No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA MOUNTS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether violations of the United States Constitution occur where defense experts are not allowed to respond to criticism of their expert reports and where prosecutors in closing arguments engage in personal attacks on defense experts, bolster the opinions of prosecution experts based on non-testifying experts supposedly agreeing with the prosecution experts, and accuse the defense experts of being like Nazis.

LIST OF PARTIES

Petitioner, Joshua Mounts, was the defendant in the Ohio state trial court and the appellant in the Ohio First Appellate District Court of Appeals and Ohio Supreme Court. Respondent the State of Ohio, was the plaintiff in the Ohio state trial court and the appellee in the Ohio First Appellate District Court of Appeals and Ohio Supreme Court.

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Joshua Mounts respectfully timely petitions this Court for a writ of certiorari to review the Ohio Supreme Court's judgment.

OPINIONS BELOW

The Ohio First District Court of Appeals decision affirming Mr. Mounts' conviction, *State v. Mounts*, 2023-Ohio-3861, 227 N.E.3d 357 (Ct. App.) is included at Appendix A. The trial court's judgment entry is included at Appendix B. The Ohio Supreme Court order denying jurisdiction, *State v. Mounts*, 2024-Ohio-1228, 173 Ohio St. 3d 1445, 230 N.E.3d 1214 is included in Appendix C,

STATEMENT OF JURISDICTION

The Court of Common Pleas of Hamilton County, Ohio, had original appellate jurisdiction over the accusation that Joshua Mounts had killed his infant son and thus violated prohibitions on Aggravated Murder, O.R.C. § 2903.01(C) and Murder, O.R.C. § 2903.02(B). The jury acquitted Mounts on the charge of Aggravated Murder but convicted him of Murder. On October 25, 2023, a panel of the Court of Appeals for the First Appellate District affirmed his conviction, finding that the manifest weight of the evidence supported the conviction, that the trial court correctly held that defense experts could not respond at trial to a prosecution witness's supplemental report disclosed shortly before trial because they did not themselves submit rebuttal supplemental reports and that prosecutorial misconduct of stating that non-testifying witnesses agreed with the state's witnesses did not plainly or prejudicially impact the defendant's substantial rights. The Ohio Supreme Court denied jurisdiction on April 2, 2024. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall be … deprived of life, liberty, or property, without due process of law…". The Compulsory Process and Confrontation

Clauses of the Sixth Amendment guarantee a defendant the right to call witnesses "in his favor" and to be confronted with the witnesses against him. U.S. Const. amend V and VI.

STATEMENT OF THE CASE

In *United States v. Robinson*, 485 U.S. 25 (1988), this Court held that in determining a defendant's guilt or innocence, "it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *Id.* at 32. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court clarified the distinction between the Compulsory Process and Confrontation Clauses of the Sixth Amendment – that Compulsory Process is violated where a defendant is unable to call witnesses in his favor and the Confrontation Clause is violated where a defendant is not confronted with the witnesses against him. The instant case presents violations of Mr. Mounts' rights to Due Process, Compulsory Process, and Confrontation.

FACTS

On January 25, 2018, Joshua Mounts discovered that his baby Jayce Fitzhugh was not breathing. Mounts' girlfriend Kayla Fitzhugh and their baby did not live with Mounts, but the baby stayed overnight that night for the first time. Kayla Fitzhugh had been dating Joshua Mounts for almost three years. Mounts lived with his parents and brother; Kayla lived with her grandparents, and she was reminded after 10 pm on January 24 that she had an appointment the following day, so she left the baby with Mounts. Jayce died, and Mounts was ultimately convicted of Murder.

Jayce Fitzhugh was born early and small, spending three weeks in Neonatal Intensive Care. He was unable to crawl but could roll over and slept on his back. Shortly after Kayla was allowed to take him home he had stopped breathing. She denied ever dropping him or that he had fallen; she denied Jayce had any prior change in temperament.

Officer Darian Bookman testified that pursuant to department policy he had responded to the Fire/EMS run to the Mounts' residence, that Mounts had been interviewed, was compliant, and showed him the bedroom; he noticed nothing unusual and had no reason to believe that a crime had been committed. No one there said Jayce fell off the bed or been dropped. Fire Clerk Ben Casteel testified; whether he testified as a lay or expert witness is unclear. Casteel testified over defense objection to his opinion that in a normal case "parents want to be with their children" but Mounts, "seemed very arms-length" and his statement that he was not the custodial parent was among comments causing Casteel to conclude Mounts was "very, just, cavalier."

Dr. Makaroff was tendered and recognized as an expert, even though she had not submitted an expert witness report. She identified the medical records and stated that if the baby's injuries were not acute, "what I would expect … the child wouldn't have been acting in his previous normal self" and that she would not expect him to be playing normally, laughing, or smiling, and that the "probability that he would be doing that after the time that he sustained the injury is low … very low." She said, "in the absence of a very significant, traumatic, accidental

history to the patient, that his findings were consistent with child physical abuse" where no one reported any accidental trauma, a fall, a drop, or anything falling on him.

Dorothy Dean, M.D., is a deputy coroner forensic pathologist. She testified that after her training she, "spent about five years in Franklin County doing this job as a deputy coroner. Then I went to Akron. I was there for about 12 years. And then in 2015, I came back to Cincinnati." Dr. Dean's C.V. was placed in evidence, though she was not questioned about it beyond pleasantries. Dr. Dean was never tendered as an expert but expressed opinions. Had she been subject to examination pursuant to *Daubert* it might have come out that her judgment has been found to be suspect. While in Columbus court of appeals in *State v. McDonald*, 10th Dist. Franklin No. 00AP-1120, 2001 Ohio App. LEXIS 2067, at p. 9 (May 10, 2001), had held that the "coroner's testimony … was insufficient to prove that Shelton's death was the proximate result of appellant's actions." While Dean was working as a deputy coroner in Akron she mistook an accidental death for homicide. In *Taser Internatl., Inc. v. Chief Med. Exam'r*, 9th Dist. Summit No. 24233, 2009-Ohio-1519, ¶ 48, the Ninth District upheld the trial court's ruling that Dr. Dean had incorrectly found homicide. The rejection of her opinions in those cases was never explored at Mr. Mounts' trial.

Dean's report in the present case stated the cause of death was "Traumatic brain injury with a skull fracture due to blunt impacts to the head", declared the manner of death to be a homicide – "Assaulted by another person(s); struck by or

against a fixed object(s).” Dr. Dean reported that Jayce was in less than the 5th percentile by length and the 10-25th percentile of weight. Her postmortem external examination was that Jayce had “1. On the right side of the forehead is an approximately 1/4-inch purple contusion associated with a subgaleal hemorrhage”, a 2-1/2 inch minimally displaced fracture which was “completely separable with no evidence of healing” and a 1-1/2 x 1 inch subgaleal hemorrhage. Dr. Dean’s report did not address the issues specifically but in closing the prosecutor argued that her opinions were superior to those of other experts because she did the autopsy, reviewed more documents, and worked from original slides.

Detective Brad Hondorf, the lead detective, never went to Mounts’ home, but he telephoned Kayla and Mounts; Mounts came to the station to be interviewed. Mounts seemed very calm, in his opinion. Denying a defense motion to strike, Hondorf testified Mounts never said anything to him about any accident occurring, only that Jayce would not take a bottle and was fussy. Mounts told him that he checked on the baby and he was not breathing, so Mounts rolled him over, called 911 and administered CPR. Mounts never said that the baby fell. Det. Hondorf said Ben Casteel testified consistently with his interview, that Mounts did not go to the hospital and communicated with Kayla through Facebook Messenger.

Det. Hondorf secured a warrant for those messages and presented a compilation of four pages of what he considered to be relevant. Over objection, Det. Hondorf testified that there was nothing to suggest that anyone other than Mounts “committed this offense.” Det. Hondorf testified on cross-examination he was

currently working Road Patrol, and this was the first homicide case on which he was "directly involved" though he had another almost simultaneously.

The Children's Hospital team meeting days after the baby died concluded the cause of death was still undetermined but Dr. Dean was convinced otherwise and thought the radiologist was unqualified. Mounts' father had told him that the baby exhibited a "deer-in-the-headlights" look but Hondorf did not tell that to Dr. Dean because Mounts' mother said that the baby seemed fine.

On redirect, Det. Hondorf testified that he did the best he could in the situation but that he did not understand much of what was said at the team meeting. On re-cross he admitted the doctors said, "We don't know what the cause of this was. This could be genetic, it could abuse, it could be accidental."

The prosecution rested and counsel made a Rule 29 motion, which the trial court denied. The trial court inquired of the prosecution whether there was "anything you want on the record before we start up with Dr. Wiens?" The prosecutor raised whether the defense experts intended to testify outside of the strict confines of their reports. Without hearing from defense counsel, the trial court held, "if I do think it's outside the body of the report, then we can address it at that time."

The defense called Dr. Andrea Wiens, D.O. She had originally been retained by and written her report for the prosecution. Wiens is one of fifty doctors in the country to hold board certifications in forensic pathology and neuropathology. Wiens was tendered and declared expert. She based her opinions on the recut slides as she

was not allowed to view the original slides. She reviewed Dean's report along with the other expert reports and rendered an opinion to the prosecutor. She told prosecutor that the death of Jayce Fitzhugh was undetermined cause and manner; because her opinion differed from Dr. Dean's she was not provided with the additional medical records she requested. She was told by the prosecutor that he:

> "was not sure if I would be allowed by the Judge to continue work on the case. He said he had to get permission from the Judge for me to continue working on the case. I sent him an email right before Christmas asking for an update, and I did not get a response."

In March 2021 she was notified by the prosecutor that, "he was not going to use me as a witness for the prosecution." Her opinion did not change from when she was hired by the prosecution to when she became a defense witness.

Defendant's Exhibit 6, Dr. Wien's report written when she was a prospective prosecution witness, concluded that, "the cause of death should be undetermined, and the manner of death should be undetermined." The "thing that caused this epidural was weeks ago; not days, not hours. It was weeks." The subdural hematoma she observed under microscope review of the brain may have resulted from birth trauma, inflicted trauma, or accidentally. Jayce may have suffered three to four Brief Resolved Unexplained Events (B.R.U.E.). B.R.U.E. are symptoms, rather than causes, of the type of bleeding found in Jayce's skull. Even though Jayce may have appeared normal, his B.R.U.E. episodes were "neurologically abnormal." Her review of the prosecution evidence showed hemorrhages in Jayce Fitzhugh's brain "associated with hypoxic ischemic encephalopathy", and that this is typical in cases of cardiac arrest; concluding that Mounts did not cause the death.

Dr. Wiens found both an organizing epidural on the outside of the dura on the underside of the skull and a chronic subdural underneath the dura – "So he has both; epidural and subdural." The brain injury occurred, "several weeks to months" before the death and she discussed the healing, not acute, linear right parietal skull fracture. In her opinion Dr. Dean was incorrect. Dr. Wiens was cut off by a sustained prosecution objection. Defense counsel proffered that Dr. Wiens was going to testify that the slides being recuts would not change her conclusions or opinions. Limited by the trial courts' instruction, Dr. Wiens testified that her examination of the recut slides demonstrated that, "There is a healing fracture" and explained in detail that this had not occurred on the night Mounts was babysitting Jayce but was at least two weeks old. Dean's report did not address that issue; the hemorrhage in the area of the fracture had a yellow/tan discoloration indicative of healing for at least two weeks. Wiens explained that the subdural membranes demonstrated hemorrhage "weeks ago" with "scar tissue that has been developing … several weeks" and concluding that the cause of death is "undetermined" as "his fracture is in a location that is typically not inflicted injury."

