

COURT OF COMMON PLEAS
CRIMINAL DIVISION
WARREN COUNTY, OHIO

STATE OF OHIO : 10 JUL - 10 10:25:25
Plaintiff, : Case No. 08-CR-25254
vs. : JAMES L. SPAETH
RYAN WIDMER : Judge
Defendant. : CLERK OF COURTS

**MOTION FOR JUDGMENT
OF ACQUITTAL**

Through counsel, Defendant Ryan Widmer moves this Court pursuant to Crim. R. 29(C) to enter a Judgment of Acquittal. The grounds for this motion are contained in the attached memorandum.

Memorandum

The First Trial

This case was first tried to a jury beginning March 29, 2009. The jury in the first trial deliberated approximately 23 hours before returning a verdict of not guilty on the charge of aggravated murder, and guilty on the lesser-included offense of murder. This first trial saw the prosecution present 22 witnesses, including three experts. And the defense presented 20 witnesses including 2 experts. The proceedings lasted eight days.

Affidavits of jurors filed as part of post-trial motions indicate several jurors were undecided until the reports of drying time experiments conducted by other jurors were reported. Ultimately as a result of these "experiments" a new trial was granted.

The Second Trial

The second trial began on May 10, 2010, with jury selection taking two full days compared to approximately half a day in the first trial. The second trial saw the prosecution and



the defense each present 22 witnesses, including three experts for each party. The evidence also included almost 100 exhibits. The second trial lasted twelve days before the jury got the case.

After approximately 19 hours of deliberations, the jury reported they were “split.” As a result, over defense objection, the Court charged the jury pursuant to O.J.I. §429.09. After an additional twelve hours of deliberation, the jury again advised the Court it was unable to reach a unanimous verdict, and further deliberations would not be productive. The Court then discharged the jury without the jury agreeing on a verdict and declared a mistrial.

Following discharge of the jury, an informal discussion was held between 13 of the 14 jurors and counsel for both parties. During this discussion jurors reported the vote when the court was first informed of a split was 6 - 6, not guilty - guilty. Jurors further disclosed following the holiday weekend, there was some movement, but no final vote was taken.

Crim. R. 29(C) and the Applicable Standard

Crim. R. 29(C) provides:

If a jury...is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed... If no verdict is returned, the court may enter judgment of acquittal.

While the rule provides virtually no guidance regarding the standard to be applied by a trial court considering such a motion, the case law does provide the standard this court must apply.

In *State v. Sanders*, the 12th District considered the standard used by the trial court when ruling on a Crim. R. 29(C) motion for acquittal.¹ *Sanders* makes clear there are two different standards to be used, depending on if a verdict is or is not reached. If a verdict is reached the trial court “applies the same standard in ruling on motions for acquittal presented either at trial or

¹ 2004 Ohio 6320, 2004 Ohio App. Lexis 5788. Exhibit A, Attached.

made after judgment.”² In this circumstance the trial court “shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.”³ But this is not the situation in the current case.

Standard When a Verdict Is Not Reached

Sanders also addresses the situation where no verdict is reached and the standard to be used by trial courts considering a Rule 29(C) motion in this situation.

We decline to apply the standard used in *State v. Norwood* (M.C.1977), 55 Ohio Misc. 19, 380 N.E.2d 772. In that case, the court granted a *Crim.R. 29(C)* motion for acquittal after the jury failed to reach a verdict. The standard employed by the *Norwood* court was one of “judicial discretion, taking into consideration all matters transpiring during the course of the trial and any other factors which may have influenced the jury in their inability to reach a verdict and the probability that other juries considering the case will be also of honest divided opinions.” ***Norwood* is distinguishable from the case at bar, of course, in that the instant jury reached a verdict before the motion was made.**⁴ (Emphasis added.)

Therefore with the jury unable to reach a verdict in this case, this Court must use it’s discretion in considering all matters transpiring during the course of the trial and any other factors which may have influenced the jury in their inability to reach a verdict and the probability other juries considering the case will be also of honest divided opinions. In short, considering everything the court is aware of which may influence the jury’s verdict, what is the probability a future jury, considering this information, would also be unable to reach a verdict.

² *State v. Sanders*, 2004 Ohio at ¶32, citing *State v. Miley*, 114 Ohio App.3d 738, 742, 684 N.E.2d 102 (1996).

³ *Sanders*, at ¶32 citing *State v. Bridgeman*, 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus, (1978).

⁴ *Sanders*, at ¶32, n. 2.

This standard is consistent with Crim. R. 1(B) which provides, “these rules are intended to provide for the just determination of every criminal proceeding. They shall be *construed and applied to secure the fair, impartial, speedy and sure administration of justice*, simplicity in procedure, and the elimination of unjustifiable expense and delay.”⁵

Argument

The Probability Other Juries Considering the Case Will Be Also of Honest Divided Opinions: The Supplemental Jury Instruction Given When the Jury Initially Advised it was Split.

Over defense objection, when the second jury advised it was “split”, the Court exercised it’s discretion, providing supplemental instructions to the jury taken from O.J.I. §429.09.⁶ In relevant part these instructions informed the jury:

You are selected in the same manner, and from the same source, as any future jury would be. There is no reason to believe the case will ever be submitted to a jury more capable, impartial, or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side.⁷

This statement of law considered in light of a jury evenly divided in its opinion establishes a very strong and substantial “probability that other juries considering the case will be also of honest divided opinions.” The juries inability to reach an unanimous verdict in light of this instruction essentially establishes, per se, any other jury to consider this case will be of “honest divided opinion.”

⁵ Crim. R. 1.

⁶ *State v. Sanders*, 2004 Ohio at ¶25.

⁷ O.J.I. §429.09.

Matters Transpiring During the Course of the Trial and Any Other Factors Which May Have Influenced the Jury in Their Inability to Reach a Verdict

The State's Theory-less, Contradictory, Case Presentation

The States case is nothing more than speculation based on assumptions. Despite a lack of supporting evidence, the prosecution argues since Ryan was the only person at the house at the time Sarah drowned, Ryan must have forcibly drowned her. The prosecution "floated" several different theories of how Ryan may have forcibly drowned Sarah, despite the lack of evidence establishing any of these theories. The prosecutions theories included the "sleeper hold", an "arm bar", and "anterior approach strangulation." And "floated" for the first time in closing argument, the prosecution suggested Sarah may not have been in the bath tub at all when she was drowned. But there are significant evidentiary problems with each of these speculative theories.

The prosecution's "shot-gun," "see-what-sticks," "lack-of-a-theory-of-the-case," presentation places the burden of figuring out what happened to Sarah on the jury. Instead of providing the jury a theory which combines the facts and law in a common sense and logical way leading the jury to conclude Ryan forcibly drown Sarah, the State invites jurors to speculate and come up with their own theories of what occurred.

Failing to provide the jury with a central theory organizing all facts, reasons, and arguments, communicates to jurors the state does not know what happened. If the State does not know what happened, the state can not prove what happened beyond a reasonable doubt. Jurors were left to consider multiple, inconsistent, and contradictory theories. Conversely, the defense presented evidence of cardiac and neurological conditions which may have caused Sarah to lose consciousness and drown. In addition, the defense exposed numerous inconsistencies and

contradictions in the evidence.

