[Cite as *State v. Benson*, 2020-Ohio-1258.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MARVIN J. BENSON Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 19CA00009 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Guernsey County Court of Common Pleas, Case No. 18-CR-98
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 23, 2020

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOEL BLUE Guernsey County Prosecuting Attorney JASON FARLEY Assistant Prosecuting Attorney 627 East Wheeling Avenue Cambridge, Ohio 43725-2284	DENNIS C. BELLI 536 South High Street, Floor 2 Columbus, Ohio 43215-5785

Hoffman, P.J.

{¶1} Appellant Marvin J. Benson appeals the judgment entered by the Guernsey County Common Pleas Court convicting him of two counts of felony murder (R.C. 2903.02), two counts of involuntary manslaughter (R.C. 2903.04(A)), felonious assault (R.C. 2903.11(A)(1)), and endangering children (R.C. 2919.22(B)(1)), and sentencing him to a term of incarceration of 15 years to life. Appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On Friday, April 13, 2018, six-year-old W.M. arrived at school, and hugged his principal. W.M. participated in an event called COSI on Wheels, a field trip brought to the school building with presentations and activities for the students. Photographs taken by the school principal show W.M. enjoying participation in the activities with his peers.

{¶3} On Monday, April 16, 2018, at approximately 3:00 p.m., paramedics were dispatched to a home occupied by Appellant, his girlfriend Tiera Mounts, Appellant's three children, and Tiera's two children, one of whom was W.M. Upon arrival, the emergency medical technician (EMT) found a child, later identified as W.M., unresponsive on the second floor of the house. W.M. was not breathing, had no pulse, and his arm was not flexible, leading the EMT to believe the child had been dead for longer than an hour.

{¶4} Patrolman Jarod Eubanks of the Cambridge Police Department arrived on the scene. He noted the child's body was "battered and bruised." Tr. 284. Based on his observations of W.M.'s body, he requested a detective to the scene. Detective Greg Clark of the Cambridge Police Department arrived on the scene.

{¶5} Det. Clark asked Appellant and Tiera Mounts to come with him to the police station, which they agreed to do. Before interviewing Appellant, Det. Clark read him his Miranda rights. During the first part of the interview, Appellant told police W.H. had

"episodes" where he would fall down as if his legs were weak, and the bruises on W.M.'s body were from "episodes" where he beats himself. Appellant stated Tiera disciplined W.M. by "busting his ass and like that," by making him do wall squats, and when W.M. "keeps fighting" with Tiera, she'll call her stepmom to come and get him. Appellant said Sunday night, the night before W.M. died, W.M. was "acting up real bad." They made W.M. do wall squats, but he would just stand and lean against the wall. After they got him to do the wall squats, he kept dropping to the ground and would sit there, like he didn't want to listen.

{¶6} Appellant stated on Monday morning, April 16, W.M. did not want to get up and put his shoes on. There was vomit in W.M.'s bedroom from the night, although Appellant claimed they did not hear him vomiting during the night. When W.M. kept falling, Appellant put him up against the wall to do wall squats. When Appellant was trying to leave to take the other children to school, W.M. put his coat on "half-assed." Appellant told police the "worst thing I did this morning was kicked him in his butt." Appellant admitted kicking W.M. out the front door of the house, where W.M. hit his head on the stoop. Although Det. Clark had noted a gash with fresh blood on W.M.'s head, Appellant claimed there was a scratch, but no blood on W.M.'s head. Appellant stated W.M. went back to bed that morning, and at one point when he woke up to use the restroom, Appellant gave him cough syrup. When Tiera arrived home from work in the afternoon, Appellant told her W.M. was acting "like a butt" plus W.M. had vomit to clean up in his room. Tiera went upstairs to W.M.'s room, and shortly thereafter Appellant heard her screaming.

{¶7} After a break, Det. Clark resumed his interview with Appellant. Appellant stated he met Tiera a year ago, and as to W.M., she was "beating his ass." He stated sometimes Tiera went pretty far and had to call her mom. Appellant stated after he "busted his butt" one time, W.M. started listening. Tiera would often say she could not handle W.M. and wanted to get rid of him.