On cross-examination Dr. Wiens admitted she had not attended the autopsy. She had been hired to review the case by the prosecutor in October 2020, after the autopsy, and provided by the prosecutor with some medical records; she spoke with the prosecutor and Dean in October 2020 but had not spoken with Dean since then. She concluded that the hemorrhage showed reabsorption.

On redirect, Dr. Wiens testified that the positioning or rotation of the

fracture does not change her opinion. Dr. Dean and the prosecutor had called her shortly after she submitted her report; Dean did not speak. Wiens reiterated that what she sees on the slides is a healing fracture which was at least two weeks old.

Dr. Satish Chundru, a private forensic pathologist who mostly testifies on behalf of the government, was tendered and declared to be expert. The trial court sustained an objection to his introductory statements. He testified that after his initial review he was "shocked, and so I requested to get slides." He testified that hypoxic ischemic encephalopathy (H.I.E.) "is not an injury," found, "no bruising to the brain" and that the hemorrhages were "a result of hypoxic ischemic encephalopathy and not due to trauma"; H.I.E. results from resuscitation rather than original injury and it is "not an indication of trauma."

Dr. Chundru's opinion was that what Dr. Dean had testified were four small contusions or bruises were in fact lividity, one of a "lot of artifacts of hospitalization," noting that "multiple physicians on multiple days, including the Child Abuse Team, described zero injuries to the skin." Dean's finding of subgaleal hemorrhages meant that, "it's in the healing process." Subarachnoid hemorrhages, those "between the brain tissue itself and a thin translucent layer that covers the brain" is "very commonly found" in H.I.E. brains. Dean's finding of myoclonic seizures was "after the fact." The seizure did not cause death but resulted from the resuscitation. Dr. Dean's finding of profound acidosis was another result of the resuscitation. Dr. Chundru's opinion was that, contrary to Dr. Dean's finding, the hypoxic ischemic brain condition was "absolutely not" what cause Jayce Fitzhugh's

death. As to Dr. Dean's finding that there was a "fracture of the skull, minimally displaced," it "was unimaginable. It's an obvious chronic subdural hematoma * * * A chronic subdural means it is weeks to months old. It is not an acute subdural". Addressing the photographs, he testified that it "is an old subdural." The coloration was indicative of healing. The red areas, he testified, are areas that "either have not healed because a subdural just doesn't all heal together exactly at the same rate" and "some, if not all, of this is just a subdural that occurred weeks or months ago that's still in the healing process." Chundru did a microscopic evaluation, testifying that the microscopic slide of the subdural showed acrophages which were clearly not three to four days old but instead are well-healed and thus are weeks to months old. Another of Dean's photos showed "healing subdural" but was improperly marked by Dean so he was uncertain of its location.

Examining the skull fracture, about which Dr. Dean had determined was an acute fracture, Dr. Chundru, who has seen hundreds of skull fractures, testified that, "This does not even look like an acute fracture, and so – just grossly" but that, "when you actually zoom in and look in, you can actually see some gray tissue, which indicates healing." Dr. Chundru testified that, "an acute fracture doesn't look anything like this." He could not give an estimate of exactly when that injury had occurred, "just that its old … * * * Absolutely not within the three- or four-days' time." The court sustained the prosecution objection to elucidation of his opinion, but Dr. Chundru described, "an epidural that was completely missed on autopsy, not even described." The epidural was, "touching and intermixed with this fracture

site." As discussed in his expert report (Def. Ex. 8), Chundru testified that Dr. Dean had missed a healing subgaleal hemorrhage inconsistent with a recent injury. He testified that, "The epidural hemorrhage was not documented at all" and described it as, "something old" based on its "yellow/orange discoloration."

Based on a reasonable degree of medical certainty Dr. Chundru's opinion was that the death was "undetermined cause and manner of death." He testified that, "The investigation wasn't done properly, based mostly because Dr. Dean, you know, said, Oh, this must be a homicide and it happened immediately when these injuries occurred. Well, these injuries occurred months or weeks ago. And its not uncommon for infants to have a fractured skull and subdurals and they survive for periods of time." He said as to the injuries being at least weeks old that, "that's not even in doubt here, and that's the whole big problem with this case."

Under cross-examination Dr. Chundru was asked about a statement he made that Dr. Dean had a good reputation. The objection to his answer that he was bothered by her report and showed it to another forensic pathologist who, "agreed with me" was sustained. He stated, "Doctors cannot diagnose child abuse simply from clinical findings" or did so, "based on statistics and false research." Overruling the defense objection to Dr. Chundru being cut off from explaining, the trial court held that he could explain on redirect examination. He had previously said that "there is a small subset of cases where pediatricians and forensic pathologists go too far." His report was dated before Dr. Guajardo's and Dr. Wiens'. Dr. Chundru was not present at the autopsy and did not speak with the police officers or prosecutor.

He relied upon Dr. Dean or an assistant to have made the photographs or slides he examined. Following a long discussion of measurement under magnification, Chundru clarified on redirect that a straight ruler is inaccurate because it was measuring a rounded skull. Dr. Chundru reiterated that the bruises came from administration of the EEG in the hospital. He disagreed with the prosecutor that the bruises could have resulted from Mr. Mounts "holding a child tightly," resulting in an instruction from the court to answer the question directly and a speech by the prosecutor about editorializing. Dr. Chundru testified that H.I.E. results from resuscitation; Dr. Dean confused H.I.E. with cortical contusions from head trauma, that intracranial bleeding is not an indicator of homicide, and that if Dean testified otherwise she was mistaken.

Dr. Andrew Guajardo, a pathologist with board certifications in forensic pathology and neuropathology, was declared an expert. Dr. Guajardo concluded that Jayce Fitzhugh had a "single skull fracture on the back of the right side of the head, which showed evidence of healing, suggesting that it was old" along with bleeding in the epidural space underneath the fracture, a subdural hemorrhage towards the front of the brain which also had extensive evidence of healing, and H.I.E. resulting from resuscitation. He estimated the age of the injury as being between three weeks and more than three months. Microscopic examination confirmed that estimate. Dr. Guajardo's conclusion was interrupted by a sustained objection as being outside of the four corners of his report, but he was allowed to state his opinion with a reasonable degree of scientific certainty that the injuries were at least three weeks

old, the skull fracture was older and the epidural hemorrhage was also older, and that the baby could have survived for a long time with these injuries.

On cross-examination, Dr. Guajardo testified that he reviewed the 1700 pages of evidence but did not have access to the radiology images. He summarized his findings that there was a subdural hemorrhage with organization on both sides – the epidural hemorrhage on the right and a subdural fracture on both sides, and that the skull fracture to be lethal would have to present with "more extensive injury to the brain itself, and those would be tears of the brain tissue, bleeding of the brain itself, bleeding, excessive bleeding on the surface of the brain causing compression of the brain leading to potential herniation, or pinching off, of the brain tissue."

Joshua Mounts' mother Theresa Mounts testified that she was present in the home that night. Jayce acted oddly, looking at an overhead light rather than at her or himself in a mirror but that he had, as her husband called it, "a blank or a deer-in-the-headlight kind of stare." As a small ranch house, "you can hear through the walls." On cross-examination Mrs. Mounts agreed that she did not see Jayce very often but disagreed that she had no way of knowing whether, "that was odd or off behavior for Jayce" because she "had seen him prior, and he had reacted differently prior." She had mentioned this odd behavior to Kayla Fitzhugh but admitted she had not mentioned it to the police. Asked about particular phrasing she had used in the interview she said several times that she did not remember it exactly like that. Rather than refreshing her recollection by showing her the transcript of her prior

conversation, which the prosecutor explicitly referenced speaking to defense counsel, the trial court played the audio recording of Mrs. Mounts statement to the jury and provided them transcripts of the recording. On redirect examination, the trial court again sustained the prosecutor's objection.

Joshua Mounts made a knowing, intelligent, and voluntary decision not to testify. The defense moved its exhibits into evidence and rested.

In rebuttal the prosecution called Dr. Folkerth by video deposition, and the video was played. The transcript of the deposition was not admitted into evidence at the trial but was ultimately filed. Dr. Folkerth is a neuropathologist for the Medical Examiner of New York City; she is board certified but apparently not in anything relevant to this case. When asked at her deposition whether she had ever been recognized by a court as an expert, Dr. Folkerth had testified, "As an expert in neuropathy, I haven't had specify forensic training. That's just based on the experience. I was qualified as a neuropathologist" (*sic)*. Folkerth disagreed with Drs. Wiens, Guajardo, and Chundru; her opinion was that there was both an old and new injury; her report stated that, "I believe there is an old subdural as well as a superimposed recent one." The video was played, and the state moved its exhibits into evidence.

The prosecution called Dr. Karen Looman, the Chief Deputy Coroner of Hamilton County, on rebuttal. She is board certified in basic anatomic pathology and forensic pathology and was tendered and noted as an expert. She had been asked by the prosecutor to review the reports of all the experts. She worked from

the reports and did not speak with anyone to avoid bias. In Looman's opinion the radiology reports not mentioning any healing fibrous tissue also meant that there was none, meaning that it was an acute fracture.

Dr. Dean was recalled and testified that the opinions of Drs. Wiens, Chundru, and Guajardo were incorrect and that she was confident in her opinions being correct. Though she had their reports before her initial testimony, she now addressed what she said were errors in each, though she said that she was not trying to "sandbag" the defense. Dr. Dean testified that she had seen evidence of an old injury and that she had disclosed that in her report, but she saw fresh blood, and the older blood had nothing to do with his hospitalization. She testified that there was a telephone call between herself, the prosecutor, and Dr. Wiens at which the prosecutor asked Dr. Wiens about looking at Exhibit 6-A, that there was, "Silence. Nothing. And then sometime later she said something like, 'Well' –." She disagreed with Dr. Chundru's report. She apparently for the first time testified that the baby died from a "shearing injury of the brain," and that just because Jayce had old injuries did not mean that he did not have new ones caused by Mounts.

Dr. Dean said that the other doctors did not address swelling in the scalp, though Dr. Chundru had written about it and Dr. Wiens mentioned the scalp injuries repeatedly. Dr. Dean testified Dr. Wiens missed the acute fracture and misinterpreted a suture as a healing fracture, though Dr. Wiens had specifically found H.I.E. and the healing right parietal skull fracture, "associated organizing epidural hemorrhage and chronic subdural hematoma, and cutaneous contusions of

the forehead and back." The trial court overruled the defense objection to her speculating as to what Dr. Wiens' report was "implying." She found no evidence of epidural hemorrhage. Asked if she would stake her reputation, her job, and her family on her opinion in this matter, the answer to all being that she would, "of course."

