APPENDIX A

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September 22, 2000

Dr. Charles R. Smith
Division of Pathology
The Hospital For Sick Children
555 University Ave.
Toronto, Ontario M5G 1X8

Dear Dr. Smith,

I thought you might want to know the outcome of the Fuller case. Christopher Fuller was convicted of the aggravated murder and attempted rape of Randi. Although sentencing is scheduled for October 9, 2000, the jury has recommended that the death penalty be imposed. The court is likely to follow the jury's recommendation.

I, along with my colleagues, found your work in this case to be truly outstanding. I can well imagine that pediatric forensic pathology must rank among the most unpleasant fields of medicine in which to practice, but society is indeed fortunate that a man of your caliber has chosen to do so.

Thanks again for your assistance. I remain

Very truly yours,

John M. Holcomb
Assistant Prosecuting Attorney

JMH/sp

PFP115000

APPENDIX B

IN THE COMMON PLEAS COURT, BUTLER COUNTY, OHIO

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CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

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COMMON PLEAS COURT
SEP 25 2000
CINDY CARPENTER
CLERK OF COURTS

STATE OF OHIO
Plaintiff

CASE NO. CR2000-03-0369

vs

JURY VERDICT

Defendant
Christopher Fuller

We the jury having been duly empaneled find the aggravating circumstance that the defendant was found guilty of committing, outweighs the mitigating factors presented in this case by proof beyond a reasonable doubt and hereby sentence Christopher Fuller to death.

ALL TWELVE JURORS MUST SIGN.

ENTER

Matthew J. Crehan, Judge

APPENDIX C

STATE OF OHIO :

Plaintiff :

vs. :

CHRISTOPHER J. FULLER :

Defendant :

CASE NO. CR 2000-03-0369

STATE OF OHIO
COUNTY OF BUTLER
COURT OF COMMON PLEAS

ENTRY OF JURY VERDICTS

FILED
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CINDY C. CARPENTER
BUTLER COUNTY
CLERK OF COURTS
OCT 02 2000

This 11th day of September, 2000, came the Butler County Prosecuting Attorney Dan Gattermeyer into Court and the defendant personally appearing with his counsel, Ronald C. Morgan and Christopher J. Pagan, and the defendant having entered a plea of NOT GUILTY to the charges contained in Counts One, Two and Three of the Indictment, to wit:

> **AGGRAVATED MURDER**, as charged in Count One of the Indictment contrary to R.C. 2903.01(C), with **Specification 1 to Count One** as specified pursuant to R.C. 2929.04(A)(9) and with **Specification 2 to Count One** as specified pursuant to R.C. 2929.04(A)(7); **AGGRAVATED MURDER**, as charged in Count Two of the Indictment contrary to R.C. 2903.01(B), with **Specification 1 to Count Two** as specified pursuant to R.C. 2929.04(A)(9) and with **Specification 2 to Count Two** as specified pursuant to R.C. 2929.04(A)(7); and **ATTEMPTED RAPE** [attempt to commit the offense of rape as defined in R.C. 2907.02(A)(1)(b)], as charged in Count Three of the Indictment contrary to R.C. 2923.02(A);

an order having been filed granting the defendant's motion to sever Counts Four, Five and Six of the Indictment for a separate trial.

WHEREFORE the trial began, and on September 19, 2000, after having heard all the facts adduced by both parties, the Jury in writing made its **VERDICTS**, to wit: **GUILTY**, as to **AGGRAVATED MURDER**, as charged in Count One of the Indictment, contrary to R.C. 2903.01(C); **GUILTY**, as to **Specification 1 to Count One** as specified pursuant to R.C. 2929.04(A)(9); **GUILTY**, as to **Specification 2 to Count One** as specified pursuant to

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R.C. 2929.04(A)(7); **GUILTY**, as to **AGGRAVATED MURDER**, as charged in Count Two of the Indictment, contrary to R.C. 2903.01(B); **GUILTY**, as to **Specification 1 to Count Two** as specified pursuant to R.C. 2929.04(A)(9); **GUILTY**, as to **Specification 2 to Count Two** as specified pursuant to R.C. 2929.04(A)(7); and **GUILTY**, as to **ATTEMPTED RAPE** [attempt to commit the offense of rape as defined in R.C. 2907.02(A)(1)(b)], as charged in Count Three of the Indictment contrary to R.C. 2923.02(A).

Wherefore the Court continued this proceeding for a sentencing hearing as to Counts One and Two of the Indictment (which Counts will be merged pursuant to R.C. 2941.25(A)for purposes of sentencing),before the court and trial jury in accordance with the procedures set forth in R.C. 2929.02 and 2929.03-.04, to commence on Wednesday, September 20, 2000, at 9:00 o'clock a.m.

ENTER

CREHAN, J.