{¶8} Appellant told Det. Clark on the night before W.M.'s death, Tiera wasn't dealing with W.M., and told Appellant to handle it. Appellant stated he put W.M. on the wall to do wall squats, and kicked W.M.'s feet out from under him. Appellant tossed W.M., and he hit a space heater or radiator. Appellant stated when he fell and hit his head on the radiator, W.M. laid there "with that defiant look that he does." Appellant picked him up and said, "Get your ass back on the wall." W.M. got back on the wall, but kept spitting and trying to hit Appellant. Tiera told Appellant to hit him back, and Appellant kicked W.M. in the stomach. W.M. fell over. Appellant tossed W.M. a second time, and kicked W.M. again while he was laying on the ground. Appellant admitted several times to kicking W.M. twice on Sunday night and once on Monday morning, and to throwing W.M. across the room twice. Appellant also told police Tiera threw W.M. once on Sunday night, and kicked his feet out from under him. When W.M. kept "acting up", Tiera told Appellant to put him in the shower.

{¶9} Dr. Sandra Schubert, the Guernsey County Coroner, arrived at the house to view the body of W.M. She noted multiple marks all over W.M.'s body – his head, neck, torso, arms, legs, and back. From looking at the injuries to W.M.'s body, she was unable to immediately determine the cause of death, although initially she believed the trauma to his face may have led to a concussion, causing his death. She determined W.M. died

laying in his bed, between the hours of 9:00 a.m. and noon on April 16, 2018. She further noted four areas of vomit in W.M.'s bedroom, which were analyzed to help determine time of death.

{¶10} W.M.'s body was sent to Licking County, where Dr. Charles Lee performed an autopsy. Dr. Lee determined the injury which caused the death was a ruptured bowel, which led to peritonitis. The doctor determined the ruptured bowel was caused by blunt force trauma to the abdomen by something of substance inflicted hard and fast, such as a punch or a kick. According to Dr. Lee, the injury would need to be inflicted when the boy's spine was stable in order for the bowel to crush against the spine, causing it to rupture, and most likely W.M. was in a stable position against a wall or the floor. He estimated the injury occurred 8-24 hours prior to W.M.'s death. W.M.'s brain was swollen, and he had twice the amount of diphenhydramine in his system as is the therapeutic dose for an adult. W.M. was malnourished, weighing only 35 pounds at the time of his death.

{¶11} Appellant was indicted by the Guernsey County Grand Jury on two counts of murder, two counts of involuntary manslaughter, one count of felonious assault, and one count of endangering children. The case proceeded to jury trial in the Guernsey County Common Pleas Court.

{¶12} Appellant sought to admit the testimony of nineteen witnesses concerning Tiera's treatment of W.M. The court limited the evidence to acts of physical abuse by Tiera occurring between the dates of April 13, 2018, and April 16, 2018. Appellant presented the testimony of an expert witness, who generally agreed with the findings of Dr. Lee, but would place the timing of the injury which caused W.M.'s death at "about 24 hours, plus or minus a few hours." Tr. 676.

{¶13} The jury found Appellant guilty of all six charges. The court found all charges merged into one, and the State elected to have Appellant sentenced on felony murder, in which the underlying offense was endangering children. The trial court sentenced Appellant to a term of incarceration of fifteen years to life.

{¶14} It is from the March 14, 2019 judgment of conviction and sentence Appellant prosecutes his appeal, assigning as error:

> I. THE TRIAL COURT'S EXCLUSION OF TESTIMONY REGARDING THE MOTHER'S PATTERN OF PHYSICAL ABUSE AGAINST THE CHILD VICTIM VIOLATED THE RULES OF EVIDENCE AND DEPRIVED DEFENDANT-APPELLANT OF HIS RIGHT UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE. (Tr. II: 264; Tr. V: 922-966)
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> II. DEFENDANT-APPELLANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENT OT THE UNITED STATES CONSTITUTION, DUE TO DEFENSE COUNSEL'S FAILURE TO CHALLENGE THE ADMISSIBILITY OF HIS CUSTODIAL STATEMENTS TO THE POLICE AS BEING THE PRODUCT OF AN ILLEGAL ARREST. (R. 67)
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> III. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS AND

A FUNDAMENTALLY FAIR JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ADMITTING UNREDACTED JAIL CALLS CONTAINING PREJUDICIAL HEARSAY STATEMENTS BY HIS PARENTS REGARDING HIS GUILT. (Tr. III: 454-61)

IV. THE TRIAL COURT'S EXCLUSION OF THE RECORDINGS OF THE MOTHER'S STATEMENTS TO THE POLICE REGARDING THE CIRCUMSTANCES OF HER SON'S DEATH VIOLATED THE RULES OF EVIDENCE AND DEPRIVED DEFENDANT-APPELLANT OF HIS RIGHT UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE. (Tr. IV: 762-64, 779)

I.