At the conclusion of the evidence defense counsel did not renew his Rule 29 motion; instead he filed a written motion for acquittal and a new trial. The jury was excused for the day. Closing was held the following day. One prosecutor in closing set out what the state had proved:

1) Mounts struck the baby in the head and shook him to get him to sleep;

2) Common sense proved Mounts guilty;

3) When Kayla Fitzhugh left Jayce with Mounts he was fine;

4) Mounts' mother lied;

5) Mounts used drugs;

6) Mounts was not Jayce's regular caregiver;

7) Mounts told Det. Hondorf that the baby slept for 11 hours;

8) Mounts was alone with Jayce that night;

9) Mounts showed no concern, according to Ben Casteel;

10) Mounts did not go to see the baby for two days;

11) Jayce died;

12) Everyone at the hospital agreed that the baby had a skull fracture;

13) Dr. Dean concluded to a reasonable degree of scientific certainty that

Jayce died due to homicide by blunt force trauma;

a. Her conclusion is best because she did the autopsy;

b. The skull was a "complete break through and through" and "the pieces fell apart;";

c. Other doctors looked at pictures; Dr. Dean looked at the body;

d. Dr. Dean documented multiple injuries;

14) Dr. Dean's boss testified that she is meticulous;

a. Dr. Chundru admitted Dean is "one of the good ones;"

b. Dr. Folkerth agrees with Dean;

c. Dr. Looman agrees with Dean;

15) The defense experts are part of a team "working together for a common goal":

a. The defense experts met over Zoom or on conference calls repeatedly;

b. The defense experts are untrustworthy because you cannot tell whether their testimony, "is their actual opinion; their actual independent, verified opinions, things that they believe themselves, or things they have gotten together to try and tell you together, to repeat to you collectively to try to sell something to you;"

c. The defense experts violated the judge's instruction not to talk with one another;

d. None of the defense experts, "identified the correct fracture site;"

e. They cannot trust Dr. Chundru's testimony as he is "just guessing;"

f. Dr. Chundru and Dr. Guajardo are making "guesses and assumptions;"

g. The defense experts are hearing hooves and concluding there are zebras;

h. The defense experts are like Nazis in *Indiana Jones and the Raiders of The Lost Arc*;

i. The jury should "question everything else about the conclusions they read in their reports;"

j. The defense experts are relating "older injuries to the fracture;"

k. The defense experts have made an "obvious mistake, and it leads to conclusions that are erroneous and it ignores the truth in this case that Jayce Fitzhugh was killed by a skull fracture, a recent acute skull fracture;"

16) Breaking an infant's skull requires great force:

a. The results of great force are instantaneous;

b. There would be noticeable changes in a child subjected to this force;

c. Circumstantial evidence of great force demonstrates purpose to kill;

17) Defendant's experts did not call Dr. Dean:

a. If so "we would have a different conversation;"

b. None bothered to "express their concerns;"

c. Dr. Chundru did not call her;

d. This made the difference between looking for horses or zebras;

18) Defense counsel will say bad things about Dr. Dean; and

19) If the defense experts would have called Dean they would have concluded otherwise.

In his closing, defense counsel reminded the jury that:

1) Jayce was colicky and when ill sleeps through the night;

2) Jayce had been up late;

3) Jayce was affected by maternal use of opiates;

4) Kayla Fitzhugh supposedly went with Mounts to get drugs, but did not tell that to the investigators until seven months into the investigation;

5) Off. Bookman corroborated Mounts' statements and that Mounts' bedroom appeared normal;

6) Ben Casteel arrived well after these events and such events are high stress;

7) Jayce had no cuts or bruising;

8) Det. Hondorf did not go to the scene or interview Kayla's grandparents, with whom Kayla and Jayce lived;

9) Det. Hondorf based his interrogation of Mounts on Dr. Dean's preliminary findings;

10) Hondorf considered only Mounts as a suspect;

11) Dean's report was written three and a half months after Jayce's death;

12) The prosecutor's allegation that the defense experts conspired is

disproven by the dates of their reports and the facts;

13) The prosecutor and Dr. Dean called Dr. Wiens, who was originally retained by the prosecution, and did not follow up;

14) The defense experts acted independently – though they spoke on the phone they never met;

15) Dr. Looman supported her subordinate;

16) Dr. Folkerth based her opinion on a telephone call with Dr. Dean and five photographs;

17) Dr. Dean jumped to a conclusion;

18) Dr. Looman is unfamiliar with the science of microscopic examination;

19) The case revolves around the microscopic examination of the subdural hemorrhaging, fracture versus suture, and epidural hemorrhage:

a. Every doctor except Dr. Dean saw an epidural hemorrhage;

b. Epidural hemorrhages come from fractures and tumors;

c. Dr. Looman said the epidural hemorrhage was organizing;

d. The subdural hemorrhage was old and could date from birth;

e. Epidural hemorrhage came from the diastatic fracture;

f. Dr. Dean rejected all the other experts' opinions;

g. The fracture was not acute, but healing and organizing;

20) If six experts cannot agree, the jury cannot determine what happened.

In rebuttal, the second prosecutor argued/testified that:

1) The defense attorney got some facts wrong in cross-examination;

2) The prosecution doctors are more credible than the defense doctors, who have forensics training [“"Forensic' means you're trained in the law, trained for court”] and thus are “professional testifiers”;

3) He did not cut out Dr. Wiens not because he did not like her opinion but because she did not know the cause of Jayce Fitzhugh’s death and relied on recut slides;

4) Det. Hondorf did not go to Mounts’ home because it might have been cleaned up;

5) He did not call Dr. Wiens because she said, “I don’t know”;

6) Defense experts did not call Dr. Dean because “We’re not on her team. We’re on his team”;

7) Dr. Wiens overbilled and did not look at all the medical records or go to the coroner’s lab;

8) Dr. Guajardo said the slide was of a suture, not a fracture but Dr. Wiens said there was intracerebral hemorrhage;

9) Dr. Guajardo said that it is difficult to tell between a suture and fracture microscopically;

10) Dr. Chundru was guessing;

11) Once Dr. Chundru met with his teammates his opinions changed and he was wordy;

12) Dr. Chundru is in business and wanted publicity from reporters of the Washington Post who had been in the courtroom – objection overruled;

13) Dr. Chundru was getting paid for his involvement and had to produce;

14) Defense counsel's claims that Kayla Fitzhugh and Ben Casteel were lying is contradicted by Theresa's statement to Det. Hondorf;

15) Dr. Wiens did not call Dr. Dean to ask questions;

16) The three state's experts all agree that there was child abuse;

17) Dr. Chundru attacked Dr. Dean but had trouble with his own report and did not call her;

18) The prosecutor represents everyone in the State, including the defendant, and his job is to do justice;

19) Defense counsel did not have the same duty;

20) "Team Mounts"' doctors want to distract the jury from the evidence;

21) Dr. Dean included everything which mattered in her report;

22) Dr. Dean knows what she is talking about, has been doing her job for 35 years, is not in the business of making extra money by helping Mounts, and is not on anyone's team;

23) The defense experts met together and Dr. Chundru is friends with Dr. Guajardo;

24) The prosecution doctors did not consult one another or read their reports;

25) Dr. Guajardo was guessing;

26) Other doctors (Dr. Lauren Jacobs, Amy Holden, Meredith Drake, Hee Kyung, Bernadette Koch, Marguerite Care, Julie Guerin, Maya Linn Dewan) came to the same conclusion that Jayce was murdered but he did not call

them because that would make the trial too long;

27) All those doctors treated Jayce as a "victim of child abuse and blunt force trauma, recent injuries";

28) Dr. Makaroff testified that the blood was fresh;

29) Dr. Pratima Shanbhag works with Dr. Makaroff and agrees, and all "these doctors are licensed to practice medicine and actively practice in the State of Ohio" unlike the defense experts who are "outside doctors who can come in here for money";

30) All the state's doctors treated Jayce "as if he was a victim of child abuse and blunt force trauma, recent injuries";

31) Not in evidence that Mounts performed CPR;

32) Mounts is a liar;

33) Mounts said he watched Jayce from midnight to 9 am while he was on drugs;

34) Colicky kids don't sleep nine, ten, or eleven hours;

35) Mounts was overwhelmed with a crying baby and hit him at least four times;

36) Murder charge is supported by Mounts hitting the baby "so hard on the side of his skull that you caused a linear fracture to the parietal bone";

37) Theresa Mounts lied about Jayce having a deer-in-the-headlights look;

38) Mounts took a nap after Fitzhugh told him that he should go to the hospital;

39) Mounts lied when he said, "Those lousy cops won't give me a ride." The jury was instructed and broke for lunch. They deliberated and found Joshua Mounts not guilty of aggravated murder but guilty of Murder. Mounts timely moved for a new trial pursuant to Crim.R. 33 based on irregularities in rulings, failure to conduct a fair trial, and insufficiency of the evidence. He also moved for acquittal pursuant to Ohio Crim.R. 29(C) based on a failure of proof. The motions were argued on November 16, 2021. The prosecutor argued that Mounts had a fair trial. The trial court overruled the motions and proceeded to sentencing.

Mounts was sentenced to an indefinite 15 years to life sentence. The fine was remitted but court costs imposed, notice of DNA testing made, and right to appeal and appointed counsel notified. At defense counsel's request the court found Mr. Mounts to be entitled to 1,328 days jail time credit. Appeal was timely filed, and the case submitted to the Ohio First District Court of Appeals.

The Court of Appeals held that the trial court did not err in admitting and controlling the expert's opinions, that the appellant's argument as to the cross-examination of two of the experts was too brief and therefore was abandoned, that the failure of the prosecution to qualify its experts did not constitute reversible error, and that the comments of the prosecutors, while egregious, did not constitute reversible error as there was sufficient evidence of guilt to support the verdict.

By affirming the conviction of Joshua Mounts despite many Due Process problems with the trial and creating new law on abandonment of legal arguments, the Court of Appeals for the First Appellate District caused problems for future

trials and appeals, made clear that prosecutorial misconduct is approved of in Hamilton County, and encouraged misuse of expert and lay witnesses.

Despite these problems, the Ohio Supreme Court did not accept jurisdiction. By granting certiorari, this Court can resolve Due Process problems:

1. Whether expert witnesses should be unable to respond to attacks on their reports based on another expert's report issued immediately before trial and testimony at trial, effectively meaning that the last expert to issue a report goes uncontradicted.

2. Whether prosecutorial misconduct is tacitly approved by being condemned without consequences so that a prosecutor is allowed to say anything at all, even things which have been held to be improper in prior cases, such as that non-testifying witnesses agreed with the prosecution case and that the defense experts should not be trusted because they were like Nazis and were playing to media reporters to secure a personal benefit.

These are issues of national importance because the Ohio courts created new law as to expert witnesses on which there was no controlling authority from this Court or the Ohio Supreme Court and encourage prosecutorial misconduct. In *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221 (2012), this Court held that an expert may base an opinion on facts that are "made known to the expert at or before the hearing," but did not address a prohibition imposed by a State on an expert testifying outside of the expert's report about points raised by another expert.

Future courts can point to the Ohio common law as now providing a basis to condone attacks on defense experts by comparing them to Nazis digging in the wrong place, asserting bias based on irrelevancies (that a reporter is in the courtroom), and arguing that specified non-testifying witnesses would support their case but that it would be too time-consuming to call them. The decision encourages a new wrinkle in the battle of the experts – last minute supplementation which the other side is either not allowed to contradict, or which would delay the trial to issue an amended report to refute. Finally, the Ohio First District decision establishes a new and consequential standard for appellate practice by holding arguments abandoned; the policy implications of its decisions impact cases throughout the nation.

REASONS FOR GRANTING CERTIORARI

I. STATE TRIAL COURTS VIOLATE THE CONSTITUTIONAL DUE PROCESS RIGHT OF A CRIMINAL DEFENDANT TO CONFRONT THE EVIDENCE AGAINST HIM WHEN THEY ALLOW PERSONAL ATTACKS ON EXPERTS AND PROHIBIT EXPERT WITNESSES FROM RESPONDING TO ATTACKS ON THEIR OPINIONS BASED ON ANOTHER EXPERT'S REPORT ISSUED IMMEDIATELY BEFORE TRIAL

The Sixth Amendment's right of accused to confront witnesses against him is a fundamental right essential to fair trial and is obligatory on states by the Due Process clause of the Fourteenth Amendment. The Confrontation Clause of the Sixth Amendment is thus enforceable against states under Fourteenth Amendment according to same standards which protect right to confrontation against federal encroachment. *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, 1965 U.S. LEXIS 1481 (1965).