APPROVED AS TO FORM:

DAN GATTERMEYER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

DJG:DGE:JMH:SNB/dge
9/22

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APPENDIX D

IN THE COMMON PLEAS COURT, BUTLER COUNTY, OHIO

STATE OF OHIO : CASE NO. CR00-03-0369

FILED
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CINDY ... ER
BUTLER COUNTY
CLERK OF COURTS

Plaintiffs :

vs : **SENTENCING OPINION**

CHRISTOPHER FULLER Final Appealable Order

Defendant :

: October 18, 2000

::: :::

This opinion is rendered pursuant to Ohio Revised Code Section 2929 03 (F).

The Butler County Grand Jury returned an indictment charging the defendant Christopher Fuller with two counts of aggravated murder, each with two specifications:(1) that the homicide was committed on a child less than 13 years of age; and (2), that the homicide was committed while the defendant was attempting to commit the offense of rape. These charges arose out of the death of Randi Fuller, the defendant's daughter who was 2 years 11 months of age at the time of the offense.

The defendant entered a plea of not guilty at his arraignment and the case was tried to a jury at a trial which commenced on September 11, 2000. The jury returned verdicts of guilty to each of the two counts of aggravated murder and guilty to the specifications contained in both counts of the indictment as well as a finding of guilty on count three of the indictment in which the defendant was charged with attempted rape.

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Common Pleas Court
Butler County Ohio

The conduct by the defendant charged in count one and count two of the indictment can be construed to constitute two or more offenses of similar import. Consequently, even though the indictment may contain counts for all such offenses, the defendant may be convicted of only one pursuant to O.R.C. section 2941.25(A). The State of Ohio has elected to have the defendant convicted of count one of the indictment and each of the specifications attached thereto.

Pursuant to Revised Code Section 2929.04 (B), a sentencing hearing was held on September 20, 2000 in which the jury was instructed to weigh the aggravating circumstance contained in the specifications against the mitigating factors and to determine if the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. For purposes of determining the aggravating circumstance, the two specification of which the defendant was found guilty were merged into one aggravating circumstance which was submitted to the jury.

The Jury returned a verdict recommending the sentence of death.

AGGRAVATING CIRCUMSTANCE: In this case the aggravating circumstance which is to be weighed against the mitigating factors is as follows:

> That the defendant, as a principal offender, committed the homicide on a child who was less than thirteen years of age while attempting to commit the offense of rape.

The Prosecution introduced the evidence submitted at the trial phase of the proceedings and submitted no further evidence.

Regarding the aggravating circumstance, the evidence as to the age of the child is obvious. The child was 2 years 11 months of age. The evidence as to the circumstance surrounding the homicide while committing the offense of attempted rape came from the defendant in his statements to the police. He gave three statements, the first of which was a witness statement which was generally exculpatory and taken by the police as a witness statement. He related a story as to how he was alone with his two children and left them to go to the bathroom. Upon returning he discovered Randi shaking and not breathing and tried to resuscitate her. Failing that, he rushed the baby to a neighborhood grocery store where others attempted to revive the child to no avail. The life squad was called and the child was transported

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to the hospital where she died. Bruising on the child's body raised the suspicion of the police and the defendant was interrogated further. In subsequent statements the defendant admitted he pushed the child down and he struck the child in the chest when the child refused to engage in sexual conduct with the defendant. There was no physical or medical evidence as to past or present sexual molestation found on the body of the child. The cause of death was asphyxiation and the bruising on the child's body indicate the asphyxiation was caused by a neck and chest compression as testified by the pathologists, however the mechanism of asphyxiation could not be established.

MITIGATING FACTORS: The Jury was, instructed that mitigating factors are factors which, while they do not justify or excuse the crime, nevertheless in fairness and mercy, may be considered as they call for a penalty less than death, or lessen the appropriateness of a sentence of death. Mitigating factors are factors about an individual which weigh in favor of a decision that one of the life sentences is the appropriate sentence.

In accordance with Section 2929.04(B), The Jury was instructed to consider all the evidence, arguments, the statement of the defendant, and all other information and reports which are relevant to the nature and circumstances of the aggravated circumstance or to any mitigating factors including but not limited to the history, character, and background of the defendant and all of the following:

> (1) The youth of the defendant;
> (2) The defendant's lack of a significant history of prior criminal convictions and delinquency adjudications;
> (3) Any other factors that are relevant to the issue of whether the defendant should be sentenced to death or that call for a penalty less than death, or lessen the appropriateness of a sentence of death.

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Common Pleas Court
Butler County, Ohio

The defendant produced testimony from a psychiatrist, the defendant's mother, a representative of the adult parole authority, the chaplain at the county jail, and an unsworn statement by the defendant. The report of the psychiatrist was accepted as evidence.

MITIGATING FACTORS PRESENTED BY DEFENSE:

Bad Childhood. Mr. Fuller was dropped on his head when he was one (1) month old. He had a very difficult childhood. The separation from his parents, and other siblings at age five (5) had a lasting negative psychological effect on Mr. Fuller.

Mental Condition. The offender's mental condition at the time of the offense. Mr. Fuller was under stress and often depressed. Further, there was medical testimony that he suffered from Pervasive Development Disorder (PDD) and Ausperger's Disease.