{¶15} Appellant argues he was denied his constitutional right to present a defense when the trial court excluded the testimony of multiple witnesses concerning Tiera's character and propensity for violence against W.M.

{¶16} Appellant sought to call nineteen witnesses to demonstrate Tiera had a history of violence against W.M., and create a reasonable doubt Appellant was the perpetrator of the blow which caused W.M.'s death. Based on Evid. R. 404(B) concerning character evidence and Evid. R. 403(A) concerning confusion of issues and misleading the jury, the trial court determined pursuant to the State's motion in limine Appellant could only present evidence of specific acts of Tiera's physical violence toward W.M. during a

three day period from April 13, 2018, to April 16, 2018. The court noted Appellant had two witnesses, Appellant's sons L.B. and X.B., who witnessed Tiera hitting W.M. during this relevant time frame.

{¶17} This Court discussed the constitutional right to present a defense of an alternate perpetrator in *State v. Walker,* 5th Dist. Stark No. 2005-CA-00286, 2006-Ohio-6240:

> Every criminal defendant has a constitutional right to present a meaningful defense. *Crane v. Kentucky* (1986), 476 U.S. 683, 690, 106 S.Ct. 2142. However, this right does not engender an unfettered entitlement to the admission of any and all evidence. *U.S. v. Scheffer* (1998), 523 U.S. 303, 308, 118 S.Ct. 1261.
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> "While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. See, e.g., Fed. Rule Evid. 403; Uniform Rule of Evid. 45 (1953); ALI, Model Code of Evidence Rule 303 (1942); 3 J. Wigmore, Evidence §§ 1863, 1904 (1904). Plainly referring to rules of this type, we have stated that the Constitution permits judges 'to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of

the issues.' *Crane, supra*, at 689-690, 106 S.Ct. 2142 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); ellipsis and brackets in original). See also *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (plurality opinion) (terming such rules "familiar and unquestionably constitutional").

"A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. See, e.g., 41 C.J.S., Homicide § 216, pp. 56-58 (1991) ('Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded'); 40A Am.Jur.2d, Homicide § 286, pp. 136-138 (1999) ('[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged.... [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial' (footnotes omitted)). Such rules are widely accepted, and neither petitioner nor his amici challenge them here". *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, 1732-1733. [Footnotes omitted].

However, "when a defendant wishes to implicate a specific individual, evidence of the third party's guilt is admissible only if the defense can produce evidence that 'tend[s] to directly connect such other person with the actual commission of the crime charged". *Smithart v. Alaska* (1999), 988 P.2d 583, 586. [Footnotes and citations omitted].

{¶18} *Id.* at ¶¶ 46-49.

{¶19} Evid. R. 404(B) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

{¶20} Evid. R. 403 states:

Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

> Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

{¶21} Most federal courts which have considered the doctrine of "reverse character evidence," i.e., when the character evidence is sought to be admitted in favor of the defendant regarding the character of an alternate perpetrator rather than against the defendant, have concluded Evid. R. 404(B) does not apply, and instead the admission of the evidence is governed by Evid. R. 403. However, a few federal courts, including the Sixth Circuit Court of Appeals, hold Fed. R. 404(b) "protects every person, not just the criminal defendant or a victim." *Wynne v. Renico*, 606 F.3d 867, 873 (6th Cir.2010). The Second District Court of Appeals has accepted the position taken by most federal courts, and found admission of evidence of other acts by a third party should be governed by the balancing provision of Evid. R. 403, rather than by the test for other acts evidence set forth in Evid. R. 404. *State v. Gillispie*, 2nd Dist. No. 24456, 2012-Ohio-2942, 985 N.E.2d 145, ¶20.

{¶22} Although the trial court cited to Evid. R. 404 as well as 403 in its ruling, we note the trial court did not strictly apply the provisions of Evid. R. 404. Rather, the trial court applied the balancing test of Evid. R. 403, and concluded Appellant could present other acts evidence of physical violence by Tiera against W.M. during a three-day time period, pertinent to the evidence concerning when the fatal blow which ruptured W.M.'s bowel was struck.