The state courts need guidance on Due Process considerations when expert witnesses are attacked or are asked to respond to criticism of their reports based on another expert's report issued immediately before trial. The Ohio decisions here effectively mean that they consider it fair to make personal attacks on experts based on irrelevancies, and that the last expert to issue a report goes uncontradicted, violating the Confrontation Clause. In *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221 (2012), this Court held that an expert may base an opinion

on facts that are "made known to the expert at or before the hearing," but did not address a prohibition imposed by a State on an expert testifying outside of the expert's report about points raised by another expert.

At trial during cross-examination of a defense expert who stated that he was waiving his fee in this matter, the prosecutor impeached him based on the presence in the courtroom of a media reporter, asking "Q. You're not worried about the guy that came all the way from Washington, D.C., *The Washington Post*, to cover this story and cover your testimony?" Dr. Chundru denied that he was waiving his bill for this case because of the reporter. During closing arguments, the prosecutor then argued with an overruled objection that, "You think he makes business by advertising and by having the newspaper like The Washington Post in here covering this story -- * * * writing an article about him coming to court and testifying, saving the day. Oh my gosh. He gave up his fee; that's how committed he is. You think he's not getting a benefit from being here?"

The Ohio Court of Appeals here held that the expert witness's opinion can properly be attacked on the basis that a media reporter is in the courtroom, holding that, "we do not conclude that but for these comments, the outcome of the trial would have been different. *See [State v.] West*, 168 Ohio St.3d 605, 2022-Ohio-1556, 200 N.E.3d 1048, at ¶ 22." On appeal, Petitioner here had argued that pursuant to the Ohio Supreme Court's decision in *State v. Boaston*, 2020-Ohio-1061, 160 Ohio St. 3d 46, 153 N.E.3d 44, this error affected the outcome and was thus prejudicial, quoting *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770,

123 L.Ed.2d 508 (1993).

The present case involved a battle of the experts in which the jury found the defendant not guilty of aggravated murder but guilty of murder based on the expert testimony of both sides, where the prosecution witnesses testified that the injuries to the baby must have immediately preceded his death and been intentional, and the defense experts testifying that the injuries were old and healing. Personal attacks on the experts therefore must be prohibited.

This case also presented the trial court prohibiting defense experts from defending their opinions from attacks based on subsequent opinions of other experts, in violation of the Confrontation Clause. In this case the initial expert witness report of Dr. Dorothy Dean was issued April 6, 2018. The opinion of Dr. Andrea Wiens, a witness retained by the prosecutor but ultimately used by the defendant, was issued November 20, 2020. The prosecution then secured the opinions of Dr. Karen Looman, with a report issued April 5, 2021, and Dr. Rebecca Folkerth, whose report was issued May 10, 2021. Dr. Kathi Makaroff testified for the prosecution but did not submit an expert report; no objection was made by defense counsel. Dr. Dean then submitted a "Rebuttal Report" on April 6, 2021 – it was not provided immediately to the defense but was given to defense counsel approximately 18 days before voir dire began on October 18, 2021.

In *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), the Ohio Supreme Court had held, applying the Confrontation Clause of the U.S. Constitution and in conformity with this Court's decision in *California v. Green*

(1970), 399 U.S. 149, 158, and *Ohio v. Roberts* (1980), 448 U.S. 56, 65, "an expert may not testify as to the expert's opinion of the veracity of the statements" (46 Ohio St.3d at 129). It noted the applicability of the Sixth Amendment to the Constitution protecting the right of a criminal defendant to confront the witnesses, citing this Court's decision in *Pointer v. Texas* (1965), 380 U.S. 400, 403, 406.

In *State v. Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061, 153 N.E.3d 44, the Ohio Supreme Court held that an expert's opinions must be set out in a written report, applying Ohio Crim.R. 16(K), which provides in pertinent part: "An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion…." The question presented to the Ohio Supreme Court, though it declined to exercise its jurisdiction, was whether every word spoken by an expert need be included in the report, or whether the expert can respond to criticisms of their expert opinions raised immediately before and at trial by another expert.

In the instant case, prosecuting expert witness Dr. Dean was asked, "Was there a time when I asked you to draw on the original slide something that would indicate the difference between the suture and the fracture?" and "Could you tell me what that is?" Dr. Dean replied, "Yes; that's exactly what I did. I drew on the actual glass slide where the suture is and where the fracture end is." When defense expert Dr. Wiens was presented with the slide about which Dr. Dean had testified, Ex. 6-A, and asked about it, the prosecutor objected. A sidebar was held and the prosecutor's objection to Dr. Wiens explaining why Dr. Dean's drawing of

where the suture is and where the fracture was wrong, stating about Dr. Dean's report, "I gave it to him two or three weeks ago" was sustained. Approximately October 1, 2021, Dr. Dean's "Rebuttal Report" dated April 6, 2021, was given to the defense for a trial on which voir dire began on October 18, 2021. In addition to Dr. Wiens not being allowed to answer, defense expert Dr. Guajardo's conclusion was likewise interrupted by a sustained objection as being outside of the four corners of his report.

The Confrontation Clause and Due Process implications of the First District's holding is that in any case in which multiple experts testify one expert is going to have made the last report; by the holding in this case the opinion of whichever doctor submits the most recent report controls because the other experts are not allowed to refute it. Here Dr. Dean's Rebuttal Report, prepared six months before trial, was given to defense counsel approximately 18 days before voir dire began. Dr. Dean's initial report was dated April 6, 2018. As her "Rebuttal Report" dated April 6, 2021, was given to defense counsel approximately October 1, 2021, there was simply no time for the defense experts to have examined Dr. Dean's Rebuttal Report and issued their own supplemental reports. This Court should find that to be unacceptable for a trial court to instruct that an attorney "… confine yourself to looking at her information and asking her opinion about her information."

The Ohio Supreme Court in *State v. Bellamy*, 169 Ohio St.3d 366, 2022-Ohio-3698, 204 N.E.3d 542, held at ¶ 9 that, "No reliance on sources other than the

text of a rule is necessary to interpret the rule if the text's meaning is obvious." Ohio Crim.R. 16(K) provides that, "An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion…." It does not require that an expert could only testify within the strict confines or "four corners" of the expert's report, as interpreted here by the trial court and approved by the First District Court of Appeals. It certainly does not provide that an expert cannot respond to questions about the report – by the holding of the First District an expert can only repeat what is already in the report rather than answering a question about the report. This Court should provide Due Process guidance to the courts of the State of Ohio.

II. PROSECUTORIAL MISCONDUCT AND LIES TO THE JURY VIOLATE THE DUE PROCESS AND CONFRONTATION CLAUSE RIGHTS OF A CRIMINAL DEFENDANT.

The Sixth Amendment's right of accused to confront witnesses against him is a fundamental right essential to fair trial and is obligatory on states by the Due Process clause of the Fourteenth Amendment. The Confrontation Clause of the Sixth Amendment is thus enforceable against states under Fourteenth Amendment according to same standards which protect right to confrontation against federal encroachment. *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, 1965 U.S. LEXIS 1481 (1965).

The decision of the Ohio First District Court of Appeals by its terms condemned but provided no remedy in holding that the rebuttal prosecutor's statements in closing argument were not so prejudicial as to require a new trial, despite citing numerous inflammatory, false, and misleading statements. An extensive list of improper statements made by the prosecution without defense objection and without interruption by the trial court, was cited by the panel. The appellate panel here referred to seven:

1. Mis-defining "forensic" ("'Forensic' means you're trained in the law, trained for court");

2. Mis-defining forensic neuropathologists as "professional testifiers;"

3. Mis-quoting witnesses;

4. Asserting that experts are prejudiced by being on "teams" ("Team

Mounts'" doctors want to distract the jury from the evidence);

5. That a defense expert was getting a benefit by press coverage;

6. That non-testifying doctors agree with the prosecution case (that Dr. Lauren Jacobs, Amy Holden, Meredith Drake, Hee Kyung, Bernadette Koch, Marguerite Care, Julie Guerin, Maya Linn Dewan supposedly came to the same conclusion that the baby was murdered but he did not call them because that would make the trial too long); and

7. That defense experts were just in it for the money ("outside doctors who can come in here for money").

Not addressed by the panel opinion, Mounts had pointed out that the prosecutor made other improper statements in closing which clearly violate this Court's prohibition on striking foul blows:

8. That the doctors at the hospital agreed with the prosecution theory (that the doctors at the hospital treated the baby as a "victim of child abuse and blunt force trauma, recent injuries" and Dr. Pratima Shanbhag works with Dr. Makaroff and agrees);

9. That the defense experts are saying "things they have gotten together to try and tell you together, to repeat to you collectively to try to sell something to you"); and

10. The defense experts are, "like … Nazis are digging in the wrong spot."

The panel did not even mention the prosecutor telling the jury that they should not trust Dr. Wiens' testimony, though she had originally been

retained as a prosecution witness but disagreed with the prosecution theory and testified for the defense, because the prosecutor told the jury in minute detail in closing about a letter he had written Dr. Wiens which was not in evidence and about which no witness had testified.

The Ohio courts excuse and thus condone the prosecutor's inflammatory rhetoric which demonized and dehumanized Mr. Mounts and the defense experts. The prosecutor asserted without evidence that Mounts struck his baby and shook him to get him to sleep, attacked forensic physicians in general and the defense experts in particular as untrustworthy and with being like Nazis, accused them of teaming up for personal advantage, listed uncalled witnesses who would have agreed with the prosecution case, and stated that the prosecutor represents everyone in the State, including the defendant, and that his job is to do justice in a case where that clearly was not true.

In Mounts' *en banc* motion, he pointed out that the panel's decision was contrary to the Ohio First District decision in *State v. Hall*, 1st Dist. Hamilton Nos. C-170699, C-170700, 2019-Ohio-2985, where the First District in reversing the conviction cited three instances of prosecutorial misstatement, holding that similar misstatements were improper and prejudicial. But the Court of Appeals merely held that his motion did not satisfy the standard for reconsideration or *en banc* review.

In *Berger v. United States* (1935), 295 U.S. 78, 88, this Court disapproved exactly this type of prosecutorial misconduct, holding as to prosecutors that, "while

he may strike hard blows, he is not at liberty to strike foul ones." The Ohio courts here condoned prosecutorial misconduct in this case by condemning it in words but without consequence. Violation of defendants' Due Process rights demands redress, which this Court is uniquely able to provide.

CONCLUSION

Counsel respectfully submits that this Honorable Court should accept jurisdiction and hold that Mr. Mounts' right to a fair and honest trial was violated.

Respectfully submitted,

_____
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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-210608 TRIAL NO. B-1801231
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY*
JOSHUA MOUNTS,	:	
Defendant-Appellant.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed under App.R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App.R. 27.

To The Clerk:

Enter upon the Journal of the Court on 10/25/2023 per Order of the Court.

By: _____
Administrative Judge

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-210608 TRIAL NO. B-1801231
Plaintiff-Appellee,	:	*OPINION.*
vs.	:	
JOSHUA MOUNTS,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: October 25, 2023

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Keith Sauter*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Paul Croushore, for Defendant-Appellant.

KINSLEY, Judge.

{¶1} Defendant-appellant Joshua Mounts appeals from his conviction for felony murder in violation of R.C. 2903.02(B) in connection with the death of his seven-month-old son J.F. In four assignments of error, Mounts argues his conviction was against the manifest weight of the evidence, that the trial court erred in prohibiting his expert witnesses from testifying outside the scope of their expert reports while allowing the state's expert witnesses to do the same, that the state improperly presented a lay witness as an expert witness and allowed him to testify to evidence of Mounts's guilt, and that the prosecutor's comments during rebuttal argument amounted to prosecutorial misconduct. In his brief, Mounts pointed out on a number of occasions that he does not challenge whether he received constitutionally effective representation at his trial, expressly reserving that issue for another day.