Criminal History. The offender's lack of a significant history of prior criminal convictions and Juvenile delinquency adjudications. Mr. Fuller at the time of the offense was thirty-one (31) years old and had no prior criminal or traffic convictions. In fact, Mr. Fuller had no prior arrests, whatsoever. Prior to the offenses charged in his indictment, Mr. Fuller had demonstrated no criminal propensities or proclivities.

Institutional Record. Mr. Fuller was a model prisoner. He had no problems whatsoever during the time of his pretrial confinement from March 21, 2000 to his conviction on September 19, 2000. This demonstrates that he is amenable to institutionalization and if given life imprisonment would conform well to such punishment.

Employment History. Mr. Fuller maintained full time employment and supported his family. While of modest income, Mr. Fuller's family was never on welfare or without food, clothing, shelter, or medical benefits.

Military Service History. To his credit Mr. Fuller served his country in the U.S. Army Signal

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Butler County, Ohio

Corps for seven (7) years and was honorably discharged, again with no disciplinary problems manifested during his two (2) tours of duty.

Education. Mr. Fuller graduated from high school in a timely manner and was not a problem student.

Remorse Mr. Fuller testified that he was very sorry about Randi's death. Mr. Fuller asked his wife and daughter's forgiveness, as well as God's. He indicated that he'd lost a substantial amount of weight, that he was very depressed, had bitten his fingernails down to the quick, and often stared into space and that he was having very difficult time coping with Randi's death.

FINDINGS

In order to sentence the defendant to death, the law requires that the Court conduct its own independent analysis and make its own finding as to whether the aggravating circumstance in this case outweighs the mitigating factors beyond a reasonable doubt. The Court must consider the evidence presented as to the aggravating circumstance which transformed this offense of aggravated murder from a case in which death was not a potential penalty to one where death is a possible penalty. This aggravating circumstance must then be weighed against the mitigating factors about the individual which would weigh in favor of a decision that a life imprisonment sentence is the appropriate sentence

The weighing process is just that. The Court must put the aggravating circumstance on one side of the scale and place all the mitigating factors on the other side and make the determination as to whether the aggravating circumstance out weighs the mitigating factors beyond a reasonable doubt. Beyond a reasonable doubt is the highest weight burden known in American law. It is greater than a preponderance which is simply the greater weight of the evidence; it is greater than a clear and convincing standard which has been defined as that which will provide a firm belief or conviction of what is to be established. Beyond a reasonable doubt, in addition to providing a firm belief or conviction, it requires that an ordinary person be willing to rely and act upon it in the most important of his or her own affairs.

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There is no doubt that the aggravating circumstance in this case deserves great weight. There is nothing mitigating about the offense itself. The circumstance is abhorrent to our civil society where protection of our children is ingrained into our very being. How any one could do this to a child is beyond this Court's comprehension. Were that the only factor to take into consideration this court would have no hesitation in inflicting the death penalty on Mr. Fuller. However that is not the law. The Court must weigh all the mitigating factors and determine if the aggravating circumstance out weighs the mitigating circumstances by the beyond a reasonable doubt standard. In other words the court must weigh the background, character, and history that Mr. Fuller has amassed during the 31 years that he has lived on this earth and determine if his is a life worth saving even in the face of the aggravating circumstance surrounding this crime of aggravated murder. This, in the last analysis, is what considering the mitigating factors is all about.

In summary form, the evidence of defendant's history, character and background considered by the Court is as follows:

The defendant is presently 31 years of age. He was born in Rome, New York and he was the third of five children. When he was one month old he apparently was dropped on his head by a sibling and suffered a skull fracture. There is no evidence as to what effect that had on his intellectual ability. Child Welfare Authorities were a part of his formative years because his parents were of very poor financial means. His mother, when she and her husband were unable to care for the children, surrendered custody of the children to relatives. When he was five years old Christopher was placed in the custody of an uncle and an aunt and he stayed with them until he was 18 years of age. Although his mother visited her children regularly, this removal from his mother and father was a traumatic event in his life and one which he remembers very well and which has affected his relationship with his family ever since. He had at least one psychiatric consultation for depression resulting from this experience and had some problems as a child with temper tantrums and withdrawal.

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In school he was somewhat of a loner and had few friends and this trait has followed him through his life. Although he liked some sports, he did not actively engage in sports because he was not good at them. In school he achieved very poor grades. He graduated from high school in the bottom ten percent of his class. There is no history of any disciplinary problems.

He joined the army after high school and served two tours with the Army from 1988 to 1992 and again from 1993 to 1996. He served in Korea, did firefighting in Montana, and served with the Army in Kuwait after the Gulf War. He received a number of commendations and received an honorable discharge from the Army for both enlistments.

He met his wife Jessica in Texas, while he was in the Army, and married her after a very short acquaintance period in 1995. After getting out of the Army he made a number of interstate moves with Jessica ending in Rhode Island which is her home. He apparently did not get along with her family and eventually the couple separated and he came to Hamilton, Ohio in 1997 to join his mother and sister who were living in this locality. Eventually he and his wife reunited and they took up residence with their two young children in Hamilton. During all of the moves he worked continuously to support his family, but was only able to hold entry level jobs. To make ends meet both he and his wife worked different shifts to accommodate baby sitting duties. He was very dependable and worked whenever he could for extra money. According to the psychiatrist he appears to exist well in a concrete and structured setting where his duties are well defined, such as the Army, and this trait hampered him in his advancement in his employment. Between working late shift, and taking care of his children he was not sleeping much and this also affected his advancement in employment.