In addition to the difficulty securing a unanimous verdict in the presence of multiple, contradictory, competing theories, evidentiary inconsistencies also undercut prosecution theories adding another layer of difficulty in obtaining a verdict. The prosecution's lack of a theory clearly was a factor in the jury's inability to reach a verdict. Given the inability of the prosecution to provide a clear theory, it is reasonable to conclude a future jury considering this same evidence would also be divided in their opinions.

Evidentiary Problems with the State's "Theories"

The basic problem with the State's numerous theories is the reliance on bruising located on Sarah's throat and neck. Exhibit B, attached, Redacted Jt. Exh. 451.⁸ Exhibit B displays three separate and distinct areas of bruising, area A, B, and C. Despite the state's arguments to the contrary, the evidence establishes all three areas are consistent with medical care provided to Sarah. Testimony of multiple witnesses established bruising in areas A and B are consistent with multiple attempts to intubate Sarah. Area C showing the bruising in the area were paramedics established a jugular vein IV. All witnesses agreed the bruising in Area C is consistent with efforts to establish the IV.

The basis of the anterior approach strangulation "theory" is provided by the testimony of doctors Uptegrove and Lee. Based on the single thumb-shaped bruise on the right side of Sarah's

⁸ Exhibits B and C contain redacted portions of Joint Exhibits 451, 452, and 455. The photos have been redacted as much as possible in the interest Sarah's privacy. The printed images of these 3 exhibits are not the same quality as the original photographs. The Defense request the Court review the actual photographs of Joint Exhibit 451, 452, and 455 if there is any concern regarding the quality of the image and the Court's ability to observe the detail contained in each image.

neck and the area of bruising on the left side of her neck depicted in Exhibit C attached, redacted Jt. Exh.'s 452 and 455. Both doctors offered their opinion Sarah was grabbed from the front by a right hand.

After acknowledging the right side bruise is oriented on its long axis as represented by the Blue line in Exhibit C, Dr. Uptegrove admitted on cross if the bruise was the result of Sarah being grabbed from the front, by a right hand, the bruise would have to be oriented on its long axis as depicted by the black line in Exhibit C. After making this concession, Uptegrove admitted the orientation of the right-side bruise was not consistent with Sarah being grabbed from the front by a right hand. Uptegrove admitted the right-side bruise is consistent with the application of pressure applied by an individual manipulating the neck and trachea in effort to visualize the vocal cords during rescuers efforts to intubate Sarah.

Despite the self evident nature of the physical evidence, Dr. Lee contradicted Dr. Uptegrove. When confronted with this same line of questioning regarding the orientation of the right-side bruise, Dr. Lee maintained this bruise was consistent with Sarah being grabbed by a right hand. The testimony of the state's two forensic pathologist left jurors to consider contradictory and conflicting testimony, in light of self-evident physical evidence.

In addition jurors heard both doctors admit, while not always present, they would expect to see fingernail marks caused by Sarah on the attacker's right hand and on her neck, as well as the attacker's DNA under Sarah's fingernails if Sarah had been grabbed by the throat from the front. Jurors saw the evidence clearly establish no finger nail marks were on Ryan's hands or arms or Sarah's neck. And Ryan's DNA was not found under Sarah's fingernails.

The prosecution relied heavily on the nature and extent of bruising present on Sarah's

throat, neck and chest to support it's theories. There was significant bruising in the area of Sarah's trachea. Exhibit B, Redacted Jt. Exh. 451, Area B. The State argued this bruising is only consistent with Sarah being assaulted. But jurors heard several prosecution and defense witnesses agree the bruising is also consistent with emergency medical intervention.

This intervention included multiple attempts to intubate Sarah, with at least one in a moving ambulance. It is undisputed some of these attempts involved manipulation of the Sarah's throat in an effort to assist the intubation process by making the vocal cords visible. Referred to by various names, all of them essentially involve application of pressure and manipulation of Sarah's throat in the area of the cricoid and thyroid cartilage. This is the same area where the state argues the bruising could only be the result of an assault.

The prosecution also relied heavily on the bruising to Sarah's upper chest. But the state did not consider other evidence and testimony regarding possible causation of the bruising in this area as a result of life saving efforts by rescuers. Jurors heard testimony describing 45 minutes of CPR applied to Sarah. Several minutes of this CPR being performed in a moving ambulance. Several prosecution witnesses discussed the problems associated with, and difficulty of, performing CPR in a moving ambulance.

Jurors heard testimony the chest bruising is consistent with a rescuer performing chest compressions during CPR losing the proper landmark, and compressing, albeit unintentionally, in the wrong anatomical location on Sarah. There was testimony the bruising present could result from even juts one compression performed in the wrong location. In addition, jurors heard testimony when the redacted flap of chest skin is returned to it's normal anatomical position, it appears some of the bruising is over Sarah's sternum.

The bruising on Sarah's body is consistent with the aggressive medical efforts to save her life. However, according to a prosecution expert witness, much of the bruising relied on by the prosecution may have occurred several days prior to Sarah's death. Although he did not recall writing a letter to prior defense counsel, when confronted with the letter on cross examination, Dr. Lee admitted in this March 20, 2009 letter to prior counsel he wrote:

Bruises are difficult to accurately time, however the bruises to the right forehead, left upper chest and lower extremities all have similar blue to purple quality, so it is most likely they were made sometime within the previous two to three days before death.

The large volume of testimony the throat, neck and chest bruising is all consistent with medical efforts to save Sarah. With the jury hearing testimony many of the bruises relied on by the prosecution may have resulted from events occurring two to three days prior to Sarah's death.

Other Evidence and Issues Which May Have Influenced the Jury in Their Inability to Reach a Verdict to be Considered By the Jury and Events at Trial

- Motive: Police did not discover any evidence of motive and prosecutors presented no evidence of motive. Compared with undisputed Ryan and Sarah had a vacation planned to Mexico in the fall, and several of the witnesses presented by the defense were Sarah's close friends. All of whom testified on Ryan's behalf.
- No defensive injuries on Sarah.
- No injuries of any type on Ryan.
- Ryan's demeanor on August 11th to 12th, 2008. Several witnesses testified Ryan was visibly upset, distraught and crying at various points in the evening beginning when he was first observed crying while he was sitting in the chair at the top of the steps on the second floor of their home, to the trip to the hospital with Max Smith driving the ambulance with Ryan in the passenger seat, to his tearful comments to Sarah's mother at the hospital.
- Juror's heard testimony Sarah's mom visited Ryan in jail. They also learned through the testimony of Sarah's mother, Ryan was out of jail, and in attendance at a private family memorial service for Sarah.