{¶2} In reviewing the limited assignments of error Mounts raises on appeal, we hold that Mounts has not demonstrated that the jury lost its way and created a manifest miscarriage of justice. We further hold that Mounts waived any claim of error regarding the scope of expert testimony and that the state did not improperly present a lay witness as an expert witness. Lastly, we hold that, in most instances, Mounts waived all but plain error by failing to object to the prosecutor's comments during rebuttal argument and that under the plain-error doctrine, these comments did not amount to prosecutorial misconduct. In the one instance in which Mounts preserved an objection, we hold that the prosecutor's comments in closing argument were not improper. Accordingly, we overrule each of Mounts's assignments of error and affirm the judgment of the trial court.

Factual and Procedural Background

{¶3} On the early afternoon of January 25, 2018, Emergency Medical Services ("EMS") responded to a 911 call for J.F., who was found unresponsive after spending the night alone with Mounts. J.F. was admitted to Cincinnati Children's Hospital, where he was treated for a skull fracture. Because J.F.'s mother, Kayla Fitzugh, was told by J.F.'s care team that J.F. had no chance of recovery due to severe brain damage, she made the decision to take J.F. off of life support.

{¶4} The state subsequently charged Mounts with one count of aggravated murder in violation of R.C. 2903.01(C) and one count of felony murder in violation of R.C. 2903.02(B) in connection with the death of J.F.

{¶5} At trial, Kayla testified that she was the primary caretaker of J.F. and lived with her grandparents, while Mounts resided with his parents and visited J.F. weekly. Kayla testified that she had previously used unprescribed drugs, but had stopped using a week after she learned that she was pregnant with J.F. Kayla further testified that J.F. was born prematurely and had experienced at least one "Brief Unresolved Event" ("BRUE episode"), which had caused J.F. to stop breathing. She testified that J.F. had not had such an episode for months prior to becoming unresponsive in Mounts's care.

{¶6} She also testified that J.F. had been to the hospital six months prior to his death for two instances of a cold. Kayla testified that J.F. was a happy baby who had just started talking, had no recent change in temperament, and had never been dropped. She testified that J.F.'s usual routine included waking up between 8:00 and 9:00 a.m. and that he rarely slept past that time. She also testified that J.F. slept on his back and in his own crib.

{¶7} Kayla testified that the day before J.F. was found unresponsive, she and J.F. had spent the day with Mounts. She also testified that she saw Mounts purchase drugs that day. She did not notice anything unusual in J.F.'s behavior before she left him in Mounts's care. After realizing that she had an appointment scheduled for the following morning, she decided to leave J.F. in Mounts's care overnight. She testified that she departed the Mounts residence at approximately 11:00 p.m. that evening.

{¶8} Kayla testified that before her appointment the following morning, she received a text message from Theresa Mounts, Mounts's mother, stating, "911 emergency. Call me." Per Kayla's testimony, EMS informed her that they were present at the Mounts's residence and that J.F. was not breathing. She testified that she was told to go to Cincinnati Children's Hospital immediately, but when she arrived, Mounts was not there. As Kayla recounted, Mounts told her that he had begged EMS for a ride to the hospital but was refused assistance, because he did not have custody.

{¶9} Kalya testified that J.F. was taken to the Pediatric Intensive Care Unit and was treated for a fracture. She stated that Mounts denied that J.F. had fallen out of the bed when she asked. She testified that although Mounts appeared visibly upset when she saw him in the parking lot of the hospital, Mounts never came inside the hospital to see J.F.

{¶10} Officer Darian Bookman, a retired officer with the Sharonville Police Department, was a first responder at Mounts's residence. At trial, Bookman testified that when he arrived on the scene and asked Mounts what happened, Mounts told him that J.F. had slept through the night and woken up crying around 11:00 a.m. He further testified that Mounts told him that after getting up to make J.F. a bottle, he came back to find J.F. unresponsive. Bookman recounted his observations of

Mounts's bedroom, noting that the bottle Mounts referenced was still warm when he picked it up, that the bed had been pushed against a wall presumably to prevent J.F. from rolling off, and that he noticed a device commonly used for smoking marijuana.

{¶11} Benjamin Casteel, a clerk for the city of Sharonville and former firefighter and paramedic for the Springfield Township Fire Department, was also present at the scene. At trial, Casteel testified that at the time he arrived, J.F. was already being carried inside an ambulance. Casteel testified that Mounts was unsure of J.F.'s date of birth and medical history. Casteel also recalled that he found it unusual that Mounts was rather distant in discussing J.F.'s condition. He further testified that Mounts refused his offer to take a ride with EMS to the hospital.

{¶12} Dr. Kathi Makoroff, a doctor at Cincinnati Children's Hospital and an expert in child-abuse pediatrics, also testified at trial. She testified that J.F. had a skull fracture on the right parietal bone and subdural bleed on the left side of his head. She further testified that for a child of J.F.'s age, a fracture like this would not have happened spontaneously, and this was an indication of some kind of trauma.

{¶13} Dr. Dorothy Dean, a forensic pathologist at the Hamilton County Coroner's Office, performed J.F.'s autopsy. At trial, Dr. Dean testified that she found bruising on J.F.'s back that could have been caused by shaking, as the marks were consistent with fingerprints. She also testified that there was fresh blood near the fracture site and that there was no evidence of healing, which indicated that this was a very recent injury. Dr. Dean did not believe the BRUE episodes had anything to do with J.F.'s cause of death. Rather, she testified that J.F. had likely died from traumatic brain injury with a skull fracture due to blunt impacts to his head.

{¶14} Dr. Dean further testified that J.F.'s skull fell apart in her hands when she made cuts, which indicated that the bone had not yet formed the fibrous tissue that cells generate when healing a new fracture. She testified that when looking at the fracture microscopically, she saw a fresh fracture and did not see any evidence of healing. She also testified that she provided Mounts's expert witnesses with recuts of histology slides from J.F.'s autopsy, but that these experts could have come into the office to view the original slides in person. And she testified that if there had been any substantial difference between the original and recut slides, she would have informed Mounts's expert witnesses.

{¶15} Detective Brad Hondorf, a police officer for the city of Sharonville and the lead detective in the investigation surrounding J.F.'s death, also testified at trial. He testified that Officer Bookman gave him a report from Cincinnati Children's Hospital which noted suspected abuse in J.F.'s case. He also testified that he interviewed Mounts over the phone and Mounts told him that J.F. was not acting abnormally before he became unresponsive. But on cross-examination, Hondorf admitted that Mounts had told him that J.F. had a deer-in-headlight stare when he looked at light, but Hondorf did not relay this information to Dr. Dean during the course of his investigation. Hondorf further testified that he obtained a search warrant and subpoena for Kayla's and Mounts's Facebook messages, and in these messages, Mounts had relayed to Kayla that he was refused a ride to the hospital, because he did not have custody of J.F.

{¶16} At the close of the state's case, Mounts moved for an acquittal under Crim.R. 29. The trial court denied Mounts's motion.

{¶17} Dr. Andrea Wiens, Dr. Satish Chundru, and Dr. Andrew Guajardo testified as expert witnesses for Mounts. They were all in agreement that the blood near the fracture site they identified was not fresh and that there was evidence of healing, which indicated that J.F.'s injuries were not recent. Dr. Wiens also testified that with repeated BRUE episodes, there was a greater likelihood that there was an underlying etiology for J.F.'s condition that had not yet been found.

{¶18} Returning from a break in her testimony, Dr. Wiens attempted to testify as to the original histology slides that were not included in her expert report, but the state objected to her testifying to information outside of her expert report. During a sidebar to discuss the state's objection, Mounts's counsel agreed to move on from this line of questioning. After defense counsel essentially abandoned the attempt to have Dr. Wiens testify about the original histology slides, the trial court sustained the state's objection.

{¶19} Dr. Chundru testified that Dr. Dean may have mislabeled some slides and that he was shocked by her diagnosis of J.F. Dr. Guajardo testified that J.F.'s injuries were a minimum of three weeks or older.

{¶20} Theresa Mounts testified as a witness for Mounts. She testified that she noticed J.F. was not making eye contact with her on the date of the incident and that he had a blank stare. On cross-examination, Theresa testified that she did not relay this information to either the police officers investigating J.F.'s death or the physicians that were treating him. Mounts did not testify.

{¶21} On rebuttal, the state played the deposition of Dr. Rebecca Folkerth. Dr. Karen Looman, Chief Deputy Coroner at the Hamilton County Coroner's Office, also testified on rebuttal. She testified that she agreed with Dr. Dean's findings. And Dr.

Dean testified again on rebuttal, emphasizing that she was still confident in her findings.

{¶22} The jury found Mounts guilty of felony murder but acquitted Mounts of aggravated murder. Mounts filed a motion for a new trial and an acquittal, which the trial court denied. Mounts was sentenced to an aggregate sentence of 15 years to life imprisonment. He now appeals.

Manifest Weight

{¶23} When reviewing a challenge to the manifest weight of the evidence,[1] we sit as a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 388, 678 N.E.2d 541 (1997). Unlike our review of a sufficiency challenge, review of a manifest-weight challenge requires us to independently "review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice." *State v. Powell*, 1st Dist. Hamilton No. C-190508, 2020-Ohio-4283, ¶ 16, citing *Thompkins* at 397. "A manifest-weight argument * * * challenges the believability of the evidence." *State v. Carter*, 1st Dist. Hamilton No. C-220041, 2023-Ohio-18, ¶ 12.

{¶24} However, we will reverse the trial court's decision to convict and grant a new trial only in " 'exceptional cases in which the evidence weighs heavily against the conviction.' " *State v. Sipple*, 1st Dist. Hamilton No. C-190462, 2021-Ohio-1319, ¶ 7. "This is because the weight to be given [to] the evidence and the credibility of the

[1] Though Mounts also includes the standard of review for a sufficiency challenge, he does not develop this argument. Pursuant to App.R. 16(A)(7), "an appellant must provide an argument and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which the appellant relies." (Internal quotation marks omitted.) *State v. Covington*, 1st Dist. Hamilton No. C-190731, 2021-Ohio-2907, ¶ 25. Accordingly, we do not consider Mounts's sufficiency challenge here.

witnesses are primarily for the trier of the facts." (Internal quotation marks omitted.) *Carter* at ¶ 13.

{¶25} In his first assignment of error, Mounts argues the state's case was conjectural or unsupported by the evidence. He further asserts that the only evidence supporting the argument that he struck J.F. was that J.F. had a skull fracture and marks on his head. But the evidence supporting Mounts's conviction was not as limited as he suggests.

{¶26} Each of the state's expert witnesses testified that there was fresh blood near the fracture site and no evidence of healing, indicating that J.F.'s injuries were recent. In particular, Dr. Makoroff testified that on the day that J.F. was brought to Cincinnati Children's Hospital, she was asked to evaluate him. She further testified that she specialized in child-abuse pediatrics and that she believed J.F.'s injuries were caused by some kind of trauma. Though Mounts's expert witnesses testified to the contrary, the jury was free to give less weight to their testimony and more weight to the testimony of physicians who had physically evaluated J.F., including Dr. Makoroff and Dr. Dean. "Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses." *State v. Johnson*, 1st Dist. Hamilton No. C-170354, 2019-Ohio-3877, ¶ 52.