The psychiatrist testified that the defendant does suffer from a condition known as Pervasive Development Disorder. This disorder apparently interferes with his relationships with people and it interferes with his social interactions and is brain based. The psychiatrist did state that this condition however was not related to a commission of the acts for which he was

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found guilty The psychiatrist did indicate that this condition however would account for his somewhat stonelike and flat emotional appearance even when speaking of the matters which brought him into the legal system. When speaking of his daughter Randi, however, he appears to get distressed and upset and is unable to talk for minutes.

Regarding his intelligence he has an overall IQ of 89 which places him at the low end of average. His verbal and math skills are average whereas his performance IQ is below average. This latter affects his perceptions of people's motives and his social interaction with people outside his immediate family, which is deficient. Psychological tests indicate an inability to imagine why things happen in social contexts and limits his ability to grasp what happens in and the social significance of interpersonal interactions.

Regarding his criminal history, he has no juvenile record and no adult record of criminal convictions of any type. He has had no contact with law enforcement authorities during the course of his 31 years.

According to the defendant he was a heavy drinker when he was younger but has not had a drink for approximately five years. There is no indication of any present or past drug use. According to the psychiatrist these factors as well as his lack of criminal history are risk factors which must be taken into consideration in terms of his future prognosis for future violent activity. In psychological tests developed to predict future violent behavior he scores low.

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Butler County Ohio

The defendant accepted the verdict of the jury, apologized to his family, expressed remorse for the death of his child and wishes he could re-live march 21, 2000 over.

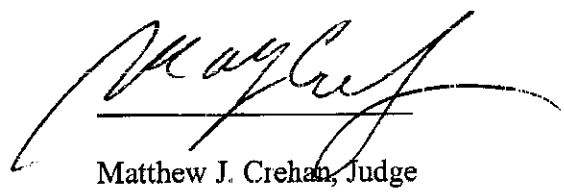
These factors are not insubstantial. They deserve and must be given substantial weight. The determination the Court must make is whether the weight given to the aggravating circumstance outweighs the weight given to the mitigating circumstances by the highest weight standard known in the law - beyond a reasonable doubt.

After much deliberation, consideration, soul searching and analysis the court finds that the aggravating circumstance does not outweigh the totality of the mitigating factors, which

lessen the appropriateness of the death penalty, beyond a reasonable doubt. His traumatic childhood which he has attempted to overcome, his lack of criminal history, his low predictability for future violence, his service to the country in the armed forces, his dependability as a worker, his ability to exist in a structured setting such as prison and his remorse over the events of March 21,2000, militate against taking this man's life. This probably is a life worth saving even though he will be living it within the confines of prison walls for the rest of his life. Even though the court gives great weight to the gravity of the aggravating circumstance, it does not outweigh the mitigating factors by the degree required by law and the sentence of death recommended by the jury will not be followed.

It is the sentence of the Court that the defendant be sentenced to life in prison without the possibility of parole on Count one of the indictment.

SO ORDERED



Matthew J. Crehan, Judge

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JUDGE MATTHEW J. CREHAN
Common Pleas Court
Butler County, Ohio

APPENDIX E

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	CASE NOS. CA2000-11-217 CA2001-03-048 CA2001-03-061
- vs -	:	
CHRISTOPHER FULLER,	:	O P I N I O N 8/12/2002
Defendant-Appellant/ Cross-Appellee.	:	

CRIMINAL APPEAL FROM COMMON PLEAS COURT

Robin N. Piper, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Fred Miller, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

VALEN, J.

{¶1} Defendant-appellant, Christopher Fuller, appeals his convictions in the Butler County Court of Common Pleas on three counts of rape, two counts of aggravated murder and one count of attempted rape.

{¶2} On March 21, 2000, around 8:00 a.m., Mrs. Jessica Fuller dressed her two-year-old daughter, Randi Fuller. Mrs. Fuller stated Randi had no cuts or bruises at that time. Mrs. Fuller then

left for work. Shortly after 2:00 p.m., appellant carried his daughter, Randi, from their house to the Sycamore Market in the city of Hamilton. Appellant carried Randi to the market because Randi was not breathing and appellant was asking for help.

{¶3} One employee of the market began cardio-pulmonary resuscitation ("CPR") and another employee called 911. The employee administering CPR noticed Randi's hair and shirt were wet. Appellant told the employee Randi got wet when he had given her a glass of water to drink. The employee also noticed a pink liquid coming from Randi's mouth and nose. When he took Randi's clothes off to perform CPR he also noticed a large bruise on her chest as well as other bruises on her face and legs.

