad's house? There is no evidence to that. Did it come from this witness stand? No.

Lewis argues these remarks misrepresented the evidence because Lewis included his parents' address on his written statement to police. Although it is true that Lewis wrote his parents' address on the police report, there was no testimony from any witness that he lived anywhere but with Sierra. Therefore, the prosecutor's statement is not wholly inaccurate since there was no oral testimony supporting his claim that he lived with his parents. Moreover, the jury heard the evidence and was free to decide where Lewis lived; the prosecutor's statement did not change the outcome of the trial.

4. Improper Hearsay

{¶ 58} Lewis argues his counsel was ineffective for failing to object to Isaiah's testimony that Sierra told him that Lewis was living with her. He contends the evidence was hearsay and would have been excluded if his trial counsel had objected. Moreover, he contends the outcome of the trial would have been different if this evidence had been excluded because Isaiah was the only witness who testified that Lewis was living with Sierra.

{¶ 59} However, as previously stated, whether Lewis was officially living with Sierra is of little importance because there was evidence that they were always together. Daycare workers testified that Lewis frequently accompanied Sierra and A.D. to the daycare centers when it was time to drop off A.D. in the morning. Other witnesses testified that they were "always together." Indeed, when asked whether Sierra and Lewis were living together, Johnson replied that they "[m]ight as well" be living together because "[t]hey were always together." (Tr. 938.) Indeed, Johnson "assumed that he did stay there with her." (Tr. 938.) Therefore, even if counsel had objected to the hearsay testimony that Sierra told Isaiah that Lewis was living with her and the testimony had been excluded, the outcome of the trial would not have been different because there was other competent evidence establishing that Lewis was staying in Sierra's apartment.

5. Promises in Opening Statements

{¶ 60} Finally, Lewis argues his trial counsel was ineffective because they promised during opening statements to call a witness who would testify that Lewis was staying elsewhere the weekend before A.D. died but counsel never called the witness during trial. Defense counsel stated, in relevant part:

> Now, the evidence will show that on March 5th, Mr. Lewis left Ms. Day's apartment; went to his brother's house, spent the night at his brother's house; came back on March 6th. Then, on March 7th, he went back to his brother's house; was gone for a while, in and out, as I said. Then he went back on March 10th, and on March the 11th this child passed.

(Tr. 381.) Lewis argues that counsel's failure to present the promised evidence is "further indicia of counsel's failure to provide competent representation." (Appellant's brief at 35.)

{¶ 61} Evidence of an alibi might have changed the outcome of the trial for Lewis, depending on the witness's credibility and the circumstances of the alibi. However, just because counsel promised to provide an alibi witness does not mean exculpatory evidence actually existed. A broken promise is far less prejudicial than the failure to provide exculpatory evidence. There is no indication that counsel failed to present exculpatory evidence; only that they promised but failed to present an alibi witness. We cannot say that the broken promise, by itself, prejudiced the outcome of the trial.

{¶ 62} The second assignment of error is overruled.

C. Failure to Sever Cases

{¶ 63} In the third assignment of error, Lewis argues the trial court erred in failing to sever his case from Sierra's case. He contends his right to fair trial was prejudiced by the joinder of the two cases because it impaired his ability to call certain witnesses.

{¶ 64} We review the trial court's ruling on joinder for an abuse of discretion. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 58; *State v. Webster*, 8th Dist. Cuyahoga No. 102833, 2016-Ohio-2624, ¶ 42. The defendant "'bears the burden of proving prejudice and of proving that the trial court

abused its discretion in denying severance.'" *Dean* at ¶ 60, quoting *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 29.

{¶ 65} Under Crim.R. 8(A), two or more offenses may be charged together if the offenses "are of the same or similar character, * * * 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." Indeed, "'[t]he law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged are of the same or similar character.'" *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990), quoting Crim.R. 8. *See also Dean* at ¶ 59.

{¶ 66} If it appears, however, that a defendant would be prejudiced by the joinder, a trial court may grant a severance pursuant to Crim.R. 14. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 94. To prevail on a claim that the trial court erred in denying a motion for severance, the defendant must affirmatively demonstrate that (1) his rights were prejudiced, (2) at the time of the motion to sever, he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) given the information provided to the court, it abused its discretion in refusing to separate the charges for trial. *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992), citing *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981), syllabus.

{¶ 67} The state may rebut a defendant's claim of prejudicial joinder in two ways. First, a defendant is not prejudiced by joinder if the evidence would have

come in as other acts evidence under Evid.R. 404(B). *Lott* at 163. Under the second method, the state is not required to meet the stricter "other acts" admissibility test, but is simply required to show that evidence of each crime joined at trial is simple and direct. *Id.*, citing *State v. Roberts*, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980). Thus, a defendant is not prejudiced by joinder where the joined offenses are "'simple and direct, so that a jury is capable of segregating the proof required for each offense.'" *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377, ¶ 39, quoting *State v. Fletcher*, 2d Dist. Clark No. 2003-CA-62, 2004-Ohio-4517, ¶ 41. *See also Lott* at 163.

{¶ 68} Lewis argues his case should have been severed from Sierra's because the evidence of prior acts of abuse, which was admitted at trial, was admissible against Sierra but was not admissible against him. Although it is true that the court never instructed the jury to apply the evidence only against Sierra, the evidence clearly showed that the prior acts of abuse occurred before Lewis was involved in A.D.'s life. It was apparent to the jury that the evidence of prior acts of abuse applied only to Sierra. Indeed, much of evidence contained statements from A.D. telling child-care workers that "Mommy hurt me." Therefore, because this evidence applied only to Sierra's case, it could not have affected the outcome of Lewis's case.

{¶ 69} Lewis nevertheless contends he was prejudiced by the court's failure to sever the cases because he was barred from eliciting testimony from a witness, who would have recounted statements made by Sierra. However, out-of-court statements offered to prove the truth of the matter asserted are generally

inadmissible because they are hearsay. Evid.R. 801(C). Moreover, there is no way to determine if Lewis was prejudiced by the inability to call the witness since Lewis has not identified what the out-of-court statements would have been.

{¶ 70} Finally, Lewis argues he was prejudiced by the joint trial because Sierra's lawyers presented evidence demonstrating that she was intellectually disabled. He claims evidence of her intellectual disability caused the jury to place a greater responsibility on him for A.D.'s death. However, there was evidence that despite Sierra's learning disabilities, she was capable of entering into a lease agreement by herself, managed to maintain employment, and paid her own bills. Moreover, as previously stated, there was evidence that both Sierra and Lewis were equally responsible for causing A.D.'s death regardless of Sierra's intellectual limitations. Therefore, Lewis fails to demonstrate that he was unfairly prejudiced by court's denial of his motion to sever his case from Sierra's.

{¶ 71} The third assignment of error is overruled.

{¶ 72} Judgment affirmed in part and reversed in part. We remand the case to the trial court to vacate Lewis's child endangering convictions under R.C. 2919.22(B)(1) and (B)(2).

It is ordered that appellant and appellee share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

remanded to the trial court to vacate Lewis's child endangering convictions, and for execution of sentence.

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

EILEEN T. GALLAGHER, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
MICHELLE J. SHEEHAN, J., CONCUR