{¶27} Additionally, Kayla testified that J.F. had never been dropped before and that he was behaving normally before she left him with Mounts. Theresa testified that on the day Kayla left J.F. with Mounts, she observed that J.F. had a blank stare and would not make eye contact with her. But on cross-examination, Theresa testified that she did not note these oddities in J.F.'s behavior when speaking with the police or

J.F.'s physicians. Moreover, Theresa testified on cross-examination that she did not see J.F. often.

{¶28} Kayla also testified that she saw Mounts purchase drugs the day before J.F. died and that he was the sole caregiver present when J.F. stopped breathing. Further, Casteel testified that Mounts refused his offer for a ride when J.F. was taken to the hospital.

{¶29} All of this evidence, taken together, may have undercut Mounts's theory of the case in the eyes of the jury. Moreover, even reviewing the evidence in the best light for Mounts, there were competing experts on both sides and lay-witness testimony supporting the state's version of events. We therefore cannot say that the evidence points overwhelmingly against conviction. On this record, Mounts has therefore not demonstrated that the jury lost its way and created a manifest miscarriage of justice. Mounts's first assignment of error is accordingly overruled.

Scope of Expert Testimony

{¶30} Crim.R. 16(K) requires that "expert witnesses generate written reports and that those reports be disclosed to the opposing party no later than 21 days before trial." *State v. Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061, 153 N.E.3d 44, ¶ 46. In this way, Crim.R. 16(K) "avoid[s] unfair surprise by providing notice to the defense and allowing the defense an opportunity to challenge the expert's findings, analysis, or qualifications." (Internal quotation marks omitted.) *Id.* at ¶ 48. Further, we have held that "Crim.R. 16(K) removes the trial court's discretion and requires the exclusion of expert testimony when a written report has not been disclosed in accordance with the rule." *Id.* at ¶ 52, citing *State v. Hall*, 1st Dist. Hamilton Nos. C-170699 and C-170700, 2019-Ohio-2985, ¶ 20.

{¶31} Here, Mounts asserts that the trial court erred in prohibiting Dr. Wiens from testifying to information outside the scope of her expert report. At trial, the state objected to Dr. Wiens testifying to an original histology slide she had not seen prior to the trial and failed to include in her report. The state asserted that Dr. Wiens was provided with a recut slide and that she did not request to see the original slide when she had the opportunity, and it attempted to prohibit her testimony on this basis. When the trial court inquired as to the purpose of Dr. Wiens testifying to the original slide, Mounts's counsel provided contradictory reasoning. Initially, he asserted that the recut slides had "some differences" from the original slides. Later, he asserted:

> This testimony answers that question about how [Mounts's expert witnesses] have an opinion of two sides of a healing fracture. They are looking at the *same* thing, that's my point, and nothing that they're talking about here is anything new. It comes down to the critical issue of what these three experts were looking at. They are going to testify they are looking at the fracture.

(Emphasis added.)

{¶32} Then, when the trial court inquired as to the difference between the slides, Mounts's counsel replied, "at the fracture site, her testimony is there's a slight ridge that contains – and I could be misquoting this – it's going to have bone formation as well as healing blood within it. That is never mentioned in Dr. Dean's report because it's a different slide."

{¶33} Before the trial court could make a ruling as to the objection, it offered Mounts the opportunity to submit an amended expert report for Dr. Wiens. But Mounts's counsel stated he could "move off of this particular slide." And when the

trial court sustained the objection to the extent that Dr. Wiens would testify to new information outside of her report, Mounts's counsel again stated he would "move on."

{¶34} As an initial matter, it is not entirely clear whether Mounts was trying to elicit testimony that these slides were substantially the same or different. But even if it was clear, Mounts failed to preserve this alleged error for appellate review by acquiescing to the state's objection to Dr. Wiens's testimony. *See, e.g., State v. Phillips*, 4th Dist. Pickaway Nos. 89-CA-32 and 89-CA-33, 1992 Ohio App. LEXIS 1016, 24 (Mar. 5, 1992); *State v. Gentry*, 10th Dist. Franklin No. 83AP-384, 1984 Ohio App. LEXIS 8718, 3 (Feb. 16, 1984). Not only did Mounts ignore the trial court's offer to submit an amended expert report for Dr. Wiens, but he also agreed not to elicit testimony from Dr. Wiens as to the original slide *before* the trial court ruled on the state's objection. Accordingly, Mounts has waived any claim of error here, and his second assignment of error is overruled.

{¶35} In presenting this assignment of error, Mounts also points to comments by the state in its rebuttal closing in which the state suggested that the recut slides were less accurate than the original slides. Mounts argues that these comments demonstrate the prejudice of prohibiting Dr. Wiens's testimony as to the original slides. But because Mounts's counsel failed to preserve an issue with regard to Dr. Wiens's testimony, we do not consider the prosecutor's statements in closing argument as to whether Dr. Wiens's testimony was admissible. Moreover, to the extent Mounts argues that the prosecutor's comments themselves were improper, we address that issue later in this opinion. In short, because Mounts did not object to these comments at trial, we are limited to plain-error review, and the elements of the plain-error doctrine are not met here.

{¶36} Lastly, Mounts contends without explanation that the trial court erred in prohibiting Dr. Guajardo from testifying outside the scope of his expert report, while allowing Dr. Looman and Dr. Dean to do the same. As the state correctly notes, however, Mounts completely abandons these undeveloped arguments regarding the testimony of Dr. Guajardo and Dr. Looman. Pursuant to App.R. 16(A)(7), an appellant must provide "an argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." "[W]e will consider all cognizable contentions presented but will not create an argument if a * * * litigant fails to develop one." *Marreez v. Jim Collins Auto Body, Inc.*, 1st Dist. Hamilton No. C-210192, 2021-Ohio-4075, ¶ 4. Thus, we overrule this undeveloped aspect of Mounts's claim and overrule Mounts's second assignment of error in full.

Lay Testimony as to Evidence of Guilt

{¶37} In his third assignment of error, Mounts argues the trial court erred in admitting the testimony of Casteel. Mounts makes two separate contentions as to Casteel's testimony. First, Mounts argues that Casteel, a lay witness, was improperly presented as expert witness by the state. Second, Mounts argues that Casteel should not have been allowed to testify that Mount's behavior was evidence of guilt.

{¶38} Decisions regarding the admissibility of evidence are reviewed for an abuse of discretion. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032.

{¶39} As to the first argument, Mounts's belief that Casteel was held out as an expert witness is wholly misplaced. The state did not in any way hold out Casteel as

an expert, did not move to qualify him as such, and did not submit a resume or expert report that would have given the impression that Casteel was an expert.

{¶40} At most, the state asked Casteel about the details of his job history as a firefighter and paramedic. And Casteel's testimony as to these details did not qualify him as an expert. For example, the fact that Casteel testified that he held that position for almost two decades did not qualify or present him as a court-defined expert, but rather emphasized his credibility on the subject just as any layperson in a seasoned job role would have credibility to speak to the nuances of his or her own profession.

{¶41} As to the second issue, Evid.R. 701 governs opinion testimony by lay witnesses. *State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700, 172 N.E.3d 841, ¶ 59. The rule provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

{¶42} In *Graham*, the Ohio Supreme Court held that the lay witness's testimony satisfied both requirements of Evid.R. 701, reasoning that the lay witness's observation of the defendant's demeanor was relevant to showing the defendant's evasiveness. *Id.* at ¶ 60. In the same way, Casteel observed Mounts's withdrawn and distant behavior when EMS arrived on scene, and this was relevant in showing Mounts's reaction to J.F.'s dire condition. Like that in *Graham*, Casteel's testimony meets both requirements of Evid.R. 701.

{¶43} First, Casteel's testimony was rationally based on his own perception, having been both personally present at the scene and well-versed in emergency situations such as this one. Second, Casteel's observations were helpful to a clearer understanding of his testimony about Mounts's casual demeanor when his child was in life-threatening distress. Importantly, the jury was free to weigh this evidence either for or against Mounts's guilt.

{¶44} For these reasons, the trial court did not abuse its discretion in admitting Casteel's testimony, and the third assignment of error is accordingly overruled.

Prosecutorial Misconduct

{¶45} In his fourth assignment of error, Mounts asserts that certain comments made by the prosecutor in rebuttal arguments amounted to prosecutorial misconduct. Specifically, Mounts takes issue with the following comments:

> A forensic person – according to Webster – and unless the Judge gives you a different definition in his jury instructions, you use the common word or the common definition for a word – forensic means you're trained in the law, trained for court.
>
> * * *
>
> So Dr. Guajardo and Dr. Wiens are neuropathologists like Dr. Folkerth, but they're neuropathologists that are trained to come to court and trained to testify. And you got to consider that when you're considering their testimony. They're actual professional testifiers, is what they are.
>
> * * *

[Dr. Wiens] said that the cuts weren't always as good as the first section that was taken, or the first cut of the section afterwards made. And as you go down and down and you remember that it's kind of like somebody described it as slicing wool pants. And as it gets lower and lower, the cut, the recut, the legal recut that they were calling it, isn't as good.

And so Dr. Wiens says I – she says the first one isn't as good.

* * *

The Defense witnesses called it a team when they were trying to explain why they didn't pick up the phone and call Dr. Dean. 'We're not on her team. We're on his team.'

* * *

[Dr. Chundru's] got a big stake in the game. This is his business. You think he makes business by telling him, "I'm sorry; the doctor was correct." You think he makes business by advertising and by having the newspaper like The Washington Post in here covering this story * * * writing an article about him coming to court and testifying, saving the day. Oh my gosh. He gave up his fee; that's how committed he is. You think he's not getting a benefit from being here?

* * *

When you look at those medical records, I read a whole list of names to you that I subpoenaed. And I just want you to think about how long the trial would have been if we called every one of those doctors. Dr. Lauren Jacobs, Amy Holden, Meredith Drake, Hee Kyung, Bernadette Koch,

> Marguerite Care, Julie Guerin, Maya Linn Dewan. They're all part of the treatment team treating [J.F.], trying to [save] his life, and treating him as if he was a victim of child abuse and blunt force trauma, recent injuries.
>
> * * *
>
> It's all these doctors who – incidentally, every one of these doctors are licensed to practice medicine and actively practice medicine in the State of Ohio. Not these outside doctors who can come in here for money and say what they want to say and then fly back off to wherever they have to fly back off to and hope that you believe what they say.

{¶46} "The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether the remarks prejudicially affected the accused's substantial rights." *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 238. And when reviewing alleged prosecutorial misconduct, "we must consider all of the prosecutor's remarks, irrespective of whether the defense preserved an objection." (Internal quotation marks and citations omitted.) *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 385.

{¶47} Here, Mounts only objected to the prosecutor's comment regarding Dr. Chundru, and thus this is the only statement that is preserved for our review. But this particular comment did not amount to prosecutorial misconduct. This is the case because evidence of bias and pecuniary interest is a legitimate subject of inquiry with respect to an expert witness. "Reasonable inferences and deductions may be drawn from evidence adduced at trial, * * * and an expert's bias and pecuniary interest are fair subjects for a closing argument." (Citations omitted.) *Hyden v. Kroger Co.*, 10th

Dist. Franklin No. 06AP-446, 2006-Ohio-6430, ¶ 21. Because the prosecutor was merely highlighting the potential influence of The Washington Post's reporting on Dr. Chundru's motivations to testify, the prosecutor's remarks were not improper and did not affect Mounts's substantial rights. *See Dean* at ¶ 238.

{¶48} Because Mounts did not object at trial to the remaining statements he now challenges on appeal, our review of those comments is limited to plain error. *See State v. West*, 168 Ohio St.3d 605, 2022-Ohio-1556, 200 N.E.3d 1048, ¶ 22.