{¶4} Paramedics and police officers arrived at the Sycamore Market and the life squad took Randi to the hospital. At the scene, appellant told an officer he gave his daughter a glass of water, went to the bathroom, and when he returned she was on the floor and not breathing. He told the officer he attempted mouth-to-mouth resuscitation but that it did not help. The officer offered to drive appellant to the hospital.

{¶5} At the hospital, appellant agreed to go to the police station to give a statement. Appellant left the hospital with the officers at 3:00 p.m. At the station, appellant told the officers he had given Randi a large plastic cup of water. Appellant stated he then went upstairs to the bathroom for two minutes and returned to see Randi shaking and not breathing. Appellant stated Randi would often hold her breath and bite her tongue until she passed

out when her mother would leave for work and that she appeared to be doing this again. Appellant stated he began mouth-to-mouth resuscitation when she began to turn blue. Appellant stated that when she did not respond, he took her to the Sycamore Market for help. After the statement was completed at 4:00 p.m., appellant returned to the hospital.

{¶6} Randi died that afternoon at the hospital. That evening the investigating officers asked appellant to return to the station for another interview. The second interview began at 5:35 p.m. Appellant was read his Miranda rights. Appellant stated that he hurt Randi because "he pushed too hard." Appellant later told the officers he was home alone with his two daughters, when he took Randi upstairs leaving his daughter Faith downstairs. Once upstairs, appellant asked Randi to "love on daddy." Randi refused and appellant stated he got mad at Randi and hit her twice in the chest.

{¶7} The officers asked appellant why Randi's rejection would anger him so much that he would hit her. Appellant responded it was because he was asking her for sex. Appellant then gave the police a third statement at 7:45 p.m. Appellant told the police that in May of 1999 he tried to put his penis into Randi's vagina but stopped because he could not maintain an erection. Appellant then stated he also tried to put his penis into Randi's vagina in February 2000 but again he could not maintain an erection so he put his penis into Randi's rectum. Appellant stated when he took Randi upstairs on March 21, 2000 he wanted to have sex with her again.

Appellant stated he believed Randi refused because she knew what he wanted.

{¶8} An autopsy revealed numerous bruises on Randi's face, chest, and back. The pathologist noted lacerations on top of her head, her brain was heavier than normal from swelling, there was a kidney hemorrhage, and petechial hemorrhages in her right eyelid. The pathologist stated the petechial hemorrhages were indicative of death by asphyxiation. Therefore, the pathologist concluded that Randi died of asphyxiation. However, an evaluation of Randi's genitalia revealed that there were no external injuries, lacerations, tears, bleeding, redness, or swelling.

{¶9} Appellant was originally indicted on six counts: two counts of murder and one count of attempted rape, for events that occurred on March 21, 1999; and three counts of rape, for events that occurred during the months proceeding March 21, 1999. The trial court severed the earlier rape counts from the murder and attempted rape charges. Appellant pleaded no contest to three counts of rape and was tried by a jury and convicted of aggravated murder and attempted rape. The appeals for both cases have been consolidated into this appeal. Appellant appeals his convictions raising four assignments of error. Appellee, the state of Ohio, raises one cross-assignment of error.

{¶10} Assignment of Error No. 1:

{¶11} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT ALLOWED EVIDENCE REGARDING APPELLANT'S PRIOR 'BAD ACTS.'"

{¶12} Appellant argues that in order for other bad acts evidence to be admissible, there must be an inextricable link between the other acts and the offense in question, even if the enumerated exceptions in Evid.R. 404(B) apply. Appellant argues that when the probative value of a defendant's statement is outweighed by the prejudicial effect, the statement is not admissible into evidence. Furthermore, appellant argues not only was the evidence prejudicial to him but it was also misleading to the jury.

{¶13} The state argues that statements are admissible where the statements "in a defendant's confession to the offense of aggravated murder, for which he was on trial, are related to his commission of other prior criminal acts against the same victim, and by which the defendant explained his state of mind in committing the murder." The state argues such evidence "is admissible under Evid.R. 404(B) and R.C. 2945.59 on the issue of the defendant's motive and intent in committing the offense." Furthermore, the state contends "in balancing its highly probative value, such evidence is not unfairly prejudicial and is admissible under Evid.R. 403(A)."

{¶14} As with any other type of evidence, admission of "other acts" testimony must not only meet the prerequisites of Evid.R. 404(B), but it must also meet the prerequisites of Evid.R. 403(A) which requires the exclusion of relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice." State v. Patterson, Butler App. No. CA 2001-01-011, 2002-Ohio-2065, ¶61. It has been held that only in rare cases is an

"accused's own actions or language" unfairly prejudicial. State v. Geasley (1993), 85 Ohio App.3d 360, 373. The admission or exclusion of evidence, including other acts evidence, lies in the trial court's sound discretion. State v. Bey, 85 Ohio St.3d 487, 489-490, 1999-Ohio-283.

{¶15} An appellate court will not disturb a trial court's evidentiary ruling absent an abuse of discretion. Krischbaum v. Dillon (1991), 58 Ohio St.3d 58, 66; State v. Hymore (1967), 9 Ohio St.2d 122, 128. In order to find an abuse of discretion, the trial court's decision must be unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219. For the following reasons, we determine that the trial court did not abuse that discretion by admitting the "other acts" evidence in this case.