- No injuries to Sarah’s feet, knees, hands, or arms, consistent with resisting a forcible attempt to drown her in the environment of the bathroom.
- The defense presented the un-rebutted testimony of Dr. Chandler Phillips, a medical doctor, Human Factors expert, and Nobel Peace Prize nominated engineer. Dr. Phillips testified Ryan did not forcibly drown Sarah. This conclusion based in part on the fact he was unable to come up with a scenario duplicating the pattern of injuries to Sarah and lack of injuries to Ryan. He testified he would have expected to see more injuries to Sarah and so see injuries to Ryan if a violent struggle occurred in the bathroom.
- Water. There is no dispute the cause of death was drowning. Prosecutors argued Ryan forcibly drowned Sarah in the master bathroom. Arguing further the perception of rescuers of Sarah’s body, the bathroom, and the location where she was laying being dry, is evidence Ryan drowned Sarah sometime before calling 911. However, jurors also heard evidence Sarah’s body temperature was described as warm or hot to the touch when rescuers arrived, there was no evidence of water splashed around the bathroom during the violence of the forced drowning, and there was no evidence of Ryan cleaning or drying the scene such as wet towels or items recently removed from the cloths dryer.
- The Widmer home was left unsecured for two days prior to police return to execute search warrant when the bath tub was removed. Additional evidence establishes beyond question, people were in the crime scene between the time of Sarah’s death and the warrant was executed. Not only in the house, but in the bathroom, where things were touched, handled and some ultimately removed. The unsecured scene compromises the integrity of any evidence recovered after the home was left unsecured, including the bath tub and the alleged fingerprints on the tub. Prosecution witness Bill Hillard, a veteran homicide detective with the City of Cincinnati Police Department testified leaving the scene unsecured was not acceptable police work.
- The Bath Tub: The photographic evidence establishes the tub was dusted with fingerprint dust twice. But prosecution Bill Hillard testified he was not aware of this until his testimony in the second trial. In addition, there is no evidence in the record establishing if the those involved in the physical removal of the tub were gloves. It is possible the “fingerprints” are the result of removing the tub from the home. Being dusted twice there is no way to determine this.
- The shoddy police investigation was led by an inexperienced detective with questionable credibility for a police department which had not investigated a homicide in over a decade. Jurors received evidence this shoddy work resulted in:
 - The mishandling and documenting physical evidence.
 - Failing to secure the scene, thereby compromising the integrity of the evidence collected afterwards.

- Failing to produce a crime scene diagram.
 - Failure to properly process the bath tub for latent prints by multiple applications of fingerprint powder.
 - Failing to properly maintain and entry and exit log of the Widmer home.
 - Failing to inform Det. Bill Hilliard the bath tub was at least twice dusted with fingerprint powder.
- In this trial Prosecutors were able to claim Sarah had no prior heart condition or history. This claim was corroborated by the testimony of Ruth Ann Steward, Sarah's mom. But documents obtained during trial establish this is not true.

Exhibit D, attached, are redacted copies Sarah's patient records obtained from her employer, Dr. John Becker, DDS, during trial. These records establish Sarah disclosed she had a heart murmur as a child. While a cardiologist consulted during trial opined this murmur "probably" did not have any connection to her death, there is no way to be certain.

At this time Sarah's pediatric medical records are not available, so there is no way to determine the nature and grade of the murmur. And while the murmur "probably" did not play a role in Sarah's death, any future jury will be allowed to consider and weigh the evidence, with each juror assigning whatever weight believed appropriate.

These documents produce two results to be considered. Ruth Ann Steward will have to explain forgetting Sarah's heart murmur. Future jurors who are also mothers may find it difficult to believe a mother forgetting their child had a heart murmur. And also significant is the restrictions now placed on the prosecution. In light of this information, the prosecution can no longer claim Sarah did not have any prior heart problems or conditions. Both of these factors weakening the prosecution's case in any future trial.

- The prosecution presented two, non-board certified forensic pathologists as the state's medical experts. These two contradicted each other on several key points. But the jury also heard testimony from a defense expert. Dr. Sptiz, a world renowned forensic pathologist who literally wrote the book on forensic pathology testified to what over 30 hours of deliberation time established, based on the evidence it is impossible to determine the manner of death.

Conclusion

Almost 33 hours of deliberations where the jury considered the testimony of over 40 witnesses and approximately 100 exhibits failed to produce a unanimous verdict with the jury remaining almost evenly divided for almost the entirety of the deliberations. In the first trial over

20 hours of deliberations failed to produce a verdict. With a verdict being reached only after the jury considered improper information. In over 50 hours of deliberations, two different juries were unable to reach an agreement. A review of the evidence and testimony reveals why.

The prosecution presented multiple, contradictory theories with little credible evidence supporting a given theory to the exclusion of all other explanations. The defense presented substantial evidence establishing the realistic probability Sarah suffered from a cardiac or neurological event which rendered her unconscious and causing her to drown.

The jury saw and heard testimony establishing virtually almost all of the credible evidence is subject to multiple, competing interpretations equally consistent with theories of innocence and guilt. Shoddy police work and investigation reduced the reliability of much of the physical evidence. Countless inconsistencies across the testimony of first responders demonstrated they are unreliable historians and can not be credited with accurately recalling information.

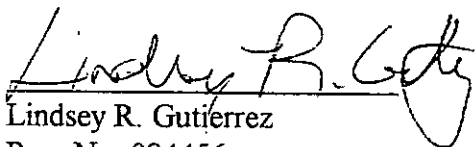
Everything the Court and both parties know about this case establish this is case where neither side can reasonably expect to obtain an unanimous verdict in a third trial. The entirety of the facts, circumstances, and evidence known about this case establish there is a very strong probability any future jury considering the case will be also of honest divided opinions, unable to reach a verdict. In light of this, the Court must act to secure the fair, impartial, speedy and sure administration of justice.

For these reasons the Ryan request this Court enter a Judgment of Acquittal.

Respectfully submitted,



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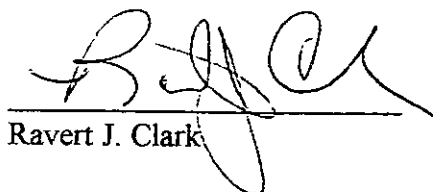
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CERTIFICATE OF SERVICE

I certify a copy of the foregoing Motion was served upon the Warren County Prosecuting Attorney by hand delivery on July 1, 2010.



Ravert J. Clark

LEXSEE

**STATE OF OHIO, Plaintiff-Appellee, -vs- NICOLE SANDERS,
Defendant-Appellant.**

CASE NO. CA2003-12-311

**COURT OF APPEALS OF OHIO, TWELFTH APPELLATE
DISTRICT, BUTLER COUNTY**

2004 Ohio 6320; 2004 Ohio App. LEXIS 5788

November 29, 2004, Decided

PRIOR HISTORY: **[**1]** CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS. Case No. CR2003-02-0240.

DISPOSITION: Judgment of the Court of Common Pleas affirmed.

COUNSEL: Robin N. Piper, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Hamilton, OH, for plaintiff-appellee.

Fred Miller, Hamilton, OH, for defendant-appellant.

JUDGES: YOUNG, P.J. POWELL and VALEN, JJ., concur.

OPINION BY: YOUNG

OPINION

YOUNG, P.J.

[*P1] Defendant-appellant, Nicole Sanders, appeals her conviction and sentence in the Butler County Court of Common Pleas for patient abuse and assault following a jury trial. We affirm appellant's conviction and sentence.