{¶49} The Ohio Supreme Court most recently explained the plain-error doctrine in *State v. Bailey*:

> Under the plain-error doctrine, intervention by a reviewing court is warranted only under exceptional circumstances to prevent injustice. To prevail under the plain-error doctrine, [the appellant] must establish that an error occurred, that the error was obvious, and that there is a reasonable *probability* that the error resulted in prejudice, meaning that the error affected the outcome of the trial.

(Internal quotation marks and citation omitted.) *State v. Bailey*, Slip Opinion No. 2022-Ohio-4407, ¶ 8.

{¶50} The court in *Bailey* did not explain what it meant by defining prejudice based upon the impacts of the plain error on the outcome of the trial. However, in previous cases, the Ohio Supreme Court has held that, to demonstrate that error affected the outcome of the trial, the defendant must show that *but for* the error, the outcome of the proceeding would have been otherwise. *West* at ¶ 22.

{¶51} For example, in *State v. Brunson*, the Ohio Supreme Court rejected a plain-error claim, because the defendant could not demonstrate a reasonable

probability that but for his inability to cross-examine a witness using a recorded statement, the result of the trial would have been different. *State v. Brunson*, Slip Opinion No. 2022-Ohio-4299, ¶ 25.

{¶52} Reading *Bailey* in concert with *West* and *Brunson*, we hold that, under the plain-error standard, Mounts must demonstrate that a reasonable probability that but for these comments made by the prosecutor, the outcome of the trial would have been different.

{¶53} Most of the comments Mounts did not object to touched on the possible bias, prejudice, or pecuniary interest of Mounts's expert witnesses. These comments, including calling Dr. Guajardo and Dr. Wiens "professional testifiers," referring to Mounts's expert witnesses as a "team," and noting that Mounts's expert witnesses were licensed outside of Ohio, emphasized the motivation for Mounts's expert witnesses to testify and their potential biases. Though unartfully stated, these are not comments which are "so inflammatory as to render the jury's decision a product solely of passion and prejudice." *See Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, at ¶ 385.

{¶54} For example, in *State v. Debardeleben*, during cross-examination of the defendant's expert witness, the prosecutor noted, "I don't want to keep you from your next endeavor * * * Your next baby death case." (Internal quotation marks omitted.) *State v. Debardeleben*, 8th Dist. Cuyahoga No. 108277, 2020-Ohio-661, ¶ 38. The trial court admonished these comments as inappropriate and prejudicial. *Id.* at ¶ 38. The appellate court, however, held that the defendant did not demonstrate a reasonable probability that but for these comments the outcome of the trial would have been different. *Id.* at ¶ 39.

{¶55} Likewise, here, we note that the prosecutor could have exercised more restraint and caution in pointing out the possible bias, prejudice, or pecuniary interest of Mounts's expert witnesses. But we do not conclude that but for these comments, the outcome of the trial would have been different. *See West*, 168 Ohio St.3d 605, 2022-Ohio-1556, 200 N.E.3d 1048, at ¶ 22.

{¶56} The prosecutor's statement regarding potential expert witnesses for the state who could have testified but did not, however, is more egregious. Because Mounts was the only witness at the time J.F. stopped breathing, expert testimony as to the cause and manner of J.F.'s death was particularly important in this case. In reaching its verdict, the jury was necessarily required to weigh the testimony of the state's three expert witnesses against the testimony of Mounts's three expert witnesses. By alluding to additional expert witnesses on behalf of the state, the prosecutor may have improperly tipped the weighing of expert witness testimony in favor of the state.

{¶57} But, despite the importance of expert witness testimony in this case, the jury had other evidence of Mounts's conduct to consider as well. *See State v. Twyford*, 94 Ohio St.3d 340, 356, 763 N.E.2d 122 (2002) (holding that although it was improper for the prosecutor to comment on the defendant's failure to testify, there was other compelling evidence of the defendant's guilt and so he was not prejudiced or denied a fair trial). The jury may have found that evidence of Mounts's drug use and withdrawn behavior at the time of J.F.'s death undercut his theory of the case. And the jury may have found that Kayla's testimony regarding J.F.'s behavior prior to his death was more persuasive than Theresa's testimony, given Kayla was J.F.'s primary caregiver and J.F. spent minimal time with Mounts and his family. Moreover, as discussed

above, the jury may have more heavily weighed the testimony of Dr. Dean and Dr. Makoroff, given that they physically examined J.F. and the defense experts did not.

{¶58} As the Ohio Supreme Court emphasized in *Bailey*, "the plain-error doctrine is warranted only under *exceptional circumstances* to prevent injustice." (Emphasis added.) *Bailey*, Slip Opinion No. 2022-Ohio-4407, at ¶ 15. To that end, the instances in which this court, our sister courts, and the Ohio Supreme Court have found prosecutorial misconduct under plain-error review are few and far between. *See e.g., State v. Keenan*, 66 Ohio St.3d 402, 405-411, 613 N.E.2d 203 (1993) (holding that despite the defendant's failure to object to the prosecutor's improper comments during closing argument, these comments deprived the defendant of a fair trial where the prosecutor disparaged defense counsel, encouraged the jury to substitute emotion for reasoned advocacy, expressed his personal outrage, called the defendant an animal, and stabbed a large knife into counsel's table in front of the jury).

{¶59} With this context in mind, we cannot conclude that this case presents exceptional circumstances, as required by *Bailey*. We certainly do not condone, and in fact condemn, the prosecutor's insinuation that additional expert witnesses who did not testify would have bolstered the state's case. But without an objection from defense counsel at trial, we are limited by the application of the plain-error standard in our review. Given the jury had other evidence of Mounts's guilt to consider, we cannot conclude that but for this comment, the outcome of the trial would have been different. *See West*, 168 Ohio St.3d 605, 2022-Ohio-1556, 200 N.E.3d 1048, at ¶ 22.

{¶60} Finally, as to the prosecutor's comment regarding the quality of the recut slides, we note that the prosecutor incorrectly attributed Dr. Dean's testimony to Dr. Wiens. It was Dr. Dean, not Dr. Wiens, who analogized the difference between the

original and recut slides to slicing wool pants. Crucially, Dr. Dean also testified that the original and recut slides were "substantially the same," and that if there had been any differences between the slides, she would have notified Mounts's expert witnesses. The jury also heard testimony from Dr. Dean that Mounts's expert witnesses could have requested to see the original slides in person but did not do so. And Dr. Wiens never testified as to the quality of the recut slides. Therefore, no expert witness testified that the recut slides were "not as good" as the original slides, as the prosecutor appeared to suggest. But because the jury was able to consider the entirety of Dr. Dean's testimony, and because the prosecutor's arguments in closing argument are not testimony, we hold that the prosecutor's mischaracterization of part of Dr. Dean's testimony did not amount to reversible error under the plain-error doctrine.

{¶61} Accordingly, because the one comment to which defense counsel did object was not improper and because our review of the remaining comments is constrained to plain error because defense counsel did not object, we hold that none of the prosecutor's comments amounted to prosecutorial misconduct. We therefore overrule Mounts's fourth assignment of error.

Conclusion

{¶62} For the reasons set forth above, we overrule each of Mounts's assignments of error. Therefore, we affirm the judgment of the trial court.

Judgment affirmed.

CROUSE, P.J., and **ZAYAS, J.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

ENTERED
NOV 16 2021

D133447956

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: **11/16/2021**
code: **GJEI**
judge: **294**

11/16/2021

Judge: **TERRY NESTOR**

NO: **B 1801231**

STATE OF OHIO
VS.
JOSHUA MOUNTS

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel **MICHAEL K ALLEN AND RICHARD D GUINAN** on the **16th day of November 2021** for sentence.
The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:
count 2: MURDER [SPECIAL FELONY], 2903-02B/ORCN, SF

count 1: AGGRAVATED MURDER [SPECIAL FELONY], 2903-01C/ORCN, SF, ACQUITTED

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:
count 2: CONFINEMENT: LIFE IMPRISONMENT, Credit 1328 Days DEPARTMENT OF CORRECTIONS

THE TOTAL AGGREGATE SENTENCE IS FIFTEEN YEARS TO LIFE IN THE DEPARTMENT OF CORRECTIONS.

FINES AND FEES ARE WAIVED.

THE DEFENDANT IS TO PAY COURT COSTS.

PURSUANT TO R.C. 2903.42, THE DEFENDANT IS CLASSIFIED A VIOLENT OFFENDER AND IS REQUIRED TO ENROLL IN THE VIOLENT OFFENDER DATABASE WITH RESPECT TO THE OFFENSE THAT SO CLASSIFIES THE DEFENDANT AND SHALL HAVE ALL VIOLENT OFFENDER DATABASE DUTIES WITH RESPECT TO THAT OFFENSE FOR TEN YEARS AFTER THE DEFENDANT INITIALLY ENROLLS IN THE DATABASE. THE TEN-YEAR ANNUAL ENROLLMENT PERIOD MAY BE EXTENDED PURSUANT TO R.C. 2903.43(D)(2) IF THE DEFENDANT VIOLATES A TERM OR CONDITION OF A SANCTION IMPOSED UNDER THE DEFENDANT'S SENTENCE OR IS

Defendant was notified of the right to appeal as required by Crim. R 32(B).

WPODR021

ENTERED
NOV 16 2021

D133447956

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: **11/16/2021**
code: **GJEI**
judge: **294**

11/16/2021

Judge: **TERRY NESTOR**

NO: **B 1801231**

STATE OF OHIO
VS.
JOSHUA MOUNTS

JUDGMENT ENTRY: SENTENCE: INCARCERATION

CONVICTED OF OR PLEADS GUILTY TO ANOTHER FELONY OR ANY MISDEMEANOR OFFENSE OF VIOLENCE DURING THAT ENROLLMENT PERIOD.

THE DEFENDANT HAS BEEN ADVISED THAT HE/SHE MAY BE ELIGIBLE TO EARN DAYS OF CREDIT UNDER THE CIRCUMSTANCES SPECIFIED IN R.C. 2967-193; THE DEFENDANT WAS FURTHER ADVISED THAT DAYS OF CREDIT ARE NOT AUTOMATIC, BUT MUST BE EARNED IN THE MANNER SPECIFIED IN THAT SECTION.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

THE DEFENDANT IS NOT SUBJECT TO THE POST RELEASE CONTROL PROVISIONS OF OHIO LAW AS THIS IS A LIFE SENTENCE. PAROLE ELIGIBILITY FOR THIS OFFENDER IS GOVERNED BY OHIO REVISED CODE §2967.13(A)(1) AND THE DEFENDANT IS SO ADVISED.

Defendant was notified of the right to appeal as required by Crim. R 32(B).

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

April 2, 2024

[Cite as *04/02/2024 Case Announcements*, 2024-Ohio-1228.]

MERIT DECISIONS WITHOUT OPINIONS

2024-0204. Garner v. Black.
In Habeas Corpus. Sua sponte, cause dismissed.

Kennedy, C.J., and Fischer, DeWine, Donnelly, Stewart, Brunner, and Deters, JJ., concur.

MOTION AND PROCEDURAL RULINGS

2024-0181. State v. Ridenour.
Warren App. No. CA2022-04-017, 2023-Ohio-2713. On motion for leave to file delayed appeal. Motion denied.

Stewart and Brunner, JJ., dissent.

2024-0182. State v. Wilmington.
Portage App. No. 2022-P-0048, 2023-Ohio-512. On motion for leave to file delayed appeal. Motion denied.

2024-0196. State v. Smith.
Licking App. No. 2022 CA 00031, 2023-Ohio-683. On motion for leave to file delayed appeal. Motion denied.