{¶16} Evid.R. 404(B) specifically states the rule of exclusion for evidence of "other crimes, wrongs, or acts." The rule provides, however, for an exception when the prosecution seeks to introduce evidence of other bad acts not to show the accused's character or his criminal propensity, but to establish circumstantially either an element of the crime or a material fact at issue. State v. Patterson, 2002-Ohio-2065 at ¶59. The Ohio Supreme Court has held that both R.C. 2945.59 and Evid.R. 404(B) are to be strictly construed against the state and conservatively applied by trial courts. State v. DeMarco (1987), 31 Ohio St.3d 191, 194. As the court pointed out in DeMarco, evidence of other acts is admissible "'not because it shows that the defendant is crime prone, or

even that he has committed an offense similar to the one in question, but in spite of such facts.'" Id., quoting State v. Burson (1974), 38 Ohio St.2d 157, 158.

{¶17} Specifically, Evid.R. 404(B) allows the introduction of evidence of "other crimes, wrongs, or acts" when that evidence is used as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident." Id.; State v. Lowe, 69 Ohio St.3d 527, 530, 1994-Ohio-345. This principle is further embodied in R.C. 2945.59, which provides: "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant[,] which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." Id.

{¶18} The threshold question in determining the admissibility of other-acts evidence under Evid.R. 404(B) is whether any of the matters of proof (motive, opportunity, scheme, etc.) are at issue in the case. State v. Griffin (2001), 142 Ohio App.3d 65, 72. If not, then the evidence is not admissible, no matter how telling, and regardless of whether an accused's past behavior constitutes a "behavioral fingerprint." State v. Knight (1998), 131 Ohio App.3d 349, 353.

{¶19} We conclude the trial court did not abuse its discretion when, under Evid.R. 404(B), it admitted the evidence of appellant's statement that he had engaged in sexual activity with Randi previously and that when he hit her in the chest it was his intent to engaging in sexual activity with her again and that is why he asked Randi to "love on daddy." Appellant surmised, "I think she knew what I wanted and that's why she said no." Appellant stated he hit Randi in the chest because he "got mad" and "just kind of snapped" when she said "no." Appellant's explanation of how his two-year-old daughter "knew what [he] wanted" when he asked her to "love on daddy" and his statements regarding prior sexual encounters relate directly to his state of mind and his intent at the time of the offenses.

{¶20} Since evidence of other crimes is admissible, under Evid.R. 404(B), to establish motive or intent, the trial court properly permitted the introduction of evidence of appellant's statements about intending to engage in sexual activity with Randi when she was hit to establish appellant's state of mind when committing the murder. Any unfair prejudice was outweighed by the probative value of the statement. Evid.R. 403(A).

{¶21} Consequently, the trial court's decision to admit appellant's statement was not unreasonable, arbitrary or unconscionable. Therefore, appellant's first assignment of error is overruled.

{¶22} Assignment of Error No. 2:

{¶23} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN

IT FILED A JUDGMENT OF CONVICTION ENTRY AGAINST APPELLANT FOR ATTEMPTED RAPE AND FOR THE SPECIFICATIONS OF ATTEMPTED RAPE BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THOSE FINDINGS."

{¶24} Appellant argues that in order to be convicted of an attempt, the defendant must take a substantial step towards completion of the crime, a step that is strongly corroborative of his purpose. When a defendant challenges the sufficiency of the evidence, the relevant question is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Yarbrough, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78, quoting Jackson v. Virginia (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789.

{¶25} In State v. Heinish (1990), 50 Ohio St.3d 231, 238-239, the Court held that attempted rape requires that the actor intend to compel the victim to submit to sexual conduct by force or threat and commit some act that "convincingly demonstrates" such intent. The conduct complained of need not be the last proximate act prior to the commission of the felony. State v. Farmer (1951), 156 Ohio St. 214, 216. Rather, the actor need only take a substantial step, or act strongly corroborative of the actor's criminal purpose. See State v. Smither (May 12, 2000), Lucas App. No. L-99-1110.

{¶26} In State v. Smither, the Sixth District Court of Appeals found that "by stating he was going to have sex with her and by beginning to remove his pants and pushing [the victim] down on the bed, the jury could have reasonably found that appellant made a

'substantial step' towards the commission of the crime." Smither at 3. Accordingly, the court held there was sufficient evidence presented which, if believed, would lead a rational trier of fact to find the elements of the attempted rape beyond a reasonable doubt. Id.

{¶27} Likewise, in the case sub judice, there was sufficient evidence presented which, if believed, would lead a rational trier of fact to find the elements of the attempted rape beyond a reasonable doubt. There was sufficient evidence to demonstrate that appellant intend to compel Randi's submission to sexual conduct and that Randi was a person less than thirteen years of age.