[*P2] In February 2003, appellant was indicted on one count each of patient abuse in

violation of *R.C. 2903.34(A)(1)*, a fourth-degree felony, and assault in violation of *R.C. 2903.13-(A)*, a first-degree misdemeanor. The charges stemmed from an incident that occurred on November 30, 2002 wherein appellant allegedly struck Terry G. several times in the groin area with a cordless phone. At the time of the incident, Terry was a 56-year-old mentally handicapped resident with limited communication skills at the Fairfield Center, a facility operated by the Butler County Department of Mental Retardation. Terry **[**2]** was completely dependent on the staff at the center for all of his day-to-day needs. At trial, two conflicting versions of the incident were presented.

[*P3] The state of Ohio presented the testimony of Tara Sparks and April Gallaher. On November 30, 2002, appellant, Tara, and April were resident specialists on duty at the center. A resident specialist provides day-to-day direct care to residents of the center. Appellant, Tara, and April had been employed at the center six months, six weeks, and 11 months respectively. That day, Tara was working from 3 to 11 p.m. and was responsible for the care of four residents, including Terry who was on a family outing. When Terry returned to the center at about 4 p.m., he was happy and in a good mood. Tara took him to the TV room to watch television until dinner time at 5 p.m. Tara then went to the nearby

EXHIBIT A

manager's office to look over her list of duties for the day. April was already in the office.

[*P4] Moments later, Tara and April heard Terry crying and yelling "stop, quit, you're fired." Tara and April immediately went to the TV room where they observed Terry sitting on a couch and appellant standing over him with a cordless phone **[**3]** in her hand. Appellant looked at Tara and April, told them Terry was acting up, and then hit Terry four or five times in the groin with the phone. Shocked, Tara and April did not react. Because Terry continued to cry, appellant told him to "shut up." As Terry then began to kick at her, appellant grabbed him by his ankles and pulled him off the couch onto his back. During the entire incident, Terry kept crying and telling appellant to stop and that she was fired. Tara and April helped Terry back on the couch, asked him if he was o.k., and went back to the office. When they left the TV room, appellant was still in the room with Terry.

[*P5] About 15 minutes later, Tara and April again heard Terry crying. They found him in the hall lying on the floor face down. Appellant, who was standing over Terry, explained that after Terry once again started to act up, she was taking him to his room when he slid off his walker and fell to the ground. Another resident specialist, Brad, helped Terry get back to his feet. Appellant called the nurse and got some ice to put on Terry's eye. When the nurse checked Terry, he had a slight bruise to his left eye. Terry ended up having a black eye.

[*P6] **[**4]** Although required by protocol to immediately notify a supervisor and file a report upon witnessing an assault on a resident, Tara and April failed to either notify a supervisor or prepare a report that day regarding the phone incident. Likewise, they did not tell the nurse about the phone incident that day. They did, however, tell their QMRP (qualified mental retardation professional) and prepare a report about the phone incident two days later when they returned to work. The

nurse was then notified about the phone incident. Upon examining Terry's body, the nurse noted a "1/2 cm round red area in the [right] groin area" as well as a "1/2 cm bruise on the inner [left] thigh."

[*P7] Appellant testified on her behalf. On November 30, 2002, she was working from 7 a.m. to about 9 p.m., and had been working 21 hours in the past two days. That day, she was responsible for the care of two residents, Kevin C. and David P. Because David had a tendency to bite staff and other residents, he had to be kept in visual sight by a staff member at all times. According to appellant, she was walking David into the TV room when Terry got off the couch and approached them. This caused David to **[**5]** snap and get ready to bite Terry. Appellant intervened, stepping between Terry and David and redirecting David.

[*P8] While appellant was busy with David, Terry walked out of the room into the hallway. Moments later, appellant heard Terry screaming. She found him lying on the floor face down next to his walker and complaining about his eye hurting. Appellant called the nurse with a cordless phone. The nurse quickly responded. Appellant told her what had happened, and then got some ice for Terry's eye. After she returned with the ice, appellant was talking to Terry telling him everything would be okay when he began kicking at her. Although she had the cordless phone in her hand, appellant denied hitting him with it. Instead, she implemented what she had learned in training to prevent herself from being injured. Eventually, Terry calmed down, stopped kicking, apologized, and hugged appellant. That day, appellant filed a report regarding Terry's fall in the hallway.

[*P9] Appellant worked the rest of her shift that day without incident and worked a double shift the following day. Although off the next day, she was called into work because of Tara's and April's allegations. **[**6]** Initially, when confronted about what had

EXHIBIT A

happened, appellant thought it was because of Terry's eye incident. Likewise, when interviewed by the police about a week later, appellant again thought it was about the eye incident. When asked about the phone incident during the police interview, appellant denied the allegation and continued to focus on the eye incident.

[*P10] On September 5, 2003, a jury found appellant guilty as charged. Several days later, appellant filed a *Crim.R. 29(C)* motion for acquittal which the trial court denied. The trial court subsequently sentenced appellant to six months in prison on the patient abuse count (the minimum prison term for a fourth-degree felony), and to a concurrent three-month jail term on the assault count. This appeal follows in which appellant raises three assignments of error.

[*P11] Assignment of Error No. 1:

[*P12] "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT SENTENCED HER TO PRISON INSTEAD OF PUTTING HER ON COMMUNITY CONTROL."

[*P13] *R.C. 2929.13(B)* governs the sentencing of an offender who, like appellant, is convicted of a fourth-degree felony. The statute does not create a presumption **[*7]** that an offender who commits a fourth-degree felony should be sentenced to community control instead of prison. Rather, the statute gives general guidance and a disposition against imprisonment for such offenders. See *State v. Carr (Jan. 31, 2000), Butler App. No. CA99-02-034, 2000 Ohio App. LEXIS 261*.

[*P14] Under *R.C. 2929.13(B)*, the trial court is first required to determine whether any of the factors enumerated in *R.C. 2929.13(B)(1)* are applicable. If the court finds that at least one of the factors is applicable, the court then reviews whether a prison term is consistent with the purposes and principles of sentencing set forth in *R.C. 2929.11*. See *R.C. 2929.13(B)(2)(a)*. In doing so, the court is

guided by the pertinent seriousness and recidivism factors set forth in *R.C. 2929.12*. *State v. Beckman, Butler App. No. CA2003-02-033, 2003 Ohio 5003, P11*. If the trial court finds after this review that the offender is not amenable to community control, and that a prison term is consistent with *R.C. 2929.11* purposes and principles of felony sentencing, then the court is required to impose a prison term *R.C. 2929.13(B)(2)(a)*.

[*P15] In its sentencing entry and at the sentencing hearing, the **[*8]** trial court found that two of the factors in *R.C. 2929.13(B)(1)* were applicable, to wit, appellant caused physical harm to Terry, and appellant held a public office or a position of trust and the offense related to that office or position. *R.C. 2929.13(B)(1)(a)* and *(d)*. Upon weighing the recidivism and seriousness factors set forth in *R.C. 2929.12*, the trial court specifically stated both in the sentencing entry and at the sentencing hearing that appellant was not amenable to community control and that a prison term was consistent with *R.C. 2929.11* purposes and principles of felony sentencing. Specifically, with regard to recidivism, the trial court found that by refusing to acknowledge the offense, appellant showed no remorse.

[*P16] With regard to seriousness, the trial court found that (1) the injury to the victim was worsened by the mental condition of the victim, (2) the "victim suffered serious physical, psychological or economic harm as a result of the offense."