{¶23} We find most of the evidence in Appellant's proffer of his nineteen witness statements to be properly excluded by the trial court. The majority of the evidence was based on hearsay, Tiera's general reputation in the community, actions of violence bearing no direct correlation to W.M. such as kicking a puppy, personal opinions of her behavior at W.M.'s funeral and her conduct after his death, and personal opinions without evidentiary support as to whether Appellant or Tiera killed W.M. We find the trial court did not err in finding the probative value of this evidence was outweighed by the danger of misleading the jury, and turning Appellant's trial into a trial of Tiera's general character. Exclusion of this evidence did not violate Appellant's constitutional right to defend himself because such evidence did not directly connect Tiera to the crime charged. *See Walker, supra.* However, we find the trial court erred in restricting evidence of physical acts of violence by Tiera against W.M. to a three-day time frame. The evidence demonstrated Tiera had access to W.M. during the time in which the fatal blow ruptured W.M.'s bowel. Thus, the testimony of any witness who personally observed Tiera committing acts of physical violence against W.M., regardless of time frame, would connect Tiera as a possible suspect to the crime charged.

{¶24} However, the trial court's error in restricting the time frame of evidence concerning Tiera's other acts does not require reversal if we conclude the error was harmless.

{¶25} In considering a case where the error was in the admission of evidence, the Ohio Supreme Court has removed the distinction in analysis of harmless error based on whether the error is constitutional or non-constitutional in nature:

Crim.R. 52(A) defines harmless error in the context of criminal cases and provides: “Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” Under the harmless-error standard of review, “the government bears the burden of demonstrating that the error did not affect the substantial rights of the defendant.” (Emphasis sic.) *State v. Perry*, 101 Ohio St.3d 118, 2004–Ohio–297, 802 N.E.2d 643, ¶ 15, *citing United States v. Olano*, 507 U.S. 725, 741, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In most cases, in order to be viewed as “affecting substantial rights,” “‘the error must have been prejudicial.’ (Emphasis added.)” *State v. Fisher*, 99 Ohio St.3d 127, 2003–Ohio–2761, 789 N.E.2d 222, ¶ 7, *quoting Olano* at 734, 113 S.Ct. 1770. Accordingly, Crim.R. 52(A) asks whether the rights affected are “substantial” and, if so, whether a defendant has suffered any prejudice as a result. *State v. Morris*, 141 Ohio St.3d 399, 2014–Ohio–5052, 24 N.E.3d 1153, ¶ 24–25.

Recently, in *Morris*, in a four-to-three decision, we examined the harmless-error rule in the context of a defendant's claim that the erroneous admission of certain evidence required a new trial. In that decision, the majority dispensed with the distinction between constitutional and non-constitutional errors under Crim.R. 52(A). *Id*. at ¶ 22–24. In its place, the following analysis was established to guide appellate courts in determining whether an error has affected the substantial rights of a defendant, thereby requiring a new trial. First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict.

Id. at ¶ 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. *Id*. at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt. *Id*. at ¶ 29, 33.

{¶26} *State v. Harris*, 142 Ohio St.3d 211, 2015–Ohio–166, 28 N.E.3d 1256, ¶ 36–37.

{¶27} Subsequent to *Harris,* the Court of Appeals for the Tenth District set forth the standard of review when the error is one excluding evidence rather than admitting evidence:

> An error by the trial court in excluding evidence "is harmless 'if such evidence would not negate the overwhelming proof of defendant's guilt.' " *State v. Johnson*, 3d Dist. No. 9-10-47, 2011-Ohio-994, 2011 WL 773407, ¶ 64, quoting *State v. Gilmore,* 28 Ohio St.3d 190, 193, 503 N.E.2d 147 (1986). *See also State v. Smith*, 3d Dist. No. 8-12-05, 2013-Ohio-746, 2013 WL 793208, ¶ 20 ("The improper exclusion of evidence is harmless where the remaining evidence provides overwhelming proof of a defendant's guilt."); *State v. West*, 10th Dist. No. 06AP-111, 2006-Ohio-6259, 2006 WL 3438651, ¶ 9 (noting that an "appellate court will not reverse a judgment for improper exclusion of evidence on a basis of error that is harmless," and

that "error is harmless if the jury would not have rendered a different verdict had the excluded evidence been admitted at trial").