2024-0206. State v. Hicks-Stevens.
Cuyahoga App. No. 112329, 2023-Ohio-4307. On motion for leave to file delayed appeal. Motion granted. Appellant shall file a memorandum in support of jurisdiction within 30 days.

DeWine, Brunner, and Deters, JJ., dissent.

2024-0222. State v. Norris.
Greene App. No. 2023-CA-8, 2023-Ohio-4057. On motion for leave to file delayed appeal. Motion denied.

Fischer, Donnelly, and Stewart, JJ., dissent.

APPEALS ACCEPTED FOR REVIEW

2024-0046. Wilson v. Wilson.
Butler App. No. CA2023-01-009, 2023-Ohio-4243. Appeal accepted on proposition of law No. II. Sua sponte, cause held for the decision in *United States v. Rahimi*, U.S. No. 22-915.

Kennedy, C.J., and Donnelly, J., would accept the appeal on both propositions of law.

Fischer, Stewart, and Brunner, JJ., dissent.

2024-0047. New Albany-Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision.
Franklin App. No. 22AP-738. Sua sponte, cause held for the decision in 2023-0964, *Marysville Exempted Village School Dist. Bd. of Edn. v. Union Cty. Bd. of Revision.*

2024-0048. New Albany-Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision.
Franklin App. No. 22AP-746. Sua sponte, cause held for the decision in 2023-0964, *Marysville Exempted Village School Dist. Bd. of Edn. v. Union Cty. Bd. of Revision.*

2024-0049. New Albany-Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision.
Franklin App. No. 22AP-747. Sua sponte, cause held for the decision in 2023-0964, *Marysville Exempted Village School Dist. Bd. of Edn. v. Union Cty. Bd. of Revision.*

2024-0050. New Albany-Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision.
Franklin App. No. 22AP-748. Sua sponte, cause held for the decision in 2023-0964, *Marysville Exempted Village School Dist. Bd. of Edn. v. Union Cty. Bd. of Revision.*

Donnelly, J., dissents.

2024-0051. New Albany-Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision.
Franklin App. No. 22AP-749. Sua sponte, cause held for the decision in 2023-0964, *Marysville Exempted Village School Dist. Bd. of Edn. v. Union Cty. Bd. of Revision.*

2024-0056. Doe v. Columbus.
Delaware App. No. 23CAE040028. Appeal accepted on proposition of law Nos. I and II.

Kennedy, C.J., would accept the appeal on all propositions of law.

Donnelly, Stewart, and Brunner, JJ., dissent.

2024-0108. State v. Staffrey.
Mahoning App. No. 23 MA 0034, 2023-Ohio-4746.

Fischer, Donnelly, and Deters, JJ., dissent.

APPEALS NOT ACCEPTED FOR REVIEW

2023-1352. State v. Gillard.
Muskingum App. No. CT2022-0040, 2023-Ohio-2682.

2023-1563. State v. Brown.
Richland App. No. 2022 CA 0042, 2023-Ohio-3906.

2023-1640. Graham v. Lake Cty. Dept. of Job & Family Servs.
Lake App. No. 2023-L-073, 2023-Ohio-4366.

Fischer, J., dissents.

2024-0017. Cain Ridge Beef Farm, L.L.C. v. Stubbins, Watson, Bryan & Witucky, L.P.A.
Monroe App. No. 23 MO 0006, 2023-Ohio-4727.

Fischer and Donnelly, JJ., dissent.

2024-0045. Alford v. Dept. of Rehab. & Corr.
Franklin App. No. 23AP-74, 2023-Ohio-4290.

2024-0053. Columbia Gas of Ohio, Inc. v. Holloway.
Union App. Nos. 14-23-18 through 14-23-25, 2023-Ohio-4257.

2024-0057. State v. Seals.
Muskingum App. No. CT2022-0045, 2023-Ohio-1261.

2024-0059. State v. Greiner.
Muskingum App. No. CT2019-0003, 2019-Ohio-3624.

2024-0062. State v. Cottrell.
Muskingum App. No. CT2022-0061, 2023-Ohio-1391.

2024-0065. Brown v. Zipkin.
Cuyahoga App. No. 113154.

2024-0066. State v. Keith.
Marion App. No. 9-22-28, 2023-Ohio-3428.

2024-0076. Cirotto v. Am. Self Storage of Pickerington, L.L.C.
Fairfield App. No. 23 CA 14, 2023-Ohio-4335.

2024-0077. State v. Reed.
Stark App. No. 2023CA00033, 2023-Ohio-4694.

2024-0079. State v. Hopkins.
Cuyahoga App. Nos. 112430 and 112704, 2023-Ohio-4311.

2024-0084. State v. Coleman.
Butler App. No. CA2023-03-037, 2023-Ohio-4354.

2024-0091. Bank of New York Mellon v. Mitchell.
Hamilton App. Nos. C-220438 and C-230041.

2024-0092. Meros v. Sunbelt Rentals, Inc.
Cuyahoga App. Nos. 112483 and 112709, 2023-Ohio-4313.
Brunner, J., dissents.

2024-0093. State v. Ware.
Richland App. Nos. 2022CA0048 and 2022CA0049.

2024-0095. State v. DiStasio.
Cuyahoga App. No. 113412.

2024-0097. Mehwald v. Atlantic Tool & Die Co.
Cuyahoga App. Nos. 111692, 111901, and 111904, 2023-Ohio-2778.

Fischer, J., dissents and would accept the appeal on proposition of law No. I.

Brunner, J., dissents and would accept the appeal on proposition of law No. II.

2024-0099. Rieg v. Seville.
Medina App. No. 23CA0023-M, 2023-Ohio-4581.

2024-0101. State v. Volpi.
Ashtabula App. No. 2022-A-0067, 2023-Ohio-4488.

2024-0103. State v. Hill.
Stark App. No. 2023CA00029, 2023-Ohio-4381.

2024-0105. Evans v. Dir., Dept. of Job & Family Servs.
Delaware App. No. 23 CAE 04 0023, 2023-Ohio-4299.

2024-0106. Bogan v. Keith.
Montgomery App. No. 29842, 2023-Ohio-4159.

2024-0107. State v. Gronbeck.
Greene App. No. 2023-CA-68, 2024-Ohio-26.

Kennedy, C.J., dissents.

2024-0113. DeVore v. Adult Parole Auth.
Franklin App. No. 23AP-350, 2023-Ohio-4558.

2024-0114. State v. Mack.
Richland App. No. 2022 CA 0083.

2024-0116. Quest Wellness Ohio, L.L.C. v. Samuels.
Mahoning App. No. 2023 MA 0013.

Donnelly and Deters, JJ., dissent and would hold the cause for the decision in 2023-1448 and 2023-1588, *Ashland Global Holdings, Inc. v. SuperAsh Remainderman Ltd. Partnership*.

2024-0119. State v. Kelley.
Cuyahoga App. No. 112162, 2023-Ohio-3972.

2024-0120. State v. Clark.
Franklin App. No. 22-AP-433.

Brunner, J., not participating.

2024-0121. State v. Helms.
Summit App. Nos. 30320 and 30321, 2023-Ohio-4225.

2024-0126. State v. Smith.
Montgomery App. No. 29597, 2023-Ohio-4565.

2024-0134. Akron v. Calhoun.
Summit App. No. 30472, 2023-Ohio-4840.

Deters, J., dissents.

2024-0136. State v. Mounts.
Hamilton App. No. C-210608, 2023-Ohio-3861.

Deters, J., not participating.

2024-0138. Hull v. Poulos.
Hamilton App. No. C-230063, 2023-Ohio-4500.

Brunner, J., dissents and would accept the appeal on proposition of law Nos. II, III, and IV.

2024-0139. State v. Stevens.
Hocking App. No. 21CA9, 2023-Ohio-3280.

2024-0140. State v. Rowland.
Columbiana App. No. 22 CO 0037, 2023-Ohio-4806.

Donnelly, J., dissents.

2024-0141. Hal Fab, L.L.C. v. Jordan.
Cuyahoga App. No. 112508, 2023-Ohio-4535.
Kennedy, C.J., dissents.

2024-0150. Roberts v. Opalich.
Cuyahoga App. No. 112612, 2023-Ohio-4652.

2024-0152. State v. Herns.
Mahoning App. No. 22 MA 0109, 2023-Ohio-4714.
Donnelly, J., dissents and would accept the appeal on proposition of law Nos. I and II and would appoint counsel.

2024-0156. Apple Ohio, L.L.C. v. Rose Italian Kitchen Solon, L.L.C.
Cuyahoga App. No. 112281, 2023-Ohio-2880.
Fischer and Stewart, JJ., dissent.

2024-0176. State v. Bender.
Belmont App. No. 23 BE 0012, 2023-Ohio-4737.
Donnelly, J., dissents.

2024-0217. Koch v. Murphy.
Wayne App. No. 23AP0011, 2023-Ohio-4828.

2024-0218. J.M. v. S.M.
Franklin App. No. 22AP-773, 2023-Ohio-4803.

2024-0225. State v. Vitumukiza.
Cuyahoga App. No. 110633, 2023-Ohio-4877.

2024-0229. State v. Potts.
Medina App. No. 22CA0059-M, 2023-Ohio-4849.

2024-0250. State v. Hillman.
Franklin App. No. 24AP-66.

RECONSIDERATION OF PRIOR DECISIONS

2023-0334. State v. Beasley.
Summit C.P. No. CR-2012-01-0169-A. Reported at 172 Ohio St.3d 1477, 2024-Ohio-302, 226 N.E.3d 969. On motion for reconsideration. Motion denied.

2023-1347. Davis v. Canton.
In Mandamus. Reported at 172 Ohio St.3d 1469, 2024-Ohio-202, 225 N.E.3d 1038. On motion for reconsideration. Motion denied.

2023-1365. Patel v. Huntington Banc Shares Fin. Corp.
Lake App. No. 2023-L-036, 2023-Ohio-3218. Reported at 172 Ohio St.3d 1464, 2024-Ohio-163, 225 N.E.3d 1023. On motion for reconsideration. Motion denied.

2023-1393. State ex rel. Pesta v. Blakeman.
In Mandamus. Reported at 172 Ohio St.3d 1469, 2024-Ohio-202, 225 N.E.3d 1039. On revised motion for reconsideration. Motion denied. Relator's motion for constitutional relief and motion to strike denied.

Donnelly, J., dissents in part and would grant the revised motion for reconsideration.

Brunner, J., dissents in part and would grant the revised motion for reconsideration and would deny the motion to strike as moot.

2023-1406. Henry Cty. Land Reutilization Corp. v. Pelmear.
Henry App. No. 7-23-03, 2023-Ohio-2718. Reported at 172 Ohio St.3d 1465, 2024-Ohio-163, 225 N.E.3d 1031. On motion for reconsideration. Motion denied.

Kennedy, C.J., dissents.

2023-1447. State v. Justice.
Franklin App. No. 23AP-280. Reported at 172 Ohio St.3d 1466, 2024-Ohio-163, 225 N.E.3d 1030. On petition for reconsideration. Petition denied. Appellant's petition for clarification denied.

2023-1469. State ex rel. Mitchell v. Eleventh Dist. Court of Appeals Judges.
In Mandamus and Prohibition. Reported at 172 Ohio St.3d 1470, 2024-Ohio-202, 225 N.E.3d 1040. On motion for reconsideration. Motion denied.

2023-1473. State ex rel. Pierce v. Clerk of the Supreme Court of Ohio.
In Mandamus. Reported at 172 Ohio St.3d 1470, 2024-Ohio-202, 225 N.E.3d 1042. On motion for reconsideration. Motion denied.