(3) appellant "held a public office or position of trust and the offense was related to that office or position," (4) appellant's occupation or position obliged her to prevent the offense or is likely to influence **[*9]** future conduct of others, and (5) appellant's occupation facilitated the offense. On appeal, appellant takes issue with the court's findings that Terry suffered serious physical harm, and that appellant held a position of trust.

[*P17] After noting that Terry was a

EXHIBIT A

"mentally retarded" person "who really couldn't do much or express much for himself," the trial court found that he had suffered "serious physical, psychological or economical harm as a result of the offense. And this certainly could be argued as to what he suffered *** because he is so unable to speak for himself. He's really unable to articulate what the injury was, but I make that finding." While we agree with appellant that the injuries suffered by Terry as described by the nurse do not fit the definition of "serious physical harm" under *R.C. 2901.01(A)(5)*, the trial court did not err in making such finding. The record shows that Terry, a mentally handicapped patient with limited communication skills, yelled out and cried while being struck several times in the groin. In addition, the striking was done by a caregiver whose job is to provide day-to-day direct care to patients.

[*P18] With regard to the trial **[**10]** court's finding that appellant held a position of trust, we find that the record supports the finding. Terry was a mentally handicapped patient with limited communication skills who resided in the center where appellant was employed as a caregiver. Appellant worked for a facility that was supposed to provide care, comfort, and security to Terry. Appellant's position as a caregiver at the center, regardless of whether Terry was her patient that day, therefore placed her in a position of trust. See *State v. Lehman, Fairfield App. No. 01CA12, 2001 Ohio 7030*, and *State v. Sturbaum, Portage App. No. 2001-P-0056, 2002 Ohio 3131*.

[*P19] After reviewing the record before us, we find that the trial court did not err by sentencing appellant to prison rather than community control. Appellant's first assignment of error is overruled.

[*P20] Assignment of Error No. 2:

[*P21] "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT DID NOT GRANT A

MISTRIAL, OR IN THE ALTERNATIVE, WHEN IT REFUSED TO INSTRUCT THE JURY REGARDING ITS INABILITY TO REACH A JUST CONCLUSION."

[*P22] Two hours into their deliberations, the jury sent a note to the trial court **[**11]** asking for the testimony of appellant, Tara, and April. The trial court considered replaying these witnesses' testimony, but upon defense objection, simply decided to instruct the jury to rely on its collective memory. Later in the deliberations, the jury asked the trial court, "what is the procedure if we are deadlocked?" After discussing the issue with both counsel for about 20 minutes, the trial court decided to give an *Allen* charge to the jury. Defense counsel objected to the *Allen* charge and moved for a mistrial. The trial court overruled the motion for a mistrial.

1 The *Allen* charge was approved by the United States Supreme Court in *Allen v. United States (1896), 164 U.S. 492, 41 L. Ed. 528, 17 S.Ct. 154*, for use with a deadlocked jury.

[*P23] Before the trial court could give the *Allen* charge, however, the jury asked for an additional ten minutes to deliberate, stating "we think we are close." Defense counsel again moved for a mistrial which the trial court denied. After a "brief **[**12]** recess," the foreperson addressed the trial court, stating "we have made some progress. Our request to review the transcripts is an integral part of a decision-making process at this point. And without those, we may, in fact, not be able to come to a conclusion." At that point, the trial court gave the *Allen* charge. After the jury resumed deliberations, defense counsel once again moved for a mistrial, which was denied by the trial court. At 8:15 p.m., the jury returned guilty verdicts. The record shows that the jury deliberated for about five hours.

[*P24] On appeal, appellant argues that the trial court abused its discretion when it gave the *Allen* charge, refused to declare a

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mistrial, and failed to issue a supplemental instruction taken from *State v. Martens* (1993), 90 Ohio App.3d 338, 629 N.E.2d 462. The *Martens* charge is reflected in 4 Ohio Jury Instructions (2000), Section 415.50(4) and discusses the impossibility of reaching a verdict. We note that defense counsel never asked the trial court to give the *Martens* charge. Appellant contends that given the fact that the jury could neither recall the details of the testimony nor resolve the issues after an additional [**13] ten minutes following several hours of deliberations, reading the *Allen* charge to the jury clearly resulted in a coerced verdict.

[*P25] The grant or denial of an order of mistrial lies within the sound discretion of the trial court. *State v. Garner*, 74 Ohio St. 3d 49, 59, 1995 Ohio 168, 656 N.E.2d 623. Likewise, an appellate court will not reverse the judgment of a trial court based on the content of a jury instruction absent an abuse of discretion. *Burke v. Schaffner* (1996), 114 Ohio App.3d 655, 683 N.E.2d 861.

[*P26] In *State v. Howard* (1989), 42 Ohio St.3d 18, 537 N.E.2d 188, the Ohio Supreme Court rejected the *Allen* charge for Ohio and instead approved a supplemental charge to be given to juries deadlocked on the question of conviction or acquittal. The *Howard* charge is not an absolute mandate for trial courts to follow, but rather a suggestion. See *State v. Barrett, Scioto App. No. 03CA2889*, 2004 Ohio 2064. If a trial court deviates from the *Howard* language, the charge must nevertheless comport with the goals of *Howard*, namely, (1) encourage a unanimous verdict only when one can conscientiously be reached, leaving open the possibility of [**14] a hung jury and resulting mistrial, and (2) call for all jurors to reevaluate their opinions, not just the jurors in the minority. *Id.*

[*P27] Upon reviewing the *Allen* charge issued by the trial court, we find that it is balanced and neutral, and that it comports with the goals of *Howard*. The trial court

encouraged the jurors to reach a unanimous verdict and left open the possibility that such a verdict might not be reached. The court did not single out the jurors in the minority, but rather asked all jurors to consult with each other. The court did not instruct the jury to reach a verdict at any cost. Instead, the court stressed the importance and desirability of reaching a verdict.

[*P28] Whether a jury is irreconcilably deadlocked is essentially a discretionary determination for the trial court to make. *State v. Brown*, 100 Ohio St. 3d 51, 2003 Ohio 5059, 796 N.E.2d 506, P37. There is no bright-line test to determine what constitutes an irreconcilably deadlocked jury. *Id.* A *Martens* charge "is appropriately given when it appears to the court that the jury, after deliberating for a reasonable period of time, is unable to reach a verdict. *** If given prematurely, [**15] the instruction may be contrary to the goal of the *Howard* charge of encouraging a verdict where one can be consciously reached." *Martens*, 90 Ohio App.3d at 343.

[*P29] In the case at bar, while the jury deliberated for several hours, we are unwilling to find that the trial court abused its discretion by choosing to give the *Allen* charge rather than giving the *Martens* charge or declaring a mistrial. The jury never advised the trial court that reaching a verdict in this matter was impossible. Indeed, before the trial court could initially give them the *Allen* charge, the jury asked for ten more minutes to deliberate. Even the foreperson merely indicated that they "may not be able to come to a conclusion." After hearing the *Allen* charge, the jury never informed the court that they continued to be deadlocked. Based upon the record before us, we cannot say that the *Allen* charge coerced the jury into reaching a verdict. We therefore find that the trial court did not err by giving the *Allen* charge to the jury, and failing to give the *Martens* charge or declare a mistrial. Appellant's second assignment of error is overruled.