{¶28} *State v. Fudge*, 10th Dist. Franklin No. 16AP-821, 2018-Ohio-601, 105 N.E.3d 766, ¶ 40.

{¶29} In the instant case, we find the error did not have an impact on the verdict and the error was harmless beyond a reasonable doubt.

{¶30} During his police interview, it was apparent Det. Clark was most concerned with the gash on W.M.'s head and the possibility the boy died from a concussion. With no questioning concerning kicking or punching the child in the stomach or torso area, Appellant several times told Det. Clark he kicked W.M. in the stomach and/or chest on Sunday night while he was doing wall squats against the wall, and also admitted kicking W.H. a second time while he was laying on the floor. In a recorded jail call, Appellant admitted he "did a couple things," including kicking W.H. in the stomach.

{¶31} Dr. Lee testified the rupture to W.H.'s bowel which resulted in his death was caused by a very quick and sharp blow to the upper abdomen between the lower breastbone and belly button, which trapped or crushed the small bowel against the spine, causing it to rupture. He testified the spine needed to be in a stable position against the wall or the floor when the blow happened in order for the injury to occur. Appellant's own expert, Dr. Carlos Schmidt admitted on cross-examination W.M.'s bowel rupture could have occurred if kicked or punched while doing wall squats with his back supported, or while laying on the floor with his back against a wall or a heater. When shown the boots

Appellant was wearing, Dr. Schmidt further testified a man kicking a child with a boot that size is consistent with what he observed.

{¶32} Therefore, the statements Appellant repeatedly made concerning kicking the child in the stomach and/or chest area while he was doing wall squats, and again on the floor, is consistent with the experts' testimony of how the injury may have occurred.

{¶33} Further, substantial evidence of acts of violence by Tiera came into evidence. L.B., Appellant's son, testified on Saturday night before the death, W.H. was standing on the wall crying, and Tiera started yelling at W.H. He testified on Sunday, he saw Tiera backhand W.H. for chewing with his mouth open. L.B. testified he thought he saw blood, but was not sure because W.H. was eating strawberry oatmeal. Also on Sunday, L.B. saw Tiera hit W.H.'s hands with a spatula. While the trial court specifically noted X.B. would be permitted to testify concerning Tiera's actions during the weekend leading to W.H.'s death, and the proffer of X.B.'s testimony reflects such, Appellant chose not to call X.B. as a witness.

{¶34} In addition, Appellant's jail phone calls and police interview included evidence of Tiera's prior acts of violence toward W.H., both inside and outside the three-day time period set by the trial court. In the phone calls from the jail, Appellant discussed the children being malnourished, and when W.M. had episodes, Tiera "tore his ass up." He specifically discussed Tiera cutting a gash in W.M.'s thumb, and cutting a deep gash in W.M.'s leg. In his interview with Det. Clark, Appellant repeatedly stated Tiera "busted his ass" when referring to W.H. He told Det. Clark she sometimes went pretty far in beating W.H., and had to call her mom to come and get W.H. Appellant stated Tiera would say she couldn't handle W.H., and wanted to get rid of him. He stated W.H. was

malnourished because Tiera wouldn't allow him to eat. He also told police on the Sunday night before W.H. died, Tiera threw W.H. once and kicked his feet out from under him, and about three weeks prior to his death, she tossed W.H. on the floor.

{¶35} Because we find the error in limiting the time frame of Tiera's past acts is harmless, the first assignment of error is overruled.

II.

{¶36} In his second assignment of error, Appellant argues counsel was ineffective for failing to raise a claim his confession was inadmissible despite the giving of Miranda warnings because he was unlawfully detained.

{¶37} A properly licensed attorney is presumed competent. State v. Hamblin, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

{¶38} A person arrested without probable cause cannot have incriminating statements, obtained after the arrest, used against him at trial. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). The magic words "you are under arrest" are not necessary to constitute an arrest. Any police confinement beyond the parameters in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), is the key to what

constitutes an arrest. If one is deprived of his movement by the state, he is in custody and considered under arrest, if he could not have attempted to leave. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Brown, supra.*

{¶39} If an illegal arrest is made by the police, the subsequent issuance of Miranda warnings to the accused will not cure the original unlawful act. Miranda concerns the Fifth and Sixth Amendment guarantees. The Fourth Amendment concerns illegal arrests, and the fruits therefrom. The exclusionary rule is a distinct safeguard from Miranda's protection. *Brown, supra*. If any statements are "seized" during illegal custody, they are inadmissible. *Dunaway v. New York, supra*.