{¶28} Appellant admitted to the officers who took his statements that he took Randi upstairs in order to engage in sexual acts with her. Appellant further admitted that he was asking Randi to engage in sexual acts when he asked her to "love on" him. By taking Randi upstairs and separating her from her sister and by asking her to "love on" him, the jury could have reasonably found that appellant made a "substantial step" towards the commission of the crime. Appellant's words combined with his actions are sufficient to support a finding that he had taken a substantial step in the course of an attempted rape, and are corroborative of the criminal purpose. See Smither.

{¶29} Considering the evidence in the light most favorable to the prosecution, a reasonable juror could have found the elements of the attempted rape beyond a reasonable doubt. Therefore, appellant's second assignment of error is overruled.

{¶30} Assignment of Error No. 3:

{¶31} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FAILING TO GRANT A MISTRIAL AS A RESULT OF PROSECUTORIAL MISCONDUCT."

{¶32} Appellant argues that it is prosecutorial misconduct and violative of due process for the state to tell the jury during final arguments that its witnesses testified truthfully and that "the defense is made up."

{¶33} According to the Ohio Supreme Court in State v. Twyford, 94 Ohio St.3d 340, 354-355, 2002-Ohio-894, "the test for prosecutorial misconduct is whether the remarks were improper and, if so, whether the remarks prejudicially affected the accused's substantial rights." The touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947. Thus, prosecutorial misconduct will not be grounds for reversal unless it so tainted the proceedings that it deprived the defendant of a fair trial. Id. at 221, 102 S.Ct. at 948.

{¶34} The prosecutor is entitled to a certain degree of latitude in closing argument, and it is within the trial court's discretion to determine the propriety of a closing argument. State v. Benge, 75 Ohio St.3d 136, 141, 1996-Ohio-227, certiorari denied, 519 U.S. 888, 117 S.Ct. 224. However, while a prosecutor may argue that certain evidence tends to make a witness more or less credible, he may not state his own belief as to whether a witness is

telling the truth because to do so would invade the jury's responsibility to determine the weight to be given to witnesses' testimony. State v. Smith (1984), 14 Ohio St.3d 13, 14; State v. Carpenter (1996), 116 Ohio App.3d 615, 622. A conviction will be reversed only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found the defendant guilty. Benge, 75 Ohio St.3d at 141, 1996-Ohio-227.

{¶35} During closing arguments, the state, in discussing the testimony of Dr. Douglas Mossman, stated: "What goes against all the evidence? Testimony from a psychiatrist that says [appellant] is troubled with socially complicated situations. Does that denigrate in any way any of the truthful, honest, abundant evidence the State provided to you? *** [Appellant] worked, worked for years as a crew leader. *** Crew leader means you're there, you interact with people, you tell them how to do things."

{¶36} When discussing the testimony of the detectives, the state commented: "These Detectives testified truthfully and honestly to you about what happened in that room and there is no question that they did that, they testified that way." The state also said, "Detective [John] Nethers didn't lie to you about anything."

{¶37} The state, while discussing the alternate theories of the defense stated, "You know, when there is no true defense, you might want - you got to come up with something." Furthermore, the state said, "the defense of this case has changed so many times, what [appellant] said about it keeps changing."

{¶38} The effect of the prosecutor's alleged misconduct must be considered in light of the whole trial. State v. Maurer (1984), 15 Ohio St.3d 239. While we do not condone the state's conduct of discussing the truthfulness of the testimony, considering the comments in light of the whole trial, it is not clear beyond a reasonable doubt that the jury would not have found appellant guilty absent the comments. Furthermore, the trial court instructed the jury that opening statements and closing arguments were not evidence. The court instructed the jury that each juror "must remember the evidence as you heard it, not as counsel told you the evidence came down. So your own remembrance of the evidence is what counts." Such curative instructions amply protected appellant's right to a fair trial. See State v. Turner (1993), 91 Ohio App.3d 153, 157. Therefore, appellant's third assignment of error is overruled.

{¶39} Assignment of Error No. 4:

{¶40} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT RULED THAT HIS STATEMENTS TO THE POLICE WERE ADMISSIBLE INTO EVIDENCE."

{¶41} Appellant argues the corpus delicti rule requires that there be some minimal evidence of the crime with which he is charged before his confession is admissible. Appellant argues there was no evidence, direct or circumstantial, that the three prior rapes occurred.

{¶42} A confession is only secondary evidence, therefore, it is

well-established that to render an extrajudicial confession admissible it is necessary to independently prove "that the crime occurred." State v. Nicely (1988), 39 Ohio St.3d 147, 154; State v. Van Hook (1988), 39 Ohio St.3d 256, 262. The historical purpose of the corpus delicti rule was to prevent a defendant's confession from being used to convict him of a crime that never transpired. Palazzolo v. Gorcyca (C.A.6, 2001), 244 F.3d 512, 515. However, with the increased number of procedural safeguards for defendants in the criminal system, courts have found limited practical or social benefits in the corpus delicti rule. See State v. Edwards (1976), 49 Ohio St.2d 31, 35-36, death penalty vacated (1978), 438 U.S. 911, 98 S.Ct. 3147. Therefore, the quantum or weight of such outside or extraneous evidence "is not of itself to be equal to prove beyond a reasonable doubt, nor even enough to make it a prima facie case." State v. Haynes (1998), 130 Ohio App.3d 31, 34. It is sufficient if there is some evidence outside the confession that "tends to prove some material element of the crime charged." Id. Even circumstantial evidence that tends to prove the fact that a crime was committed is sufficient. State v. Maranda (1916), 94 Ohio St. 364, syllabus.