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3: [*P30] [**16] Assignment of Error No.

[*P31] "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED HER [CRIM.R. 29(C)] MOTION FOR A JUDGMENT OF ACQUITTAL."

[*P32] *Crim.R. 29(C)* allows a trial court, upon motion, to set aside a guilty verdict and enter a judgment of acquittal. The trial court applies the same standard in ruling on motions for acquittal presented either at trial or made after judgment. *State v. Miley (1996), 114 Ohio App.3d 738, 742, 684 N.E.2d 102*. Therefore, a trial court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. *State v. Bridgeman (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.* 2

2 We decline to apply the standard used in *State v. Norwood (M.C.1977), 55 Ohio Misc. 19, 380 N.E.2d 772*. In that case, the court granted a *Crim.R. 29(C)* motion for acquittal after the jury failed to reach a verdict. The standard employed by the *Norwood* court was one of "judicial discretion, taking into consideration all matters transpiring during the course of the trial and any other factors which may have influenced the jury in their inability to reach a verdict and the probability that other juries considering the case will be also of honest divided opinions." *Norwood* is distinguishable from the case at bar, of course, in that the instant jury reached a verdict before the motion was

made. See *State v. McMahan (Jan. 12, 1983), Hamilton App. No. C-810728, 1983 Ohio App. LEXIS 11821*.

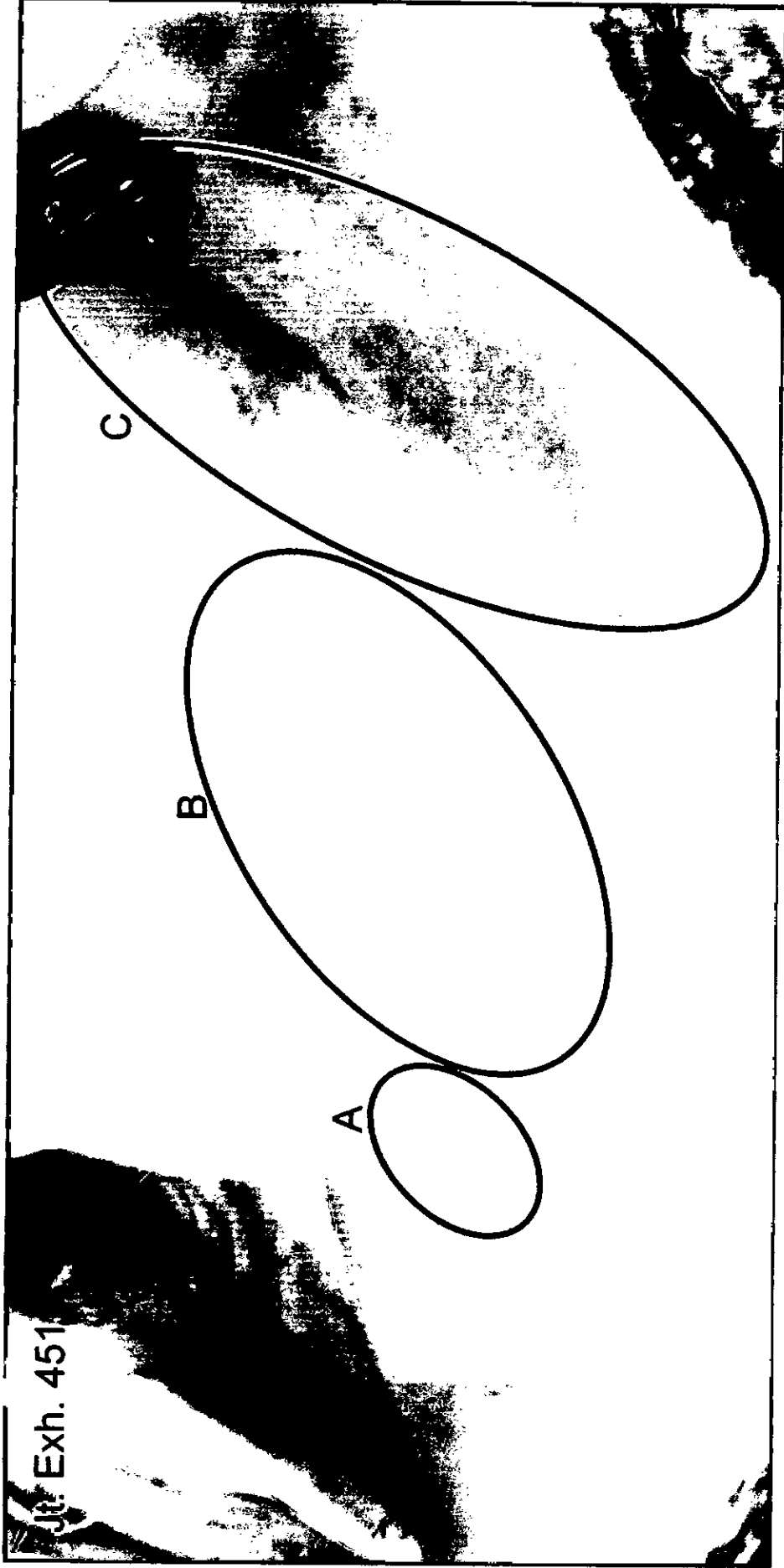
[**17] [*P33] Appellant argues that considering the length of the jury deliberations, their indication it was deadlocked, their apparent difficulty in recalling the uncomplicated testimony of appellant, Tara, and April after a two-day trial, despite being able to take notes, their coerced verdict as a result of the *Allen* charge, and the fact that "the overwhelming evidence points to an acquittal," appellant's conviction was clearly questionable and the trial court should have granted her motion for acquittal.

[*P34] Appellant was convicted of violating *R.C. 2903.13(A)* which states that "no person shall knowingly cause or attempt to cause physical harm to another," and *R.C. 2903.34(A)(1)* which states that "no person *** who is an agent or employee of a care facility shall *** commit abuse against a resident or patient of the facility." Upon thoroughly reviewing the record, and incorporating our resolution of appellant's second assignment of error under this assignment of error, we find that the evidence is such that reasonable minds could reach different conclusions as to whether each material element of the offenses of patient abuse and assault has been proved beyond a reasonable [**18] doubt. The trial court, therefore, did not err by denying appellant's *Crim.R. 29(C)* motion. Appellant's third assignment of error is overruled.

[*P35] Judgment affirmed.

POWELL and VALEN, JJ., concur.