{¶40} Appellant argues the facts in the instant case are indistinguishable from *Dunaway, supra*. However, Dunaway was involuntarily taken to the police station for questioning. In the instant case, the record reflects Appellant voluntarily went to the station to talk to police.

{¶41} Counsel moved to suppress Appellant's statement on other grounds. At the suppression hearing, Ptl. Eubanks testified Appellant was asked, not told, to come to the station to talk with police. He testified he "possibly" may have been detained if he refused, but he was unsure. Supp. Tr. 30. Det. Clark testified at the suppression hearing he Mirandized Appellant before interviewing him, but he was not in custody. Supp. Tr. 43. The detective wanted to hear what Appellant had to say because there were only two people at the scene when the body was discovered, but did not inform Appellant he was under arrest. *Id*.

{¶42} At trial, Det. Clark testified Appellant was asked to come to the station, and came voluntarily. When asked what would have happened if what would have happened if Appellant had tried to leave the room, Det. Clark said he would have asked Appellant to sit down. Det. Clark responded if Appellant would not sit down when asked, he "probably would have been detained." Tr. 369-70. However, the officer's subjective intent to arrest is not controlling. *State v. Edwards*, 10th Dist. Franklin No. 15AP-879, 2016-Ohio-4771, 68 N.E.3d 228, ¶19. Further, the officer's statement as to what he would "probably" have done had Appellant tried to leave is not a certainty as to his intention to detain Appellant.

{¶43} Appellant argues he was placed in custody immediately upon his arrival at the police station, as he was placed in a locked interview room, and an officer took away his cell phone and wallet. However, Det. Clark testified at the suppression hearing Appellant could have left the station, but wouldn't have his wallet and phone unless he asked for them. Supp. Tr. 55. At trial, Det. Clark testified for security reasons, to prevent civilians being interviewed from wandering freely throughout the station where evidence and confidential information is accessible, suspects are placed in a locked interview room. Security measures in place to restrict Appellant's freedom of movement inside the police station are not controlling on whether Appellant was free to leave the station if he asked to leave, after voluntarily accompanying the officer to the station. The testimony at the suppression hearing indicates Appellant was free to leave the station, he simply would have had to ask for his cell phone and wallet to be returned.

{¶44} During the first interview with Appellant, Det. Clark noticed Appellant's story kept changing. Eventually, Appellant admitted to police he physically kicked W.M. out the

door of the residence, at which time W.M. hit his head on the concrete. The officer had noted a gash on W.M.'s head, and we find at this point in the questioning, the officer had probable cause to further detain Appellant.

{¶45} The record reflects Appellant voluntarily went to the station for questioning, and during the first interview Appellant made incriminating statements giving police probable cause to detain him further. We find Appellant has not demonstrated had counsel moved to suppress his statements on the basis they were the product of an illegal detention, the motion would have been granted, and therefore has not demonstrated a reasonable probability of a change in the outcome had counsel made the motion.

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

III.

{¶47} In his third assignment of error, Appellant argues the court erred in failing to redact Appellant's parents' statements from recorded telephone calls he made from the jail, as the statements of his parents were inadmissible hearsay.

{¶48} Recordings of telephone calls Appellant made from the jail to his parents were played for the jury and admitted into evidence. In addition to Appellant's own statements on the recordings, statements made by his parents were played for the jury. During the calls, Appellant told his parents what he said to the detective during his interrogation at the police station. In one of the calls, one of his parents responded, "Well, I don't know what a lawyer can do, you admitting to that." State's Exhibit G, call 1. In another call, after Benson admitted what he told the police, a parent responded, "You're done, you're done." States Exhibit G, call 2. Finally, one parent remarked, "The lawyer

said that he hoped you didn't say nothing to none of them," and the other parent responded, "It's too late now." State's Exhibit G.

{¶49} Appellant objected on the basis the parents' statements were inadmissible hearsay. The trial court overruled the objection, finding the parents' statements were not offered to prove the truth of the matter asserted therein.