{¶43} Appellant was charged for the three prior rapes under R.C. 2907.02(A)(1)(b). R.C. 2907.02(A)(1)(b) states, "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender ***, when any of the following applies: (b) [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." There was evidence

offered that tended to prove some material elements of R.C. 2907.-02(A)(1)(b). Evidence confirmed that Randi was under thirteen years of age and that Randi was not appellant's spouse.

{¶44} Furthermore, evidence was presented that appellant and Mrs. Fuller were Randi's only caregivers. Mrs. Fuller and appellant split child care duties according to their work schedules. Mrs. Fuller testified that it was common for Randi to throw a tantrum whenever she would depart and leave Randi with appellant. Mrs. Fuller testified that the tantrums sometimes included Randi holding her breath until she turned blue. Mrs. Fuller stated, "if I left and [Randi] wasn't with me, she would scream." Mrs. Fuller stated that on March 21, 2000, Randi "was throwing a fit and I went to sneak out the back door."

{¶45} Additionally, Dr. James Swinehart, the pathologist who examined Randi, noted that she had a dilated anus. Dr. Swinehart stated that while Randi's dilated anus did not conclusively indicate "that the child had been sexually molested," he could not rule out sexual abuse as a cause. When Dr. Swinehart was asked, "there is nothing that you observed that would suggest to you, hey, there was sexual abuse here, isn't that right?" Dr. Swinehart answered, "I testified there were no injuries to the female genitalia or anus. This does not rule out sexual abuse." Dr. Swinehart was also asked, "if there was part way penetration with a penis, would it have hit the hymen?" He answered, the hymen "might not have been lacerated by a very partial penetration." Dr. Swinehart further clarified this answer by stating, "what I'm contending, it

is possible for someone to put a soft organ between the labia and perhaps just inside the labia minora without damaging that hymenal ring, because from his own statement he said he couldn't keep an erection."

{¶46} In addition, Dr. Charles Smith, a forensic pediatric pathologist, noted that Randi "had a urinary tract infection in the days or weeks before she died." However, he stated that wasn't necessarily indicative of sexual contact because there are "lots of different causes of urinary tract infection."

{¶47} Since the quantum or weight of such outside or extraneous evidence required to render an extrajudicial confession admissible is not as much as is required to make a prima facie case, the minimal requirements tending to show that the rapes had occurred has been met. Some independent evidence that the crime occurred, which tends to prove some material element of the prior rapes, was presented. Therefore, appellant's fourth assignment of error is overruled.

{¶48} Cross-Assignment of Error No. 1:

{¶49} "THE TRIAL COURT ABUSED IT [SIC] DISCRETION IN GRANTING THE APPELLANT/CROSS-APPELLEE'S MOTION TO SEVER COUNTS FOUR, FIVE, AND SIX FROM COUNTS ONE, TWO AND THREE FOR SEPARATE TRIALS."

{¶50} The state argues in its assignment of error that severance of the rape charges was not required. The state argues where there is a joinder pursuant to Crim.R. 8(A) and the offenses are of the same or similar character, constitute a common scheme or plan,

or a course of criminal conduct by the defendant against the same victim, the evidence as to one crime is admissible in a trial of the other under Evid.R. 404(B). The state argues even if separate trials were granted, joinder is not prejudicial and therefore, a severance is not warranted pursuant to Crim.R. 14.

{¶51} Crim.R. 14 states, "[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses *** in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, *** or provide such other relief as justice requires." The decision on the issue of severance is left to the discretion of the trial court. Braxton v. Maxwell (1965), 1 Ohio St.2d 134, 135. For an appellate court to reverse a trial court ruling granting severance, the trial court must have abused its discretion. See State v. Perod (1968), 15 Ohio App.2d 115.

{¶52} Appellant argued in his motion to sever counts 4, 5, and 6 of the indictment that prejudice would result if joinder were permitted. Furthermore, appellant argued Evid.R. 404(B) cannot negate the prejudice because evidence of counts 4, 5, and 6 would not be separate and distinct, since appellant's statement would be aggregated to each instance of rape, and seen as corroborative of one another. Appellant prevailed on his motion to sever because he was able to demonstrate that he was prejudiced by the charges being tried together. See State v. Mills (1992), 62 Ohio St.3d 357, 362.

{¶53} The trial court found that the three counts of rape were

improperly joined in the indictment and therefore counts 4, 5, and 6 were severed. The decision on severance is left to the discretion of the trial court. Maxwell at 135. The trial court's decision was not unreasonable, arbitrary or unconscionable. Therefore, the state's cross-assignment of error is overruled.

{¶54} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.