Exhibit B



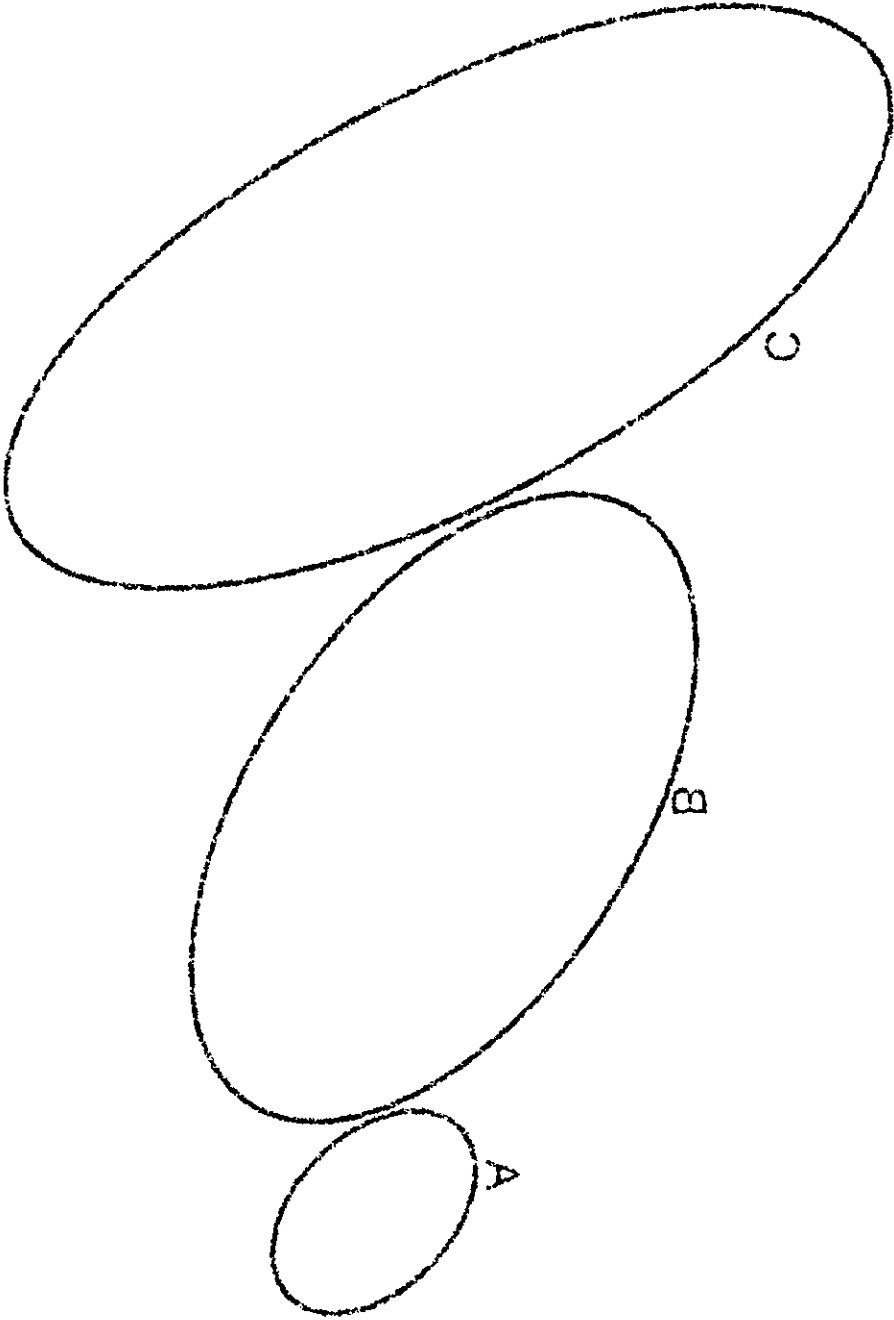


EXHIBIT B

EXHIBIT B

Blue = Actual orientation of bruise.

Exhibit C

Black = Required orientation of bruise in order for bruise to be consistent with being grabbed by a right hand as part of "Anterior Approach Strangulation"

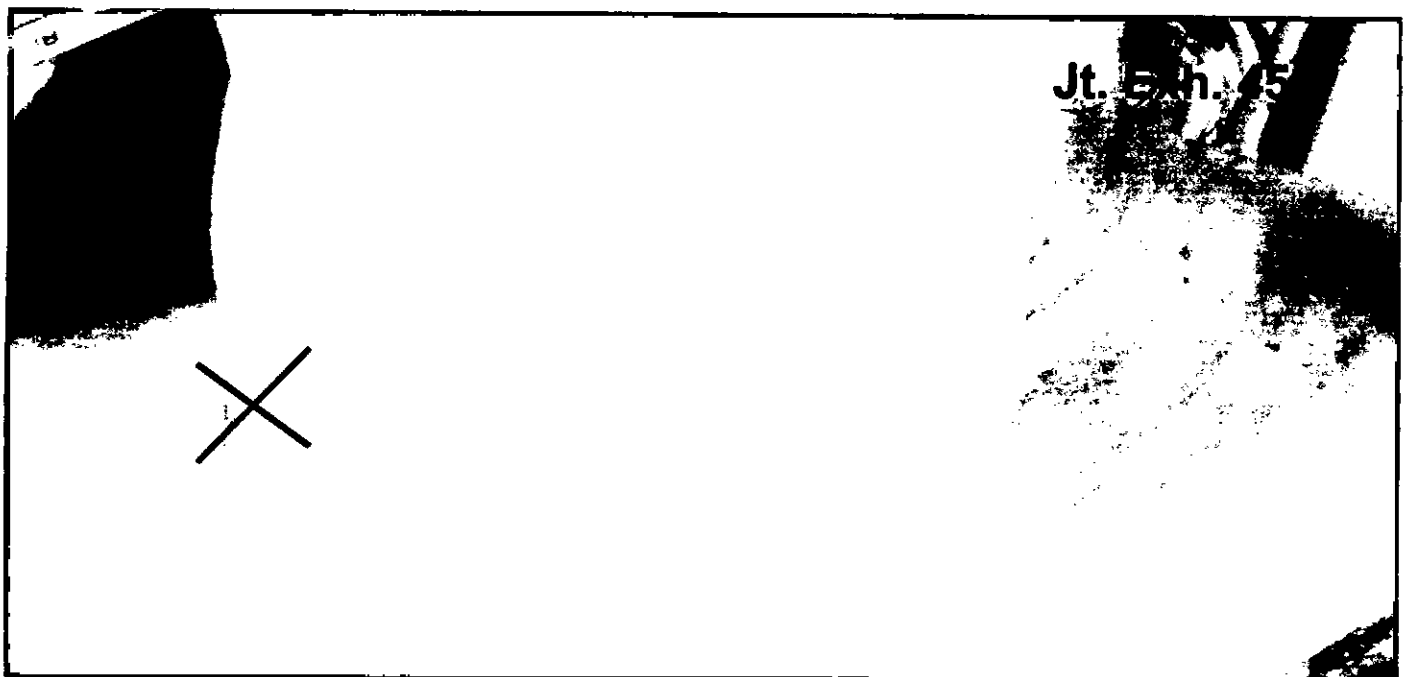
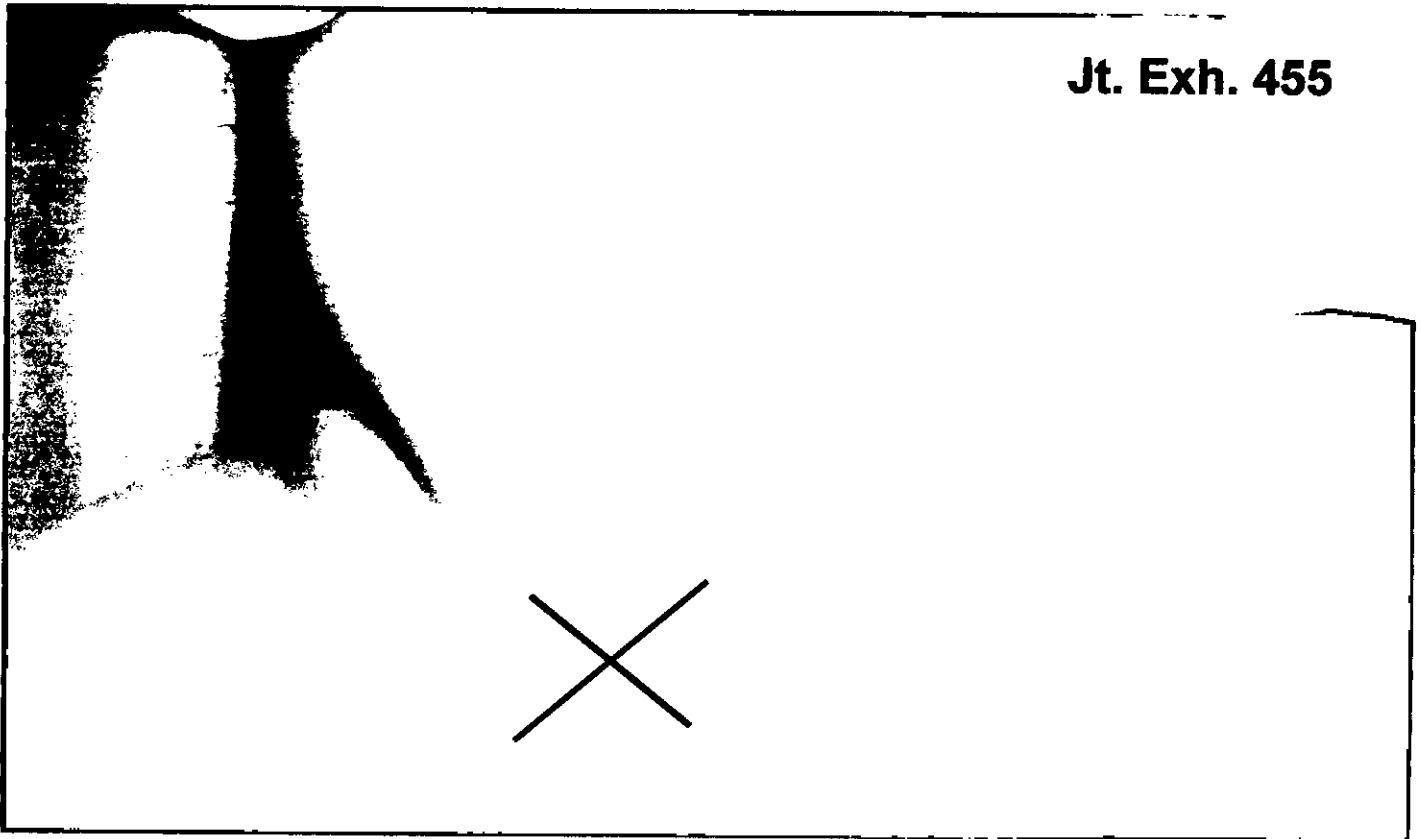