{¶50} Evid. R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." If an out-of-court statement is not offered to prove the truth of the matter asserted in the statement, such as to provide context for other admissible statements in the piece of evidence, the statement is not hearsay, and is admissible. *See State v. Martin*, 5th Dist. Delaware No. 19 CAA 01 0004, 2019-Ohio-4931, ¶18 (confidential informant's comments on recording of controlled drug buy were not offered to prove the truth of the matter asserted, but were offered to give context to defendant's admissible statements on the recordings).

{¶51} The comments by Appellant's parents in the recordings of the jail calls were not offered to prove the truth of what his parents said, but were offered as context for the complete conversation which included Appellant's admissible statements. While Appellant argues the opinions of his parents concerning his guilt were prejudicial, the trial court gave the following limiting instruction:

> THE COURT: Ladies and gentlemen, the Court had to hear a couple matters outside your presence and I appreciate your patience with regard to that. The Court will, in light of the Court's ruling, permit the playing of the

> recording that has been authenticated by Lieutenant Stoney and Guernsey County Sheriff's Office. Now, I will advise you that part of the conversation you're going to hear, it's represented that there's a party, not the defendant Mr. Benson, but another party. That's not being offered for the truth of the matter as what was asserted by the other party, but simply the fact that the statements were made. I believe that would be true of the limiting instruction.
>
> * * * *
>
> THE COURT: Right, So, ladies and gentlemen, as I've indicated, part of the conversation here as a third party, other than the defendant, you're not to consider the statements that those persons made for the truth of what was actually said. It's more the fact of the phone call and any statements of the defendant, Mr. Benson.

{¶52} Tr. 456-457.

{¶53} It is well-established juries are presumed to follow and obey the limiting instructions given them by the trial court. *State v. Davis*, 5th Dist. Richland No. 14 CA 34, 2015-Ohio-889, 31 N.E.3d 1204, ¶54, *citing State v. DeMastry*, 155 Ohio App.3d 110, 127, 799 N.E.2d 229, 2003-Ohio-5588, ¶84; *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991); *Zafiro v. United States*, 506 U.S. 534, 540, 113 S.Ct. 933, 122 L.Ed.2d 317(1993). "A presumption always exists that the jury has followed the instructions given to it by the trial court." *Pang v. Minch*, 53 Ohio St.3d 186, 187, 559

N.E.2d 1313 (1990), at paragraph four of the syllabus, *rehearing denied*, 54 Ohio St.3d 716, 562 N.E.2d 163.

{¶54} We find the trial court did not err in failing to redact Appellant's parents' statements from the jail calls, particularly in light of the limiting instruction given by the court.

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

IV.

{¶56} In his fourth assignment of error, Appellant argues the court erred in excluding the interview of Tiera Mounts by police from evidence on the grounds it was hearsay.

{¶57} When called as a witness in this case, Tiera exercised her Fifth Amendment right against self-incrimination. Appellant sought admission of her statements to Det. Clark as a statement against interest pursuant to Evid. R. 804(B)(3):

> Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (3) Statement Against Interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate

the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

{¶58} The trial court found Tiera did not implicate herself in the crime, nor did she exonerate Appellant.

{¶59} We find the trial court improperly focused solely on whether Tiera implicated herself in the crime of which Appellant is accused. In the interview, Tiera admitted to physical violence against W.M., specifically to "whooping his butt," "popping" him in the mouth, and hitting him in the head with a door. As we discussed earlier in this opinion concerning Appellant's first assignment of error, evidence of Tiera's physical violence against W.M. in the past was relevant in the instant case because the evidence reflects she had access to W.M. during the time period when the blow which resulted in his death was delivered. We therefore find the court erred in excluding those portions of her statement to Det. Clark in which she admitted physical violence against W.M. based on the trial court's rationale her admission of these acts was not connected directly to the time frame in which W.M. was killed.

{¶60} While we find the court erred in denying admission of her statement pursuant to Evid. R. 804(B)(3), we find the error harmless for the reasons stated in our discussion of Appellant's first assignment of error.

{¶61} Appellant's fourth assignment of error is overruled.

{¶62} The judgment of the Guernsey County Common Pleas Court is affirmed.

By: Hoffman, P.J.
Delaney, J. and
Baldwin, J. concur