Exhibit C

Black = Required orientation of bruise in order for bruise to be consistent with being grabbed by a right hand as part of Anterior Approach Strangulation

JL Exh. 455



JL Exh. 455



State of Ohio, Warren County
Common Pleas Court
Criminal Division

DEFENDANT'S
EXHIBIT

D

10 MAY 21 PM 12:33

STATE OF OHIO,
CLERK OF COURTS

CASE NO. 08CR 25254

Plaintiff,

vs.

RYAN WIDMER

Defendant.

ORDER TO PRODUCE
PATIENT RECORDS

It is hereby the order of this court, that Dr. John Becker, DDS., produce the full patient record and files of Sarah Steward Widmer, D.O.B. 1/2/84, a dental patient of his office. Said records are to be delivered forthwith to the Courtroom of Common Pleas Judge Neal Bronson, located at 550 Justice Drive, Lebanon, Ohio.

Neal B. Bronson
Judge Neal Bronson

PAST MEDICAL HISTORY QUESTIONNAIRE

Please Circle One: Yes, No, Don't Know

- 1. Have you been seen by a physician the past year? Yes No DK
- 2. Are you presently under medical care or taking any medications? Yes No DK
- 3. Have you ever had a prolonged illness or hospitalization? Yes No DK
- 4. Have you ever had surgery? Yes No DK
- 5. Have you ever had any of the following diseases?
 Rheumatic fever Yes No DK
 Intrinsic deficiency disease Yes No DK
 Yellow jaundice or Hepatitis (yellow skin or eyes) Yes No DK
 Epilepsy or seizures Yes No DK
 Sugar diabetes Yes No DK
 High or low blood pressure Yes No DK
 Kidney Trouble Yes No DK
 Heart trouble or heart attack Yes No DK
 Venereal disease Yes No DK
 Thyroid disease Yes No DK
 Tuberculosis Yes No DK
 Cancer Yes No DK
 Aids Yes No DK
- 6. Have you lost weight without dieting in the last few months? Yes No DK
- 7. Have you ever been sick from a dental shot or injection? Yes No DK
- 8. Have you or any relative ever had a bleeding problem? Yes No DK
- 9. Have you ever had a bleeding problem after a tooth extraction? Yes No DK
- 10. Do you have hay fever? Yes No DK
- 11. Are you allergic to any foods, clothing, animals, etc.? Yes No DK
- 12. Do any of the following drugs make you ill?
 Aspirin Yes No DK
 Penicillin or antibiotics Yes No DK
 Sulfu drugs Yes No DK
 Barbiturates (sleeping pills) Yes No DK
 Local anesthetics (Novacaine) Yes No DK
 Any other medication Yes No DK
- 13. Have you ever been told by a physician that you have a heart murmur? Yes No DK
- 14. Do you have chest pains or are you short of breath after walking up a flight of stairs? Yes No DK
- 15. Do your ankles swell at the end of the day? Yes No DK
- 16. Have you ever had painful or swollen joints? Yes No DK
- 17. Do you have any blood disorder such as thin or tired blood? Yes No DK
- 18. FEMALE ONLY: Are you pregnant? If yes, then what month? Yes No DK
- 19. Please add any information concerning your medical health that you feel is important. Yes No DK

Signature: [Handwritten Signature] Date: 10-5-06

CLINICAL EXAM

- A _____ Lips _____
- B _____ Labial Mucosa _____
- C _____ Buccal Mucosa _____
- D _____ Mucosa Buccal Fold _____
- E _____ Palate _____
- F _____ Thyroid _____
- G _____ Tongue _____
- H _____ Floor of Mouth _____
- I _____ Gingiva _____
- J _____ Tonsils _____
- K _____ Pharynx _____
- L _____ Salivary Glands _____
- M _____ Lymph Nodes _____
- N _____ Skin _____

COMMENTS

PROGRESS NOTES

Sarah Stewart
1-1984

DATE

AREA

DATE

AREA

ADVA: 1518-0 (SJD) signed per Sgt. RLC

19-0 (MS) signed per Sgt. RLC

2220/Extra ongoing. RLC April 10, 2008